City of Geneva Local Development Corporation
Meeting Agenda

Title:	LDC Monthly Meeting
Location:	Geneva City Hall, 2nd Floor Conf. Rm 47 Castle St. Geneva NY 14456
Date:	February 7th, 2024
Time:	12:00 PM

Agenda Item	Potential Outcome	Person Responsible
Call to Order		Craig Talmage, Chair
Administration		
January Minutes 2024	Motion to approve minutes	Craig Talmage, Chair
Financial January 2024	Motion to approve financial report	David West
Reports		
City of Geneva	Informing the board	Amie Hendrix
Agenda Items		
Strategic Plan for Economic Dev. RFP	Appoint members to selection committee	David West
Review of Mission and Powers	Discussion Topic	David West
Executive Session		
Executive Session	If needed	Craig Talmage, Chair
Adjournment	Motion to adjourn	Craig Talmage, Chair

Next LDC meeting: March 6th, 2024

Quorum (Confirmation required)

Craig Talmage
Chevanne Devaney
Paula Bucklin
Dana Hollenbeck
Marc Rodriguez
Kyle Ackart
Josh Miller
VACANT
VACANT

Join Zoom Meeting

https://us02web.zoom.us/j/85060583345
Dial in: (929) 205-6099
Meeting ID: 850 6058 3345

Staff

David West
Hailea Higgins

GENEVA

UNIQUELY URBAN

ANNUAL MEETING MINUTES
January 3, 2024 at 12:00 PM
BID Conference Room

Board Members in Attendance
Dana Hollenbeck
Craig Talmage*
Josh Miller
Kyle Ackart
Chevy Devaney
Marc Rodriguez

Others in Attendance
Tracy Verrier, MRB Group
Emma Falkenstein, MRB Group*
David West, City of Geneva
Amie Hendrix, City of Geneva
Stefanie Newcomb, City of Geneva
*denotes remote attendance

Agenda Items

Call to Order:
Craig Talmage called the meeting to order at 12:12 pm with a quorum present.

Financial Report
Tracy Verrier provided an overview of the Geneva LDC's annual finances. She noted that the financial statements reflect all interest accrued through Dec. 31st,2023. She noted that a CD matured in November, which provided roughly $2,000 in interest and that she rolled it over for another 6 months. Tracy stated that the financial report shows the outside contract services and other programming expenses.

Board Member Nominations
Tracy Verrier updated the Board on where they stand on nominations. She noted that to date, the Nominating Committee hasn't contacted any of the people put forward. Craig Talmage inquired about the recommended people. Tracy noted that Edith Wormley was suggested to fill the neighborhood leader seat and Jeff Kowalski was nominated as the downtown representative. Following discussion, the Board decided that Chevy would contact Edith and Josh would contact Jeff to inquire if either were interested in joining the Board. David West indicated that he will bring the nominations to the City Council in February if the LDC receives positive responses from the nominees.

- Motion to table the Board member nominations until the February regular meeting pending interest by the nominees by Chevy Devany, second by Dana Hollenbeck. Motion approved unanimously.

Officer and Committee Appointments
The CLDC engaged in discussion regarding officer and committee appointments. Craig indicated that he is willing to fill the position of Chair. Kyle Ackart noted that he is willing to be Vice-Chair, and Josh Miller stated that he could be Treasurer. Tracy noted that whoever takes the position of Treasurer will also be Chair of the Audit Committee. Tracy noted that the Board may want to hold off on filling out the other committees until the Board nominations are approved.

- Motion to approve Craig Talmage as Chair, Kyle Ackart as Vice-Chair, and Josh Miller as Treasurer and Chair of the Audit Committee and reaffirm all other committees as presently listed by Marc Rodriguez, second by Dana Hollenbeck. Motion approved unanimously.

BOARD OF DIRECTORS
JOSH MILLER ('25) ~ CHEVANNE DEVANEY ('24) ~ DANA HOLLENBECK ('25)
PAULA BUCKLIN ('24) ~ KYLE ACKART ('25) ~ MARC RODRIGUEZ ('23) ~ CRAIG TALMAGE ('25)

GENEVA
UNIQUELY URBAN

REGULAR MEETING MINUTES
January 3, 2024 at 12:00 PM
BID Conference Room

Board Members in Attendance
Dana Hollenbeck
Craig Talmage*
Josh Miller
Marc Rodriguez
Kyle Ackart
Chevy Devaney

Others in Attendance
Tracy Verrier, MRB Group
Emma Falkenstein, MRB Group*
Amie Hendrix, City of Geneva
Stefanie Newcomb, City of Geneva
David West, City of Geneva
*denotes remote attendance

Agenda Items

Call to Order:
Craig Talmage called the meeting to order at 12:28 pm with a quorum present.

Minutes Approval:
- Motion to approve the November regular meeting minutes by Kyle Ackart, second by Dana Hollenbeck. Motion carried unanimously.

Financial Report:
Tracy Verrier reviewed the November and December financial reports noting that the LDC has a healthy cash balance, and that nothing much has changed through the end of the year. Tracy noted the MRB Group bill, and that the $25,000 allocated for the Tech Farm will be executed later today, which will bring the LDC's checking balance to just under $40,000. Tracy stated that the LDC will want to keep an eye on their cash flow as some CDs will mature later in the spring and that they should receive additional cash flow from the gateway sale.
- Motion to approve the November and December financial statements by Chevy Devaney, second by Josh Miller. Motion approved unanimously.

Tracy stated that the LDC will want to update the signatories on the accounts now that the Board has approved new officer appointments.
- Motion to approve the signatories on the accounts to be Amie Hendrix as City Manager, Stefanie Newcomb as Comptroller, Craig Talmage as Chair, and Josh Miller as Treasurer by Chevy Devaney, second by Kyle Ackart. Motion approved unanimously.

City of Geneva Report:
Amie Hendrix, City Manager, provided an update on the City of Geneva. She noted that there will be a City Council meeting on 1/3/24 with the newly sworn in Council, and that the agenda will be light. Amie stated that the City Council approved the Zoning Code update and that all new projects will need to follow the new code. She noted that any projects approved prior to the update will use the old Zoning Code. Amie noted that the Short-Term rental policies will go into effect in March 2024, which is quickly approaching. She noted that the Planning and Zoning Boards will have a lot of work to do over the next couple of months.

BOARD OF DIRECTORS
JOSH MILLER ('26) ~ CHEVANNE DEVANEY ('24) ~ DANA HOLLENBECK ('23)
PAULA BUCKLIN ('24) ~ KYLE ACKART ('26) ~ DAVID LINGER ('23) ~ MARC RODRIGUEZ ('23) ~ PETER GILLOTTE ('23)

Tracy noted that now that appropriate City staff are in place, the various community development organizations can get together to determine their collective vision and appropriate roles. David stated that he's working on a Strategic Plan RFP to create an overall direction for the Planning and Economic Development Department, BID, IDA, and LDC.

Craig emphasized the need for revenue generation and his excitement to explore future opportunities.

Adjournment:

- Motion to adjourn at 12:49 by Josh Miller, second by Kyle Ackart. Motion passed unanimously.

LOCAL AGENCIES, INCENTIVES AND LAWS

ECONOMIC DEVELOPMENT HANDBOOK

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INDUSTRIAL DEVELOPMENT AGENCIES (IDAS)

by Shawn M. Griffin

Introduction

Industrial development agencies ("IDAs" or "Agency") are formed under Article 18-A of New York State General Municipal Law (GML), as amended (the "Act"), as public benefit corporations. From 1969 to 1984, approximately 176 IDAs were formed by legislative acts contained within Title 2 of the Act. There are approximately 110 IDAs still active with varying policies and practices reflecting the local community needs and/or desires. IDAs were created to actively promote, encourage, attract and develop job and recreational opportunities and economically-sound commerce and industry in counties, cities, towns, and villages throughout New York state (the "State"). IDAs are empowered to provide financial assistance to private entities through tax incentives in order to promote the economic welfare, prosperity and recreational opportunities for residents of a municipality (a "Benefited Municipality"). Although the activity level for each IDA varies, any company considering a construction/renovation/expansion project or other economic development activity within the State should begin with a call to the local IDA. Additionally, any company that seeks assistance to retain its business interests within the State should contact the local IDA.

Title 1 of the Act vests broad powers in IDAs, including the ability to purchase, sell, lease and/or mortgage real property and to borrow and make money available in connection with properly-induced IDA projects. However, as discussed in detail below, because IDAs are public benefit corporations, they are subject to open government laws, have limited investment powers and specifically are not empowered to make outright gifts to a private enterprise.

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Structure of an IDA-Assisted Transaction

Any entity—either for-profit or not-for-profit[1]—that wants to undertake a construction or expansion project[2] in a Benefited Municipality can, in general, be considered a qualified applicant. The IDA usually participates by taking title to or a leasehold interest in the real and/or personal property involved in the project. The IDA then leases the property under a lease agreement, or sells the property under an installment sale agreement, to the company undertaking the project. The payment under the lease or installment sale agreement is usually a nominal consideration, plus debt service on any money the IDA borrowed to fund the project. At the time of closing, the IDA will generally charge an administrative fee ranging from 0.5% to 1.5% of the total project costs.

If a company owns the property before starting the project, it transfers an interest in the property (either fee title or a leasehold interest) to the IDA without paying a transfer tax. If a third party owns the property, the company must arrange for the transfer of an interest in the property to the IDA. The length of time the IDA maintains an interest in the property depends on the financial assistance being provided to the company. (See Section C, below.) When financial assistance is limited to the issuance of tax-exempt bonds and/or a mortgage recording tax exemption, the IDA need only maintain an interest in the property for a period as short as one day. When providing a sales tax exemption, the IDA may secure an interest in the property through the construction or installation period only, or in the alternative an IDA may provide sales tax exemptions through an Agent Agreement. The IDA will maintain an interest in the property for upwards of 20 years or more when offering a real property tax abatement.

Appendix A, attached hereto, shows schematics illustrating the relationships between the parties involved in a straight lease transaction and a tax-exempt bond transaction.

Chapter 563 of the Laws 2015 was enacted on December 18, 2015 and took effect on June 15, 2016 amending Sections 859-a and 874 of the General Municipal Law to require IDAs to develop a standard application for applicants to include, among others, (i) a statement that there is a likelihood that the project would not be undertaken but for the financial assistance provided by the IDA or if the project could be undertaken without financial assistance, a statement indicating why the project should be undertaken by the IDA, (ii) an estimate of private and public funding as well as applicant investment, (iii) job information including salary and benefits, (iv) a statement that the owner, occupant or operator receiving financial assistance is in substantial compliance with applicable local, state and federal tax, worker protection and environmental laws, rules and regulations, and (v) a statement acknowledging that the submission of any knowingly false or misleading information may lead to the immediate termination of any financial assistance and the reimbursement of any tax exemptions claimed.

Chapter 563 also requires IDAs to adopt uniform criteria for the evaluation and selection of projects for financial assistance that includes, among other things, a written cost-benefit analysis and notification by the IDA to the municipality or municipalities in which the facility or plant was located, if applicable. Furthermore, Chapter 563 requires IDAs to develop a uniform project agreement that sets

[1] An IDA's ability to provide financial assistance to, or undertake projects for the benefit of not-for-profit corporations has expired. Through structuring and/or use of a local development corporation, necessary benefits can be made available to not-for-profits.

[2] "Project" is currently defined broadly by GML § 854(4) as "any land, any building or other improvement, and all real and personal properties located within the State of New York and within or outside or partially in and partially outside the municipality for whose benefit the agency was created..."

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forth the terms and conditions under which financial assistance will be provided. The project agreement must include, among other things, (i) the purpose to be achieved by the IDA, (ii) annual certification by the applicant of job information, (iii) the PILOT schedule, and (iv) the suspension or discontinuance of financial assistance, or the modification of the PILOT schedule to require increased payments, or the return of all or a part of the financial assistance, for material violations of the terms and conditions of the project agreement.

Lastly, Chapter 563 requires the IDA to develop policies for the suspension or discontinuance of financial assistance, or the modification of the PILOT schedule to require increased payments, or the return of all or a part of the financial assistance, for such things as material shortfalls in job creation and retention projections or material violations of the terms and conditions of the project agreement. IDAs must at least annually assess the progress of each active project toward achieving the investment, job retention or creation, or other objectives of the project indicated in the project application. See Appendix F for recent regulations issued by the ABO based on Chapter 563 and a checklist we developed to assist our clients with compliance.

Financial Assistance

The current provisions of the Act allow IDAs to provide four basic forms of financial assistance that include: (1) mortgage recording tax exemption, (2) sales and use tax exemption, (3) real property tax abatement, and (4) interest rate savings via tax-exempt financing.

1. Mortgage Recording Tax Exemption

Whenever a county clerk records a mortgage in the State, the mortgagor must pay a 0.75% to 1.85%[3] (of the mortgaged amount) mortgage recording tax—a significant expense on projects involving substantial financing. The IDA, however, can qualify a company for a mortgage recording tax exemption. If an IDA (on a non-recourse basis) has an interest in the property (either fee title or leasehold interest) at the time the mortgage is recorded, the IDA will mortgage its interest in the property (exempt from the mortgage recording tax under GML § 874—exemption for taxes and assessments upon any of the property acquired by the IDA or under its "jurisdiction or control or supervision or upon its activities") and the company will simultaneously mortgage its interest in the property (exempt from the mortgage recording tax under New York State Tax Law (Tax Law) § 255—as a supplemental mortgage securing the same indebtedness). As an alternative, the IDA and the company can execute one mortgage with the IDA agreeing to pay the mortgage recording tax (which triggers a single exemption under GML § 874). Either arrangement can save a substantial amount of money for the company—from $7,500 to $18,500 for example, on a $1 million principal mortgage. Provided, however, Chapter 394 of the Laws of 2016 was enacted on September 30, 2016, which amended Section 874(1) of the General Municipal Law and Sections 252 and 253(2)(a) of the Tax Law eliminating the authority for IDAs to exempt the portion of the mortgage recording tax imposed by the following transportation districts: (i) Capital District Transportation Authority, (ii) Central New York Regional Transportation District, (iii) Metropolitan Commuter Transportation District, (iv) Niagara Frontier Transportation District and (v) Rochester-Genesee Transportation District. Chapter 394 also amended the Public Authorities Law to make conforming changes for the two industrial

[3] NYS 0.50%; Special Additional Tax 0.25%; MTA 0.30%; Westchester County 0.25%; Yonkers 0.50%.

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development authorities established under the Public Authorities Law.

Although the statute was amended on October 3, 2016, Governor Andrew Cuomo indicated in his approval memorandum that because the amendment would interfere with the completion of several pending projects, a chapter amendment should be approved to delay the effective date of the amendment to July 1, 2019. Despite the Governor's stated intention, the Legislature was adjourned and the chapter amendment was not passed until January 2019. The intent is to provide refunds in this gap period and make the change effective July 1, 2019. We note that an LDC can provide a full exemption independently or working with the IDA.

2. Sales and Use Tax Exemption

The sales and use tax rates in the State generally range from 7% to 8.875%. Under GML § 874, all purchases made by an IDA or its agents are exempt from sales and use tax. Pursuant to TSB-M-14(1.1)S, *Sales Tax Reporting and Recordkeeping Requirements for Industrial Development Agencies and Authorities*, agents of an IDA should present a form ST-123 when making purchases for the project. The former practice of using an IDA letter is no longer used. The agent can then acquire the equipment, materials and services needed to acquire, construct, reconstruct and/or equip the project without having to pay sales or use taxes. The exemption is generally limited to the construction, reconstruction or installation period and cannot cover ongoing operational costs. However, tax exemptions for operational costs may be available through the New York State Empire Zones program if currently zone certified. (See discussion below.) A company in an Empire Zone may benefit from both the IDA sales tax exemption (exempts both the local and State portions for purchases of equipment and materials) and the Empire Zone sales tax exemption (exempts State portion only, but also exempts operational costs for up to 10 years).

Depending on the size of the project, the cost savings for the company under this arrangement can be significant. On a project where $1 million of the costs are subject to sales and use tax, the exemption can result in a savings of $70,000 to $88,750. When the lease or installment sale agreement expires, the IDA transfers any personal property that is involved in the project to the company without the payment of any sales or use tax.

Sales Tax Procedures, Administration and Recapture Provisions Instituted with the 2013-14 State Budget. Chapter 59 of the Laws of 2013. The State budget legislation includes GML Section 875[5], which establishes heightened transparency and accountability for the process by which IDAs provide sales tax exemptions to all applicants. Historically, IDAs have been required to follow IDA Act provisions under which estimated sales tax exemption amounts were disclosed at public hearings and project agents were issued a State-prescribed form ST-60 to evidence IDA agent status for purposes of acquiring goods and services exempt from sales taxes. IDAs were required to timely file the ST-60 with the State Department of Taxation and Finance (DTF) and project agents were also required annually to file a form ST-340 with DTF. The new provisions will allow DTF to identify and control any disparities between the amount of

[4] The IDA Reform provisions from the 2013-14 State Budget, apply to (i) all IDA projects established, agent or project operator appointed on or after the date of the act (March 28, 2013), (ii) any amendments or revisions made to provide additional funds or benefits after the date of the act for projects established, agent or project operator appointed, or financial assistance provided prior to the date of the act, and (iii) to any IDA recapture of state sales or compensating use taxes on or after the date of the act. The retail provisions embedded within GML Section 862 are not mirrored within Public Authorities Law (PAL) Article 8 relating to the Auburn Industrial Development Authority (AIDA) and the Troy Industrial Development Authority (TIDA), but the new sales tax provisions are imposed upon AIDA and TIDA within new PAL Sections 2326-a and 1963-b, respectively.

[5] As mentioned above, DTF requires now an agent to use the new form ST-123 and submit it to the requesting vendor

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financial assistance actually granted by IDAs and the amount of exemptions actually received by project agents and operators.

The budget legislation includes significant procedural, administrative and recapture safeguards imposed upon IDAs and their agents, including the following major elements:

1. IDAs must keep records of the actual amounts of sales tax exemptions conferred to each applicant. IDAs must provide additional information and reports to DTF and reports to DTF within thirty (30) days of providing financial assistance to a project, which includes the estimated exemption amounts. DTF may prescribe new forms for IDAs to use for this requirement.[4] IDAs that fail to file these reports could lose their ability to confer sales tax exemptions (GML 875(2)).
2. IDAs must include new terms and conditions within resolutions and project documents relating to sales tax reporting and recapture provisions (GML 875(3)(a)). This requirement should be reflected within all project authorizing resolutions and match the corresponding amount(s) of estimated financial assistance disclosed by the IDA at the required public hearing.
3. IDAs are required to recapture sales tax exemptions claimed by project agents in excess of the actual amount conferred by the IDA. Failure by an agent to repay any such amounts will allow DTF to directly assess the agent or operator for the exemption amounts, together with any relevant penalties and interest due thereon. (GML 875(3)(b)).
4. To the extent that an IDA recaptures any unauthorized state sales tax exemption, the IDA must remit same to DTF within 30 days of receipt. IDAs are further required to join DTF in any lawsuit or action to recover unauthorized sales tax exemptions (GML 875(3)(c)).
5. IDAs are required to issue an annual report on the terms and conditions of all sales tax exemptions conferred and all recapture policies and activities (along with any other information required by the Commissioner of the State Department of Economic Development (DED). This report must be filed with DTF, the Director of the Division of the Budget (DOB), ESDC, OSC, and the IDA's benefited municipality. The report should be included within an IDA's annual filings with OSC. Failure to file could also result in an IDA's loss of ability to provide future tax exemptions. (GML 875(3)(d)).
6. IDAs may not use an ST-60 to confer and report sales tax exemptions. IDAs must issue and appointed agents must utilize a form ST-123 in order to properly confer and secure sales and use tax exemptions. GML Section 875(5) contains provisions for penalties and implications for fraudulent use that all IDAs and their agents should be aware of.
7. DTF is authorized to audit IDA records and use any findings to assess agents and operators for any unauthorized exemptions (GML 875(6)).
8. IDAs must post all project resolutions and sales tax exemption agreements on the internet. These documents must also be provided free of charge to any person requesting the information. This requirement is in addition to and supersedes provisions of the Public Authorities Accountability Act of 2005 (PAAA) and the Freedom of Information Law, or FOIL. Qualifying "trade secrets" exceptions under FOIL may be used to protect sensitive agent or operator information (GML 875(7)).

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9. IDAs must timely report to DTF any amendments, revocations, or terminations of agent appointments (GML 874(9)(b)).
10. DTF is authorized to adopt rules and regulations regarding the foregoing provisions. Together with forms to be adopted by DTF, all IDAs and practitioners should be prepared to react to and comply with same as they are issued in the coming months.

IDAs should annually review their UTEPs and Policies and Procedures to account for the retail prohibitions under GML Section 862; recapture and forfeiture; for the new sales tax reporting and recapture provisions contained in GML Section 875; and the ABO Regulations. In addition, IDA Application for Financial Assistance should also be amended to require (i) greater detail on proposed project expenditures to assure accuracy on Agency authorized exemptions, and (ii) project applicants to specifically acknowledge their understanding of the new state sales tax recapture requirements under GML Section 875. All IDA public hearing records, inducement resolutions, agent agreements, leaseback agreements, and, as best practice, sales tax letters, should be reviewed and revised so they contain the terms and conditions of the reporting and recapture provisions of GML Section 875. In addition, all IDAs should carefully review and consider all requests for extensions of IDA agent status for projects that were approved prior to the March 2013 effective date of GML Section 875 and/or any projects that were authorized prior to the use of revised Form ST-60 and/or ST-123. These extensions may require an IDA to carefully review the amount and limits of sales tax exemptions previously authorized and require a new recapture agreement to be executed by the IDA agent. Clearly, it is imperative that IDAs should closely administer and comply with applicable reporting requirements to ensure continued ability to provide financial assistance to applicants. In addition, all IDA applicants, agents and operators should be aware of and comply with these new requirements in order to avoid possible IDA recapture and/or imposition of DTF assessments.

3. Real Property Tax Abatement

In the State, property owners pay a real property tax based on the assessed value of land and improvements to a site. Any real property owned or controlled by an IDA is not subject to ad valorem real property taxes, under GML § 874 and Real Property Tax Law (RPTL) § 412-a. However, real property owned or controlled by an IDA continues to be subject to special assessments and user fees (water, sewer, fire, etc.). When an IDA takes title to or a leasehold interest in real property, the property becomes 100% exempt from ad valorem real property taxes. To accommodate the needs of the local tax jurisdictions, however, the IDA generally negotiates a Payment-In-Lieu-Of-Tax Agreement (PILOT Agreement) with the company. The IDA will then direct, or receive and forward, these payments-in-lieu-of-taxes to the affected tax jurisdictions in the percentage that each affected tax jurisdiction would otherwise have received but for the Agency's involvement. By law, IDAs have the authority to negotiate any PILOT Agreement they deem reasonable. There is no required formula for calculating the payments to be made under a PILOT Agreement. They are, however, required to have specific policies adopted which outline the types of PILOT Agreements they are offering and procedures for deviation from those stated policies (the Uniform Tax Exemption Policy "UTEP"). If the IDA deviates from its UTEP, it must notify the affected jurisdictions. Although there is no statutory limit to the period or amount of the abatement, IDAs generally limit the period to between 10 and 20 years, with the assumption that the abatement generally results in more revenue for the tax jurisdictions

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than was generated by the property before the IDA's involvement.

This benefit is generally referred to as a "real property tax abatement" rather than a real property tax exemption, given the interplay between the 100% exemption from real property taxes and the IDA policy of requiring a payment-in-lieu-of-taxes. Some PILOT Agreements provide a specific dollar amount to be paid each year for the term of the PILOT Agreement. The mere predictability provided by such a PILOT Agreement can be invaluable to a developer. Since each PILOT Agreement is negotiated on a project-by-project basis, it is difficult to estimate the exact savings from the real property tax abatement. There is little doubt, however, that the abatement can provide significant savings. As a reminder, certain projects may already qualify for a partial exemption from real property taxes for new improvements under RPTL §§485-b (business investment exemption) or 485-e (Empire Zone Exemption). A company in an Empire Zone may benefit from a refund of real property taxes paid on payments made under a PILOT Agreement. Where companies qualify for a 100% refund from the State, the IDA will often negotiate a payment-in-lieu-of-tax equal to full taxes and allow the increment (difference between full taxes and otherwise negotiated amount) to be used to repay debt service related to certain infrastructure improvements (referred to as "PILOT Increment Financing" or "PIF").

4. PILOT Administration Issues

Pursuant to GML § 874(1), IDAs "shall be required to pay no taxes or assessments upon any of the property acquired by it or under its jurisdiction or control or supervision or upon its activities." This broad exemption is mirrored within RPTL § 412-a, wherein real property "owned by or under the jurisdiction, supervision or control of industrial development agencies enumerated in GML shall be entitled to such exemption." (See 9 Op. Counsel SBEA No. 17 and Ch. 228 of the Laws of 1988, Section 1.)

In order to secure this exemption, an application (See Form RP-412-a, as prescribed by the New York State Office of Real Property Services (ORPS)) must be filed in the office of the applicable assessor on or before the appropriate taxable status date for the year in which the exemption is first claimed. At such time, copies of the RP- 412-a application along with the PILOT Agreement (or extract of terms thereof) must be mailed or delivered to the chief elected official of each city, county, town, village within which the project is located. Additional applications are not required for subsequent PILOT years unless the terms of the agreement are modified or amended.

It is important to note that the real property tax exemption afforded to and provided by IDAs applies only to general taxes and not to special assessments and special ad valorem levies. (See 1 Op. Counsel SBEA No. 23.) Likewise, the extent to which an IDA may afford an abatement from real property taxes largely depends upon each Agency's adopted UTEP. (See GML § 874.)

While property acquired by the State or Federal government after taxable status date and prior to lien date is immune from taxation (See 2 Op. Counsel SBEA No. 33; 1 Op. Counsel SBEA No. 40, respectively), property acquired by quasi-governmental agencies, such as IDAs (See 5 Op. Counsel SBEA No. 55), urban renewal agencies (See 1 Op. Counsel SBEA No. 68) and economic development agencies (See 2 Op. Counsel SBEA No. 28), is subject to taxation until the applicable tax years following the next taxable status date.

Therefore, the execution, delivery and filing of any IDA PILOT Agreement and related Form RP-412-a, should be carefully timed to account for the applicable taxable status date. Likewise, the exemption afforded by the IDA's jurisdiction,

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control or supervision of the subject parcel (via deed or lease agreement), along with the applicable abatement schedule, will be effective for the tax years following the applicable taxable status date through the termination date of the PILOT Agreement.

PILOT Termination Effective Immediately. In contrast to the taxable status date driving the effectiveness of the commencement of the PILOT Agreement, the termination of a PILOT Agreement is considered an immediate taxable event whereby the subject property becomes a fully-taxable improvement as of the date of PILOT Agreement termination. Section 520 of RPTL provides that whenever property receiving a total or partial exemption is transferred to an owner not entitled to receive such exemption, the property becomes immediately liable to taxation both for the unexpired portions of the fiscal years during which the transfer occurs and for succeeding fiscal years (See OSC Opinion 87-61 and 10 Op. Counsel SBEA No. 87). The appropriate appointed assessor is thereafter empowered to establish the corresponding assessed valuation attributable to the project facility as of the PILOT Agreement termination date and such determination is subject to the administrative and judicial review process set forth within Article V and Article VII of RPTL. (See also 10 SBRPS No. 21.)

Tax Increment Financing (TIF) versus PILOT Increment Financing (PIF)

TIF has been authorized in New York since 1984. However, only two small TIF financings (approximately $8mm and $1.2mm respectively) had been completed in New York state by the end of 2011. A more popular structure was the use of an IDA PIF. One of the main reasons for the infrequent use of TIFs is that the vast majority of municipalities within the State have separately assessing school districts, which results in dividing the property tax receipts between the municipality and the local school district. Prior to 2012, only a municipality could adopt a redevelopment plan and participate in a TIF. As a result, the property taxes generated by the municipality are insufficient to leverage viable bond financing. The exceptions to this general rule are the five big cities in the State—New York, Buffalo, Rochester, Yonkers and Syracuse. Recent legislation expanded the statute by amending the law to allow schools to participate which generated renewed interest in TIF. However, upon further research as to determine how the increment would be created, a bigger concern arises and this issue was not addressed by the 2012 legislative changes. If TIF Bonds were to be issued by a Town or the County, neither the increment nor the assessed value of the properties within the TIF district could be assured and under certain scenarios, the increment and assessed values decline over time.

TIF Bonds in New York state call for a rigid statutory process to be followed. The payments that are used for debt service are true tax payments secured by tax liens. However, payments made under the Real Property Tax Law are a function of assessment, equalization rate and tax rate. A falling equalization rate means that assessing unit-wide market values are rising. This leads to the potential for commercial property owners to contest their assessed valuation. With an active grievance practice for commercial properties, a falling equalization rate is likely due to sales of older residential properties. Given the limited circumstances when assessments can be grieved under New York law, those holding their property for long periods tend to have lower assessed valuations versus new owners. As these older residential properties are sold, the state formula picks up the spread between assessed value and sale price as one of the factors that impacts the equalization rate being calculated. If a commercial property has recently grieved its taxes and/or is otherwise properly assessed, a declining equalization

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rate will artificially inflate the estimated market value for the commercial property based on the assessed value and lead to further grievances. If the TIF Bonds were issued for improvements in a defined district, you can assume that these new improvements would be properly assessed when first established. If activity outside the increment area causes the equalization rate to decline, the tax formulas will imply a growing market value for the increment improvements. If this implied increase is beyond what the market price has grown to, the owners of the improvements in the increment district would grieve their taxes. Outside a written tax agreement, there is no way to prevent grievances by the owners in the increment district. As they grieve their taxes their assessment would be adjusted downward. In the extreme case, this practice could continue such that, if tax rates are otherwise stable, the aggregate tax load moves outside the increment district causing the actual amount paid by the owners in the increment district to decline. Under this scenario, we cannot insure the TIF Bondholders of an increment or the tax jurisdictions of a base payment. This uncertainty was unacceptable to the working groups in other communities with whom we have worked and we note that the other states authorize property tax agreements with TIFs that eliminate these issues and bring certainty to the payment stream. As a practical matter, a property tax agreement would need to involve the IDA or the New York State Urban Development Corporation (d/b/a ESDC). ESDC can establish a PILOT and use payments made for debt service without tax jurisdiction consent, whereas use of payments under an IDA PILOT require consent of the tax jurisdictions. We assume for the balance of this analysis that use of the IDA is the preferred route. As a final note, use of the IDA for the PILOT does not necessarily mean that the IDA will borrow the funds. This is an important note given imposition of the State Bond Issuance Charge on IDA bond issues that does not apply to LDC or other types of borrowing.

Across New York state, there are instances where the increment from a specific project is utilized for debt service with the consent of the tax jurisdictions through use of an IDA PILOT Agreement. When bonds are issued by an IDA, LDC or other designated borrower, and payments under the PILOT Agreement can be set up to have a base amount payable to the tax jurisdictions and an increment used for debt service, the structure is often referred to as "PILOT Increment Financing" or "PIF." This structure became very popular statewide when the Empire Zone program added the refund for property taxes paid. Rather than negotiate a discounted payment under the PILOT Agreement and incur the debts directly, developers opted to pay the amount through the PILOT Agreement such that the amount was refunded and, effectively, the state program ended up paying the debt service on the borrowing. As transaction counsel for over 33 IDAs statewide, we have worked on dozens of these structures between 2002 and 2006 and note the $300mm borrowing undertaken with this structure by City of Syracuse IDA for Destiny Mall.

Lower Interest Rates for Debt Incurred as Part of the Project

IDAs are authorized by State law to issue bonds and notes. An IDA can issue tax-exempt bonds, subject to the limitations imposed by the Internal Revenue Code of 1986, as amended (the "Code"). The proceeds of these tax-exempt bonds can be used to fund all, or substantially all, the costs of a project (excluding certain costs of issuance in excess of 2% of the total amount of the bond issue). If the project meets the strict qualification requirements of the Code, the company should then determine if issuing tax-exempt bonds is a cost-effective method of financing the project.

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An IDA itself provides no credit enhancement and issues bonds on a non-recourse basis. For that reason, the ability to sell bonds depends solely on the creditworthiness of the company (or the credit rating of the credit enhancement supporting the transaction, if any—see discussion, below). State law does not allow an IDA to loan the net proceeds directly to the company, as is done in other states. Because an IDA does not have the statutory authority to "loan" money, bond proceeds are used by the company to build the project in the name of the IDA.

The project is then leased or sold by the IDA to the company for an amount equal to debt service on the bonds issued. The company's rental payments under the lease agreement, or installment purchase payments made under the installment sale agreement to the IDA (or bond trustee), are used to pay principal of and interest on the bonds. The property involved is generally used as collateral and the company's direct guaranty is generally required. It may be necessary to provide some form of credit enhancement, such as a letter of credit issued by a bank or other qualified financial institution, bond insurance, or Federal Housing Administration (FHA) insurance, depending on the market where the tax-exempt bonds are sold and on the creditworthiness of the company.

Before proceeding with a bond transaction, the company should conduct a cost/benefit analysis, weighing the cost of financing through traditional means against those costs associated with a tax-exempt bond transaction. Does it pay to finance the project with funds that are at an interest rate that is generally two to three percentage points lower than the cost of borrowing money directly through a taxable transaction? Or will that benefit be outweighed by the additional costs of documenting a bond transaction such as bond counsel fees and, potentially, letter of credit fees of 0.75% to 1.5% of the bond amount, underwriter discount fees of 1% to 3% of the bond amount, underwriter counsel fees, letter of credit and issuer counsel fees, trustee fees and other incidental costs?

A detailed discussion concerning tax-exempt financing is included herein under the Federal Incentives section, below. Since January 2008, most IDAs deliver this form of benefit through an affiliated LDC (see Section II below).

Bond Issuance Charge

Pursuant to the New York State Public Authorities Law (the "PAL") § 2976, payment of a "bond issuance charge" to the State is required for any bonds issued by certain public benefit corporations, which, by statute, include IDAs but do not include LDCs. Bond issuance charges will typically be passed on to and paid by the borrower. This is in addition to any issuance fee charged by the IDA. The amount of the bond issuance charge is calculated by multiplying the principal amount of the bonds by the following schedule:

Principal Amount	Percent Charged
$1,000,000 or less	.168%
$1,000,001 to $5,000,000	.336%
$5,000,001 to $10,000,000	.504%
$10,000,001 to $20,000,000	.672%
More than $20,000,000	.84%

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In addition to the State bond issuance charge described above, an annual charge equal to 0.3% (30 basis points), payable in monthly installments, must be paid to the Department of Health for inspection, regulation, supervision and audit costs associated with bonds or notes issued to finance certain health care facilities (typically facilities that require the approval of the Commissioner of Health). (See 10 NYCRR § 400.24.) However, the 2014-15 State Budget eliminated PAL § 2976-a, which required a fee to be paid to the New York State Commissioner of Health in an amount equal to 0.9% (90 basis points) of the principal amount of such bonds or notes.

Limitations On Financial Assistance and IDA Powers

While it is the purpose of an IDA to promote the economic welfare and prosperity of a Benefited Municipality's inhabitants and to actively attract and encourage the development of such activities, Article 18-A of the Act does place some restrictions on an IDA's ability to participate in certain types of projects. In addition, there are certain statutorily required prerequisites an IDA must comply with prior to undertaking a project.

This section is intended to highlight certain sections of GML that must be addressed prior to commencing any project for which IDA assistance is sought. Despite these requirements, the vast majority of projects, whether new construction, expansion, renovation or equipment acquisition, will qualify for IDA assistance.

The Reform Act—Provisions from the 2013-14 State Budget effective March 28, 2013

The Reform Act amended the General Municipal Law (GML) in an attempt to increase accountability and improve the efficiencies and transparency of the operations of Industrial Development Agencies (IDAs) by mandating the adoption of standardized procedures. The Reform Act requires each IDA to adopt the following: (a) a standard application form; (b) a resolution specifying the criteria by which an IDA will evaluate projects; (c) a standard project agreement; (d) a recapture policy; and (e) a policy by which the IDA annually assesses the progress of outstanding projects.

a. Standard Application Form
As part of the standard application form, the applicant must submit basic project information such as "the proposed location and the purpose of the project," the "amount and type of financial assistantant being sought" and detailed employment figures associated with the project—including how many jobs will be created and retained, what the timeframe would be for employment, and salary ranges.

b. Resolution Specifying Evaluation Criteria
Under the Reform Act, an IDA must develop and adopt by resolution certain criteria for the evaluation and selection of projects for which financial assistance must be provided. The statute also requires that the IDA engage in a written cost and benefit analysis for each project.

c. Standard Project Agreement
Similar to the standard application form, the standard project agreement should include a brief description of the project and the type of financial assistance being provided by the IDA. If the financial assistance project includes a Payment-In-Lieu-Of-Tax Agreement (PILOT), the project agreement must specify the dates on which the PILOT payments will be made.

d. Recapture Policy
IDAs are required to develop policies for the discontinuance, suspension or modification of financial assistance. Although the Reform Act provides

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examples of certain conditions that may be considered a violation of an IDA's recapture policy, the statute largely leaves the development and creation of the policy subject to IDA discretion.

e. Re-Evaluation Policy
The Reform Act now requires IDAs to annually assess each project it provides financial assistance to and provide annual progress reports to each board member. Because the Reform Act does not apply retroactively, certain projects may be excluded from this requirement.

Public Hearing Required

Section 859-a of the Act requires IDAs to hold a public hearing with respect to any proposed project that would provide more than $100,000 in financial assistance. The hearing must be held within the municipality that the proposed project will be located and present the application for financial assistance, additional details relating to the project, and the estimated amount of the financial assistance being contemplated by the IDA, including a cost-benefit analysis. The IDA must give at least 10 days published notice of the public hearing, and a notice must be provided to the CEO of each affected tax jurisdiction. When a tax-exempt bond is being issued, a hearing is required on 14 days published notice under the Code. These hearings are generally combined.

Commercial Projects

GML § 854(4) defines the categories of "projects" eligible for IDA assistance as any land, building, improvement or facility that is suitable for "manufacturing, research, commercial or industrial purposes or other economically sound purposes." Courts have interpreted "project" as an "all embracing" term encompassing any number of projects.[6] With respect to commercial projects, the New York State Comptroller's Office has opined that the word "commercial" denotes a trade or profit-making activity, and courts have similarly found projects are commercial where they are a profit-making business that will create jobs and promote economic prosperity in the area in keeping with the purposes of the IDAs.[7] Generally, the Act provides that the purpose of IDAs are to encourage and assist in the development of projects which promote employment opportunities and prevent economic deterioration in the area served by the IDA.

Projects Benefiting Continuing Care Retirement Communities

GML § 859-b requires special procedures to be undertaken where an IDA project will benefit a continuing care retirement community. Project applicants seeking financial assistance in the form of tax-exempt financing must present to the IDA a completed application for a certificate of authority and documentation establishing the continuing care retirement community council's approval of that application, pursuant to Article 46 of Public Health Law (PHL). In addition, at the request of the IDA, the applicant shall present an analysis of project impacts that takes into account the parameters set forth within the IDA's UTEP, which is required pursuant to GML § 874. Applicants must also present the IDA with a financial feasibility study, including

[6] For example, in *Wegmans Food Markets, Inc. v. Dept. of Taxation and Fin. of the State of New York*, 126 Misc. 2d 144 (Sup Ct 1984), affd, 115 A.D.2d 962 (4th Dept 1985), the court determined that the term "project" under GML § 854(4) was made "all-embracing."

[7] For example, in *Nearpass v. Seneca County Industrial Development Agency* (Seneca County Index No. 49939), the court determined that the del Lago Resort & Casino, consisting of a 95,000 square-foot casino with approximately 85 gaming tables and approximately 2,000 slot machines, plus an additional 75,000 square feet of support and back-of-house space, a six-story approximately 153,000 square foot hotel containing approximately 205 rooms, an approximate 12,500 square-foot state-of-the-art full-service spa, and approximately 2,500 square-feet of pool area, an assortment of restaurants totaling approximately 28,000 square-feet, approximately 40,000 square-foot event center, approximately 4,000 square-foot child care center, concierge service, and a parking garage, was a commercial project because it is a profit-making business that will create jobs and promote economic prosperity in the area. The court also determined that the project was a recreation facility because it will provide recreational and leisure activities to its visitors.

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a financial forecast and market study, and the analysis of economic costs and benefits required by Article 46 of PHL.

All required documentation must be made available to the public at the time of publication of the notice of the public hearing for the project during regular office hours in at least two locations, at least one of which shall be in the city, town or village within which the proposed project is located. The public hearing notice must include a statement indicating the location and times of availability of the required documentation.

Pursuant to GML § 862-a(2)(a), IDAs may not adopt any resolution authorizing any financial assistance, including the issuance of bonds, notes or other obligations, for the benefit of a continuing care retirement community unless and until the project has received a certificate of authorization pursuant to PHL § 464-a. Furthermore, the IDA may not undertake the project unless it will serve the public purposes of the Act by preserving permanent, private sector jobs or increasing the overall number of permanent, private sector jobs in the State.

Retail Facilities

Under § 862-a of GML, an IDA is limited in its ability to provide financial assistance to projects where facilities "that are primarily used in making retail sales to customers who personally visit such facilities constitute more than one-third of the total project cost".[8] This retail restriction does not apply to "tourism destinations" which are defined as locations or facilities which are likely to attract a significant number of visitors from outside the economic development region in which the project is located. "Economic Development Regions" are defined by the Economic Development Law. A map of the State's Economic Development Regions is located inside the back cover of this Handbook.

The retail restriction may be overcome where, based upon an application, an IDA finds that: (i) the predominant purpose of the project is to make available goods or services which would not be, but for the project, reasonably accessible to residents of the municipality where the project is located; or (ii) the project is located within a "highly distressed area" as defined in § 854(18) of GML. Projects located in a former Empire Zone qualify as being in a highly distressed area; note that there are several other methods to establish an area with this definition.

The IDA must make an additional finding for projects listed in (i) or (ii) above, that the project will preserve permanent, private sector jobs or increase the overall number of permanent, private sector jobs in the State. This finding, once adopted by the IDA, must also be confirmed by the CEO of the municipality for whose benefit the IDA was created. This confirmation must be made by the CEO, as defined within § 2(5-a) of the Local Finance Law, of the Benefited Municipality.

IDA boards, staff and committees are encouraged to review these restored provisions and consider revisions to existing policies and procedures, including forms of Applications and to the extent appropriate an Agency's Uniform Tax Exemption Policies (UTEP). Further, IDAs are encouraged to work closely with retail applicants to secure market studies and other supporting information to bolster an IDAs finding that a project constitutes a tourism destination and/or will provide a unique product or service to the residents of the municipality within which the project will be located.

[8] As of January 2008 the limitation concerning retail facilities sunset with the Civic Facility authority; however most IDAs have adopted these limitations as part of their UTEP and these limitations were restored with the 2013-2014 State Budget with additional IDA References.

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IDA Investment, Procurement and Gift Restrictions

Investment of Surplus Funds. GML § 858-a states that deposits and investments made by an IDA are subject to the provisions of GML §§ 10 and 11, which govern cash flow management practices of local governments in the State. The term "local government" is defined to include IDAs. (See GML § 10(1)(a).) These statutory provisions were enacted for the purpose of establishing uniform standards for the deposit and investment of municipal moneys. (Ch. 464, L. 1954; Ch. 708, L. 1992). IDAs were included within the definition of "local government" for purposes of this regulatory scheme as a part of the IDA Reform Act of 1993. (Ch. 356, L. 1993.) This legislative framework provides uniform standards to which local governments must adhere when depositing and investing public moneys. In essence, these uniform standards serve to eliminate any risk factor associated with both the deposit and investment of public moneys. The governing board of an IDA shall designate by resolution one or more banks or trust companies for the deposit of moneys; such resolution shall also specify the maximum amount of money that can be on deposit at a time at each bank or trust company (GML § 10(2)(a)).

Generally speaking, the governing board of an IDA, or a delegate thereof, may temporarily invest moneys not required for immediate expenditure in special time-deposit accounts or certificates of deposit (hereinafter, "Deposits") with a bank or trust company located and authorized to do business in the State. (See GML § 11(2)(a).) In addition, an IDA may invest moneys not required for immediate expenditure in: (i) obligations of the United States of America (the "USA"); (ii) obligations guaranteed by agencies of the USA where payment of principal and interest are guaranteed by the USA; (iii) obligations of the State; and, with the approval of the Office of the State Comptroller; (iv) tax anticipation notes and revenue anticipation notes issued by any municipality, school district or district corporation within the State pursuant to §§ 24 and 25, respectively, of the Local Finance Law of the State. (See GML § 11(3)(a)(1).)

The terms "bank" and "trust company" are defined to have the same meanings as set forth within the Banking Law of the State. The term "bank" may also include a national banking association located and authorized to do business in the State. Trust companies, as the term is defined, must also be located and authorized to do business in the State. (See GML § 11(1), referring to GML §§ 10(1)(d) and (e).)

Any Deposits made by an IDA must be payable within such time as the IDA may be required to meet expenditures for which the moneys were obtained. Furthermore, and of significant importance, any Deposits in excess of the amount insured by the Federal Deposit Insurance Act must be secured in conformance with GML.

The terms "eligible securities," "eligible surety bond" and "eligible letter of credit" are defined within GML § 10(1). The necessary provisions of the required security agreement are set forth in GML § 10(3)(a).

Procurement. GML § 884 exempts IDAs from the public bidding and procurement requirements normally associated with public projects. (See GML § 103.) However, any goods or services procured by an IDA for its own use and account must be acquired pursuant to GML § 104-b.

Gift Powers. While the "gift clause" contained within Article VIII § 1 of the State Constitution specifically prohibits municipalities from making gifts or loans to private entities, this prohibition does not extend to public benefit corporations. However, the powers of public benefit corporations are limited to those granted by statute. Article 18-A of the Act specifically empowers IDAs to accept gifts,

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but no power has been granted to extend gifts to others. (See OSC Opinions 91-32 and 99-4 for relevant discussions.) In sum, IDAs are not empowered to make outright gifts to either public or private entities; however, services and funds may be expended by an IDA without equitable consideration in connection with the undertaking of a proper IDA project. The prohibition on IDA provision of gifts and loans of IDA funds was recently discussed and emphasized by the Office of the New York State Attorney General in Formal Opinion 2014-F1.

Note Regarding Civic Facility Legislation

As noted above, IDA authority to finance or participate in “civic facility” (not-for-profit) projects has remained in expired status since January 31, 2008. We recommend the IDA coordinate its activities with a local development corporation to provide tax exempt bonding for not-for-profits and other forms of financial assistance when the IDA is unable to provide.

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LOCAL DEVELOPMENT CORPORATIONS (LDCs)

by Justin S. Miller

Economic development projects in New York often involve a local development corporation (LDC). In fact, use of LDCs pre-dates the existence of IDAs, and is often the vehicle through which local economic development is conducted. LDCs are formed and empowered to conduct certain projects pursuant to Not-For-Profit Corporation Law (N-PCL) § 1411.[9] LDCs were frequently formed by local business or civic leaders to administer a revolving loan fund. The State legislature authorized the formation of LDCs in 1967 to enable municipalities to dispose of municipal land balancing issues other than "highest responsible bidder," which normally governs municipal real property sales, and to access funding for economic development.

LDCs are predominately formed by, and work closely with, municipalities and IDAs by providing not only greater transactional flexibility for undertaking economic development projects, but also added liability protection because the LDC is a bankruptcy remote entity.

Distinguished from IDAs (which exist as public benefit corporations formed by state legislation), LDCs can be formed by anyone over the age of 18 and are established as charitable corporations that are empowered to construct, acquire, rehabilitate and improve for use by others, industrial or manufacturing plants in the territory in which its operations are principally to be conducted (a "Benefited Territory") and to make loans. LDCs can provide financial assistance for the construction, acquisition, rehabilitation, improvement, and maintenance of facilities for others in its Benefited Territory. Specific LDC powers include the ability to: (i) disseminate information and furnish advice, technical assistance and liaison services to Federal, State and local authorities; (ii) to acquire by purchase, lease, gift, bequest, devise or otherwise, real or personal property; and (iii) to borrow money and to issue negotiable bonds, notes and other obligations. LDCs are also uniquely empowered not-for-profit corporations because, without leave of a court, LDCs are empowered to sell, lease, mortgage or otherwise

[9] This section is attached as Appendix B.

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dispose of or encumber facilities or any real or personal property or any interest therein upon such terms as they may determine.

Of particular importance is the LDC's ability to directly acquire real property from municipalities without the need for public bidding or full market value consideration. (See N-PCL § 1411(d)(2).) Notwithstanding the liability protections that may be afforded by building a bankruptcy-remote entity into a development project, the LDC's ability to acquire realty is a unique asset. More often than not, economic development efforts are significantly hindered by traditional constraints on municipally-owned realty. This special power granted to municipalities for the disposition of realty has become a crucial element in sophisticated economic development projects undertaken in recent years.

LDCs also offer great latitude to development professionals because they do not require special legislation to be created. However, great care must be employed when LDCs are formed because their structure and membership will dictate how the entity must undertake day-to-day business operations. Because these entities are quasi-governmental in nature and often exist specifically to lessen the burdens of government, the make-up of an LDC's membership and board of directors can subject it to New York's open government laws, including the Open Meetings Law and the Freedom of Information Law (FOIL) (these topics are discussed in detail herein under the State Agencies, Incentives and Laws section, below).[10]

LDCs can provide financial assistance packages to developers similar to those provided by IDAs, except that LDCs are not specifically exempted from real property taxes (See RPTL § 420-a), and therefore cannot provide a real property tax exemption or related PILOT. Hence, the IDA PILOT structure cannot be employed by an LDC without involvement of the IDA. Despite this, LDCs can provide significant project savings through mortgage recording tax exemptions (See Adv. Op. Comm. T&F, TSB-A-95(16)-R and TSB-A-97(7)-R and sales and use tax exemptions.) (See Tax Law § 1116(a)(4).)

Generally, LDCs may provide financial assistance in the form of exemptions from mortgage recording taxes and/or sales and use taxes. (These exemptions are more specifically detailed in A and B, below.) N-PCL §1411(f) states that "the income and operations of corporations incorporated or re-incorporated under this section shall be exempt from taxation." Based on § 1411(f), the commissioner of the Tax Department (the "Commissioner") has indicated in several advisory opinions that the involvement of an LDC in the construction and/or finance aspects of a qualifying project may allow for an exemption from sales and use taxes and/or mortgage recording taxes. (See TSB-A-93(13)-R, TSB-A-95(16)-R, TSB-A-97(7) R, and TSB-A-97(54)-S.) However, it should be noted that the facts and circumstances set forth within each of these advisory opinions are unique and that the use of an LDC should be carefully structured to assure that the exemptions sought are proper and obtainable. The LDC mortgage tax exemption with respect to the MTA or other transportation district percentage of the mortgage tax may not be available unless the LDC signs a separate mortgage from the IDA.

[10] For example, the Buffalo Enterprise Development Corporation had a board make-up and conducted its activities in a manner that caused it to be subject to the Open Meetings Law and FOIL. (See Matter of *Buffalo News v. Buffalo Enter. Dev. Corp.*, 84 N.Y.2d 488 (1994).) In contrast, the Saratoga Economic Development Corporation had a board make-up and conducted its activities in a manner that caused it to be exempt from the Open Meetings Law and FOIL. (See Matter of *Farms First v. Saratoga Economic Dev. Corp*., 222 A.D.2d 861 (1999).)

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New York State Mortgage Recording Tax Exemption

Section 252 of the Tax Law contains the codified and generally recognized exemptions from State tax imposed in connection with the recording of mortgages. While this statute does not contain a specific exemption for entities incorporated or re-incorporated under N-PCL § 1411, several advisory opinions have nonetheless granted exemptions for LDCs acting as either mortgagor or mortgagee. (See advisory opinions noted above.) In TSB-A-93(13)-R, the Commissioner found that, although § 252 of the Tax Law does not specifically exempt LDC mortgages and further states that there will be no exemptions other than the ones provided by that statute, the recording of mortgages issued by various public authorities were exempt. In that case, the Commissioner reasoned that since the petitioner (Empire State Certified Development Corporation) was re-incorporated under N-PCL § 1411 and that N-PCL § 1411(f) provides that the income and operations of LDCs are exempt from taxation, mortgages given to or by the petitioner, are exempt from mortgage recording taxes. The Commissioner made similar findings within TSB-A-95(16)-R and TSB-A-97(7)-R. It should be particularly noted that in TSB-A-97(7)- R, the Commissioner found that no mortgage recording tax is due where an LDC participates as mortgagor.

Based on the foregoing, it appears as though either an existing or newly-formed LDC could participate as mortgagor with the company for the purpose of providing an exemption from Article 11 taxation on the recording of mortgage(s) on the project. This financial assistance could be provided by an LDC, based upon the general LDC powers to (i) acquire real and personal property, and (ii) mortgage its interests therein.

New York State Sales and Use Tax Exemptions

The imposition of sales and compensating use taxes in New York state is governed by Article 28 of the Tax Law. Section 1116 of Article 28 sets forth organizations that are exempt from the sales and compensating use tax as, "any corporation ... organized and operated exclusively for ... charitable ... purposes ... no part of the net earnings of which inures to the benefit of any private shareholder or individual ...". (See Tax Law § 1116(a)(4).) It is important to note that the sales and use tax regulations define "charitable" to include, "lessening the burdens of government." (See 20 NYCRR Part 529.7(e)(1)(ii).) The exemption afforded to charitable organizations, however, is not automatic. Rather, the applicable sales and use tax regulations provide that, "an organization is not exempt from tax because it is organized and operated as a nonprofit organization or because it appears to meet the requirements of this section. In order to establish exempt status, it is necessary to file a completed application as set forth in subdivision (f) of this section and prove that the organization meets the statutory requirements." (See 20 NYCRR Part 529.7(a)(2).)

The application to secure a State sales tax exemption pursuant to Tax Law § 1116(a) is made with State Form ST-119.2. Successful applicants are issued an Exempt Organization Certificate and, thereafter, the applicant's purchases are exempt from sales and use taxes. Among other things, the application form requests submission of an exemption determination letter from the IRS 501(c)(3) Exemption Letter, or "IRS Determination." It appears as though an application may still be made if an IRS Determination has not been applied for or received by the applicant; however, because the application requires a significant amount of organizational and

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project information to be provided in its place, applications unaccompanied by an IRS Determination will likely garner greater scrutiny by the State Department of Taxation and Finance and the State may attempt to defer its decision until the IRS acts.

The Commissioner has consistently issued advisory opinions allowing the issuance of an Exempt Organization Certificate where an LDC meets the requirements of Tax Law § 1116(a)(4), 20 NYCRR Parts 529.7(a)(2) and 529.7(f). (See TSB-A-97(54)-S, granting exemption to Greater Syracuse Business Development Corporation, hereinafter, the "GSBDC Advisory Opinion.") In the GSBDC Advisory Opinion, the Commissioner found that because N-PCL § 1411(a) states that LDCs are to be established and operated for "exclusively charitable or public purposes," the "charitable" requirements of Tax Law § 1116(a)(4) are met. The GSBDC Advisory Opinion notes that Tax Law § 1116(a)(4) does not explicitly include "public purposes." Nonetheless, the Commissioner in that case interpreted the exemption definition to match LDC purposes.[11]

The GSBDC Advisory Opinion notes two distinct means by which an entity that has been granted an Exempt Organization Certificate may secure the exemption from sales and use taxes for purchases of otherwise taxable items: (1) the agency contract exemption, and (2) the Capital Improvement Exemption (discussed below).

Agency Contract Exemption

First, an exempt organization may appoint a contractor or agent to purchase taxable items on its behalf where an agency contract between the exempt entity and the contractor conforms to the requirements set forth within 20 NYCRR Part 541.3(d)(4) (the "Agency Contract Exemption"). This regulation states that all purchases pursuant to a qualifying agency contract are exempt as long as the property and services are purchased by the contractor or subcontractor as agent for the exempt organization. In order to create a principal/agent relationship all of the following conditions must be met:

1. purchases must be billed or invoiced by the vendor to the exempt organization, or to the contractor specifying that the contractor is acting as agent for the exempt organization (e.g., X contractor, as agent for Y, name of exempt organization), and identify the place of delivery;
2, payment must be made by the exempt organization, or by the contractor acting as agent, directly to the vendor from a special fund created by the exempt organization for this specific purpose;
3. deliveries must be made to the job site; or under certain circumstances (such as where the materials require additional fabrication before installation on the job site or for storage to protect the materials from theft or vandalism prior to installation at the job site) deliveries may be made to a site other than the job site, providing the ultimate delivery of the materials is made to the job site. Where delivery is made to a site other than the job site, the purchases must be billed or invoiced by the vendor to the exempt organization or to the contractor as agent, identify the place of delivery, the exempt organization's full name and address and the job site location where the materials will ultimately be delivered for installation; and
4. the contractor must furnish the vendor with the exempt organization certification when acting as agent for such organization. A statement signed by a responsible officer of the exempt organization which identifies the contract and the contractor, as agent

[11] Any ambiguity regarding whether an LDC is a "charitable" entity has been clarified with the enactment of the Nonprofit Revitalization Act of 2013, which, defines an LDC as a "charitable corporation." (See N-PCL § 1411(b).)

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for the exempt organization, must be either made on the exempt organization certification or appropriately attached thereto. (See 20 NYCRR Part 541.3(d)(4).)

The contract with the agent must completely comply with these requirements. If it is subsequently determined that the contract does not qualify as an agency contract, the contractor will be liable for the relevant sales tax. (See 20 NYCRR Part 541.3(d)(4)(iii).) However, the purchase of materials that are incorporated into the structure of the real property would be exempt (with proper documentation) under the Capital Improvement Exemption.

Capital Improvement Exemption

Second, the Commissioner noted that whether or not an exempt organization enters into a qualified Agency Contract, the purchase of materials incorporated into real property owned by the exempt organization as a capital improvement is exempt from sales and use tax, providing proper exemption documentation is given to the vendor of the materials (the "Capital Improvement Exemption"). Pursuant to Tax Law § 1115(a)(15) and (16), tangible personal property sold to a contractor, subcontractor or repairman for use in altering, improving, erecting or adding to a structure or building, or in maintaining, servicing or repairing real property, property or land of an organization that has secured an Exempt Organization Certificate is not subject to sales and use tax where such tangible personal property becomes an integral component part of such structure, building or real property. Where a sales tax exemption is sought using this Capital Improvement Exemption, contractors are required to issue a properly completed contractor exempt purchase certificate (Form ST-120.1) to affected suppliers when making purchases.

Therefore, if the LDC were to establish an exemption under Tax Law § 1116(a)(4), tangible personal property sold to a contractor, subcontractor or repairman for incorporation into the project would not be subject to sales and use tax if the LDC owns the project at the time the personal property is acquired and installed. It is important to note that purchases will not qualify for exemption under § 1115(a)(15) or § 1115(a)(16) if an exempt organization has only a leasehold interest. (See 20 NYCRR Part 528.16, Ex. 3.) Therefore, fee title will have to be conveyed to the LDC in order to obtain a sales tax exemption.

Section 528.16 of the New York Taxation and Finance Regulations (the "Regulations") notes that in order for the materials to be exempt, the exempt organization must own the land and (the rights to) the structure prior to the construction or improvement project. A contractor is not eligible for the exemption if the structure is first built and then sold to an exempt organization, even if such sale is pursuant to a pre-construction contract. (See 20 NYCRR 528.16, Ex. 2 & 4.) Equipment rentals are subject to tax, as are materials used to build forms that do not become part of the structure. (See 20 NYCRR 528.16, Ex. 5 & 6.)

Section 528.17 of the Regulations concerns the exemption for tangible personal property sold to contractors, subcontractors, or repairmen for use in the repair of an exempt organization's real property. In order for such property to be exempt from sales tax, it must become "an integral component of such structure, building, or real property." (See 20 NYCRR 528.17.) The Regulations illustrate this principle by using the example of a painter who uses masking tape to line a building's windows before painting. Because the tape will not become an integral part of the real property, it is subject to tax.

It is possible that a court could impose a limited interpretation on an LDC's power to construct, acquire, rehabilitate and improve facilities for use by others. N-PCL § 1411(c) states that these

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powers are specifically conferred in connection with industrial or manufacturing plants only. Likewise, the companion powers granted to LDCs are similarly limited to industrial or manufacturing plants. If literally interpreted, LDC powers may not be broad enough to construct, acquire, rehabilitate and improve general commercial, retail or housing facilities. However, N-PCL § 1411(i) states that:

> *Corporations incorporated or reincorporated under this section shall be organized and operated exclusively for the purposes set forth in paragraph (a), shall have, in addition to the powers otherwise conferred by law, the powers conferred by paragraph (c) and shall be subject to all the restrictions and limitations imposed by paragraph (e) and paragraph (g). In so far as the provisions of this section are inconsistent with the provisions of any other law, general or special, the provisions of this section shall be controlling as to corporations incorporated or reincorporated hereunder.*

Because it refers to the purposes in § 1411(a), which (unlike the powers in § 1411(c)) are not limited to industrial and manufacturing plants, the catch-all provision in N-PCL § 1411(i) may be sufficient to allow LDCs to undertake the construction, acquisition, rehabilitation and improvement to facilities other than industrial and manufacturing facilities. If LDC powers to construct, acquire, rehabilitate and improve facilities are limited to industrial and manufacturing projects, the Agency Contract Exemption would not be available to the company for a non-manufacturing or non-industrial project. If an LDC is not properly empowered to undertake the project, then an LDC would not be empowered to appoint a company to do the same on its behalf. However, the Capital Improvement Exemption may still be available where an LDC simply owns the project, but grants a license or lease to the company allowing the improvements to be constructed by the company on its own behest and behalf. Under this scenario, an LDC with an Exempt Organization Certificate would simply own the land and have title to the improvements. This simple arrangement should be sufficient to secure both the mortgage recording tax exemption and the sales tax exemption via the Capital Improvement Exemption.

Where a municipality, IDA, developer, or any combination thereof, pursues economic development on a proactive basis (for example, the creation of an industrial park and/or taking over existing facilities), we often recommend the formation of a new LDC to shield the municipality and/or IDA from unknown liabilities. This option is essential where an IDA either is not available or is unwilling to undertake a particular project. Where an IDA is available, we then consider whether an IDA straight lease transaction (or even a tax-exempt bond transaction) should be employed to supplement or replace the financial assistance that is available through the LDC.

***Note Regarding the Non-Profit Revitalization Act of 2013**

As of July 1, 2014, the Nonprofit Revitalization Act of 2013 took effect (the "Revitalization Act"). The Revitalization Act was enacted to "reduce unnecessary and outdated burdens on nonprofits" and to "enhance nonprofit governance and oversight to prevent fraud and improve public trust." The following list highlights some of the provisions which specifically impact LDCs:

- LDCs are defined as "charitable corporations" (See N-PCL § 1411(c));
- LDCs must adopt a conflict of interest policy requiring (at a minimum):
  - A definition of what constitutes a conflict of interest;
  - Procedures for disclosing a conflict of interest to the audit committee or board;

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- A prohibition against any attempt by the person with the conflict of interest to influence improperly the deliberation or voting on the matter giving rise to such conflict; and
- A requirement that the existence and resolution of the conflict be documented in the LDC's records, including the minutes of any meeting at which the conflict was discussed or voted upon (See N-PCL §§ 715-a(a)&(b));

- All LDC directors must submit an annual, written statement to the secretary of the LDC disclosing any potential conflicts (See N-PCL § 715-a(c));
- In the event that an LDC engages in a related-party transaction, the board must:
  - Consider any alternatives to the transaction;
  - Approve the transaction by at least a majority vote of the directors present at the meeting; and
  - Contemporaneously document in writing the basis for the board's approval (See N-PCL § 715(b));
- In the event that an LDC engages in a related-party transaction, the attorney general may bring an action to enjoin, void, or rescind such transaction if it was not reasonable or in the best interest of the LDC at the time it was approved. In the alternative, the attorney general may seek restitution and removal of LDC directors or officers (See N-PCL § 715(f));
- Email may be used to transmit board meeting notices (See N-PCL § 605); and
- LDCs seeking to dispose of substantially all of their assets or merge or consolidate may do so utilizing a one-step process (i.e., attorney general approval) rather than the former more cumbersome two-step process requiring attorney general review and court approval (See N-PCL § 510(3).)

In sum, the Revitalization Act attempts to update and modernize (somewhat archaic) provisions of the Not-For Profit Corporation Law. In doing so, LDCs are burdened with more government oversight. However, LDCs also gain several benefits: (a) the ability to use streamlined processes; and (b) the ability to utilize modern technologies for simple tasks (i.e., sending electronic notices).

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BUSINESS IMPROVEMENT DISTRICT (BID)[12]

by Shawn M. Griffin

Introduction

One economic development tool is a local Business Improvement District (BID). BIDs were originally allowed to be established only in cities. However, in 1989, the State, through GML Article 19-A, also gave towns and villages the ability to create a BID. A BID is a special district created by a local municipality to focus on promoting business activity and furthering the revitalization in a downtown or commercial area. A BID is a specific geographic area in which a variety of improvement activities and services are undertaken. A BID is managed by a district management association, which is incorporated under the state not-for-profit law. Its board of directors is made up of property owners and tenants within the BID, with a majority of the board being comprised of property owners from the district.

One of the defining features of BIDs is their ability to raise revenue through special assessment charges on properties in the district. This revenue is used to support programs and services to promote business activity in and to revitalize the area of the district. Most BIDs augment this revenue stream with funds from other sources. These can include municipal or county government funding, outside grants, foundation funding, income from events, donations, etc. Many BIDs hire a professional staff, often referred to as "downtown managers," who administer and carry out the BID programs and services.

A BID program is guided by a district plan that describes the organization of the district and the activities to be carried out by the district management association. This plan must be adopted by the legislative board of the authorizing municipality.

The improvements and services provided by the BID are required to supplement, not replace, the services and activities being provided by the local municipality in the district. Local municipalities are required by law to maintain the same level of municipal services in the BID. Therefore, by coordinating and focusing activity in a targeted area and by providing a "higher level of services," the process of economic development and revitalization in the BID can accelerate.

[12] Information discussed does not pertain to cities with populations of one million or more. Chapter 562 of the Laws of 1990 made changes to Article 19-A.

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BID Activities

Article 19-A § 980-c identifies the types of activities that can be carried out by a BID with revenues from the assessment charges.

First, the BID can undertake the following capital improvements on municipal land or on land owned or leased to the district:

1. construction and installation of landscaping, planting and park areas;
2. construction of lighting and heating facilities;
3. construction of physically aesthetic and decorative safety fixtures, equipment and facilities;
4. construction of improvements to enhance security of persons or property within the District;
5. construction of pedestrian overpasses and underpasses and connections between buildings;
6. closing, opening, widening or narrowing of existing streets;
7. construction of ramps, sidewalks, plazas, and pedestrian malls;
8. rehabilitation and removal of existing structures;
9. removal and relocation of utilities and vaults;
10. construction of parking lot and parking garage facilities; and
11. construction of fixtures, equipment, facilities and appurtenances as may enhance the movement, convenience and enjoyment of the public and be of economic benefit to the surrounding properties such as: bus stop shelters; benches and street furniture; booths; kiosks; signs; etc.

A municipality may issue and sell bonds and other obligations to undertake any of these improvements. In this case, the assessment charge revenue received from the district may be used by the municipality to cover some or all of the resulting debt service costs.

Second, the BID can provide the following additional services to promote business activity and the revitalization of the district:

1. enhanced sanitation services;
2. services promoting and advertising activities within the district;
3. marketing education for businesses within the district;
4. decorations and lighting for seasonal or holiday purposes; and
5. services that enhance the security of persons within the district.

In addition, the law allows the BID to operate and maintain any district improvement and to enter into contracts to construct accessibility improvements to increase public access from public areas to businesses for persons with disabilities. Also, a BID can carry out other improvements and services not listed above as long as it is funded from a source(s) other than the district assessment charge.

The Assessment[13]

The district plan must include the method or methods that properties in the district are to be assessed. Generally, there are two basic approaches for assessing properties in the district. The one(s) chosen should best reflect the equitable allocation of costs among all properties in proportion to the benefits they receive.

The first is the ad valorem method. Here, the charge is an amount per $1,000 of the property's assessed valuation. The valuation is

[13] A summary of the method(s) that can be used to assess property owners in the BID discussed herein come from information in a publication entitled "Business Improvement Districts" (pages 2-3), prepared by staff of the New York State Conference of Mayors, revised April, 2006.

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based on the assessed value of the property as shown on the most recent assessment roll used for the levy of general municipal taxes. These charges are levied and collected by the municipality in the same manner as that used to collect general municipal taxes. This method is the easiest to administer and is most equitable when the properties in the district are generally of the same size and type.

The second is the benefit based method. Here a charge is assessed to each property in proportion to the benefits they receive from the services or improvements of the district. Factors to determine the amount of benefit could include the property's type, size, front footage, use, etc. This method works best when properties in the district are of very different sizes, types or uses, or when the district charges are used for services or improvements that disproportionately benefit properties in one part of the district.

The BID may use a combination of these methods if they most equitably assess the charges to properties in proportion to the benefits they receive from the BID services and improvements. However, whatever method(s) is used, the annual district charge, excluding any debt service costs, cannot exceed 20% of the total general municipal taxes levied in that year against all taxable properties in the district. And the district charge is included in the municipality's taxing limit imposed by the State Constitution, and cannot exceed 10% of that taxing limit.

The district can assess properties that are tax exempt (for property tax purposes) as long as they benefit from the BID improvements or services. However, properties that are exempt from property taxes that do not benefit from the BID services or improvements may be included in the district, but cannot be subject to the assessment charge.

The District Plan

Preparing the district plan is a critical step in the process of establishing a BID. The plan is prepared during the process of establishing the BID and must be approved by the legislative body of the municipality authorizing the district. It describes the BID area; by detailing how the BID is to be organized and operated, including the method(s) of assessing properties in the district; and identifies the supplemental services and improvements the district will be carrying out. During the development of the plan, it is critically important to involve the affected property owners from the proposed district as well as other stakeholders in the community. Once adopted, the plan should be reviewed periodically by the BID organization and by the municipality to assure it remains current and still reflects the needs of the district and the community's goals for revitalization.

Section 980-a of Article 19-A identifies the required contents of the district plan. It must include:

1. a map of the district and description of boundaries of the district so that all lands included in the district are identified;
2. description of present and proposed uses of these lands;
3. proposed improvements and their maximum cost;
4. total annual amount proposed to be expended for improvements, operation and maintenance;
5. proposed sources of financing;
6. proposed time frame for implementation and completion of the district plan;
7. any proposed rules and regulations applicable to the district;
8. a list of properties to be benefited and a statement of the method or methods by which the expenses will be imposed upon

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the benefited properties, in proportion to their benefit, to defray costs;

9. statement identifying the district management association for the district; and
10. any other matter or item required to be important by the legislative body of the authorizing municipality.

Establishing the District

Before preparing the district plan, the municipality and the downtown business community should assess the pros and cons of establishing a BID. They should examine the needs of the area under consideration and determine what their goals and objectives are for promoting business activity and advancing the revitalization of the area. A number of questions should be examined. What are the resources that are available for revitalization of the area and how will a BID contribute to the effort? What are the specific types of needed improvements and supplemental services that could be undertaken by a BID? Do the benefits of creating a district outweigh the costs and administrative requirements of establishing and operating the district?

Clearly one of the benefits of a BID is the creation of a new revenue stream dedicated to implementing the district plan. However, for some smaller communities, the amount of funds raised through annual assessment charges might be quite small. On the other hand, another advantage of a BID is that it helps organize the revitalization effort in a community. It requires the community's stakeholders—property owners and tenants and municipal officials—to come together in a partnership that is committed to promoting and revitalizing the area. Having a formal organizational structure in place can focus the community's effort and help leverage other resources—both people as well as money—in support of a revitalization program.

Formally establishing a BID involves several specific steps, some of which are spelled out in GML Article 19-A. The New York Conference of Mayors (NYCOM) has published a guidebook on BIDs that identifies nine distinct steps to establishing a BID:[14]

1. **Applying GML Article 19-A to the Municipality.** The local legislative body must adopt a local law that applies GML Article 19-A to the municipality. The local law is subject to a permissive referendum. If a valid petition requesting a referendum is received, the referendum must be held and result in a majority vote for the municipality to proceed with setting up a BID.
2. **Preparing a District Plan.** If a valid petition requesting a referendum is not received or if a referendum on the local law passes, the local legislative body may adopt a resolution authorizing preparation of a district plan. The legislative body determines who should prepare the plan. Costs associated with preparing the plan are the responsibility of the municipality. There is no time limit for preparation of the plan.
3. **Adopting a District Plan.** Once the district plan is prepared, it must be filed with the municipal clerk's office. The local legislative body may then adopt a resolution that contains: (1) a copy of the district plan and notice that it is on file in the clerk's office and other places for public inspection as determined by the legislative body; (2) a notice of the time and place where the legislative body will hold a public hearing on establishing the BID; (3) a statement that any owner of real property in the proposed BID that is deemed benefited by the

[14] Information is contained on pages 5-11 of "Business Improvement Districts," NYCOM Municipal Management Series, prepared by staff of the New York Conference of Mayors (NYCOM), revised April, 2006.

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establishment of the district may object in writing within 30 days of the public hearing. The resolution must also state that the BID will not be established if written objections are filed from either: (1) owners of at least 51% of the assessed valuation of all benefited properties in the proposed BID; or (2) at least 51% of owners of benefited properties in the proposed district.

4. **Notice Requirements.** A copy or summary of the resolution must be published at least once in the municipality's official newspaper or a newspaper of general circulation. This must be done at least 10 days, but not more than 30 days, before the public hearing date. Also, a copy or summary of the resolution must be mailed to each owner of real property in the proposed district.
5. **Public Hearing.** At least one public hearing must be held by the legislative body.
6. **Filing Objections.** Property owners in the proposed district have 30 days to file written objections to the formation of the BID with the municipal clerk's office.
7. **Local Legislative Determination.** Thirty days after the public hearing, the legislative body must determine how many objections to creating the BID have been filed. The body must adopt a resolution disapproving the establishment of the district if objections have been filed from either: (1) owners of at least 51% of the assessed valuation of all benefited properties in the proposed BID; or (2) at least 51% of owners of benefited properties in the proposed district.

   If a sufficient number of objections (noted above) have not been filed, the legislative body must determine that: (1) the public notice requirements have been met and are sufficient; (2) that all real property in the proposed district will benefit from its establishment, exempting those that have been included despite their tax-exempt status; (3) that all properties benefitting from the district are included in the district; and (4) that the establishment of the district is in the public interest. If these determinations are made, the legislative body may adopt a local law establishing the district.

   If the legislative body determines that establishing the district is not in the public interest (see element 4 above), the body must adopt a resolution disapproving the establishment of the district. If the body determines that the public notice requirements have not been met or are insufficient, that not all properties in the proposed district will benefit from the district, or that not all of the properties that will benefit from the district are included in the proposed district, then the legislative body must hold another public hearing.

   If the legislative body decides to amend the district plan by adjusting the proposed boundaries, increasing or reducing the improvements or services in the district as noted in the district plan, or by changing the method(s) of assessment, an additional public hearing must be held.
8. **New York State Comptrollers Review.** Before the local law becomes effective, the State Comptroller must review the district plan and determine if the municipality's tax and debt limitations will be exceeded by the establishment of the district. The municipality must provide information to the State Comptroller on the amount of its outstanding indebtedness, assessment valuations, property taxes, etc. A form specifying the information that must be submitted is available from the State Comptroller's office. This information must be provided within 20 days after the legislative body adopts the local law.

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The State Comptroller must notify the municipality of its determination within 60 days after receiving the financial information submitted by the municipality. Upon a favorable determination from the State Comptroller and after the normal filings with the Secretary of State, the local law becomes effective and the municipality can begin establishing the BID.

9. **Final Filing and Notice Requirements.** Within 10 days of the law becoming effective, certified copies of the law must be filed in the municipal clerk's office and with the Office of the State Comptroller in Albany. Finally, within two weeks of the filing with the Office of the State Comptroller, a copy or summary of the local law must be published at least once in the municipality's official newspaper or a newspaper of general circulation.

Implementing the BID Program

As noted earlier, a district management association (DMA) must be created to manage the operations of the BID and carry out the improvements and services noted in the district plan. The DMA must be incorporated under the not-for-profit law of the State. There must be three incorporators representing the mayor/town supervisor or chief executive officer, the chief financial officer of the municipality, and the legislative body. The DMA's board of directors must consist of property owners and tenants within the district. However configured, the board must have a majority of its members representing property owners in the district. The three incorporators who represent the authorizing municipality are also members of the board. The DMA's bylaws or certificate of incorporation must provide for voting representation by both property owners and tenants in the district.

While the daily operations of the BID function independent of the municipality, the municipality does have an important oversight responsibility. It should monitor the activities of the DMA to assure that the services and improvements carried out by the BID are consistent with the district plan. In addition to collecting the assessment charge from the property owners and expending these funds to the DMA, the municipality should monitor the financial operations of the BID by reviewing its annual budget, financial statements and audits.

It is recommended that the DMA and the municipality formalize their respective roles and responsibilities in an agreement. This document can clarify other issues and help the DMA carry out its responsibilities consistent with the plan and the needs of the community. Two important provisions are recommended to be included in a DMA-municipal agreement: (1) that any BID employee should not be considered to be a municipal employee for the purposes of civil service requirements and benefits; and (2) that contracting and bidding activities of the BID should reflect the procurement policies of the municipality. This agreement can be a way to formalize the partnership between the municipality and the BID organization and serve as a foundation for ongoing communication and further collaboration.

The strategies for implementing a BID program are contained in the district plan that has been adopted by the municipality's legislative body. As discussed earlier, this plan should be kept current and be revised as necessary to reflect the changing needs in the BID and the activities the BID is undertaking or wishes to undertake. Amending the district plan is required when the BID anticipates providing additional services or improvements, changing the method(s) of assessing the district charge or undertaking other major changes. Revisions to the district plan must first be recommended by the DMA and the municipality's legislative body must act to amend the district plan by local law. Before the legislative body approves

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the local law, a public hearing must be held. To expand the boundary of an existing BID, the same procedures must be followed for establishing the district discussed above, except the local governing body does not have to re-adopt a local law to apply GML Art. 19-A to the municipality.

Many BIDs hire professional staff to carry out their day-to-day work. They typically are hired by and are responsible to the DMA board of directors. Whether to hire staff or not is often a function of the size of the BID and the complexity of its programs and services. In smaller BIDs, professional staff often serve on a part-time basis.

DMAs are subject to the requirements of the Public Authorities Accountability Act of 2005 as amended by the Public Authorities Reform Act of 2009. These requirements are discussed in another section of this handbook.

The Main Street Approach

As discussed earlier, the district plan should include the strategy for revitalizing the BID. One well-known and proven approach has been developed by the National Trust For Historic Preservation (NTHP) and is referred to as the "Main Street Approach."[15] This provides a framework for developing a comprehensive strategy for revitalization of downtown areas and neighborhood commercial centers. According to the NTHP, the approach has four elements.

Organization. This involves establishing an organizational structure to oversee and carry out activities and programs. The structure should be geared to involving the community and its stakeholders in meaningful work to advance the goals of the organization. A governing structure could be a DMA with a board of directors, which is augmented by standing committees, each with a specific charge and focus. Since many downtown improvement programs have limited resources, the organization could be a mechanism to recruit and involve volunteers. The structure can provide for a continuity of effort over time and help build consensus and cooperation in support of the revitalization program.

Promotion. A positive image of the downtown or commercial area is essential to encouraging consumers, investors and funders to be part of the revitalization effort. Promotion and marketing activities should speak to the assets, attractions and development and investment opportunities in the district. Activities, such as special events, holiday festivals, and marketing campaigns, can help create a positive image for the business district.

Design. The physical appearance and functioning of the business district have much to do with its attractiveness and economic viability. Enhancing an area's physical appearance should focus on preserving its architectural style and creating a pedestrian friendly environment. The design and scale of new construction should be consistent with and support the overall physical appearance and style of the area. Attention should be given to attractive and well-designed street furniture, lighting, signs, plantings, etc. It is essential that the district function well for consumers and businesses. As such, parking, and vehicular and pedestrian circulation and access should work together and contribute, not detract, from the overall physical appeal of the business district.

Economic Restructuring. Activities that seek to expand and improve the economic base of the business district are critical to a program's success. Efforts should focus on diversifying and expanding the assets in the district and helping existing businesses increase their

[15] This is a trademarked strategy, known as the "Main Street Four-Points Approach," developed by the Main Street Center of the National Trust for Historic Preservation.

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competitive position. Traditional economic development tools could be used, including working with existing businesses to stay and expand in the district through the provision of small business counseling and business planning services as well as using economic development incentives as appropriate. Retail recruitment activities should be directed at areas of vacant space, including first floor commercial space. Opportunities for new mixed use development should be considered. Oftentimes, developing or rehabilitating just one or two larger properties can create a catalytic effect throughout the business district, generating new demand for business activity and development.

Using the Main Street Approach as a framework to develop a revitalization strategy will help assure that the program is comprehensive and considers the broad range of activities needed for success. This approach can help communities focus their revitalization program, whether or not they choose to establish a BID.

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PUBLIC AUTHORITIES ACCOUNTABILITY ACT OF 2005 (PAAA) *AND* PUBLIC AUTHORITIES REFORM ACT OF 2009 (PARA)

by Robert J. Ryan

Summary

The Public Authorities Reform Act of 2009 (PARA), signed into law by Governor Paterson on December 11, 2009, amends the Public Authorities Accountability Act of 2005 (PAAA), which was signed into law by Governor Pataki on January 13, 2006. The primary purposes of PAAA and PARA are to ensure greater efficiency, openness and accountability for New York's public authorities, and establish an independent authorities budget office. PAAA and PARA seek to accomplish these purposes by establishing comprehensive reporting, auditing, governance and property disposition requirements. The provisions of the PAAA as amended by PARA are in addition to, and do not supersede any other existing requirements of, public authorities. In addition, PARA overhauls the Authority Budget Office established by PAAA and mandates the governor to establish a replacement independent authorities budget office (ABO) to: (i) promulgate rules and regulations; (ii) receive and act upon complaints; (iii) initiate formal investigations in response to complaints or non-compliance; (iv) issue subpoenas pertaining to investigations; (v) publicly warn and censure authorities for noncompliance; (vi) report suspected criminal activity to the attorney general; (vii) compel any noncompliant authority to submit an explanation; (viii) commence special proceedings in Supreme Court seeking an order for the production of documents or information; (ix) develop with the Attorney General a written acknowledgment for board members; (x) assess the ability of individual authorities to implement PARA 2009 and set a date for which changes must be implemented by; and (xi) recommend to appointing authority the suspension or dismissal of officers or directors.

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Scope and Applicability

Definitions (Public Authorities Law § 2).

PAAA and PARA are applicable to "local authorities," defined as:

1. a local IDA or authority or other local public benefit corporation.
2. a not-for-profit corporation affiliated with, sponsored by, or created by a county, city, town or village government.[16]
3. a public authority or public benefit corporation created by or existing under the Public Authorities Law (PAL) or any other law of the State whose members do not hold a civil office of the State, are not appointed by the governor or are appointed by the governor specifically upon the recommendation of the local government or governments.
4. an affiliate of such local authority.

Reporting Requirements

Annual Reports (PAL § 2800(2))[17]

Within 90 days after the end of its fiscal year, the authority must submit to the CEO, CFO, chairperson of the legislative body of the local government or local governments, and the Authority Budget Office an annual report[18] that must include:

1. operations and accomplishments;
2. financial reports including: (i) audited financials, (ii) grant and subsidy programs, (iii) operating and financial risks, (iv) current ratings, if any, of bonds issued by recognized municipal bond rating agencies and notice of changes in such ratings, and (v) long-term liabilities, including leases and employee benefits plans;
3. mission statement and measurements including its most recent measurement report;
4. schedule of bonds and notes outstanding;
5. compensation schedule for salaries in excess of $100,000;
6. biographical information for all persons with salaries in excess of $100,000;
7. projects undertaken during the past year;
8. list of real property acquired or disposed of during the year including the price paid or received and the names of the buyers or sellers;
9. code of ethics;
10. assessment of internal controls;
11. enabling legislation;
12. description of the authority and its board structure[19] including: (i) committees and members, (ii) board meetings and attendance, (iii) description of major

[16] See also *Griffiss Local Development Corp. v. State of New York Authority Budget Office*, 26 Misc.3d 815 [2009], where the court held that a development corporation was a local authority subject to PAAA because the LDC was created by the county in cooperation with the city and the redevelopment planning council.

[17] Effective Date: Immediately unless the authority fiscal year begins after January 1, 2006.

[18] Waiver: Upon application by an authority, the new ABO may waive any requirement of § 2800 of the PAL (i.e., Annual Report, website publication, Certification of Annual Report by CEO and CFO) pursuant to regulations promulgated by the ABO, which take into consideration number of employees, annual budget, ability to use existing staff, and other factors. See the ABO Policy Guidance No. 11-01 Compliance Review Process for further guidance, available on ABO's website www.abo.ny.gov/policyguidance/11-01complianceReviewRequirements.pdf (last visited April 25, 2011).

[19] Personnel Reports: By January 15 of each year a listing of employees, title and salary to OSC, Budget, legislative fiscal committees and ABO. May reference information contained in the annual report if appropriate with any updates as necessary.

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authority units or subsidiaries, and (iv) number of employees;

13. charter and by-laws;
14. listing of material changes in operations and programs during the reporting year;
15. minimum of a four-year financial plan, including: (i) current and projected capital budget, (ii) operating budget report, including an actual versus estimated budget with an analysis and measurements of financial and operating performance;
16. board performance evaluations, provided, however, that such evaluations shall not be subject to disclosure under FOIL;
17. description of the total amount of assets, services or both assets and services bought or sold without competitive bidding including: (i) the nature of assets and services, (ii) names of the counterparts, (iii) where the contract price for the assets purchased exceed FMV or where the contract price for the assets sold is less than FMV, a detailed explanation of the justification for making a purchase or sale without competitive bidding and a certification by the CEO and CFO that they have reviewed the terms of such purchase or sale and determined that it complies with applicable law and procurement guidelines; and
18. description of material pending litigation.

Every financial report submitted with the Annual Report under PAL § 2800 must be approved by the authority's board and must be certified in writing by the CEO and the CFO of such authority that, based on that officer's knowledge: (i) the information is accurate, correct and does not contain any untrue statement of material fact; (ii) the report does not omit any material fact which, if omitted, would cause the financial statements to be misleading in light of the circumstances under which the statements are made; and (iii) the report fairly presents, in all material respects, the financial condition and results of operations of the authority as of, and for, the periods presented in the financial statements.

Website Publication

Each local authority shall make accessible to the public, via its official or shared internet website, documentation pertaining to its mission, current activities, most recent annual financial report, current year budget and its most recent independent audit report unless such information is exempt from disclosure pursuant to § 87 of the Public Officers Law (FOIL). A more complete list of the information to be posted on a public authority's website can be obtained by contacting the ABO.[20]

Budget Reports (PAL § 2801(2))[21]

At least 60 days prior to the commencement of its fiscal year the authority must submit to the CEO, CFO, chairperson of the legislative body of the local government or local governments, and the Authority Budget Office an annual report that must include:

1. budget information on operations and capital construction setting forth the estimated receipts and expenditures for the next fiscal year and the current fiscal year, and
2. actual receipts and expenditures for the last completed fiscal year.

[20] See the ABO Policy Guidance No. 10-03 Posting and Maintaining Reports on Public Authority Web Sites for further guidance, available on ABO's website www.abo.ny.gov/policyguidance/10-03PostingInformationAuthorityWebSite.pdf.

[21] Effective Date: authority fiscal year ending on or after December 31, 2007.

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Audit Requirements (PAL § 2802(2))[22]

Report

The authority must submit along with the Annual Report required by PAL §2800(2) (see above) a copy of the annual independent audit report (performed by a certified public accounting firm in accordance with generally- accepted government auditing standards), a management letter, and any other external examination of the books and accounts of the authority, other than examinations made by the State Comptroller to the CEO, CFO, chairperson of the legislative body of the local government or local governments, and the Authority Budget Office.

The authority may exempt from disclosure any information exempted pursuant to § 87 of the Public Officers Law (FOIL).

Auditor

The lead audit partner or the audit partner responsible for reviewing the audit cannot have performed audit services for the authority in each of the five previous fiscal years.

The CPA firm performing the audit is prohibited from performing any non-audit services to the authority contemporaneously with the audit, unless prior approval is granted by the audit committee. (See paragraph 5(a), below.)

The CPA firm is prohibited from performing any audit service if the CEO, comptroller, CFO, chief accounting officer, or any other person serving in an equivalent position for such authority, was employed by the CPA firm and participated in any capacity in the audit of the authority during the one year preceding the date of the initiation of the audit.

Board Member Requirements (PAL § 2824)[23]

Responsibilities

1. execute direct oversight of the authority's chief executive and other senior management in the effective and ethical management of the authority;
2. understand, review and monitor the implementation of fundamental financial and management controls and operational decisions of the authority;
3. establish policies regarding the payment of salary, compensation and reimbursements to, and establish rules for the time and attendance of, the chief executive and senior management;
4. adopt a code of ethics applicable to each officer, director and employee that, at a minimum, includes the standards established in § 74 of the Public Officers Law;
5. establish written policies and procedures on personnel including policies protecting employees from retaliation for disclosing information concerning acts of wrongdoing, misconduct, malfeasance, or other inappropriate behavior by an employee or board member of the authority, investments, travel, the acquisition of real property and the disposition of real and personal property and the procurement of goods and services;

[22] Effective Date: authority fiscal year ending on or after December 31, 2007.

[23] Effective Date: Immediately unless the authority fiscal year begins after January 1, 2006.

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6. adopt a defense and indemnification policy and disclose such plan to any and all prospective board members.
7. perform each of their duties as board members in good faith and with that degree of diligence, care and skill which an ordinarily prudent person in like position would use under similar circumstances, and may take into consideration the views and policies of any elected official or body, or other person and ultimately apply independent judgment in the best interest of the authority, its mission and the public; and
8. at the time the board member takes his or her oath of office or within 60 days after the effective date of PARA 2009 (i.e., March 1, 2010) if the board member has already taken his or her oath of office, execute an acknowledgment (form to be developed by ABO and AG) in which the board member acknowledges that he or she understands his or her role, and fiduciary responsibilities and acknowledges that he or she understands his or her duty of loyalty and care to the organization and commitment to the authority's mission and public interest.

Training[24]

Board members must participate in State-approved training regarding their legal, fiduciary, financial and ethical responsibilities as directors of the authority within one year of appointment to the board. Board members must participate in continuing training as may be required to remain informed of best practices, and regulatory and statutory changes relating to effective oversight of management and financial activities of authorities.

Separation of Board and Management

No chair who is also the chief executive officer shall participate in determining the level of compensation or reimbursement, or time and attendance rules for the position of chief executive officer.

Extension of Credit

The board is prohibited from extending or maintaining credit, arranging for the extension of credit, or renewing an extension of credit, in the form of a personal loan to or for any officer, board member or employee of the authority.

Establishment of Committees

Audit Committee. An audit committee must be established and comprised of at least three independent members who shall constitute a majority on the committee. If the board has less than three independent members, the board can appoint nonindependent members to the committee provided that the independent members constitute the majority. To the extent practicable, members of the audit committee should be familiar with corporate financial and accounting practices. The audit committee must recommend to the board the hiring of a CPA firm, establish compensation to be paid to the CPA firm and provide direct oversight of the performance of the independent annual audit performed by the CPA firm.

Governance Committee. Must establish a governance committee to be comprised of at least three independent members who shall constitute a majority on the committee. If the board has less than three independent members, the board can appoint nonindependent members to the committee provided that the independent members constitute the majority. The governance committee must keep the board informed

[24] See ABO Recommended Governance Practices – New Board Member Orientation for further guidance, available on ABO's website: www.abo.ny.gov/recommendedpractices/NewBoardMemberOrientation.pdf.

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of current best governance practices, review corporate governance trends, update the authority's governance principles, and advise appointing authorities of the skills and experiences required of potential board members. In addition, PARA requires that the committee examine ethical and conflicts of interest issues; perform board self-evaluations; and recommend by-laws which include rules and procedures for conduct of board business.

Finance Committee. Any authority that issues debt must establish a finance committee. The finance committee must have at least three independent members who shall constitute a majority on the committee. If the board has less than three independent members, the board can appoint nonindependent members to the committee provided that the independent members constitute the majority. Responsibility is to review proposals for the issuance of debt by the authority and its subsidiaries and make recommendations.[25]

Mission Statement and Measurement Report (PAL § 2824-a)

Each authority must submit to the ABO a proposed authority mission statement and proposed measurements which the ABO will post on its website. Due Date: State authorities—March 31, 2010, Local authorities—March 31, 2011. The report must contain a brief mission statement expressing the purpose and goals of the authority, a description of the stakeholders of the authority and their reasonable expectations from the authority, and a list of measurements by which performance of the authority and the achievement of its goals may be evaluated. The authority must annually reexamine its mission statement and measurements and publish a self- evaluation. A waiver may be obtained from the director of the ABO if determined unnecessary for an individual authority.

Independence and Financial Disclosure (PAL § 2825)

Independence[26]

Except for board members who serve as members by virtue of holding a civil office of the State, the majority of the remaining members who are appointed on or after January 13, 2006 must be independent. An independent member is one who:

1. is not, and in the past two years has not been, employed by the public authority or an affiliate in an executive capacity;
2. is not, and in the past two years has not been, employed by an entity that received remuneration valued at more than $15,000 for goods and services provided to the public authority or received any other form of financial assistance valued at more than $15,000 from the public authority;
3. is not a relative of an executive officer or employee in an executive position of the public authority or an affiliate; and
4. is not, and in the past two years has not been, a lobbyist registered under a State or local law and paid by a client to influence the management decisions, contract awards, rate determinations or any other

[25] See ABO Recommended Governance Practices – Model Finance Committee Charter for further guidance, available on ABO's website: www.abo.ny.gov/recommendedpractices/ModelFinanceCommitteeCharter.pdf.

[26] Effective for board members appointed on or after January 13, 2006.

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similar actions of the public authority or an affiliate. The new audit committee would be required to make recommendations to the board concerning the engagement of a certified independent accounting firm, compensation to be paid for same, and to provide direct oversight of the engagement.

Financial Disclosure[27]

Board members, officers, and employees must file annual financial disclosure statements with the county board of ethics for the county in which the local public authority has its primary office pursuant to Article 18 pursuant to the Act.

Disposition of Property[28]

Definitions (PAL § 2895)

1. "Dispose" or "Disposal" means the "transfer of title or any other beneficial interest in personal or real property," and
2. "Property" means "personal property in excess of $5,000 in value, real property, and any inchoate or other interest in such property, to the extent that such interest may be conveyed to another person for any purpose, excluding an interest securing a loan or other financial obligation of another party."

Duties of the Authority (PAL § 2896)

Adopt Guidelines. Adopt by resolution, guidelines which must: (i) detail the authority's policy and instructions regarding the use, awarding, monitoring and reporting of contracts for the disposal of property, and (ii) designate a contracting officer who shall be responsible for the authority's compliance with, and enforcement of, such guidelines. The guidelines must be consistent with the provisions of the PAAA, the authorities enabling legislation, and any other applicable law for the disposal of property, except that the guidelines may be stricter than the aforementioned if the authority determines that additional safeguards are necessary. The guidelines must be annually reviewed and approved by the governing body of the authority.

On or before the 31st of March in each year, the authority must file with the comptroller a copy of the guidelines most recently reviewed and approved by the authority, including the name of the designated contracting officer. The guidelines must be posted on the authority's website and maintained on such site until the procurement guidelines for the following year are posted.

1. maintain adequate inventory controls and accountability systems for all property under its control.
2. periodically inventory such property to determine which property shall be disposed.
3. transfer or dispose of such property as promptly as possible.
4. publish, not less frequently than annually, a report listing all real property of the public authority. The report must consist of a list and a full description of all real and personal property disposed of during the reporting period. The report must contain the price received by the authority and the name of the purchaser for all property sold by the authority during the reporting period. The report must be delivered to the

[27] Effective Date: Immediately unless the authority's fiscal year begins after January 1, 2006.

[28] Effective Date: Immediately unless the authority's fiscal year begins after January 1, 2006.

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comptroller, the director of the budget, the commissioner of general services, and the legislature.

Disposal Requirements (PAL § 2897)

1. The contracting officer must have supervision and direction over the disposition of property.
2. The custody and control of the property, pending its disposition, and the disposal of such property must be performed by the authority in possession thereof.
3. A deed, bill of sale, lease, or other instrument executed by or on behalf of any public authority, purporting to transfer title or any other interest in the property under the provisions of the PAAA shall be conclusive evidence of compliance with the provisions of PAAA insofar as it concerns title or other interest of any bona fide grantee or transferee who has given valuable consideration for such title or other interest and has not received actual or constructive notice of a lack of such compliance prior to closing.
4. No disposition of real property, or any interest in real property, shall be made by the authority unless an appraisal of the value of such property has been made by an independent appraiser and included in the record.
5. The authority must not dispose of property unless it publicly advertises for bids, with exceptions (see below).
6. The authority must not dispose of property for less than FMV, with exceptions (see below).

Procedures for Disposal

1. An appraisal for real property must be obtained and included in the record of the disposition.
2. All disposals or contracts for disposal of property must be made after publicly advertising for bids (with exceptions as discussed below).
3. The advertisement for bids must be made at such time prior to the disposal or contract through such methods and on such terms and conditions as shall permit full and free competition consistent with the value and nature of the property.
4. All bids would have to be publicly disclosed at the time and place stated in the advertisement.
5. The award of bids shall be made with reasonable promptness by notice to the responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the State. Price and other factors may be considered and all bids may be rejected when it is in the public interest to do so.
6. Exceptions to publicly advertising: The disposal and contracts for disposal of property may be negotiated or made by public auction subject to obtaining such competition as is feasible under the circumstances if:
   - the personal property involved has qualities separate from the utilitarian purpose of such property, such as artistic quality, antiquity, historical significance, rarity or other quality of similar effect that would tend to increase its value, or if the personal property is to be sold in such quantity that, if it were disposed of under paragraphs (a) and (b) of this subdivision, would adversely affect the State or local market for such property and the estimated fair market value of such property and other satisfactory terms of disposal can be obtained by negotiation;
   - the FMV of the property does not exceed $15,000;
   - bid prices after advertising are not

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reasonable, either as to all or some part of the property, or have not been independently arrived at in open competition;
- the disposal will be to the State or any political subdivision, and the estimated FMV of the property and other satisfactory terms of disposal are obtained by negotiation; or
- such action is otherwise authorized by law.

7. Exceptions to publicly advertising and obtaining FMV:
- transferee is a government or public entity and terms of transfer require ownership and use to remain with the government or public entity; or
- purpose of the transfer is within the purpose, mission or statute of the authority; or
- written notification to the Governor, the Speaker and the Temporary President. Such notification is subject to denial. Denial by Governor is in the form of a certification. Denial by the legislature is in the form of a resolution. Denial must be made within 60 days of receiving the notification during the months January through June. Provided no denial, then authority may effectuate transfer. If the legislature receives the notification in the months July through December, then legislature may take 60 days from January 1 of the following year. However, a local authority may obtain local approval from the chief executive and legislature of the political subdivision in lieu of the notification to the Governor, Speaker and Temporary President provided the local authority's enabling legislation provides for such approval and the property was obtained by the authority from the political subdivision.

8. If a below FMV transfer is proposed, the following information is required to be provided to the authority's board and the public:
- description of the asset;
- appraisal of the FMV of the asset;
- description of purpose of the transfer, the kind and amount of the benefit to the public resulting from the transfer, such as jobs and wages created or preserved;
- value received compared to FMV;
- names of private parties to the transaction and the value received;
- names of private parties that have made an offer, the value of offer and purpose for which the asset would have been used.
- board must make a written determination that there is no reasonable alternative to the proposed below-market transfer that would achieve the same purpose of such transfer.

9. Ninety-day notice of a negotiated disposal[29]: An explanatory statement would have to be prepared and transmitted to the comptroller, the director of the budget, the commissioner of general services and the legislature at least 90 days in advance of such disposal in instances of disposal by negotiation where:
- any personal property has an estimated FMV in excess of $15,000;
- any real property that has an estimated FMV in excess of $100,000, except in instances where real property is disposed of by lease or exchange unless such lease or exchange includes:
  - any real property disposed of by lease, if the estimated fair annual rent is in excess of $15,000;
  - any real property or real and related personal property disposed of by exchange, regardless of value, or any property any part of the consideration for which is real property.

[29] A copy of the statement must be preserved in the files of the authority making the disposal.

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- no disposition of real property, or any interest in real property, shall be made unless an appraisal of the value of such property has been made by an independent appraiser and included in the record.

Investment Guidelines (PAL § 2925)[30]

The PAAA requires all authorities to annually adopt and review comprehensive investment guidelines which detail the authority's operative policy and instructions to officers and staff regarding the investing, monitoring and reporting of funds.

Debt (PAL § 2856)

Every authority not subject to a statutory limit on the debt it may issue, must submit to the ABO a statement of intent to guide the authority's issuance and overall amount of debt. The submission date will be set by the ABO.

Requirements

For purposes of complying with PARA and PAAA, IDAs and LDCs should be aware of the following requirements:

Annual Report. Within 90 days after the end of its fiscal year, the authority must submit to the CEO, CFO, chairperson of the legislative body of the local government or local governments and the ABO, an Annual Report.

Certification of Financial Reports. Every financial report submitted in the annual report must be approved by the board and must be certified in writing by the CEO and the CFO of such authority.

Website. The authority must post its mission, current activities, most recent annual report, current year budget and its most recent independent audit report on its website.

Budget Report. At least 60 days prior to the commencement of its fiscal year, the authority must submit to the CEO, CFO, chairperson of the legislative body of the local government or local governments, and the ABO, a budget report.

Audit Report. The authority must submit, along with the Annual Report required by PAL § 2800(2), a copy of the annual independent audit report (performed by a certified public accounting firm in accordance with generally-accepted government auditing standards), a management letter, and any other external examination of the books and accounts of the authority, other than examinations made by the State Comptroller, to the CEO, CFO, chairperson of the legislative body of the local government or local governments, and the ABO.

Auditor Qualification. A CPA firm is prohibited from performing any non-audit function contemporaneously with the audit, unless prior approval is given by the audit committee; CPA firm is prohibited from performing the audit if senior management of the authority was employed by the CPA firm within one year prior to the commencement of the audit; the lead audit partner or the audit partner responsible for reviewing the audit cannot have performed audit services for the authority in each of the five previous fiscal years.

[30] Effective Date: Immediately unless the authority fiscal year begins after January 1, 2006.

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Property Disposition. Must obtain an appraisal for the disposition of any interest in real property. Must appoint a contracting officer; dispose of property for at least FMV after publicly advertising with exceptions; must provide 90 days prior notice to the comptroller, the director of the budget, the commissioner of general services and the legislature for negotiated disposals.

Board Members. Majority of board members appointed on or after January 13, 2006 must be independent (not including ex-officio); must receive training within one year of appointment.

Board Committees. Must establish audit, governance and finance committees comprised of at least 3 independent members.

Financial Disclosure. Board members, officers and employees must file annual financial disclosure statements with the county board of ethics for the county in which the local public authority has its primary office pursuant to Article 18 pursuant to the Act.

Codes, Policies and Guidelines.

1. Establish policies regarding the payment of salary, compensation and reimbursements to, and establish rules for, the time and attendance of the CEO and senior management.
2. Adopt a code of ethics applicable to each officer, director and employee that, at a minimum, includes the standards established in § 74 of the POL.
3. Establish written policies and procedures on personnel, including policies protecting employees from retaliation for disclosing information concerning acts of wrongdoing, misconduct, malfeasance or other inappropriate behavior by an employee or board member of the authority, investments, travel, the acquisition of real property and the disposition of real and personal property and the procurement of goods and services.
4. Adopt a defense and indemnification policy and disclose such plan to any and all prospective board members.
5. Adopt by resolution, guidelines which must (a) detail the authority's policy and instructions regarding the use, awarding, monitoring and reporting of contracts for the disposal of property, and (b) designate a contracting officer who shall be responsible for the authority's compliance with, and enforcement of, such guidelines.
6. Annually adopt and review comprehensive investment guidelines which detail the authority's operative policy and instructions to officers and staff regarding the investing, monitoring and reporting of funds of the authority.
7. Adopt a Mission Statement and Measurement Report. Must re-examine annually and publish a self-evaluation.

Compliance Review

The ABO is authorized by the PAAA to conduct reviews and analyses of the operations, practices and reports of public authorities to assess compliance with the provisions of the PAAA and other applicable laws.

The ABO has commenced governance reviews of public authorities and has specifically reviewed the following:

1. Board duties and committee involvement;
2. Board member participation in State-approved training;

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3. Policies and procedures required under the PAAA, PARA, PAL, GML and POL;
4. Policies and procedures indicative of good governance practices;
5. Cash and investments, and asset management practices;
6. Independent financial audits and other reporting;
7. Adherence with reporting requirements; and
8. Project review, approval and monitoring processes

In addition to reviewing records and documentation, the ABO will attend board meetings and interview management.

The ABO in its compliance reviews has identified where authorities have failed to be in compliance with applicable statutory provision and/or where authorities followed their own procedures. The ABO has also provided specific comments recommending certain procedures or activities that the ABO believes will improve the overall good governance of authorities.

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PROCUREMENT LOBBYING LAW

by Mitchell J. Pawluck and Robert J. Ryan

Summary

Chapter 1 of the Laws of 2005, as amended by Chapter 596 of the Laws of 2005, generally referred to as the "Procurement Lobbying Law" (PLL) significantly changes procurement contracting with governmental entities. The PLL affects: (i) activities by the lobbying community seeking procurement contracts by amending the Legislative Law, and (ii) the activities of governmental entities seeking to enter into procurement contracts by amending the State Finance Law (SFL). As such, PLL provides that contacts made to governmental entities regarding procurements are covered under the Lobby Law and limits communications on governmental procurements to contacts between contractors and procurement professionals in contracting entities.

Additionally, PLL established an Advisory Council on Procurement Lobbying (Advisory Council). Among other things, the Advisory Council is charged with developing model guidelines and forms for use by governmental entities regarding the restrictions on contacts during the procurement process. A website link to the Advisory Council information can be found on the NYS Office of General Services (OGS) website at www.OGS.NY.GOV.

The PLL restricts contacts by an offerer which are intended to influence the governmental procurement, at the point in time when the governmental entity issues its first written document soliciting a response from offerers that is intended to result in a procurement contract. Such contacts must only be made to specifically designated persons at the governmental entity.

The PLL requires the governmental entity to collect and record certain information pertaining to those who contact the governmental entity to influence a governmental procurement. Such information must be made part of the procurement record. In addition, PLL requires governmental entities to notify offerers of the permissible contacts provisions in its solicitation materials and to obtain prior non-responsibility determinations from the offerer.

Furthermore, PLL requires governmental entities to make a determination of non-responsibility if it is found that the offerer knowingly and willfully made an impermissible contact or failed to timely disclose accurate and complete information or otherwise cooperate in providing the required information. Such a determination of non-responsibility precludes

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the governmental entity from awarding a procurement contract to such offerer. In addition, offerers that are determined to be non-responsible for a second time within a four-year period are rendered ineligible to submit a proposal on, or be awarded any, procurement contract for a period of four years from the date of the second determination.

Lastly, the governmental entity must report all such findings of non-responsibility to the OGS, which will maintain a publicly available list.

Applicability (SFL § 139-J(1)(A))

The following "governmental entities" are required to comply with the new SFL provisions when conducting procurements:

1. State Agencies (includes boards, commissions, divisions, offices, councils and committees);
2. NYS Legislature;
3. Unified Court System;
4. IDAs in jurisdictions with a population of 50,000 or more;
5. Local public benefit corporations; and
6. Public authorities and public benefit corporations and any subsidiary or affiliate thereof.

Note: In general, the provisions of PLL apply to procurements of governmental entities, however, in regard to real property, disposals are included.

The provisions of SFL, as set forth herein, are effective on January 1, 2006, however, procurement contracts for which bid solicitations have been issued prior to the effective date of the PAAA (August 23, 2005) shall be awarded pursuant to the provisions of law in effect at the time of issuance.

Key Definitions

Contacts. Any oral, written or electronic communication with a governmental entity under circumstances wherein a reasonable person would infer that communication was intended to influence a governmental procurement.

Governmental Procurement. (i) the preparation or terms of the specifications, bids, requests for proposals (RFPs) or evaluation criteria for a procurement contract; (ii) solicitation for a procurement contract; (iii) evaluation of the procurement contract; (iv) award or denial of a procurement contract; or (v) approval or denial of an assignment, amendment (other than amendments that were authorized under the terms of the procurement contract approved by the comptroller), renewal or extension of a procurement contract or any other material change that results in a financial benefit to the offerer.

Procurement Contract. Any contract or other agreement for an article of procurement involving an estimated annualized expenditure in excess of $15,000. Grants and contracts providing for payments to not-for- profit organizations under a program appropriation pursuant to Article 11-B of SFL are exempted from the definition of "procurement contract." In addition, intergovernmental agreements, railroad and utility force accounts, utility relocation agreements or orders and eminent domain transactions are also exempted.

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Article of Procurement. A commodity, service, technology, public work, construction, revenue contract, the purchase, sale or lease of real property or an acquisition or granting of other interest in real property that is the subject of a governmental procurement.

Offerer. The individual or entity, or any employee, agent or consultant or person acting on the behalf of such individual or entity that contacts a governmental entity about a governmental procurement during the restricted period of such governmental procurement.

Restricted Period. The period of time commencing with the earliest written notice, advertisement or solicitation of a RFP, invitation for bids, or solicitation of proposals, or any other method for soliciting a response from offerers intending to result in a procurement contract with a governmental entity with the final contract award and approval by the governmental entity and, where applicable, the State Comptroller.

Restrictions on Contacts During the Procurement Process (SFL § 139-J)

Governmental Entity Requirements (SFL § 139-j(2), (5-11))

Each government entity:

1. shall designate a person or persons who may be contacted by offerers related to a procurement.
2. shall make any determinations on any procurement consistent with that authority's procurement guidelines and free from any conduct that would be prohibited by POL 73(5) and 74 or any other applicable code of ethics.
3. may consult model guidelines that may be established by the Advisory Council on procurement lobbying.
4. must incorporate a summary of the policy and prohibitions regarding permissible contacts during a procurement as well as copies of all rules, regulations and guidelines concerning permissible contacts into the authority's solicitation of proposals or bid documents or specifications for all procurements.
5. must seek written affirmation from all offerers as to that offerer's understanding of and agreement to comply with the authority's procedures relating to permissible contacts.
6. must make a final determination of responsibility of the proposed awardee in accordance with the authority's procurement guidelines.
7. must, if any member of the procuring governmental entity becomes aware that an offerer violated the permissible contacts provision, immediately notify the ethics officer, the New York State Inspector General (the "IG"), if any, or other official of the governmental entity responsible for reviewing and investigating such matters.
8. must, if any member of another governmental entity becomes aware that an offerer violated the permissible contacts provision, immediately notify the ethics officer, the IG, if any, or other official of the governmental entity responsible for reviewing and investigating such matters and such person must immediately notify the equivalent person at the procuring governmental entity.
9. must establish a process for review by the ethics officer, the IG, if any, or other official of the governmental entity responsible for

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reviewing and investigating any allegations of violations of the permissible contacts provisions.

10. must establish a process for the imposition of sanctions if such violations have been found to exist.

11. must, upon notification of an alleged violation, the governmental entity's ethics officer, the IG, if any, or other official of the governmental entity responsible for reviewing and investigating such matters, immediately investigate such allegation and, if sufficient cause exists to believe that the allegation is true, must give the offerer reasonable notice that an investigation is ongoing and must give said offerer an opportunity to be heard in response to the allegation.

12. may make a finding that an offerer has knowingly and willfully violated the permissible contact provisions which must result in a determination of non-responsibility for such offerer and such offerer must not be awarded the procurement contract unless the governmental entity finds that the award is necessary to protect public property or public health or safety, and that the offerer is the only source capable of supplying the required article of procurement within the necessary time frame. The governmental entity must include in the procurement record, a statement describing the basis of the finding. Any subsequent finding of non- responsibility due to a violation of the permissible contacts provisions within four years of a determination must result in the offerer being rendered ineligible to submit a proposal on, or be awarded any, procurement contract for a period of four years from the date of the second final determination.

13. must require offerers to disclose findings of non-responsibility due to violations of the permissible contacts provisions or the intentional provision of false or inaccurate information to a governmental entity within the previous four years in the entity's solicitations for proposals. (See also SFL § 139-k(2).)

14. must consider in its determination of responsibility, any failure of an offerer to timely disclose accurate and complete information or otherwise cooperate with the governmental entity. (See also SFL § 139-k(3).)

15. must not award a contract to an offerer who fails to timely disclose accurate and complete information or otherwise cooperate with the governmental entity unless the governmental entity finds that the award is necessary to protect public property or public health or safety, and that the offerer is the only source capable of supplying the required article of procurement within the necessary time frame. The governmental entity must include in the procurement record, a statement describing the basis of the finding. (See also SFL § 139-k(3).)

16. must, upon a finding of non-responsibility or debarment, the governmental entity must notify the OGS, which shall keep a list and make it publicly available.

If an employee of the governmental entity is found to have knowingly and willfully violated the governmental entity's requirements in relation to the permissible contacts provisions, then the ethics officer, the IG, if any, or other official of the governmental entity responsible for reviewing and investigating such matters must report the violation to the governmental entity's chairperson or highest official.

A procurement contract award must contain a certification by the offerer that all information provided to the governmental entity is complete, true and accurate and

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such procurement contract must contain a provision authorizing the governmental entity to terminate the contract in the event such certification is found to be intentionally false or intentionally incomplete. The governmental entity shall include in the procurement record, a statement describing the basis for any action taken pursuant to such termination provision. (See SFL § 139-k(5).)

Offerer Responsibilities (SFL § 139-j(3) & (4))

The offerer may contact only the person or persons designated by the governmental entity with respect to a governmental procurement. Violations of this provision also include any contacts during the restricted period of a governmental procurement between the offerer and any member, officer or employee of any governmental entity other than the entity conducting the governmental procurement. However, this does not prohibit an offerer from communicating with a member of the State Legislature or legislative staff about a governmental procurement being conducted by a governmental entity other than the State Legislature, or a member of the State Legislature. In addition, this does not prohibit a member of the State Legislature or legislative staff member from contacting a governmental entity other than the State Legislature about a procurement being conducted by that entity as long as the legislative member or staff person is acting in their official capacity.[32]

The offerer must not attempt to influence the governmental procurement in a manner that would result in a violation or an attempted violation of POL 73(5) and 74 or any other applicable code of ethics.

Disclosure By Governmental Entities (SFL § 139-K)

Upon any contact in the restricted period, the governmental entity must obtain the name, address, telephone number, place of principal employment and occupation of the person or organization making the contact and inquire and record whether the person or organization making such contact was the offerer or was retained, employed or designated by or on behalf of the offerer to appear before or contact the governmental entity about the

[31] Exemptions from the restrictive contacts provision in this section include: (1) the submission of written proposals in response to RFPs, invitation for bids or any other method of soliciting a response from offerers intending to result in a procurement contract; (2) the submission of written questions to a designated contact set forth in a RFP, or invitation for bids, or any other method of soliciting a response from offerers intending to result in a procurement contract, when all written questions and responses are to be disseminated to all offerers who have expressed an interest in the RFPs, or invitation for bids, or any other method of soliciting a response from offerers intending to result in a procurement contract; (3) participation in a conference provided for in a RFP, invitation for bids, or any other method of soliciting a response from offerers intending to result in a procuring contract; (4) complaints by an offerer regarding the failure of the person or persons designated by the procuring governmental entity pursuant to this section to respond in a timely manner to authorized offerer contacts make in writing to the office of general counsel of the procuring governmental entity, provided, that any such written complaints shall become a part of the procurement record; (5) Offerers who have been tentatively awarded a contract and are engaged in communications with a governmental entity solely for the purpose of negotiating the terms of the procurement contract after being notified of tentative award; (6) contacts between designated governmental entity staff of contacts, the procuring governmental entity and an offerer to request the review of a procurement contract award; and (7) (a) contacts by offerers in protests, appeals or other review proceedings (including the apparent successful bidder or proposer and his or her representatives) before the governmental entity conducting the procurement seeking a final administrative determination, or in a subsequent judicial proceeding; or complaints of alleged improper conduct in a governmental procurement to the attorney general, inspector general, district attorney, or court of competent jurisdiction; or (b) complaints of alleged improper conduct in a governmental procurement to the attorney general, inspector general, district attorney, or court of competent jurisdiction; or (c) written protests, appeals or complaints to the State Comptroller's office during the process of contract approval, where the State Comptroller's approval is required by law, and where such communications and any responses thereto are made in writing and shall be entered in the procurement record pursuant to section one hundred sixty-three of the SFL; or (d) complaints of alleged improper conduct in a governmental procurement conducted by a municipal agency or local legislative body to the State Comptroller's office.

[32] Note: An offerer must only contact the person or persons designated as the contact person(s) by the governmental entity during the Restrict Period of a governmental procurement.

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governmental procurement. All recorded contacts shall be included in the procurement record for the procurement contract.

Any communications received by a governmental entity from members of the State Legislature, or legislative staffers, when acting in their official capacity, shall not be considered to be a "contact" and shall not be recorded by a governmental entity.

Requirements

Per the PLL, local public authorities, including IDAs, need to comply with the following requirements:[31]

1. Designate, with regard to each governmental procurement, a person or persons who may be contacted by offerers. (See SFL § 139-j(2)(a).)
2. Upon any contact in the Restricted Period, the governmental entity must obtain the name, address, telephone number, place of principal employment and occupation of the person or organization making the contact and inquire and record whether the person or organization making such contact was the offerer or was retained, employed or designated by or on behalf of the offerer to appear before or contact the governmental entity about the governmental procurement. All recorded contacts shall be included in the procurement record for the procurement contract. (See SFL § 139-k(4).)
3. Incorporate a summary of the Governmental Entity's policy and prohibitions regarding permissible contacts during a governmental procurement in its solicitation materials. (See SFL § 139 j(6).)
4. Must seek written affirmation from all offerers as to said offerer's understanding of and agreement to comply with the authority's procedures relating to permissible contacts. (See SFL § 139-j(6)(b).)
5. Must require offerers to disclose findings of non-responsibility due to violations of the permissible contacts provisions or the intentional provision of false or inaccurate information to a governmental entity within the previous four years in the entity's solicitations for proposals. (See SFL §139-k(2).)
6. A procurement contract award must contain a certification by the offerer that all information provided to the governmental entity is complete, true and accurate and such procurement contract must contain a provision authorizing the governmental entity to terminate the contract in the event such certification is found to be intentionally false or intentionally incomplete. The governmental entity shall include in the procurement record a statement describing the basis for any action taken pursuant to such termination provision. (See SFL § 139-k(5).)
7. Any member of the procuring governmental entity that becomes aware that an offerer violated the permissible contacts provision must immediately notify the ethics officer, the IG, if any, or other official of the governmental entity responsible for reviewing and investigating such matters. (See SFL § 139-j(8).)
8. Must establish a process for review by the ethics officer, the IG, if any, or other official of the governmental entity responsible for reviewing and investigating any allegations of violations of the permissible contacts provisions. (See SFL § 139-j(9).)
9. Upon notification of an alleged violation, the governmental entity's ethics officer, the IG,

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if any, or other official of the governmental entity responsible for reviewing and investigating such matters, must immediately investigate such allegation and, if sufficient cause exists to believe that the allegation is true, must give the offerer reasonable notice that an investigation is ongoing and must give said offerer an opportunity to be heard in response to the allegation. (See SFL § 139-j(10)(a).)

A finding that an offerer has knowingly and willfully violated the permissible contact provisions or the disclosure provisions must result in a determination of non-responsibility for such offerer, and such offerer must not be awarded the procurement contract unless the governmental entity finds that the award is necessary to protect public property or public health or safety, and that the offerer is the only source capable of supplying the required article of procurement within the necessary time frame. The governmental entity must include in the procurement record a statement describing the basis of the finding. Any subsequent finding of non-responsibility due to a violation of the permissible contacts or disclosure provisions within four years of a determination must result in the offerer being rendered ineligible to submit a proposal on or be awarded any procurement contract for a period of four years from the date of the second determination (debarment). (See SFL § 139-j (10)(b) & 139-k(3).)

Upon a finding of non-responsibility or debarment, the governmental entity must notify OGS, which shall keep a list and make it publicly available. (See SFL § 139-j (10)(b).)

If an employee of the governmental entity is found to have knowingly and willfully violated the governmental entity's requirements in relation to the permissible contacts provisions, then the ethics officer, the IG, if any, or other official of the governmental entity responsible for reviewing and investigating such matters must report such instances to the governmental entity's chairperson or highest official. (See SFL § 139-j(10)(c).)

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10 THINGS TO KNOW:
NEW YORK'S NEW LOBBYING REGULATIONS

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New York state's first-ever comprehensive lobbying regulations, effective January 1, 2019, apply to any corporation, nonprofit organization or individual that attempts to influence government decision-making at the state or local level. Here are the top ten things to know:

1. GREATER SPECIFICITY IN FILINGS

The common practice of just listing "NYS Senate" or "Executive Branch" as the entity lobbied will no longer be permissible. The regulations will now require the inclusion of a Public Official's name, office, legislative committee or individual staff member lobbied.

2. "LOBBYING" NOW ENCOMPASSES "PRELIMINARY CONTACT" & "DOOR OPENING"

Preliminary contact is defined as when a person knows, or has reason to know, their client will attempt to influence a public official (i.e., engage in lobbying activities). Preliminary contact can occur through the scheduling of a meeting or phone call, introducing a client to a public official, or any other contact with a public official on behalf of a client.

3. NEW DEFINITIONS OF "GRASSROOTS LOBBYING"

A Grassroots Lobbyist is a person or organization who solicits another—typically, the public—to deliver a message to a public official. To qualify as "grassroots lobbying" a communication must: 1) reference a lobbying activity, 2) take a clear position on that activity, and 3) solicit others to contact the public official. Additionally, corresponding filings must identify whether lobbying activity was Direct Lobbying, Grassroots Lobbying, or both.

4. "LOBBYING" INCLUDES SOCIAL MEDIA ACTIVITIES

Direct lobbying can occur via social media when a communication is sent directly to an account owned or controlled by a public official (aka a "direct message"), or if tweets advocating for a position tag a public official. Expenses concerning social media activity must also be reported.

5. GREATER CLARITY ON LOBBY DAYS

The new regulations require that an organization holding a Lobby Day register any employees as lobbyists if those persons make direct contact with a public official and speak on behalf of the organization. Unpaid volunteers who are not board members will not need to be listed on a filing, although the expenses related to accommodating those volunteers must be disclosed (e.g., travel expenses, food, etc.).

6. REPORTING OPTIONS FOR COALITIONS

Coalitions can file lobbying reports as a single entity, or each member can individually file a report disclosing their contributions to the Coalition. Also, if a Coalition spends more than $5,000 per year on lobbying, the Coalition may be required to file a Source of Funding report.

7. ONLINE ETHICS TRAINING REQUIRED

All registered lobbyists must now complete online ethics training developed by the Joint Commission on Public Ethics (JCOPE) within 60 days of registration.

8. CONTRACTUAL VERSUS BENEFICIAL CLIENTS

The new regulations require lobbyists to identify who is paying for their services, and whom the services are intended to benefit. A Contractual Client is the individual or organization who retains a lobbyist for itself or another. A Beneficial Client is the individual or organization who benefits from the lobbying activity.

9. IDA RESOLUTIONS/"PILOTS"

The new regulations define a number of agreements before an Industrial Development Agency as "procurement contracts," for which an attempt to influence is reportable lobbying. These agreements include Payments In Lieu of Taxes (PILOTs), the purchase or sale of real property, and lease agreements (including purchase-leaseback and lease-leaseback agreements).

10. NEW LOBBYING APPLICATION & INTERFACE

Beginning January 1, 2019, all filers will be required to register and file lobbying reports in the new JCOPE Lobbying Application ("LA"). LA will allow for greater public access and additional search functions.

Harris Beach offers a variety of lobbying compliance services to companies, organizations and industry associations including: disclosure report filing services, legal counsel, and tailored compliance training on lobbying, ethics and campaign finance.

Call Mitchell J. Pawluk, Karl J. Sleight or Joan P. Sullivan to learn more at 518.427.9700

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LOBBYING COMPLIANCE
IN A PAGE

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WHAT IS LOBBYING?

Lobbying is any **attempt to influence** certain specified government actions.

DO I NEED TO REGISTER AS A LOBBYIST?

The answer depends on whether your company or organization is a registered lobbyist or whether you engage in lobbying activities above a certain threshold. Note, the definition of "lobbying" and thresholds differ at the federal, state and municipal (e.g., New York City) levels.

FEDERAL

Under federal law, "lobbying" includes any communication or other **attempt to influence** a public official or employee regarding (1) federal legislation; (2) a federal rule, regulation, executive order, or any other program, policy or proposition of the U.S. government; (3) a federal program or policy (including contracts, grants, loans, permits or licenses); and (4) federal nominations or confirmations.

SOME EXCEPTIONS

1. Requests for a meeting or status update
2. Participation in an advisory committee
3. Testimony before Congress

THRESHOLD

A quick and easy way to determine whether you must register as a lobbyist is to use the **2x/20% Test.** Under this test, you must register if you have more than one lobbying contact, *and* lobbying activities exceed 20% of your time over ***any*** consecutive three-month period. Note, however, that even if you meet this test, you are exempt from having to register if your total compensation and/or expenses related to lobbying do not exceed $13,000 for a three-month period.

NEW YORK STATE

Under NYS law, "lobbying" includes any attempt to influence: (1) legislation or resolutions before the New York State Legislature; (2) gubernatorial executive orders; (3) any rule or regulation of a state agency; (4) state or municipal ratemaking proceedings (e.g., Public Service Commission); (5) governmental procurements; (6) local laws, ordinances, resolutions, or regulations; (7) municipal executive orders (e.g., County Executive); (8) tribal-state agreements, compacts or memoranda of understanding (e.g., Indian gaming); and (9) articles of procurement.

THRESHOLD

New York State's threshold is significantly lower than the federal government's threshold. Unlike the federal level, there is no test based on your number of contacts or percentage of time devoted to lobbying. For NYS, you must register if your organization as a whole expends more than $5,000 related to "lobbying" activities (which includes internal employee time/compensation and expenses).

NYS PRACTICE POINTERS

1. Unlike federal law, NYS law covers both direct and "grassroots" lobbying
2. NYS law requires disclosure of "lobbying" at the state level (e.g., the Legislature) *and* any local lobbying (e.g., NYC)

SOME EXCEPTIONS

1. Participation in public proceedings as a witness, attorney, or representative
2. Submitting responses to requests for information, proposals and/or public comment
3. Non-lobbying legal services
4. News gathering and publication
5. Applications for licenses and permits

NEW YORK CITY & OTHER MUNICIPALITIES

NEW YORK CITY

New York City's law is more expansive than New York State's Lobbying Law. NYC also includes any attempt to influence determinations related to real property (e.g., zoning and development), including actions by the City Planning Commission, and local Boroughs or Community Boards.

NASSAU COUNTY & SUFFOLK COUNTY

Any lobbyist incurring more than $1,000 in reportable compensation and expenses must register with the County Attorney (Nassau County) or the Clerk of the County Legislature (Suffolk County).

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