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New Prevailing Wage Legislation In The 2020 State Budget

Earlier this month, [the Governor signed the FY 2021 Budget](#),* which includes new Labor Law provisions. The Budget incorporates critical changes to the prevailing wage requirements for certain construction contracts that receive IDA and other public financial assistance. This could add significant construction costs, possibly defeating the purpose of such financial assistance, which is to incentivize development and stimulate local economies.

Prevailing wage rates were only required to be paid to construction workers under public works contracts (construction projects undertaken by State and municipal agencies, school districts, or public authorities). The new provisions broaden the requirement. Prevailing wages must be paid to construction workers on all “covered projects.” Covered Projects: (i) cost over \$5 million; and (ii) are funded by “public funds” or other financial benefits (PILOTs or other tax credits), abatements, exemptions, rent reductions, reduced insurance costs, savings from fees, etc., from an IDA, LDC, or municipal corporation. The funds must total at least 30% of the total construction.

The new provisions will take effect on January 1, 2022. They contain a few exemptions, including, housing developments where at least 25% of the units are affordable, certain renewable energy projects, brownfield redevelopments, designated non-profit developments, and developments where there is a project labor agreement with organized labor.

[Some in the building trades view the new prevailing wage legislation as a way to incentivize construction](#),* ensure good wages, encourage projects to advance once construction is permitted again. Some organizations, however, [view the legislation as creating a potential roadblock to long-term recovery once the ban on non-essential construction is lifted](#).*

Importantly, the new provisions call for the creation of a governor-appointed 13-member Public Subsidiary Board to study the effects and impact of the new requirements, and, if necessary, recommend adjustments to the new qualification and cost threshold requirements. There is no set timeline for meetings or any policy recommendations. The public will have an opportunity to be heard.

[The relevant portion of the adopted Budget can be found here.](#)

Planning (Or Not) For The Future Pandemic In The Land Use Context

How should an agency treat the potential of a future pandemic in the land use review process?

As we covered in the last [Z&S Land Use, Construction, & Litigation Update](#), current SEQRA reviews should be able to rely on pre-pandemic empirical data to quantify impacts, such as anticipated traffic trips. The question is whether agencies will seek to require projects to address mitigation measures to avoid potential significant impacts if another pandemic was to occur?

Under SEQRA, an applicant is only required to study “reasonably foreseeable catastrophic impacts to the environment” in limited cases, i.e., siting of hazardous waste treatment facilities or liquid gas facilities. Consideration of catastrophic events at any level is not applicable to developments such as “shopping malls, residential subdivisions or an office park.” See [6 N.Y.C.R.R. § 617.9\(b\)\(6\)](#).*

It would be inappropriate under SEQRA’s “rule of reason,” for example, to require that applicants incorporate measures such as social distancing into their post-COVID-19 projects to mitigate the impacts of a potential pandemic. By illustration, Courts in the past have been hesitant to broadly interpret SEQRA as requiring the study of potential impacts on social patterns that might result from another terrorist attack. See, e.g., [Develop Don’t Destroy \(Brooklyn\) v Urban Dev. Corp.](#), No. 0104597/2007, slip op. at 41-42, 2008 WL 206942 (Sup. Ct. N.Y. Cnty. Jan. 11, 2008) (“[T]he SEQRA regulations were never intended to address the issue of terrorism”).

Regardless of whether the impacts of a pandemic are beyond the scope of SEQRA, other aspects of the land use regulatory landscape may start responding to the pandemic, either by incorporating resiliency planning, or responding to changes in the real estate and development markets caused by the pandemic. If, for example, COVID-19 fundamentally changes the conditions in which many of us will live and work in the future, then we anticipate there will be movement to update local zoning and building codes in response to the pandemic. Municipalities can best position their communities for recovery by ensuring that their zoning codes allow for flexibility in design that changed market conditions may require: accommodating home offices, creating affordable housing opportunities (i.e., townhouses for less dense living arrangements) and incentivizing the adaptive reuse of existing retail, office, or other buildings.

NYSDEC Adopts New SEQRA Handbook

Ten years after the last edition was adopted, DEC last month adopted the [The SEQR Handbook, Fourth Edition, 2020](#). The Handbook changes are in furtherance of DEC’s stated intent to [“streamline and improve the SEQR process without sacrificing meaningful environmental review.”](#)*

DEC now advises that for most Unlisted actions, a short EAF will be adequate. A full EAF should be limited to the “most large-scale Unlisted actions.” The DEC cautions that “lead agencies should ask whether it needs all the information and analysis that is called for in the full form.” SEQR Handbook (4th ed.) at 25.

The new Handbook also elaborates on the 2018 SEQRA amendment requiring a lead agency to specify any deficiencies in a DEIS deemed incomplete, and then adhere *solely* to that list when it evaluates a resubmitted DEIS. "This amendment is to allow the EIS process to continue to move forward to the public comment phase, and to strongly discourage lead agencies from moving the figurative goalposts such that an applicant who is acting in good faith to fulfill the requirements of the scope cannot get to a complete or adequate draft EIS." SEQR Handbook (4th ed.) at 128.

Similarly, a lead agency should be mindful that a smaller project may not warrant a large-scale climate change analysis under [6 N.Y.C.R.R. § 617.9\(b\)\(5\)\(iii\)](#).^{*} The Handbook continues to emphasize that "the depth of analysis required for climate change considerations, *as well as other impact areas*, should be tailored to the magnitude of the action or project." SEQR Handbook (4th ed.) at 124 (emphasis added).

Through these and other revisions to the Handbook, DEC's guidance on the SEQRA regulations and the 2018 Amendments continue to attempt to streamline the SEQRA process, although this result often seems illusive.

Key Dates And Deadlines Of Interest:

- Returning to the Office: The telecommuting or work from home procedures of Executive Order 202.8 [were extended through May 15, 2020](#).^{*} Any essential business, or entity providing essential services or functions, is not subject to the restrictions, but must continue to practice social distancing to the extent practical.
- "Non-Essential" Litigation: As of May 3, 2020, e-filing in all existing matters is now permitted per the Chief Administrative Judge's [Administrative Order AO-87 \(05/01/20\)](#).^{*} This includes the filing of new motions and other applications (including post-judgment applications). Since paper filing is still not being permitted in any event, on May 4, 2020, [the Court rolled out a new Electronic Document Delivery System \("EDDS"\)](#)^{*} to allow for the uploading of documents in cases that are not otherwise electronically filed. EDDS is not for matters that are available on the NYSCEF system, and filing via the EDDS does not constitute service. Notices of appeals may be filed electronically. The commencement of new non-essential cases is still not permitted, with no date provided as of yet. Many Courts are making decisions on what is "essential" litigation on a case-by-case basis. Deadlines for perfecting appeals and filing papers in the First, Second, and Third Departments remain tolled, but electronic filing is being accepted and encouraged. The Fourth Department, however, [has lifted its suspension order and is resuming normal operating procedures](#).^{*}
- "Non-Essential" Construction: With the exception of emergency construction, all non-essential construction must remain safely shut down through May 15, 2020. [On April 26, 2020, the Governor discussed a phased re-opening](#),^{*} that would allow low risk construction and manufacturing functions to re-open on a [region-by-region](#)^{*} basis in Phase I of his plan. Once a region experiences a 14-day decline in the hospitalization rate, and subject to maintaining and implementing various region-wide health and safety conditions and protocols (30% hospital bed capacity, testing regimens, contact tracing and monitoring, proactive infection plans, etc.) the region may begin a phased re-opening. The process will be overseen by the NY Forward Re-Opening Advisory Board, which is comprised of [business, community, and civic leaders from each of the regions](#).^{*}
- Evictions and Foreclosures: [Executive Order 202.8 \(03/20/20\)](#) placed a 90-day moratorium on the enforcement of all residential and commercial evictions (including pending and pre-existing eviction orders) and foreclosures. The moratorium is set to expire on June 20, 2020. Pending eviction and foreclosure cases are continuing or being allowed to proceed on a Court-by-Court basis. Parties and attorneys should contact their respective Courts.

Looking Ahead While Sheltering-In-Place

Below are links to articles and resources you might find of interest:^{*}

- [Essential Construction Tracker](#) (The Journal of Light Construction) [A breakdown of how each of the 50 states classifies construction in terms of whether it is an "essential" business]
- [Retail's Second Act](#) (GlobeSt.Com)
- [The New Normal: 8 Ways the Coronavirus Crisis is Changing Construction](#) (Construction Dive)
- [How to Make a No-Sew Face Mask](#) (The Spruce)
- [During Quarantine, Being Productive Means Surviving Your Emotions](#) (The Ascent via Medium)

^{*}Note: Links are to external web sites that friends of our firm may find helpful. They are provided for information only, and do not constitute an endorsement by Zarin & Steinmetz of those organizations, their policies, or their products. Zarin & Steinmetz is not responsible for, does not endorse, nor have any control over the content of linked websites.

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