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Town of Blooming Grove Zoning Board of Appeals
Town of Blooming Grove Town Hall
6 Horton Road
Blooming Grove, NY 10914

To: Members of the Town of Blooming Grove Zoning Board of Appeals

Re: Proposed Solar Energy Facility Located on Marycrest Road

Our firm represents NY Blooming Grove (Marycrest Road), LLC, an affiliate of Delaware River Solar ("Applicant"), in connection with its efforts to develop a five (5) megawatt alternating current ("MWac") large-scale solar energy system ("Project") on one parcel of land located at 39, 49 Marycrest Road, tax map number 55-1-12.1 ("Property"), in the Town of Blooming Grove, New York ("Town"). The Property is located in the Rural Residential ("RR") District, as well as the Ridgeline Overlay and Surface Water Overlay Districts.

This letter is in support of the Applicant's application for area variances ("Application"). The Application is being submitted to the Town of Blooming Grove Zoning Board of Appeals ("ZBA") to permit deviations from certain setback and buffer requirements provided in Sections 235-45.7 (A) (1) and 235-14.4 (E)(1)(a) of the Town of Blooming Grove Town Code ("Town Code").

The Town Code requires that Large-Scale Solar Energy Systems—as that term is used in the Town Code—be set back at least 200 feet from all roads and property lines. Town Code § 235-45.7 (A)(1). However, the Project layout requires a lesser setback from the northern rear property line and the western side property line. As shown on the site plan set on the "General Layout" page, the proposed setback from the northern rear property line is 115 feet and the proposed setback from the western side property line is 100 feet. Additionally, the Project layout requires relief in three locations on the Project site from the Town Code's requirement that a "one-hundred-foot buffer strip shall be maintained along the edge of any stream, lake, pond, or other water body, including wetlands". Town Code § 235-14.4 (E)(1)(a). As such, the Applicant is seeking the following area variances: (1) a 100-foot setback with respect to the western side property line, which borders residential properties which will be screened by significant existing tree coverage; (2) a 115-foot setback with respect to the northern rear property line, which borders significant vacant, wooded land; and (3) a ten (10) foot setback, a thirty-one (31) foot setback and

a thirty-two (32) foot setback with respect to three small onsite wetlands, which are more fully detailed in the site plan set. The Project will comply with the setback requirement as to the eastern and southern property lines. Because solar energy facilities are public utilities for zoning and land use purposes, the Application is reviewed pursuant to the variance standard applicable to public utilities, rather than the area variance test under N.Y. Town Law § 267-b(3).

The Application is being submitted to the ZBA contemporaneously with the Applicant's application to the Town of Blooming Grove Planning Board. Given that the Project does not comply with the Town Code's setback requirements, the Applicant is proceeding directly to the ZBA with its Application, in accordance with Town Code § 235.45.7 (A)(1) and New York Town Law §§ 274-a(3) and 274-b(3).

I. The Application is reviewed pursuant to the variance standard applicable to public utilities.

The Court of Appeals in *Consolidated Edison Co. of New York, Inc. v. Hoffman*, 43 N.Y.2d 598 (1978) ("*Hoffman*") held that public utilities are subject to an alternative standard when seeking variances. The *Hoffman* case involved the proposed addition of a 565-foot wet cooling tower at the Indian Point nuclear plant operated by Consolidated Edison ("Con Ed") to mitigate the negative environmental impacts on the Hudson River from its prior cooling system. After Con Ed's building permit application was denied on the grounds that the tower exceeded the 40-foot building height limit in the zoning district and would result in prohibited uses, Con Ed sought a variance from the Village of Buchanan Zoning Board of Appeals ("Buchanan ZBA"). The Buchanan ZBA denied the application, finding that Con Ed had not shown any practical difficulties requiring the variance, had not demonstrated it was the minimal variance necessary, and failed to adequately consider alternatives.

Once this denial was challenged and made its way to the Court of Appeals, the Court determined that although the traditional approach is to require an applicant for a variance to demonstrate an unnecessary hardship,[1] such showing is "not appropriate where a public utility such as Con Edison seeks a variance, since the land may be usable for a purpose consistent with the zoning law, the uniqueness may be the result merely of the peculiar needs of the utility, and some impact on the neighborhood is likely." *Hoffman*, 43 N.Y.2d at 607. Instead, utilities can demonstrate entitlement to a variance by showing that the proposed "modification is a public necessity … required to render safe and adequate service[.]" *Id*. at 610 (internal citations omitted). And, "where the intrusion or burden on the community is minimal" the Court determined that the requisite showing "should be correspondingly reduced." *Id*.

Since the *Hoffman* case, application of the alternative standard for public utility uses in the context of local land use approvals has been expanded given the more inclusive definition of a public utility developed by the Court of Appeals in *Cellular Tel. Co. v. Rosenberg*, 82 N.Y.2d 364 (1993) ("*Rosenberg*"). There, the Court defined "public utility" as

[1] This requires the applicant to demonstrate that the property cannot yield a reasonable return if used for a permitted use, that the circumstances causing the hardship are unique to the subject property, and that the proposed use will not alter the essential character of the neighborhood. *Hoffman*, 43 N.Y.2d at 607.

> "'a private business, often a monopoly, which provides services so essential to the public interest as to enjoy certain privileges such as eminent domain and be subject to such governmental regulation as fixing of rates, and standards of service.' Characteristics of the public utility include (1) the essential nature of the services offered which must be taken into account when regulations seek to limit expansion of facilities which provide the services, (2) 'operat[ion] under a franchise, subject to some measure of public regulation,' and (3) logistic problems, such as the fact that '[t]he product of the utility must be piped, wired, or otherwise served to each user * * *[,] the supply must be maintained at a constant level to meet minute-by-minute need[, and] [t]he user has no alternative source [and] the supplier commonly has no alternative means of delivery.'"

Rosenberg, 82 N.Y.2d 371 (internal citations omitted).

This much broader definition has resulted in application of the variance standard articulated in *Hoffman* to siting facilities, rather than just modifications or expansions to existing facilities, and to less "traditional" public utilities such as cellular telephone companies and renewable energy projects. *See Rosenberg*, 82 N.Y.2d 372 (The *Hoffman* case "applies to entirely new siting of facilities, as well as the modification of existing facilities."). Based on the reasoning in this line of cases, New York courts have annulled variance denials for renewable energy projects based on Town Law § 267-b, and remanded such applications to local ZBA's for review under the public utility variance standard. *See Delaware River Solar, LLC, et al. v. Town of Aurora Zoning Bd. of Appeals, Index No. 808123/2022* (Sup. Ct. Erie Cty. Nov. 7, 2022); *see also Cipriani Energy Grp. Corp. v. Zoning Bd. of Appeals of the Town of Minetto, New York et al.,* EFC-2022-0043 (Sup. Ct. Oswego Cty. Apr. 12, 2022) ("[*Rosenberg*] directly applies to this situation and compels the determination as a matter of law that Cipriani [a solar developer] is a public utility."); *Freepoint Solar LLC and FPS Potic Solar LLC v. Town of Athens Zoning Bd. of Appeals*, EF2021-795 (Sup. Ct. Greene Cty. Aug. 18, 2022) (vacated local ZBA's denial of a use variance under Town Law § 267-b for failing to apply the use variance test under *Hoffman*). Zoning Boards of Appeal have also applied the public utility variance standard to variance applications submitted for solar energy facilities as a matter of course. *See* Town of Binghamton Zoning Bd. of Appeals Decision, dated June 14, 2022 (applying the public utility variance standard to a community solar developer and granting a use variance); *see* Town of Oswego Zoning Bd. of Appeals Resolution, dated Jan. 19, 2023 ("the Applicant … further addressed the applicable use variance criteria the Courts of this State have applied to renewable energy projects … declaring such projects to be public utilities and thus reviewable under the less-restrictive *Hoffman* standard of review, which was recently applied by the New York State Supreme Court in a legal proceeding involving the neighboring Town of Minetto … the Project is a public utility and thus is afforded the standard of review for a [] variance articulated in *Hoffman*[] … By its very nature, clean energy is a public necessity as proclaimed by the State of New York in its Clean Energy Standard and further codified in the Climate Leadership and Community Protection Act[.]"). These decisions are attached hereto as **Exhibit A**.

As in the above cases, this Project meets each one of the *Rosenberg* factors. Firstly, the Project will be owned by NY Blooming Grove (Marycrest Road), LLC, an affiliate of Delaware River Solar—a private solar energy company that operates to provide clean, renewable electricity to the grid for consumers. Further, it cannot be argued that electricity is not essential to our everyday life. As former U.S. Secretary of Energy Hazel O'Leary said, "[e]lectricity is just another commodity in the same way that oxygen is just another gas."[2] Second, the Project will be subject to "regulation and supervision" by the Public Service Commission ("PSC") because it will generate electricity. *See W. Beekmantown Neighborhood Ass'n, Inc. v. Zoning Bd. of Appeals of Town of Beekmantown*, 53 A.D.3d 954, 956 (3d Dep't 2008) (*citing* N.Y. PUB. SERV. LAW §§ 2(2–b), (12), (23); § 5(1)(b); § 66–c). The Project will be an integral part of the electricity generation and transmission system, generating clean, renewable energy and distributing it to consumers through the electric grid—a utility in its own right, subject to significant public regulation. And even though the more modern utility model has decoupled generation and transmission, companies that generate electricity for sale to consumers through the State's transmission system are still treated as public utilities. Specifically, as a community solar development, installation and operation of the Project will be subject to the provisions of the PSC's "New York State Standardized Interconnection Requirements and Application Process for New Distributed Generators and Energy Storage Systems 5MW or Less Connected in Parallel with Utility Distribution Systems." *See* N.Y. PUB. SERV. COMM'N, Case 15-E-0082, *Proceeding on Motion of the Commission as to the Policies, Requirements and Conditions For Implementing a Community Net Metering Program*.

Lastly, the product—electricity—can only be distributed by way of the electric grid. There is no other feasible method for an electricity generator to deliver electricity to consumers. Both the generator and the consumer are beholden to the transmission system to send and receive electricity service, and because of the ever-present demand for power, adequate supply must be maintained at all times. Further, there are significant logistical constraints in siting solar projects. Most properties in a municipality are not economically feasible for solar development. The size and layout of the parcel have to be at such a scale to accommodate the project, which often cannot be reduced to fit a smaller property given that solar projects are only economically feasible at a certain size. The property must also be located near existing utility infrastructure—namely, transmission lines and a substation—in order to interconnect the project to the utility grid. Without these crucial pieces, a solar project simply could not go forward. There is also the question of topography of the site and solar access. Installation of solar panels is significantly more expensive on certain challenging terrain (*e.g.*, excessive wetlands and steep slopes). And access to sunlight at the site as it exists, without having to modify it at exponential cost, is similarly crucial. Lastly, community solar sites are often leased, making it challenging to find a willing property owner.

Here, the Property was carefully selected to meet the needs of a community solar project. The Applicant began its search for an adequate project site by evaluating the capacity of the Orange and Rockland Utilities, Inc. ("Orange & Rockland") Substation network. Once it was confirmed that this system had excess capacity, the Applicant began looking for available parcels. A few parcels were identified, which were then further analyzed to determine if they met certain

[2] Quoted in Ralph Cavanagh, "Restructuring for Sustainability: Toward New Electric Service Industries," Electricity Journal (July 1996): 71.

criteria tied to lot size, slopes, and the presence of wetlands, waterbodies, and extensive tree coverage. The Applicant and its consultants reviewed the topography, slope, and elevation data; the New York State Department of Environmental Conservation ("NYSDEC") and the U.S. Fish & Wildlife Service National Wetlands Inventory ("NWI") data to identify any mapped wetlands onsite; applied local zoning requirements to the identified parcels to determine useable acreage; evaluated expected substation and feeder capacity; and assessed any substation upgrades that would be required by the Project. This extensive analysis identified the Property as an ideal candidate for the Project, and the Applicant then entered into a lease agreement with the landowners for part of the Property to develop a community solar facility and is applying to the Planning Board in January 2024 to begin the permitting process.

The roughly 59-acre Property is comprised of relatively flat land, which provides sufficient area to build and maintain a Large-Scale Solar Energy System without needing to heavily modify the site. This avoids any additional financial burden that would otherwise be passed on to energy consumers, or which would simply prohibit development of the Project. The Property is also near the point of interconnection ("POI") (*i.e.*, where the Project physically connects to the Orange & Rockland transmission system)—a necessary piece of the puzzle where the Applicant connects the Project to the grid in order to transmit the power to consumers. This proximity to the POI allows the Applicant to interconnect to the grid directly from the Property, without intruding on any neighboring properties. And, Orange & Rockland has verified that both the feeder and substation have enough available capacity to accommodate a project of this size at a reasonable cost. Finding suitable land with available interconnection capacity is often the most challenging aspect of siting solar energy systems, since capacity is scarce and the costs to interconnect a solar project can be prohibitive. In this case, these criteria were met.

This unique combination of site characteristics provides an opportunity to build an economically feasible solar energy facility on a relatively small project site. The sole reason that the area variances are needed is that the Town Code requires Large Scale Solar Energy Systems to be set back 200 feet from all property lines and the Town Code also requires all uses in the Surface Water Overlay District to be set back 100 feet from all surface bodies of water, which includes wetlands. As seen on the Project site plan set on the "General Layout" page, the Project meets the 200-foot setback requirement with respect to the property boundary lot lines to the east and south of the Project. However, the necessary layout of the Project requires a 115-foot setback to the north property line, a 100-foot setback to the west property line and several encroachments into the 100-foot wetland buffer setback. The Project cannot feasibly be built on the Property without encroaching within the 200-foot setback area to the north and west of the Project site and within the 100-foot wetland buffer.

Nevertheless, these decreased setbacks will not impact neighboring property owners or the community at large given the use of such parcels and existing buffers. The northern rear property line borders wooded and forested land and provides significant, natural screening. To the south of the Project there is a small collection of residential properties, however, the Project will be set back significantly from the southern property line and existing vegetation will screen the Project from these properties. Likewise, the residential properties to the east and west of the Project site will be significantly buffered by preexisting vegetative screening. As such, the Property is well-suited for a solar project of this scale.

a. The Project meets the public utility standard.

The Project is a public utility use, and a request for a variance for the Project is reviewed under the variance standard articulated in *Hoffman*.[3] This only requires a showing that the Project is a public necessity, needed to provide safe and adequate service. As stated above, electricity generation is undeniably a necessity. There is a public necessity for the Project, which will provide extensive public benefits: (a) the development of the Project will generate local, county, and school tax revenue while not increasing demand on Town infrastructure; (b) energy generated from the Project will be distributed to the utilities' electrical grid and will directly benefit utility customers (residential and/or small businesses) enrolled in the "community solar program" via a discount; and (c) residential customers will have the option to source solar energy which they may not have the capital to generate on their own.

Moreover, the Project will assist the State to achieve its aggressive climate goals, which have not yet been achieved. The Climate Leadership and Community Protection Act ("CLCPA") outlines interrelated climate mandates, including: "to reduce greenhouse gas emissions from all anthropogenic sources 100% over 1990 levels by the year 2050, with an incremental target of at least a 40% reduction in climate pollution by the year 2030."[4] To date, the State has not met all mandates imposed by the CLCPA. The State still needs 20 GW of new renewable generation and transmission to meet the 2030 goals—meaning, the "State will have to increase the rate at which renewable electricity projects are permitted and approved for interconnection to the State electric grid as over the last 20 years the State has only added 12.9 gigawatts of projects of both renewable and fossil projects."[5] This has created an additional public need for increased renewable energy generation siting throughout the State.

b. The Project presents little to no burden on the community.

Further, as noted in *Hoffman*, where there is little to no burden on the community, the requisite showing from the utility is correspondingly reduced. Here, the Project will not present any significant burden on the community, but will instead be a safe, quiet, clean generator of electricity. The Project is proposed to be sited in an area surrounded by vacant land and wooded areas, as well as residential properties. There is a significant forested buffer between the solar panels on the Project site and nearby residential properties to the north, east, south and west, further

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[3] Courts that have considered the question have determined that a renewable energy project is a public utility. *See W. Beekmantown Neighborhood Ass'n, Inc. v. Zoning Bd. of Appeals of Town of Beekmantown*, 53 A.D.3d 954, 956 (3d Dep't 2008) (where the Third Department upheld the ZBA's determination that wind turbines were a "public utility" under the zoning law); *see also Wind Power Ethics Group (WPEG) v. Zoning Bd. of Appeals of Town of Cape Vincent*, 60 A.D.3d 1282, 1283 (4th Dep't 2009) (where the Fourth Department upheld the ZBA's classification of a series of wind-powered generators as a utility within the meaning of the zoning law which defined a utility as "telephone dial equipment centers, electrical or gas substations, water treatment or storage facilities, pumping stations and similar facilities.").

[4] S.6599, Reg. Sess. (N.Y. 2019) (Relates to the New York state climate leadership and community protection act) at § 2(a).

[5] N.Y.S. COMPTROLLER, *Renewable Electricity in New York State, Review and Prospects* (Aug. 2023) at 5; *see also* NYISO, *Short-Term Assessment of Reliability: 2023 Quarter 2* (July 2023) at 29.

limiting the potential view of the Project from residences in the area. Also, long stretches of property boundary lines at the Project site border undeveloped wooded and forested land, not private property owners. The portion of the Property to be used for the Project is also undeveloped, with no public water or sewer facilities—and no municipal water or sewer facilities will be required for the Project—making the Property more suitable for a community solar project than residential development. Once constructed, the Project will have negligible impacts on traffic in the area, as the Project will only be visited a few times per year for routine maintenance and inspections. The landowners prefer development of a temporary community solar farm over a permanent development on the land, but without the Project, much more intensive permanent land uses are possible. Lastly, the Applicant submitted a Full Environmental Assessment Form ("FEAF") Part I as part of its initial application, as required by the State Environmental Quality Review Act ("SEQRA"), which indicated that the Project will not result in stormwater impacts, will not impact wetlands or waterbodies, will not create a new demand for water or energy or generate wastes, will not generate air emissions or noise once installed, will not result in any traffic impacts, and will not impact a designated significant natural community or critical environmental area. Thus, the Applicant is seeking to convert largely unused land to an economically beneficial site with zero emissions, fumes, or odors, no traffic impacts, and little to no noise above background levels.

Moreover, the Project actually presents *net benefits* to the community. As noted above, because the Applicant is proposing a community solar project, residents and local businesses can use the electricity generated from the Project at a lower cost. They would receive electricity from the transmission utility (*i.e.*, Orange & Rockland) in the same manner as they do now, but with a discount—and the added benefit of knowing it is being generated from a renewable source in their own neighborhood. Lastly, the installation, operation, and removal of the Project will impact the land and subsequent future uses to a lesser extent than would other current land use options. The solar posts are pile driven or screwed in place, creating minimal disturbance during installation. The racking system that holds the solar panels is elevated off the ground, leaving the area under and between the solar arrays as grassland or meadow ecosystems, planted with native grasses and pollinator species to benefit a host of wildlife. After construction, soils on site will not be disturbed, but will instead be left fallow to build organics and other important soil components overtime. Disturbance to the land that would need to be restored upon decommissioning is generally limited to removal of the panels along with their racking and posts, and any installed concrete pads for inverters or other similar equipment. The access road will be removed, unless the owner requests otherwise. At such time, the Applicant (then the Project Operator) must decommission the Project, remove all components, and restore the land to a future use deemed acceptable by the landowners and Town. This decommissioning work will be ensured by a security instrument held by the Town, in an amount deemed acceptable to the Town.

II. If applied, the area variance requests meet the five-factor test under New York Town Law § 267-b(3).

As noted above, the standard variance test is inapplicable to the proposed Project. However, if applied, the application satisfies the balancing test set forth in N.Y. Town Law § 267-b(3) for area variance applications. In conducting this balancing test, the ZBA shall consider

the following factors: "Whether an undesirable change will be produced in the character of the neighborhood, or a detriment to nearby properties will be created by the granting of the area variance;" "[w]hether the benefit sought by the applicant can be achieved by some other method feasible for the applicant to pursue, other than an area variance; "[w]hether the requested area variance is substantial;" "[w]hether the proposed area variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or zoning district;" and "[w]hether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the [ZBA] but shall not necessarily preclude the granting of the area variance." For the reasons outlined below, the ZBA is respectfully requested to grant the requested area variances.

a. Granting the area variance requests will not result in an undesirable change to the character of the community or impose a detriment to nearby properties.

The requested area variances will not cause an undesirable change to the essential character of the neighborhood because an allowable use is proposed. The Project is located in the RR District, where Large-Scale Solar Energy Systems are special permitted conditional uses, subject to site plan approval and other applicable requirements. Town of Blooming Grove Local Law 6 of 2023 ("Solar Law"). Section 235-46 (A) of the Town Code proclaims the Town's goals of "[P]ermit and regulate solar energy systems and equipment and the provision of adequate sunlight and convenience of access necessary therefor; to balance the potential impact on neighbors when solar collectors may be installed near their property, while preserving the rights of property owners to install solar energy systems in accordance with applicable laws and regulations; and to recognize solar energy as a source for current and long term energy sustainability." Construction of the Project, which will introduce renewable energy generation into the community, furthers these goals and the stated intention of the Town to promote them.

When the Town drafted the Town Code and amended Solar Law to regulate solar energy systems, the Town Board approved the inclusion of Large-Scale Solar Energy Systems (like the Project) as a permitted conditional use in the RR District. The fact that the Town Board designated such solar facilities as a permitted use in the RR District is a legislative finding that the Project is appropriate and thus consistent and in harmony with the community plan. *See North Shore Steak House, Inc. v. Bd. of Appeals of Inc. Vill. of Thomaston*, 30 N.Y.2d 238, 243 (1972) ("The inclusion of the permitted use in the ordinance is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood."). Moreover, any legislative action by the Town Board that involves the adoption of an amendment or addition to the Town Code must be in conformance with the Town's comprehensive plan. Clearly, the Town Board spent significant time and resources to amend the Town Code to permit Large-Scale Solar Energy Systems in the RR District and throughout the Town. Otherwise, the Town Board would not have adopted such Town Code amendments.

As noted above, the Project will not adversely affect any nearby properties. There will be no significant impacts from the Project (*e.g.*, visual, noise, glare, etc.) on surrounding properties that would result from granting the area variances. The Applicant is seeking to convert largely unused land to an economically beneficial site with zero emissions, fumes, or odors, no

traffic impacts, and little to no noise above background levels. The Project will be sited in a mixed-use area, with sparsely populated rural residential land and vacant wooded land. The Project meets the 200-foot setback requirement with respect to the property boundary lot lines to the east and south of the Project. However, the necessary layout of the Project requires a 100-foot setback to the north and west property boundary lot lines and several encroachments into the 100-foot wetland buffer. The Project will only be minimally visible from the Property, as existing vegetation surrounding the entire Project site will limit the view of the Project from residential properties.

As such, granting the area variances will not create an undesirable change to or negative impact on the community or neighboring properties.

b. There is no other feasible method for the Applicant to pursue.

Evaluation of this factor requires consideration of whether an applicant can achieve its objective without the requested area variances. There is no financially feasible way to provide for the 200-foot setback to every adjoining property boundary lot line and the 100-foot wetland buffer. The developable area on the Property, when these requirements are applied, is too small to accommodate a financially viable solar project. Given the interconnection costs, the cost of construction, materials, labor, etc., a solar project must be a certain size in order to be financeable. And an alternative that does not allow the applicant to achieve the desired benefit is not truly a feasible alternative to obtaining an area variance. *See Baker v. Brownlie*, 248 A.D.2d 527 (2d Dep't 1998) (granting an area variance where the board's determination that the applicant had alternative means of achieving the benefit was "clearly erroneous," because the applicant's objective was to face the proposed patio toward the water, not merely to build a patio).

Thus, the Applicant must receive the area variances to construct the Project.

c. The area variances are not substantial.

The requested area variances are not substantial given the location of the Property and the lack of negative impacts on the neighborhood and surrounding properties. The Project will be sited in a mixed-use neighborhood, with populated residential land and substantial areas of vacant wooded land. As discussed above, the Project requires a 115-foot setback to the north property boundary lot line, a 100-foot setback to the west property boundary lot line and several encroachments into the 100-foot wetland buffer measuring 10 feet, 31 feet and 32 feet, respectively.

As mentioned, it is unlikely that the Project will be visible—with or without the area variances. Thus, there will be no measurable differences in impacts on the neighborhood (which are already minimal) as a result of granting the requested area variances. *See Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Zoning Bd. of Appeals of Town/Village of Harrison*, 296 A.D.2d 460 (2d Dep't 2002) (overturning ZBA's denial of variance requested 77% increase over the maximum height permitted by code where there was no evidence in the record indicating that the variance would be detrimental to the health, safety, and welfare of the neighborhood or community.).

Additionally, consideration of the percentage deviation alone is not an adequate indicator of the substantiality of a variance application. The totality of relevant circumstances must be evaluated in determining whether the variance sought is a substantial one. This is a fact-based determination. *See* 2 N.Y. ZONING LAW & PRAC. § 29:15 (2021); *see also Wambold v. Vill. of Southampton Zoning Bd. of Appeals*, 140 A.D.3d 891 (2d Dep't 2016) (where the court upheld the Zoning Board of Appeal's grant of the area variance even though it was substantial *since the court found no evidence that the variance would have a detrimental effect* on the character of the neighborhood, or physical and environmental conditions, nor would the variance impose a detriment to the health, safety, or welfare of the community.") (emphasis added). Here, even if the requested area variances were substantial, given the complete lack of significant negative impact on the surrounding properties or on the overall character or condition of the community, the requested area variances should be granted.

d. The area variances will not have any negative impact on the physical or environmental conditions of the neighborhood, and will instead have a net beneficial impact.

The granting of the area variances will not have a significant undesirable effect or impact on the physical conditions in the neighborhood or district because, as explained above, it would not change the allowable use or increase the impact from the allowable use. The Property is zoned in the RR District, which conditionally permits Large-Scale Solar Energy Systems subject to site plan approval and adherence to additional requirements in Town Code § 235-45.7.

Further, the Project does not pose any significant environmental impacts to the community, and instead, presents opportunities for *positive* impact as a safe, quiet, clean generator of electricity. The immediate area consists of rural residential and undeveloped, wooded land. Adding a solar development to the makeup of this neighborhood will not present a significant impact on residential or other properties. Also, the portion of the Property to be leased to the Applicant is largely vacant, and no municipal water or sewer facilities will be required for the Project—making the Property more suitable for a solar project than agricultural or residential development. Additionally, solar developments like the Project often blend seamlessly into rural areas as they can be easily screened, do not impede the rural, open space feel of such neighborhoods, and emit zero emissions, fumes or odors and little to no noise. Installation of the Project will be minimally invasive and once installed, operation will present near-zero impact.

As part of the project development, the Applicant will implement erosion control and drainage measures, conduct removal of existing vegetation only to the extent necessary and in compliance with applicable guidelines, and avoid any safety concerns from possible subsidence, landslides, flooding, etc., and will obtain the necessary general construction stormwater permits from the NYSDEC. Additionally, solar developments are semi-permanent and a solar installation like the Project can be fully removed at the end of its useful life leaving the land in a reasonably similar state as its preconstruction condition, or even improved by being left to fallow over the life of the project. Lastly, a Full Environmental Assessment Form was completed for the Project, and no areas of significant environmental concern were identified.

Thus, granting the area variances would not adversely impact the physical or environmental conditions in the neighborhood.

e. The alleged difficulty was not self-created.

The proposed location of the Project is dictated by various factors beyond the Applicant's control as there are significant logistical constraints in siting a solar project (as discussed fully above, in Section I). Most properties in a municipality are not adequate for solar facilities. A parcel must be large enough and have a suitable layout to accommodate a solar project, as such projects are only economically feasible at a certain size. To be eligible, a proposed site cannot have excessive wetlands, tree cover, steep slopes, etc., and must have sufficient solar access as is, without needing substantial, oftentimes prohibitive, modification. The property must also be located near specific transmission lines and a substation with sufficient available capacity to interconnect the project to the utility grid. Lastly, these projects require landowners who are willing to enter into leases for 30-35 years or more, allowing the projects to act as a tenant on their property. Without these crucial features, a solar project could not be built.

Here, the Property is one of those parcels well-suited for solar development. This parcel provides access to the POI, which has capacity. The Property is largely wooded, flat land with a significant forested buffer around the entire Project area. There are only small areas of steep slopes and wetlands on the Property, which will be avoided or mitigated to the greatest extent possible. Additionally, the Project will not add significant traffic, noise, odors, or pollution to the neighborhood, and unlike a more permanent development, the Project will protect the existing natural elements and character of the area once operational.

Lastly, strict application of the Town Code here will not serve a valid public purpose because it does not outweigh the injury to the Applicant—namely, that without the area variances, the Project is not financially viable. No valid public purpose would be served by the denial of the area variances. And regardless, even if the ZBA found this hardship to be self-created, given the overwhelming weight of the first four factors in favor of the Applicant, such a finding would not preclude the ZBA from granting the area variances.

Finally, the ZBA, "shall grant the minimum variance that it shall deem necessary and adequate and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community." Town Law § 267-b (3)(c). As noted above, due to the constraints of siting a solar energy facility such as this one, the area variances are the minimum necessary to install the proposed Project.

III. Conclusion

Given the facts presented above, the Applicant respectfully requests that the ZBA find the Project to be a public utility use and grant the area variances allowing the Project to deviate from the specific setback and buffer requirements discussed above, as it meets the variance standard for public utilities under New York law. In the alternative, should the ZBA apply the five-factor area variance test under Town Law, we respectfully submit that the benefits to the Applicant

and the Town greatly outweigh any potential impacts to the immediately surrounding neighborhood and properties. As such, an evaluation of the five factors demonstrates that the requested area variances should be granted.

We thank you for your consideration of this letter and request. If you have any questions or concerns, please do not hesitate to contact me at (585) 613-3943 or astoklosa@hodgsonruss.com.

Respectfully submitted,

Alicia R. Stoklosa

Alicia R. Stoklosa

AST
Enclosure

cc: Michelle Marrone, Town of Blooming Grove ZBA Clerk
David MacCartney, Esq., Counsel to Town of Blooming Grove ZBA
Matthew Mihaly, Project Manager, Delaware River Solar (*via email*)

Exhibit A

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

DELAWARE RIVER SOLAR, LLC, NY AURORA I, LLC, NY AURORA II, LLC,

Petitioners,

For Judgment Pursuant to Article 78 of the CPLR and for a Declaratory Judgment Pursuant to CPLR 3001

Index No.: 808123/2022
Hon. Craig. D. Hannah

-against-

TOWN OF AURORA ZONING BOARD OF APPEALS,

Respondent.

ORDER AND JUDGMENT

WHEREAS, Petitioners DELAWARE RIVER SOLAR, LLC, NY AURORA I, LLC, NY AURORA II, LLC (together, "Petitioners"), commenced this combined Declaratory Judgment action and CPLR Article 78 proceeding by filing a Notice of Petition and Verified Petition, with exhibits, on July 18, 2022, seeking an order and judgment annulling the determination of the Town of Aurora Zoning Board of Appeals ("Respondent"), declaring Petitioners to be a public utility for purposes of reviewing their use variance application, ordering Respondent to issue the use variance for Petitioners' proposed project pursuant to the public utility use variance standard, and awarding Petitioners attorneys' fees under Section 107 of the Public Officers Law; and

WHEREAS, upon reading and considering (1) Petitioners' Notice of Petition, dated July 18, 2022 [Doc. 5]; (2) Petitioners' Verified Petition, with exhibits, dated July 18, 2022 [Docs. 1-5]; (3) Petitioners' Memorandum of Law in Support of the Verified Petition, dated

August 24, 2022 [Doc. 11]; (4) the Affirmation of Charles W. Malcomb, Esq. in Support of the Verified Petition, with exhibits, dated August 24, 2022 [Docs. 12,13]; and (5) the Affidavit of Peter Dolgos in Support of the Petition, dated August 24, 2022 [Doc. 14]; and

WHEREAS, upon reading and considering (6) The Certified Transcript of Proceedings dated September 2, 2022 [Doc. 15]; (7) Respondent's Verified Answer with Objections in Point of Law, dated September 28, 2022 [Doc. 16]; and (8) Respondent's Memorandum of Law in Support of the Answer with Objections in Points of Law of Town of Aurora Zoning Board of Appeals, dated September 28, 2022 [Doc. 17]; and

WHEREAS, upon reading and considering (9) Petitioners' Memorandum of Law in Reply, dated October 5, 2022 [Doc. 18]; and

WHEREAS, the Court hearing oral argument on October 12, 2022, and appearances having been made by Hodgson Russ LLP (Charles W. Malcomb, Esq. and Alicia R. Legland, Esq.) on behalf of Petitioners and Lippes Mathias LLP (Jennifer C. Persico, Esq.) on behalf of Respondent; and

WHEREAS, the Court having issued rulings on October 12, 2022 on the above and the transcript of said ruling is annexed hereto as **Exhibit A,** and

NOW, upon all of the pleadings, affidavits, papers, and proceedings had herein, and deliberation having been had thereon, it is hereby:

ORDERED, ADJUDGED, AND DECREED that Petitioners' Verified Petition filed on July 18, 2022 is hereby granted in part, and denied in part; and it is further

ORDERED, ADJUDGED, AND DECREED that the determination of the Town of Aurora Zoning Board of Appeals is hereby annulled; and it is further

ORDERED, ADJUDGED, AND DECREED that Petitioners' use variance application for the proposed solar energy facility is hereby remanded to Respondent for consideration pursuant to the public utility use variance standard as articulated in *Consolidated Edison v. Hoffman,* 43 N.Y.2d 598 (1978); and it is further

ORDERED, ADJUDGED, AND DECREED that Petitioners' request for attorneys' fees pursuant to Section 107 of the Public Officers Law is hereby denied.

SO ORDERED:

Dated: November 7, 2022

Hon. Craig. D. Hannah, J.S.C.

GRANTED:

EXHIBIT A

STATE OF NEW YORK : SUPREME COURT
COUNTY OF ERIE : PART 31

DELAWARE RIVER SOLAR, LLC,
NY AURORA I, LLC,
NY AURORA II, LLC,

Petitioners,

-vs- Index No. 808123/2022

TOWN OF AURORA ZONING BOARD OF APPEALS,

Respondent.

Buffalo City Court Building
50 Delaware Avenue
October 12, 2022

B e f o r e:

HONORABLE CRAIG D. HANNAH
SUPREME COURT JUSTICE

A p p e a r a n c e s:

CHARLES W. MALCOMB, II, ESQ.,
Appearing for the Petitioners via Teams

JENNIFER PERSICO, ESQ.,
Appearing for the Respondent via Teams

KIM M. HAETTICH
Official Court Reporter

THE COURT: Okay. Thank you both. I appreciate both of your arguments and I think you both made some very interesting and very concise points. I'm going to follow the ruling from Consolidated Edison versus Hoffman. I do agree with Miss Persico it is not our job to supplant the Zoning Board of Appeals. Our job is to make sure that the right standard was followed. So, I'm going to grant the Petitioners' application in part. I'm going to annul and set aside the initial ruling and send it back to the Town of Aurora to consider the public use standard variance. I'm not going to grant attorneys fees, so that part of the application will be denied. And that's the ruling of the Court. Could one of you prepare an order and circulate it and submit it to me.

MR. MALCOMB: I can take care of that, Your Honor. I'll submit a proposed order to respondent's counsel before I submit it to the Court.

THE COURT: My clerk would like for it to be exchanged and submitted to the Court within ten days. All right. Thank you both.

MS. PERSICO: Thank you.

MR. MALCOMB: Thank you, Your Honor.

* * * * *

KIM M. HAETTICH
Official Court Reporter

C E R T I F I C A T I O N

The above is certified to be a true and correct transcript of the testimony.

Kim M. Haettich

KIM M. HAETTICH
Official Court Reporter

STATE OF NEW YORK
SUPREME COURT : COUNTY OF OSWEGO

CIPRIANI ENERGY GROUP CORP.,

Petitioners

For Judgment Pursuant to Article 78 of the CPLR and for a Declaratory Judgment, Pursuant to the CPLR

v.

ZONING BOARD OF APPEALS OF THE TOWN OF MINETTO, NEW YORK, ROB RAMSEY in his official capacity as Code Enforcement Officer of the Town of Minetto, New York and TOWN OF MINETTO, NEW YORK,

Respondents.

JUDGMENT

Index No.: EFC-2022-0043

HON. GREGORY R. GILBERT JSC

Appearances: Daniel A. Spitzer, Esq.
Hodgson Russ LLP
Attorneys for Petitioners
140 Pearl Street, Ste. 100
Buffalo, New York 14202-4040

Christopher J. Baiamonte, Esq.
The Wladis Law Firm, PC
Attorneys for Respondents
PO Box 245
Syracuse, New York 13214

BACKGROUND

This Article 78 Petition seeks to annul findings by the Town of Minetto Zoning Board of Appeals: directing the Town Code Enforcement Officer to stop requiring a use variance; and declaring that petitioner is a public utility. The issues pertain to plans by Cipriani Energy Group Corp. ("Cipriani") to build a solar energy project on lands to which it is holder of a purchase option agreement located in the Town. The Town Code Enforcement Officer ("CEO") determined that a variance was required and the application for the same was denied by the Town Zoning Board of Appeals ("ZBA"). Cipriani alleges that this contravenes the Town's Local Law No. 3 of 2020.

The land in question is zoned R-10 and R-20. As set forth by the petition, the project is for the construction and operation of a 4.5 megawatt solar energy facility classified as a large solar energy system under Section 107 of the Zoning Code. Cipriani submitted a site plan application on March 9, 2021 and a Unified Solar Permit on April 6, 2021. In response, the CEO determined that a use variance would be required. Cipriani filed an appeal to the ZBA under Zoning Code 302(1) requesting an interpretation in the matter on May 25, 2021. The matter was tabled for further review by the ZBA at a meeting on July 22, 2021 and eventually decided on December 14,

2021 with the ZBA making determination that Cipriani would be required to seek a variance for the project. The ZBA made no determination as to the status of Cipriani as a public utility.

The matter was argued before the Court via Microsoft Teams on March 17, 2022 with counsel as indicated above appearing for the parties.

DISCUSSION

The question presented is whether the determination by the ZBA was made in violation of lawful procedure, affected by error of law, arbitrary or capricious or an abuse of discretion. Jackson v. New York State Urban Development Corp., 67 NY2d 400 (1986); Matter of May v. Town of Lafayette Zoning Board of Appeals, 43 AD3d 1427 (4th Dept 2007). The essence of the dispute is the finding that Section 606 of the Zoning Ordinance of the Town of Minetto ("Code") applies to the exclusion of Article 4 of the Code to prohibit the special permit sought by Cipriani. The petition claims that the Code does not state such an exclusion and that the ZBA failed to distinguish the use sought by Cipriani as a public utility or to even determine if Cipriani was a public utility.

The Court starts with the claim that Cipriani is a public utility. The case, Cellular Telephone Company v. Rosenberg, 82 NY2d 364 (1993), directly applies to this situation and compels the determination as a matter of law that Cipriani is a public utility. Matter of W. Beekmantown Neighborhood Association, Inc. v. Zoning Board of Appeals of the Town of Beekmantown, 53 AD3d 954 (3rd Dept 2008); Matter of Wind Power Ethics Group (WPRG) v. Zoning Board of Appeals of the Town of Cape Vincent, 60 AD3d 1282 (4th Dept 2009). As in Beekmantown and WPRG, public utility is not specifically defined by the Code.

Generally, the decision by the ZBA is regarded as presumptively correct absent illegality, a finding that it is arbitrary and capricious or erroneous as a matter of law or that it is unsupported by substantial evidence. Corter v. Zoning Board of Appeals for the Village of Fredonia, 46 AD2d 184 (4th Dept 1974); Matter of Carnelian Farms, LLC v. Leventhal, 151 AD3d 844 (2nd Dept 2017). In this matter what is presented is the interpretation of the Code and specifically that interpretation given to Section 606 by the ZBA. While the ZBA interpretation of the Code is entitled to deference, the Court bears the ultimate responsibility for interpreting the law. Matter of Devogelaere v. Webster Zoning Board of Appeals, 87 AD3d 1407 (4th Dept 2011) motion for leave to appeal denied 18 NY3d 808; Matter of Ogden Land Development, LLC v. Zoning Board of Appeals of the Village of Scarsdale, 121 AD3d 695 (2nd Dept 2014).

The Code must be construed according to the words used being given their ordinary meaning. Baker v. Town of Islip Zoning Board of Appeals, 20 AD3d 522 (2nd Dept 2005) motion for leave to appeal denied 6 NY3d 701; Matter of Falco realty, Inc. v. Town of Poughkeepsie Zoning Board of Appeals, 40 AD3d 635 (2nd Dept 2007) motion for leave to appeal denied 9 NY3d 807. It is well settled that a zoning code must be strictly construed against the municipality and in favor the property owner. Matter of Mamaroneck Beach & Yacht Club, Inc. v. Zoning Board of Appeals of the Village of Mamaroneck, 53 AD3d 494 (2nd Dept 2008); Matter of Falco realty, Inc. v. Town of Poughkeepsie Zoning Board of Appeals, 40 AD3d 635 (2nd Dept 2007) motion for leave to appeal denied 9 NY3d 807.

As a public utility, Cipriani is entitled to the application of Article 4 of the Code. The finding by the ZBA directly contravenes the express provisions of Article 4 of the Code that allow for the use sought by Cipriani and renders Article 4 of the Code meaningless for the public utility use. The use is authorized under the Code for a public utility in either the R-10 or R-20 districts pursuant to Code Sections 431 and 441 after issuance of a special permit. If it were the case that Section 606 was intended to modify either Section 431 or 441 specifically as to solar public utility energy projects, then it should have specified that to be the case. Instead, Section 606 is silent as to solar energy projects as a public utility. It was error to read such a restriction into Section 606.

Further, Section 606 as interpreted by the ZBA would nullify other provisions of Article 6 as follows:

> Section 601 Purpose
> The purpose of this section is to facilitate the development and operation of renewable energy systems based on sunlight. Solar energy systems are appropriate in all zoning districts when measures are taken, as provided in this section, to minimize adverse impacts on neighboring properties and protect the public health, safety and welfare.
>
> Section 602 Applicability
> 2. Solar energy systems are permitted in all zones in the Town, subject to the requirements described below.
>
> Section 605 Large Scale Solar Energy Systems
> 1. A Large Solar energy System is defined as a solar photovoltaic system with a rated capacity larger than 200kW, the principal purpose of which is to provide electrical power for sale to the general power grid or to be sold to other power customers, or to be consumed on site.
> 2. Pursuant to the Site Plan Review process, the project proponent shall provide the following documents to the Planning Board and/or Zoning Board:
> a. Survey map done by a licensed surveyor;
> b. Proposed changes to the landscape of the site, grading, vegetation clearing and planting, exterior lighting, screening vegetation or structures;
> c. Blueprints or drawings of the solar energy system showing the proposed layout of the system, any potential shading from nearby structures, the distance between the proposed solar collector and all property lines and existing on-site buildings and structures, and the tallest finished height of the solar collector;
> d. Documentation of the major system components to be used, including the panels, mounting system, and inverter;
> e. Name, address and contact information for system installer;

f. Name, address and phone number of the project proponent, as well as all other property owners, if any;
g. Zoning district designation for the parcel of land comprising the project site;
h. Proof the owner has submitted notification to the utility company of the customer's intent to install an interconnected customer owned generator. Off grid systems are exempt from this requirement.

3. Large scale principal use energy systems are subject to setback requirements of the particular zoning district in which they are located.

Section 609 Non-Conformance

2. Ground mounted systems
   b. If a ground mounted system is to be installed on a property that is non-conforming because it violates zoning district requirements other than setbacks, then a special use permit must be obtained for the proposed installation.

While Section 601 states the purpose of Article 6 is to facilitate solar energy systems in all zoning districts, Section 606 permits the use in all zoning districts except residential districts. The conflict is again apparent with Section 602 allowing solar energy systems in all zones in the Town. Section 605 applies to large scale solar energy systems but makes no limitation to the public utility use allowed for both R-20 and R-10 residential zones. Section 609(2)(b) allows for a special use permit when there is a violation of zoning district requirements whereas here the ZBA determined that a special use permit could not be allowed based on Section 606.

The ZBA determination based on Section 606 is also internally inconsistent stating:

1. The zoning law of the Town of Minetto must be read and interpreted in its entirety. Section 431 allows certain uses with a special permit in an R-20 zone. Section 609 also refers to the use of special permits in certain cases. However, Section 606 specifically excludes the inclusion of ground mounted solar systems in R-20 zones.

Section 606 states as follows:

Section 606 Permitted Zoning Districts

1. All building mounted and ground mounted systems are permitted in all zoning districts, except residential zones, as a primary use or accessory use to any lawfully permitted principal use on the same property upon issuance of the proper permits herein and upon compliance with all requirements of this zoning ordinance.

Section 606 makes no specific reference to R-20 zones just as it makes no reference to the public utility use. Reference to the R-10 zone also does not appear in Section 606 and was not addressed

by the ZBA while it was part of the application. [DKT# 1 par. 14]. The ZBA interpretation of Section 606 is unreasonable and irrational. The failure of the ZBA to address the issue of public utility or the R-10 use as requested also affects the ZBA determination with a failure of substantial evidence to support the denial. Van Wormer v. Planning Board, 158 AD2d 995 (4th Dept 1990).

In short, the public utility use proposed by Cipriani for a large solar energy system is specifically allowed by Sections 431 and 441 of the Code and is subject to the requirements of Article 6 of the Code including but not limited to Section 603(1); 605 and 607(5). Cipriani is required to apply for a special use permit. The Town does not have the right under the Code to issue a blanket denial of a special use permit based on Section 606.

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that the petition of **CIPRIANI ENERGY GROUP CORP.** is hereby **GRANTED** to the extent indicated herein; and it is

ORDERED, ADJUDGED AND DECREED that the determination of the Zoning Board of Appeals is **RESCINDED**, and the Respondents are hereby directed to proceed with a review of such building permit and special use permit requirements as have been and may be submitted by **CIPRIANI ENERGY GROUP CORP.** in accordance herewith.

ENTER

Dated: April 12, 2022
Oswego, New York

HON. GREGORY R. GILBERT
SUPREME COURT JUSTICE

At an IAS Term of the Greene County Supreme Court, held in and for the County of Greene, in the Village of Catskill, New York, on the 18th day of August, 2022.

PRESENT: HON. ADAM W. SILVERMAN,
Acting Justice of the Supreme Court

STATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE

In the Matter of the Application of

FREEPOINT SOLAR LLC, and FPS POTIC SOLAR LLC,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

-against-

TOWN OF ATHENS ZONING BOARD OF APPEALS,

Respondent.

DECISION AND ORDER
INDEX NO. EF2021-795

APPEARANCES:

THE MURRAY LAW FIRM PLLC
Jacqueline Phillips Murray, Esq.
10 Maxwell Dr Ste 100,
Clifton Park, NY 12065
Attorney for Petitioners

DREYER BOYAJIAN, LLP
John Dowd, Esq.
75 Columbia St.
Albany, NY 12210
Attorney for the Respondent

The following e-filed documents, listed by NYSCEF document number 1, 2, 15-35, 39-43, 46-53, 55, 56, 57 were read on the Petition and Answer.

ADAM W. SILVERMAN, A.J.S.C.

This special proceeding pursuant to CPLR article 78 was commenced on October 6, 2021, when Petitioners filed the Petition challenging Respondent's denial of a use variance. Petitioners, Freepoint Solar LLC, a nationwide developer of renewable energy infrastructure, and FPS Potic Solar LLC, a subsidiary of Freepoint Solar LLC, secured options to purchase two parcels of real property located at Potic Mountain Road in the Town of Athens, Greene County, intending to locate a solar energy facility on a portion thereof. Petitioners faced repeated delays from the Town government as they sought a building permit or standing to apply for a use variance. When their application to Respondent was finally heard, Respondent determined not to apply the public utility variance standard ("public necessity" test) to the application, but rather the general standard set under Town Law § 267-b (2) (b) (*see generally Matter of Otto v Steinhilber,* 282 NY 71 [1939]). Because Respondent erred by applying the wrong standard to the application, the determination is hereby vacated, and the matter remanded to Respondent for a new determination based upon application of the correct standard.

I. BACKGROUND

On July 18, 2018, Petitioners contacted the Town regarding the building permit application and to request a pre-application meeting with Respondent [NYSCEF Doc No 1 ¶ 19]. Although an application with details of the Project had yet to be filed, the Town Attorney advised, by e-mail dated July 25, 2018, Petitioners' project "would not seem to fit the circumstances of wanting a large scale development in an RU zone" [NYSCEF Doc No 1 ¶ 20]. Petitioners thereafter attended the Town Board's September 17, 2018 meeting to informally present on the project and, based upon feedback from that meeting, Petitioners met with adjoining landowners regarding the

proposal leading to letters of support from nine of fourteen adjoining landowners and two additional adjoining landowners also offering their adjacent properties to be used for the project. [NYSCEF Doc No 1 ¶ 21-24].

On December 6, 2019, Petitioners contacted the Town Attorney to confirm the Town's application procedures and were informed they must file an application for a building permit from the Town Code Enforcement Officer ("CEO") and be denied before they would have standing to appeal the denial and could file a Use Variance Application with Respondent [NYSCEF Doc No 1 ¶ 25-27]. On January 7, 2020, Petitioners sent their Building Permit Application, together with two copies of the preliminary site plan [NYSCEF Doc No 1 ¶ 28].

The CEO requested the "cost of construction" to calculate the fee, and, on January 10, 2020, the Town Attorney replied that Petitioners would "need to use a proposed value for the Project" so that the building permit fee could be calculated [NYSCEF Doc No 1 ¶ 29-30]. On January 15, 2020, Petitioners sought clarification regarding the need for cost of construction as the Town's fee schedule did not set forth a building permit application fee based on the "costs of construction" or the "value for the Project," but was rather, based on a "per square foot" calculation [NYSCEF Doc No 1 ¶ 31]. On January 16, 2020, the Town Attorney directed Petitioners to contact the CEO directly, however the CEO failed to respond until February 7, 2020, when he advised that the building permit application was "incomplete without an estimate of the cost of construction so we can calculate the permit fee," and requested copies of Petitioners' option agreements [NYSCEF Doc No 1 ¶ 31-33]. On February 12, 2020, the CEO advised Petitioners that the denial would be issued upon receipt of the option agreements [NYSCEF Doc No 1 ¶ 34]. On February 26, 2020,

Petitioners provided the "cost of construction" and option agreements while offering to pay the fee once it was calculated by the CEO [NYSCEF Doc No 1 ¶ 35].

Expecting the denial to be forthcoming, on February 28, 2020, Petitioners' expressed their intention to attend Respondent's March 11, 2020 meeting, however the Town Attorney stated a denial would not be provided until the application was "completed and the building permit fee is paid," despite the Town having not provided a fee amount or noted any additional alleged omissions and advised that Petitioners would not be afforded an opportunity to be heard at the meeting [NYSCEF Doc No 1 ¶ 35-38]

On March 2, 2020, the CEO discussed Petitioners' application with the Town Board, and on March 3, 2020, the Town Attorney advised Petitioners that the application would not be decided until the fee was paid, despite no fee amount being set, and that the Town Board directed the Town Attorney to have no further discussions or correspondence with Petitioners regarding the matter [NYSCEF Doc No 1 ¶ 39]. Thereafter, on March 6, 2022, since no calculation was provided, Petitioners did their own calculation and submitted it with a check to the Town [NYSCEF Doc No 1 ¶ 40-42]. In response, on March 19, 2020, the CEO requested data related to the project's lot coverage and connection to the power grid despite Petitioners having already provided lot coverage information with its application [NYSCEF Doc No 1 ¶ 43-45].

On April 15, 2020, the CEO requested, despite none of these items being on the building permit application, the quantity and square feet of the proposed solar panels, the total square feet of land for the project, and whether a Stormwater Pollution Prevention Plan ("SWPPP") and State Pollutant Discharge Elimination System ("SPDES") General Permit would be filed with the New York State Department of Environmental Conservation ("NYSDEC") and any other

environmental requirements [NYSCEF Doc No 1 ¶ 46-49]. On April 16, 2020, Petitioners replied that the solar panel square footage was already provided to the CEO on March 13 and 19, 2020, and added the solar panel quantity and dimensions, and confirmed that a SWPPP, SPDES General Permit and a Full Environmental Assessment Form would be required for the project and would be submitted with Petitioners' applications upon the CEO denying the building permit application [NYSCEF Doc No 1 ¶ 49]. On April 17, 2020, the CEO requested the NYSDEC SWPPP and SPDES General Permit [NYSCEF Doc No 1 ¶ 50]. On May 8, 2020 the CEO requested Petitioners secure all New York State approvals for the project [NYSCEF Doc No 1 ¶ 54].

On May 4, 2020, Petitioners attempted to speak at the Town Board meeting but were muted and told they must request to be on the agenda through the Town Clerk [NYSCEF Doc No 1 ¶ 52]. On May 12, 2020, after rejecting Petitioners' request to be added to the agenda, the Town Supervisor stated that there was "no reason to schedule a meeting with the Town Board/Town Attorney/Planning or Zoning Boards" because Petitioners' application remained "incomplete" until the Town received: (1) "full set of engineered plans"; (2) "estimated project cost"; and (3) "correct application fee" [NYSCEF Doc No 1 ¶ 52-58].

On May 15, 2020, the CEO made an additional request for Workers' Compensation and liability insurance certificates [NYSCEF Doc No 1 ¶ 60].

On June 15 and July 1, 2020, Petitioners provided the Town with a full set of plans, all New York State approvals for the project, and Workers' Compensation and liability insurance certificates, however, despite outreach by Petitioners over the next two months, the CEO failed to provide a fee amount [NYSCEF Doc No 1 ¶ 61-62].

On September 9, 2020, the Town Attorney requested that Petitioners re-submit all previously provided information and Petitioners did so the same day [NYSCEF Doc No 1 ¶ 63]. On October 20, 2020, the Town Board adopted a fee of $1,000 per megawatt and on December 11, 2020, Petitioners delivered the fee [NYSCEF Doc No 1 ¶ 64-65]. On January 20, 2021, over a year after the initial application, the CEO finally denied the application because the project was in a zoning district not permitted by Town's Solar Law, as was evident since the time the application was submitted [NYSCEF Doc No 1 ¶ 66-67]

On February 9, 2021, Petitioners filed their Use Variance Application with Respondent [NYSCEF Doc No 1 ¶ 68-70]. Petitioners then attended Respondent's March 17, 2021 meeting, observing their applications unopened, and were informed by Respondent's Chairman that "there was nothing he could do" because the project was in a zoning district where it was not a permitted use [NYSCEF Doc No 1 ¶ 71-78]. Petitioners next presented at Respondents' May 12, 2021 meeting, urging consideration of the Use Variance under the public utility standard [NYSCEF Doc No 1 ¶ 80-89]. After Respondent requested the option agreements, despite their previous submittal, and failed to attend a joint visual field study at the site organized by Petitioners with the Planning Board and Respondent, Petitioners next presented the Project at the ZBA's August 11, 2021 meeting [NYSCEF Doc No 1 ¶ 96, 106, 108, 111-119]. On September 8, 2021, Respondent issued a written decision unanimously denying Petitioners' Use Variance Application [NYSCEF Doc No 1 ¶ 124-129]. Significantly, the determination was based upon the standard set forth in Town Law § 267-b (2) (b) and provided no consideration under the public utility test set forth in *Matter of Consolidated Edison Co. v Hoffman* [NYSCEF Doc No 29].

II. Standard Applicable to a Public Utility Use Variance Application

Generally, an applicant for a use variance must show that the zoning regulations and restrictions have caused "unnecessary hardship. In order to prove such unnecessary hardship the applicant shall demonstrate to the board of appeals that for each and every permitted use under the zoning regulations for the particular district where the property is located, (1) the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence; (2) that the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood; (3) that the requested use variance, if granted, will not alter the essential character of the neighborhood; and (4) that the alleged hardship has not been self-created" (Town Law § 267-b [2] [b]; *see generally Matter of Otto v Steinhilber*, 282 NY 71 [1939]).

"It has been observed . . . that [the unnecessary hardship] requirements are not appropriate where a public utility . . . seeks a variance, since the land may be usable for a purpose consistent with the zoning law, the uniqueness may be the result merely of the peculiar needs of the utility, and some impact on the neighborhood is likely" (*Matter of Consolidated Edison Co. of N.Y. v Hoffman*, 43 NY2d 598, 607 [1978]; *see* 2 Salkin, New York Zoning Law and Practice § 11:22 [4th ed. 2011]). "It has long been held that a zoning board may not exclude a utility from a community where the utility has shown a need for its facilities" (*Matter of Cellular Tel. Co. v Rosenberg*, 82 NY2d 364, 372 [1993] [internal quotation marks, brackets, and citations omitted]; *see* 12 NY Jur 2d, Buildings, Zoning, and Land Controls § 290; 2 Salkin, New York Zoning Law and Practice § 11:19 [4th ed. 2011]). Likewise, local boards may not deny an application based "solely on community objection" (*Matter of Biggs v Eden Renewables LLC*, 188 AD3d 1544, 1548

[3d Dept 2020] [Generalized community objections to the large scale solar project "due to potential concerns of negative visual impact and negative impact upon adjoining property values" held insufficient to overcome evidence in the record justifying granting of application]; *see also Cellular Tel. Co. v Village of Tarrytown*, 209 AD2d 57, 66 [2d Dept 1995] [In considering a public utility's application for a variance, "a municipality may not invoke its police powers solely as a pretext to assuage strident community opposition"], *lv denied* 86 NY2d 701 [1995]). "In short, due to the essential nature of the service and the limited flexibility there is as to where the facility can be located in order to generate or provide the service, the facility must be, and is, entitled to a relaxed zoning standard" (Patricia E. Salkin and Robert Burgdorf, *Siting Wind Farms in New York: Applicability of the Relaxed Public Utility Standard*, New York Zoning Law and Practice Report vol. 7, No. 1.; *see* 3 Rathkopf's The Law of Zoning and Planning § 48:6; 78:2 [4th ed.]).

"Although a municipality is not free to prevent a utility from providing necessary services by application of its zoning powers, neither may a utility simply disregard the local ordinances. Rather, a balance must be maintained between those interests of the locality which can be expressed by zoning ordinances and the needs of the community which must be served by the utility" (*Matter of Zagoreos v Conklin*, 109 AD2d 281, 289 [2d Dept 1985]; *see Matter of United States Transmission Sys. v Schoepflin*, 63 AD2d 970, 971 [2d Dept 1978]; *see also* 2 Salkin, New York Zoning Law and Practice § 11:27 [4th ed. 2011] [Expanding upon efforts to regulate solar energy facility siting to balance the need for energy with the potential negative externality such as loss of habit and open space]; *see generally* Sarah Pizzo, Note, *When Saving the Environment Hurts the Environment: Balancing Solar Energy Development with Land and Wildlife Conservation in A Warming Climate*, 22 Colo J Intl Envtl L & Poly 123 [2011]). "Instead [of the

unnecessary hardship test], the utility must show that modification is a public necessity in that it is required to render safe and adequate service, and that there are compelling reasons, economic or otherwise, which make it more feasible [to seek the variance] than to use alternative [sites]" (*Matter of Consolidated Edison Co. of N.Y. v Hoffman*, 43 NY2d at 611; *see Matter of Cellular Tel. Co. v Rosenberg*, 82 NY2d at 372 [Holding "*Matter of Consolidated Edison* (*supra*), applies to all public utilities. It also applies to entirely new sitings of facilities, as well as the modification of existing facilities"]). The Court of Appeals has further held that "'where the intrusion or burden on the community is minimal, the showing required by the utility should be correspondingly reduced'" (*Matter of Cellular Tel. Co. v Rosenberg,* 82 NY2d at 372, quoting *Matter of Consolidated Edison Co. of N.Y. v Hoffman*, 43 NY2d at 611; *see Sprint Spectrum, L.P. v Zoning Bd. of Appeals of the Town of Guilderland*, 173 Misc 2d 874, 877 [Sup Ct, Albany County 1997, Graffeo, J.] [Holding "to obtain a use variance, the petitioner must demonstrate that the site is necessary to provide safe and adequate service and that there are compelling reasons, economic or otherwise, to obtain the variance. Moreover, where the burden on the community is minimal, the showing required by the utility should be correspondingly reduced"]).

In determining what applicants are subject to the public utility standard, courts do not apply a rigid rule (*see Matter of Nextel Partners v Town of Fort Ann,* 1 AD3d 89, 93 [3d Dept 2003] [Holding a "case-by-case" analysis of changes in industries and regulations may impact the viability of the rationale underlying the public utility exception, but deregulation and competition alone do not prevent an applicant from being a public utility], *lv denied* 1 NY3d 507 [2004]) "A 'public utility' has been defined to mean 'a private business, often a monopoly, which provides services so essential to the public interest as to enjoy certain privileges such as eminent domain

and be subject to such governmental regulation as fixing of rates, and standards of service'" (*Matter of Cellular Tel. Co. v Rosenberg*, 82 NY2d at 371, quoting 2 Anderson, American Law of Zoning § 12.32, at 568-569 [3d ed]). "Characteristics of the public utility include (1) the essential nature of the services offered which must be taken into account when regulations seek to limit expansion of facilities which provide the services, (2) 'operat[ion] under a franchise, subject to some measure of public regulation,' and (3) logistic problems, such as the fact that '[t]he product of the utility must be piped, wired, or otherwise served to each user . . . [,] the supply must be maintained at a constant level to meet minute-by-minute need[, and] [t]he user has no alternative source [and] the supplier commonly has no alternative means of delivery'" (*id.*). "There is usually no question that the activities of heavily regulated electric and gas companies and their energy generation and transmission projects and facilities involve the activities of public utilities" (4 Rathkopf's The Law of Zoning and Planning § 78:9 [4th ed.], citing *Matter of West Beekmantown Neighborhood Assn., Inc. v Zoning Bd. of Appeals of Town of Beekmantown*, 53 AD3d 954, 956 [3d Dept 2008] [Holding zoning board rationally found that wind turbines were "public utility"]; *see Matter of Wind Power Ethics Group (WPEG) v Zoning Bd. of Appeals of Town of Cape Vincent*, 60 AD3d 1282, 1283 [4th Dept 2009] [Holding zoning board's classification of wind-powered generators as a utility was neither irrational nor unreasonable, and that the determination is supported by substantial evidence]).

III. Discussion

Respondent asserts that Petitioners' solar facility is not a public utility for zoning purposes. Respondent also argues that the Town of Athens zoning ordinance does not address public utilities

and its definition of "essential services" [1] is narrower than that interpreted to support wind turbines as public utilities (*compare Matter of Wind Power Ethics Group (WPEG) v Zoning Bd. of Appeals of Town of Cape Vincent*, 60 AD3d at 1283). Additionally, Respondent contends that Petitioners cannot be consider a utility because they do not meet the test under *Matter of Cellular Tel. Co. v Rosenberg* since they do "not hold a monopoly on the provision of a particular service"; do "not have the power of eminent domain; there is nothing unique about the essential nature of its services that requires mandatory placement in one specific area; while operators of such facilities are lightly regulated by the [Public Service Commission], the applicant does not operate under a franchise; and finally, solar generating facilities are not subject to the same logistical problems as true public utilities with respect to location and alternative sources and means of delivery." Finally, Respondent maintains that even assuming the applicability of the public utility standard, it must be held as a "gap" test, that is it would only be appliable if an applicant could show a gap in service that needs to be filled (*citing* 2 Salkin, New York Zoning Law and Practice § 12:03 [4th ed. 2011]).

Contrary to Respondent's assertion that "electricity is an essential service - is well settled" (Patricia E. Salkin and Robert Burgdorf, *Siting Wind Farms in New York: Applicability of the Relaxed Public Utility Standard*, New York Zoning Law and Practice Report vol. 7, No. 1.; *see generally Berg v Chelsea Hotel Owner, LLC*, 203 AD3d 484 [1st Dept 2022] [Listing, in a different context, "essential services" as "heat, hot water, gas, and electricity"]). "While 'public utility' is not defined by the zoning law at issue, it is undisputed that the [facility that Petitioners] intend[]

[1] Code of the Town of Athens 180-3 provides "Essential Services: The erection, construction, alteration or maintenance by public utilities or municipal or other governmental agencies of underground or overhead gas, electrical, steam or water transmission or distribution systems, including poles, wires, mains, drains, sewers, pipes, conduit cables, fire alarm boxes, traffic signals, hydrants, street signs and similar equipment and accessories in connection therewith, but not including buildings, unless specifically permitted by special permit, and reasonably necessary for the furnishing of adequate service by such public utilities or municipal or other governmental agencies or for the public health or safety or general welfare".

to construct will generate energy, a useful public service, and will be subjected to regulation and supervision by the Public Service Commission" (*Matter of West Beekmantown Neighborhood Assn., Inc. v Zoning Bd. of Appeals of Town of Beekmantown*, 53 AD3d at 956; *see* Public Service Law § 2 [2-b] [Stating that the "term 'alternate energy production facility,' . . . includes any solar (facility) . . . together with any related facilities located at the same project site, with an electric generating capacity of up to eighty megawatts, which produces electricity, gas or useful thermal energy"]; *see also* Public Service Law § 2 [12], [23]; 5 [1] [b]; 66-c [1]). That the solar energy industry is not subject to an exclusive franchise does not prevent the application of the relaxed standard (*see Matter of Nextel Partners v Town of Fort Ann,* 1 AD3d at 93). Nor is the power of eminent domain the sole defining feature of a public utility (*see Matter of Cellular Tel. Co. v Rosenberg*, 82 NY2d at 371). While Respondent argues that Petitioners' facility does not face the same logistical challenges as "true public utilities," the record includes a Central Hudson Capacity Map showing distribution system locations throughout the area supporting Petitioners' assertion that the location is subject to the logistic problems contemplated by *Matter of Cellular Tel. Co. v Rosenberg* (82 NY2d at 371) [NYSCEF Doc No 33].[2]

Finally, Respondent's assertion that Petitioners must meet a "gap" test in a manner similar to a cellular provider (*see Matter of Independent Wireless One Corp. v City of Syracuse,* 12 AD3d 1085, 1086 {4th Dept 2004]) is unavailing. In *Matter of Consolidated Edison Co. v Hoffman*,

[2] Beyond Respondent's conclusory assertion that solar can be located anywhere and Petitioners' evidence in the record regarding infrastructure limitations, property law generally has begun recognizing the variable rights, and impacts, associated with solar energy and real property (*see e.g.* Brent Resh, Note, *Something New Under the Sun: The Drecp and Utility-Scale Solar on the New Energy Frontier*, 18 Nev LJ 317, 333-335 [2017] [Discussing the limitations of economics and infrastructure in siting large scale solar creating theoretical "renewable parcels" or "solarsheds"]; Hannah Wiseman, *Expanding Regional Renewable Governance*, 35 Harv Envtl L Rev 477, 511-512 [2011] [Recognizing that a "large wind or solar farm is useless if not connected to a transmission line that carries the electricity generated to consumers]).

respondent in that case denied an application by Consolidated Edison Company for a variance for the construction of a wet cooling tower for its nuclear generating plant (43 NY2d at 611). The Court of Appeals did not look solely to a coverage gap relating only to the municipality making the determination, but instead considered the broader "potential hardship to Con Edison's approximately three million customers, and millions of others affected" (*id.* at 609). In considering the necessity of the variance, the Court of Appeals noted that "operation of the plant saved Con Edison customers $78,000,000 in fuel expense . . . [and if the variance were denied and the facility] closed down[,] additional fuel costs to make up the lack of generation by increasing production at its other plants, all of which burn imported oil, would translate to $567,000 per day . . . approximately 7,300,000 barrels of oil or equivalently 306,600,000 gallons" in a year (*id.* at 608). Similarly, the test for an electrical public utility, such as in this case, is not that there is "no other public utility provider available that could provide access to the proposed utility service . . . [and that] the locality not already served by another service provider" as urged by Respondent [NYSCEF Doc 46, p 9], but public necessity must be viewed in a broader consideration of the general public's need for the service.

IV. Conclusion

Because Respondent erred by applying the general standard set under Town Law § 267-b rather than the test for a use variance set forth in *Matter of Consolidated Edison Co. v Hoffman*, the determination is hereby vacated, and the matter is remitted for Respondent to reconsider Petitioners' application with the appropriate test in mind (*see generally Matter of Nye v Zoning Bd. of Appeals of Town of Grand Is.*, 81 AD3d 1455, 1456 [4th Dept 2011]; *Millpond Mgt., Inc. v Town of Ulster Zoning Bd. of Appeals*, 42 AD3d 804, 806 [3d Dept 2007]).

Finally, in light of the foregoing, while the record reflects that an executive session was held that may have constituted a technical violation of the Open Meetings Law (Public Officers Law art 7), the Court finds this insufficient to warrant the award of attorney fees (*see Matter of Nextel Partners v Town of Fort Ann,* 1 AD3d at 96).

Accordingly, it is

ORDERED, that the petition is hereby **partially granted** to the extent that Respondent's determination is annulled and the matter is remitted to Respondent for further proceedings not inconsistent with this Court's decision; and it is further

ORDERED, the petition is **partially denied and dismissed.**

The Court has uploaded the original Decision/Order to the case record in this matter as maintained on the NYSCEF website whereupon it is to be filed and entered by the Office of the County Clerk.

Counsel for Petitioners is not relieved from the applicable provisions of CPLR 2220 and 202.5b (h) (2) of the Uniform Rules of Supreme and County Courts insofar as it relates to service and notice of entry of the filed document upon all other parties to the action/proceeding, whether accomplished by mailing or electronic means, whichever may be appropriate dependent upon the filing status of the party.

SO ORDERED AND ADJUDGED

ENTER.

Dated: August 18, 2022
Catskill, New York

ADAM W. SILVERMAN
Acting Justice of the Supreme Court

TOWN OF BINGHAMTON
ZONING BOARD OF APPEALS

In the Matter
Of the
Application by
ATLAS RENEWABLES LLC
for a public utility use variance
affecting property known as
57 Powers Road, Binghamton, New York
Tax Map No.: 161.14-1-35.11

DECISION

Atlas Renewables LLC/Binghamton Solar, LLC, with consent and authorization of the property owner, having filed an application for a public utility use variance with the Zoning Board of Appeals, with respect to the construction of a 5.00 Megawatt Community Solar Farm on the property located at 57 Powers Road, Binghamton, New York owned by Robert Haskell, and the Zoning Board of Appeals having caused due notice of a public hearing on the said application to be duly published, posted and served, and having conducted a public hearing on the application of Atlas Renewables LLC on November 8, 2021 which public hearing was kept open through the December 13, 2021 meeting; and regular zoning board meetings were held to discuss the application of Atlas Renewables LLC on; January 10, 2022; February 14, 2022, April 18, 2022 and May 9, 2022, and having heard all of the evidence presented relating to the public utility use variance required by law to be considered in granting or denying such a public utility use variance, the Zoning Board of Appeals hereby makes the following findings and decision. Present for said meetings were Members Gerardo Tagliaferri, Mark Bordeau, Theresa Taro, Tom Bensley, and alternate member Timothy Cooper. Zoning Board Member, Sara Reifler, recused herself at the meeting on November 8, 2021 and did not participate in any of the meetings or public hearing.

FINDINGS OF FACT

1. That Robert D. Haskell is the owner-landlord of 57 Powers Road, Binghamton, New York, hereinafter referred to as the "Premises" and is hereby bound by this Decision.

2. That Atlas Renewables LLC is the general contractor and Applicant for the Premises.

3. That the Premises is located in a district zoned R-1 according to the Town of Binghamton Zoning Map.

4. That the Applicant seeks to construct a 5.00 Megawatt Community Solar Farm upon obtaining a public utility use variance given to certain public utility related projects across NYS, which if granted, would then require site plan approval through the Planning Board.

DECISION

The Applicant filed a timely application for a public utility use variance and has standing as the Lessee of the Premises, together with the Owner-Landlord of the Premises. The provisions of the State Environment Quality Review Act apply to this project. Timely notice of the November 8, 2021 public hearing was duly published, posted and served. A public hearing was convened on November 8, 2021 at which time the Applicant and any other interested parties were given an opportunity to present evidence relevant to the application. The public hearing was continued on December 13, 2021 which notice was duly published, posted and served. The continuation of the public hearing was convened on December 13, 2021 at which time the applicant and any other interested parties were given an opportunity to present evidence relevant to the application. The public hearing was closed on December 13, 2021. The Zoning Board of Appeals meeting was continued on January 10, 2022 at a regularly scheduled Board meeting at which time the Applicant and the Board members discussed a list of potential issues related to

the application and SEQR part 1. The applicant was given further opportunity to present evidence relevant to the Application. The meeting was continued on February 14, 2022 at a regularly scheduled Board meeting which was convened on February 14, 2022 at which time the Applicant and the Board members discussed a list of potential issues related to the application and SEQR part 2. The Board meeting was continued on April 18, 2022 which notice was duly published, although not required, and, posted. The continuation of the Zoning Board of Appeals meeting was held on April 18, 2022 at which time the Applicant and the Board members continued the discussion related to SEQR part 2. The Board meeting was continued on May 9, 2022 which notice was duly published, posted and served. On May 9, 2022 the Applicant and the Board members continued discussion related to SEQR part 3, and any other interested parties were given an opportunity to present evidence relevant to the Application. The Applicant had previously presented evidence of the statutory factors required for the granting of a public utility use variance, and reviewed those factors again with the Board.

Lluis Torrent (Atlas-Applicant), John Watson (Atlas-Applicant), Robert Haskell (Owner-Applicant) attended the public hearing in person and David Brennan (Atlas-Applicant Attorney) attended the public hearing via zoom on November 8, 2021. Residents Tami Zebrowski-Darrow, Michael Bensley, Bill Miller & Bill Miller Jr., Gary & Barbara Sanford, Carolyn Cavallaro, Ruth McCormick, Charrie Stymacks, Gary Taubar, Joan & Stephen Zahorian, Teresa Quain, Anthony Restin attended the public hearing in person and Lisa Young attended via zoom on November 8, 2022. The members of the public listened to the presentation by the Applicant and raised questions, comments and concerns. Generally speaking, the public did not voice opposition to the proposed project and some voiced support for green energy.

Lluis Torrent (Atlas-Applicant), John Watson (Atlas-Applicant), Robert Haskell (Owner -Applicant) attended the meeting in person and David Brennan (Atlas-Applicant Attorney) attended via zoom on the December 13, 2021 continued hearing. Residents Gary Taubar, Tami Zebrowski-Darrow, Carolyn Cavallaro, Gary Sanford, Barbara Sanford, Ruth McCormick attended the continued public hearing in person on December 13, 2021.

Lluis Torrent (Atlas-Applicant), John Watson (Atlas-Applicant), Robert Haskell (Owner-Applicant) attended the meeting in person and David Brennan (Atlas-Applicant Attorney) attended via zoom on January 10, 2022. Other than some elected officials, no members of the public directly participated.

Lluis Torrent (Atlas-Applicant), John Watson (Atlas-Applicant), Robert Haskell (Owner-Applicant) attended the ZBA meeting in person and David Brennan (Atlas-Applicant Attorney) attended via zoom on February 14, 2022. Other than some elected officials, no members of the public directly participated.

Lluis Torrent (Atlas-Applicant), John Watson (Atlas-Applicant), David Brennan (Atlas-Applicant Attorney), and Robert Haskell (Owner-Applicant) attended the ZBA meeting in person and on April 18, 2022. Other than some elected officials, no members of the public directly participated.

Lluis Torrent (Atlas-Applicant), John Watson (Atlas-Applicant), David Brennan (Atlas-Applicant Attorney), attended the Board meeting in person on May 9, 2022. At no time did any members of the public present any opposition to the proposed project and no one presented any documentary evidence in opposition to the request for the said public utility use variance.

The Zoning Board of Appeals again reviewed part 1 and part 2 of SEQR for this proposed project. The Zoning Board of Appeals then voted 5-0 that there was no significant

environmental impact with respect to said proposed project that could not be mitigated by actions on the part of the Applicant and Landowner. Accordingly, the Zoning Board determined there there was a negative declaration with respect to SEQR provided certain mitigation efforts were implemented by the Applicant and Landowner.

Based on the list of issues developed by the Zoning Board of Appeals, it appears that all issues, concerns and questions initially raised by the public were satisfactorily answered. Over the course of the Board meetings after the public hearing was closed, the Board deliberated, and discussed the various factors and underlying facts, including applying said proof to the applicable legal factors that must be considered in determining an application for a public utility use variance. The Board determined that granting the public utility use variance would not produce an undesirable change in the character of the neighborhood or a detriment to nearby properties.

The Zoning Board of Appeals considered the specific factors or criteria for a public utility use variance approval, including the following:

1) Will the project provide an essential service, namely a) energy required to render safe and adequate electrical service to the local electric grid and b) compelling reasons, economic or otherwise, for a need for such a variance,

2) Will the generation of electricity through the proposed solar energy facility be regulated by the Public Service Commission, or by or through any other public regulations,

3) Will the electricity to be generated go into the regulated electric grid system in New York State.

4) Is there a lack of any other alternative viable locations in the Town for such a project.

The Zoning Board of Appeals having duly considered the evidence and proof presented with respect to said factors in their deliberations prior to voting, and also in consideration of the fact that there was no public opposition made to the requested variance. As a result, the Board then took up a motion by member Mark Bordeau, seconded by member Timothy Cooper. The Board then voted to approve the public utility use variance by a vote of four ayes and one nay as follows: Chairman, Gerardo Tagliaferri, aye; Theresa Taro, aye; Mark Bordeau, aye; Tom Bensley, nay; and Timothy Cooper, aye.

Based on all of the evidence and proof presented, and for the reasons stated above, the application for said public utility use variance was granted with the following conditions:

1) The Applicant and any successor or assign shall maintain the buffer as shown on the revised plan drawing submitted to the Board.

2) If the buffer is disturbed in any manner during construction/development, the Applicant shall be responsible for all replacement plantings to establish and maintain the buffer.

3) Additional plantings and screening shall be placed in the areas where the Orchard Park area is visible from the project development boundary.

4) All plantings or new screening to make up the buffer or to supplement the buffer shall be deer resistant.

5) To extent permitted by law, the Town of Binghamton residents shall have priority for solar energy from this solar development.

6) Any decommissioning by the Applicant, or any successors and assigns, shall be performed in accordance with the Town's Solar Local Law and any applicable New York State law.

7) All conditions herein shall also be the responsibility of any successor or assign of the Applicant Atlas Renewables LLC/Binghamton Solar LLC.

Dated: June 14, 2022

Gerardo Tagliaferri, Chairman

At a Regular Monthly Meeting of the Zoning Board of Appeals held in and for the Town of Oswego on the 19th day of January, 2023, at 7:00 p.m. at the Town Hall located at 2320 County Route 7, Oswego, NY.

STATE OF NEW YORK COUNTY OF OSWEGO
TOWN OF OSWEGO ZONING BOARD OF APPEALS

In the Matter of an Application by

Oswego PV, LLC

For A Use Variance to Operate a 3-MWAC solar farm
at 447 County Route 20, Residential 3 (R3) District
pursuant to the Zoning Law of the Town of Oswego, New York

RESOLUTION

WHEREAS, Oswego PV, LLC, a subsidiary of RIC Development, LLC (the "Applicant") has applied for a use variance to operate a 3.0MWac solar farm (the "Project") on property owned by Constance Simmons located at 447 County Route 7 (Tax Parcel No. 164.00-06-02.08) in the Town of Oswego's Residential 3 (R3) Zoning District; and

WHEREAS, a use variance application was submitted by letter dated September 8, 2022, together with a comprehensive packet of materials that included, among other items, a site plan, evidence of site control, a visual impact assessment, Full Environmental Assessment Form (FEAF), Wetland study, Stormwater Pollution Prevention Plan (SWPPP), various state and federal agency determinations, a Coordinated Electric System Interconnect Review (CESAIR) from National Grid, and a Decommissioning Plan, (collectively the "Special Use Permit Application"); and

WHEREAS, all documentation contained in the Special Use Permit Application has been reviewed by the Zoning Board of Appeals ("ZBA"), in addition to the Use Variance application for consideration of a use variance as the result of the absence of a solar energy facility being specifically permitted within the Town of Oswego[1]; and

WHEREAS, the provisions of GML §239 l & m are triggered by the Project and therefore the use variance application together with the Special Use Permit Application packet were provided by the Town of Oswego Planning Board to the County of Oswego Planning Department for its recommendation; and

[1] The Town of Oswego Zoning Law does not reference any renewable energy facilities, having been adopted and revised prior to the influx of such facilities that are now commonplace in New York State; accordingly, a use variance is required before a special permit/site plan approval is considered.

WHEREAS, the County of Oswego reviewed the Project and in a letter dated October 10, 2022, recommended denial without prejudice, reasoning that the packet of materials submitted contained no evidence that the "applicable zoning regulations and restrictions have caused unnecessary hardship"[2] and declared that "the ZBA can submit evidence documenting the [sic] that the zoning regulations have created unnecessary hardship; and we will reconsider the application by the ZBA for a use variance, and planning board for site plan review and special permit[;]" and

WHEREAS, a joint public meeting of the Town's ZBA and Planning Board was held on October 17, 2022, at which point several members of the public attended and provide various comments opposed to the proposed use variance and the Project in general; and

WHEREAS, the Applicant submitted additional supplemental materials to address many of the concerns of the residents and property owners near the proposed solar farm location, and further addressed the applicable use variance criteria the Courts of this State have applied to renewable energy projects (mostly wind and solar facilities), declaring such projects to be public utilities and thus reviewable under the less-restrictive *Hoffman*[3] standard of review, which was recently applied by the New York State Supreme Court in a legal proceeding involving the neighboring Town of Minetto[4]; and

WHEREAS, during a separate meeting, the Planning Board declared itself lead agency pursuant to SEQRA and began reviewing the FEAF submitted by the applicant, and the ZBA having also considered the environmental impacts of granting a use variance communicated its position on potential impacts on the environment and thereafter were notified that the Planning Board carefully considered such impacts and determined no significant impacts to the environment will occur as a result of the Project and the issued a Negative Declaration on January 16, 2023; and

WHEREAS, based on the *Hoffmann* use variance standard, as well as the completeness of the application, the ZBA hereby declares that it has sufficient information before it to make a determination on the application for use variance for the Project;

NOW, THEREFORE, upon motion made by board member Palm and seconded by board member Lorenz it is and shall hereby be

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[2] For reasons set out in this resolution and supplemental materials submitted by Applicant, the standard of review for a use variance for a public utility was incorrectly applied by the County of Oswego initially, but later correctly applied resulting in its letter recommendation dated November 18, 2022 to approve the Project.

[3] Consolidated Edison Co. of New York v. Hoffmann, 43 N.Y.2d 598 (1978), the NYS Court of Appeals holding that public utilities are subject to a more lenient standard when seeking a use variance. Public utilities can demonstrate entitlement to a variance by showing that the proposed "modification is a public necessity…required to render safe and adequate service…[and]…where the intrusion or burden on the community is minimal." *Id.* at 610.

[4] See, Cipriani Energy Group Corp. v. Zoning Board of Appeals of the Town of Minetto, et al. (Index No. EFC-2022-0043), J. Gilbert, April 13, 2022.

RESOLVED, that the use variance application submitted by Oswego PV, LLC is approved as submitted for the following reasons:

1. The Project is a public utility and thus is afforded the standard of review for a use variance articulated in *Hoffmann*;
    a. By its very nature, clean energy is a public necessity as proclaimed by the State of New York in its Clean Energy Standard and further codified in the Climate Leadership and Community Protection Act; and
    b. based on the environmental review the impacts on the community are minimal; and it further

RESOLVED, that the use variance application submitted by Oswego PV, LLC is approved as submitted upon the following conditions:

1. Follow the conditions contained in any resolution by the Town of Oswego Planning Board approving the site plan and special permit[5];

2. Follow all applicable federal, state, and local laws governing the construction and use of the property as a solar farm; and

3. Present the Town of Oswego with proof that a decommission bond or fund is established for the benefit of the Town and the property owner for the removal of the solar arrays and the return of the property to its pre-solar farm condition, and such bond or fund is periodically renewed to ensure the decommissioning costs are appropriate.

The motion having been placed before the Zoning Board of Appeals for a vote was adopted/defeated by a vote of 3 in favor, 2 opposed, and 0 abstained/recused in accordance with the following roll call vote:

DEBRA SHOENFELT-JASKULA, CHAIR	YES
ROBERT BAKER	YES
KENNETH KRAPF	NO
TRICIA LORENZ	NO
COLIN PALM	YES

[5] The ZBA strongly recommends that every consideration be given to utilizing access to the solar farm from County Route 7 through the Town of Oswego Highway Garage property to minimize or eliminate vehicle safety concerns should access to the property be gained solely from County Route 20. The Town Board is encouraged to grant the applicant the necessary easement to permit access through the town's property.

CERTIFICATION

I HEREBY CERTIFY the above to be a full, true and correct copy of a Resolution duly adopted by the Zoning Board of Appeals of the Town of Oswego, on the date mentioned, in accordance with the vote recorded above.

Dated: January 23, 2023

Kathy Delaney

KATHY DELANEY
SECRETARY
ZONING BOARD OF APPEALS