DELAWARE RIVER SOLAR

VARIANCES

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What is a variance?

A variance is a request to deviate from zoning law requirements. If granted, it permits the owner to use the land in a manner not otherwise permitted by the zoning law. It is not a change in the zoning law. Instead, it is a specific waiver of requirements of the zoning law.

Variances – NY Law

The Town Law at §267-b(5); the Village Law at §7-712-B(4); and the General City Law at §81-b(5) set forth the state law authority of Zoning Boards of Appeals ("ZBA"). In general, a ZBA may reverse, affirm or modify (wholly or partly) the determination by an administrative official charged with the enforcement of a Zoning Law, and to that end, the ZBA shall have all the powers of the administrative official making the determination appealed from.

The Town, Village and City Law have similar legislative requirements. For purposes of today's presentation, our examples will be a variance in a Town governed by Town Law §267.

Variances – Solar Projects

In the context of a Solar Project, the “administrative official” making a determination which is to be appealed from is most often the Code Enforcement Official. In some towns, (Blooming Grove, Orange County), local officials require an application be made to the Planning Board and only recognize a right to appeal from a Planning Board denial.

There is a statutory authorization to “appeal” certain variances without an administrative denial. The direct path to a ZBA, while legislatively authorized, is often ignored by local governments.

Zoning Laws – A Development Guide

A zoning law is a community's guide to its future development. That is its purpose. It is not meant to be just another governmental intrusion or another bit of red tape to be untangled before the property owner can go ahead with development plans.

The protections afforded residents and property owners within the community from undesirable development come from the restrictiveness of zoning. Traditionally, zoning is characterized by pre-set regulations contained in a local law, and applied uniformly within districts. A landowner can look at the zoning map and regulations and know that if he follows them, he has a right to use his land in a certain way, and that neighboring property is subject to the same restrictions. Because all land in the district is subject to the same rules, and because no two parcels of land are precisely the same, problems can arise.

The First Zoning Law

When the first zoning ordinance in this country was passed in New York City in 1916, there was doubt that the courts would uphold its constitutionality, since it was a new and, at that time, radical system of land use control. Various "safety valves" were, therefore, included in that first ordinance, in an attempt to relieve the pressure of too rigid enforcement of the zoning ordinance and any attendant hardship, and also to attempt to ensure judicial approval of the new concept. Foremost among these “safety valves” was the concept of an administrative body that would stand as a buffer between the property owner and the court, designed "to interpret, to perfect, and to ensure the validity of zoning." That administrative body is the ZBA, referred to in the 1916 NYC Zoning as a board of adjustment.

Judicial Approval of Zoning

The concept of zoning received judicial approval early in history[1]. The "safety valve" aspect of boards of appeals was recognized by the courts of New York State as early as 1925, when a court discussed the fact that zoning regulations limit the freedom of action of an owner in dealing with his/her property and, by their very nature, raise constitutional questions as to whether an individual's rights are violated.

[1] *People v. Kerner*, 125 Misc. 526, 533 (Sup. Ct., Oneida Co., 1925.

Court Findings

In determining that zoning was a legal restriction on use of property, a court in 1925 found:

"The creation of a board of appeals, with discretionary powers to meet specific cases of hardship or specific instances of improper classification, is not to destroy zoning as a policy, but to save it. The property of citizens cannot and ought not to be placed within a strait-jacket. Not only may there be grievous injury caused by the immediate act of zoning, but time itself works changes which require adjustment. What might be reasonable today might not be reasonable tomorrow.“

The Court of Appeals, New York State's highest court, has recognized the necessity for and the value of boards of appeals as a "safety valve" to prevent the oppressive operation of zoning laws in particular instances, when the zoning restrictions are otherwise generally reasonable[2].

[2] *People v. Walsh*, 244 N.Y. 280, 290 (1927).

ZBA Creation

Town Law §267(2) provides that any Town adopting zoning must provide for the appointment of a board of appeals. This must be done in the zoning ordinance or local law itself. The appointment is not discretionary, as in the case of a planning board, but must be made by any municipality which has adopted zoning.

The statutes provide for a ZBA of three (3) or five (5) members. Under prior law, a board could have up to seven (7) members, so there are rare localities with pre-existing seven- (7) member boards.

Municipal Home Rule Law Impact

Pursuant to Section 10 of the Municipal Home Rule Law, a town, by local law, may supersede or modify any provisions of the Town Law in their application to that particular town. This means that, by local law, a town may vary the requirements set forth in the Town Law, relating to the number of members on the board of appeals and their terms of office.

ZBA Powers and Duties

The powers and duties of the ZBA are specifically set forth in the Town Law. As is usually the case in planning and zoning, however, there has been extensive litigation and judicial interpretation of these provisions. There are very few, if any, fields of law that have generated more litigation than that dealing with boards of appeals.

All ZBAs have appellate jurisdiction by state law. Appellate jurisdiction is the power to hear and decide appeals from decisions of those officials charged with the administration and enforcement of the zoning law.

The Town Law provides that boards of appeals are limited to appellate jurisdiction “unless otherwise provided”. Otherwise provided may, for example, be the grant of authority for a ZBA to issue a special permit.

Appellate Jurisdiction – In General

Appellate Jurisdiction is limited to “hearing and deciding appeals from and reviewing any order, requirement, decision, interpretation or determination made by the administrative official charged with enforcement of the local law”. In a case in which the parties to a dispute appeared before a board of appeals for its interpretation of the terms of a zoning ordinance, without having first applied for a permit, been denied the permit and then appealed the denial, the court declared the findings of the board null and void.

In other words, in the absence of an application for a building permit, in the absence of a denial of such application on the ground that the proposed use violates the Zoning Law, and in the absence of an appeal from such decision to the board of appeals, the board has no jurisdiction or power to make any ruling as to the meaning of any provision of the ordinance.

Appellate Jurisdiction – Variances

The same reasoning holds true for the issuance of a grant. Granting a variance is an appellate power. In general, a property owner cannot simply appear before the board of appeals and ask for a variance. While it is true that only the board of appeals can issue a variance, it is equally true that it cannot issue a variance except on an appeal from a decision made by the zoning enforcement officer. It is only on such appeals – and then only when the applicant can show that he meets the legal requirements for a variance – that the board of appeals can issue a variance.

Appellate Jurisdiction – Exceptions

There are narrow exceptions which apply in cases where area variances are necessary in the course of subdivision, site plan and special use permit ("SUP") applications. In such cases, the statutes allow an applicant to apply directly to the board of appeals for an area variance without having to first apply to the enforcement officer for a permit and appeal a denial.

See Town Law §274-a(3), 267-b(3) and 277-(6).

In practice, local governments routinely ignore authorized direct area variance applications. Recently, for example, the Town of Blooming Grove rejected an authorized direct appeal for a sideyard setback variance and directed DRS to apply to the Planning Board, be denied, and appeal the Planning Board denial to the ZBA.

ZBA Function

In its exercise of the appellate power, it has been held that it is not the board's function merely to decide whether the enforcement officer's action was "arbitrary and capricious." Rather, the board of appeals must conduct a *de novo* review; that is, it must review all of the facts which formed the basis of the decision appealed from and must decide the application as though it were the enforcement officer.

ZBA Powers

In this context, it becomes easier to appreciate the following words of the enabling statutes:

"The board of appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, interpretation or determination appealed from and shall make such order, requirement, decision, interpretation or determination as in its opinion ought to have been made in the matter by the administrative official charged with the enforcement of such ordinance or local law and to that end shall have all the powers of the administrative official from whose order, requirement, decision, interpretation or determination the appeal is taken."

See Town Law §267-b(1)

ZBA Limitations on the Board’s Powers

The board of appeals is an administrative body of limited jurisdiction and powers designed to function as a "safety valve" to relieve the pressure of rigid and inflexible provisions of zoning regulations.

The board of appeals serves an essential role examining those restrictions in the individual applications that are brought before it, with the power to vary these restrictions if the circumstances show the need and essential legal criteria are met.

ZBA- What It Cannot Do

To better understand the limited powers of a ZBA, we need to clarify what a ZBA cannot do. The functions of a board of appeals can be seen better if they are contrasted with the limitations on those functions.

A board of appeals is an administrative body, not a legislative body. It does not have any legislative functions.

The fact that a board of appeals does not have any legislative powers was recognized in early litigation involving the powers of the board[3]:

"No power has been conferred upon the Board of Standards and Appeals [the board of appeals in New York City] to review the legislative general rules regulating the use of land [cite]. The board does not exercise legislative powers. It may not determine what restrictions should be imposed upon property in a particular district. It may not review the legislative general rules regulating the use of land. It may not amend such general rules or change the boundaries of the districts where they are applicable. Its function is primarily administrative.“

The above decision is an excellent capsule review of the "thou shalt nots" which govern the action of a board of appeals. First, the board of appeals may not itself impose zoning. The State Comptroller observed that:

"*We are satisfied that no authority exists in the General City Law or elsewhere for the delegation of the law-making powers of a legislative body to a purely administrative board, such as a board of zoning appeals“.*[4]

[3]Levy v. Board of Standards and Appeals, 267 N.Y. 347 (1935).
[4]Op. St. Comptr. 65-770.

ZBA- What It Cannot Do (continued)

A board of appeals reviews the general rules adopted by the legislative body respecting the use of land. It has no power to set aside a zoning law on the ground that by its terms are arbitrary, unreasonable and unconstitutional.

The board of appeals does not have the authority to amend the zoning regulations or change the boundaries of the districts where they are applicable.

The distinction between the power possessed by a board of appeals to grant variances, and the power to amend a zoning law, which the board of appeals clearly does not possess, may be a very fine distinction indeed.

What is a Variance

A variance is permission granted by the ZBA so that property may be used in a manner not allowed by the zoning law. It is only the zoning board of appeals that has the power to provide for such exceptions from the zoning law. Since zoning is meant to implement the municipality's development objectives and protect the health, safety and general welfare of the people, it follows that there are strict rules governing when variances may be granted.

Variances - Application

Though it is not a legislated change in zoning, a variance is essentially a change in the zoning law as it applies to a single parcel of land. It therefore applies to the land itself, and not merely to the owner who happens to have applied for it.

"*It is basic that a variance runs with the land and, 'absent a specific time limitation, it continues until properly revoked' . . .*"[5]

[5] *St. Onge v. Donovan*, 71 N.Y.2d 507, 527 N.Y.S.d 721(1988).

Use Variance Defined

A use variance is defined as:

". . . one which permits a use of land which is proscribed by the zoning regulations. Thus, a variance which permits a commercial use in a residential district, which permits a multiple dwelling in a district limited to single-family homes, or which permits an industrial use in a district limited to commercial uses, is a use variance.“[6]

Since the use variance grants permission to the owner to do what the Zoning Law prohibits, this power of the board of appeals must be exercised very carefully to avoid serious conflict with the overall zoning scheme for the community. The showing required for entitlement to a use variance is therefore intended to be a difficult one.

Town Law §267(1) provides as follows:

"*‘Use variance’ shall mean the authorization by the zoning board of appeals for the use of land for a purpose which is otherwise not allowed or is prohibited by the applicable zoning regulations*."

[6]Salkin, New York Zoning Law and Practice, 4th Ed., §27.08.

Otto v. Steinhilber

In 1939, the landmark case of *Otto v. Steinhilber*[7], was decided, and laid down specific rules governing the finding of unnecessary hardship in the granting of use variances. In that case, the owner of a parcel of property which was located in both a residential and commercial zone applied for a variance enabling him to use the entire parcel for a skating rink.

The lower court upheld the granting of the use variance, which ruling was affirmed by the Appellate Division. The Court of Appeals reversed these holdings and in doing so, set forth the definitive use variance rules that are still followed today.

[7]*Otto v. Steinhilber*, 282 N.Y. 71 (1939).

Otto v. Steinhilber (continued)

The court found that the object of a use variance in favor of property owners suffering unnecessary hardship in the operation of a zoning law ". . . is to afford relief to an individual property owner laboring under restrictions to which no valid general objection may be made.“

“*Before the Board may exercise its discretion and grant a variance upon the ground of unnecessary hardship, the record must show that (1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the essential character of the locality.*“

These rules have since become known by land use practitioners as the "*Otto*" rules for granting a use variance.

Otto v. Steinhilber (continued)

Town Law §267-b(2)(b) essentially codify the *Otto* rules, and those of cases following *Otto*, specifically regarding the issuance of use variances:

"(b) No such use variance shall be granted by a board of appeals without a showing by the applicant that applicable 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."

Unnecessary Hardship

The Town Law defines unnecessary hardship using the three criteria established in the *Otto* case, as they have been refined by court decisions over the years. A fourth requirement is based upon court decisions after the *Otto* case, which held that a use variance cannot be granted where the unnecessary hardship was created by the applicant.

Reasonable Return

Town Law §267-b(2)(b) provides that the first test for the issuance of a use variance is that the applicant must demonstrate to the board of appeals that:

"*the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence*."

The salient inquiry is whether the uses allowed by the zoning law are capable of yielding a reasonable return. An applicant must prove that he or she cannot realize a reasonable return from each of the uses permitted in the zoning district.

Reasonable Return (continued)

It has been held that only by actual "dollars and cents proof" can lack of reasonable return be shown.

"A mere showing of present loss is not enough. In order to establish a lack of `reasonable return', the applicant must demonstrate that the return from the property would not be reasonable for each and every permitted use under the ordinance. Moreover, an applicant can sustain his burden of proving lack of reasonable return, from permitted uses only by 'dollars and cents proof'. . ."[8]

[8]Everhart v. Johnston, 30 A.D.2d 608 (3rd Dept., 1968).

Unique Circumstances

The second test that an applicant for a use variance must adhere to under the Town Law is that the property's plight is due to unique circumstances and not to general neighborhood conditions. Town Law §267-b(2)(b) provides that an applicant must demonstrate to the board: "*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*."

"*Difficulties or hardships shared with others go to the reasonableness of the ordinance generally and will not support a variance relating to one parcel upon the ground of hardship*."

Unique Circumstances (continued)

"Uniqueness does not require that only the parcel of land in question and none other be affected by the condition which creates the hardship... What is required is that the hardship condition be not so generally applicable throughout the district as to require the conclusion that if all parcels similarly situated are granted variances the zoning of the district would be materially changed. ..."[9]

The uniqueness relates, therefore, to the hardship, which in turn relates to the land, and not to the personal circumstances of the owner.

[9]*Douglaston Civic Association, Inc. v. Klein*, 51 N.Y.2d 963 (1980).

Essential Character

The third test that must be met pursuant to Town Law §267-b(2)(b) before a use variance may properly be granted, is that:

"*the requested use variance, if granted, will not alter the essential character of the neighborhood*."

Because one of the basic purposes of zoning is to adopt reasonable regulations in accordance with a comprehensive plan, it follows that changes which would disrupt or alter the character of a neighborhood, or a district, would be at odds with the very purpose of the zoning regulation itself.

One court has held that the applicant will fail this third test if it is shown that the proposed project would "stimulate a process which in time would completely divert . . .[the neighborhood's] . . . complexion." In other words, the proposed project need not in and of itself alter the character of the neighborhood if it is shown that the project would set a pattern for future development that would, in time, alter the neighborhood's character.

Self-Created Hardship

While it was not a factor established by the *Otto* decision, the self-created hardship rule has now been codified in Town Law §267-b(2)(b).

It is well settled that a use variance cannot be granted where the "unnecessary hardship" complained of has been created by the applicant, or where she/he acquired the property knowing of the existence of the condition she/he now complains of.

The Court of Appeals noted that the property in question was purchased to be used as a funeral home in a district where such use was not permitted. The court observed that:

"*Nevertheless . . .[the owner] . . . purchased the lot, then applied for a variance. We could end this opinion at this point by saying that one who thus knowingly acquires land for a prohibited use, cannot thereafter have a variance on the ground of `special hardship' . . .*"[10]

[10]*Clark v. Board of Zoning Appeals*, 301 N.Y. 86 (1950).

Contract Vendee

A contract vendee – i.e., a person who enters into an agreement with the owner to purchase a property contingent on the grant of a variance – is a legitimate “person aggrieved”. Since the contract vendee has yet to purchase the property, he/she cannot be said to present a self-created hardship, but the contract vendee must rely on the circumstances of the owner with whom he/she has a contract in order to prove a variance is warranted.

Area Variances Defined

Town Law §267(1)(b) defines an area variance as follows:

"*'Area variance' shall mean the authorization by the zoning board of appeals for the use of land in a manner which is not allowed by the dimensional or physical requirements of the applicable zoning regulations*."

Area variances are thus, as a practical matter, distinguished from use variances in that a use variance applies to the use to which a parcel of land or a structure thereon is put, and an area variance applies to the parcel itself.

Practical Difficulties – Pre and Post 1992

Prior to a July 1, 1992 amendment to the Town Law, the standard for the issuance of all area variances was that of "practical difficulty." This term had appeared in the statute for many years and had been interpreted by the courts in a great number of cases significant to its understanding. Since July 1, 1992, the Town Law no longer employs “practical difficulty” as the standard for granting an area variance.

Town Law §267-b(3), adopted in 1992, sets forth today’s rules for the granting of area variances. The rules provide that in making a ZBA’s determination on an application for an area variance, the ZBA must balance the benefit to be realized by the applicant against the potential detriment to the health, safety and general welfare of the neighborhood or community if the variance were to be granted.

The Five Factors

In balancing the benefit to the applicant VS the detriment to the community, the board of appeals must consider the following five factors:

1. 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.

2. Whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance.

3. Whether the requested area variance is substantial.

4. Whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district.

5. Whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals but shall not necessarily preclude the granting of the area variance.

1 Undesirable Change in the Neighborhood

The board must consider whether the dimensional alteration being proposed will result in a structure or a configuration that will be seriously out of place in the neighborhood.

2

Alternative to Variance

The board should consider alternatives open to the applicant that are lawful under the Town and Zoning Law. Perhaps, for example, a proposed addition can be constructed in a different location on the property, where a variance would not be needed. Or, as one court recently observed, the applicant should have at least explored the possibility, of either acquiring adjoining vacant property, or of selling his substandard unimproved lot to an adjoining neighbor.

3

Substantiality

It is difficult to quantify "substantiality." The board should, however, make a reasoned judgment as to whether the nonconformity being proposed is too great, as compared to the lawful dimensions allowed by the zoning law. Some courts have looked favorably upon a board's application of a simple mathematical analysis. "A variance to reduce a required side yard by fifteen (15%) percent might be reasonable but a reduction by eighty-five (85%) percent of the required side yard may create unjustifiable nonconformity."

4 Impact on the Environment

The board of appeals should weigh the proposal's potential impact on the environment. Such factors as drainage, traffic circulation, dust, noise, odor, and impact on emergency services, among others, should be considered.

5

Self-Created Difficulty

The most important point to be made here is that self-created difficulty, as it relates to an area variance application, is not the same as self-created hardship, as set forth above with respect to the use variance. Even if present, self-created difficulty constitutes only one factor to be considered by the board of appeals; it does not, in and of itself, act as a bar to the grant of an area variance like a self-created hardship prevents grant of a use variance.

Minimum Variance Necessary

When granting either a use or an area variance, a ZBA must grant the minimum variance that it deems necessary and adequate, while at the same time preserving and protecting the character of the neighborhood and the health, safety and welfare of the community. Thus, the board need not grant to an applicant everything he/she has asked for. Rather, the board is required to grant only the approval that is necessary to afford relief.

Conditions

Town Law §267-b(4) empowers the board of appeals, when granting a use or area variance, to impose "such reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property."

A common condition to the grant of a use variance is that prior to issuance of a building permit, site plan review take place or that a Special Use Permit be issued, or both.

Conditions vs. Alternatives

Conditions are different from alternatives. While an alternative is a different version of relief – or, perhaps, a way to avoid the need for relief – conditions are instead requirements placed on the enjoyment of the relief that the ZBA actually grants. Conditions are meant to mitigate the impacts of the approved project on both the neighborhood and on the integrity of the zoning law.

Procedure by and before the Board

Procedure is immensely important in the administration and enforcement of the community's zoning law. Procedural requisites should ensure evenhandedness and due process for all parties.

Failure to strictly adhere to procedural requirements imposed by the Town Law or a local zoning law will put at risk any grant of a variance by the ZBA.

Proper Applicants for a Variance

ZBAs are provided with appellate jurisdiction by state statute. This, of course, envisions appeals to the board from decisions of the administrative official charged with enforcement of the zoning.

The town law limits ZBA’s to appellate jurisdiction "unless otherwise provided by local law or ordinance." Variances must always be a request for appellate relief.

The right to appeal to the board of appeals does not extend to everyone. It is necessary to understand the concept of a "person aggrieved“, a person who has sufficient standing to be able to properly appeal to the board.

Refusal to Make a Decision

If no decision had been made by the building inspector, a ZBA has no right to hear and decide any appeal. Without a decision, the appropriate remedy for someone who seeks a decision would be an Article 78 mandamus proceeding against the building inspector, and not an appeal to the zoning board of appeals.

A failure to render a decision was recently the result of an application made for a variance in the Town of Fenton, Broome County. Instead of placing the matter on the ZBA agenda, the Town Attorney returned the application and application fee, leaving DRS without a practical remedy.

The Landowner and Long-Term Lessee

A landowner is a party entitled to appeal to a ZBA if his/her land is substantially affected. This would include the owner of land whose own application for a permit has been denied since his/her interest is direct. **There is also authority for extension of the owner's rights to a lessee under a long-term lease.**

Typically, a solar Project Company seeking a variance is a tenant under a long-term lease and as such is a party entitled to appeal to the ZBA.

Contract Vendee

An applicant for a variance under a contract with the owner of the land under which the prospective purchaser would be obligated to purchase only if the variance were granted is a person aggrieved. The court held (1) that the contract vendee (buyer) under a conditional sales contract was a person aggrieved for purposes of appealing to the zoning board of appeals for a variance, and (2) the owner of the land -- the vendor (seller) under the same contract -- was a person aggrieved for purposes of appealing from the board of appeals decision to the court.

Any contract to purchase land for development of a solar project which requires a variance should include a grant of authority to the contract vendee to apply for necessary variances.

How to Appeal - Timing

Town Law §267-a(5) requires all determinations of the zoning enforcement officer (or a planning board) to be filed in his, her or its office within five (5) business days of the day it is rendered. Town Law §267-a(5) requires that any appeal to the ZBA must be taken within sixty (60) days after the filing of the determination.

How to Appeal - Forms

Many municipalities supply forms to those who wish to apply for a variance. Properly crafted, such forms can serve to guide the applicant to state clearly what it is she/he wants. An applicant need not use the official forms for his/her appeal, as long as the object of the request are communicated to the local officials.

How to Appeal – Comprehensive Cover Letter

It is a best practice to draft a comprehensive cover letter to the ZBA enclosing the application, supporting materials, and outlining the facts which support the variance request.

Letters drafted on DRS's behalf enclosing applications to ZBA's for variances are included in the materials provided.

There is no better time to set forth the facts supporting the grant of a variance than in the first communication to the ZBA.

Referral to Planning Agency

The ZBA may be required to refer certain matters for recommendation before making a decision.

Section 239-m of the General Municipal Law requires that a Town located in a County which has a county planning agency, shall – before taking such action – refer the application to the County planning agency. Town Law section 267-a(10) requires that such referral must occur at least five (5) days prior to the board of appeals' public hearing on the proposed action.

The matters covered by this section include any variance lying within a distance of five hundred (500') feet of a Town boundary or from the boundary of any existing or proposed County or state park, or from the right-of-way of any existing or proposed County or state parkway or thruway, expressway or highway, or (except for area variances) from the boundary of a farm operation located in an agricultural district, as defined by Article 25-AA of the Agriculture and Markets Law.

Referral Mandatory
Timing of Recommendation

The referral requirement is mandatory. Courts have held that a ZBA's failure to follow the mandates of Section 239-m creates a jurisdictional defect, because its provisions are a pre-condition to acquiring jurisdiction. The board's failure to follow referral mandates, therefore, renders its decision void.

The County or regional planning agency has thirty (30) days to report its recommendation. In the event the planning agency fails to do so, the board of appeals may act without such a report.

Basis for Review; Local Determination Impacts of Recommendations

The County review by the planning agency is limited to a determination if the proposed action is likely to create intercommunity or community-wide implications. Absent these determinations, the County planning agency may respond that the action is a matter of local determination only and not make a recommendation.

If the County planning agency recommends approval, a majority vote of a quorum of members present at a meeting must vote on the application.

If the County planning agency recommends disapproval or modification, the board of appeals can only act contrary to the recommendation by a vote of a majority plus one of all of its members (not merely of members present) and after the adoption of a resolution fully setting forth the reasons for the contrary action. Failure to comply with the voting requirements in Section 239-m renders the local decision invalid.

Environmental Quality Review
Lead Agency

Any appeal to a board of appeals will require a decision that constitutes an “exercise of discretion” by the board, thereby invoking application of the State Environmental Quality Review Act, better known as “SEQRA”.

Very often in the context of an area variance, a site plan or special permit application will be made to a Town Board or Planning Board and a board other than the ZBA will be the Lead Agency for purposes of SEQRA review.

If the ZBA is the Lead Agency, the first SEQRA decision is classification of the matter as a Type I, Type II or Unlisted Action under SEQRA.

Type II Actions

Some classification decisions are guided by a list of Type II Actions, which have already been determined not to have a significant adverse impact on the environment. If the board finds that the matter is Type II, it should document that finding, whereupon its SEQRA function is complete.

It should be noted that certain applications for a variance that commonly come before a board of appeals are listed as Type II. Among these are the granting of all setback and lot-line variances.

A use variance will always be either a Type I or Unlisted Action, thus requiring the board of appeals to make a “Determination of Significance”.

Use Variances – Criteria Overlap

With respect to use variance applications, there is an overlap between the statutory criteria for granting the variance, on the one hand, and the criteria under Part 617 for determining whether to require an environmental impact statement ("EIS"). To be granted a use variance, the applicant must show, among other factors, that the variance, if granted, will not alter the essential character of the neighborhood.

Closely akin, SEQRA requires the board (if lead agency) to consider community character and aesthetics in making its Determination of Significance. Even where the board decides not to require an EIS – it issues a "negative declaration" – it must apply the same factors in its later review of the merits of the application.

Redundant SEQRA Reviews

Another practical problem is the potential for redundant SEQRA reviews where, once a use variance is granted, the ZBA, Planning Board or Town Board must also issue a Special Use Permit. This subsequent Special Use Permit review often requires SEQRA review in itself. This may result in needless repetition of the same SEQRA issues that were addressed during the variance application. To avoid such repetition, the lead agency should perform SEQRA review of the entire potential project at an initial stage, and then apply the determination from that review to any subsequent permits or approvals that are necessary.

Time and Notice for Hearing

The Town Law requires a hearing before the ZBA may grant a variance. Local Zoning Law may have requirements in addition to those in the Town Law.

The ZBA must fix "a reasonable time" for the hearing. This means that after an appeal is taken to the board, the board of appeals must fix a date in the reasonable future for the required hearing. In the case of Blum v. Zoning Board of Appeals[11], this statutory requirement was held to mean that the board of appeals as a body must fix the hearing date. Because no formal action of the board set the date for the hearing, the variance which was granted was invalidated. The courts will construe this requirement strictly. The board should adopt a formal resolution fixing the date for the hearing on any matter coming before it.

The notice of the public hearing must be timely, clear and directed to the proper persons.

[11] *Blum v. Zoning Board of Appeals*, 1 Misc.2d 668 (Sup. Ct., Nassau Co., 1956).

Who to Notice & When

The Town Law requires at least five (5) days' notice of the public hearing to be provided to the parties; to the county or regional planning agency pursuant to General Municipal Law, Section 239-m; and to the regional state park commission having jurisdiction over any state park or parkway within five hundred (500’) feet of the property affected by the appeal.

Many Local Zoning Laws also require notice of the public hearing to be mailed to property owners within a fixed distance of the property subject to the variance application (five hundred (500’) feet is typical).

Use Variances near Town Boundary

When holding a hearing on the granting of a use variance on property that is within five hundred (500’) feet of an adjacent municipality, notice of the public hearing must be sent to the clerk of the adjacent municipality at least ten (10) days prior to the hearing. The notice may be given by mail or by electronic transmission. Representatives from the adjacent municipality may appear at the hearing and have a right to be heard.

Publication; Posting; Signs

Publication of notice is also required, in a newspaper of general circulation at least five (5) days before the hearing. See Town Law §267-a(7).

Local Zoning Laws often provide for a greater period of time between publication and the hearing.

Local Zoning Laws may require posting of the notice of the public hearing on the Town's bulletin board or other conspicuous public place.

Some Local Zoning Laws require a sign be placed on the property subject to a variance application. The practical value of a small sign on a large property in a rural area is of questionable value.

Strict Interpretation; Local Rules

The requirements of the town law are often accompanied by similar or more strict notice requirements in a Local Zoning Law. In all situations, both should be reviewed and the more onerous should be observed.

Courts are strict about interpreting notice requirements.

A failure to publish a notice, post a notice, erect a sign, notify a nearby property owner, or otherwise strictly comply with notice requirements is jurisdictional so any action taken by the ZBA can be easily set aside if notice requirements are not followed.

Contents of Notice

What should the notice of the hearing say? While there is no statutory form, the notice should be clear and unambiguous enough so that the general public will know what property is affected by the proposed variance of what relief has been requested, and what the nature of the hearing will be. Obviously, the notice must also state time and place for the hearing.

It is preferable to get the form of notice reviewed by the ZBA chairperson or attorney if the notice is being handled by the applicant. Conversely, the applicant should request the opportunity to review the notice if the ZBA Clerk is handling the notice of the public hearing. Any deviation will render the decision of the ZBA invalid.

Purpose of the Hearing
Evidence on the Record

The purpose of the hearing is to determine the facts involved in the application. Variances may be granted only if facts are in the record showing the criteria for the grant of an area or use variance exist. The purpose of the hearing is to determine whether the applicant is entitled to what he or she is asking for.

While courts generally approve informal hearings, a court will not approve a conclusion or a decision for which no evidence appears on a record. Without a proper record and evidence to support a ZBA determination, courts will order a new hearing. The court may very well use words such as "arbitrary" and "capricious" to describe the faulty board's action being appealed. The important point to remember is that the hearing should concern itself with evidence. This is because courts must have enough information before them to make a reasoned determination in case of decisions of the ZBA challenged in the courts.

Local Knowledge; Personal Inspections

What about personal knowledge of the community? ZBA members are usually people who know the community well, and thus cannot act as independent and detached from local knowledge. Several decisions have held that it is permissible to rely on personal knowledge as "evidence" to support a board decision, but it must be memorialized as part of the record. The same rule applies to personal inspections of the premises by board members; a personal inspection is perfectly acceptable, but if something learned at such an inspection is relied upon, it should be documented in the record.

Recommendations

Planning Board, or Town Board information, reports and recommendations may also be considered by the ZBA. A practical matter, they should be evidence of some importance, but they are not determinative. The board of appeals is not bound to follow advice it may receive from a Planning Board or Town Board expressing an opinion on the grant or denial of a variance application. If no recommendations are made by the Planning Board, or the Town Board opposes the grant of a variance the record should contain findings supporting a decision by the ZBA that ignores the input of other local boards.

Cross Examination of Witnesses

Cross-examination of witnesses at board of appeals hearings may be done by the board itself, and the applicants also has this right. The nature of a board of appeals hearing is such that the right to cross-examination should be limited to relevant points and by persons with an interest in the pending application.

The cross-examination by the applicant of an expert witness hired by an opponent of the grant of a variance by the ZBA is perfectly reasonable.

The cross-examination of the applicant by a competitor with no local interest in the application would be improper.

Open Meeting Law

The board of appeals is a “quasi-judicial body”. The ZBA is subject to the state’s Open Meetings Law. All meetings of the board of appeals must be open to the public. This requirement of openness will almost always include all of the board’s discussions, deliberations and votes. See Town Law §267-a(1).

No evidence should be received, no witnesses heard, no discussions held, and no decision made except at a meeting open to the public.

Affidavit in Support – A Best Practice

It is a best practice to submit a sworn affidavit in support of a variance.

Each of the criteria to be “proven” by an applicant for an area or use variance should be supported by fact evidence presented to the ZBA in writing.

Often minutes of ZBA meetings are summary in form. A verbatim transcript is not required. Evidence presented by oral testimony onlymay not be set forth in the record. Providing evidentiary proof supporting each criteria for granting a variance can’t be lost, if presented in affidavit form and will be part of the record.

The Decision

The board has sixty-two (62) days from the conclusion of the hearing on the matter to render its decision. This period may, however, be extended by mutual consent of the applicant and the board of appeals.

From a practical standpoint, absent a belief the ZBA is somehow acting in bad faith, it is far better to agree to a reasonable extension than to force a vote likely to result in a denial of the variance.

Basis and Form of Decision

The facts which form the basis of the board of appeals' decision are found in the criteria, discussed above, for the grant of use or area variances.

However the board arrives at its decision, the decision itself must be supported by findings which constitute "substantial evidence." In other words, findings of fact and/or testimony must be placed on the record which adequately support the decision. Each and every board of appeals' decision is a potential lawsuit. Board of appeals actions are one of the most litigated fields of law.

Every decision of the ZBA should be carefully drafted to reference evidence in the record that supports each required criteria supporting the grant of a variance. The attorney assisting DRS with a variance should prepare a draft of the decision to submit to the ZBA or its legal counsel. If a decision on a variance application is drafted by the ZBA or its legal counsel, DRS should request the opportunity to review the decision in advance of the board's vote on the decision.

Substantial Evidence

There are many cases in which the decision of a ZBA was remanded by a court back to the board of appeals for a redetermination because of an inadequate record; or, even where an adequate record of evidence existed, because there was no findings of fact which supported the final decision.[12]

The decision must:

- be in writing;

-reference evidence in the record supporting the grant of the variance; and

- contain findings of fact related to the evidence in the record.

A decision not meeting these standards is an invitation to potential opponents of a variance to bring a proceeding challenging the ZBA's decision.

[12]*Gill v. O'Neil*, 21 A.D.2d 718 (3rd Dept., 1964).

Findings

Findings must explicitly set forth the reasons for the decision. A mere restatement of the statutory requirements will not constitute sufficient findings.

A court decision reversing the grant of an area variance to reduce required parking spaces provided:

"Findings of fact which show the actual grounds of a decision are necessary for an intelligent judicial review of a quasi-judicial or administrative determination . . . There is nothing in the record upon which to base a determination that adequate and existing parking areas are available…".[13]

[13] *Gilbert v. Stevens*, 284 A.D. 1016 (3rd Dept., 1954).

Amending a Failed Motion

What if the board, upon conclusion of the original hearing of an appeal, conducts a vote that fails to result in a majority in favor of granting the applicant the relief requested? This results in a default denial. The Town Law provides that the board may amend the failed motion and vote on an amendment, within the sixty-two- (62) day period after the close of the public hearing. This will not require the board to follow the statutory rehearing process, described below.

It is, therefore, important for DRS to push a ZBA to revote soon after a denial (or default denial) since an amended resolution requires only a majority vote, vs. an unanimous vote upon rehearing.

Rehearing

Town Law §267-a(12) provides for the rehearing of a matter upon which the board of appeals has previously made a decision. The rehearing may only occur following the unanimous vote of those members present to conduct the rehearing. Where such a unanimous vote occurs, the board would then rehear the case in its entirety and make a new decision. In order to change its original decision, another unanimous vote of those members then present is required. In addition (and regardless of a unanimous concurring vote), no new decision of the board may be made if the board finds that it would prejudice the rights of any persons who acted in good faith reliance on the original decision.

Filing the Decision

The Town Law and all Local Zoning Laws provide that every rule and every decision or determination of the board shall be filed in the office of the Town Clerk within five (5) business days after the day it is rendered. These filing requirements are of importance as a practical matter, because the thirty (30) day period to appeal a board of appeals decision to the courts under CPLR Article 78 begins to run from the date of the filing of the board's decision.

Public Utilities

A public utility would rarely meet the criteria for granting a variance under the Town Law standards. Public Utility structures are rarely contemplated by local zoning. In the context of a use variance, dollars and cents proof that a parcel of land cannot be used for any permitted use is impractical. Proving the alleged hardship is not self-created would be impossible if the use was construction of a Community Solar Project.

The Court of Appeals (NY's highest court) established an alternative standard to be applied when a public utility seeks a variance.

Con Ed vs. Hoffman

The *Hoffman* case[14] involved a proposed addition of a 565-foot tall wet cooling tower at the Indian Point nuclear plant operated by Consolidated Edison ("Con Ed") to mitigate negative environmental impacts on the Hudson River from the plants existing cooling system.

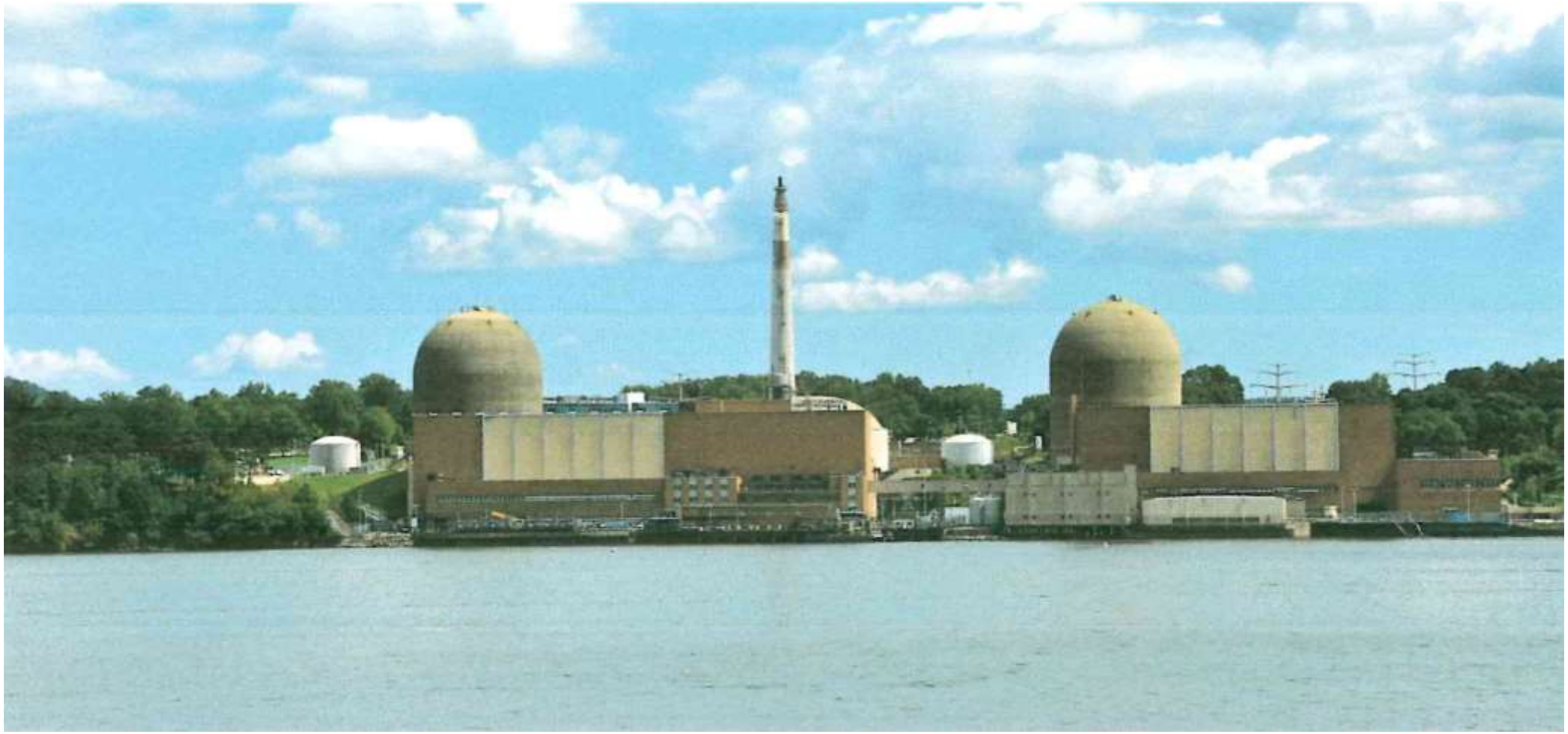
After Con Ed's building permit application was denied 1) on the grounds that the tower exceeded the 40-foot building height limit in the zoning district and 2) the cooling tower was a prohibited use, Con Ed sought a variance from the Village of Buchanan Zoning Board of Appeals ("Buchanan ZBA"). The Buchanan 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.

[14]Matter of Consolidated Edison Co. of N.Y. v. Hoffman 43 N.Y.2d 598 (1978)

Con Ed vs. Hoffman (continued)

The underlying variance request by Con Ed was for both an area and use variance. The height of the proposed cooling tower exceeded the 40-foot height limitation in the zoning district, which led to the area variance request. The Village of Buchanan Zoning ordinance prohibited any use emitting a visible vapor plume extending beyond the boundary of the subject site. The Zoning ordinance also prohibited offsite impacts and the proposed cooling method by the proposed tower would result in a saline deposit beyond the nuclear plant site boundaries . The visible plume and saline deposit were the reason for the use variances requested.

Con Ed vs. Hoffman (continued)



Con Ed vs. Hoffman (continued)

This permit denial was challenged and made its way to the Court of Appeals. The Court of Appeals determined that although the traditional approach is to require an applicant for a variance to demonstrate unnecessary hardship, such a showing is "not appropriate where a public utility such as Con Ed 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."

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". And, "where the intrusion or burden on the community is minimal", the Court of Appeals determined that the requisite showing of lack of local impact "should be correspondingly reduced."

Is Community Solar a Public Utility

Since the *Hoffman* case, application of the alternative variance 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*[15],There, the Court of Appeals defined “public utility” as:

“*‘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.*"

[15]*Cellular Tel Co v. Rosenberg*, 82 N.Y. 2nd 364 (1993)

Is Community Solar a Public Utility (continued)

This much broader definition of public utility 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.

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).

Is Community Solar a Public Utility (continued)

Zoning Boards of Appeal have 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 variance); *see* Town of Oswego Zoning Bd. Appeals Resolution, dated Jan. 19, 2023 ("The Applicant … further addressed the applicable 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 Towns of Minetto … the Project is a public utility and thus is afforded the standard of review for a [] variance articulated in *Hoffman*[] „„

The Utility Standard – Public Necessity

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[.]".

As former U.S. Secretary of Energy Hazel O'Leary said, "electricity is just another commodity in the same way that oxygen is just another gas."

Community Solar projects are subject to "regulation and supervision" by the Public Service Commission ("PSC") because the project 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).

Every community solar project is 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.

The Utility Standard – Public Necessity (continued)

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."

Additionally, 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.

The Utility Standard – Lack of Properly Zoned Alternative Sites

It is beneficial for an applicant for a use variance under the public utility standard to show there are no viable sites on which to develop a community solar facility in the municipality that are properly zoned for such a use.

Hoffman does not require a showing that other properly zoned, developable, and available sites are not present in a Town. This additional information provides additional support of the necessity to grant a use variance to the property subject to the application including information showing a lack of alternatives make it easier for the ZBA to say “yes”.

Presenting information on site selection is helpful and the following factors should be considered.

Size of a Parcel

The size of a site must be of a scale to accommodate a project. There is a practical minimum size below which a Community Solar Project is not economically feasible. All parcels below the minimum required parcel size to accommodate a financially feasible project can be eliminated from consideration.

Parcel Constraints

Any site large enough to accommodate a Community Solar Project must be further studied to determine if environmental constraints are present. Topography, wetlands, depth to bedrock and presence of threatened or endangered species may all hinder development. Any site with material constraints preventing development should be eliminated from consideration.

Proximity to 3-Phase Powerline

The site must be located adjacent to or near existing utility infrastructure, namely 3-Phase distribution circuit, where the project can interconnect to the utility grid. The circuit must have conductors (wires) large enough to accept locally generated power and be without defects that would cause voltage or thermal violations. At nearly all project sites, the Point of Interconnection ("POI") is an existing pole on an existing 3-Phase circuit.

Any site not located adjacent to or near a 3-Phase circuit should be eliminated from consideration.

Substation Capacity

The circuit with the POI must be fed from (connected to) a substation that has a transformer with open capacity. The substation must also be viable for receiving locally generated power without overburdening other equipment at the substation or on the circuit.

Cost estimates for utility infrastructure upgrades should be made and any site located where upgrade costs exceed the level for a project to be economically feasible should be eliminated from consideration.

Finding suitable land with available interconnection capacity is often the most challenging aspect of siting a Solar Project. Capacity is scarce and the utility infrastructure upgrade costs are often prohibitive.

A Willing Property Owner

After eliminating all sites that are too small, are overly burdened by constraints, are not located on or near a viable circuit fed by a substation with capacity available, an analysis of remaining sites (if any) should be conducted to determine if the owner of the properties is interested in selling or leasing the land. If land is not available to be purchased or leased, the site can be eliminated from consideration.

Zoning Law Analysis

Once one or more sites are identified as possible development locations, the local zoning should be reviewed. If there are no or few identified sites zoned for public utility uses or development of a Community Solar Project (or if these uses are not permitted in the Town), then the identified site is a good candidate for application of a use variance relying on the Public Utility Standard.

Local Benefits

While not a *Hoffman* requirement, a properly crafted variance application should also outline the benefits that a Community Solar Project will bring to the local community.

These include local revenue to the County/Town and school district by either taxes or payments in lieu of taxation. Another local benefit is reduced electric costs to local residents and small businesses. A Community Solar Project allows local residents and small businesses the option to “purchase” the electricity generated from the project at a discount to default utility rates. Customers would receive electricity from the transmission utility 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 Town.

Including benefit information also makes it easier for the ZBA to grant the variance.

Lack of Community Burden

In most situations, a Community Solar Project will create little or no burden on the community. As noted in *Hoffman* where a proposed project provides a necessary utility (electricity), the showing of lack of burden on the community is reduced.

The support for the variance application should highlight that the Project will be a safe, quiet, clean generator of electricity, with zero emissions, fumes, or odors, no traffic impacts after construction, and little to no noise above background levels.

All of the foregoing should be captured in the enclosure letter to the ZBA enclosing the application and supporting materials.

Reference Material

1. Town Law 267-b
2. Matter of Otto v. Steinhilber
3. Matter of Con Ed Co. of NY v. Hoffman
4. Matter of Delaware River Solar v. Aurora Town Zoning Board of Appeals
5. Neversink Enclosure Letter
6. Blooming Grove Enclosure Letter

ENDNOTES

1 *People v. Kerner*, 125 Misc. 526, 533 (Sup. Ct., Oneida Co., 1925.

2 *People v. Walsh*, 224 N.Y. 280, 290 (1927).

3 Levy v. Board of Standards and Appeals, 267 N.Y. 347 (1935).

4 Op. St. Comptr. 65-770.

5 See *St. Onge v. Donovan*, 71 N.Y.2d 507, 527 N.Y.S.d 721(1988).

6 Salkin, New York Zoning Law and Practice, 4th Ed., §27.08.

7 Otto c. Steinhilber, 282 N.Y. 71 (1939).

8 Everhart v. Johnston, 30 A.D.2d 608 (3rd Dept., 1968).

9 *Douglaston Civic Association, Inc. v. Klein*, 51 N.Y.2d 963 (1980).

10 *Clark v. Board of Zoning Appeals*, 301 N.Y. 86 (1950).

11 *Blum v. Zoning Board of Appeals*, 1 Misc.2d 668 (Sup. Ct., Nassau Co., 1956).

12 *Cellular Tel Co v. Rosenberg*, 82 N.Y. 2nd 364 (1993).

13 *Gilbert v. Stevens*, 284 A.D. 1016 (3rd Dept., 1954).

14 Matter of Consolidated Edison Co. of N.Y. v. Hoffman 43 N.Y.2d 598 (1978

15 *Cellular Tel Co v. Rosenberg*, 82 N.Y. 2nd 364 (1993)