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September 5, 2023

Town of Neversink Zoning Board of Appeals  
Town of Neversink Town Hall  
273 Main Street  
Grahamsville, New York 12740

Re: Proposed Solar Energy Facility near Hastings Drive

To: Members of the Zoning Board of Appeals:

Our firm represents NY Neversink I, LLC ("NY Neversink I") in connection with its efforts to develop a 3.9-megawatt ("MW") AC solar energy facility ("Project") on two parcels of land near Hastings Drive in the Town of Neversink, New York ("Town"). One parcel upon which the Project is proposed is a portion of the Property owned by The Ceresnak Legacy Trust and John Ceresnak ("Ceresnak") and depicted on the Town tax map as SBL 18.-1-9.1. The second parcel upon which the Project is proposed is a portion of the property owned by Hastings Realty Holding, LLC ("Hastings Realty") and depicted on the Town tax map as SBL 26.-1-6.1. This letter is in support of two area variance applications ("Applications") submitted to the Town Zoning Board of Appeals ("ZBA") allowing the Project to deviate from the required side yard requirements provided in Town Zoning Law ("Zoning Law"). Specifically, this letter addresses the standard applicable to public utilities in New York.

The Zoning Law requires large-scale solar energy systems (defined as "Equipment that directly converts and then transfers or stores solar energy into usable forms of thermal or electrical energy. For the purposes of this chapter, a large solar energy system shall have a surface area of greater than 4,000 square feet.") be setback from property lines by at least 25 feet. Zoning Law §50-8 Schedule of District Regulations. The Project will be located on both the Ceresnak and Hastings Realty properties. Both properties will be leased to NY Neversink I. The operations term of both leases will be identical. The yard setback in the Zoning Law is intended to allow separation distance between potentially incompatible uses. Here the proposed Project is a single use proposed to be located on adjoining properties. As such, both Ceresnak and Hastings Realty seek an area variance so the Project can be most efficiently designed and construed. Because solar

energy facilities are public utilities for zoning and land use purposes, the Applications must be reviewed pursuant to the variance standard applicable to public utilities, rather than the traditional five-factor area variance test under N.Y. Town Law §267-b(3).

To minimize any potential unintended impacts, both property owners expect as a condition of the approval, the area variances only apply to the use of the properties as a solar energy facility, as the variance if granted should speak directly to the use of the property and not the owner or lessee. This would preserve the purpose behind the requirement for setbacks between parcels, should either property at any time be converted to another use. The ZBA has authority to impose reasonable conditions on a grant of a variance applicable to the use of the property. *St. Onge v. Donovan*, 71 N.Y.2d 507, 515–16 (1988) (quoting *Matter of Pearson v. Shoemaker*, 25 Misc.2d 591, 592 (Sup. Ct. 1960) (“A zoning board may, where appropriate, impose ‘reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property’, and aimed at minimizing the adverse impact to an area that might result from the grant of a variance or special permit.”)).

**The Applications must be reviewed pursuant to the variance standard applicable to public utilities.**

The New York Court of Appeals (“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 a variance. 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.

This 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 an unnecessary hardship, 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 of Appeals 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 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.’”

*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 NY Neversink I [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 variance under Town Law § 267-b for failing to apply the 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 variance); see *Town of Oswego Zoning Bd. Of 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 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 mentioned above are enclosed with this letter of support.

This Project meets each one of the *Rosenberg* factors. Firstly, the Project will be owned by NY Neversink I, an affiliate of Delaware River Solar, LLC (“DRS”)—a private solar energy company which 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.”<sup>1</sup> 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 in this way, 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.

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.

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 a project site must be at such a scale to accommodate the project, which often cannot be reduced to fit a smaller property or a single 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/distribution 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. The Ceresnak property has no practical means to connect to the electric grid other than being used for the Project which will interconnect to the electric line, which is located on a right-of-way running along the Hastings Realty property. 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. In this case, DRS began its search for an adequate project site by evaluating the capacity of the Central-Hudson Gas and Electric Corp. (“Central Hudson”) Substation network. Once it was

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<sup>1</sup> Quoted in Ralph Cavanagh, “Restructuring for Sustainability: Toward New Electric Service Industries,” *Electricity Journal* (July 1996): 71.

confirmed that Central Hudson's 13.2kV Feeder 3091 connected to Central Hudson's Neversink substation (located on Route 42 in Grahamsville) had excess capacity, DRS inquired about leasing land in the area for the purpose of a community solar facility. Very few parcels were identified, which were then further analyzed to determine if they met certain criteria tied to lot size, slopes, and the presence of wetlands, waterbodies, extensive old-growth-tree coverage and distance to a point of interconnection ("POI") and distance to the substation. DRS 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; applied the Zoning Law 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 revealed building the Project on these two properties was the best option to site the Project.

Moreover, the two properties are comprised of land, which provides sufficient area to build and maintain a large-scale solar energy facility without material viewshed impact. The Hastings Realty property is near the POI (*i.e.*, where the Project physically connects to the Central Hudson distribution power line)—a necessary piece of the puzzle where NY Neversink I will connect the Project to the grid in order to transmit the power to consumers. This proximity to the POI allows NY Neversink I to interconnect to the grid directly from the project site, without intruding on any neighboring properties. Central Hudson has verified that both the feeder and substation have enough available capacity to accommodate a project of this size. Finding suitable land with available interconnection capacity is often the most challenging aspect of sitting solar energy systems, since capacity is scarce and the costs to interconnect a solar project can be prohibitive. In the case of this Project, these criteria were met.

This unique combination of locating the Project on two properties provides an opportunity to build an economically feasible solar energy facility. The sole reason that the area variances are needed is that the Solar Law requires large-scale solar energy facilities to be setback 25 feet from boundaries. The most efficient layout of the Project requires no setback from the common property boundaries.<sup>2</sup>

The Project is a public utility use, and a request for variances for the Project is reviewed under the variance standard articulated in *Hoffman*.<sup>3</sup> 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

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<sup>2</sup> Both property owners have consented to the grant of the variances and there are no other parties of interest.

<sup>3</sup> 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.").

tax revenue (directly or through a payment in lieu of taxation agreement) while not increasing demand on Town infrastructure; (b) energy generated from the Project will be distributed to the NY ISO Central Hudson 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.

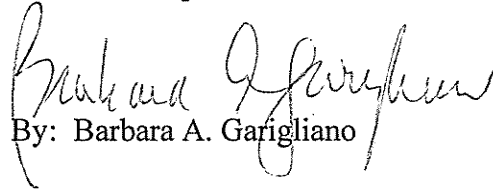
Further, as noted in *Hoffman*, where there is little to no burden on the community, the requisite showing from the utility is correspondingly reduced. The Project will not present any significant burden on the community, but will instead be a safe, quiet, clean generator of electricity. The Project is proposed to be sited in a remote area, surrounded by forest land. The Project will be bordered on all sides by a significant forested buffer limiting the view of the Project from surrounding properties. The leased portion of each property is presently undeveloped. Thus, NY Neversink I is seeking to convert 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 actually presents *net benefits* to the community. As noted above, because the Applicant is proposing a community solar project, residents and local businesses can access the electricity generated from the Project at a lower cost. They would receive electricity from the transmission utility (*i.e.*, Central Hudson) 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. 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 pollinator species to benefit a host of wildlife. Soils on site will not be materially disturbed but will instead be left fallow to build organics and other important soil components over time. 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 to the extent located on the Ceresnak property. And, pursuant to the terms of the lease, the landowner has the option to terminate the Project after its initial useful life. At such time, NY Neversink I, the Project Operator, must decommission the Project, remove all components, and restore the land to a future use deemed acceptable by the landowner and Town. This decommissioning work will be ensured by a security instrument held by the Town, in an amount deemed acceptable to the Town.

Given the facts presented above, NY Neversink I 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 required yard requirements discussed above, as it meets the variance standard for public utilities under New York law.

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 (845) 796-1010 or my colleague Michael Blustein, Esq. at (845) 291-0011.

Very truly yours,  
Blustein, Shapiro, Frank & Barone, LLP

  
By: Barbara A. Garigliano

BAG/sj  
Enc.

cc:	Keith Stryker, Code Enforcement Officer, Town of Neversink	<i>Via Email</i>
	Kenneth C. Klein, Esq., Town Attorney, Town of Neversink	<i>Via Email</i>
	Richard Winter, Chief Executive Officer, Delaware River Solar, LLC	<i>Via Email</i>
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