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ATTORNEYS

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Town of Aurora Zoning Board of Appeals
575 Oakwood Avenue
East Aurora, New York 14052

To Members of the Zoning Board of Appeals:

Re: Proposed Solar Energy Facility on Davis Road

Our firm represents Delaware River Solar, LLC ("DRS"), and its affiliates NY Aurora I, LLC and NY Aurora II, LLC (together, "Applicant"), in connection with its efforts to develop two solar energy facilities of 4.0 and 5.0 MW AC ("Projects") located at 637 Davis Road ("Property") in the Town of Aurora ("Town"). The purpose of this letter is to request a use variance from the Town of Aurora Zoning Board of Appeals ("ZBA") allowing the Project in the Agriculture and Rural Residential ("RR") Districts pursuant to the standard applicable to public utilities under New York case law.

The use variance application for the Projects must be reviewed pursuant to the use variance standard applicable to public utilities.

Section 95A-4(C) of the Code of the Town of Aurora ("Solar Law") states that utility-scale solar systems[1] are only permitted in the B1 Business ("B1"), B2 Business ("B2"), and Industrial zoning districts. As such, the Applicant is seeking a use variance. The Court of Appeals in *Consolidated Edison Co. of New York, Inc. v. Hoffman*, 43 N.Y.2d 598 (1978) held that public utilities are subject to a more lenient standard when seeking a use 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 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

[1] Utility-scale solar systems are defined as "[a]ny solar energy system that cumulatively on a lot is designed and intended to supply energy primarily into a utility grid for offsite sale or consumption." Solar Law § 95A-3. The Projects meet this definition.

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,[2] 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." *Consolidated Edison Co. of New York, Inc. v. Hoffman*, 43 N.Y.2d 598, 607 (1978). 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 lighter standards 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). There, the Court 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 use 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."); *see also Nextel Partners,*

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[2] 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. *Consolidated Edison Co. of New York, Inc. v. Hoffman*, 43 N.Y.2d 598, 607 (1978).