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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 systems¹ 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*,

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).

Inc. v. Town of Fort Ann, 1 A.D.3d 89 (3d Dep’t 2003) (“There is no question that petitioners [a telephone corporation and a network manager for a national wireless telecommunications business] are public utilities whose entitlement to a use variance is governed by the “public utility” exception articulated by the Court of Appeals[.]”).

Here, the Projects meet each one of the *Rosenberg* factors.³ Firstly, the Projects will be owned by a project entity affiliated with 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.”⁴ Second, the Projects will be regulated by the Public Service Commission (“PSC”) under the Public Service Law (“PSL”) (*see* definition of “alternate energy production facility” and “electric plant” in N.Y. Pub. Serv. Law § 2)⁵ because they will generate electricity. The Projects 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 Projects 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.”

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 utility-controlled transmission system to send and receive electricity service, and because of the ever-present demand for power, adequate

³ The Projects are also a public utility use pursuant to the plain meaning of the Zoning Code of the Town of Aurora, Erie County, and State of New York (“Zoning Code”). Section 116-4 of the Zoning Code defines “municipal or public utility structure” as “[a] facility necessary for the installation, delivery, and/or maintenance of utility services in and for the Town of Aurora.” The Projects—community solar installations that will generate electricity delivered to the grid, which members of the community may subscribe to—fit this definition.

⁴ Quoted in Ralph Cavanagh, “Restructuring for Sustainability: Toward New Electric Service Industries,” *Electricity Journal* (July 1996): 71.

⁵ PSL § 2(2-b) defines “alternate energy production facility” to include “any solar, wind turbine, fuel cell, tidal, wave energy, waste management resource recovery, refuse-derived fuel, wood burning facility, or energy storage device utilizing batteries, flow batteries, flywheels or compressed air, 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.” Further, PSL § 2(12) defines “electric plant” as all real estate, fixtures and personal property operated, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power; and any conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power, and also includes retired nuclear power reactors and their associated systems, structures, fuel and waste storage facilities, real estate, fixtures and personal property.”

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, bordering on prohibitive, 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, and finding a property owner willing to forgo other types of development for a solar installation is also challenging.

Here, the Applicant identified four areas in the Town that would currently allow utility-scale solar systems under the Town’s Solar Law (*i.e.*, because they are zoned either B1, B2, or Industrial). Three of these areas, however, do not have the necessary existing utility lines (three phase lines) near enough to reasonably interconnect the Projects without commercially unreasonable upgrades that would render the Projects economically unviable. The one remaining area consists of 23 separate tax parcels, none of which are suitable for utility-scale solar: 21 of these parcels would not be suitable due to size, configuration, or existing structures, and the remaining two parcels are heavily wooded with wetland features or are too far from existing utility infrastructure, which would severely limit design options. Thus, the 16.5-acre Property is one of the rare parcels in the Town that is perfectly suitable for solar development as it is large enough to support the Projects, is sited along a 3-Phase distribution power line with capacity, and is sufficiently close to the nearest substation. The sole issue is that utility-scale solar systems are not permitted in the RR and Agriculture Districts where the Property is located. Indeed, the current zoning limitations severely constrain the ability to develop solar in the Town, requiring a use variance application to proceed with the Projects.

As such, the Projects are a public utility use entitled to the lighter use variance standard articulated in *Hoffman*.⁶ This requires only a showing of public necessity for the Projects, needed to provide safe and adequate service. As discussed more fully below, the Projects will provide extensive public benefits: (a) the development of the Projects will generate local, county, and school tax revenue while not adding students or other demands on the local school district and Town infrastructure; (b) energy generated from the Projects will be distributed to the utilities’

⁶ Courts that have considered the question have determined that a renewable energy project is a public utility under *Hoffman* and *Rosenberg*. 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); *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.”).

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 be able to generate on their own property under an allowed residential use (*i.e.* rooftop-mounted solar). In addition, the State has put forward a policy of aggressive climate goals to reach 70 percent renewable energy by 2030 and 100 percent carbon-neutrality by 2050, and these Projects are in furtherance of those State goals.

Additionally, 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 Projects will not present any significant burden on the community, but will instead be safe, quiet, clean generators of electricity. The area consists of agricultural and low-density rural residential land. Adding a solar development to the makeup of this neighborhood will not change its overwhelmingly rural and residential character. The Property is currently vacant. It has never been developed, and as such, there are no public water or sewer facilities onsite—and no municipal water or sewer facilities will be required for the Projects—making the Property more suitable for a community solar project than agricultural or residential development. And the owner of the Property has no intention of developing it in the future for such uses, finding the opportunity to lease the land for a semi-permanent solar development the most attractive option. Further, solar developments like the Projects often blend seamlessly into agricultural/residential areas as they can be easily screened, do not impede the rural, open space feel of a neighborhood, and emit zero emissions, fumes or odors and little to no noise. Further, the landowners are not currently using the Property for agricultural purposes, however, co-agricultural practices like sheep grazing and beekeeping can be utilized during the operation of the Projects.

Additionally, the Projects actually present *benefits* to the community. As noted above, residents can subscribe to use the electricity generated from the Projects at a lower cost. They would receive electricity from the utility in the same manner as they do now, but with a discount and the added benefit of knowing its being generated from a renewable source in their own neighborhood. Additionally, the Applicant intends to seek a Payment in Lieu of Taxes (“PILOT”) agreement which provides additional tax revenue to the Town while not adding children to the local school district or burdening the Town’s fire, police, and other community services. Lastly, solar projects are semi-permanent, meaning that after their useful life of 30 to 50 years, they can be decommissioned, removed, and the land can be redeveloped. The installation and removal of the Projects impacts the future agricultural use of the land to a lesser extent than other types of commercial development. Disturbance to the land that would need to be restored upon installation and removal is generally limited to the access road and a small concrete inverter pad for equipment. The majority of the Property would contain racking to mount the solar panels, with the area under and between the solar arrays remaining as “meadows”. The racking is pile driven, creating minimal disturbance, and when removed will leave the Property in a reasonably similar state as its preconstruction condition (or in an improved state by allowing the fields time to fallow over the life of the Project).

As such, the Applicant is requesting that the ZBA find the Projects to be a public utility use and grant the use variance allowing the Projects in the RR and Agriculture Districts as they meet the use variance standard for public utilities under New York case law.

We thank you for your consideration of this letter and request. If you have any questions or concerns, please contact me at (716) 848-1261 or cmalcomb@hodgsonruss.com.

Very truly yours,



Charles W. Malcomb

CWM:arl

cc: Peter Dolgos, Senior Vice President, Delaware River Solar (*via email*)
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