

**TOWN OF SCHODACK - COUNTY OF RENSSELAER - STATE OF NEW YORK
ZONING BOARD OF APPEAL JULY 12, 2021
CALLED TO ORDER BY: CHAIRMAN CALARCO AT: 7:00 P.M.**

PRESENT

David Calarco, Chairman
Ed Brewer
Anthony Maier
Lou Spada
Craig Crist, Esq.
Nadine Fuda, Director of Planning and Zoning
Melissa Knights, Assistant to Director

MEMBERS ABSENT

Bob Loveridge

APPROVE DRAFT MINUTES - JUNE 14, 2021

Spada moved, Brewer seconded that the minutes be approved as amended.

4 Ayes. 0 Noes

Ayes: Brewer, Calarco, Maier, Spada

Oppose: None

Nadine Fuda, Director, read the hearing notice(s) as published in the Troy Record on the following variance application(s):

Green Dale Solar LLC. June 4, 2021

public hearing open 7:00 p.m.

public hearing closed 7:20 p.m.

Green Dale Solar LLC.

Z797-21/PD-1/227.-1-7

County Rte. 32

Proposed - interpretation of the Building Inspector Determination on the solar setback.

Attorney James Muscato II from Young & Summer Law Firm, was present for this meeting.

Chairman Calarco stated we adjourned this application from the last meeting to do further inquiry on the timely manner he stated we are in receipt of the letter that was sent on July 2, 2021 (See file) to the board. He asked if they would like to address that issue.

Mr. Muscato stated this is actually his application Mr. Clark works in his office and appeared on his behalf for the last meeting. he lives here in Schodack as well as the applicant Eden Renewables, he has been before the planning and town boards but never the

zoning board. The appreciated the meeting and taking the time tonight. He doesn't have anything further with respect to the time frames, he would request the opportunity to make a very brief presentation on the application but at this point does the board have any questions about the time frame or if we were beyond that issue he would like to move on.

Chairman Calarco stated this is exactly what we were concerning with the adjournment the adjournment of the last meeting was because we needed to find some sort of definitive proof as to the fact that whether that provision of general construction law did apply, nobody had an answer, Mr. Clark didn't have an answer for us, he thought he did but he had nothing to back it up. He appreciates that he put it down for the board and giving them a reference point for that.

Mr. Muscato asked if that issue has been resolved at this point is the ZBA considered the setback application timely?

Chairman Calarco stated he believes that your application did come in a timely manner. It was on the last possible day, but it made it.

Mr. Muscato actually

- At this point in the meeting Mrs. Fuda read the public hearing notice for the record.

Chairman Calarco asked Mr. Muscato for the sake of understanding a little of the demeanor of some of the board members, so this application came into the ZBA on May 17, 2021, on May 17, 2021 the application came in at night, went before the planning board for what he believes further site plan refinement. Then the applicant went before the town board on May 27, 2021 to get final PD (Planned Development) creation for a PD zone. Using the site plan that was on file with the planning board and that site plan contained the 200-foot setback as required in the utility solar law. First thing as you know in 267A-6 of NYS town law that's the part that says (Stay upon appeal) he read only the first sentence; I supplied the entire law. (See Below) *An appeal shall stay all proceedings in furtherance of the action appealed from (see below for the law)* his first question is why did the applicant not honor the stay that is required by law when you make an appeal before a ZBA.

**** 267-A #6 Stay upon appeal. An appeal shall stay all proceedings in furtherance of the action appealed from, unless the administrative official charged with the enforcement of such ordinance or local law, from whom the appeal is taken, certifies to the board of appeals, after the notice of appeal shall have been filed with the administrative official, that by reason of facts stated in the certificate a stay, would, in his or her opinion, cause imminent peril to life or property, in which case proceedings shall not be stayed otherwise than by a restraining order*

which may be granted by the board of appeals or by a court of record on application, on notice to the administrative official from whom the appeal is taken and on due cause shown.

Mr. Muscato stated with all due respect he doesn't know what the chairman is talking about. The planning board and the town board are fully authorized either pursuant to a stay or otherwise to proceed on an application that is in front of them. That is not in front of this body, so he is not certain why you are asking the applicant ask the planning board and the town board. He is sure they would be able to answer the question.

Chairman Calarco stated to Attorney Muscato that he has a very different interpretation of that law, cause the case law.

Mr. Muscato stated so back to interpretation of laws again and we just had a whole discussion about the construction law and the timeliness of this application, so he is really hoping that they are going to talk about the interpretation of a state provision that is not even applicable to this body.

Chairman Calarco stated you are trying to tell this board that when you make an application for an appeal which is what this is to a zoning board of appeals in the state of New York that it doesn't automatically stay.

Mr. Muscato asked what is the difference?

Chairman Calarco continue to speak that all proceedings in furtherance of the action appeal from. The action would be your application before the town board for a PD2 that is the same action you would agree that if a lawsuit was involved here that the lawsuit would be but in hold until and appeal before a zoning board of appeals is heard and a decision is made.

Mr. Muscato stated he does not agree with that. But regardless of if he agrees with that or not how does it effect this board.

Chairman Calarco stated so that's what is going to be his question, how would that effect this board. He is feeling along with some of the members that what they are doing here tonight making a interpretation of the code enforcement officers determination is possibility a moot point. In that you have received final approval by the town board for a PD (planned development) and during that approval process before the town board you never once mentioned anything about the code enforcement officers decision, the 200 foot set back being contested, with no mention of that amount to full acceptance on your park of the creation of the PD2 zone with the boundary with the site plan as on file with the planning board. And so he guess they are concerned how this is not a moot issue at this point.

Attorney Muscato stated that is a very good question Mr. Chairman, he apologized if he misunderstood where Mr. Calarco was going with this the stay question. He appeared in front of the town board so he is very familiar as to what was said at that meeting, and they recognized at that meeting that even with the introduction of the PD law that they weren't at the end of the review process for this project, in fact there were three things that that point that still had to be done, the town of Kinderhook had to issue site plan approval what it has subsequently has done , the town planning board of Schodack had to issue site plan approval which is waiting for this board to act before the planning board is going to act on that site plan approval. So, the 2 months delay now 3 months of this board have resulted in additional delays at the planning board and the 4th thing is you asked about weather or not the

Attorney Crist interrupted to get the timeline of what Attorney Muscato was referencing Asking first was the Town of Kinderhook site plan, second was the town of Schodack planning board site plan?

Attorney Muscato continue stating he was identifying the actions that he mentions to the town board. So, it was the Town of Kinderhook site plan approval, the town of Schodack site plan approval, and the town of Schodack town board PD (plan development) approval and the ZBA's interpretation of the solar code on the 200-foot setback. So, at the time he appeared at the town board (your question ultimately was going STAY but keeping that aside for right now) but to answer your question about the site plan, ultimately if the zoning board agrees with the interpretation the 100-foot limitation imposes a significant can put a constraint on the project.

Chairman Calarco stated 200 feet.

Attorney Muscato stated the 100 difference between the applicable and what they would argue is not an applicable setback. That constraint the difference between those two eliminates a significance portion of the acreage that would be available to the project, it would provide for further flexibility in the layout and the site plan proper, the other portion of the project site it also eliminates some of the feature's greenspace and some other things that the applicant has proposed, including in this project proposal. So it a long way of saying that if the board issues an interpretation that is favorable to the applicants interpretation at that point they have to go back to the planning board as you noted that planning board has indicated their staying their proceedings until the interpretation at that point they would have the option of amending the site plan and revising it to show consistent with your interpretation 100 feet setback as compared to the 200 feet setback.

Chairman Calarco asked do you not also agree that you would have to vacate the PD

approval by the town board and go through the whole process over again, that would require another public hearing because what they adopted clearly says in the resolution, (it adopts the amendment of the zoning map relating to a portion of the tax map with your tax map parcel number for a PD1 to a PD2 in accordance with the planning boards site plan file 2020-28 Green Dale solar) which again has the 200 foot setbacks, for the preceding to be legal wouldn't they have to hold another public hearing. Because the public hearing was for the that, if you were going to amend it to 100 foot of something else or you would like to at least pursue that, there PD2 process must be done over.

Attorney Muscato stated no, this is actually probably some of the confusion with the respect to the interpretation, PD is a district.

Chairman Calarco stated we know all about the PD process let's not go through that. We are very aware of the process

Attorney Muscato stated I'm not convinced that the board is fully aware this because if you where you wouldn't have asked the question. The district doesn't change the parcel the outstanding boundary of the parcel of the PD district that shown on the map that was included as part of the town board submission to the county planning board. And ultimately that will be filed with DOS and ultimately on the towns official zoning map, it has a boundary that goes beyond the 100 feet, the 200 feet in the setback. And so, when you create a district, you are creating as parcel boundaries not layout. It is not specific to the layout of the project.

Chairman Calarco stated he is not arguing that what he is arguing about is that change of parameters in a proposed development that got an approval, and you start doing that it changed from what the public hearing was held on, I believe the town board would be required to rehold that public hearing and go through that PD process with the new site plan that would then be proposed.

Attorney Muscato stated he would take that under advisement.

Chairman Calarco stated lets just supposed for a second that this board tonight was to disagree with the code enforcement officer and agree with the applicant in your assumption, how would that effect this project.

Attorney Muscato stated so at that point we have a planning board meeting that is coming up in a few weeks, he is not certain they would have enough time before that meeting to address a favorable interpretation, but we would try to submit to make a decision with respect to whether we're going to amend the site plan and seek approval consistent with the interpretation granted by the Board, or whether or not we would need to proceed in some other manner just because of the time. Time is of the essence with respect to these

projects. There is a block grant and NYSERDA incentives that is dwindling as time goes on and in fact I believe now that NYSERDA block grant has expired. The opportunity for this project may have expired. But in any event, you know an order to proceed in front of the Planning Board at that point we would need to decide whether or not the difference - the flexibility affords the project an opportunity or whether or not we need to proceed as stated already at the Planning Board.

Chairman Calarco Stated So, what you're really telling me though there is a possibility that this would have zero effect on this application. It may not change a thing, correct?

Attorney Muscato stated Zoning interpretations are often times academic. It's one of the things that you will often see consistency or just interpretations applicable interpretations to projects that don't fit within the ordinary zoning considerations. We've asked for these types of interpretations from Code Enforcement Officers all the time. There's nothing unusual about that.

Chairman Calarco stated, and he would agree. with that except for the fact that we have here a project that went forward and got an approval of a PD district and again, you and I disagree on the stay part. He doesn't think we're going to agree on that tonight. I believe that this application is like all applicants that come before the ZBA, they are required to stay the process. That meant you don't do anything. That's why you didn't go before the Planning Board in the month of June because we presented the fact that a stay is a stay.

Attorney Muscato stated but that's my point, Mr. Chairman. Just so we are clear, again, the Planning Board's application - we have a site plan pending that will not -

Chairman Calarco Pending final approval but that won't change, you said.

Attorney Muscato stated Well, it may change but it won't be final. The Planning Board is not going to act until the ZBA acts. With respect to the Town Board, this was the creation of a district and that is not specific site plan approval. That's not the arrangement, the layout. The approval that you get from the Town Board doesn't identify the specific location of project components. That's not the point of doing an established PD law for a project. That's why we would not have to go back to the Town Board. Just so you know again.

Chairman Calarco stated He thinks you're right. He thinks it is academic between us. Alright gentlemen, I'm going to say that we should probably just continue on, here with the appeal and take it from there. He just wanted to put on the record that there are some of us here that don't believe that the requirement under the law of staying the process was honored. He did want to put on the record because we think it's something that should have been honored. At least, he feels that way. He has talked to a couple of

other Members in the past couple of weeks and he think there is a consensus here that rather than going for a final approval for a PD, everything about this project should have stayed until we made our determination. That said, why don't you make your presentation for the actual Code Enforcement Officer's interpretation determination, he should say, and we will go on from there. Let her read the notice.

Mrs. Fuda read the public hearing notice (see file)

Chairman Calarco stated when we get to the actual time for public commenting, in case someone would like to call in. It's all yours.

Attorney Muscato stated It's obvious that the Board is very familiar with this application based on the questions and the discussions that we have had. So, I'm going to be very brief and in fact to the extent that the Board has questions, for the most part our written submission speaks for itself. He's not going to add to the written submission, but what he would like to do is just highlight a couple of points to clarify what the primary purpose of this interpretation is. Eden Renewables has developed, he thinks this will be their fifth solar project in the Town of Schodack. They are developing other projects around the capital region. It is very common for solar projects to need to be located in close proximity to their interconnect locations, it's very common for the solar projects to about or adjoin the transmission line either easement or right-of-way that is typically owned by the utility. In fact, he thinks for the Oakdale or Oak Hill the project further south on Brookview or -

Mrs. Fuda stated Cedar Hill.

Attorney Muscato Cedar Hill - that's what I was thinking of. As well as the project on the principal's home residential property, all three of those locations have transmission lines that directly about the solar projects. In the past, we have proceeded with a 100-foot setback at those locations and partly because through the PD process under the Zoning Code the Town Board has the authority when a use is required to obtain a PD district - a planned development district - the Town Board can establish standards and conditions that it sees fit and appropriate for that type of use. There is a recognition in the Zoning Code that for PDs there should be flexibility around the use. And so, in that regard, if this instance came up, you can see the site plan makes this very obvious. The issue with this project is very simple. The yellow highlight is the transmission line so the setback difference would be the difference of 200 feet or 100 feet from this location and the back portion of the solar project. This is County Route 32, rt.9 is over here (Indicating). The project at this point has proceeded favorably at both the Town of Schodack to the point it has proceeded as well as the Town of Kinderhook. The Town of Kinderhook didn't have any special conditions associated with their approval. We are not anticipating anything unusual with the Town Planning Board. And so at this point the limitation with

respect to the project was this again that corridor that was going to be established from National Grid's right-of-way. In this instance, the Zoning Code establishes setbacks in order to keep panel arrays away from adjoining landowners and residential properties. That's the reason that set acts are in the Zoning Codes. In this instance, it is unique because there are no residences adjoining that location. What is adjoining the location is a transmission corridor. A transmission corridor that is ultimately going to serve as the interconnect for the project to the grid. So, it's very unusual to apply a residential setback to a transmission easement when National Grid doesn't care. It doesn't affect their rights - whether it's 100 feet away or 200 feet away. So, in this instance we requested clarification and interpretation from the Code Enforcement Officer. The Code Enforcement Officer who was a different Code Enforcement Officer from the first projects reviewed - reached out and the interpretation was different than what we expected. and interpreted that the Zoning Code the solar provisions in the Solar Code trumped anything that the Town could do under the PD regulations.

Chairman Calarco asked did he say why he thought that.

Attorney Muscato Because there was a provision in the Solar Code that talks about inconsistencies with other provisions in the Zoning Code. But what we think was misunderstood is the PD law - the law itself and the Zoning Code has a provision that says. In fact, you know what? I will read it. I think it's very important for the Board to understand. This procedure, meeting the procedure for obtaining a PD from the Town Board.

Chairman Calarco asked where you are reading this from.

Attorney Muscato continued I'm sorry. 219-90a. This is under the Zoning Code plans development section. It is 219-90a. This is the purpose of the PD district. This procedure - again, the PD procedure - recognizes that while the standard zoning function use and bulk meaning an area setback like the one we are talking about here, and the subdivision function which is irrelevant here are appropriate for the regulations of land use and areas substantially developed. These controls represent a type of regulatory rigidity and uniformity which may be inimical to the techniques of land development contained in the PD concept. So that language that I just read to is reflecting on the PD the uniqueness of the uses that are required to obtain PD approval and the authority of the Town Board to deviate standards bulk and use on what would otherwise be allowable under the Zoning Code. That's the summary the crux of the argument interpretation that is in front of the ZBA. He just want to mention one last thing. Pragmatically, if the Board were to take an interpretation consistent with what the Zoning Officer has already determined, essentially what the ZBA would be saying was that the Town Board cannot deviate setbacks that are established on anything. Forget solar; on Amazon on whatever it might be with respect to planned development Districts - if there's a setback in the Zoning Code

that's different than what the Town Board determines is appropriate in the PD, the setback in the Zoning Law will control. That's just inconsistent with the way that provision of the PD law has been applied to date in the Town.

Chairman Calarco stated I would agree with you on that case except for the fact that he doesn't think you can find anywhere else in the entire Schodack Zoning Code a paragraph qualifier like is in the Utility Solar Law. Purpose and intent paragraphs 1 and 2 of the Utility Solar Law which were put in there by the Zoning Committee that drafted created this law, presented to the town board which adopted it. You will not find anywhere else in the Code of the Town of Schodack a qualifier paragraph that basically says if there's anything else in this Code that conflicts or is not in agreement with this section, this section takes charge. The reason I say that Mr. Muscato, is myself and Mrs. Fuda and past member Paul Puccio, who is deceased, were the three representatives on the Zoning Committee. We drafted that law; I, myself, Mrs. Fuda and Mr. Puccio - with the help of our engineer facilitator and an attorney that helped us. So, when we drafted this law, we purposely put that in there because we understood that the PD process was open-ended for the town board to do. We saw inherent problems with that. Not necessarily with the current Town Board that adopted this law, but 10 or 20 years down the line we saw unbelievable problems that could result from the Town Board being lobbied by applicants to erode the protections we had put in the Utility Solar Law - not just setbacks, height requirements of the solar panels, requirements for the height of the fence or the requirements for a lesser bond amount. They could ask for anything under the PD process according to you, which would normally take place, but again, I challenge you to find anywhere else in the Schodack Zoning Code where there is a qualifier that says this section shall take precedence, which is basically what that says in paragraph 2 under purpose and intent, unless you read it differently than I do.

Attorney Muscato stated he does, Mr. Chairman. Admittedly, he will take your word for the statement that you made that you will find no other provision anywhere in the Zoning Code the **natalist** to the precedents that you are reading from. I don't have every provision of the Code memorized. To the extent that the Board wants to consider and looking at other commercial development that's taking place in this Town and look at whether or not those approvals apply standards that were consistent with commercial development standards for that district, or whether to apply the PD standard that was established by the Town - in my view that would take precedence over what you're saying - the interpretation that you're taking. Regardless, the reason I don't agree with you is because 2 also specifically says: In all instances not specifically addressed in this section or in the PD of this chapter, this chapter shall apply. This is something that specifically is addressed as part of the PD bulk standards. Again, to read this section that one sentence as saying the only thing that is intended to require you said it yourself, of all the uses allowed in the Town of Schodack, solar was so special that it was going to be treated to an interpretation of this Code in such a way that only the standards in the solar section apply

and not any PD or not anything else - despite the language at the end of that section that says this section and chapter 12, which is the PD section applied, then you are correct. There is no other interpretation. But the problem is that's not the case. It belies reality that this was the one use that they singled out or that you folks serving on that committee singled out, particularly where it says we contemplate the standards in this section as well as what could be done in 12.

Chairman Calarco stated But that doesn't make any sense, Mr. Muscato. If we wanted this to be an open-ended PD zone where the Town Board set the standards, why would we have gone through the trouble of putting in any standards in the law? Why would we have set 200-foot setbacks? Let's let the Town Board decide that in the PD process. Why would we have given height standards for the solar panels? Why would we have gone so far as to say you need an 8-foot fence and not a 6-foot fence?

Attorney Muscato The very question that you're asking is a great question. The problem is it's not the question in front of the Board right now. The question in front of the Board is a specific interpretation that is not inconsistent with the text of the Code. The question you are asking that should be posed to the Town Board is about why this Town Board has such unfettered jurisdiction and discretion to be able to make whatever decisions it wants to make in PD zones. That's a very good question but the only answer - and again of course he is not speaking on behalf of the Town Board - the answer he can provide would be because the Town Board as a legislative body has functions that are beyond the Zoning Board of Appeals or the Planning Board that the legislative body at the Town Board can dictate specific standards in situations like this. We are not talking about a variance. We're not talking about a commercial or residential property where the standard is always X and we want to apply Y. We're talking about a unique use that is consistent with the purposes of the planned development where we have a strip of land which admittedly would be an orphan strip that serves no environmental or other purpose other than the interest that you're stating which is we believe the section was meant to be interpreted this way. As compared to looking at actual situations there, applying the facts in the law and agreeing that it is a reasonable interpretation of the purpose of the planned development to allow this Town Board in these circumstances where you have some unique situation like an easement to a right-of-way to apply a different standard, but an appropriate standard for the circumstances.

Chairman Calarco stated, and he doesn't disagree with you except for the fact that when we wrote this law those two paragraphs were put in specifically to prevent that. he understands as a Member of the Board, for me to say this he can see where there might even be a little doubt on your part about the intent and he will address that in a second. Specifically, our member who is deceased, Mr. Puccio, being a Planning Board Member, he was extremely concerned that the future Town Boards were going to be lobbied and they

were going to start to whittle away at the safeguards of this law such as setbacks and not even in this particular case, but in the case of like where it was near a neighbor's property where it was residential or farmer that used his agricultural fields or whatever. He was afraid it was going to be lobbied to whittle away those safeguards for public health, safety and welfare as well as things like the fence and the eights and even the bonding that we talked about quite a bit in formulating this law because we were worried about these things being abandoned and not having enough of a bond available in the future to tear them down and reclaim the land etcetera, etcetera. So, that's why we came up with this particular thing that we put in there. he just wants to read Section 1, which he thinks is also important. It talks about the purpose of the regulation and balancing the unique characteristics of each site. In addition to the following regulations of this section which implies that those regulations apply it implies that they apply to this. The following regulations of this section all utilities, solar, collector systems shall comply with the regulations for planned developments and the resulting PD 2 regulations found in Article 12 which is what you quoted and referred to. However, I don't know if you had a chance to look at Section 219-37 of the Town Code plan development districts. In paragraph C where it says except for otherwise indicated and I would say to you this Solar Law is otherwise indicated, minimum lot size or frontage maximum height, yard requirements, maximum percent of lot coverage are not specified herein. In reviewing any site plan for PD 1 districts the planning Board shall be guided by standards set elsewhere in this chapter for the comparable uses and by good planning practice in the end that the resulting development shall be compatible with the surrounding so, elsewhere in the chapter meaning Chapter 219 elsewhere utility solar. It says specifically here, and we can argue about the semantics, but it simply says that this shall take precedence.

Attorney Muscato stated Well, it doesn't. In fact, what it says is that the standards in the PD that the provisions, the process set forth in the PD shall apply, which leads me to the obvious question that if the Planning Commission that enacted or drafted this law was concerned about the Town Board's use of the PD, then why didn't that Commission recommend that this use solar not be subject to the PD?

Chairman Calarco stated Well, then how would we cite utility solar's in the town of Schodack.

Attorney Muscato stated you could have a provision of the law like you have for other believe it or not, most Towns do not do zoning this way. PD's are a unique standpoint that the Town of Schodack allows for pretty much any use. What you would have is with your bulk restrictions table, you would have your zoning districts. He live in the AR1. This property I apologize, but I don't know what zoning district it is.

Mrs. Fuda stated it is RA.

Attorney Muscato stated Well, it doesn't. In fact what it says is that the standards in the PD the provisions - the process set forth in the PD shall apply, which leads me to the obvious question that if the Planning Commission that enacted or drafted this law was concerned about the Town Board's use of the PD, then why didn't that Commission recommend that this use solar not be subject to the PD?

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Chairman Calarco stated It's RA.

Mrs. Fuda stated It's not RA 1, it is RA or A40 or R20.

Attorney Muscato stated In the RA zone you have permitted uses, or in the commercial zone you have permitted uses. You can even allow permitted uses exceptions.

Chairman Calarco stated You're absolutely right.

Attorney Muscato stated He's just answering your question. So if that Commission was so concerned, as you stated, that the biggest concern of the commission was the Town Board deviating from the standards and eroding those standards over time well if that were the case, then the law would not read that it takes into account the standards in the PD in 12 as part of the allowed regulations it would not have had the PD involved at all. Don't involve the Town Board in the decision on solar.

Chairman Calarco stated Let me just tell you why we did it this way. I live in the RA zone. My property, if we did it the way you suggested and we just put it as an allowable use in a zoning district, RA zone my property is no more compatible for a utility solar farm than the property right here in Byer's Estates. So, how could you allow as an allowable use anywhere in the RA zone there are multitudes of properties that would never be compatible for allowing this type of use. You can't do it by zoning. It can't be done by districts, period.

Attorney Muscato Stated Mr. Chairman, that's by definition what zoning does it looks at the use and determines-

Chairman Calarco stated But in this case this is the conflict that most municipalities run into. We can do it by zoning. If we said it is allowed everywhere in the RA zone, there are places right down the road in the RA zone that you could never put - it's the density of homes etcetera and it would make it impractical. So, we could go through the Town and pick out property, by property, by property to try and say well, that looks like a good place to put solar without knowing every bit of the background of that parcel. That would be challenged for spot zoning, I'm sure, anyway. We can't do it by parcels. We can't do it by zoning districts because that's not appropriate. The only way to do it is to allow the Town Board to approve the site in the PD process. This is routinely done by multitudes of municipalities for mining and now for solar because these things are truly controversial, and the legislators of the Town should be the ones -

Attorney Muscato stated with all due respect, not a single person has showed up at any of the Town Board or Planning Board or Zoning Board meetings I have attended on these projects.

Chairman Calarco stated It may be due to the size of the solar project. Let me give you an example. There are two solar projects in Montgomery County. One is 1,000 acres and the other is 800 acres. You don't think people didn't object to those projects? They most certainly did. It is a matter of record. So. My point is: Something like this should be left to the Legislators to decide as to where is a good place for this to go?

Mr. Muscato: And they did. The legislators decided it.

Chairman Calarco stated Listen to me. We didn't want them to be burdened with the possibility of being lobbied for things that are really outside their purview. They don't know about the requirements of the Code like the Planning Board or even like this Board does and they would be lobbied for things like setbacks, heights and all those things I mentioned, when we didn't want them to be burdened with that and have to be concerned. We wanted them to understand, you have to look at where this is going and if you think this is a good place to have a solar farm, so be it. Then, that's your decision. You are the elected people and if people don't agree with you, then they have the right to take action at the polls or whatever. The fact is there is no way a Town can sit there and strictly regulate these things strictly by zoning districts. Zoning districts are far too diverse, even though they have the same classification. You just can't say it's allowed everywhere in the RA zone and go yes, okay that means if I have a 7-acre property next to houses right alongside that I made a good choice for a utility solar farm. That's why we use the PD process as a way to site these things and where they go. Now you have heard from a lot and what I would like to do at this point - just so that we hear from everyone's perspective I would like you to hear from Mrs. Fuda on her interpretation of what we did when we adopted and why we did it and I would like to have Mr. Crist ask some questions pertaining to that, if you don't mind.

Attorney Muscato stated he don't object to that at this point as long as he has an opportunity to respond.

Attorney Crist: You can ask her questions, as well.

Attorney Muscato stated at this point I wasn't prepared to ask Ms. Fuda questions tonight. I didn't know that she was taking the stand. There was no identification of witnesses that were to be called by the ZBA prior to this, so. would just respectfully request the opportunity to ask questions and continue the session. I don't anticipate that the ZBA is going to be making a decision on this tonight, correct?

Attorney Crist stated probably not.

Chairman Calarco stated You don't have a problem if he asked her questions, as well?

Mr. Spada Stated No, I have no problem with that.

Attorney Muscato stated I presume that the ZBA was not intending to make a decision on this tonight.

Chairman Calarco stated Gentlemen, this is your decision as well. I think tonight, let's wait and hear what's presented. It is our job to discuss this, I understand, but I don't know that tonight is necessarily the -

Mr. Brewer stated I wonder how we get to discussing the actual project as opposed to I think as Board Members I don't feel qualified to discuss what you guys are discussing back-and-forth here too much. I am concerned about the project going forward as being something that's viable for that site.

Chairman Calarco stated Well, we're not here to discuss that.

Mr. Brewer stated That's what I'm saying. When do we get to that point?

Chairman Calarco stated We are not here to discuss that, Mr. Brewer.

Attorney Crist stated We are here to determine whether or not the solar uses a good decision.

Attorney Muscato stated but that is a valid question. That gets to something that the Chairperson was repeatedly referring to about the concerns for other people or adjacent landowners or whatever it is. The setback is being applied in this case very specifically to this transmission easement. To answer your question, the Planning Board. That's the

opportunity where there will be a broader presentation or has been a broader presentation of the project, its benefits, its environmental impacts all of that has been presented to the Planning Board. Fortunately, or unfortunately, the review here is limited just to this interpretation of the Code.

Chairman Calarco stated Now, Mr. Brewer let's say we didn't decide in favor of the applicant, here. He has the opportunity under the law to actually go back and reapply for a variance. At that point, he could come back to this Board with a new application for a variance of the 200-foot setback which we then would consider those things you were talking about for the project, itself. You do have that right.

Attorney Muscato stated in a variance situation.

Chairman Calarco stated Yes, you would. At which point we would then take into consideration the things that you were talking about.

Attorney Muscato stated It is broader than just this interpretation.

Chairman Calarco stated Mr. Muscato, you keep referring to this as an easement right-of-way.

Attorney Muscato stated I'm sorry. National Grid owns the land.

Chairman Calarco stated It is a property boundary.

Attorney Muscato stated Yes, the utility

Chairman Calarco stated and that's why we think of it as a different situation.

Attorney Muscato stated that's a 115 KV line. That width of that right-of-way is owned in fee they own the land for that line.

Chairman Calarco stated A separate tax map.

Attorney Muscato stated Right, a separate tax map.

Chairman Calarco stated It's a property boundary.

Attorney Muscato stated It is but -

Chairman Calarco stated It is next to a utility, your property next to them is one utility next to another utility.

Attorney Crist stated Mr. Muscato, when you're briefing to this Board, are you still asserting that should be included as part of a setback, or are you arguing exclusively that what we have been discussing before, your assertion that the Planning Board is not trumped by this language that Mr. Calarco was reading?

Attorney Muscato stated If I understand what you asked and if I misstated, please correct me. You are saying are we essentially at this point applying the 100-foot setback from the edge of the National Grid land to 100 feet and the 1 panels would start

Chairman Calarco stated 200. The 100 - just tell me where that comes from.

Attorney Muscato stated my understanding was that the application had 100 feet.

Chairman Calarco stated originally.

Attorney Muscato stated Originally.

Chairman Calarco stated In other words instead of 200, they wanted to go as close as 100.

Attorney Muscato stated correct.

Chairman Calarco stated Okay I was wondering where the 100 was coming from.

Attorney Muscato stated I apologize.

Chairman Calarco stated I don't have any of that information - just so you know.

Attorney Muscato stated the distance he believes it was in the application not the application to this Board, but the distance would be 200 feet under the solar provisions of the Code and under the PD, it would be 100. So, I think to answer your question, it's not inclusive of the National Grid land. It's 100 feet from the edge of their land or 200 feet. Because the 200 feet would also be measured from.

Mrs. Fuda stated The property line.

Chairman Calarco stated the 100 would be measured the same way.

Attorney Muscato stated correct.

Attorney Crist stated while we are on this topic Jim, I want to see what points we have agreement on and what points we don't have agreement on. So, just putting aside the PD legislation and so forth, is that your client's position that the building Inspector's determination that the property on the north side of the National Grid easement should not be included as part of the setback.

Attorney Muscato stated Yes, that's correct.

Attorney Crist stated Okay.

Mr. Maier would you clarify one thing? You're talking about the electric easement being close, you refer to hooking up. Correct me if I am wrong but I don't think you can actually hook into that high line. You would have to hook into somewhere else.

Attorney Muscato stated Correct, and if I misstated that earlier the point of interconnection for the facility is proposed at a location at Rt.32. My point in referencing that was simply that for the purposes of setbacks in the application of the uses, oftentimes solar projects are near utility corridors because they are compatible utility uses.

Attorney Muscato stated Thank you for clarifying that.

Chairman Calarco stated Lou, gentlemen, do you have any other questions for Mr. Moscato? I'm going to open it up to the hearing portion if not.

Mrs. Fuda stated yes, if anyone out there would like to make public comment, you can call in at 518-376-7875.

Chairman Calarco stated while we are waiting for that, I did want to read into the record that this application was submitted to the Rensselaer County Bureau of Economic Development and planning and after carefully reviewing information, they determined that the proposal does not have a major impact on county plans and local consideration shall prevail. There was a couple of comments submitted with that when they returned that to the Town. One was that although the solar power plant electrical transmission lines both have electricity in common, electrical transmission right-of-ways can be used for additional purposes as seen in the Albany Hudson Electric Trail. That's the one over on Miller Road. The Board should examine whether the power corridor should have other possible uses of similar nature in the future. I think that is a good point. I know I didn't think about.

Attorney Muscato stated with respect to that comment, again none of the facilities components are located in that corridor. This is all land that is privately owned that the facility will be located solely within.

Chairman Calarco stated I think that comment was made -

Mrs. Fuda stated with regard to the setback.

Attorney Muscato stated again, even in that situation, they would have to have an agreement from a private landowner. The difference with the rail trails - you guys all know this, but the rail trails were able to be used the way they are because they didn't have to obtain permission from each underlying landowner all along the length of those lines. At some points

they have to make connections, but for the most part they had existing easements with either the trolley company or the telephone company or whatever utility it was that maintained those easements. That's what enabled that to happen. The assumption in that comment - it's a little different when you're talking about private land ownership.

Chairman Calarco stated right, other than National Grid. So gentlemen, we will wait just a couple more minutes to see if someone has any public comment that they would like to. Gentlemen, are there any other questions from Mr. Muscato you would like to ask concerning this? So, Mr. Muscato, since it appears that we are probably not going to render a decision tonight, I think this Board wants time to think about this as well. We will keep this open - not the public hearing portion, but we will adjourn this again until the next meeting and what I will do for your benefit is we will hold off on having Mrs. Fuda under oath.

Attorney Muscato stated with respect to that, I would just as soon get that on the record tonight. I don't want to delay this proceeding. In fact he would go so far as to say the board can act. I don't think there's any additional information that's going to be provided by the applicant. If you going to present information from Ms. Fuda or otherwise, that's up to the Board. With respect to the interpretation and just the interpretation issue, I think the Board has all the information that it needs. There is a detriment to the applicant with continued delays at the ZBA.

Attorney Crist We have 62 days to decide this with a public hearing -

Attorney Muscato state: Understood, but in terms of what I was going to say though is I'm not saying the ZBA is delaying this. What I'm saying is that because of the stay position that you stressed earlier, it's my understanding that the Planning Board is interpreting that as not proceeding with the review of this application pending this

Board's decision. So, again we would very much encourage the Board to make a decision as soon as possible and not delay this proceeding.

Chairman Calarco stated Well gentlemen, I don't know about you but I personally would like to take more time just to think about this. I know what my feelings are and I know what my position is, but I'm just trying to be fair to the applicant to maybe give myself a little more time to think it over and dwell on it. The problem we have though guys is that I don't know that we're going to have a quorum for next August's regular meeting. I'm sorry, I thought you were in the back observing, sir. Go ahead.

Mr. Peter stated My name is Charles Peter and I own a family farm over on Brook Road - Peter's Dairy Hillview Farms. I just wanted to speak kind of in favor of what they're looking to do here. As you mentioned, farmers are in consideration in the zoning plans of solar. I think it was a good thing the Town did to get ahead of it. A lot of towns have gotten caught up on the wrong foot with the understanding of mind that you're going to have situations where the 200-foot setback eats up a lot of land and if you are concerned about farming operations, that should be part of your consideration. This plan maybe not so much, but what they are asking to do - I don't think it's out of the realm of possibility for consideration, given the nature of the property and given the nature of the surrounding areas. I totally agree with you if somebody came in and wanted to propose this up at Byer's Estates, you would want that setback to protect those residents. By the way, this is also very stringent, and it would make that sort of project totally impossible to pull off. This law is written in a tight manner to limit the areas that these projects can even be considered in. That's the first thing that I want you to consider. When you talk about land, you talk about land use, and you mentioned farmers. Two hundred feet eats up a lot of acreage quick and that land is not usable to anybody at that point. It's a different situation with this property, but overall, please take that into consideration when these things move forward. I would really hope that the Board considers moving on something tonight after the last meeting were felt like this applicant wrongly got delayed in getting some resolution. The Town was wrong in their interpretation. They were right. I would hope that the Board works to get something done tonight. Thank you.

Chairman Calarco stated thank you. Gentlemen, if we don't have a quorum for that August 9th meeting, then we're delayed even further. I don't want to do that. If we can help it. If I could poll everybody, could we have a special meeting to discuss this on the following Monday which is what is that August 16th? Yes, August 16th. We could do an early 5 o'clock meeting before the Planning Board meeting.

Mrs. Fuda stated Well, you can have a meeting at any point. You could have it on the 19th or the 26th.

Attorney Crist stated I could do the 16th. August 19th is good for me, as well.

Chairman Calarco It looks like we're not going to have that quorum for August. Can we right now commit to the 16th?

Mr. Brewer stated the applicant wants to have a decision tonight. Are we going to vote on that or are we not going to discuss -

Attorney Muscato stated from the procedural standpoint -

Attorney Crist stated No, procedurally we would have to do a motion not to vote on it.

Attorney Muscato stated I understand, but you procedurally did not have to proceed with a public hearing on an interpretation. So, the 62-day timeframe that you mentioned - that's voluntary. It doesn't have to be applied in this case. The public hearing is voluntary in this case. So, in terms of the decision, the Board can act tonight.

Chairman Calarco stated Of course we could act tonight.

Attorney Crist stated but we can agree that we don't have to.

Chairman Calarco stated That's correct.

Attorney Muscato stated I don't want to wait till August 16th. The reality is that not only do I have to wait, but I have to wait to whatever the next regular scheduled meeting would be.

Chairman Calarco stated yes, but if I don't have a quorum and I don't - it doesn't look like we're going to have a quorum on the August meeting. If I don't have that quorum, then it would push it off to September. We are legally within our right to do that - 62 days. I am trying to accommodate you by getting -

Attorney Muscato stated is it possible that the Board can meet before August 9?

Mrs. Fuda stated August 2nd is the next Planning Board meeting after the 19th.

Attorney Muscato stated I know you're not going to do this because I'm asking, but I would ask that you keep in mind if we could have this meeting with the ZBA before the Planning Board meeting, it would allow us to have -

Attorney Crist stated August 2nd, I can't. I have another meeting then.

Attorney Muscato stated I'm not asking for August 2nd. I'm saying a date at the end of July so that we can go to the Planning Board meeting with our next steps and a decision whatever way is going to go with the ZBA.

Chairman Calarco stated What about the 26th?

Mr. Maier stated is that okay with Nadine as far as her getting her time and things ready?

Mrs. Fuda stated It's not one of my normal nights, so I can't determine that. There could be court that night. If it's not one of my normal Planning or ZBA Mondays, I can't tell you if that day is open or not until I check with the court. The court would be the one that would possibly be in session. I don't know what their court nights are. I know there are some Mondays and some Wednesdays. So, it would have to be a Planning Board night or ZBA night, just like I had a Planning Board meeting tonight on a ZBA night.

Attorney Crist stated I will just tell you that the next Planning Board night is -

Mrs. Fuda stated the 19th.

Chairman Calarco stated that's a week from tonight.

Mrs. Fuda stated and then there's August 2nd.

Chairman Calarco stated I'm trying to think of when people are available here.

Mrs. Fuda stated Summers are tough because you have vacations that are in there.

Chairman Calarco stated are those nights bad for you?

Attorney Crist stated What are the nights?

Mrs. Fuda stated the 19th or the second.

Attorney Crist stated the 19th or the second. The 19th is a week from today. I can't do a 5 PM that night. I can do it at seven, but we have a Planning Board.

Mrs. Fuda stated Then, August 2nd. Again, it would have to be at 5 o'clock. I don't know if I have would have the room that night.

Attorney Crist stated the court has the room on those nights.

Mrs. Fuda stated yes, but it is constantly changing, so I would have to check to see they are not booked.

Mr. Maier stated Nadine, how about the meeting room up by your office upstairs?

Mrs. Fuda stated it's got to be on the website. it's got to be virtual. You are in this room.

Mr. Maier stated Okay.

Chairman Calarco stated That's what creates problem is the necessity of this room. At this point we are down to the 26th if it is available.

Mrs. Fuda stated If it is available, but I can't commit to that tonight.

Chairman Calarco stated I understand. If it's available on 26th of July or it pushes us to the 16th. Because I know the 9th is going to be difficult in not having a quorum.

Attorney Crist stated Can we say we can schedule maybe tentatively the 26th if it's available if we know tomorrow? If it's not, then the 19th of August.

Chairman Calarco stated Yes, if we can get in on the 26th, we can try to do that. If the room is not available.

Attorney Crist stated We need a motion Dave, on that.

Chairman Calarco stated Okay, I make a motion that we - before I do that, let me close the public hearing. So, no one is called in and Mr. Peter has made his comments so at this point, there is nothing further. I will close the public hearing.

Mrs. Fuda stated who's got the motion.

Chairman Calarco stated I'll make the motion.

Mr. Spada seconded by raising his hand.

Chairman Calarco stated Mr. Spada, second. All in favor? (Ayes from all board members.) Opposed. No board members opposed. Okay, so with that action I will make the motion that we try to have the special meeting on Monday, July 26th, if the room is available. That will be a 5 o'clock.

Attorney Crist stated Do we have to do it at 5 o'clock? Can we just do it at the normal time - at 7 o'clock?

Mrs. Fuda stated that's up to you guys.

Chairman Calarco stated Well, it would depend on the room too, right?

Mrs. Fuda stated It will depend on the room.

Chairman Calarco stated Okay, let's say seven o'clock. Then, at which point if that's not available, then we will adjourn to August 16th which it will be at 5 o'clock on the 16th it would be a 5 o'clock. That's Planning Board night.

Attorney Muscato stated Sorry, what was the alternative night?

Chairman Calarco stated the 16th is the alternative. So, we will try for the 26th and if not, then we'll move it to the 16th. So, that's a motion by me.

Mrs. Fuda stated August 16th would be 5 o'clock.

Chairman Calarco stated CHAIRPERSON CALARCO: One is at 7 o'clock and one is at 5 o'clock.

Mrs. Fuda stated Right.

Chairman Calarco stated second on that

Mr. Maier raised his hand.

Chairman Calarco stated Mr. Maier. All in favor? Ayes from all board members. Opposed. None opposed.

Attorney Crist stated Muscato, just so you are prepared, Planning Director Fuda will likely be testifying on that next meeting about what we discussed before - her position on that committee and so forth.

Attorney Muscato stated It was my understanding that testimony was ready to proceed tonight.

Attorney Crist stated are you ready to proceed tonight?

Attorney Muscato stated Sure, yes.

Attorney Crist stated well, we are having another meeting so we will do that at the next meeting.

Attorney Muscato stated the problem becomes that the public hearing has been closed and we're talking about the difficulty of the decision date, so I'm presuming that you're going to open the meeting, we're going to take testimony from the witness, close that and make a decision.

Attorney Crist stated Yes.

Attorney Muscato stated That cannot happen in one night.

Attorney Crist stated Yes. That's the only thing we're doing that night.

Attorney Muscato stated Do you want objections to that submitted in writing?

Attorney Crist stated Sure. You can make your objections now, if you like.

Attorney Muscato stated with respect to the objections on that, we don't have any knowledge of Ms. Fuda's capacity on the committee and whether or not she was the clerk of the committee, or whether she was an active participant. How long ago was this committee even established? In other words, I don't understand why -

Chairman Calarco stated Probably five years ago.

Mrs. Fuda stated in 2015 the law was adopted.

Attorney Muscato stated I've never seen a proceeding, I mean, I don't know if you have case law on this where you talk about the people who drafted -- not it's not even the Town Board Members who enacted the legislation. We are talking about the people who were involved on the committee that made recommendations to the Town Board.

Attorney Crist stated that's exactly what it is.

Attorney Muscato stated but that's what I'm saying. I think that it is wholly inconsistent as compared with the legislative intent which is 1 the plain language but the Board is charged with -

Attorney Crist stated that the Town Board later adopted. This is the law that was examined by this committee that the Town Board adopted. We're not saying that it was adopted by the committee. Of course, the legislation was adopted by the Town Board.

Attorney Muscato stated My objection is irrelevance. It's irrelevant what the commission or what any individual committee members were thinking, or feelings, or whatever opinions about the law. The law is the law. With the Town Board evidenced with respect to the law in its intent is in the black letter law which is what the Board is here to interpret and not a third-party perspective on what the law was intended to do.

Attorney Crist stated Your objection is noted, thank you.

Attorney Muscato stated Thank you.

Chairman Calarco stated Do we have anything further on this? The board members had not questions or comments, Okay, gentlemen, if there's nothing further on this we are adjourned. This application to hopefully the 26th if we could squeeze it in.

Attorney Muscato stated I'm sorry, one further clarification. Ms. Fuda is going to be available for cross-examination in that session.

Attorney Crist stated Most certainly.

Attorney Muscato stated Okay, thank you.

Chairman Calarco stated Okay so we are adjourned. We will notify you as soon as we know the dates. Nadine will get to us and let us know what's available. Remember it's 5 o'clock on the 26th or 7 PM on August date. I'm sorry, it's the other way around. 7 PM on the 26th or 5 o'clock on the August date. Okay, thank you.

Chairman Calarco Can I have a motion to adjourn? Mr. Spada raised his hand.

Chairman Calarco stated Mr. Spada moved and asked who would Second? Mr. Maier raised his hand.

Chairman Calarco stated Mr. Maier seconded the motion. All in favor? All members of the board said Ayes.

Chairman Calarco stated anyone opposed? No board members opposed the motion

Chairman Calarco stated Thank you gentlemen.
Meeting was adjourned at 8:23 p.m.

Attorney Muscato stated I don't object to that at this point, as long as we have an opportunity to respond.

ADJOURN

Spada moved, Maier seconded that the meeting be adjourned. There being no objections, Chairman Calarco adjourned the meeting at 8:32 p.m.

Respectfully submitted,
Nadine Fuda
Director of Planning & Zoning