

**TOWN OF SCHODACK - COUNTY OF RENSSELAER - STATE OF NEW YORK
ZONING BOARD OF APPEAL JULY 26, 2021
CALLED TO ORDER BY: CHAIRMAN CALARCO AT: 7:00 P.M.**

PRESENT

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

MEMBERS ABSENT

APPROVE DRAFT MINUTES - JULY 12, 2021 Chairman Calarco stated he was unable to get his packet today and he really didn't have a chance to look over those minutes the way he would like to. And if you are so in cline, he would ask that we could put off adopting them until the next ZBA meeting. he asked if everyone was ok with this decision. All agreed.

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

Green Dale Solar LLC. published on June 4, 2021

public hearing open July 12, 2021 at 7:00 p.m. closed 7:20 p.m.
tonight's meeting is continuation from the meeting on July 2, 2021

Green Dale Solar LLC.
County Rte. 32

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

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

Attorney James Muscato II from Young & Summer Law Firm, Giovanni Maruca applicant were present for this meeting.

Chairman Calarco stated to the board, so gentleman we as you remember we adjourned from the last meeting to give you and myself a little time to consider all the information and what we were reviewing for this decision, and this special meeting was called tonight

to basically deal with that and make that decision on the interpretation. So the first thing that needs to be done is to establish lead agency for SEQRA.

Chairman Calarco stated this application was adjourn from the last meeting for both the board and the applicant to consider all the information on this application. And at the wish of the applicant, we are having a special meeting tonight to deal with and make a decision on the interpretation of the 200-foot setback in the towns solar law. The first thing we need to do is establish lead agency.

Maier motion, Spada seconded that the Zoning Board of Appeals be **LEAD AGENCY, TYPE II** relative to the variance only.

4, 0 Noes, Motion carried.

Ayes: Brewer, Calarco, Maier, Spada

Oppose: 0

TYPE II ACTION

Be it resolved that the Zoning Board hereby classifies the proposed action as a Type II Action under SEQRA.

Calarco moved, Spada seconded.

4, 0 Noes, Motion carried.

Ayes: Brewer, Calarco, Maier, Spada

Oppose: 0

He spoke to the board that they had an opportunity to consider all the evidence, the public hearing was closed at the last meeting on July 12, 2021, at this point he will ask if anyone would like to make a motion in favor of the applicant position that the building inspector interpretation of the code was incorrect.

Mr. Brewer offered a motion that the building inspector was incorrect but there was no seconded to that motion.

Chairman Calarco asked for a seconded on the motion. There was no seconded by a board member. So, without a motion in favor of the applicant he would therefore like to make a motion to affirm the building inspector interpretation of the code .

Chairman Calarco had asked our council to help him in coming up with a decision that incorporated all the items that were discussed and the issues that were before board in that last couple of meetings. Just so that it was clear and to make sure that all the bases were covered. That was done and copies of the decision were handed out to the board members for the members to read before making a formal decision.

Attorney James Muscato asked the board for a copy of the decision so he and Mr. Maruca can review it. Our attorney Mr. Crist handed him the copy.

The applicant Mr. Maruca and his attorney Mr. Muscato did not go to the microphone to speak to the board and because of this only parts of what they said cannot be heard.

Mr. Muscato questioned about the reading on the issues being decided.

Chairman Calarco stated no, we are not looking at that. There is a venue for that.

Mr. Muscato stated he didn't know if the board understands (the sound cut out) something about the town board believed in a more restrictive setback,

Chairman Calarco stated he appreciated to try to get into a discussion, all he is saying is the time for that was at the last meeting, there was quite a bit of back-and-forth conversation on this topic.

There was discussion back and forth between Chairman Calarco, Attorney Crist and the applicant on the ability to hold a hearing and speak to Mrs. Fuda, it was stated at the last meeting that the applicant objected to the witness testimony, so nothing is being asked of Mrs. Fuda therefore there will be nothing else to talk about.

Chairman Calarco stated that the public hearing was closed at the last meeting and no further comment was needed.

Attorney Mr. Crist stated your comments are noted.

During this discussion the members took time to read through the document provided by our attorney Mr. Crist

At this part of the tape the sound went blank.

Member Loveridge stated since he was absent for the last meeting, he is going to abstain himself from this vote.

Spada moved; Calarco seconded to waive the reading of the resolution.

4 Ayes. 0 Noes. Motion carried.

Ayes: Brewer, Calarco, Maier, Spada

Abstain: Loveridge

Mr. Brewer asked about number 14 on the decision regarding "Issues Presented" (see below) he understands part 1 which he feels is the most compelling argument to him on the

process of this. Parts 2 and 3 he is confused on not allowing the setback with a utility to a utility. To make parts 2 and 3 part tied to the interpretation of the drawing up of that specific drafted law, he has trouble excepting the premise of that. The question that he has to this in this discussion of those two issues about the setback specifically seems that it doesn't fit the interpretation that he is reading.

Chairman Calarco stated he appreciates his opinion he thinks that he is misconstruing what the intent was, the code specifically says the setback applies to any property line, and whether it be in this case the National Grid property line, (it is not an easement they own the property). In this case your right, it is owned by National Grid which happens to be another utility, but if it weren't National Grid and a random person property it would still be a 200-foot setback at the property line. so, the principle would be at any property line. Now in another word does the principle apply that you need a 200-foot setback from the property line, the code stated that it does. However, in this case the applicant has the right as does anyone to come to this board for a variance, that is not what they chose to do and they still have the right even after we were to render a decision unfavorable to them they would still have the right to come back and say they would like to apply for variance. He stated that he doesn't think Mr. Brewer is wrong, in that this maybe the one unique case where we have a utility up against another utility that this board might be able to help the applicant with relief with a variance and not impact neighbors. This is probably the one scenario where we would not be making a decision which would harm the safety and welfare of the public.

Mr. Brewer stated that helps clarify that point but this particular piece of property he feels is pretty much worthless for anything else, he is very familiar with this property, the best use is something like this project. He doesn't want to see them go away.

Chairman Calarco stated they already have a Town Board PD2 created approval for this project and that was with the 200-foot setbacks required by the code, the decision made at this meeting will in no way deny them anything this is just an interpretation of what the building inspector stated in his letter. All we are saying is that we believe that the way interpretation from the building inspector was it applies to property lines regardless of it being National Grid or a privately owned property.

Calarco moves, Spada seconded to affirm the decision from town building inspector interpretation of the code.

<u>Brewer</u>	<u>Calarco</u>	<u>Loveridge</u>	<u>Maier</u>	<u>Spada</u>
No	Yes	abstain	Yes	Yes

**STATE OF NEW YORK
TOWN OF SCHODACK**

ZONING BOARD OF APPEALS

In the Matter of the Application
of

DECISION

Green Dale Solar LLC and Eden Renewables

File No. Z797-21

Parcel No.: 227.-1-7

For An Interpretation.

Relevant Procedural History

1. Green Dale Solar LLC and Eden Renewables (hereinafter "Appellants") filed an application "to develop a solar farm on an approximately 129.35 acre parcel of land located on County Route 32 and designated as tax map number 227.-1-7." (Building Inspector/Code Enforcement Officer letter of March 17, 2021). The project "is a proposed 7.5 MW (DC) solar project to be located at the southern edge of the Town of Schodack, with road frontage along County Route 32" and a portion of the project is in the Town of Kinderhook. (Appellants' May 14, 2021 letter-appeal).

2. As also detailed in the Building Inspector/Code Enforcement Officer's (hereinafter "Code Enforcement Officer") March 17, 2021 letter:

The subject parcel is bisected by a right of way deeded to and owned in the name of Niagara Mohawk Power Corporation (tax map number 22.1-1-1-4), which is approximately 250-255 feet wide and generally runs in an east-west direction across the subject parcel. As a result, the subject parcel is effectively divided into two sub-parcels, with the approximately one-quarter of the parcel located north of the deeded right of way and the remaining three-quarters located south of the deeded right way.

3. In furtherance thereof, Appellants applied for this project, which has been classified as "Utility-Scale Solar Collector System¹," to be part of a desired Planned Development district per Article XII of the Code of the Town of Schodack ("Town Code").

¹ Town Code § 219-5 (B), which like all solar provisions was added to the Town Code on May 12, 2015 as part of Local Law No. 1 of 2015. It defines "Utility-Scale Solar Collector System" as: "A solar energy system that is designed and/or built to provide energy as an ongoing commercial enterprise, or for commercial profit, or designed to distribute energy generated to a transmission system for distribution to customers rather than for use on the site. A utility-scale solar use may include solar energy system equipment and uses, such as but not limited to supporting posts and frames, buildings and/or other structure(s), access drives, inverter equipment, wires, cables and other equipment for the purpose of supplying electrical energy produced from solar technologies, whether such use is a principal use, a part of the principal use or an accessory use or structure."

4. The project was first presented to the Town of Schodack Planning Board. That Board raised the issue as to whether the project, as presented, satisfied the setback requirements of Town Code § 219-39.3(B)(2), which states: "Setback. All utility-scale solar collector systems and associated buildings, accessory structures and equipment shall have a minimum setback from any property line of 200 feet."

5. Thereafter, by memo dated March 3, 2021, Nadine Fuda, the Town Director of Planning and Zoning, requested on behalf of the Planning Board, that the Code Enforcement Officer make a formal determination "as to whether the property on the North side of the National Grid Easement² should be included as part of the setback as per code 200 ft." (Code Enforcement Officer's letter of March 17, 2021).

6. By letter-decision dated March 17, 2021, the Code Enforcement Officer rendered his decision.

7. Thereafter, on May 14, 2021, Appellants emailed their "appeal letter."

8. After filing same, and during the pendency of the appeal Appellants proceeded to obtain PD2 (a planned development) creation and approval from the Schodack Town Board.

9. The matter was first before this Board at the June 14, 2021 meeting. After an issue was raised as to timeliness of the appeal, Appellants requested, and the Board agreed, to adjourn the matter until the July 12, 2021, meeting, pending clarification.

10. Upon resolution of the aforementioned timeliness issue, the application proceeded at the July 12, 2021 meeting, at which time a public hearing was held and Appellants detailed their position on the Code Enforcement Officer's determination. At that time the Chairman of the Board also detailed how he was a member of the committee that drafted the subject "Utility-Scale Solar Collector System Law." That law, which is the subject of this interpretation, is contained in part Town Code in § 219-39.3, and which was adopted, as noted above, as part of Local Law No. 1 of 2015 on May 14, 2015. He also specifically spoke about the committee including § 219-39.3(A)(2), and the purpose behind said provision was to allow the Town Board not to be requested to consider bulk and area requirement issues and how the Town Board adopted that law.

11. Thereafter, the Board held a special meeting on July 26, 2021 to further consider the matter.

The ZBA's Duty of Interpretation

12. Town Code § 219-110 entitled "Powers and Duties" of the Zoning Board of Appeals, provides:

² It needs to be noted that the subject National Grid property is owned in fee by National Grid and is not an easement, despite being referred to incorrectly as same in various correspondence involving this matter. Moreover, at the July 12, 2021 meeting, Appellants' counsel acknowledged that said National Grid property was owned in fee and was not an easement.

The Board of Appeals shall have all the powers and duties prescribed by law and by this chapter, which are more particularly specified as follows:

A. Interpretation. On appeal from an order, requirement, decision or determination made by an administrative official or on request by an official, board or agency of the town, to decide any of the following questions:

(1) Determination of the meaning of any portion of the text of this chapter or any conditions or requirement specified or made under the provisions of this chapter.

13. Similarly, New York State Town Law § 267-b(1) provides:

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

Issue Presented

14. The issue presented is whether the Building Inspector's March 17, 2021, determination was correct in determining that the property on the north side of the National Grid property should not be included as part of the required setback—or also phrased as does the project have to be 200 feet from the National Grid property? This issue is, in the opinion of the Board, appropriately broken down into three sub-issues: (1) has Appellants' appeal been rendered moot by Appellants proceeding to obtain PD2 creation and approval with required setbacks from the Schodack Town Board?; (2) was the Code Enforcement Officer correct in determining that the National Grid Property should not be included as part of the setback?; and (3) was the Code Enforcement Officer correct in determining that Town Code § 219-39(B)(2), which specifically sets forth the required minimum setback requirement applicable to utility-scale solar collector systems, takes precedence and control over the provisions of Article XII relating to Planned Developments Town Code § 219-39(A)(2)?

Analysis

15. The subject of this Decision, the Code Enforcement Officer's March 17, 2021, letter- determination, states, in relevant part:

It is my determination that the Applicant's proposed site plan does not meet the requirements of the Code. Town Code § 219-39(B)(2) requires that the minimum 200 foot setback be maintained 'from any property line.' With respect to the subject parcel, the southern boundary of the deeded right of way which crosses the parcel is effectively a 'property line,' and as such the required 200 foot setback must be measured from that property line. In other words, and in response to Ms. Fuda's specific question, the property on the

north side of the right of way should not be included as part of the setback.

[The foregoing is sub-issue #2, above].

The Applicant has suggested that the Town Board has the authority to modify the setback requirement of Town Code § 219-39(B)(2) as part of the Planned Development approval process set forth in Article XII of the Town Code. I disagree with that interpretation. Town Code § 219-39(A)(2) states as follows:

In any instances where specific permitted uses, area, or height standards, development guidelines and/or review procedures specifically set forth in this section conflict with any other general provision or requirements of the Zoning chapter, the particular provisions set forth herein shall take precedence and control. In all instances not specifically addressed in this section or in Article XII of this chapter, the Zoning chapter shall apply.

Since Town Code § 219-39(B)(2) specifically sets forth the required minimum setback requirement applicable to utility-scale solar collector system developments, that specific requirement 'shall take precedence and control' over the more general provisions of Article XII relating to Planned Developments generally. ...

[The foregoing is sub-issue #3, above].

16. Appellants' appeal, dated May 14, 2021, is essentially based on the following assertion (relegated to sub-issue #3):

As noted in the determination letter, the Town Board has the authority to modify the setback requirement of Zoning Code Section 219-39.3(B)(2) as part of the Planned Development Approval process as set forth in Article XII of the Zoning Code.

Appellants assert that the Code Enforcement Officer's determination is flawed, stating, in relevant part, that:

The disagreement is with the determination that the general conflict provision at Section 219-39.3(A)(2) overrules the legislative authority of the Town Board in the planned development review process. The legislative intent and purpose of planned development is to give the Town Board flexibility to site projects that may not meet the bulk area requirements that are otherwise established in the Zoning Code. In fact, if this interpretation is upheld, the this would essentially undo the Town Board's authority to ever deviate from a standard with a planned development ... The Town Board, through the PD process, is

not constrained to the setback requirements stated in the zoning code.

Appellants' May 14, 2021 letter, p. 2. In furtherance thereof, Appellants also assert: 'Conventional area and density specifications set forth by other sections of this chapter are intended to be replaced by application of the planned development procedure and resulting PD-2 District, as provided for herein, to lands upon which the approved plan becomes the basis for control and development.' (Section 219-90(A); see also Section 291-95(D) Town Board action on sketch plan '(3) Conventional use and bulk regulations for the PD are replaced by the approved sketch plan.') A variance should not be required because the Town Board has the legislative authority to set unique and specific setback amounts based upon the parcel and surrounding properties.

Id.

17. As more fully detailed below, the decision of the Code Enforcement Officer is affirmed in all respects.

18. First, as to whether Appellants' appeal has been rendered moot, it is the determination of this Board that Appellants, who incontrovertibly elected to proceed to obtain PD2 creation and approval before and during the pendency of the determination of this appeal, and who conceded that this appeal may be rendered "academic" by obtaining such approval, have rendered their appeal moot by such actions. Incontrovertibly, at least certain approvals would have to be undone in order for Appellants to proceed if the Code Enforcement Officer/this Board decided/decides in their favor. Notwithstanding such determination, this Board will still proceed to address the merits of Appellants' appeal in the event a court should disagree with the aforementioned mootness determination.

19. Second, Appellants' appeal does not dispute the determination of the Code Enforcement Officer that the National Grid property should not be included in the required setback per Town Code § 219-39.3(B)(2). Appellants do not controvert such interpretation in their appeal and conceded no disagreement with said interpretation at the July 12, 2021 meeting when directly asked. However, so there is no doubt, the Board finds the determination that the National Grid property, which once again is owned in fee (not just an easement) to be a property line and that the project setback line must be 200 feet from said National Grid property line.

20. Third, it is the determination of this Board to affirm the Code Enforcement Officer's determination that Town Code § 219-39(B)(2), which specifically sets forth the required specific minimum area/setback requirement applicable to utility-scale solar collector system developments, takes precedence and control over what this Board classifies as the more general provisions of Article XII of the Town Code relating to Planned Developments and therefore § 219-39(B)(2) sets forth the required setbacks for the subject project. As such, as to utility-scale solar collector systems, it is the determination of this Board that the bulk and area requirements set forth in Town Code §

219-39(B) for utility-scale solar collector systems apply, as the Town Board intended, including to projects to be included in/part of planned developments in the Town.

21. Additionally, it needs to be noted that no other section of the Town Code has the specific precedence language at issue in § 219-39(A)(2), which this Board again interprets as requiring the setbacks as contained in § 219-39(B)(2) apply, taking precedence over, as the Code Enforcement Officer noted, the more general provisions of Article XII relating to Planned Developments.

22. As to Appellants' assertion that the Code Enforcement Officer's interpretation is incorrect because it "overrules the legislative authority of the Town Board," it was the Town Board who of course elected to pass the subject law. While Appellants assert that same is an impermissible limitation, this Board views same as the Town Board electing to limit its authority and choosing not to have to deal with this issue as to bulk and area requirements for planned development district applications before it involving utility-scale solar collector projects. The Town Board, quite simply, did not have to pass § 219-39(A)(2) and § 219-39(B). As such, the subject section does not, as Appellant asserts, "overrule the legislative authority of the Town Board in the planned development process."

23. Moreover, quite simply, if the Town Board wanted to be able to still deal with and control such things as bulk and area requirements of utility-scale solar collector systems in planned developments it did not have to pass this law, a law that was passed, as noted above, as Local Law No. 1 of 2015. In doing so, the Town Board simply made clear that there were things it wanted to deal with and things it did not want to have to deal with in the creation and siting of planned developments concerning utility-scale solar collector systems when it adopted the subject Local Law Number 1 of 2015, which contained the provisions concerning utility-scale solar collector systems (including Town Code § 219.3), a law that post-dated Article XII, Planned Districts, including § 219-95(D)(3). Moreover, it does not as Appellants assert, "essentially undo the Town Board's authority to ever deviate from a standard with a planned development" because it is a limitation that applies only to utility-scale solar collector systems.

24. Additionally, it needs to be noted that the Town Board in the passing of this legislation was certainly aware how it would affect the foregoing solar projects and how it approves Planned Developments. Quite simply, the Town Board surely knew that every utility-scale solar collector system project was going in a planned development. This has been evidenced by the fact that all of the Town's utility-scale solar collector system projects are all created via the Planned Development process and are located in such districts. For instance, Appellants note in their May 14, 2021 letter how they have already obtained approvals for three such projects in the town. If the Town Board did not intend for the provision to apply to utility-scale solar collector system projects, it would not have adopted § 219-39(A)(2) and § 219-39(B)'s limitations and/or would have expressly said such provisions do not apply to Planned Development projects.

25. As such, for all other reasons as set forth in the determination of the Code Enforcement Officer's letter-decision of March 17, 2021, the Board hereby votes to

affirm the March 17, 2021 determination of the Code Enforcement Officer. The motion was made by MR. Calarco, seconded by Mr. Spada and approved by a vote of 3 Ayes , 1 naves against and 1 abstaining by the following vote:

AYES	NAYES	ABSTAIN
D. CALARCO	E. BREWER	W. LOVERIDGE
A. MAIER		
L. SPADA		

ADJOURN

Spada moved, Maier seconded that the meeting be adjourned. There being no objections, Chairman Calarco adjourned the meeting at 7:30 p.m.

5 Ayes. 0 Noes. Motion carried.

Ayes: Brewer, Calarco, Loveridge, Maier, Spada

Abstain: Loveridge

Respectfully submitted,
Melissa Knights
Assistant to the Director