Matter of Freepoint Solar LLC v Town of Athens Zoning Bd. of Appeals
2022 NY Slip Op 34473(U)
August 18, 2022
Supreme Court, Greene County
Docket Number: Index No. EF2021-795
Judge: Adam W. Silverman
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At an IAS Term of the Greene County Supreme Court, held in and for the County of Greene, in the Village of Catskill, New York, on the 18th day of August, 2022.

PRESENT: HON. ADAM W. SILVERMAN,
Acting Justice of the Supreme Court

STATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE

In the Matter of the Application of

FREEPOINT SOLAR LLC, and FPS POTIC SOLAR LLC,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

-against-

TOWN OF ATHENS ZONING BOARD OF APPEALS,

Respondent.

DECISION AND ORDER
INDEX NO. EF2021-795

APPEARANCES:

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The following e-filed documents, listed by NYSCEF document number 1, 2, 15-35, 39-43, 46-53, 55, 56, 57 were read on the Petition and Answer.

ADAM W. SILVERMAN, A.J.S.C.

This special proceeding pursuant to CPLR article 78 was commenced on October 6, 2021, when Petitioners filed the Petition challenging Respondent's denial of a use variance. Petitioners, Freepoint Solar LLC, a nationwide developer of renewable energy infrastructure, and FPS Potic Solar LLC, a subsidiary of Freepoint Solar LLC, secured options to purchase two parcels of real property located at Potic Mountain Road in the Town of Athens, Greene County, intending to locate a solar energy facility on a portion thereof. Petitioners faced repeated delays from the Town government as they sought a building permit or standing to apply for a use variance. When their application to Respondent was finally heard, Respondent determined not to apply the public utility variance standard ("public necessity" test) to the application, but rather the general standard set under Town Law § 267-b (2) (b) (*see generally Matter of Otto v Steinhilber,* 282 NY 71 [1939]). Because Respondent erred by applying the wrong standard to the application, the determination is hereby vacated, and the matter remanded to Respondent for a new determination based upon application of the correct standard.

I. BACKGROUND

On July 18, 2018, Petitioners contacted the Town regarding the building permit application and to request a pre-application meeting with Respondent [NYSCEF Doc No 1 ¶ 19]. Although an application with details of the Project had yet to be filed, the Town Attorney advised, by e-mail dated July 25, 2018, Petitioners' project "would not seem to fit the circumstances of wanting a large scale development in an RU zone" [NYSCEF Doc No 1 ¶ 20]. Petitioners thereafter attended the Town Board's September 17, 2018 meeting to informally present on the project and, based upon feedback from that meeting, Petitioners met with adjoining landowners regarding the

proposal leading to letters of support from nine of fourteen adjoining landowners and two additional adjoining landowners also offering their adjacent properties to be used for the project. [NYSCEF Doc No 1 ¶ 21-24].

On December 6, 2019, Petitioners contacted the Town Attorney to confirm the Town's application procedures and were informed they must file an application for a building permit from the Town Code Enforcement Officer ("CEO") and be denied before they would have standing to appeal the denial and could file a Use Variance Application with Respondent [NYSCEF Doc No 1 ¶ 25-27]. On January 7, 2020, Petitioners sent their Building Permit Application, together with two copies of the preliminary site plan [NYSCEF Doc No 1 ¶ 28].

The CEO requested the "cost of construction" to calculate the fee, and, on January 10, 2020, the Town Attorney replied that Petitioners would "need to use a proposed value for the Project" so that the building permit fee could be calculated [NYSCEF Doc No 1 ¶ 29-30]. On January 15, 2020, Petitioners sought clarification regarding the need for cost of construction as the Town's fee schedule did not set forth a building permit application fee based on the "costs of construction" or the "value for the Project," but was rather, based on a "per square foot" calculation [NYSCEF Doc No 1 ¶ 31]. On January 16, 2020, the Town Attorney directed Petitioners to contact the CEO directly, however the CEO failed to respond until February 7, 2020, when he advised that the building permit application was "incomplete without an estimate of the cost of construction so we can calculate the permit fee," and requested copies of Petitioners' option agreements [NYSCEF Doc No 1 ¶ 31-33]. On February 12, 2020, the CEO advised Petitioners that the denial would be issued upon receipt of the option agreements [NYSCEF Doc No 1 ¶ 34]. On February 26, 2020,

Petitioners provided the "cost of construction" and option agreements while offering to pay the fee once it was calculated by the CEO [NYSCEF Doc No 1 ¶ 35].

Expecting the denial to be forthcoming, on February 28, 2020, Petitioners' expressed their intention to attend Respondent's March 11, 2020 meeting, however the Town Attorney stated a denial would not be provided until the application was "completed and the building permit fee is paid," despite the Town having not provided a fee amount or noted any additional alleged omissions and advised that Petitioners would not be afforded an opportunity to be heard at the meeting [NYSCEF Doc No 1 ¶ 35-38]

On March 2, 2020, the CEO discussed Petitioners' application with the Town Board, and on March 3, 2020, the Town Attorney advised Petitioners that the application would not be decided until the fee was paid, despite no fee amount being set, and that the Town Board directed the Town Attorney to have no further discussions or correspondence with Petitioners regarding the matter [NYSCEF Doc No 1 ¶ 39]. Thereafter, on March 6, 2022, since no calculation was provided, Petitioners did their own calculation and submitted it with a check to the Town [NYSCEF Doc No 1 ¶ 40-42]. In response, on March 19, 2020, the CEO requested data related to the project's lot coverage and connection to the power grid despite Petitioners having already provided lot coverage information with its application [NYSCEF Doc No 1 ¶ 43-45].

On April 15, 2020, the CEO requested, despite none of these items being on the building permit application, the quantity and square feet of the proposed solar panels, the total square feet of land for the project, and whether a Stormwater Pollution Prevention Plan ("SWPPP") and State Pollutant Discharge Elimination System ("SPDES") General Permit would be filed with the New York State Department of Environmental Conservation ("NYSDEC") and any other

environmental requirements [NYSCEF Doc No 1 ¶ 46-49]. On April 16, 2020, Petitioners replied that the solar panel square footage was already provided to the CEO on March 13 and 19, 2020, and added the solar panel quantity and dimensions, and confirmed that a SWPPP, SPDES General Permit and a Full Environmental Assessment Form would be required for the project and would be submitted with Petitioners' applications upon the CEO denying the building permit application [NYSCEF Doc No 1 ¶ 49]. On April 17, 2020, the CEO requested the NYSDEC SWPPP and SPDES General Permit [NYSCEF Doc No 1 ¶ 50]. On May 8, 2020 the CEO requested Petitioners secure all New York State approvals for the project [NYSCEF Doc No 1 ¶ 54].

On May 4, 2020, Petitioners attempted to speak at the Town Board meeting but were muted and told they must request to be on the agenda through the Town Clerk [NYSCEF Doc No 1 ¶ 52]. On May 12, 2020, after rejecting Petitioners' request to be added to the agenda, the Town Supervisor stated that there was "no reason to schedule a meeting with the Town Board/Town Attorney/Planning or Zoning Boards" because Petitioners' application remained "incomplete" until the Town received: (1) "full set of engineered plans"; (2) "estimated project cost"; and (3) "correct application fee" [NYSCEF Doc No 1 ¶ 52-58].

On May 15, 2020, the CEO made an additional request for Workers' Compensation and liability insurance certificates [NYSCEF Doc No 1 ¶ 60].

On June 15 and July 1, 2020, Petitioners provided the Town with a full set of plans, all New York State approvals for the project, and Workers' Compensation and liability insurance certificates, however, despite outreach by Petitioners over the next two months, the CEO failed to provide a fee amount [NYSCEF Doc No 1 ¶ 61-62].

On September 9, 2020, the Town Attorney requested that Petitioners re-submit all previously provided information and Petitioners did so the same day [NYSCEF Doc No 1 ¶ 63]. On October 20, 2020, the Town Board adopted a fee of $1,000 per megawatt and on December 11, 2020, Petitioners delivered the fee [NYSCEF Doc No 1 ¶ 64-65]. On January 20, 2021, over a year after the initial application, the CEO finally denied the application because the project was in a zoning district not permitted by Town's Solar Law, as was evident since the time the application was submitted [NYSCEF Doc No 1 ¶ 66-67]

On February 9, 2021, Petitioners filed their Use Variance Application with Respondent [NYSCEF Doc No 1 ¶ 68-70]. Petitioners then attended Respondent's March 17, 2021 meeting, observing their applications unopened, and were informed by Respondent's Chairman that "there was nothing he could do" because the project was in a zoning district where it was not a permitted use [NYSCEF Doc No 1 ¶ 71-78]. Petitioners next presented at Respondents' May 12, 2021 meeting, urging consideration of the Use Variance under the public utility standard [NYSCEF Doc No 1 ¶ 80-89]. After Respondent requested the option agreements, despite their previous submittal, and failed to attend a joint visual field study at the site organized by Petitioners with the Planning Board and Respondent, Petitioners next presented the Project at the ZBA's August 11, 2021 meeting [NYSCEF Doc No 1 ¶ 96, 106, 108, 111-119]. On September 8, 2021, Respondent issued a written decision unanimously denying Petitioners' Use Variance Application [NYSCEF Doc No 1 ¶ 124-129]. Significantly, the determination was based upon the standard set forth in Town Law § 267-b (2) (b) and provided no consideration under the public utility test set forth in *Matter of Consolidated Edison Co. v Hoffman* [NYSCEF Doc No 29].

II. Standard Applicable to a Public Utility Use Variance Application

Generally, an applicant for a use variance must show that the zoning regulations and restrictions have caused "unnecessary hardship. In order to prove such unnecessary hardship the applicant shall demonstrate to the board of appeals that for each and every permitted use under the zoning regulations for the particular district where the property is located, (1) the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence; (2) that the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood; (3) that the requested use variance, if granted, will not alter the essential character of the neighborhood; and (4) that the alleged hardship has not been self-created" (Town Law § 267-b [2] [b]; *see generally Matter of Otto v Steinhilber*, 282 NY 71 [1939]).

"It has been observed . . . that [the unnecessary hardship] requirements are not appropriate where a public utility . . . 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" (*Matter of Consolidated Edison Co. of N.Y. v Hoffman*, 43 NY2d 598, 607 [1978]; *see* 2 Salkin, New York Zoning Law and Practice § 11:22 [4th ed. 2011]). "It has long been held that a zoning board may not exclude a utility from a community where the utility has shown a need for its facilities" (*Matter of Cellular Tel. Co. v Rosenberg*, 82 NY2d 364, 372 [1993] [internal quotation marks, brackets, and citations omitted]; *see* 12 NY Jur 2d, Buildings, Zoning, and Land Controls § 290; 2 Salkin, New York Zoning Law and Practice § 11:19 [4th ed. 2011]). Likewise, local boards may not deny an application based "solely on community objection" (*Matter of Biggs v Eden Renewables LLC*, 188 AD3d 1544, 1548

[3d Dept 2020] [Generalized community objections to the large scale solar project "due to potential concerns of negative visual impact and negative impact upon adjoining property values" held insufficient to overcome evidence in the record justifying granting of application]; *see also Cellular Tel. Co. v Village of Tarrytown*, 209 AD2d 57, 66 [2d Dept 1995] [In considering a public utility's application for a variance, "a municipality may not invoke its police powers solely as a pretext to assuage strident community opposition"], *lv denied* 86 NY2d 701 [1995]). "In short, due to the essential nature of the service and the limited flexibility there is as to where the facility can be located in order to generate or provide the service, the facility must be, and is, entitled to a relaxed zoning standard" (Patricia E. Salkin and Robert Burgdorf, *Siting Wind Farms in New York: Applicability of the Relaxed Public Utility Standard*, New York Zoning Law and Practice Report vol. 7, No. 1.; *see* 3 Rathkopf's The Law of Zoning and Planning § 48:6; 78:2 [4th ed.]).

"Although a municipality is not free to prevent a utility from providing necessary services by application of its zoning powers, neither may a utility simply disregard the local ordinances. Rather, a balance must be maintained between those interests of the locality which can be expressed by zoning ordinances and the needs of the community which must be served by the utility" (*Matter of Zagoreos v Conklin*, 109 AD2d 281, 289 [2d Dept 1985]; *see Matter of United States Transmission Sys. v Schoepflin*, 63 AD2d 970, 971 [2d Dept 1978]; *see also* 2 Salkin, New York Zoning Law and Practice § 11:27 [4th ed. 2011] [Expanding upon efforts to regulate solar energy facility siting to balance the need for energy with the potential negative externality such as loss of habit and open space]; *see generally* Sarah Pizzo, Note, *When Saving the Environment Hurts the Environment: Balancing Solar Energy Development with Land and Wildlife Conservation in A Warming Climate*, 22 Colo J Intl Envtl L & Poly 123 [2011]). "Instead [of the

unnecessary hardship test], the utility must show that modification is a public necessity in that it is required to render safe and adequate service, and that there are compelling reasons, economic or otherwise, which make it more feasible [to seek the variance] than to use alternative [sites]" (*Matter of Consolidated Edison Co. of N.Y. v Hoffman*, 43 NY2d at 611; *see Matter of Cellular Tel. Co. v Rosenberg*, 82 NY2d at 372 [Holding "*Matter of Consolidated Edison* (*supra*), applies to all public utilities. It also applies to entirely new sitings of facilities, as well as the modification of existing facilities"]). The Court of Appeals has further held that "'where the intrusion or burden on the community is minimal, the showing required by the utility should be correspondingly reduced'" (*Matter of Cellular Tel. Co. v Rosenberg,* 82 NY2d at 372, quoting *Matter of Consolidated Edison Co. of N.Y. v Hoffman*, 43 NY2d at 611; *see Sprint Spectrum, L.P. v Zoning Bd. of Appeals of the Town of Guilderland*, 173 Misc 2d 874, 877 [Sup Ct, Albany County 1997, Graffeo, J.] [Holding "to obtain a use variance, the petitioner must demonstrate that the site is necessary to provide safe and adequate service and that there are compelling reasons, economic or otherwise, to obtain the variance. Moreover, where the burden on the community is minimal, the showing required by the utility should be correspondingly reduced"]).

In determining what applicants are subject to the public utility standard, courts do not apply a rigid rule (*see Matter of Nextel Partners v Town of Fort Ann,* 1 AD3d 89, 93 [3d Dept 2003] [Holding a "case-by-case" analysis of changes in industries and regulations may impact the viability of the rationale underlying the public utility exception, but deregulation and competition alone do not prevent an applicant from being a public utility], *lv denied* 1 NY3d 507 [2004]) "A 'public utility' has been defined to mean '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'" (*Matter of Cellular Tel. Co. v Rosenberg*, 82 NY2d at 371, quoting 2 Anderson, American Law of Zoning § 12.32, at 568-569 [3d ed]). "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'" (*id.*). "There is usually no question that the activities of heavily regulated electric and gas companies and their energy generation and transmission projects and facilities involve the activities of public utilities" (4 Rathkopf's The Law of Zoning and Planning § 78:9 [4th ed.], citing *Matter of West Beekmantown Neighborhood Assn., Inc. v Zoning Bd. of Appeals of Town of Beekmantown*, 53 AD3d 954, 956 [3d Dept 2008] [Holding zoning board rationally found that wind turbines were "public utility"]; *see Matter of Wind Power Ethics Group (WPEG) v Zoning Bd. of Appeals of Town of Cape Vincent*, 60 AD3d 1282, 1283 [4th Dept 2009] [Holding zoning board's classification of wind-powered generators as a utility was neither irrational nor unreasonable, and that the determination is supported by substantial evidence]).

III. Discussion

Respondent asserts that Petitioners' solar facility is not a public utility for zoning purposes. Respondent also argues that the Town of Athens zoning ordinance does not address public utilities

and its definition of "essential services"[1] is narrower than that interpreted to support wind turbines as public utilities (*compare Matter of Wind Power Ethics Group (WPEG) v Zoning Bd. of Appeals of Town of Cape Vincent*, 60 AD3d at 1283). Additionally, Respondent contends that Petitioners cannot be consider a utility because they do not meet the test under *Matter of Cellular Tel. Co. v Rosenberg* since they do "not hold a monopoly on the provision of a particular service"; do "not have the power of eminent domain; there is nothing unique about the essential nature of its services that requires mandatory placement in one specific area; while operators of such facilities are lightly regulated by the [Public Service Commission], the applicant does not operate under a franchise; and finally, solar generating facilities are not subject to the same logistical problems as true public utilities with respect to location and alternative sources and means of delivery." Finally, Respondent maintains that even assuming the applicability of the public utility standard, it must be held as a "gap" test, that is it would only be appliable if an applicant could show a gap in service that needs to be filled (*citing* 2 Salkin, New York Zoning Law and Practice § 12:03 [4th ed. 2011]).

Contrary to Respondent's assertion that "electricity is an essential service - is well settled" (Patricia E. Salkin and Robert Burgdorf, *Siting Wind Farms in New York: Applicability of the Relaxed Public Utility Standard*, New York Zoning Law and Practice Report vol. 7, No. 1.; *see generally Berg v Chelsea Hotel Owner, LLC*, 203 AD3d 484 [1st Dept 2022] [Listing, in a different context, "essential services" as "heat, hot water, gas, and electricity"]). "While 'public utility' is not defined by the zoning law at issue, it is undisputed that the [facility that Petitioners] intend[]

[1] Code of the Town of Athens 180-3 provides "Essential Services: The erection, construction, alteration or maintenance by public utilities or municipal or other governmental agencies of underground or overhead gas, electrical, steam or water transmission or distribution systems, including poles, wires, mains, drains, sewers, pipes, conduit cables, fire alarm boxes, traffic signals, hydrants, street signs and similar equipment and accessories in connection therewith, but not including buildings, unless specifically permitted by special permit, and reasonably necessary for the furnishing of adequate service by such public utilities or municipal or other governmental agencies or for the public health or safety or general welfare".

to construct will generate energy, a useful public service, and will be subjected to regulation and supervision by the Public Service Commission" (*Matter of West Beekmantown Neighborhood Assn., Inc. v Zoning Bd. of Appeals of Town of Beekmantown*, 53 AD3d at 956; *see* Public Service Law § 2 [2-b] [Stating that the "term 'alternate energy production facility,' . . . includes any solar (facility) . . . 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"]; *see also* Public Service Law § 2 [12], [23]; 5 [1] [b]; 66-c [1]). That the solar energy industry is not subject to an exclusive franchise does not prevent the application of the relaxed standard (*see Matter of Nextel Partners v Town of Fort Ann,* 1 AD3d at 93). Nor is the power of eminent domain the sole defining feature of a public utility (*see Matter of Cellular Tel. Co. v Rosenberg*, 82 NY2d at 371). While Respondent argues that Petitioners' facility does not face the same logistical challenges as "true public utilities," the record includes a Central Hudson Capacity Map showing distribution system locations throughout the area supporting Petitioners' assertion that the location is subject to the logistic problems contemplated by *Matter of Cellular Tel. Co. v Rosenberg* (82 NY2d at 371) [NYSCEF Doc No 33].[2]

Finally, Respondent's assertion that Petitioners must meet a "gap" test in a manner similar to a cellular provider (*see Matter of Independent Wireless One Corp. v City of Syracuse,* 12 AD3d 1085, 1086 {4th Dept 2004]) is unavailing. In *Matter of Consolidated Edison Co. v Hoffman*,

[2] Beyond Respondent's conclusory assertion that solar can be located anywhere and Petitioners' evidence in the record regarding infrastructure limitations, property law generally has begun recognizing the variable rights, and impacts, associated with solar energy and real property (*see e.g.* Brent Resh, Note, *Something New Under the Sun: The Drecp and Utility-Scale Solar on the New Energy Frontier*, 18 Nev LJ 317, 333-335 [2017] [Discussing the limitations of economics and infrastructure in siting large scale solar creating theoretical "renewable parcels" or "solarsheds"]; Hannah Wiseman, *Expanding Regional Renewable Governance*, 35 Harv Envtl L Rev 477, 511-512 [2011] [Recognizing that a "large wind or solar farm is useless if not connected to a transmission line that carries the electricity generated to consumers]).

respondent in that case denied an application by Consolidated Edison Company for a variance for the construction of a wet cooling tower for its nuclear generating plant (43 NY2d at 611). The Court of Appeals did not look solely to a coverage gap relating only to the municipality making the determination, but instead considered the broader "potential hardship to Con Edison's approximately three million customers, and millions of others affected" (*id.* at 609). In considering the necessity of the variance, the Court of Appeals noted that "operation of the plant saved Con Edison customers $78,000,000 in fuel expense . . . [and if the variance were denied and the facility] closed down[,] additional fuel costs to make up the lack of generation by increasing production at its other plants, all of which burn imported oil, would translate to $567,000 per day . . . approximately 7,300,000 barrels of oil or equivalently 306,600,000 gallons" in a year (*id.* at 608). Similarly, the test for an electrical public utility, such as in this case, is not that there is "no other public utility provider available that could provide access to the proposed utility service . . . [and that] the locality not already served by another service provider" as urged by Respondent [NYSCEF Doc 46, p 9], but public necessity must be viewed in a broader consideration of the general public's need for the service.

IV. Conclusion

Because Respondent erred by applying the general standard set under Town Law § 267-b rather than the test for a use variance set forth in *Matter of Consolidated Edison Co. v Hoffman*, the determination is hereby vacated, and the matter is remitted for Respondent to reconsider Petitioners' application with the appropriate test in mind (*see generally Matter of Nye v Zoning Bd. of Appeals of Town of Grand Is.*, 81 AD3d 1455, 1456 [4th Dept 2011]; *Millpond Mgt., Inc. v Town of Ulster Zoning Bd. of Appeals*, 42 AD3d 804, 806 [3d Dept 2007]).

Finally, in light of the foregoing, while the record reflects that an executive session was held that may have constituted a technical violation of the Open Meetings Law (Public Officers Law art 7), the Court finds this insufficient to warrant the award of attorney fees (*see Matter of Nextel Partners v Town of Fort Ann,* 1 AD3d at 96).

Accordingly, it is

ORDERED, that the petition is hereby **partially granted** to the extent that Respondent's determination is annulled and the matter is remitted to Respondent for further proceedings not inconsistent with this Court's decision; and it is further

ORDERED, the petition is **partially denied and dismissed.**

The Court has uploaded the original Decision/Order to the case record in this matter as maintained on the NYSCEF website whereupon it is to be filed and entered by the Office of the County Clerk.

Counsel for Petitioners is not relieved from the applicable provisions of CPLR 2220 and 202.5b (h) (2) of the Uniform Rules of Supreme and County Courts insofar as it relates to service and notice of entry of the filed document upon all other parties to the action/proceeding, whether accomplished by mailing or electronic means, whichever may be appropriate dependent upon the filing status of the party.

SO ORDERED AND ADJUDGED

ENTER.

Dated: August 18, 2022
Catskill, New York

ADAM W. SILVERMAN
Acting Justice of the Supreme Court