

# **Integrating Sustainability and Resiliency with Local Land Use and Environmental Planning**

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**2023 ANNUAL ALFRED B. DELBELLO  
LAND USE AND SUSTAINABLE DEVELOPMENT CONFERENCE  
December 8, 2023**

**BALANCING ECONOMIC REALITIES WITH ENVIRONMENTAL AND  
SOCIAL CONCERNS**

**INTEGRATING SUSTAINABILITY AND RESILIENCY WITH LOCAL  
LAND USE AND ENVIRONMENTAL PLANNING**

**Presented by the Westchester Municipal Planning Federation**

**CLE Materials– Caselaw and Sample Local Code Provisions**

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**With assistance from Greg Cutler, *Planner, Village of Mamaroneck***

# Pace Conference 2023

## CLE Materials

### Integrating Sustainability and Resiliency with Local Land Use and Environmental Planning

#### Cases

1. Matter of Wind Power Ethics Group (WPEG) v. Zoning Board of Appeals of Town of Cape Vincent, St. Lawrence Windpower, LLC, 60 A.D.3d 1282 (4th Dep't 2009)
2. Matter of Source Renewables, LLC v. Town of Cortlandville Zoning Board of Appeals, et al., 213 A.D.3d 1178 (3rd Dep't 2023)
3. Matter of CES Hawthorne Solar, LLC v. Town of Mount Pleasant Planning, Index No. 66112/2021, Supreme Court of the State of New York, County of Westchester
4. Matter of Freepoint Solar, LLC and FPS Potic Solar LLC v. Town of Athens Zoning Board of Appeals. Index No. EF2021-795, Supreme Court of State of New York, Greene County, August 2022

#### Laws

1. Local Law W-2023
  - a. Law to amend Chapters 294 (Stormwater Management and Erosion and Sediment Control) and 342 (Zoning) of the Code of the Village of Mamaroneck regarding zoning and stormwater changes to improve resiliency and reduce flooding.
2. Local Law || NG-Zero Special Permit – Town of New Castle
3. Zoning Code §197-46.1. First-floor elevations for single-family residences - City of Rye
4. Zoning Code §300-81.5. Battery energy storage systems - Town of Yorktown
5. Zoning Code §200-31.4. Battery energy storage systems - Town of Ossining

# Case 1

60 A.D.3d 1282

Supreme Court, Appellate Division, Fourth Department, New York.

In the Matter of WIND POWER ETHICS GROUP (WPEG) and Sarah Boss,  
Petitioners–Appellants,

v.

ZONING BOARD OF APPEALS OF TOWN OF CAPE VINCENT, St. Lawrence Windpower,  
LLC, Respondents–Respondents, et al., Respondents. (Appeal No. 1.)

March 20, 2009.

#### Synopsis

Background: Organization of property owners in town initiated Article 78 proceeding, seeking to annul determination of town zoning board of appeals that series of wind-powered generators qualified as utility and that project was permitted site plan use in agricultural residential district. The Supreme Court, Jefferson County, [Hugh A. Gilbert](#), J., dismissed petition. Organization appealed.

[\[Holding:\]](#) The Supreme Court, Appellate Division, held that determination was not arbitrary, capricious, illegal, ultra vires or void.

Affirmed.

West Headnotes (5)

[\[1\] Zoning and Planning](#)  [Record, assignment of errors and briefs](#)

Contention that town zoning board of appeals failed to refer application for wind-powered generators project to appropriate county planning agency was raised for first time in organization’s reply papers and

thus was court would not consider issue on appeal. [McKinney's General Municipal Law § 239-m](#).

[Cases that cite this headnote](#)

[2] [Zoning and Planning](#) 🔑 [Public utilities; water and sewage considerations](#)

Determination of town zoning board of appeals that series of wind-powered generators qualified as utility and that project was permitted site plan use in agricultural residential district was not arbitrary, capricious, illegal, ultra vires or void; classification by board of series of wind-powered generators as utility within meaning of zoning law was neither irrational nor unreasonable, and determination was supported by substantial evidence.

[1 Cases that cite this headnote](#)

[3] [Administrative Law and Procedure](#) 🔑 [Permissible or reasonable construction](#)

When applying its special expertise in a particular field to interpret statutory language, an agency's rational construction is entitled to deference.

[Cases that cite this headnote](#)

[4] [Zoning and Planning](#) 🔑 [Scope and Extent of Review](#)

Documents concerning comprehensive plan for town were not before court when it dismissed petition for review of determination of town zoning board of appeals that series of wind-powered generators qualified as utility and that project was permitted site plan use in agricultural residential district, and thus documents were properly excluded on appeal.

[Cases that cite this headnote](#)

[5] [Zoning and Planning](#)  [Scope and Extent of Review](#)

Comprehensive plan for town was not relevant to issues raised on appeal of dismissal of Article 78 proceeding seeking to annul determination of town zoning board of appeals that series of wind-powered generators qualified as utility and that project was permitted site plan use in agricultural residential district, and thus court would not take judicial notice of plan. [McKinney's CPLR 7801 et seq.](#)

[Cases that cite this headnote](#)

Attorneys and Law Firms

\*\*360 Menter, Rudin & Trivelpiece, P.C., Syracuse ([Julian B. Modesti](#) of Counsel), for Petitioners–Appellants.

Whiteman Osterman & Hanna LLP, Albany ([Michael G. Sterthous](#) of Counsel), for Respondent–Respondent Zoning Board of Appeals of Town of Cape Vincent.

Nixon Peabody LLP, Albany ([Jena R. Rotheim](#) of Counsel), for Respondent–Respondent St. Lawrence Windpower, LLC.

PRESENT: [HURLBUTT](#), J.P., SMITH, [FAHEY](#), [PERADOTTO](#), AND PINE, JJ.

Opinion

MEMORANDUM:

[1] \*1282 Respondent St. Lawrence Windpower, LLC (St. Lawrence) applied to the Town of Cape Vincent Planning Board for, inter alia, site plan approval for its proposed construction of a series of wind-powered generators (project) on property designated as an “Agricultural Residential District.” Petitioners commenced this CPLR article 78 proceeding seeking to annul the determination of respondent Zoning Board of Appeals of Town of Cape Vincent (ZBA) that the series of wind-powered generators qualified as a utility and that the project therefore was a permitted \*\*361 site plan use in that district. With respect to the judgment in appeal No. 1, we conclude that Supreme Court properly dismissed the petition. Petitioners’ contention that the ZBA failed to refer St. Lawrence’s application to the \*1283 appropriate county planning agency pursuant to [General Municipal Law § 239–m](#) is raised for the first time in petitioners’ reply papers and thus is not properly before us (see [Matter of](#)

[Ball v. New York State Dept. of Envtl. Conservation, 35 A.D.3d 732, 733–734, 826 N.Y.S.2d 698](#); [Matter of Falk v. Village of Scarsdale Zoning Bd. of Appeals, 254 A.D.2d 358, 678 N.Y.S.2d 299](#); [Matter of Hill v. New York City Tr. Auth., 222 A.D.2d 506, 635 N.Y.S.2d 540](#), lv. denied [88 N.Y.2d 815, 651 N.Y.S.2d 17, 673 N.E.2d 1244](#)).

[2] [3] We reject petitioners’ further contention that the ZBA’s determination was “arbitrary, capricious, illegal, ultra vires and void.” Pursuant to section 315 of the Town of Cape Vincent Zoning Law, utilities are defined as “telephone dial equipment centers, electrical or gas substations, water treatment or storage facilities, pumping stations and similar facilities” that have been, inter alia, constructed or maintained by municipal agencies or public utilities. It is well settled that, “when applying its special expertise in a particular field to interpret statutory language, an agency’s rational construction is entitled to deference” ([Matter of Raritan Dev. Corp. v. Silva, 91 N.Y.2d 98, 102, 667 N.Y.S.2d 327, 689 N.E.2d 1373](#)), and we conclude that the classification by the ZBA of the series of wind-powered generators as a utility within the meaning of section 315 of its Zoning Law is neither irrational nor unreasonable, and that the determination is supported by substantial evidence (see [Matter of West Beekmantown Neighborhood Assn., Inc. v. Zoning Bd. of Appeals of Town of Beekmantown, 53 A.D.3d 954, 956, 861 N.Y.S.2d 864](#); [Matter of May v. Town of Lafayette Zoning Bd. of Appeals, 43 A.D.3d 1427, 1428, 843 N.Y.S.2d 747](#); see generally [Matter of Cellular Tel. Co. v. Rosenberg, 82 N.Y.2d 364, 371, 604 N.Y.S.2d 895, 624 N.E.2d 990](#)).

[4] [5] With respect to the order in appeal No. 2, we reject the contention of petitioners that the court erred in excluding three documents in settling the record in appeal No. 1. Petitioners do not contend that the documents were before the court when it dismissed the petition, and thus they were properly excluded from the record on appeal (see [Matter of Gullo v. Semon, 265 A.D.2d 656, 696 N.Y.S.2d 554](#), lv. denied [94 N.Y.2d 757, 704 N.Y.S.2d 532, 725 N.E.2d 1094](#); [Matter of Dyno v. Village of Johnson City, 255 A.D.2d 737, 680 N.Y.S.2d 709](#)).

Alternatively, petitioners contend that we should take judicial notice of the three documents. We reject that contention. One of the documents, “A Joint Comprehensive Plan for the Village & Town of Cape Vincent,” is not relevant to the issues raised in appeal No. 1, and judicial notice is not available with respect to the remaining two documents.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

All Citations

60 A.D.3d 1282, 875 N.Y.S.2d 359, 2009 N.Y. Slip Op. 02016

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## Case 2

2023 WL 2168411

Supreme Court, Appellate Division,  
Third Department, New York.

In the Matter of SOURCE  
RENEWABLES, LLC, et al., Appellants,  
v.  
TOWN OF CORTLANDVILLE ZONING  
BOARD OF APPEALS et al., Respondents.

534106

|  
Calendar Date: January 12, 2023

|  
Decided and Entered: February 23, 2023

**Attorneys and Law Firms**

Barclay Damon LLP, Buffalo (Corey A. Auerbach of counsel), for appellants.

Nash Connors, PC, Buffalo (Andrew J. Kowalewski of counsel), for respondents.


Before: Garry, P.J., Egan Jr., Lynch, Pritzker and McShan, JJ.

**MEMORANDUM AND ORDER**

Garry, P.J.

\*1 Appeal from an order and judgment of the Supreme Court (Oliver N. Blaise III, J.), entered September 10, 2021 in Cortland County, which, in a combined proceeding pursuant to CPLR article 78 and plenary action, partially granted respondents' motion to dismiss the amended petition/complaint.

Petitioner Gunzenhauser Real Estate Company has owned certain real property in Cortland County since 1963. That property is comprised of two abutting parcels: one parcel, approximately 38.5 acres, is located in the City of Cortland, and the other parcel, approximately 24.5 acres, is located in the Town of Cortlandville. Both parcels are elevated, with precipitous slopes and shallow bedrock, essentially undeveloped and situated in R-1 residential land use districts (*see generally* Code of City of Cortland, ch 300, art II; Code of Town of Cortlandville, ch 178, art IV). Petitioner Source Renewables, LLC is under contract to purchase the

property, which has been on the market for over 30 years, contingent upon municipal approval to construct a ground-mounted photovoltaic, or solar energy, system thereon. In February 2020, Source Renewables, as contract vendee and with the express authorization of Gunzenhauser, submitted an application to the Town of Cortlandville Planning Board requesting a use variance, conditional permit and aquifer protection district special permit to construct a solar array, access roads and chain-link fencing on approximately 21 acres of the Cortlandville parcel. Pursuant to  General Municipal Law § 239-m, the proposed zoning action was referred to the Cortland County Planning Department, which prepared a staff report on the application and authorized the Town to proceed with the consideration of same.<sup>1</sup> The Cortland County Industrial Development Agency, acting as lead agency, later completed a coordinated environmental review pursuant to the State Environmental Quality Review Act (*see* ECL art 8 [hereinafter SEQRA]) and determined that the Cortlandville project would have no significant environmental impacts. Meanwhile, the City of Cortland Zoning Board of Appeals reviewed and approved Source Renewables' use variance for the adjoining Cortland parcel.

<sup>1</sup> The County Planning Department was unable to meet due to the COVID-19 pandemic and thus forwarded its report for informational purposes only, without a recommendation.

In November 2020, respondent Town of Cortlandville Zoning Board of Appeals (hereinafter the ZBA) held a public hearing on Source Renewables' application. Following the hearing, the ZBA found that Source Renewables demonstrated that the alleged hardship was unique to the Cortlandville parcel but otherwise failed to satisfy the statutory criteria for a use variance (*see generally* Town Law § 267-b [2][b]). Upon motion of one of its members, the ZBA postponed any action on the application until its next meeting. Source Renewables later supplemented the administrative record with an economic viability study, visual simulations and a statutory analysis. In January 2021, respondent held a second public hearing, at the conclusion of which the ZBA determined that Source Renewables demonstrated that the Cortlandville parcel cannot provide a reasonable return as presently zoned but failed to satisfy the remaining criteria to justify a use variance. The ZBA then separately considered whether the statutory criteria were met for the access road – so that the Cortland parcel could be accessed via the Cortlandville parcel – and concluded that Source Renewables failed in all respects.

\*2 Petitioners commenced this combined CPLR article 78 proceeding and plenary action to annul the ZBA's determination, arguing that the denial was arbitrary and capricious and amounted to a regulatory taking. Respondents then moved, pre-answer, to dismiss the amended petition/complaint pursuant to CPLR 3211(a)(3) and (5) and CPLR 7804(f). Following oral argument, Supreme Court partially granted the motion, concluding that petitioners have standing but finding Source Renewable's alleged hardship to be self-created and petitioners' regulatory taking claim to be inadequately pleaded. Petitioners appeal.

As a preliminary matter, although a motion pursuant to CPLR 7804(f) raising objections in point of law "proscribes dismissal on the merits following such a motion," there is an exception permitting a resolution on the merits where "the facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer" (*Matter of Nassau BOCES Cent. Council of Teachers v. Board of Coop. Educ. Servs. of Nassau County*, 63 N.Y.2d 100, 102, 480 N.Y.S.2d 190, 469 N.E.2d 511 [1984]; see *Matter of Kickertz v. New York Univ.*, 25 N.Y.3d 942, 944, 6 N.Y.S.3d 546, 29 N.E.3d 893 [2015]). Here, there is no dispute as to the facts, and the arguments of the parties with respect to the rationality of the ZBA's determination were fully set forth in the motion papers (see *Leonard v. Planning Bd. of Town of Union Vale*, 136 A.D.3d 868, 871, 26 N.Y.S.3d 293 [2d Dept. 2016]; *Matter of S & R Dev. Estates, LLC v. Feiner*, 112 A.D.3d 945, 946–947, 977 N.Y.S.2d 377 [2d Dept. 2013]; *Matter of Hunt v. Hamilton County*, 235 A.D.2d 758, 760, 652 N.Y.S.2d 402 [3d Dept. 1997]). We therefore discern no error in Supreme Court addressing the merits of petitioners' first and second causes of action on this pre-answer motion.

As for the merits, the applicant for a use variance bears the burden to demonstrate that the "applicable zoning regulations and restrictions have caused unnecessary hardship" (Town Law § 267–b [2][b]). Unnecessary hardship requires a showing that (1) the property cannot provide a reasonable return as it is currently zoned, (2) the hardship results from characteristics unique to the property, (3) the proposed use will not alter the essential character of the neighborhood and (4) that the hardship has not been self-created (see Town Law § 267–b [2][b]). "Local zoning boards have broad discretion in considering applications for variances, and judicial review

[of such determinations] is limited to determining whether the action taken by the board was illegal, arbitrary or an abuse of discretion" (*Matter of Ifrah v. Utschig*, 98 N.Y.2d 304, 308, 746 N.Y.S.2d 667, 774 N.E.2d 732 [2002] [citation omitted]; see *Matter of Sasso v. Osgood*, 86 N.Y.2d 374, 384, 384 n. 2, 633 N.Y.S.2d 259, 657 N.E.2d 254 [1995]). We are further limited by the principle that judicial review of an administrative determination is restricted solely to the grounds invoked by the administrative entity as the basis for its decision (see *Matter of Tri-Serendipity, LLC v. City of Kingston*, 145 A.D.3d 1264, 1266, 42 N.Y.S.3d 682 [3d Dept. 2016]; *Matter of Mobil Oil Corp. v. Village of Mamaroneck Bd. of Appeals*, 293 A.D.2d 679, 681, 740 N.Y.S.2d 456 [2d Dept. 2002]).

The ZBA ultimately concluded that Source Renewables satisfied the first criteria for a use variance, and the economic viability analysis, prepared by a licensed appraiser, contains ample dollars and cents evidence demonstrating that no permissible use of the Cortlandville parcel would yield a reasonable return. As to the second criteria, there is no basis in the record for the ZBA's conclusion that Source Renewables failed to prove that the alleged hardship results from " 'unique conditions peculiar to and inherent in the property as compared to other properties in the zoning district' " or neighborhood (*Matter of Jones v. Zoning Bd. of Appeals of the Town of Oneonta*, 90 A.D.3d 1280, 1283, 934 N.Y.S.2d 599 [3d Dept. 2011], quoting *Matter of First Natl. Bank of Downsville v. City of Albany Bd. of Zoning Appeals*, 216 A.D.2d 680, 682, 628 N.Y.S.2d 199 [3d Dept. 1995]). In support of its conclusion, the ZBA found that the whole hillside is similar and that there are other parcels on the hill with houses.<sup>2</sup> However, the evidence before the ZBA established that the Cortlandville parcel is poorly suited for residential development due its lack of access to public utilities. The economic viability study submitted in support of the application, and credited by the ZBA in concluding that the property could not realize a reasonable return, established that fully infrastructured lots within a mile of the Cortlandville parcel sell for \$20,000 to \$25,000, but that the per lot development cost for the Cortlandville parcel would be more than \$100,000 due to the lack of infrastructure. There is nothing in the administrative record to suggest that the other parcels noted by the ZBA share that limitation.<sup>3</sup>

<sup>2</sup> After the initial public hearing, the ZBA had previously concluded that this criteria had been met. Although Source Renewables submitted


additional evidence thereafter, the ZBA did not articulate a basis for the change in position.

3 As discussed more fully below, Source Renewables has satisfied the remaining statutory criteria for a use variance, and, generally speaking, to deny a use variance solely “on the ground that ‘unique circumstances’ have not been shown invites a potentially successful assault on the zoning ordinance as being confiscatory” (*Matter of Family of Woodstock, Inc. v. Auerbach*, 225 A.D.2d 854, 856, 638 N.Y.S.2d 825 [3d Dept. 1996]).

\*3 There is also no evidence in the record to support the ZBA's conclusion that Source Renewables failed to satisfy the third criteria for a use variance – that the variance would not alter the essential character of the neighborhood. The ZBA acknowledged the negative SEQRA declaration, which, in pertinent part, found that the Cortlandville project would not impair the quality of aesthetic resources or of existing community or neighborhood character (*see* 6 NYCRR 617.2[1]), but ultimately relied upon the opinion of one of its members that the solar array would not be visually pleasing from certain vantage points, particularly in the fall and winter. Although the personal observations of members of a zoning board may be considered (*see Matter of Genser v. Board of Zoning & Appeals of Town of N. Hempstead*, 65 A.D.3d 1144, 1147, 885 N.Y.S.2d 327 [2d Dept. 2009]; *Matter of Rosewood Home Bldrs., Inc. v. Zoning Bd. of Appeals of Town of Waterford*, 17 A.D.3d 962, 964, 794 N.Y.S.2d 152 [3d Dept. 2005]), the ZBA failed to account for the fact that, from the vantage points referenced by its member, the solar arrays on the equally elevated Cortland parcel will be readily observable (*see generally Matter of West Vil. Houses Tenants' Assn. v. New York City Bd. of Stds. & Appeals*, 302 A.D.2d 230, 231, 755 N.Y.S.2d 377 [1st Dept. 2003], *lv dismissed & denied* 100 N.Y.2d 533, 761 N.Y.S.2d 594, 791 N.E.2d 960 [2003]). Similarly, to the extent that the ZBA relied upon the City's – versus the Town's – goal for aesthetically improving the gateway to the City, as previously noted, the City approved the variance for the Cortland parcel.

Turning to the final criteria, we must first note that Supreme Court concluded that Source Renewables failed to prove that the alleged hardship was not self-created because it entered into the subject contract knowing its proposed project was prohibited. This was not the basis articulated by the ZBA (*see Matter of Mobil Oil Corp. v. Village of Mamaroneck Bd. of Appeals*, 293 A.D.2d at 680–681, 740 N.Y.S.2d 456). The court further erred by basing its determination upon the

knowledge Source Renewables possessed when entering into the contract. “Although a contract vendee may apply for a use variance,” where, as here, the contract is executory and conditional upon the granting of the variance, “ ‘it is the vendor's rights that are being determined’ ” (*Matter of Amco Dev., Inc. v. Zoning Bd. of Appeals of Town of Perinton*, 185 A.D.2d 637, 638, 586 N.Y.S.2d 50 [4th Dept. 1992] [emphasis omitted], quoting *Matter of Colony Park, Inc. v. Malone*, 25 Misc.2d 1072, 1077, 205 N.Y.S.2d 166 [Sup. Ct., Nassau County 1960]; *see e.g. Matter of Save the Pine Bush Inc. v. Zoning Bd. of Appeals of Town of Guilderland*, 220 A.D.2d 90, 92, 643 N.Y.S.2d 689 [3d Dept. 1996], *lv denied* 88 N.Y.2d 815, 651 N.Y.S.2d 16, 673 N.E.2d 1243 [1996]; *see generally* Department of State, Division of Local Government Services, James A. Coon Local Government Technical Series, *Zoning Board of Appeals* at 16 [2005, 2023 reprint], available at <https://dos.ny.gov/system/files/documents/2023/01/zoning-board-appeals.pdf>).

As to the basis for the ZBA's determination, the ZBA concluded that, because the property has not changed since Gunzenhauser purchased it in 1963, any alleged hardship was self-imposed. This was an irrational reason for branding the hardship self-created. Although a hardship is considered self-created, for zoning purposes, where property is acquired subject to the restrictions from which relief is sought (*see*  *Conley v. Town of Brookhaven Zoning Bd. of Appeals*, 40 N.Y.2d 309, 315, 386 N.Y.S.2d 681, 353 N.E.2d 594 [1976]; *Matter of Jones v. Zoning Bd. of Appeals of the Town of Oneonta*, 90 A.D.3d at 1283–1284, 934 N.Y.S.2d 599), here, Gunzenhauser purchased the Cortlandville parcel in 1963, and it was not until 1986 and 2018, respectively, that the Town adopted any zoning law (*see* Local Law No. 1–1986 of Town of Cortlandville) or regulated solar energy systems (*see* Local Law No. 2–2018 of Town of Cortlandville). Thus, Gunzenhauser cannot be said to have willingly assumed the hardship alleged (*see Matter of Supkis v. Town of Sand Lake Zoning Bd. of Appeals*, 227 A.D.2d 779, 782, 642 N.Y.S.2d 374 [3d Dept. 1996]). To the extent that the ZBA relied upon the fact that the Cortlandville parcel can be used for agricultural related uses, which are permitted in an R–1 district subject to site plan approval (*see* Code of Town of Cortlandville § 178–18[B]), that basis too was irrational. Although Gunzenhauser leased the Cortlandville parcel to a farmer for a short period in the 1980s, that lease resulted in negligible income, and there has been no agricultural interest in the property, with its inclines and shallow bedrock, from the marketplace since then. Any future market demand for that use is speculative.

\*4 Based upon the foregoing, we agree with petitioners that the ZBA's determination was irrational and therefore must be annulled.<sup>4</sup> Given our disposition, we need not consider petitioners' remaining arguments.

4 As the ZBA acknowledged, because Source Renewables satisfied the criteria for a use variance as to the solar array on the Cortlandville parcel, they necessarily also demonstrated their entitlement to an access road over the parcel.

Egan Jr., Lynch, Pritzker and McShan, JJ., concur.

ORDERED that the order and judgment is reversed, on the law, without costs, petition granted to the extent set forth herein, determination annulled and matter remitted to respondent Town of Cortlandville Zoning Board of Appeals for further proceedings not inconsistent with this Court's decision.

**All Citations**

--- N.Y.S.3d ----, 2023 WL 2168411, 2023 N.Y. Slip Op. 01036

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## Case 3

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

CES HAWTHORNE SOLAR, LLC,

Petitioner,

-against-

THE TOWN OF MOUNT PLEASANT PLANNING  
BOARD,

Respondent.

Index No.: 66112/2021

**NOTICE OF ENTRY OF  
DECISION ORDER AND  
JUDGMENT**

**PLEASE TAKE NOTICE**, that the within is a true copy of the Decision Order and Judgment, dated and filed on May 10, 2022 in the Office of the Clerk of the within named Court.

Dated: White Plains, New York  
May 11, 2022

By: 

Darius P. Chafizadeh  
Harris Beach PLLC  
*Attorneys for Respondent*  
445 Hamilton Avenue, Suite 1206  
White Plains, New York 10601  
(914) 683-1200

To: Adam L. Wekstein, Esq. *(VIA NYSCEF)*  
Hocherman Tortorella & Wekstein, LLP  
*Attorneys for Petitioner*  
One North Broadway, Suite 701  
White Plains, New York 10601



<p align="center"><b>FILED AND ENTERED</b></p> <p align="center">ON <u>5-10</u> - 2022</p> <p align="center"><b>WESTCHESTER COUNTY CLERK</b></p>
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X Index No. 66112/2021  
CES HAWTHORNE SOLAR, LLC,

Petitioner,

- against -

DECISION ORDER  
AND JUDGMENT  
Seq. No. 1

THE TOWN OF MOUNT PLEASANT PLANNING BOARD,

Respondent.

-----X  
NEARY, J.

The Petitioner seeks an order, pursuant to CPLR Article 78, annulling, setting aside and declaring invalid the Respondent's October 8, 2021 Resolution which denied the Petitioner's application for a special use permit and site plan approval of a 5.75-megawatt direct current ground-mounted photovoltaic solar energy facility ("Solar Farm") on an undeveloped portion of the Gate of Heaven Cemetery in Mount Pleasant, New York. The Respondent opposes the Petition in all respects.

*CES Hawthorne Solar, LLC v. the Town of  
Mount Pleasant Planning Board*  
Index No. 66112/2021

The Court has reviewed the following submitted papers:

Petitioner's Notice of Verified Petition, Verified Petition with Exhibits numbered 1 through 16, Memorandum of Law and Affidavit of Service

Respondent's Verified Answer and Affirmative Defenses/Objections in Point of Law, Memorandum of Law in Opposition to the Verified Petition with Certified Record numbered Exhibits I through V and Supplemental Record of Proceeding numbered Exhibits VI through VII(b)

Petitioner's Memorandum of Law in Reply

Affidavit of William P. Harrington, Esq.

### **FACTUAL BACKGROUND**

In December 2018, the Petitioner submitted an application to the Town Board of the Town of Mount Pleasant to amend the Zoning Code to permit a solar energy system within the R-20 zoning district, subject to approval of a special use permit issued by the Planning Board. In January 2019, the Town Board referred the Petitioner's zoning petition to the Planning Board for review and recommendation. The zoning petition was made in conjunction with a proposed development plan to construct a Solar Farm on a 40-acre portion of land contained within the 160-acre Gate of Heaven Cemetery. The Solar Farm would occupy approximately 26-acres of the property and would require removal of all trees from that area which is currently undeveloped and described as a forest. The Petitioner appeared before the Planning Board and provided details of the proposed plan to construct a Solar Farm and to discuss the proposed zoning amendment during meetings in February, March and April of 2019. On April 4, 2019, the Planning Board adopted a resolution recommending that the Town Board adopt the Zoning

*CES Hawthorne Solar, LLC v. the Town of  
Mount Pleasant Planning Board*  
Index No. 66112/2021

Amendment subject to certain recommendations. On May 14, 2019, the Town Board accepted the zoning petition and environmental assessment form under SEQRA and referred the matter back to the Planning Board to act as lead agency under SEQRA.

In May 2019, the Petitioner submitted a full set of plans to the Planning Board for review. The plan consisted of 20 sheets including site plans, step slope plans, soil erosion and construction plans and details. Also submitted were a survey, subsurface investigation report, pile loading test report and a storm water analysis report. A revised set of plans was submitted on September 13, 2019, which addressed the comments from the Planning Board, the wetlands consultants and the Town Engineer.

On April 20, 2020, the Planning Board, acting as the lead agency pursuant to SEQRA, adopted a Negative Declaration finding that the proposed action would not have a significant adverse effect on the environment. The Town Board subsequently adopted Local Law No 4 of 2020, amending Section 218 of the Town Code to permit solar energy system by special use permit in a R-20 zoning district.

The Petitioner then submitted a final application dated August 4, 2020, for a special use permit and site plan approval to construct the Solar Farm. The Petitioner made a full presentation to the Planning Board on September 3, 2020. The Board received comments in the form of letters and memorandums over the next several months. On March 15, 2021, the Board met again on the application. The Planning Board conducted public hearings on the application on May 17, 2021, July 1, 2021, and August 5, 2021.

Throughout this process, a myriad of opinions were expressed regarding the proposed project from members of the public and numerous other interested parties and agencies.

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However, the overriding concern involved the impact of clear cutting 26-acres of forested land to make way for the Solar Farm.

At the conclusion of the public hearings, the Board voted on the application which resulted in a tie. The Board met again on September 2, 2021, to further consider the application. The Board voted to deny the application. The matter was adjourned to October 7, 2021 for the submission of a formal written Resolution. The Board voted to accept the Resolution on October 7, 2021. In rendering its determination, the Board cited twenty-four (24) specific points that weighed against granting the application. The Board expressed the opinion that “the site is a particularly poor location for a community solar facility that does not significantly benefit the residents of the Town of Mount Pleasant, when far more preferable alternative locations exist elsewhere in the Town. Further, the size and scope of the Proposed Action is massive, and the Applicant never proposed smaller alternatives.” In addition, the Planning Board cited the recommendation of the Pace University Energy and Climate Center which stated in a June 1, 2021-letter that “. . . it is essential that local communities deploy clean energy in a manner that safeguards natural resources such as forests. While recognizing the importance of advancing solar in New York State, the Pace Energy and Climate Center does not recommend clear-cutting healthy tree stands to clear land to install solar PV arrays. Trees are important for sequestering carbon and, also for protecting biodiversity, preventing heat island effects, and providing a healthy environment in urban and suburban areas. Biodiversity is especially difficult to quantify and track, cannot be directly valued against other metrics like carbon reductions, and as a result, is chronically undervalued, contributing to ecosystem losses. Given that biodiversity is severely at risk and that many decades are required to fully replace all the environmental services provided by mature tree stands, tree removal should only be done sparingly.”

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Shortly, thereafter, the Petitioner timely commenced the instant proceeding.

### LEGAL DISCUSSION

A local planning board has broad discretion in reaching its determinations, and judicial review is limited to ascertaining whether the challenged action was illegal, arbitrary and capricious, or an abuse of discretion. [See *Matter of Marcus v. Planning Bd. of the Vil. of Wesley Hills*, 199 AD3d 1007, 1009, 154 NYS3d 822; *Matter of Yorktown Smart Growth v. Town of Yorktown*, 168 AD3d 957, 958, 92 NYS3d 344]. A reviewing court should not substitute its own judgment for the reasonable determination of the Board on the question of whether a special use permit should have been granted. [See *Mamaroneck Coastal Envt. Coalition, Inc. v. Board of Appeals of the Vil. of Mamaroneck*, 152 AD3d 771 at 773]. Such an action would be an incursion on the discretion of the Board and cannot be justified where there was substantial evidence in the record supporting the Board's determination.

Unlike a variance which gives permission to an owner to use property in a manner inconsistent with a local zoning ordinance, a special use permit gives permission to use property that is consistent with the zoning ordinance, although not necessarily allowed as of right. [See *Matter of Retail Prop. Trust v. Board of Zoning Appeals of Town of Hempstead*, 98 NY2d 190, 746 NYS2d 662, 774 NE2d 727 (2002)].

As with board determinations on variances, a reviewing court may examine only whether substantial evidence supports the determination of the board. Where substantial evidence exists, a court may not substitute its own judgment for that of the board, even if such a contrary determination is itself supported by the record. [See *Matter of Retail Prop. Trust v. Board of Zoning Appeals of the Town of Hempstead, supra*; *Matter of Pelham Esplanade v.*

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*Board of Trustees of the Vil. of Pelham Manor*, 77 NY2d 66, 563 NYS2d 759, 565 NE2d 508 (1990)].

A zoning board is free to consider matters related to the public welfare in determining whether to grant or deny a special permit or exception. [See *Matter of C.B.H. Props. v. Rose*, 205 AD2d 686, 613 NYS2d 913 (1994); *Matter of Chernick v. McGowan*, 238 AD2d 586, 656 NYS2d 392 (1997)]. However, a zoning board may not deny a special exception or permit solely on the basis of generalized objections and concerns expressed by the community's residents. [See *Leon Petroleum, LLC v. Bd. of Trs.*, 309 AD2d 804; *Matter of C.B.H. Properties v. Rose, supra*; *Matter of Chernick v. McGowan, supra*].

Although there is no entitlement to a special permit or exception, once a petitioner shows that the contemplated use is in conformance with the conditions imposed, a special permit or exception must be granted unless there are reasonable grounds for denying it that are supported by substantial evidence. [See *Matter of Retail Prop. Trust v. Board of Zoning Appeals of the Town of Hempstead, supra*; *Matter of Toys "R" Us v. Silva*, 89 NY2d 411, 654 NYS2d 100, 676 NE2d 862 (1996); *Matter of C.B.H. Prop. v. Rose, supra*].

In the instant case, the Court finds that the Planning Board's determination to deny the application for site plan approval and a special use permit had a rational basis and was not illegal, arbitrary and capricious, or an abuse of discretion. [See *Matter of St. James Antiochian Orthodox Church v. Town of Hyde Park Planning Bd.*, 132 AD3d 687, 688, 17 NYS3d 481]. The Planning Board engaged in the required balancing test and considered the relevant statutory factors, and their determination is supported by evidence in the record. [See *Matter of Pecoraro v. Board of Appeals of Town of Hempstead*, 2 NY3d 608, 814 NE2d 404,

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781 NYS2d 234 (2004)]. Each of the twenty-four (24) points cited by the Board in denying the application had factual support in the record.

Moreover, the SEQRA determination did not supplant the Town's zoning regulations governing review of special use permit applications, nor did it predetermine the Town's decision on the Petitioner's permit application. The SEQRA findings did not bind the Planning Board to issue the requested special use permit or preclude it from employing the procedures—and considering the standards—in its own local zoning regulations, including the environmental and neighborhood impacts of the project. [See *Matter of Albany-Greene Sanitation v. Town of Baltimore Zoning Bd. of Appeals*, 263 AD2d 644 at 646; *Matter of Wal-Mart Stores v. Planning Bd of Town of N. Elba*, 238 AD2d 93, 97, 668 NYS2d 774 (1998); *Matter of Zagoreos v. Conklin*, 109 AD2d 281, 297, 491 NYS2d 358 (1985); see also *Matter of Chadwick Garden Assoc. v. City of Newburgh Zoning Bd. of Appeals*, 273 AD2d 232, 709 NYS2d 450 (2000)]. The Respondent's SEQRA determination, including its findings statement and final environmental impact statement, are binding on the Town. However, local land use matters and zoning decisions—such as the consideration of special use permits—are within the exclusive responsibility of the Town, as representative of its local community, which “possess[es] the familiarity with local conditions necessary to make the often sensitive planning decisions which affect the development of [its] community.” [See *Matter of Cowan v. Kern*, 41 NYS2d 591; 599 363 NE2d 305, 394 NYS2d 579 (1977); see *Matter of Albany-Greene Sanitation v. Town of New Baltimore Zoning Bd of Appeals*, 263 AD2d 644, 646, 692 NYS2d 831 (1999), lv. denied 94 NY2d 752, 722 NE2d 505, 700 NYS2d 425 (1999); *Waste Mgt. of N.Y., LLC v. Town of Albion*, 18 Misc.3d 1133(A), 859 NYS2d 900, 2005 NY Slip Op

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052343 (U), (Sup Ct, Orleans County, 2005), aff'd 32 AD3d 1295, 821 NYS2d 544 (2006), lv. denied 8 NY3d 805, 863 NE2d 1023, 831 NYS2d 771 (2007); see Town Law §261].

Significantly, while zoning ordinances are to be interpreted and administered in accord with SEQRA, the SEQRA process and requirements do “not change the existing jurisdiction of agencies nor the jurisdiction between or among state and local agencies.” (6 NYCRR 617.3(b); See ECL 8-0103(6); *Matter of Albany-Greene Sanitation v. Town of New Baltimore Zoning Bd of Appeals*, 263 AD2d 644 at 646)—that is, “SEQRA neither preempts nor interferes with local zoning ordinances.” [See *Matter of WEOK Broadcasting Corp. v. Planning Bd of Town of Lloyd*, 165 AD2d 578, 581, 568 NYS2d 974 (1991), aff'd 79 NY2d 373, 592 NE2d 778, 583 NYS2d 170 (1992), citing *Matter of Town of Poughkeepsie v. Flacke*, 84 AD2d 1, 5, 445 NYS2d 233 (1981), lv. denied 57 NY2d 602, 439 NE2d 1245 (1982); see *Monroe-Livingston Sanitary Landfill v. Town of Caledonia*, 51 NY2d 679, 683-684, 417 NE2d 78, 435 NYS2d 966 (1980)]. The SEQRA simply means that the Petitioner’s proposal satisfies the applicable state law and regulatory standards.

Lastly, the Court finds that St. Patrick’s Cathedral, Archdiocese of New York is not a necessary party to this proceeding as there is a clear unity of interest between the Petitioner and St. Patrick’s and St. Patrick’s has deliberately chosen not to be a party in this litigation

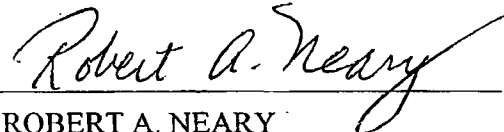
Therefore, as the Court finds that the Planning Board’s determination was rational and supported by substantial evidence in the record, the Petition is denied as the matter is dismissed.



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The foregoing constitutes the opinion, decision, order and judgment of the Court.

Dated: White Plains, New York  
May 10, 2022



ROBERT A. NEARY  
SUPREME COURT JUSTICE

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## Case 4

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

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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*

DECISION AND ORDER  
INDEX NO. EF2021-795

-against-

TOWN OF ATHENS ZONING BOARD OF  
APPEALS,

Respondent.

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APPEARANCES:

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**Attorney for Petitioners**

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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 Envntl 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”<sup>1</sup> 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 applicable 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[]

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<sup>1</sup> 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].<sup>2</sup>

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*,

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<sup>2</sup> 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**.

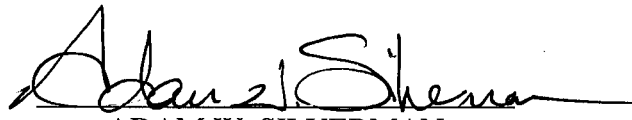
The Court has uploaded the original Decision/Order to the case record in this matter as maintained on the NYSCEF website whereupon it is to be filed and entered by the Office of the County Clerk.

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

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Law 1

## PROPOSED LOCAL LAW W – 2023

A Proposed Local Law to amend Chapters 294 (Stormwater Management and Erosion and Sediment Control) and 342 (Zoning) of the Code of the Village of Mamaroneck regarding zoning and stormwater changes to improve resiliency and reduce flooding.

**BE IT ENACTED BY THE BOARD OF TRUSTEES OF THE VILLAGE OF MAMARONECK  
AS FOLLOWS:**

*(Language in strike-through ~~abedefhijk~~ to be deleted; language in **bold** is to be added)*

### Section 1.

Section 294-6 of the Code of the Village of Mamaroneck is amended by adding the following definitions:

#### **STORM, FIVE-HUNDRED YEAR (QP 500)**

**A flood event which statistically has a 0.2% chance of being equaled or exceeded in any given year.**

#### **STORM, ONE-HUNDRED YEAR (QP 100)**

**A flood event which statistically has a one-percent chance of being equaled or exceeded in any given year.**

### Section 2.

Section 294-8(B)(2) of the Code of the Village of Mamaroneck is amended as follows:

(2) Postconstruction runoff controls for new development and redevelopment projects.

- (a) **For all projects that will result in an increase in the building coverage or the area of impervious surface on the site and are anticipated to cost 25 percent or more of the value of the improvements on the property at the time of the application, the stormwater calculation must base the pre-development runoff on the unimproved lot area and the post-development runoff on the area of all existing and proposed improvements.**
- ~~(a)~~(b) All construction activities for new development resulting in a land disturbance greater than 200 square feet and less than 2,000 square feet ~~shall~~ **must** include stormwater quantity controls, as described in the ~~New York State Stormwater Management Design Manual~~, to attenuate the post-development ~~twenty-five year~~ **one-hundred year** design storm, ~~24-hour~~ **twenty-four hour** peak discharge rate (Qf) to predevelopment rates.
- ~~(b)~~ (c) All construction activities resulting in a land disturbance greater than 2,000 square feet and less than one acre ~~shall~~ **must** include stormwater quality and quantity controls (postconstruction stormwater runoff controls), as set forth in § 294-9 and described in the Design Manual, to provide treatment of the water quality volume (WQv) through runoff reduction, and to attenuate the post-development ~~twenty-five year~~ **one-hundred year** design storm, ~~24-hour~~ **twenty-four hour** peak discharge rate (Qf) to predevelopment rates.
- ~~(c)~~ (d) All construction activities for new development resulting in a land disturbance greater than one acre ~~shall~~ **must** include stormwater quality and quantity controls (postconstruction stormwater runoff controls), as set forth in § 294-9 and described in the Design Manual, to provide treatment of the water quality volume (WQv) through runoff reduction, and to

attenuate the post-development one-, ten- and one-hundred-year design storms, **24-hour** ~~twenty-four-hour~~ peak discharge rate (Qf) to predevelopment rates.

- (d) (e) Additionally, stormwater runoff from land development and redevelopment activities discharging a pollutant of concern to either an impaired water identified on the Department's 303(d) list of impaired waters or a total maximum daily load (TMDL) designated watershed for which pollutants in stormwater have been identified as a source of the impairment shall **must** comply with the requirements for post-construction stormwater control as outlined in Subsection B(2)(e)(d) above.
- (e) (f) All construction activities that meet the "redevelopment project" criteria shall **must** comply with items in Subsection B(2)(a) through (de) above, including "Chapter 9: Redevelopment Projects" of the Design Manual. The sizing criteria described in Chapter 9 cannot be used to address runoff from new development. If a construction project includes both new development and redevelopment, the stormwater management practices for the new development portion of the project must be designed in accordance with the sizing criteria in Chapter 4 of the Design Manual, and the redevelopment portion of the project is subject to the sizing criteria in Section 9.3.2 of the Design Manual.

### Section 3.

Section 342-3(B) of the Code of the Village of Mamaroneck is amended as follows:

#### **FLOOR AREA, GROSS**

The sum of gross horizontal areas of the several floors of the building or buildings on a lot, measured from the exterior faces of exterior walls or from the center line of party walls separating two buildings. Any interior space with a floor-to-ceiling height in excess of 12 feet shall be counted 1.5 times, except in the M-1 Zone. The following are excluded:

- (1) Any attic space with a floor-to-ceiling height of less than seven feet.
- (2) Cellar and basement areas where the average height of all exposed exterior wall or walls is less than three feet measured from both the existing grade prior to construction and from the proposed finish grade after construction as indicated on the approved plans.
- (3) In connection with uses other than single-family and two-family homes, any areas or structures devoted only to off-street parking or loading.
- (4) Any horizontal areas that are within the special flood hazard area below two feet above Base Flood Elevation that are useable solely for parking of vehicles, building access or storage in an area other than a basement as defined in Section 186-2(B).**

#### **COVERAGES**

~~That percentage of the lot area covered by the combined area of all buildings or structures on the lot. A parking garage whose height is at least 50% below finished grade is exempt from this definition, provided that the roof of the parking garage is landscaped. The height of a parking garage that is located in the one hundred year floodplain may exceed 50% below finished grade, provided there is sufficient mitigation including landscaping, screening and setbacks.~~

#### **HEIGHT, BUILDING**

For one- and two-family dwellings, the vertical distance to the highest level of the highest point of the roof if the roof is flat or mansard or to the mean level between the eaves and the highest point of the roof if the roof is of any other type, measured from the average level of the existing

grade prior to construction adjacent to the exterior walls of the building. For all other buildings, the vertical distance to the highest level of the highest point of the roof if the roof is flat or mansard or to the mean level between the eaves and the highest point of the roof if the roof is of any other type, measured from the average level of the existing grade at the lot line abutting the lot at the front yard. **When a building is within the special flood hazard area, height is measured from two feet above base flood elevation.**

## **STORY**

**The portion** ~~Portion~~ of a building which is between one floor level and the next higher floor level or the roof. If a **A** mezzanine floor area ~~exceeds~~ **exceeding** 1/3 of the area of the floor immediately below, ~~it shall be~~ **is** deemed to be a "story." A basement ~~shall be~~ **is** deemed to be a "story," but a cellar ~~shall~~ **is** not be deemed to be a "story." An attic ~~shall~~ **is** not be deemed to be a "story" if unfinished and without human occupancy. **A horizontal area within the special flood hazard area below two feet above Base Flood Elevation that is useable solely for parking of vehicles, building access or storage in an area other than a basement as defined in Section 186-2(B) is not a story.**

### *Section 4.*

Section 342-3(B) of the Code of the Village of Mamaroneck is amended by adding the following definitions:

## **BIOPHILIC DESIGN ELEMENTS**

**Exterior design elements that incorporate natural systems into building design and building systems. Biophilic design elements include biomimicry, habitat creation, and the creation of natural landscapes. Examples include green walls, green roofs, and pollinator sanctuaries. Biophilic design is intended to embrace abundant biodiversity, improve health and well-being, improve the natural environment, create nature-based resiliency, and create a symbiotic built environment.**

## **COVERAGE, BUILDING**

The percentage of the area of a lot covered by all buildings on the lot.

## **COVERAGE, BUILDING AND IMPERVIOUS SURFACES**

The percentage of the area of a lot covered by the combined area of all buildings and impervious surfaces on the lot.

## **IMPERVIOUS SURFACE**

**Those surfaces in the landscape, including pavement, sidewalks, driveways, and other structures, that cannot effectively infiltrate rainfall. Steep slopes and compact soils are not impervious surfaces. Materials that meet the specifications for New York State Department of Transportation (NYSDOT) road subbase material (formerly known as "Item 4") and well-graded or close-graded subbase materials are impervious surfaces. Decks constructed above the ground surface that allow one-hundred-percent pass-through of stormwater to the ground surface below are not impervious surfaces.**

### *Section 4.*

Section 342-14(A) of the Code of the Village of Mamaroneck is amended as follows:

- A. Projecting architectural features (horizontal). The space in any required yard ~~shall~~ **must** be open and unobstructed, except for the ordinary projection of the windowsills, bay windows, belt courses, cornices, eaves, exterior stairs and other architectural features; ~~provided,~~

however, that such, **but those** features shall **must** not project more than three feet into any required yard and **must**, but not **be** closer than five feet to the property line. **If the building is located in the special flood hazard area, ingress and egress stairs may project up to five feet into the front yard but may not be closer than three feet to the property line.** The sum total of ~~such~~ **the** projections in any one yard shall **must** not exceed ~~25%~~ **25 percent** of the overall dimension of the wall from which they project, **except that if the building is located in the special flood hazard area, the projection of the ingress and egress stairs into the front yard may be not more than 50 percent of the overall dimension of the wall from which it projects.**

*Section 5.*

Section 342-50(B)(4) of the Code of the Village of Mamaroneck is amended as follows:

- (4) Green building elements and infrastructure. ~~The development must incorporate green building elements and/or green infrastructure to the satisfaction of the Planning Board.~~ **All developments for which a special permit is required by this Section 342-50 must incorporate green building elements and green infrastructure achieving a sum of 100 points based on the metrics set forth in this subsection.**

<b>Green Building Element/Infrastructure Practice</b>	<b>Points</b>
<b>Any combination of stormwater practices that attenuate peak flows to a 500-year storm as defined in Section 294-6</b>	<b>75</b>
<b>Permeable pavers, porous concrete, rain gardens not included in the stormwater calculations for Chapter 294 compliance or the 500-year storm calculation for the purpose of achieving green building elements/infrastructure points.</b>	<b>15</b>
<b>Solar Panels (minimum 10 panels)</b>	<b>15</b>
<b>Exceeding state energy code</b>	<b>15</b>
<b>Biophilic design elements as defined in Section 342-3</b>	<b>15</b>
<b>Building heated by 100 percent electric systems</b>	<b>15</b>
<b>Bicycle parking (1 space per 10 units, and 1 outlet per 2 spaces for e-bike charging)</b>	<b>10</b>
<b>Electric vehicle charging station (minimum 1 charger per 10 units)</b>	<b>10</b>
<b>Rainwater detention and reuse system or blue roof</b>	<b>10</b>

*Section 2.*

If any section, subsection, clause, phrase or other portion of this local law is, for any reason, declared invalid, in whole or in part, by any court, agency, commission, legislative body or other authority of competent jurisdiction, the portion of the law declared to be invalid will be deemed a separate, distinct and independent portion and the declaration will not affect the validity of the remaining portions hereof, which will continue in full force and effect.

*Section 3.*

This local law is adopted pursuant to the authority granted by Municipal Home Rule Law § 10(1)(e)(3). It supersedes the provisions of the Village Law to the extent that they are inconsistent with this local law.

*Section 4.*

This local law will take effect immediately upon its filing in the office of the Secretary of State in accordance with Municipal Home Rule Law § 27.

## Law 2

Local Law  
NG-Zero Special Permit

§ 60-430.O Permitted special uses.

....

(19) North Greeley Net Zero Carbon (NG-Zero). NG-Zero development shall be permitted only upon the issuance of a special permit by the Town Board and shall be subject to the specific requirements set forth herein in addition to the general procedures, conditions, and standards applicable to special permit uses as set forth in § 60-430 of this chapter.

(a) Purpose and intent. The NG-Zero special permit is intended to encourage and facilitate the redevelopment of a large, vacant property on North Greeley Avenue in the Chappaqua Hamlet as a mixed used, multi-family residential building that will exceed the currently applicable Green Building Code requirements in Chapter 74 of the New Castle Town Code, serve as a model for sustainable, environmentally responsible development not just in New Castle but statewide, and promote the following goals set forth in the Town Comprehensive Plan: help promote a vibrant and walkable downtown; help promote diversity and affordability of housing types; require environmentally friendly forms of residential development; promote carbon-neutral construction practices; promote resource conservation; promote reduction of construction waste; promote reduction in energy use; and promote access to public transportation, bicycle and pedestrian infrastructure.

(b) Special development standards.

[1] Site requirements.

[a] Location. NG-Zero development shall be permitted on any lot that is situated on the westerly side of North Greeley Avenue in the Retail Business and Parking (B-RP) Zoning District, and shall not include any corner lot or lot also having frontage on lower King Street (Allen Place).

[b] Site size. The minimum required lot area for a NG-Zero shall be 33,000 square feet.

[c] Variances. Relief from the site requirements of this subsection may be granted only upon application to and after hearing by the Zoning Board of Appeals upon a showing of unnecessary hardship as required in connection with the granting of a use variance.



[2] Dwelling units.

[a] Dwelling unit type. Individual dwelling units may be of the efficiency, studio, one-bedroom or two-bedroom type, but shall not contain more than two bedrooms. The Town Building Inspector shall have the authority to determine which rooms may function as bedrooms for the purpose of determining compliance with this requirement and may include any room other than bathrooms, kitchens, entranceways, foyers and closets.

[b] The gross floor area for an individual dwelling unit, excluding exterior space, shall be at least 500 square feet, but in no case shall it exceed 2,000 square feet.

[3] Affordable housing. A multifamily development, including a mixed-use development, shall be required to provide AFFH units pursuant to §§ 60-220 and 60-410H(6)(k) of this chapter except that in developments of 10 or more units no less than 12% of the total number of units must be created as AFFH units. Alternatively, the applicant may provide no less than 10% of the total number of units as AFFH units if at least 2% of the total number of units (minimum of 1) are Workforce unit(s), as defined at § 60-210. In calculating the number of required AFFH units and Workforce units, partial units shall be rounded up to the next largest integer in all cases. No less than 20% of the total dwelling units in an NG-Zero building shall be comprised of AFFH and Workforce units.

[4] Traffic management. Roadways giving vehicular access to NG-Zero sites shall be adequate to accommodate the anticipated traffic generation resulting from the development proposed thereon. The Town Board shall not approve a special use permit until and unless said Board determines that the roads and intersections proximate to the project site are capable of accommodating the additional traffic generation or, if not, that the necessary improvements will be made prior to the occupancy of the development.

[5] Off-street bicycle and e-bike/scooter storage. Off-street bicycle storage and charging for e-bikes and scooters shall be provided. Off-street e-bike/scooter storage shall be appropriately sized and secured in a self-contained area, readily accessible in the event of an emergency. Such storage shall be accessible to all residents of the NG-Zero building.

[6] Permitted uses. Permitted principal and accessory uses shall be as follows:

[a] Ground-floor. To promote the goals and intent of this provision, a project utilizing the NG-Zero special permit in the B-RP district shall provide one or

more ground floor retail or commercial uses consistent with the permitted principal uses within said district.

[b] Residential Density. Residential density shall be calculated as follows:

**Minimum Gross Lot Area Requirement per Dwelling Unit**

Efficiency (studio) apartment	375 square feet
1-bedroom apartment	500 square feet
2-bedroom apartment	750 square feet

[c] Any accessory use customarily incidental to a permitted principal use on the same lot.

[7] Utilities and services.

[a] Drainage. At a minimum, stormwater drainage systems shall comply with the requirements of Chapter 108A, Stormwater Management and Erosion and Sediment Control.

[b] Green infrastructure. Green infrastructure practices to improve water quality through stormwater management, such as rain gardens, green roofs, and cisterns, shall be provided to the extent readily achievable.

[c] Refuse storage and collection. Plans for the storage and collection of refuse and recycling shall be designed to the satisfaction of the Town Board to minimize disruption to nearby properties and provide appropriate odor, pollution and vermin controls. Refuse and recycling shall be stored in rodent-proof containers which shall be conveniently located to serve all dwelling units and shall be enclosed or otherwise screened from view in a location easily accessible by emergency responders and service providers. Such facilities shall comply with all setback requirements applicable to principal buildings and may not be located in the front yard.

[d] Undergrounding. All utilities, including electric, telephone and cable television service shall be placed underground, unless it is determined by the Town Board, based on professional consultation, that such a requirement is technically infeasible. If such undergrounding is not feasible, adequate fire suppression must be incorporated into the roof structure of the building.

[9] Off-street parking and loading.

[a] The applicant shall demonstrate compliance with the following off-street parking standards:

Use	Minimum Required Off-Street Parking	
Residential, Multi-Family	1 space per unit if on-site car share is provided. If no on-site car share is provided parking shall be:	
Rental	Studio	.85/DU
	1-Bedroom	1.1/ DU
	2-Bedroom	1.4/ DU
Retail	2.8 spaces per each 1,000 SF	
Restaurant	10 spaces per each 1,000 SF	
Office	2.8 spaces per each 1,000 SF	
Medical Office	3.3 spaces per each 1,000 SF	

Any use not specifically listed in the table above shall be subject to the minimum off-street parking requirements set forth at § 60-420.F of this chapter.

[b] The Town Board may approve a reduction of these minimum standard(s) based upon a finding that:

- (i) Sufficient public parking is available within 2,000 feet of the project site; or
- (ii) The projected operational characteristics of the proposed use(s) or other strategies proposed by the applicant justify a different amount of parking.

[c] Payment in lieu of off-street parking. Where off-street parking is insufficient to meet the standards set forth in paragraph [a] above, the Town Board may require as a condition of special permit approval a payment to the Town in lieu of providing such parking spaces. The amount of the fee-in-lieu shall be established by the Town Board in its Fee Schedule. The fee-in-lieu shall be deposited by the Town in a designed trust fund to be used by the Town exclusively for ensuring the availability of adequate off-site parking in the Chappaqua Hamlet.

[10] Electric Vehicle Charging Stations. A minimum of 50% of the required parking shall be electric vehicle ready with sufficient capacity to charge electric vehicles at the full rated amperage.

[11] Green Building.

In compliance with Chapter 74, Section 13 of the Town Code, new construction shall incorporate green building practices designed to minimize short-term and long-term negative impacts on the environment. In addition to meeting the Town Code Green Building Standards, all NG-Zero projects must comply with the following requirements:

[a] Minimize on-site generation of carbon emissions: all buildings greater than 5,000 square feet of conditioned space shall not be serviced by gas or fossil-fuel fired equipment or appliances, except as required for emergency standby power.

[b] Minimize operational carbon emissions: all new construction addressed by the International Energy Conservation Code must incorporate renewable energy systems of adequate capacity to achieve net zero carbon, per the requirements of the 2021 International Energy Conservation Code (IECC) Appendix CC: Zero Energy Commercial Building Provisions, as may be amended from time to time.

[c] Minimize embodied carbon in building products and materials: all buildings greater than 5,000 square feet of conditioned space must perform a whole building life cycle assessment (WBLCA) of the project's structure and enclosure prior to building permit approval. The project WBLCA must demonstrate a minimum 25% reduction in global warming potential (GWP) compared to a typical baseline building. Suitable WBLCA frameworks include LEED v4.1 Building Design & Construction and ANSI/GBI 01-2021 Green Globes Assessment Protocol for Commercial Buildings or similar. Where possible, material reuse (salvaged material) is strongly encouraged, as these materials can be designated to have low/zero GWP.

[12] Energy Efficient Building Standards.

[a] Purpose. To ensure that a NG-Zero building serves as a model for sustainable, environmentally responsible development, this subsection incorporates performance standards used for tax deductions allowable under Internal Revenue Code § 179D. However, nothing herein shall require any taxpayer to claim any such deduction with any taxing authority.

[b] Energy Efficiency Standard. proposed NG-Zero building performance must be modeled and certified by a registered design professional as having interior lighting systems, heating, cooling, ventilation, hot water systems, and a building envelope, that together:

[i] meet the energy efficiency requirements described in Internal Revenue Service Notices 2006-52, 2008-40, and 2012-26, or any newer version(s) issued hereafter, as applicable; and

[ii] reduce the building's total annual energy and power costs by 50 percent or more over the minimum ANSI/ASHRAE/IE 90.1-2022 energy standard or latest version using generally accepted proofing methods and technologies which may include computer modeling having the features described in section 6 of Notice 2006-52 or section 4 of Notice 2008-40.

[c] Certification. The Certification required under this subsection shall meet all the requirements listed in Notice 2006-52, section 4, and Notice 2008-40, section 5.

[d] Testing. Prior to the issuance of a Certificate of Occupancy, the owner of a NG-Zero building shall furnish the Building Inspector with the results of an air space (blower door) test, a system adjusting and balancing test, and a commissioned test, verifying that the building's HVAC and energy systems meet the standard described in paragraph 12[b][ii] of this subsection.

[e] Waiver. The Building Inspector may waive or modify, in whole or in part, the requirements in this subsection upon a showing that strict compliance with such requirements would be infeasible or impose an unreasonable hardship upon the applicant.

[13] Open space.

[a] Outdoor space. Outdoor space for NG-Zero building residents shall be provided in the form of one or more of the following: individual patios or terraces, rooftop garden, community garden, courtyard deck or balcony.

[b] Public open space. To foster a walkable community and activate street life in the downtown Chappaqua hamlet, suitable public open space shall be provided in connection with the ground floor commercial use(s). Outdoor seating, plantings, and lighting shall be incorporated into such public open space.

[c] Other open spaces. Land within a NG-Zero project site which is not used for one or more of the purposes enumerated above shall be designed and maintained as permanent open space either to be improved and landscaped or to be preserved in its natural state, all in accordance with plans and restrictions as may be approved by the Town Board.

[14] Design.

[a] The site design shall include features that enhance the visual aesthetic and pedestrian experience, such as streetscape improvements, attractive lighting, benches, variation of façade and building materials, landscaping, and suitable building and parking orientation.

[b] Building height shall not exceed either 50 feet or 4 stories, as measured pursuant to § 60-210(B)[1] of this chapter. To ensure development compatible with the area in which the NG-Zero project is located, the Town Board may further limit the height. The floor area limitations in § 60-410.B, Schedule of regulations for business and industrial districts -- Lot and Bulk Regulations – Part 4, shall not apply.

[c] The design shall integrate low-impact ecologically conscious construction techniques and construction management practices.

[d] Building facades facing a street, which shall be defined as “street walls” for the purpose of this subsection, shall adhere to the following requirements:

[i] The street wall shall have varying depths from the property line to create outdoor open spaces at the street level and outdoor common areas for residents of the building above the ground floor.

[ii] The street wall shall maintain a minimum setback from the curb of at least 10 feet.

[ii] Street wall height shall not exceed maximum allowable building height;

[iii] The street wall shall incorporate a varied design that mitigates its mass and optimizes the amount of natural light into residential units;

[iv] Through the use of open public spaces, windows, and other architectural features, the street wall shall activate the street and enhance the pedestrian experience; and

[v] Outdoor common areas for residents of the building above the ground floor shall include amenities such as landscaped planters and green courtyards that utilize sustainable materials and technologies.

[f] An NG-Zero building shall optimize the configuration and location of its ground floor retail space, which shall consist of at least 4,000 square feet of public facing retail or restaurant space. Residential units shall not be located on the ground floor or have windows directly facing the Metro-North railroad tracks.

[h] On-site parking shall be located on the ground floor beyond the street wall so it is not directly visible from the street.

[15] Visual.

[a] A shadow study of the proposed project shall be submitted based upon appropriate modeling, photography and other pertinent analytical techniques accounting for the worst-case seasonal conditions.

[b] A visual impact assessment of the proposed project shall be submitted based upon appropriate modeling, photography and other pertinent analytical techniques accounting for the worst-case seasonal conditions.

[c] The Town Board may require modifications to the project to reduce or eliminate impacts based on the results of the shadow study or visual impact assessment.

[16] Waiver of site requirements. The Town Board may waive or modify, in whole or in part, the standards set forth at § 60-430.O(19)(b)(2)-(15) where the Town Board finds substantial evidence that such waiver or modification is consistent with the goals of the Town Comprehensive Plan, will better serve the public health, safety and welfare than strict compliance with such standard(s), and is necessary to avoid an unreasonable hardship upon the applicant.

(c) Application Procedure. Except as otherwise indicated below, applications for NG-Zero special permits shall comply with the procedures and requirements in § 60-430. B.

[1] Application. An application for a NG-Zero special permit and site development approval shall be submitted to the Town Clerk's Office, with 12 copies, and an electronic file format. Application form(s) as required by the Development Department shall be completed and submitted and shall include at a minimum the following information:

[a] The names and addresses of the property owner(s) of the applicant (if other than the owner), and of the planner, engineer, architect, surveyor and/or other professionals engaged to work on the project. If the applicant is not the owner of the property, authorization from the owner(s) to make the application shall be provided.

[b] A written statement: (i) describing the nature of the proposed NG-Zero special permit and a site development plan and how the proposed project is consistent with the special permit standards and will serve the purpose of NG-Zero; (ii) describing how the project is consistent with the Town Development Plan; (iii) describing in narrative or graphic form the relationship of the proposed site development plan with adjoining properties, other uses and improvements and the broader community; (iv) analyzing the availability and adequacy of utilities to serve the proposed site development plan; (v) analyzing the safety and capacity of the street system in the area in relation to the anticipated traffic generation and parking demand of the proposed project, and (vi) presenting such other information as may be required by law or deemed necessary by the Town Director of Planning to ensure efficient review of the application.

[c] A site development plan for the project site drawn to a convenient scale and including the following items of information: (i) the area of the property in both acres and square feet; (ii) the floor area in square feet of the proposed site development plan; (iii) a map of existing terrain conditions of the proposed site, including topography with a vertical contour interval of no more than two feet, existing drainage features, and major environmental features; (iv) a sketch indicating the location of the proposed project improvements with respect to neighboring streets and properties, including the names of all owners of property within 500 feet of the development site, showing the existing zoning of the property and showing the location of zoning district boundaries in the surrounding area; (v) a site development plan indicating the footprint, height, and design of the building(s), the approximate layout of individual uses, pedestrian and bicycle access, parking areas and access drives, and the general nature and location of other proposed site improvements including landscaping and screening, storm drainage, water and sewer



connections, etc., (vi) a generalized schedule for construction staging and completion of the proposed project; and (vii) an itemized list as to the green building attributes employed in the development project, (viii) an application fee in an amount as set forth by resolution of the Town Board in the Master Fee Schedule, which may be amended.

Upon determination by the Director of Planning that the application is substantially complete, the Director of Planning shall refer said application to the Town Board for review at its next regularly scheduled meeting. The Town Board may, in its discretion, invite the Planning Board to meet jointly with the Town Board in an advisory capacity.

[2] Public Hearing and Decision. Within 62 days of the date a completed NG-Zero special permit application is received, the Town Board shall schedule a public hearing on the NG-Zero special permit and associated site development plan. Within 62 days of the later of the date that the public hearing is closed or that all actions required under the State Environmental Quality Review Act as a prerequisite to Town Board action have been taken, the Town Board shall act to approve, approve with modifications, or disapprove the NG-Zero special permit and site development plan. Nothing in this section is to be construed as authorization for a default approval in the event these periods are exceeded.

## Law 3

**§ 197-46.1. First-floor elevations for single-family residences. [Added 7-16-2003 by L.L. No. 6-2003<sup>1</sup>]**

The first-floor elevation (excluding basements) for single-family residences located in one-family districts (i.e., R-1 through R-6) shall not be more than three feet above the average preexisting grade (as defined in § 197-1) abutting the front building line of the residence. This provision shall not apply in the following cases:

- A. Area of special flood hazard. Where a residence is situated in an area of special flood hazard, the first-floor elevation shall be no less than the minimum floor elevation required to comply with Chapter 100, Floodplain Management, of the Rye City Code.
- B. Modifications to existing residences. The requirement that the first-floor elevation shall not be more than three feet above the average preexisting grade (as defined in § 197-1) shall not apply where an expansion is proposed to an existing residence that increases the floor area of the first floor by less than 50%.
- C. Corner lots. In the case of a property having frontage on more than one street, the applicant shall have the option of choosing only one front yard in meeting the requirements of this section.

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1. Editor's Note: This local law also stated that it would not apply if a building permit application or Zoning Board of Appeals application had been received by the City prior to 7-3-2003.

## Law 4

**§ 300-81.5. Battery energy storage systems. [Added 9-15-2020 by L.L. No. 10-2020]**

- A. Authority. This Battery Energy Storage System Law is adopted pursuant to Article IX of the New York State Constitution, § 2(c)(6) and (10), New York Statute of Local Governments, § 10, Subdivisions 1 and 7, §§ 261 through 263 of the Town Law, and § 10 of the Municipal Home Rule of the State of New York, which authorize the Town to adopt zoning provisions that advance and protect the health, safety, and welfare of the community.
- B. Statement of purpose. This Battery Energy Storage System Law is adopted to advance and protect the public health, safety, and welfare of the Town by creating regulations for the installation and use of battery energy storage systems, with the following objectives:
- (1) To provide a regulatory scheme for the designation of properties suitable for the location, construction and operation of battery energy storage systems;
  - (2) To protect the health, welfare, safety, and quality of life for the general public;
  - (3) To ensure compatible land uses in the vicinity of the areas affected by battery energy storage systems;
  - (4) To mitigate the impacts of battery energy storage systems on environmental resources such as important agricultural lands, forests, wildlife and other protected resources; and
  - (5) To create synergy between battery energy storage system development and other stated goals of the community pursuant to Yorktown's Comprehensive Plan.
- C. Definitions. As used in this section, the following terms shall have the meanings indicated:

ANSI — American National Standards Institute.

BATTERY — A single cell or a group of cells connected together electrically in series, in parallel, or a combination of both, which can charge, discharge, and store energy electrochemically. For the purposes of this section, batteries utilized in consumer products are excluded from these requirements.

BATTERY ENERGY STORAGE MANAGEMENT SYSTEM — An electronic system that protects storage batteries from operating outside their safe operating parameters and disconnects electrical power to the energy storage system or places it in a safe condition if potentially hazardous temperatures or other conditions are detected. The system generates an alarm and trouble signal for off normal conditions.

BATTERY ENERGY STORAGE SYSTEM — A system consisting of electrochemical storage batteries, battery chargers, controls, power conditioning systems and associated electrical equipment, assembled together, capable of storing energy in order to supply electrical energy at a future time, not to include a stand-alone twelve-volt car battery or an electric motor vehicle. A battery energy storage

system is classified as a Tier 1 or Tier 2 battery energy storage system as follows:

- (1) Tier 1 battery energy storage systems have an aggregate energy capacity less than or equal to 600 kWh and, if in a room or enclosed area, consist of only a single energy storage system technology.
  - (a) Battery energy storage systems for one- to two-family residential dwellings within or outside the structure with an aggregate energy capacity that shall not exceed:
    - [1] Forty kWh within utility closets and storage or utility spaces.
    - [2] Eighty kWh in attached or detached garages and detached accessory structures.
    - [3] Eighty kWh on exterior walls.
    - [4] Eighty kWh outdoors on the ground.
- (2) Tier 2 battery energy storage systems have an aggregate energy capacity greater than 600 kWh or are comprised of more than one storage battery technology in a room or enclosed area.

**CELL** — The basic electrochemical unit, characterized by an anode and a cathode, used to receive, store, and deliver electrical energy.

**COMMISSIONING** — A systematic process that provides documented confirmation that a battery energy storage system functions according to the intended design criteria and complies with applicable code requirements.

**DEDICATED-USE BUILDING** — A building that is built for the primary intention of housing battery energy storage system equipment and is classified as Group F-1 occupancy as defined in the International Building Code. It is constructed in accordance with the Uniform Code, and it complies with the following:

- (1) The building's only permitted primary use is for battery energy storage, energy generation, and other electrical grid-related operations.
- (2) No other occupancy types are permitted in the building.
- (3) Occupants in the rooms and areas containing battery-energy storage systems are limited to personnel that operate, maintain, service, test, and repair the battery energy storage system and other energy systems.
- (4) Administrative and support personnel are permitted in incidental-use areas within the buildings that do not contain battery energy storage system, provided the following:
  - (a) The areas do not occupy more than 10% of the building area of the story in which they are located.
  - (b) A means of egress is provided from the incidental-use areas to a public way that does not require occupants to traverse through areas containing

battery energy storage systems or other energy systems.

**DWELLING UNIT** — A building or portion thereof or immobile house trailer, which is used, occupied or maintained as living quarters for one family only and providing complete housekeeping facilities; except that for specialized housing as provided for in RSP Districts, living quarters may consist of sleeping accommodations only, plus individual bathrooms, such dwelling unit having one full kitchen only, free access within the dwelling unit on all floors, one main entrance and only one meter each for gas, electricity and water.

**ENERGY CODE** — The New York State Energy Conservation Construction Code adopted pursuant to Article 11 of the Energy Law, as currently in effect and as hereafter amended from time to time.

**FIRE CODE** — The fire code section of the New York State Uniform Fire Prevention and Building Code adopted pursuant to Article 18 of the Executive Law, as currently in effect and as hereafter amended from time to time.

**NATIONALLY RECOGNIZED TESTING LABORATORY (NRTL)** — A U.S. Department of Labor designation recognizing a private sector organization to perform certification for certain products to ensure that they meet the requirements of both the construction and general industry OSHA electrical standards.

**NEC** — National Electric Code.

**NFPA** — National Fire Protection Association.

**NONDEDICATED-USE BUILDING** — All buildings that contain a battery energy storage system and do not comply with the dedicated-use building requirements, including all other occupancy types such as, but not limited to, commercial, industrial, offices, and multifamily housing.

**NONPARTICIPATING PROPERTY** — Any property that is not a participating property.

**NONPARTICIPATING RESIDENCE** — Any residence located on nonparticipating property.

**OCCUPIED COMMUNITY BUILDING** — Any building in Occupancy Group A, B, E, I, R, as defined in the International Building Code, including but not limited to schools, colleges, day-care facilities, hospitals, correctional facilities, public libraries, theaters, stadiums, apartments, hotels, and houses of worship.

**PARTICIPATING PROPERTY** — A battery energy storage system host property or any real property that is the subject of an agreement that provides for the payment of monetary compensation to the landowner from the battery energy storage system owner (or affiliate) regardless of whether any part of a battery energy storage system is constructed on the property.

**SPECIAL FLOOD HAZARD AREA** — The land area covered by the floodwaters of the base flood is the special flood hazard area (SFHA) on NFIP maps. The SFHA is the area where the National Flood Insurance Program's (NFIP's) floodplain management regulations must be enforced and the area where the mandatory

purchase of flood insurance applies.

UL — Underwriters Laboratory, an accredited standards developer in the United States.

UNIFORM CODE — The New York State Uniform Fire Prevention and Building Code adopted pursuant to Article 18 of the Executive Law, as currently in effect and as hereafter amended from time to time.

D. Applicability.

- (1) The requirements of this section shall apply to all battery energy storage systems permitted, installed, or modified in the Town after the effective date of this section, excluding general maintenance and repair. Battery energy storage systems constructed or installed prior to the effective date of this section shall not be required to meet the requirements of this section.
- (2) Modifications to, retrofits or replacements of an existing battery energy storage system that increase the total battery energy storage system designed discharge duration or power rating shall be subject to this section.

E. General requirements.

- (1) A building permit and an electrical permit shall be required for installation of all battery energy storage systems.
- (2) Issuance of special permits and approvals by the Planning Board shall include review pursuant to §§ 300-28 through 300-37 of the Zoning Code of the Town of Yorktown and the State Environmental Quality Review Act, Article 8 of the Environmental Conservation Law and its implementing regulations at 6 NYCRR Part 617 (SEQRA).
- (3) All battery energy storage systems, all dedicated use buildings, and all other buildings or structures that contain or are otherwise associated with a battery energy storage system and subject to the Uniform Code and/or the Energy Code shall be designed, erected, and installed in accordance with all applicable provisions of the Uniform Code, all applicable provisions of the Energy Code, and all applicable provisions of the codes, regulations, and industry standards as referenced in the Uniform Code, the Energy Code, and the Town Code.

F. Permitting requirements for Tier 1 battery energy storage systems. Tier 1 battery energy storage systems shall be permitted in all zoning districts and shall be subject to the general requirements set forth above.

G. Permitting requirements for Tier 2 battery energy storage systems. Tier 2 battery energy storage systems are permitted through the issuance of a special use permit within all zoning districts, and subject to the Uniform Code and site plan application requirements set forth in this section.

- (1) Applications for the installation of Tier 2 battery energy storage system shall:



- (a) Address all matters listed in this section, including, but not necessarily limited to, compliance with all applicable provisions of the Uniform Code and all applicable provisions of the Energy Code and matters relating to the proposed battery energy storage system and floodplain, utility lines and electrical circuitry, signage, lighting, vegetation and tree-cutting, noise, decommissioning, site plan and development, special use and development, ownership changes, safety, permit time frame and abandonment. The Planning Board may require additional information pursuant to requirements in Chapter 195, Land Development, and Chapter 300, Zoning, of the Code of the Town of Yorktown.
  - (b) Subject to a public hearing to hear all comments for and against the application pursuant to Town Law § 274-b and Chapter 205 of the Code of the Town of Yorktown.
  - (c) Be referred to the County Planning Department pursuant to General Municipal Law § 239-m if required and referred to interested and involved agencies pursuant to the State Environmental Quality Review Act, Article 8, of the Environmental Conservation Law and its implementing regulations at 6 NYCRR Part 617 (SEQRA).
- (2) Floodplain. Battery energy storage systems are prohibited in designated floodplains and flood zones.
  - (3) Utility lines and electrical circuitry. All on-site utility lines shall be placed underground to the extent feasible and as permitted by the serving utility, with the exception of the main service connection at the utility company right-of-way and any new interconnection equipment, including without limitation any poles, with new easements and right-of-way.
  - (4) Signage.
    - (a) Signage shall be in compliance with ANSI Z535 and shall include the type of technology associated with the battery energy storage systems, any special hazards associated, the type of suppression system installed in the area of battery energy storage systems, and twenty-four-hour emergency contact information, including reach-back phone number.
    - (b) As required by the NEC, disconnect and other emergency shutoff information shall be clearly displayed on a light-reflective surface. A clearly visible warning sign concerning voltage shall be placed at the base of all pad-mounted transformers and substations.
  - (5) Lighting. Lighting of the battery energy storage systems shall be limited to that minimally required for safety and operational purposes and shall be reasonably shielded and downcast from abutting properties.
  - (6) Vegetation and tree cutting. Areas within 20 feet on each side of Tier 2 battery energy storage systems shall be cleared of combustible vegetation and other combustible growth. Single specimens of trees, shrubbery, or cultivated

ground cover, such as green grass, ivy, succulents, or similar plants used as ground covers shall be permitted to be exempt, provided that they do not form a means of readily transmitting fire.

- (7) Noise. The one-hour average noise generated from the battery energy storage systems, components, and associated ancillary equipment shall not exceed a noise level of 60 dBA as measured at the outside wall of any nonparticipating residence and occupied community building. Applicants may submit equipment and component manufacturers' noise ratings to demonstrate compliance. The applicant may be required to provide operating sound pressure level measurements from a reasonable number of sampled locations at the perimeter of the battery energy storage system to demonstrate compliance with this standard.
- (8) Decommissioning.
  - (a) Decommissioning plan. The applicant shall submit a decommissioning plan developed in accordance with the Uniform Code, containing a narrative description of the activities to be accomplished for removing the energy storage system from service, and from the facility in which it is located. The decommissioning plan shall also include:
    - [1] A narrative description of the activities to be accomplished, including who will perform that activity and at what point in time, for complete physical removal of all battery energy storage system components, structures, equipment, security barriers, and transmission lines from the site;
    - [2] Disposal of all solid and hazardous waste in accordance with local, state, and federal waste disposal regulations;
    - [3] The anticipated life of the battery energy storage system;
    - [4] The estimated decommissioning costs and how said estimate was determined;
    - [5] The method of ensuring that funds will be available for decommissioning and restoration;
    - [6] The method that the decommissioning cost will be kept current;
    - [7] The manner in which the battery energy storage system will be decommissioned, and the site restored, including a description of how any changes to the surrounding areas and other systems adjacent to the battery energy storage system, such as, but not limited to, structural elements, building penetrations, means of egress, and required fire detection suppression systems, will be protected during decommissioning and confirmed as being acceptable after the system is removed; and

[8] A listing of any contingencies for removing an intact operational energy storage system from service, and for removing an energy storage system from service that has been damaged by a fire or other event.

- (b) Decommissioning fund. The applicant, or successors, shall continuously maintain a fund or bond payable to the Town, in a form approved by the Town, for the removal of the battery energy storage system, in an amount to be determined by the Town, for the period of the life of the facility. This fund may consist of a letter of credit from a State of New York licensed financial institution. All costs of the financial security shall be borne by the applicant.
- (9) Site plan application. Tier 2 battery energy storage systems shall require site plan approval. Any site plan application shall include the following information:
- (a) Property lines and physical features, including roads, for the project site.
  - (b) Proposed changes to the landscape of the site, grading, vegetation clearing and planting, exterior lighting, and screening vegetation or structures.
  - (c) A one- or three-line electrical diagram detailing the battery energy storage system layout, associated components, and electrical interconnection methods, with all National Electrical Code compliant disconnects and over current devices.
  - (d) A preliminary equipment specification sheet that documents the proposed battery energy storage system components, inverters and associated electrical equipment that are to be installed. A final equipment specification sheet shall be submitted prior to the issuance of a building permit.
  - (e) Name, address, and contact information of proposed or potential system installer and the owner and/or operator of the battery energy storage system. Such information of the final system installer shall be submitted prior to the issuance of a building permit.
  - (f) Name, address, phone number, and signature of the project applicant, as well as all the property owners, demonstrating their consent to the application and the use of the property for the battery energy storage system.
  - (g) Zoning district designation for the parcel(s) of land comprising the project site.
  - (h) Commissioning plan.

[1] Such plan shall document and verify that the system and its

associated controls and safety systems are in proper working condition per requirements set forth in the Uniform Code. Where commissioning is required by the Uniform Code, battery energy storage system commissioning shall be conducted by a New York State (NYS) licensed professional engineer after the installation is complete but prior to final inspection and approval. A corrective action plan shall be developed for any open or continuing issues that are allowed to be continued after commissioning. A report describing the results of the system commissioning and including the results of the initial acceptance testing required in the Uniform Code shall be provided to the Planning Board prior to final inspection and approval and maintained at an approved on-site location.

- [2] Energy storage system commissioning shall not be required for lead-acid and nickel-cadmium battery systems at facilities under the exclusive control of communications utilities that comply with NFPA 76 and operate at less than 50 VAC and 60 VDC.
- (i) Fire safety compliance plan. Such plan shall document and verify that the system and its associated controls and safety systems are in compliance with the Uniform Code.
  - (j) System and property operation and maintenance manual. Such plan shall describe continuing battery energy storage system maintenance and property upkeep, as well as design, construction, installation, testing and commissioning information and shall meet all requirements set forth in the Uniform Code.
  - (k) Erosion and sediment control and stormwater management plans prepared to New York State Department of Environmental Conservation standards, if applicable, and to such standards as may be established by the Planning Board.
  - (l) Prior to the issuance of the building permit or final approval by the Planning Board, but not required as part of the application, engineering documents must be signed and sealed by a NYS licensed professional engineer.
  - (m) An emergency operations plan. A copy of the approved emergency operations plan shall be given to the system owner, the local fire department, and local fire code official. A permanent copy shall also be placed in an approved location to be accessible to facility personnel, fire code officials, and emergency responders. The emergency operations plan shall include the following information:
    - [1] Procedures for safe shutdown, de-energizing, or isolation of equipment and systems under emergency conditions to reduce the risk of fire, electric shock, and personal injuries, and for safe start-up

following cessation of emergency conditions.

- [2] Procedures for inspection and testing of associated alarms, interlocks, and controls.
- [3] Procedures to be followed in response to notifications from the battery energy storage management system, when provided, that could signify potentially dangerous conditions, including shutting down equipment, summoning service and repair personnel, and providing agreed upon notification to fire department personnel for potentially hazardous conditions in the event of a system failure.
- [4] Emergency procedures to be followed in case of fire, explosion, release of liquids or vapors, damage to critical moving parts, or other potentially dangerous conditions. Procedures can include sounding the alarm, notifying the fire department, evacuating personnel, de-energizing equipment, and controlling and extinguishing the fire. Procedures must follow all applicable local, state and national codes.
- [5] Response considerations similar to a safety data sheet (SDS) that will address response safety concerns and extinguishment when an SDS is not required.
- [6] Procedures for dealing with battery energy storage system equipment damaged in a fire or other emergency event, including maintaining contact information for personnel qualified to safely remove damaged battery energy storage system equipment from the facility.
- [7] Other procedures as determined necessary by the Town to provide for the safety of occupants, neighboring properties, and emergency responders.
- [8] Procedures and schedules for conducting drills of these procedures and for training local first responders on the contents of the plan and appropriate response procedures.
- [9] The Planning Board may require additional information not specifically contained herein that would be necessary to provide to the greatest extent practicable, maximum protection of the health, safety and welfare of the general public.

(10) Special use permit standards.

- (a) Lot size. Tier 2 battery energy storage systems shall be located on lots with a minimum lot size of 40,000 square feet.
- (b) Lot coverage. Lot coverage shall not exceed 15% of the area of the lot or 33,000 square feet, whichever is less. "Lot coverage" shall mean the area formed by the outermost perimeter of the footprint of all of the equipment

and battery storage units, including the clearance spaces between the individual equipment.

- (c) Setbacks. Tier 2 battery energy storage systems shall comply with the setback requirements of the underlying zoning district for principal structures, provided that adequate screening can be accomplished within the allotted setback. The Planning Board may determine that the setback be increased to accommodate such required screening.
  - (d) Height. Tier 2 battery energy storage systems shall not exceed 15 feet in height, unless part of a larger structure housing a main use as allowed in the underlying zoning district.
  - (e) Fencing requirements. Tier 2 battery energy storage systems, including all mechanical equipment, shall be enclosed by a seven-foot-high fence with a self-locking gate to prevent unauthorized access unless housed in a dedicated-use building and not interfering with ventilation or exhaust ports. Type and design of fencing shall be determined by the Planning Board.
  - (f) Screening and visibility. A Tier 2 battery energy storage system shall be fully screened from adjacent residential properties, streets or roads on which it fronts or is visible from, and any other views, which the Planning Board determines is necessary. Views from adjacent commercial properties shall be minimized to the extent reasonably practicable and screened from streets or roads on which it fronts. Screening and buffering may be accomplished using architectural features, earth berms, landscaping, or other screening methods that will harmonize with the character of the property and surrounding area and not interfere with ventilation or exhaust ports.
- (11) Ownership changes. If the owner of the battery energy storage system changes or the owner of the property changes, the special use permit shall remain in effect, provided that the successor owner or operator assumes in writing all of the obligations of the special use permit, site plan approval, and decommissioning plan. A new owner or operator of the battery energy storage system shall notify the Building Inspector of such change in ownership or operator within 30 days of the ownership change. A new owner or operator must provide such notification to the Building Inspector in writing. The special use permit and all other local approvals for the battery energy storage system would be void if a new owner or operator fails to provide written notification to the Building Inspector in the required time frame. Reinstatement of a void special use permit will be subject to the same review and approval processes for new applications under this section.

#### H. Safety.

- (1) System certification. Battery energy storage systems and equipment shall be listed by a nationally recognized testing laboratory to UL 9540 or CAN 9540

(Standard for Battery Energy Storage Systems and Equipment). The systems shall comply with the following codes and regulations along with all other applicable local, state, and national codes for installation, operation, and emergency procedures:

- (a) UL 1973 (Standard for Batteries for Use in Stationary, Vehicle Auxiliary Power and Light Electric Rail Applications).
  - (b) UL 1642 (Standard for Lithium Batteries).
  - (c) UL 1741 or UL 62109 (inverters and power converters).
  - (d) Certified under the applicable electrical, building, and fire prevention codes as required.
  - (e) Alternatively, field evaluation by an approved testing laboratory for compliance with UL 9540 and applicable codes, regulations and safety standards may be used to meet system certification requirements.
  - (f) NFPA 855, Standard for the Installation of Stationary Energy Storage Systems, 2020 Edition.
- (2) Site access. Battery energy storage systems shall be maintained in good working order and in accordance with industry standards. Site access shall be maintained, including snow removal, in accordance with the conditions and parameters set forth in the special use permit, building permit, or electrical permit, and notwithstanding any provisions therein, at a level acceptable to the local fire department and, if the Tier 2 battery energy storage system is located in an ambulance district, the local ambulance corps. All battery energy storage systems must undergo regular inspections at intervals specified in the plans and documents approved under this section.
  - (3) Battery energy storage systems, components, and associated ancillary equipment shall have required working space clearances, and electrical circuitry shall be within weatherproof enclosures marked with the environmental rating suitable for the type of exposure in compliance with NFPA 70.

I. Permit time frame and abandonment.

- (1) The special use permit and site plan approval for a battery energy storage system shall be valid for a period of 24 months, provided that a building permit is issued for construction and construction is commenced. In the event construction is not completed in accordance with the final site plan, as may have been amended and approved, as required by the Planning Board, within 24 months after approval, the applicant or the Town may extend the time to complete construction for 180 days. If the owner and/or operator fails to perform substantial construction after 36 months, the approvals shall expire.
- (2) The battery energy storage system shall be considered abandoned when it

ceases to operate consistently for more than one year. If the owner and/or operator fails to comply with decommissioning upon any abandonment, the Town may, at its discretion, utilize the available bond and/or security for the removal of a Tier 2 battery energy storage system and restoration of the site in accordance with the decommissioning plan.

- J. Enforcement. Any violation of this battery energy storage system section shall be subject to the same enforcement requirements, including the civil and criminal penalties, provided for in the zoning or land use regulations of Town.
- K. Severability. The invalidity or unenforceability of any section, subsection, paragraph, sentence, clause, provision, or phrase of the aforementioned sections, as declared by the valid judgment of any court of competent jurisdiction to be unconstitutional, shall not affect the validity or enforceability of any other section, subsection, paragraph, sentence, clause, provision, or phrase, which shall remain in full force and effect.
- L. Conflicts with other provisions of this Chapter 300, Zoning. Any provision of this section that conflicts with other provisions of this chapter take precedence and shall be enforceable as it pertains to uses under this section only.



Law 5

**§ 200-31.4. Battery energy storage systems. [Added 1-26-2021 by L.L. No. 2-2021]**

- A. Authority. This section is adopted pursuant to §§ 261 through 263 of the Town Law and § 20 of the Municipal Home Rule Law of New York State (NYS), which authorize the Town to adopt zoning provisions that advance and protect the health, safety and welfare of the community and, in accordance with the NYS Town Law, "to make provision for, so far as conditions may permit, the accommodation of battery energy storage systems and equipment and access to sunlight necessary therefor."
- B. Statement of purpose. This section is adopted to advance and protect the public health, safety and welfare of the Town by creating regulations for the installation and use of battery energy storage systems and equipment.
- C. Applicability.
  - (1) The requirements of this section shall apply to all battery energy storage systems permitted, installed, or modified in the Town after the effective date of this section, excluding general maintenance and repair.
  - (2) Battery energy storage systems that have a valid building permit or have been constructed or installed prior to the effective date of this section shall not be required to meet the requirements of this section.
  - (3) Modifications to, retrofits or replacements of an existing battery energy storage system that increase the total battery energy storage system designed discharge duration or power rating shall be subject to this section.
- D. General requirements.
  - (1) A building permit and an electrical permit shall be required for installation of all battery energy storage systems.
  - (2) All battery energy storage systems, all dedicated-use buildings, and all other buildings or structures that 1) contain or are otherwise associated with a battery energy storage system and 2) are subject to the Uniform Code and/or the Energy Code shall be designed, erected, and installed in accordance with all applicable provisions of the Uniform Code, all applicable provisions of the Energy Code, and all applicable provisions of the codes, regulations, and industry standards as referenced in the Uniform Code, the Energy Code, and the Town Code.
- E. Tier 1 battery energy storage systems shall be permitted in all zoning districts, as an accessory use subject to the Uniform Code and the battery energy storage system permit, and shall be shown on plans submitted for the building permit application for the building containing the system. Tier 1 battery energy storage systems are exempt from site plan review.
  - (1) Battery energy storage systems for one- or two-family residential dwelling units shall not exceed an aggregate energy capacity of the following:

- (a) Forty kWh within utility closets and storage or utility spaces.
  - (b) Eighty kWh in attached or detached garages and detached accessory structures.
  - (c) Eighty kWh on exterior walls.
  - (d) Eighty kWh outdoors on the ground.
- (2) All outside Tier 1 battery energy storage systems shall only be installed in side or rear yards and meet the minimum lot size and standard setbacks in the zoning district for principal structures. Heights are limited to 6.5 feet for any external battery energy storage systems.
  - (3) All outside Tier 1 battery energy storage systems shall provide a firesafety compliance plan. Such plan shall document and verify that the system and its associated controls and safety systems are in compliance with the Uniform Code.
  - (4) All outside Tier 1 battery energy storage systems shall not have an area greater than 225 square feet for a single energy storage system, and all systems in the aggregate shall not occupy more than 25% of the area of the required rear or side yard.

F. Requirements for Tier 2 battery energy storage systems.

- (1) In the interest of promoting alternative energy through battery energy storage, the Town Board may entertain the creation of Tier 2 battery energy storage system floating zones by the legislative amendment of the Town's Zoning Map. The One-Family, GB, O-RB, O-RE and BE Zoning Districts are eligible hosts for this floating zone. The Town Board, as a legislative body, has broad discretion in amending the Zoning Map and shall take the preservation and use of environment resources, as well as any other factors it deems pertinent, into consideration in determining whether the Board will entertain an application for the creation of said floating zone. In evaluating this balance, the Town Board will, all other things being equal, favor paved parking areas over natural treeless areas, and will favor natural treeless areas over treed areas, for the installation of Tier 2 battery energy storage systems. Protection of the visual environment is another important consideration of the Town Board. All applications for Tier 2 battery energy storage system floating zone shall be subject to the Uniform Code and the site plan application requirements set forth in this section.
- (2) Amendment of the Zoning Map shall follow the same procedure contained in Article XII of this chapter.
- (3) Subsequent to amendment of the Zoning Map, Tier 2 battery energy storage systems are permitted through the issuance of a conditional use permit and site plan approval under §§ 200-49 and 200-50 of this chapter, respectively, Subsections G and H below, and Architectural Review Board approval

pursuant to Chapter 55 of this Code.

- G. Site plan application. For the installation of Tier 2 battery energy storage systems, the following site plan requirements apply:
- (1) Property lines and physical features, including roads, for the project site.
  - (2) Proposed changes to the landscape of the site, grading, vegetation clearing and planting, and exterior lighting.
  - (3) A screening and landscaping plan to show adequate measures to screen through landscaping, grading or other means so that views of the storage systems shall be minimized as reasonably practical and feasible from public roadways and adjacent properties.
  - (4) Location of the battery energy storage system and setbacks from property lines.
  - (5) A one- or three-line electrical diagram detailing the battery energy storage system layout, associated components, and electrical interconnection methods, with all National Electrical Code compliant disconnects and over current devices.
  - (6) A preliminary equipment specification sheet that documents the proposed battery energy storage system components, inverters and associated electrical equipment that are to be installed. A final equipment specification sheet shall be submitted prior to the issuance of a building permit.
  - (7) Name, address, and contact information of the proposed or potential system installer and the owner and/or operator of the battery energy storage system. Such information of the final system installer shall be submitted prior to the issuance of a building permit.
  - (8) Name, address, phone number, and signature of the project applicant, as well as all the property owners, demonstrating their consent to the application and the use of the property for the battery energy storage system.
  - (9) Zoning district designation for the parcel(s) of land comprising the project site.
  - (10) Commissioning plan. Such plan shall document and verify that the system and its associated controls and safety systems are in proper working condition per requirements set forth in the Uniform Code. Where commissioning is required by the Uniform Code, battery energy storage system commissioning shall be conducted by a New York State (NYS) licensed professional engineer after the installation is complete but prior to final inspection and approval. A corrective action plan shall be developed for any open or continuing issues that are allowed to be continued after commissioning. A report describing the results of the system commissioning and including the results of the initial acceptance testing required in the Uniform Code shall be provided to the Building Inspector prior to final inspection and approval and maintained at an approved

on-site location.

- (11) Firesafety compliance plan. Such plan shall document and verify that the system and its associated controls and safety systems are in compliance with the Uniform Code.
- (12) Operation and maintenance manual. Such plan shall describe continuing battery energy storage system maintenance and property upkeep, as well as design, construction, installation, testing and commissioning information, and shall meet all requirements set forth in the Uniform Code.
- (13) Erosion and sediment control and stormwater management plans prepared to New York State Department of Environmental Conservation standards, if applicable, and to such standards as may be established by the Planning Board.
- (14) Prior to the issuance of the building permit or final approval by the Planning Board, but not required as part of the application, engineering documents must be signed and sealed by a NYS licensed professional engineer.
- (15) Emergency operations plan. A copy of the approved emergency operations plan shall be given to the system owner, the local Fire Department, and local fire code official. A permanent copy shall also be placed in an approved location to be accessible to facility personnel, fire code officials, and emergency responders. The emergency operations plan shall include the following information:
  - (a) Procedures for safe shutdown, de-energizing, or isolation of equipment and systems under emergency conditions to reduce the risk of fire, electric shock, and personal injuries, and for safe start-up following cessation of emergency conditions.
  - (b) Procedures for inspection and testing of associated alarms, interlocks, and controls.
  - (c) Procedures to be followed in response to notifications from the battery energy storage management system, when provided, that could signify potentially dangerous conditions, including shutting down equipment, summoning service and repair personnel, and providing agreed upon notification to Fire Department personnel for potentially hazardous conditions in the event of a system failure.
  - (d) Emergency procedures to be followed in case of fire, explosion, release of liquids or vapors, damage to critical moving parts, or other potentially dangerous conditions. Procedures can include sounding the alarm, notifying the Fire Department, evacuating personnel, de-energizing equipment, and controlling and extinguishing the fire.
  - (e) Response considerations similar to a safety data sheet (SDS) that will address response safety concerns and extinguishment when an SDS is not required.

- (f) Procedures for dealing with battery energy storage system equipment damaged in a fire or other emergency event, including maintaining contact information for personnel qualified to safely remove damaged battery energy storage system equipment from the facility.
  - (g) Other procedures as determined necessary by the Town to provide for the safety of occupants, neighboring properties, and emergency responders.
  - (h) Procedures and schedules for conducting drills of these procedures and for training local first responders on the contents of the plan and appropriate response procedures.
- H. Conditional use permit. In addition to the other conditional use standards in this chapter, the following conditional use permit standards shall apply for Tier 2 battery energy storage systems:
- (1) Bulk requirements. The property on which the Tier 2 battery energy storage system is placed shall meet the lot size, setbacks, and height requirements in the Tier 2 battery energy storage system bulk table herein.
  - (2) Screening and visibility. Tier 2 battery energy storage systems shall be screened to the maximum extent practicable from public roadways and adjacent properties through the use of architectural features, earth berms, landscaping, fencing or other screening methods which harmonize with the character of the subject property and the surrounding area. The screening shall not, however, interfere with the normal operation, ventilation or exhaust ports, or firesafety of the storage system. A covenant regarding the maintenance of any required screening shall be provided by the applicant.
  - (3) Access. Vehicular access within the site shall be designed to minimize the extent of impervious materials and soil compaction and meet any applicable emergency access or safety requirements.
  - (4) Trees and vegetation. The clearing of vegetation shall be limited to that which is necessary for the construction, operation and maintenance of the Tier 2 battery energy storage system.
    - (a) Areas within 10 feet on each side of Tier 2 battery energy storage systems shall be cleared of combustible vegetation and other combustible growth. Single specimens of trees, shrubbery, or cultivated ground cover such as green grass, ivy, succulents, or similar plants used as ground covers shall be permitted to be exempt, provided that they do not form a means of readily transmitting fire.
    - (b) Tree removal shall be subject to Chapter 183 of this Code, including, but not limited to, § 183-12G pertaining to tree replacement and/or other mitigation.
    - (c) Battery energy storage systems shall not be sited within any required buffer areas.

- (5) Fencing. All mechanical equipment shall be enclosed by a 6.5-foot-high fence or a fence with a self-locking gate to prevent unauthorized access unless housed in a dedicated-use building and not interfering with ventilation or exhaust ports.
- (6) Lighting. Lighting of the battery energy storage systems shall be limited to lighting that is minimally required for safety and operational purposes and shall be reasonably shielded, downcast and does not encroach on abutting properties. All lighting should be less than 3,000 Kelvin.
- (7) Coverage. The battery energy storage system shall be included in calculating maximum permitted building coverage for the applicable zoning district.
- (8) Security.
  - (a) A cash deposit, bond or other form of security in an amount and form acceptable to the Town Attorney and Town Engineer shall be submitted to the Town, and shall be in an amount sufficient to ensure the good-faith performance of the terms and conditions of the permit issued pursuant hereto, and shall also provide for the removal of the battery energy storage system and restoration of the lot subsequent to removal. The amount of the cash deposit, bond or other security shall be 125% of the cost of removal of the battery energy storage system and restoration of the property with an escalator of 2% annually for the life of the battery energy storage system. The decommissioning amount shall be reduced by the amount of the estimated salvage value of the battery energy storage system.
  - (b) In the event of default upon performance of such conditions, after proper notice and expiration of any cure periods, the cash deposit, bond or other security shall be forfeited to the Town, which shall be entitled to maintain an action thereon. The cash deposit, bond or other security shall remain in full force and effect until restoration of the property as set forth in the decommissioning plan is completed.
  - (c) In the event of default or abandonment of the battery energy storage system, the system shall be decommissioned as set forth in Subsection H(9) and (10) herein.
- (9) Abandonment.
  - (a) Upon cessation of electricity generation of a battery energy storage system on a continuous basis for 12 months, the Town may notify and instruct the owner and/or operator of the battery energy storage system to implement the decommissioning plan. The decommissioning plan must be completed within 360 days of notification.
  - (b) If the owner and/or operator fails to comply with decommissioning upon abandonment of the battery energy storage system, the Town may, at its discretion, utilize the cash deposit, bond or other security for the removal

of the battery energy storage system and restoration of the site in accordance with the decommissioning plan Subsection L herein.

- (10) Decommissioning. Battery energy storage systems that have been abandoned and/or not producing electricity for a period of one year shall be removed at the owner and/or operator's expense, which, at the owner's option, may come from any security made with the Town as set forth in Subsection F(8) herein.
- (11) Ownership or operator changes. If the owner or operator of the battery energy storage system changes or the owner of the property changes, the conditional use permit shall remain in effect, provided that the successor owner or operator assumes, in writing, all of the obligations of the conditional use permit, site plan approval and decommissioning plan. A new owner or operator of the battery energy storage system shall notify the Building Inspector of such change in ownership or operator within 30 days of the ownership or operator change. A new owner or operator must provide such notification to the Building Inspector in writing. The special use permit and all other local approvals for the battery energy storage system would be void if a new owner or operator fails to provide written notification to the Building Inspector in the required time frame. Reinstatement of a void permit will be subject to the same review and approval processes for new applications under this section.
  - I. Utility lines and electrical circuitry. All on-site utility lines shall be placed underground to the extent feasible and as permitted by the serving utility, with the exception of the main service connection at the utility company right-of-way and any new interconnection equipment, including without limitation any poles, with new easements and right-of-way.
  - J. Noise. The noise generated from the battery energy storage systems, components, and associated ancillary equipment shall meet the requirements of Chapter 130, Noise. Applicants may submit equipment and component manufacturers noise ratings to demonstrate compliance. The applicant may be required to provide operating sound pressure level measurements from a reasonable number of sampled locations at the perimeter of the battery energy storage system to demonstrate compliance with this standard.
  - K. Signage.
    - (1) The signage shall be in compliance with ANSI Z535 and shall include the type of technology associated with the battery energy storage systems, any special hazards associated, the type of suppression system installed in the area of battery energy storage systems, and twenty-four-hour emergency contact information, including reach-back phone number.
    - (2) As required by the NEC, disconnect and other emergency shutoff information shall be clearly displayed on a light reflective surface. A clearly visible warning sign concerning voltage shall be placed at the base of all pad-mounted transformers and substations.



- L. Decommissioning plan. The applicant shall submit a decommissioning plan, developed in accordance with the Uniform Code, to be implemented upon abandonment and/or in conjunction with removal from the facility prior to the issuance of a building permit. The decommissioning plan shall include:
- (1) A narrative description of the activities to be accomplished, including who will perform that activity and at what point in time, for complete physical removal of all battery energy storage system components, structures, equipment, security barriers, and transmission lines from the site;
  - (2) Disposal of all solid and hazardous waste in accordance with local, state, and federal waste disposal regulations;
  - (3) The anticipated life of the battery energy storage system;
  - (4) The estimated decommissioning costs and how said estimate was determined;
  - (5) The method of ensuring that funds will be available for decommissioning and restoration;
  - (6) The method by which the decommissioning cost will be kept current;
  - (7) The manner in which the site will be restored, including a description of how any changes to the surrounding areas and other systems adjacent to the battery energy storage system, such as, but not limited to, structural elements, building penetrations, means of egress, and required fire detection suppression systems, will be protected during decommissioning and confirmed as being acceptable after the system is removed; and
  - (8) A listing of any contingencies for removing an intact operational energy storage system from service and for removing an energy storage system from service that has been damaged by a fire or other event.
- M. An application shall not be deemed complete unless it addresses all matters listed in this section, including, but not necessarily limited to, i) compliance with all applicable provisions of the Uniform Code and all applicable provisions of the Energy Code and ii) matters relating to the proposed battery energy storage system and floodplain, utility lines and electrical circuitry, signage, lighting, vegetation and tree-cutting, noise, decommissioning, ownership changes, safety, and permit time frame and abandonment.
- N. Safety; system certification. Battery energy storage systems and equipment shall be listed by a nationally recognized testing laboratory to UL 9540 (standard for battery energy storage systems and equipment) with subcomponents meeting each of the following standards as applicable:
- (1) UL 1973 (standard for batteries for use in stationary, vehicle auxiliary power, and light electric rail applications);
  - (2) UL 1642 (standard for lithium batteries);

- (3) UL 1741 or UL 62109 (inverters and power converters);
  - (4) Certified under the applicable electrical, building, and fire prevention codes as required;
  - (5) Alternatively, field evaluation by an approved testing laboratory for compliance with UL 9540 and applicable codes, regulations and safety standards may be used to meet system certification requirements.
- O. Site access. Battery energy storage systems shall be maintained in good working order and in accordance with industry standards. Site access shall be maintained, including snow removal at a level acceptable to the local Fire Department and, if the Tier 2 battery energy storage system is located in an ambulance district, the local ambulance corps.
- P. Battery energy storage systems, components, and associated ancillary equipment shall have required working space clearances, and electrical circuitry shall be within weatherproof enclosures marked with the environmental rating suitable for the type of exposure in compliance with NFPA 70.
- Q. Conflict. If any of the provisions of this section are found to be in conflict with other provisions of this chapter, the provisions of this section shall be controlling.
- R. Severability. The invalidity or unenforceability of any section, subsection, paragraph, sentence, clause, provision, or phrase of the aforementioned sections, as declared by the valid judgment of any court of competent jurisdiction to be unconstitutional, shall not affect the validity or enforceability of any other section, subsection, paragraph, sentence, clause, provision, or phrase, which shall remain in full force and effect.