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The Intersection of New York's Public Utility Use Variance Standard and the Climate Leadership and Community Protection Act

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New York courts have long recognized that public utility uses require special consideration when the proposed use is not authorized under the local zoning code, thereby requiring a use variance. Normally, a prohibited use cannot obtain a use variance if the underlying use—often a working farm in the case of renewable energy generation—is legally and financially viable, because the proposal is deemed a self-created hardship.

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New York state law prohibits granting use variances for self-created hardships. But the Court of Appeals has applied a less restrictive standard in evaluating use variances for public utility-type uses. And courts that have reviewed the issue have found renewable energy facilities qualify as public utility uses entitled to review under such less restrictive standard—the Public Utility Variance Standard ("PUV Standard").

Application of the PUV Standard to a planned solar project is currently being challenged by a municipal zoning board in the Town of Athens. The Town of Athens Zoning Board of Appeals ("Athens ZBA") found that a community solar project did not meet the PUV Standard because the developer failed to establish a public necessity for the project.

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In support of its decision, the Athens ZBA found that "the proposed Project is not required to render safe and adequate service for the residents of the Town of Athens" and that no evidence was presented indicating that

(a) there were residents within the Town of Athens who were searching for but unable to obtain solar energy or that there were Town of Athens' residents, who were experiencing inadequate power or the risk of brown outs; or (b) the Town of Athens would receive any economic benefit as a result of the proposed Project.

Zoning Bd. of Appeals of the Town of Athens County of Greene, *Resolution Denying Use Variance Request of Freepoint Solar LLC and FPS Potic Solar LLC* (adopted July 12, 2023) ("ZBA Denial Resolution") at 11.

As further justification for determining that the proposed community solar project was not entitled to a use variance, the Athens ZBA indicated in its resolution that another large-scale solar energy generating system in Greene County would satisfy the needs of the region and that the relevant mandates of the state's Climate Leadership and Community Protection Act ("CLCPA") have been met. As a result, the Athens ZBA concluded

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that there was no need for the energy generated by the proposed project.

The current controversy demonstrates the tensions between local concerns and the state's public utility law (mainly expressed in the Public Service Law), which finds expression in the PUV Standard.

Those strains are now intensified by the CLCPA, embodying the state's motivated drive to reach zero carbon emissions in electricity generation. The Athens case presents to the courts the question of how public necessity is to be judged. And this question is being posed in an environment of increasing local resistance to the growing renewable energy industry.

In this article we examine the history of the PUV Standard and look to how the courts may apply it now that the State has mandated an aggressive response to climate change through the CLCPA and related laws and regulations. Significant portions of the renewable energy infrastructure needed to accomplish the State's goals, including community solar, wind projects, and all standalone energy storage, remains under the control of local government zoning boards. Therefore, understanding the PUV Standard and what evidence is necessary to demonstrate a public need for a project is essential for both municipalities and renewable energy developers.

I. Local Zoning Power and the Public Utility Variance Standard

A. Background: A Brief History of Zoning Variance Law in New York

Zoning in New York is generally viewed as a local concern. One of the primary "home rule" powers, and "[o]ne of the most significant functions of a local government, is to foster productive land use within its borders by enacting zoning ordinances." *DJL Rest. Corp. v. City of New York*, 96 N.Y.2d 91, 96 (2001) (*citing* 1 Anderson, American Law of Zoning §2.16 (Young 4th ed.)).

State constitutional authority for municipalities to enact local laws is granted by Article IX of the New York State Constitution, and finds specific voice as to zoning in two state statutes: (1) the Municipal Home Rule Law, which authorizes enactment of local laws for the "protection and enhancement of its physical and visual environment" and for the "government, protection, order, conduct, safety, health and well-being of persons or property therein[,]" (N.Y. Mun. Home Rule Law §10(1)(ii)(a)(11), (12) (McKinney 1994)) and (2) the Statute of Local Governments permitting adoption, amendment, and repeal of local zoning laws. N.Y. Stat. of Local Gov't. Law §10(6) (McKinney 1994)).

But the zoning power is not limitless. The New York State Constitution prohibits local laws that are "inconsistent with the provisions of [the] constitution or any general law." N.Y. Const. art. IX, § 2(c). As such, local zoning regulations must be consistent with the State Constitution and State statutes, and those local laws that conflict with State statutes or the New York State Constitution may be preempted. *See Albany Area Bldrs. Assn. v. Town of Guilderland*, 74 N.Y.2d 372, 376 (1989).

In the arena of energy generation siting, a local law "affecting power plant studies [was] inconsistent with article VIII of the Public Service Law, which is a general law relating to matters of substantial State concern[]" and was preempted. *Consol. Edison Co. of New York v. Town of Red Hook*, 60 N.Y.2d 99, 107 (1983). Not every local law touching upon areas of state regulation, however, is preempted.

In the "general regulation of land use, the zoning ordinance inevitably exerts an incidental control over any of the particular uses or businesses which… may be allowed in some districts but not in others." *Frew Run Gravel Prod., Inc. v. Town of Carroll*, 71 N.Y.2d 126, 131 (1987). The development of area and use variance standards shows how this interaction plays out.

Prior to July 1, 1992, state law did not differentiate between area and use variances. Zoning boards of appeal were authorized to grant variances from local zoning ordinances "[w]here there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of [local] ordinances[,]" provided that "the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done." *Sasso v. Osgood*, 86 N.Y.2d 374, 380 (1995) (*citing* former N.Y. Town Law § 267(5) (McKinney 2013)).

Much of the guidelines for how to consider area and use variances arose from case law, with communities free to place their own imprimatur on the standards within the broad confines of state law.

But effective July 1, 1992, the Legislature enacted comprehensive provisions governing zoning boards of appeals, including definitions of "use" and "area" variances and criteria to be evaluated in reviewing variance applications. *See* 1991 N.Y. Sess. Laws, c. 692; *see also* N.Y. Town Law §§ 267(1), 267-b (McKinney 2013); N.Y. Village Law §§ 7-712(1), 7-712-b (McKinney 2011); N.Y. Gen. City Law § 81-b (McKinney 2018).

After lower courts and communities continued to apply outdated concepts in variance applications, (*see e.g., Sasso*, 86 N.Y.2d at 379–82 (holding that "practical difficulties" was no longer a consideration for variances after the amendments)) the Court of Appeals ruled that the legislature had intended to occupy the entire field of variance standards, and therefore any local law contrary to the state standards was preempted. *See Cohen v. Bd. of Appeals of Vill. of Saddle Rock*, 100 N.Y.2d 395, 402 (2003).

Thus, while the sole authority to grant variances remains a local power, the criteria employed are delineated in State law. And, in the case of public utility uses, the Court of Appeals has carved out an exception, one that localities have not always accepted, and the application of which is now the focus of the above dispute in the Town of Athens.

B. The Public Utility Variance Standard

1.The Road to the Public Utility Standard

Energy generation facilities and related distribution infrastructure inherently impact multiple local jurisdictions. Therefore, tension between the needs of a public utility

and the hesitation of zoning boards to give up local control over zoning decisions is not surprising. An early example arose in the post-war boom of residential expansion. In *Long Island Lighting Co. v. Griffin*, the local utility sought "permission to erect a gas manufacturing plant and storage holder on such of its property as lies within the 'Industrial I' use district[,]" where it was an allowable use subject to approval of the Zoning Board of Appeals. *Long Island Lighting Co. v. Griffin*, 272 A.D. 551, 553 (2d Dept. 1947) *aff'd*, 297 N.Y. 897 (1948).

The Zoning Board of Appeals denied the application, inter alia, because the utility did not show any unnecessary hardship, the key criteria for a use variance at the time.

The court swept this argument away, noting the gas plant was an allowable use so a variance was not required. It focused on the public need for the facility:

There can be no question of the dire need of petitioner for additional facilities. The backbone of its system is a line of transmission extending from its existent gas manufacturing plants at Far Rockaway, Garden City and Bay Shore. There is no plant on the north shore of Long Island, although in that area the present demand is sixteen million cubic feet a day and there is a prospective demand of twenty-five million cubic feet. The present facilities have been overtaxed to the extent that on two occasions immediately preceding the hearings, petitioner was required to send warnings to present users that the supply was inadequate and subsequently was compelled to curtail service. Petitioner has been required to apply to the Public Service Commission for permission to discontinue acceptance of applications for gas heaters, but even so, it has on its books two thousand of such pending orders. A formidable volume of house building in Nassau County portends heavily increased demands.

272 A.D.at 553.

The court also implied there was a preemption issue, noting that the utility, via statutory authority and pursuant to franchises granted by the Town "has the right, subject to regulation, to erect and maintain a gas manufacturing plant in the Town … and no town zoning ordinance enacted subsequent to the granting of such franchises can serve to nullify that right." 272 A.D. at 554.

The court set aside the denial of the Zoning Board of Appeals as an abuse of the board's discretion, "[i]n view of the right of petitioner to erect a plant and holder and of the nature of the plant as one promoting general welfare[.]" A number of other cases also noted that public necessity required that utilities be treated differently under zoning laws. *See* Robert H. Twichell, *Zoning and the Expanding Public Utility*, 13 Syracuse L. Rev. 581 (1962) (noting that "[b]ecause they are essential to the public health, safety and welfare, it has been stated that public utilities enjoy a favored position in relation to zoning regulations.").

However, not all cases were decided in a utility's favor. In a case touching on a similar evidentiary issue presented in the Town of Athens dispute, the Appellate Division, Second Department upheld a variance denial because the Zoning Board of Appeals "had no power to grant the application … [because] the petitioner could not show facts warranting the conclusion that a variance was required because of practical difficulties or unnecessary hardship." *Long Island Lighting Co. v. Inc. Vill. of East Rockaway*, 279 A.D. 926, 927 (2d Dept. 1952), *aff'd*, 304 N.Y. 932 (1953). The Court of Appeals affirmed, declining the utility's invitation to find the Zoning Board of Appeals erred, and failed to respect the role of the utility as a public utility. *Long Island Lighting Co. v. Inc. Vill. of East Rockaway*, 304 N.Y. 932 (1953).

2. The Court of Appeals Creates, and then Expands, the Public Utility Variance Standard

Sailing head on into the unsettled seas of utility variances, the Court of Appeals first formally articulated the PUV Standard in *Consol. Edison Co. of New York v. Hoffman*, 43 N.Y.2d 598, 610 (1978) (herein "*Hoffman*"). Consolidated Edison ("Con Edison") sought to upgrade the cooling system at a nuclear facility in the Village of Buchanan, requiring both use and area variances. After the Buchanan Zoning Board of Appeals denied the variances, the Supreme Court reversed and the Appellate Division affirmed the reversal, largely on federal preemption grounds as the upgrade had been approved by federal regulators. The Court of Appeals affirmed, but first noted it was unnecessary to go past state law to reach that conclusion.

The court started by laying out the traditional tests for use and area variances, but then, signaling its path forward, noted that such tests "are not appropriate where a public utility such as Con Edison seeks a variance, since the land may be usable for a purpose consistent with the zoning law, the uniqueness may be the result merely of the peculiar needs of the utility, and some impact on the neighborhood is likely." *Consol. Edison Co. of New York v. Hoffman*, 43 N.Y.2d 598, 607 (1978) (*citing* 2 Anderson, American Law of Zoning (2d e), § 21.31, pp. 474-75 and 3 Rathkopf, Law of Zoning and Planning, ch 72, (3d ed)). The court noted that zoning boards had to look at more than local values, and in particular at the role placed on utilities by the public service law:

Local concerns, though important, are not the sole criteria, since utilities such as Con Edison, a gas, electric and steam corporation, are required to "provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable." Indeed, consideration of the needs of a broader public are reasonably within the contemplation of the enabling legislation, which authorizes a zoning board to grant a variance "so that the spirit of the local law or ordinance shall be observed, public safety and welfare secured and substantial justice done." Thus, in resolving the question of hardship, the effect on the utility's customers is a significant factor to be considered by local zoning boards.

43 N.Y.2d at 608 (internal citations omitted) (emphasis added). The court established a new standard for variances sought by public utilities:

To be granted such a use variance, the utility should be required to show that denial of the variance would cause unnecessary hardship, but *not in the sense required of other applicants*. Instead, 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 modify the plant than to use alternative sources of power such as may be provided by other facilities. However, where the intrusion or burden on the community is minimal, the showing required by the utility should be correspondingly reduced.

43 N.Y.2d at 610 (internal citations omitted) (emphasis added). Based on these criteria, it is not surprising the court overturned the denial. Location-wise, a nuclear plant cooling system could only be located at the relevant facility, and Con Edison's customers faced millions in extra costs if the variance was not approved. Importantly for the current Athens dispute, the court noted that while the cooling tower was of limited value to local Village residents, it was of vital importance to Con Edison's three million plus customers, emphasizing the broad view that must be taken in evaluating public necessity of public utility uses in the context of local zoning approvals.

Hoffman involved both a traditional utility and little discretion over alternative locations. Both factors were central to the Court of Appeals' next examination of the PUV Standard in *Cellular Tel. Co. v. Rosenberg*, 82 N.Y.2d 364 (1993) (herein "*Rosenberg*"). In that case, a use variance was denied to a cellular telephone company under the traditional use variance test, in part because of a lack of evidence "that there exists a public necessity for its service, or what the need of the broader public is relating to such service, or that it is a public utility relating to the zoning ordinance." 82 N.Y.2d at 370-2. The court rejected these arguments, unequivocally holding that *Hoffman* "applies to all public utilities. It also applies to entirely new sitings of facilities, as well as the modification of existing facilities."

The court's ruling on the definition of public utility is particularly important to the renewable energy industry, which like the cellular telephone company in *Rosenberg*, is lightly regulated by the New York State Public Service Commission:

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.' 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.'

82 NY2d at 371 (internal citations omitted).

Although *Hoffman* and *Rosenberg* remain the primary examinations of the public utility variance standard, other cases directly expanded its application to renewable energy projects. The PUV Standard has been applied in cases where a Zoning Board of Appeals was challenged for characterizing the renewable energy applicant as a public utility, (*see W. Beekmantown Neighborhood Ass'n, Inc. v. Zoning Bd. of Appeals of Town of Beekmantown*, 53 A.D.3d 954, 956 (3d Dept. 2008) (ZBA's interpretation of the Town Zoning Law treating wind project as a public utility was not unreasonable or not rationally based); *Wind Power Ethics Grp. (WPEG) v. Zoning Bd. of Appeals of Town of Cape Vincent*, 60 A.D.3d 1282, 1283 (4th Dept. 2009) ("classification by the ZBA of the series of wind-powered generators as a utility within the meaning of … Zoning Law is neither irrational nor unreasonable, and that the determination is supported by substantial evidence")) and where a Zoning Board of Appeals unsuccessfully rejected the application of the PUV Standard in the case of a wind project. *See Delaware River Solar, LLC, et al. v. Town of Aurora Zoning Bd. of Appeals*, Index No. 808123/2022 (Sup. Ct. Erie Cty. Nov. 7, 2022); *Cipriani Energy Grp. Corp. v. Zoning Bd. of Appeals of the Town of Minetto, New York et al.*, EFC-2022-0043 (Sup. Ct. Oswego Cty. Apr. 12, 2022) ("[Rosenberg] directly applies to this situation and compels the determination as a matter of law that Cipriani [a solar developer] is a public utility.").

The PUV Standard has also been applied over local objection to find public utility status applicable to non-zoning statutes. *See Alle-Catt Wind Energy LLC v. Town of Farmersville, New York et al.*, Index No. 89872 (Sup. Ct. Cattaraugus Cty. June 26, 2021) (where the court determined a wind developer company to be a public utility for purposes of a local road use statute).

II. The Climate Leadership and Community Protection Act and Related State Actions

With the PUV Standard firmly established, we next turn to how it is to be applied, which requires consideration of the State's aggressive response to climate change: the CLCPA. Enacted in 2019, the CLCPA creates a wide-ranging set of responses to climate change, including specific goals for decarbonizing the state's economy.

In regard to energy generation, the statute calls for 70 percent to be carbon free by 2030 and 100 percent by 2040. *See* N.Y. Pub. Serv. Law §66-p(2) (McKinney 2019); *see also* N.Y.S Climate Action Council, *Scoping Plan Full Report*, December 2022 (**https://climate.ny.gov/resources/scoping-plan/**) at 13. The carbon emissions reductions in electricity generation are a key element in the CLCPA's overall goal of achieving 40 percent emissions reductions in absolute terms from 1990 levels by 2030 and 85 percent emissions reductions by 2050. The mandates are backed up in the law by specific directions for the New York State Public Service Commission ("PSC") and New York State

Department of Environmental Conservation ("NYSDEC") to enact mandatory regulations enforcing the CLCPA's goals.

The potential importance of the CLCPA in local zoning decisions promises to be significant. In its first appearance in a New York courtroom, the CLCPA justified the denial of an air permit to a gas-fired generating facility, even though the NYSDEC has not yet issued the required implementing regulations. *See Danskammer Energy, LLC v. N.Y.S. Dep't of Envtl. Conservation*, 76 Misc.3d 196 (Sup. Ct. Orange Cty. 2022) (where an air permit was determined to be inconsistent with the CLCPA, which permitted gas fired power plants to be subjected to greater scrutiny). We are seeing similar tension between the push for siting of renewable energy projects and the hold that local municipal boards want to maintain over zoning decisions—as clearly demonstrated in the Town of Athens dispute.

A. The Athens ZBA May Have Misapplied the PUV Standard to the Application.

Freepoint Solar LLC and FPS Potic Solar LLC (collectively, "Applicant") proposed construction of a 5 megawatt ("MW") community solar facility in the Town of Athens ("Project"). Because the Project was not a permitted use under the Town's zoning code, the Applicant requested a use variance from the Athens ZBA.

After review, the Athens ZBA denied the application based on the traditional use variance test under New York Town Law, rather than applying the PUV Standard as requested by the Applicant. Following this denial, the Applicant filed a CPLR Article 78 Petition and won. The decision of the Athens ZBA was annulled and the ZBA was ordered by the Supreme Court, Greene County to consider the Application pursuant to the PUV Standard. *In re Freepoint Solar LLC, and FPS Potic Solar LLC v. Town of Athens Zoning Bd. of Appeals*, 2022 WL 18494058 (Sup. Ct. Greene Cty. 2022).

On remand, the Athens ZBA again denied the application (the "ZBA Denial Resolution"), finding that the Applicant did not provide an adequate showing to demonstrate it met the PUV Standard and was therefore not entitled to a use variance.The ZBA Denial Resolution rested on the following grounds:

- The Applicant did not adequately demonstrate that there is a public necessity for the Project because the Project is not needed to render safe and adequate service for residents of the Town;
- The Applicant failed to provide documentation that there are residents unable to obtain solar energy or that residents would receive any economic benefit;
- Because the Flint Mine Solar project (a 100 MW solar project permitted by the New York State Board on Electric Generation Siting and the Environment under Public Service Law Article 10) in the Towns of Coxsackie and Athens (*e.*, the Flint Mine Solar Project) would satisfy the electricity needs for all of Greene County;
- No one in the community came forward with support for the Project (in addition to the PUV Standard discussed in this Article, by referring to the public's view of the Project as a basis for denial, the Athens ZBA also opened itself up to reversal as a decision based on generalized community opposition. *See e.g., Matter of Pleasant Val. Home Constr. v. Van Wagner,* 41 N.Y.2d 1028, 1029 (1977); *Twin Cty. Recycling Corp. v. Yevoli*, 90 N.Y.2d 1000, 1002 (1997));
- A Town engineering consultant's report determining that the relevant goals of the CLCPA have already been achieved and that the Project is actually inconsistent with various provisions of the CLCPA;
- The Applicant did not "establish that there were compelling reasons, economic or otherwise, which made it more feasible to seek a use variance for the proposed Project on the Property than to use alternative sites[;]"
- The Applicant failed to "furnish the ZBA with any fact-based documentation demonstrating that it was impossible for the proposed Project to be constructed in a zoning district within the Town where solar facilities were permitted[;]"
- The Athens ZBA stated that "the Central Hudson Gas & Electric ("CHG&E") Hosting Capacity Map which the Applicant provided shows that feeder 2006, to which the proposed Solar Facility will connect, has less than 0.5 MW hosting capacity where it adjoins the Property." Yet the Athens ZBA challenged whether there was adequate hosting capacity, even though the Applicant had entered into an Interconnection Agreement with CHG&E; and
- The Athens ZBA did not agree with the Applicant's conclusion that there would be minimal intrusion in the community.

In reviewing the Athens ZBA decision against the PUV Standard cases, as well as the goals of the CLCPA and the actual progress towards meeting those goals, the Athens ZBA appears to have made a number of potentially reversible errors. Analysis of the decision and the record presents a compelling case that the use variance should have been granted.

1. The Athens ZBA Inappropriately Focused Solely on Local Need When Determining Public Necessity for the Project

The Athens ZBA found that the Applicant failed to establish a public necessity for the Project. to support this, the Athens ZBA noted that the Applicant did not present evidence that there are "residents within the Town of Athens who were searching for but unable to obtain solar energy or that there [are] Town of Athens' residents, who [are] experiencing inadequate power or the risk of brown outs[.]" *See* ZBA Denial Resolution at 11.

Additionally, the Athens ZBA stated that the Flint Mine Solar Project proposed to be sited in the Towns of Coxsackie and Athens is "expected to generate enough electricity for every home in Greene County on an annual basis (which would satisfy any need for safe and adequate service for the Town of Athens' residents)."

However, these considerations, in and of themselves, are not the test for what is a public necessity under the PUV Standard. To demonstrate that a proposed public utility project is a public necessity under the PUV Standard, an applicant need only show that the project 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]." *Hoffman*, 43 N.Y.2d at 610; *see also Rosenberg*, 82 N.Y.2d at 372. And, where the "burden on the community is minimal, the showing required by the utility should be correspondingly reduced." *Hoffman*, 43 N.Y.2d at 610.

Whether or not the Town of Athens or Greene County themselves are in need of electricity is not the only consideration; "public necessity" is not solely a question of local need. This has been the case since 1978 and the focus on statewide renewable energy needs has only become more acute since the setting of the state's clean energy mandates in the CLCPA.

With this decision, the Athens ZBA appears to have violated *Hoffman's* warning that "[l]ocal concerns, though important, are not the sole criteria, since utilities … are required to provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable." The Athens ZBA did attempt examination of a wider service area, alleging (without any proof or documentation) that the Flint Mine Solar Project could address the solar energy needs of the Town and County.

However, the board did not address the larger New York Independent System Operator ("NYISO") Zone served by the local distribution facility, which is the immediate service area of the Project. Indeed, consideration of the needs of a broader public are reasonably within the contemplation of the enabling legislation, which authorizes a zoning board of appeals to grant a variance "so that the spirit of the local law or ordinance shall be observed, public safety and welfare secured and substantial justice done."

As such, the Athens ZBA's narrow focus only on the needs of the local municipality and county may have prevented it from adequately considering whether or not there is a public necessity for the Project.

In this regard, the actions of the Athens ZBA appear to have been specifically rejected in the first proceeding. There, the Town had argued there was no public need, citing to the coverage gap issue raised in *Rosenberg*. But the Supreme Court, relying on *Hoffman*, rejected that defense: "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." The court noted

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, but public necessity must be viewed in a broader consideration of the general public need for the service.

In re Freepoint Solar LLC, and FPS Potic Solar LLC, 2022 WL 18494058 at *6 (*quoting Hoffman*, 43 N.Y.2d at 609). It remains to be seen how a court may handle a second challenge to the variance denial, but given the apparent failure of the Athens ZBA to adequately consider public necessity when applying the PUV Standard, another reversal could be handed down.

2. The State Has Not Fully Met its Clean Energy Goals, and Asserting as Such as a Reason for Finding No Public Necessity for the Project May Have Been a Misstep By the Athens ZBA.

In its decision, the Athens ZBA stated that the Applicant failed to demonstrate that there is a public necessity for the Project—asserting that the Project is not needed to meet the State's goals in the Energy Plan, the Clean Energy Standard ("CES"), or the CLCPA. *See* ZBA Denial Resolution at 12. The Athens ZBA relied on its engineer's analysis of these goals, and determined that because the CLCPA goal of deploying six gigawatt ("GW") of distributed solar by 2025 has been achieved, there is not a public necessity for the Project. However, it appears the Athens ZBA misunderstood the State's clean energy mandates and its progress in meeting them.

First, whether or not a proposed public utility project helps the state meet its climate goals, in and of itself, is not the only consideration for whether there is a public necessary for the project. Such finding may help make the case that there is a public necessity, but that consideration, standing alone, is the not the test for public necessity.

Regardless of the state's climate goals, all communities still need safe, adequate, and reliable electricity service. And where such service can be provided with minimal impact to the local community, the applicant's burden is further reduced (*Hoffman*, 43 N.Y.2d at 610), providing an even stronger case for a variance under the standard. (In general, solar facilities like the Project create minimal burdens on localities. There is no burden placed on schools and local roads are rarely used after construction. Visual impacts are limited to adjoining properties and often minimized by landscaping.

By comparison, fossil fuel facilities involve air and water discharges and regular fuel deliveries.) Despite this, the Athens ZBA misunderstood the State's climate mandates and its progress to date in achieving them.

The CLCPA created the Climate Action Council ("CAC"), which, pursuant to the statute, was required to draft a Scoping Plan (*see* N.Y.S. Climate Action Council, *Scoping Plan Full Report*, December 2022 (**https://climate.ny.gov/resources/scoping-plan/**)) to provide recommendations to achieve the mandates outlined in the CLCPA: "to reduce greenhouse gas emissions from all anthropogenic sources 100% over 1990 levels by the year 2050, with an incremental target of at least a 40% reduction in climate pollution

by the year 2030." S.6599, Reg. Sess. (N.Y. 2019) (Relates to the New York state climate leadership and community protection act) at § 1(4). The CLCPA mandated the CAC, in the Scoping Plan, "identify and make recommendations on regulatory measures and other state actions that will ensure the attainment of the statewide greenhouse gas emissions limits…[and the] scoping plan shall at a minimum include:

Measures to achieve six [GW] of distributed solar energy capacity installed in the state by [2025], nine [GW] of offshore wind capacity installed by [2035], a statewide energy efficiency goal of one hundred eighty-five trillion British thermal units energy reduction from the [2025] forecast; and three [GW] of statewide energy storage capacity by [2030]."

N.Y. Envtl. Conservation Law §75-0103(13)(E) (McKinney 1997).

The Athens ZBA seemed to focus on only one part of one of these goals: installation of six GW of distributed solar capacity by 2025. But the State has not met all of these goals yet. We still need 20 GW of new renewable generation and transmission to meet the 2030 goals. Meaning, the "State will have to increase the rate at which renewable electricity projects are permitted and approved for interconnection to the State electric grid as over the last 20 years the State has only added 12.9 gigawatts of projects of both renewable and fossil projects." (N.Y.S. Comptroller, *Renewable Electricity in New York State, Review and Prospects* (Aug. 2023) at 5; *see also* NYISO, *Short-Term Assessment of Reliability: 2023 Quarter 2* (July 2023) at 29 ("This assessment finds a reliability need beginning in summer 2025 in New York City [("NYC")] primarily driven by a combination of forecasted increases in peak demand and the assumed unavailability of certain generation in [NYC] affected by the "Peaker Rule."

The reliability need is a deficiency in the transmission security margin that accounts for expected generator availability, transmission limitations, and updated demand forecasts…the [NYC] zone is deficient by as much as 446 MW for a duration of nine hours on the peak day during expected weather conditions (95 degrees Fahrenheit) when accounting for forecasted economic growth and policy-driven increases in demand. The deficiency would be significantly greater if [NYC] experiences a heatwave (98 degrees Fahrenheit) or an extreme heatwave (102 degrees Fahrenheit).")). Given this, it is hard to understand the conclusion of the Athens ZBA that there was no showing of a public necessity for the Project based on completion of relevant goals of the CLCPA.

Moreover, not referenced in the ZBA Denial Resolution is the CLCPA goals regarding disadvantaged communities—those that have disproportionately borne the impacts from climate change. The CLCPA requires such communities to receive at least 35 percent of the overall benefits of the State spending on clean energy and energy efficiency. (*See* S.6599, Reg. Sess. (N.Y. 2019) (Relates to the New York state climate leadership and community protection act) at § 75-0117; *see also* N.Y.S. Climate Action Council, *Scoping Plan Full Report*, December 2022 (**https://climate.ny.gov/resources/scoping-plan/**) at 37).

Community solar works on the premise of providing reduction in energy bills to subscribers, and the NYISO Zone that would be served by the Project contains a number of disadvantaged communities. The failure of the Athens ZBA to acknowledge these goals of the CLCPA, and the negative impact on those potential customers, presents yet another potential issue for appeal.

As discussed herein, the finding of the Athens ZBA that there is no public necessity for the Project, based solely on localized need and the reported completion of the State's distributed solar energy goal of 6 GW by 2025, may be found to have been improper.

Conclusion

New York law has long held that "a zoning board may not exclude a utility from a community where the utility has shown a need for its facilities." *Hoffman,* 43 N.Y.2d at 610 (*citing Long Island Lighting Co. v. Griffin*, 272 A.D. 551, *aff'd*, 297 N.Y. 897; *Matter of Long Island Water Corp. v. Michaelis*, 28 A.D.2d 887 (2d Dept. 1967)). Yet the decision of the Athens ZBA may represent such a result.

A challenge to the Athens ZBA's second denial of the variance application for the Project will represent the first judicial test of the evidence required for a renewable energy project to satisfy the PUV Standard.

If the court finds the Athens ZBA misapplied the standard, and holds in favor of the Applicant, such decision could represent a huge win for small-scale solar developers (*i.e.*, less than 20 MW) facing difficult local zoning boards. On the other hand, if the Athens ZBA prevails, this could create an obstacle for developers challenging local board decisions, and may well embolden project opponents, which seem to be increasing in number. And, because many of the projects needed to meet the CLCPA's goals are subject to local control, this may even create an obstacle for the success of the CLCPA itself.

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