

ZONING NUANCES FOR ENERGY STORAGE DEVELOPMENT IN NEW YORK CITY THAT EVERY DEVELOPER SHOULD KNOW

Hodgson Russ Renewable Energy Alert
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New York's statewide energy storage goal of 3,000 megawatts (MW) by 2030, with an interim objective of deploying 1,500 MW by 2025 require significant increases in the high energy consumption zone of New York City. Market conditions there are trending positive for energy storage, including: the late 2019 adoption by the New York City Fire Department ("FDNY") of standards and requirements for siting outdoor energy storage systems; the availability of bridge incentives that help to close the gap between the calculated value of energy storage and the money it can earn in the market today; the 2019 release of Con Edison's request for proposals for bulk storage resource, with more RFPs to come; the natural grid constraints of such a densely populated area that imports so much of its electricity; the related need for demand charge management; and relatively high electricity prices that improve the economics under the State's Value of Distributed Energy Resources ("VDER") tariff.

While New York City is a promising market for energy storage development, the process for project siting within the City is unique and in some ways more challenging than the permitting and approvals process followed in the rest of New York State. If developers are aware of the nuances in New York City's Zoning Resolution from the outset, they can streamline approvals and ensure project success.

NYC's Energy Storage Development Regulatory Scheme

It goes without saying that one of the first steps in project development is the identification of a promising site. In New York City, where higher bridge incentives create a promising market but real estate is more constrained, the identification of a viable site can be more difficult.

Under the New York City Zoning Resolution there is no mention of energy storage however, the New York City Planning Commission has confirmed that energy storage falls under Use Group 6 (Utility, Small). As such, energy storage projects are permitted in some Residential Districts (R1-R2 and R3-R10) by special permit and are permitted as-of-right within some Commercial (C1, C2, C4, C5, C6, and C8) and Manufacturing (M1, M2 and M3) Districts. Developers are therefore limited to sites within these districts unless they obtain a use variance from the Board of Standards and Appeals (i.e., an approval to use the land in a manner not permitted

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by the Zoning Resolution).

From there, developers are wise to focus on outdoor rather than indoor installations. Last year FDNY adopted rules for the outdoor installation of stationary lithium-ion batteries. These rules helped to speed up the siting process for energy storage as compared to the early days when developers worked with FDNY on an ad hoc basis. While FDNY has issued guidance for outdoor installations, it is still taking a more cautious approach to indoor lithium-ion projects. As a result, developers are mostly limited to the consideration of rooftops and empty lots for the siting of an energy storage projects within the City.

While there may be a smaller pool of sites in New York City, developers are finding success with creative approaches such as the demolition of old buildings to create open space for energy storage development. Once cleared, a developer can pack in multiple battery systems with a larger number of megawatts (“MW”) that maximize revenue streams.

These strategies, however, amplify the importance of the nuances of the New York City Zoning Resolution. When siting a project in this way, developers must deal with setback requirements imposed upon the property by the Zoning Resolution, and may need an area variance (*i.e.*, an approval from the zoning board to use the land in a manner that is not permitted by the dimensional and physical requirements of the Zoning Resolution).

Outside of New York City, zoning boards have broad discretion to grant area variances. If a developer is thoughtful and strategic in his/her application, an area variances is often times granted. However, within New York City, the law is different and an approval is harder to obtain.

Zoning Boards in the Rest of the State Have Broad Discretion to Grant Area Variances

Area variances in towns, villages and cities throughout New York State are governed by Town Law § 267-b, Village Law § 7-712-b and General City Law § 81-b. These laws establish the authority of a zoning board to grant area variances, and also provide the statutory criteria that must be analyzed by the boards when granting area variances. *Id.*

When determining whether to grant an area variance, a zoning board is required to engage in a balancing test “weighing the benefit to the applicant against the detriment to the health, safety and welfare of the neighborhood or community if the variance is granted.” *See Matter of Sasso v. Osgood*, 86 N.Y.2d 374, 384 (1995); *see also*, Town Law § 267-b, Village Law §7-712-b and General City Law § 81-b.[1]

In applying the statutory balancing test for granting area variances, a zoning board is “not required to justify its determination with supporting evidence with respect to each of the five factors, so long as its ultimate determination balancing the relevant considerations was rational.” *See Matter of Merlotto v. Town of Patterson Zoning Bd. of Appeals*, 43 A.D.3d 926, 929 (2d Dept. 2007). Moreover, a determination of a zoning board should be sustained on judicial review if it has a rational basis and is supported by substantial evidence. *See Matter of Ifrah v Utschig*, 98 NY2d 304, 308 (2002).

Under this balancing test, Zoning Boards have significant discretion to grant an area variance. Therefore, if a developer is thoughtful and strategic, they have a good chance of obtaining this approval. Unfortunately, the process is more complex within New York City.

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Area Variances (“Bulk Variances”) in New York City

New York City is empowered under state law to create its own rules for area variances and does not follow the balancing test carried out in the rest of state.

The New York City Zoning Resolution sets forth the approval process for area variances which are referred to as bulk variances. Bulk variances are granted by the New York City Board of Standards and Appeals (“BSA”).

In order for the BSA to grant a bulk variance each and every one of the following findings must be made:

1. that there are unique physical conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to and inherent in the particular zoning lot; and that, as a result of such unique physical conditions, practical difficulties or unnecessary hardship arise in complying strictly with the use or bulk provisions of the Resolution; and that the alleged practical difficulties or unnecessary hardship are not due to circumstances created generally by the strict application of such provisions in the neighborhood or district in which the zoning lot is located;
2. that because of such physical conditions there is no reasonable possibility that the development of the zoning lot in strict conformity with the provisions of this Resolution will bring a reasonable return, and that the grant of a variance is therefore necessary to enable the owner to realize a reasonable return from such zoning lot; this finding shall not be required for the granting of a variance to a non-profit organization;
3. that the variance, if granted, will not alter the essential character of the neighborhood or district in which the zoning lot is located; will not substantially impair the appropriate use or development of adjacent property; and will not be detrimental to the public welfare;
4. that the practical difficulties or unnecessary hardship claimed as a ground for a variance have not been created by the owner or by a predecessor in title; however where all other required findings are made, the purchase of a zoning lot subject to the restrictions sought to be varied shall not itself constitute a self-created hardship; and
5. that within the intent and purposes of this Resolution the variance, if granted, is the minimum variance necessary to afford relief; and to this end, the Board may permit a lesser variance than that applied for.

Compared to the balancing test used by the rest of the State, New York City’s five factor test is significantly more burdensome. By comparison, a bulk area variance approval in New York City looks more like the approval for a use variance in the rest of the State. To this point, it is particularly difficult for an energy storage applicant to meet the first prong of the

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balancing test demonstrating the unique physical conditions “peculiar to and inherent in the particular zoning lot.” *see* ZR § 72-21(a). Successful applicants focus on physical conditions such as small, shallow or irregularly shaped lots, subsurface soil conditions, such as rock, soft soil, contamination or a high water table or the inability to reuse obsolete buildings. Given the unique properties that are being scouted for energy storage installations, these physical characteristics may very well exist and should be used to strengthen an application for a bulk area variance.

Successful Permitting in NYC

1. Recognize that a bulk area variance is not as simple to obtain as in the rest of the State and design a site plan so that this approval is not required. Subject to project economics, including the potential for increased real property taxes, and parcel availability, of course, combining multiple smaller lots to create a larger parcel may provide relief from setback requirements.
2. If a determination is made that a bulk area variance is required, pursue this approval early in the development process. Consider requesting an informal consultation with the BSA before submitting an application in order to understand whether approval is likely and whether any alternatives exist.
3. Stay in touch with New York’s rapidly evolving policies and laws for the deployment of energy storage. This market is moving quickly with continued progress towards streamlining approvals so that these projects can get in the ground and online in time to meet the 2025 1,500 MW target. Stakeholders are working with municipalities to refine the permitting process and continue to receive support in this endeavor from the leadership within the State.

To learn more about the zoning of energy storage facilities in New York City, please contact Mila Buckner (646.218.7658) Noah Shaw (518.7362924) or Dan Spitzer (716.848.1420) in Hodgson Russ’s Renewable Energy Practice.

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[1] In engaging in the balancing test, a zoning board is required to consider whether: (1) an undesirable change will be produced in the character of the neighborhood, or a detriment to nearby properties will be created by the granting of the area variance, (2) the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance, (3) the requested area variance is substantial, (4) the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district, and (5) the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance.