SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF GREENE

DECISION/ORDER

FREEPOINT SOLAR LLC, and
FPS POTIC SOLAR LLC,

Petitioners,

Index #: EF 2023-571

-against-

Richard Mott, J.S.C.

TOWN OF ATHENS ZONING BOARD of APPEALS,
Respondent.

Petition Return Date: February 9, 2024

APPEARANCES:

Petitioners:
Jacqueline Phillips Murray, Esq.
The Murray Law Firm, PLLC
58 Clifton Country Road, Suite 200
Clifton Park, NY 12065

Respondent:
John J. Dowd, Esq.
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75 Columbia Street
Albany, NY 12210

Mott, J.

In this petition pursuant to Article 78 of the Civil Practice Law and Rules, Petitioners, Freepoint Solar LLC and FPS Potic Solar LLC, (collectively, "Freepoint"), seek judicial review of the determination of the Respondent, Town of Athens Zoning Board of Appeals, ("ZBA"), dated July 12, 2023, which denied Petitioners' application for a use variance to allow a Community Distributed solar energy electric generating facility in the Town of Athens' Rural Residential (RU) Zoning District. The ZBA opposes.

BACKGROUND

The history of this application is as set forth in the Decision and Order dated August 18, 2022, of Hon. Adam W. Silverman, which partially granted Petitioners' first Article 78 Petition

by vacating the ZBA's first determination and remitting the matter to the ZBA for further proceedings in which the correct legal standard is utilized by the ZBA. The ZBA had employed the general standard as provided by Town Law § 267-b, rather than the "public utility" standard as described in *Matter of Consolidated Edison v Hoffman,* 43 N.Y.2d 598, 611(1978). In that case, the Court of Appeals held that a utility should be required to show that denial of a use variance would cause unnecessary hardship, but not in the same sense required of other applicants. Instead, the utility must demonstrate a "public necessity", viewed in the broader consideration of the general public's need for the service. The Court of Appeals also stated that, "[I]t 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". Id., at 610. Where the intrusion or burden on the community is minimal, the showing required by the utility should be correspondingly reduced. Id., at 611.

In the matter before the Court, Freepoint contends that on remittal, the ZBA once again failed to utilize the "public utility" standard in its decision to deny Freepoint the use variance it sought. Since the ZBA is given discretion in deciding whether to grant a use variance, the Court's function is limited and the ZBA's determination may not be set aside in the absence of illegality, arbitrariness or abuse of discretion. Id., at 608.

DISCUSSION/PROCEEDINGS UPON REMITTAL

Following the Court's prior Decision and Order, Freepoint returned to the ZBA to process its application for a use variance. Once the public hearing ended, Freepoint contends that the ZBA Chairperson stated that the project did not meet the public utility standard because he believed that there was no need for the project; that Town residents did not want the project and that Town property owners would not benefit from the project. Freepoint responded that the test

for public necessity under the public utility standard is a "broader consideration of the general public's need" for solar energy from the proposed facility and that such need has been determined by the New York State Legislature pursuant to the "Climate Act" (the 2019 New York State Climate Leadership and Community Protection Act), which mandates that 70% of all electricity consumed in the State shall be generated by renewable energy systems by 2030 and increases the mandate to 100% by 2040.

The ZBA contends that it did, in fact, consider the public necessity of the project, and thereby employed the public utility standard applicable to this use variance application. The ZBA submits the affidavit of Adam Yagelski, Senior Planner for Delaware Engineering, D.P.C., which the ZBA retained as its consultant on this project. Yagelski avers that the State of New York, through its Climate Act legislation, established a goal of at least six gigawatts of photovoltaic solar generation by the year 2025. Thereafter, Governor Hochul called for the New York State Energy Research and Development Authority ("NYSERDA") and the New York State Department of Public Service ("DPS") to develop a distributed solar "roadmap" to be issued in 2021 to chart a path to advance an expanded NY-Sun goal of at least 10 gigawatts (GW) by 2030.

In December 2021, NYSERDA and DPS released its plan for achieving 10 GW by 2030, entitled *New York's 10 GW Distributed Solar Roadmap: Policy Options for Continued Growth in Distributed Solar* ("the Roadmap"). The Roadmap indicates that, as of December 2021, solar projects with a total generating capacity of 3,322 megawatts (MW) had been completed, with another 2,461MW considered to be "in development". Accordingly, the Roadmap indicates that more than 93% of the 6GW goal for 2025 has been achieved. In addition to those completed projects and "in development" projects, there are another 4.095GW of projects in the early stages

of development. Thus, Yagelski avers that, using the sources and methods suggested by the Roadmap, as of July 11, 2023, his analysis indicates that there is a total of 8.125GW of solar generating capacity statewide, which is well beyond the 2025 goal of 6GW.

Based upon this analysis, the ZBA determined that there was no public necessity for this project. Having determined, using the "public utility" standard, that there was no public necessity for this project, the ZBA denied Freepoint's application for the use variance.

DISCUSSION/JUDICIAL REVIEW

On an application for a use variance by a public utility, the utility must demonstrate that its project is a public necessity, in that it is required to render safe and adequate service, and that there are compelling reasons, economic or otherwise, to obtain the variance. *Cellular Tel. Co. v Rosenberg*, 82 NY2d 364, 372 (1993); *Matter of Consolidated Edison v Hoffman,* 43 N.Y.2d at 611. Where the intrusion or burden on the community is minimal, the showing required by the utility should be correspondingly reduced. Id; *Cellular Tel. Co. v Rosenberg*, 82 NY2d 364, 372 (1993). The proposed solar electric generating facility is a public utility. See, *Matter of West Beekmantown Neighborhood Assn., Inc. v Zoning Bd. of Appeals of the Town of Beekmantown*, 53 AD3d 954 (3d Dept., 2008)(applying the public utility standard to wind energy farm).

In issuing a negative SEQRA determination, the ZBA found that there would be no significant environmental impact on the community. Any visual impacts would be reduced by fencing and planted visual barriers. Thus, as the intrusion or burden on the community is minimal, the showing required by the utility is correspondingly reduced.

Despite the reduced legal standard, the ZBA nonetheless found that Freepoint failed to demonstrate a public necessity. Their conclusion that Freepoint failed to demonstrate the public necessity of their proposed project was based on New York State having either "completed" or

"in development" solar generating capacity of 8.125GW, or 2.125GW above the goal of 6GW set for 2025. The ZBA also determined that Freepoint failed to establish that there were compelling reasons, economic or otherwise, which made it more feasible to seek a use variance for the proposed site than to use alternative sites. The ZBA considered that the proposed site was unique based upon the lack of available points of interconnection with the distribution line in parts of the Town where solar facilities are a permitted use however, it also noted that Freepoint failed to furnish any fact-based documentation demonstrating that it was impossible for the proposed project to be constructed in a zoning district within the Town of Athens where solar facilities are a permitted use.

Consequently, the Court finds that the ZBA's determination to deny the use variance is not arbitrary and capricious and is supported by substantial evidence in the record.

Accordingly, it is hereby

ORDERED, that the petition is dismissed.

This shall constitute the Decision/Order of the Court. The Court is e-filing the original of this Decision/Order, relieving the parties of their obligations under CPLR § 2220 regarding filing and entry of same, but this does not relieve the parties of their obligations regarding service with notice of entry thereon.

ENTER

Dated: April 8 ,2024
Hudson, NY

Richard Mott, J.S.C.

Papers considered:
1. Notice of Petition dated August 10, 2023; Verified Petition dated August 10, 2023.
2. Verified Answer dated September 29, 2023 with Certified Transcript of Proceedings.
3. Verified Reply dated November 9, 2023 with Memorandum of Law in Support.
4. Memorandum of Law in Opposition; Affidavit in Opposition of Adam Yagelski dated January 9, 2024 with Exhibit A.

5. Reply Memorandum of Law.