

Town of Red Hook ZBA
Draft Meeting Minutes
July 12, 2023

Preliminaries

Roll Call

Chairperson Karakassis moves to call the meeting to order at 7:04pm. Present are Chairperson Karakassis, Chris Carney, George Jahn, and John Bonavita-Goldman. Chris Klose is absent. Also Present are ZBA Attorney, Janis Gomez Anderson, Town of Red Hook ZEO, Bob Fennell, and Town Board Liason, Bill Hamel.

Approval of Draft Minutes

Chairperson Karakassis states the Board will not vote on the June 14, 2023 meeting minutes, since there is a question regarding a statement by Chris Klose, who is not present.

Planning Board Minutes

Chairperson Karakassis states the Board will vote on the Lead Agency Coordination Request as soon as it has a copy from the Planning Board.

Comments from the Chair

Public Hearing (continued from May 10, 2023)

ZBA 23-02 Bard College, represented by Coleen Murphy Alexander application an area variance to construct four student residence halls as follows, Building A1 41' in height, Building B 47' 6" in height, Building C 46' in height, Building HH 43' in height. Section 143-12, The District Schedule of Area and Bulk Regulations, of the Town of Red Hook Zoning Law, limits the maximum height of buildings in the Institutional Zoning District to 35'. See also, 143-Attachment 2 of the Town of Red Hook Zoning Law. The subject parcel is located at 30 Campus Road, Annandale on Hudson, NY, in the Town of Red Hook, in the Institutional Zoning District.

At 7:09pm Chairperson Karakassis reads the agenda item, and asks for a motion to continue the public hearing to the August 9, 2023 ZBA meeting, or the first subsequent meeting after the present meeting. George Jahn so moves, John Bonavita-Goldman seconds, and all Board members present vote in favor of continuing the public hearing to the August 9, 2023, or first subsequent meeting.

Review (Discussion Continued from 6-14-2023)

ZBA 23-07 Rhinebeck Solar and Carson Power, application for two area variances of Town of Red Hook Zoning Enforcement Officer, Robert Fennell's Determination of April 27, 2023, interpreting The Town of Red Hook Zoning Law, Section 143-37(E)(1)(a) prohibiting the installation of a ground mounted solar system in a NYSDEC, or US Army Corps of Engineers, designated wetland. The Town of Red Hook Zoning Law Section 143-37E(1)(b) prohibits the installation of a ground mounted solar system in the AB District, on Important Farmland, as defined in Section 143-4. The subject parcel is located at 7099 Albany Post Road, in the Town of Red Hook, in the AB, EP-O, and FF-O Zoning Districts.

Chairperson Karakassis states the ZBA Application Rhinebeck Solar – Carson Power 23-06, for an Interpretation, was withdrawn at the June 14, 2023 meeting.

Chairperson Karakassis refers to Application 23-07, by the same applicant, stating the applicant, or his representative, stated at the last meeting his intent to make a presentation of the project to the Board. Chairperson Karakassis states the Board is familiar with solar installations, and further states she has some questions for the applicant.

Chairperson Karakassis asks the applicant how many acres the proposed solar panels occupy on the site, and further notes the current Site Plan, submitted to the Town of Red Hook Planning Board, shows 14.288 acres, to which Mr. Gordon replies the solar array will occupy 6.05 acres on a 37.4-acre parcel, and further states the coverage is 16%, because there will be spaces between the rows of panels. Chairperson Karakassis states the area taken up by the panels themselves may not be more than ten acres.

ZEO, Bob Fennell, states Town of Red Hook Zoning Law, § 143-37 D 3 (a) states “**Large solar energy systems. Large solar energy systems** are permitted as a principal and accessory use of land subject to a special use permit from the Planning Board in accordance with Article VI of the Zoning Law and the following conditions:

(a) Lot coverage shall not exceed 10 acres of land per parcel as measured in § 143-37D(2)(g)

And in **143-37D(2)(g)**.

“Total lot coverage shall not exceed 60% for all structures. Lot coverage shall be calculated for medium **solar energy systems** as the area measured from the outer edge(s) of the **solar** panel(s) at maximum horizontal tilt and shall include all other **solar** photovoltaic related equipment.”

Chairperson Karakassis asks Mr. Gordon, who has stated he is the Carson Power Director of Development in New York, if Carson Power has other solar projects in the area, to which Mr. Gordon replies Carson Power has 50+ community solar projects in the pipeline. Chairperson Karakassis asks Mr. Gordon to state where they are located. Mr. Gordon states the Village of Maybrook in Orange County, the Town of Pine Plains, the Town of Cortlandville, and the Town of Bethlehem each have projects already

submitted to the municipality. Mr. Gordon states there are other projects in the Hudson Valley and Greater New York, which are not as far along. Mr. Gordon states the Prime Farmland Designation of Code Section 143-37, which prevents development on Prime Farmland represents a huge logistical challenge, and further states there is no electrical substation in the Town, and states any infrastructure more than five miles requires significant upgrades. Mr. Gordon states the nature of three-phase lines require the land be constructable, and large enough for economies of scale. Mr. Gordon states there are 12 parcels in the Town of Red Hook, which meet these criteria, all of which are on Prime Farmland, or Farmland of Statewide Importance.

Mr. Gordon states, regarding the wetlands on the subject parcel, they will fall under NYSDEC, or US Army Corps of Engineers jurisdiction, and further states the proposed solar energy system will comply with each agency's requirements, in the case the wetlands will be impacted. Mr. Gordon describes Wetland A, on the Site Plan, submitted to the Town of Red Hook Planning Board, as a poorly drained farm field. Chairperson Karakassis states the Board will be looking to the Town of Red Hook Planning Board for guidance on wetlands and soils.

Chairperson Karakassis states she has the following comments prepared, which are a response to the June 30, 2023 letter from Mr. Muscato.

Chairperson Karakassis [very lightly formatted by A. Rubin, for clarity] reads the following comments to all present.

Comments ZBA Meeting July 12, 2023 - IS CARSON SOLAR A UTILITY?

The ZBA must decide if the applicant solar array company is "utility" whose application for a use variance is judged using the "public utility exception" test set forth by New York's highest court in Matter of Con Ed v. Hoffman in 1978.

The Hoffman court said that utilities are exempt from the ordinary requirements for getting a use variance. Hoffman said a utility has to show only that it 1) provides an essential service, and 2) there is a compelling reason, economic or otherwise, to be granted a use variance.

So, at this point we are deciding only if Carson/Rhinebeck Solar is a utility to determine whether Carson's application will be judged by the ordinary standard or by the lower utility exception standards.

First, we can look to the courts that created the utilities exception to tell us what a utility is. But the courts say there is no explicit test. See Freepoint Solar, v. Town of Athens ZBA citing to Nextel Partners. In deciding which entities are subject to the public utility standard, courts do not apply a rigid rule.

Next, we can look for a definition of a utility in statutes and regulations. There is no general state law definition, although "utility" is defined under various chapters and those definitions apply only to the laws of the defining chapter.

Going to Red Hook's own zoning code, it doesn't define utility. However, Red Hook Code 143 - 37 E. (1)(d) reads: "All solar energy systems that are connected to the electric distribution or

transmission system shall obtain an interconnection agreement with the applicable electric utility. "From that language the ZBA may infer that the Solar energy system is not itself considered a utility."

The ZBA can also go to court decisions for guidance. The Ct. of Appeals in Con Ed v. Hoffman in 1978 sites to a legal treatise, Anderson's – American Law of Zoning 3rd ed. – which says a public utility has been defined to be a private business, which Carson is, often a monopoly, which Carson isn't, providing services so essential to the public interest they can use eminent domain. Carson can't exercise eminent domain. [Only utilities, as defined as such, are] subject to such regulations as fixing of rate and standards of service."

Carson argues it is subject to such regulation and in its June 30, 2023, letter points us to Public Service Law Section (2), which provides definitions, and PSL Sec. 66.

Looking first at Pub. Svc. Law Sec. 66 - it reads: The Public Service Commission has "general supervision of all gas corporations and electric corporations having authority under any general or special law or under any charges or franchises to lay down, to erect or maintain wires, pipes, conduits, ducts of other fixtures in, over or under the streets, highways and public spaces of any municipality for the purpose of furnishing or distributing gas or of furnishing or transmitting electricity for light, heat or power."

PSL Sec. 2.13 provides: The term "electric corporation," when used in this chapter includes every corporation, company, and person, ... owning, operating or managing any electric plant ...except where electricity is generated by the producer solely from one or more co-generation, small hydro or alternate energy production facilities

Carson is an alternate energy production facility as defined in PSL Sec. 2(b) as follows:

The term "alternate energy production facility," when used in this chapter, 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.

So the Public Services Commission does not have the authority to regulate facilities such as Carson's solar farm which will produce 5 MW. The other PSL sections cited by applicant in its June 30, 2023 letter do not contain any language regulating the applicant.

Additionally, I've been advised by the ZBA attorney that she spoke to an attorney with the Public. Service Commission, who confirmed that they regulate electric and gas corporations, but do not regulate alternate energy production facilities such as Carson Solar.

Using the Hoffman criteria, the applicant's alternative energy facility cannot be called a utility. The Hoffman criteria for being a utility was amplified in a later 1993 case, Cellular Tel. Co. v. Rosenberg in which the Ct. of Appeals stated that the characteristic of the public utility include:

1. Provides an Essential Service - CARSON arguably does - electricity is essential, whether Carson's 5 MW production delivered to a utility is essential is an open question
2. Operates under a franchise or subject to some measure of government regulations – To give meaning to this language, I think the ZBA must look back to the Hoffman decision. Every individual and business entity is subject to some measure of government regulation, but Hoffman makes

clear that the regulation at issue must relate to the standards of service or the fixing of rates. As discussed above, the Public Service Commission does not regulate alternate energy facilities such as Carson in this way.

3. Logistic problems - ..the “product of the utility must be piped wired, or otherwise served to each user and the supplier has no alternative means of delivery. First, the mere existence of general logistic problems doesn’t qualify an entity as a utility. The difficulties have to be related to the ability to deliver the service to the user. A utility has a business purpose of providing essential services requiring wires or pipes for delivery, and the utility must reach a great number of residential and commercial users located in a variety of urban and rural locations. The logic of creating an exception for utilities is that they must reach thousands, even millions of users located in places that can be difficult to access with pipes, wires and ducts. It may be terrain, barriers created by densely inhabited and built up areas, or natural barriers like rivers or forested lands that create the logistical difficulties.

That logic does not apply to Carson, a business that serves only one user – the utility it connects to. While the service it provides is essential to homes and businesses for heat, light and power, it is not essential to the utility it serves. Carson has no business purpose requiring it to be placed in any particular location in the state.

Carson has no current presence in the Town of Red Hook or Dutchess County and its business catchment area is the entire state. It also is organized as a foreign corporation, meaning it anticipates doing out of state development. It is a matter of financial opportunity, not a necessity to provide utility services, that motivates Carson to locate in Red Hook. Carson does not face the logistical difficulties of the type set forth in the Rosenberg case.

And finally, we can look to Carson Solar’s Own Explanation of what it is. Carson Solar describes itself on its corporate website saying “we develop and own solar and storage projects.” It is in the business of managing the financing and construction of solar farms for the purpose of selling the energy to a utility.

After considering all these factors, my view is that Carson Solar is not a utility, it is a vendor to a utility.

The court cases of 1978 and 1993 did not anticipate energy generating technologies which are now commonplace and preferred. Those technologies and new business models allow small energy producers which serve utilities, not end users. This was not anticipated by the courts that created and have interpreted the utilities exception for the undue hardship test. Applying the utilities exception to each small alternate energy producer would lead to unintended consequences for local municipalities denying them the opportunity to regulate development and meaningfully decide the character of their communities. My opinion is that Carson Solar is not a utility, but is merely a vendor to a utility, and, therefore, not entitled to the utility exception for an application for a use variance.

Chairperson Karakassis asks the Board members if there are any questions and comments regarding her statement, to which George Jahn replies he tends to agree with her line of reasoning and citation of regulators, and further states he does not feel quite as strongly, but states Chairperson Karakassis’ arguments make sense. Chairperson Karakassis responds the cases cited were decided well before this technology and business model existed, and further states the Board is left trying to fit new technology to

old tests. George Jahn states the applicant and others are incremental providers to the grid, opportunistically done, and further states, as such, the applicant does not get over the bar to qualify as a public utility. Chris Carney states he agrees, and asks to whom Carson Power sells its energy, Central Hudson. Mr. Gordon replies the proposed solar energy system is a form of community solar for which residents can sign up as the end consumers. Chairperson Karakassis states the energy produced would be feeding into Central Hudson's grid, and Central Hudson supplies the energy to consumers.

Mr. Gordon states the energy would be provided to consumers via Nex Amp, via net metering. Mr. Muscato states it would not be a direct sale from generator to utility, but rather a sale to subscribers via Nex Amp NY, governed by an Open Access Tariff. Chairperson Karakassis states utilities were always conduits, to which Mr. Muscato responds deregulation in New York State has changed the electricity market. Mr. Muscato states Public Utility Generation is gone in New York. Chairperson Karakassis states municipalities need new definitions. The business model in which Consolidated Edison was providing energy directly no longer applies.

Mr. Muscato states the Rosenberg case, which qualified cell towers as a public utility, is very similar to Carson Power, today. Chairperson Karakassis responds she does see that solar has been recognized in that way. Mr. Muscato states the Freepoint case addresses every point Chairperson Karakassis has made. Chairperson Karakassis states she agrees electricity is an essential service.

Mr. Muscato states in the Freepoint Solar case, the Greene County Supreme Court held that the Athens ZBA decision to apply the traditional use variance standard to a solar facility was made in error, and the court directed the Athens ZBA on remand to apply the relaxed Rosenberg public utility standard to the solar facility's use variance application. Chairperson Karakassis states the Athens case is incorrect, and asks the Board if the service, which would be provided by Carson Power, is essential. George Jahn states it is useful, a term used by Chairperson Karakassis, but not essential.

Mr. Muscato states there is a New York State mandate for six gigaWatts of distributed generation, and further states he cannot argue each small operator is essential, but, he states, collectively, they are. Chairperson Karakassis states the public utility exception is not construed to apply to thousands of small producers. Chairperson Karakassis states Red Hook has much open land for farming, and further states applying the relaxed utility standard would open up the Town to solar development. Mr. Muscato states the standard in Rosenberg applies, but does not open up the Town to solar development, since the ZBA can consider the location, and minimizing impacts to community character. Chairperson Karakassis states the lower standard of proof opens the door to further development.

John Bonavita Goldman states he is confused about the variance, and asks if it is a use variance or an area variance. Mr. Muscato states it is his and the applicant's position it is an area variance. Chairperson Karakassis states the Board will review this, once it decides if the applicant is a public utility. John Bonavita Goldman asks the applicant if his

business is regulated statewide by the Public Service Law, FERC, or Section 66 L of the Public Service Law. Mr. Muscato states New York State has a Distributed Energy Program, which regulates energy supply companies, and further states it is for large scale generators, and Section 68 (2) exempts generators smaller than 80 megaWatts. Mr. Muscato states Section 66 (j), which requires certificates of Public Convenience and Necessity, and Compatibility and Public Need do not apply. Chairperson Karakassis states the proposed solar energy system does not qualify for regulation of fixing of rates, and standards of service, as described in the definition of a public utility.

John Bonavita Goldman asks what it will look like driving by, to which Chairperson Karakassis replies this is not in the ZBA purview. Mr. Gordon states he has completed visual simulations for the Planning Board, and further states the site will be completely screened. Mr. Muscato states they are not removing vegetation on the front of the site, and states it will be very well screened. Mr. Gordon invites the Board members to visit the site. George Jahn states between Red Hook and Albany he has seen a big field of solar panels, over 14 acres. Chairperson Karakassis states the aesthetics are a different stage of the project, and further states the Board must consider the issue of whether or not Carson Power is a public utility.

John Bonavita Goldman states to a large degree an area variance is a matter of aesthetics. Chairperson Karakassis states it is for granting an area variance, but not for deciding which type of variance applies. Chairperson Karakassis states the Board can refer the its attorney for a written decision regarding which variance standard applies. ZBA Attorney Janis Gomez Anderson asks the Board if it needs more information, to which Chairperson Karakassis replies she is hearing of Sections 68 and 66 (j) of the Public Service Law for the first time, and states she needs more time to review them, and the Board needs the proper time to consider them, and further states it is not her intention to delay the applicant unnecessarily.

Ms. Gomez Anderson states she can draft a resolution based on the discussion at tonight's meeting, and the Board can vote on it. Chairperson Karakassis states if the Board members have questions they can speak to her, or contact the ZBA Attorney directly.

At 8:11 Chairperson Karakassis asks for a motion to refer to ZBA Attorney, Janis Gomez Anderson, to draft a resolution to be voted on at the next ZBA meeting. John Bonavita Goldman so moves, George Jahn seconds, and all Board members vote in favor of referring to the ZBA Attorney to draft a resolution to be voted on at the next meeting.

Chairperson Karakassis states the question is if the applicant should be looking for a use variance or an area variance, and further states it is a use variance because the applicant is seeking to use the land in a way which the Zoning Code does not allow. Mr. Muscato states the use is permitted in the Agricultural Business District, to which Chairperson Karakassis replies the proposed use is not permitted on Prime Farmland. Mr. Muscato states he can supply the relevant case law to the Board, which supports his position. Janis Gomez Anderson invites Mr. Muscato to provide the case law, so the Board is not stuck.

Chairperson Karakassis states the discussion with Carson Power is concluded, and further states the Board has on the agenda an internal bookkeeping matter regarding changes to Owner Consent and Application Forms.

At 8:18 pm Chairperson Karakassis asks for a motion to require a notarized signature on all Owner Consent Forms. George Jahn so moves, John Bonavita Goldman seconds, and all Board members present vote in favor of requiring a notarized signature on all Owner Consent Forms.

At 8:20 pm Chairperson Karakassis asks for a motion to require, in addition to the notarized signature, a printed signature and affiliation, on all ZBA Application Forms. Chris Carney so moves, Chairperson Karakassis seconds, and all Board members present vote in favor of requiring a printed signature and affiliation, in addition to the notarized signature, on all ZBA Application Forms.

At 8:20 pm Chairperson Karakassis asks for a motion to adjourn the meeting. George Jahn so moves, John Bonavita Goldman seconds, and all Board members present vote in favor of adjourning the meeting.

At 8:20 pm Chairperson Karakassis asks for a motion to adjourn. George so moves, and Chris Klose seconds. All Board members vote in favor of adjourning.

The next regularly scheduled ZBA meeting is August 9, 2023.

The submission deadline for this meeting is noon of Tuesday, August 1, 2023