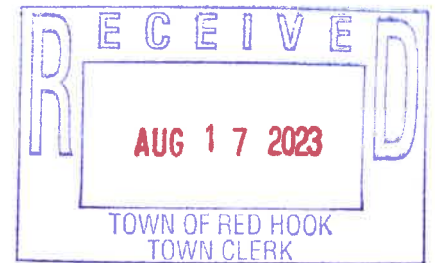


Town of Red Hook ZBA
Draft Meeting Minutes
August 09, 2023



Preliminaries

Roll Call

Chairperson Karakassis moves to call the meeting to order at 7:02pm. Present are Chairperson Karakassis, Chris Carney, Chris Klose, and John Bonavita-Goldman. George Jahn is absent. Also Present are ZBA Attorney, Janis Gomez Anderson, and Town Board Liaison Bill Hamel.

Approval of Draft Minutes 6-14-23, 7-12-23

At 7:03pm Chairperson Karakassis asks for a motion to approve the June 14, 2023 draft meeting minutes, as amended. There is no discussion. Chairperson Karakassis so moves and Chris Klose seconds. Chairperson Karakassis, Chris Carney, John Bonavita-Goldman, and Chris Klose vote in favor of approving the revised June 14, 2023 meeting minutes.

At 7:04pm Chairperson Karakassis ask for a motion to approve the July 12, 2023 draft minutes, as revised. John Bonavita-Goldman Chris Carney seconds, and Chairperson Karakassis, John Bonavita-Goldman, Chris Klose, and Chris Carney vote to approve the revised July 12, 2023 meeting minutes.

Planning Board Minutes

Chairperson Karakassis states because the scheduled August 7, 2023 Planning Board meeting was cancelled, the Planning Board did not conduct a SEQR process vote on the Bard College Residency Hall project.

Chairperson Karakassis further states the Planning Board took no actions concerning the ZBA at the July 17, 2023 Planning Board meeting.

Comments from the Chair

There are no comments from the Chairperson at this time.

Public Hearing (continued from July 12, 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 7:05pm Chairperson Karakassis reads the agenda item, and asks for a motion to continue the public hearing to the September 13, 2023 ZBA meeting, or the first subsequent meeting after the present meeting. Chris Klose so moves, John Bonavita-Goldman seconds, and Chairperson Karakassis, John Bonavita-Goldman, Chris Klose, and Chris Carney vote in favor of continuing the public hearing to the September 13, 2023, or first subsequent meeting.

Review

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.

At 7:06pm Chairperson Karakassis asks for a motion to grant the Planning Board's request for Lead Agency status under SEQR, for the Rhinebeck Solar – Carson Power proposed ground mounted solar system. Chris Carney so moves, John Bonavita-Goldman seconds, and Chairperson Karakassis, John Bonavita-Goldman, Chris Klose and Chris Carney vote to grant the Planning Board's request for Lead Agency status under SEQR, for the Rhinebeck Solar – Carson Power proposed ground mounted solar system.

At 7:06pm Chairperson Karakassis states the Board has been advised by counsel to vote on a request to the applicant of appeal 23-07 of an escrow deposit of ten thousand dollars (\$10,000.00). Chris Klose so moves, Chris Carney seconds, and Chairperson Karakassis, John Bonavita Goldman, Chris Klose, and Chris Carney vote to request an escrow deposit, in the above amount, from the applicant of appeal 23-07. Chairperson Karakassis states the application is more complicated than usual, and thanks the applicant's representative, Owen Hooper, for this cooperation. Chairperson Karakassis states the applicant has provided the funds for the escrow deposit just prior to the ZBA meeting, and further notes additional legal fees are the main expense the Board is incurring. Chairperson Karakassis states any unused funds will be returned to the applicant.

Chairperson Karakassis reads the agenda item and states the ZBA Attorney has prepared a resolution, which has been posted on the Town website, and provided to the applicant. Chairperson Karakassis asks the applicant's representative, Owen Hooper, of Carson Power, if he has any questions or comments. Mr. Hooper states Ms. Ayah Badran, of Young & Sommer, LLC, will provide comments.

Ms. Badran states her responses to various items in the resolution as follows:

Item number one: The Town of Red Hook Zoning Code does not provide a definition of 'Public Utility'. You stated there appears to be a distinction in the way certain terms are described. I would like to point out that none of them say, specifically, that solar is not a public utility. There may be a distinction between public utilities that are generation utilities, distribution utilities, or transmission, but your code does not define public utilities, or say that solar is not a public utility.

With respect to items in paragraph three, we have addressed all of these items at the prior meeting, and in the letter that briefed the ZBA on the Public Utility Standard, and why Carson Power, and the project they are proposing here, is a public utility. Rhinebeck Solar is a public utility.

I would like to point out Item B: 'The applicants are not monopolies' – the Rosenberg Standard does not require that a utility be a public utility. The case law says there are often monopolies, but since these cases, the electric sector in New York has changed. For example, telecom has been recognized as a public utility, and telecom is not entirely a monopoly. The electric sector, as Jim Muscato discussed at the last meeting, has been decentralized.

Item number C: 'The provision of electricity is not a centralized service' – while a five megawatts AC, ground-mounted community project, proposed here, does not alone provide a central service, arguably, its contribution to the six gigawatt [?], through the CPCLA, which was increased to ten gigawatts, is an essential service.

Item G: 'The applicants do not face logistical problems' – The applicant, in his application, has discussed and identified the logistical challenges in siting solar facilities. One of the items is proximity to a three-phase line, and distance from a substation, which was outlined in the submission.

Ms. Badran states this is her statement to the Board at this time.

Chairperson Karakassis asks the Board members if they have any questions or comments, to which Chris Carney replies he does not, Chris Klose replies he does not, and John Bonavita-Goldman replies he does not.

At 7:10pm Chairperson Karakassis moves to adopt ZBA 23-07 Resolution Number One. Chris Klose seconds, and Chairperson Karakassis, John Bonavita Goldman, Chris Klose, and Chris Carney vote to adopt ZBA 23-07 Resolution Number One.

Chairperson Karakassis states the ZBA 23-07 Resolution Number One is adopted and further states the Board can move on to the question of whether Rhinebeck Solar – Carson Power needs a use variance or an area variance, to permit building on Important Farmland, in the AB District, and on Designated Wetlands. Chairperson Karakassis further states she would like to make a statement on this matter, and asks Ms. Badran if she would like to wait to respond after the statement, to which Ms. Badran replies she would.

Chairperson Karakassis states, as follows:

Firstly, the Board has looked at the cases you provided. In Overhill Bldg. Co. v. Delaney 28 NY2d 449, 453, and I quote, 'A use variance is a variance which permits a use of land, which is proscribed'.

In Khan v. ZBA 87 NY2d 344, 351, another case you provided, I quote 'A use variance will allow use of land, as a matter of discretion, in circumstances when the desired, exceptional use has been proscribed by the zoning regulations'.

Then I look at Town of Red Hook Zoning Code Section 143-37 E 1 (b), which states 'A ground-mounted, solar energy system shall not be installed in the AB District, on Important Farmland, as defined in Section 143-4.

I also look at Town of Red Hook Zoning Code, Section 143-37 E 1 (a), which reads 'Solar energy systems shall not be installed within a designated wetland, as defined by the New York State Department of Environmental Conservation, and/or the US Army Corps of Engineers'.

I also look at Town of Red Hook Zoning Code, Section 143-135 B 1, which reads 'The ZBA shall have the power to grant use variances, authorizing a use of land, which would otherwise not be allowed, or would be prohibited by the terms of this Chapter'.

Chairperson Karakassis states, in her opinion, the proposed construction is on Important Farmland, and on Designated Wetlands, and as such, is a prohibited use, on that land. Chairperson Karakassis asks if any Board members wish to comment. John Bonavita-Goldman states the IRS ruled last year that solar energy facilities as public utility infrastructure, and further states, since Rhinebeck Solar – Carson Power is not definitively a public utility, a use variance is the way to address it.

Chairperson Karakassis asks the Board for any additional comments regarding the question of whether the requested variance, to permit building on Designated Wetlands, and Important Farmland, is a use variance or an area variance. There are no further comments. Chairperson Karakassis asks Ms. Badran if she would like to respond, to which Ms. Badran states if the Board has no further questions or comments, she would respond as follows:

The statement you pulled from the cases is taken a bit out of context. If you look at all of the case law, you will see that in every single case, the discussion on use was based on whether the use was allowed in the zoned district, whether it was a permitted use in the zone. It didn't necessarily relate to whether or not the use itself was changing – the project proposed changed the use.

And that's why in the cases you'll see even when a use is changing, for example, in Hoffman, the use was changing from an accessory building use to a principal building use; in Overhill, it was changing from a parking area to an office building; in Khan, the change in use was from vacant land, in a flood plain to a residential use. In all of those cases these changes in uses were in violation of a specific section of the zoning code. In Hoffman the use of an accessory structure as a primary structure was prohibited, and two primary residences on a single two-acre lot was prohibited by the zoning code. In Overhill, getting rid of the parking lot, to convert it to an office space was prohibited by the zoning code, because it would create a use without sufficient parking spaces, in violation of the zoning code. In Khan, the use of a flood plain property to develop residences was technically prohibited, because the flood plain covered the entire lot, and there was no buildable area on the parcel.

However, in all of those cases, the courts made a decision that the variances requested were deemed area variances, and not use variances, because the use that was being proposed was a use that was a permitted use in the zoning district at issue.

In the zoning district the parcel is in, for the proposed project, the AB Zone, Large-Scale Solar is a permitted use. Section 143-39.1 (c), lists Large-Scale Solar as a permitted, Special Use, in that District. There is also Section 143-37 C (3), which allows Large-Scale Solar in all zoning districts, with certain exceptions. Those excepted districts do not include the AB Zone, the EPO Overlay, and the FFO Overlay.

In all the cases you'll see the court made its decision looking at allowed or permitted uses in the district. The cases state 'if the intended use is within the allowed uses in the zoning district, it follows that the requested variances are area variances. And that is the case here. There are certain prohibitions that restrict the placement of solar panels, in certain areas of the project parcel, but it is not a prohibited use on the parcel.

Ms. Badran asks the Board if it has any questions. Chairperson Karakassis thanks Ms. Badran, and notes the Board is not discussing the merits of the cases, or the holdings in these cases, and further states the portions she quoted were general statements of what a use variance is, which is what the Board is looking at here. Ms. Badran states in each of those cases, there was also a section in those cases that explained that the proposed use was allowed in the zoning district. Chairperson Karkassis states that did not address what a use variance is, the definition of which permits a use of land, which is prohibited, without any regard to what any specific use might be at issue. Chairperson Karakassis states this is the definition of a use variance, in her opinion. Ms. Badran asks if any other Board members have any questions. There are no further questions. Ms. Badran thanks the Board.

Chairperson Karakassis states, if there is no further discussion, the Board will now vote on Resolution Number Two, for Appeal 23-07, and notes this is an oral resolution. At 7:20pm, Chairperson Karakassis moves to adopt resolution, as 23-07 Resolution Number Two, as follows:

I move that based on the information provided in the application for area variances, and after a review of the case law, including cases referenced in the applicant's letter brief, dated July 27, 2023, and after a review of the Town of Red Hook Zoning Code,

The ZBA finds that the applicant requires two use variances to build its solar energy project on Important Farmland, in the AB District, and on Designated Wetlands, in the Town of Red Hook.

Chris Klose seconds the motion, and Chairperson Karakassis, John Bonavita-Goldman, Chris Klose, and Chris Carney vote to adopt 23-07 Resolution Number Two.

Chairperson Karakassis states the applicant may convert the two area variance applications to use variances, as submitted, or the applicant may submit use variance applications. Chairperson Karakassis states the ZBA will accept any such applications, and waive fees. The applicant's representative, Mr. Hooper, states if the Board will entertain use variances under the Rosenberg Standard, the applicant will submit the applications. Chairperson Karakassis states there are about five weeks until the next ZBA meeting, on September 13, 2023, and further states the submission deadline is September 5, 2023, and requests the applicant submit any new materials by August 29, 2023, in order to give the Board sufficient time to review it.

Chris Klose asks Mr. Hooper if he accepts the Board's decision that the applicant needs two use variances. Mr. Hooper replies he will take it under advisement. Mr. Hooper also states the applicant is seeking a SEQR Negative Declaration, from the Town of Red Hook Planning Boare, at the the August 21, 2023 Planning Board meeting.

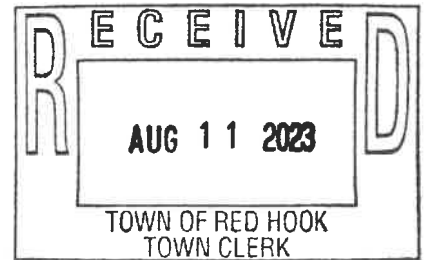
At 7:27pm Chairperson Karakassis asks for a motion to adjourn the meeting. Chris Klose so moves, Chris Carney seconds. Chairperson Karakassis, John Bonavita-Goldman, Chris Klose and Chris Carney vote in favor of adjourning the meeting.

The next regularly scheduled ZBA meeting is September 13, 2023.

The submission deadline for this meeting is noon of Tuesday, September 5, 2023

**TOWN OF RED HOOK
Zoning Board of Appeals**

**RESOLUTION NO. 1
Application #23-07**



Application #: 23-07

Grid #: 6271-00-073869-0000

Introduced by: Kathleen Karakassis
Seconded by: Christopher Klose

Date: August 9, 2023

WHEREAS, the Applicants, Rhinebeck Solar LLC and Carson Power LLC, seek to construct a 5MWac ground mounted community solar facility on property located at 7099 Albany Post Road (Tax Id No. 6271-00-073869-0000) ("the Solar Project")

WHEREAS, the Applicants submitted a request for an interpretation/appeal of the April 24, 2023, Determination of the Zoning Enforcement Officer (#23-06) which it withdrew with prejudice orally on the record at the June 14, 2023, Zoning Board of Appeals ("ZBA" or "Board") meeting (June 14th Meeting"); and

WHEREAS, the Applicants also submitted an application (#23-07) for variances from §143-37E(1)(a) and §143-37E(1)(b) of the Code of the Town of Red Hook ("Town Code") which it has posited as requests for area variances; and

WHEREAS, the Applicants also asserted in their application that the relaxed public utility exception to the standard variance analysis applies to its application; and

WHEREAS, at its June 14th Meeting, this Board questioned whether the variances requested are area variances or use variances; and

WHEREAS, at its June 14th Meeting, this Board also questioned whether the public utility standard applies; and

WHEREAS, the Applicants requested that this Board first resolve the question whether the public utility standard applies; and

WHEREAS, in addition to its original application materials, the Applicants submitted an additional letter brief, dated June 30, 2023, arguing why it believes the public utility standard applies; and

WHEREAS, this Board also asked its attorney to conduct research regarding the public utility standard and to report back to it; and

WHEREAS, the Chairperson of this Board conducted her own research on this issue and shared her findings and conclusions with the Applicants and this Board at the July 12, 2023, meeting; and

WHEREAS, this Board has considered all of the above and renders the following decision with respect to whether the Solar Project is a public utility.

NOW THEREFORE BE IT RESOLVED that this Board finds that the proposed solar array is not a “public utility;” and therefore, the application currently before this Board for variances from Town Code §§143-37E(1)(a) and 143-37E(1)(b) are not subject to the relaxed public utility standard based on the following:

1. The Town of Red Hook Code clearly differentiates between public utilities and solar energy systems. Public franchise or utility stations are regulated as a use under the Schedule of Use Regulations. Solar energy systems are also regulated under the Schedule of Use Regulations as a distinct use from public utilities and are regulated in detail §143-37 of the Town Code. In multiple places, §143-37 refers to utilities in such a way that they are clearly separate and apart from a solar energy system:
 - a. An owner of a large solar system is required to submit proof that it “has submitted notification *to the utility company* of the customer's intent to install an interconnected customer-owned generator. Off-grid systems are exempt from this requirement.” §143D(3)(k)(1)(i) (emphasis added).
 - b. All solar energy systems that are connected to the electric distribution or transmission system shall obtain an interconnection agreement *with the applicable electric utility*. Solar energy systems connected directly to the distribution or transmission system must obtain an interconnection agreement *with the interconnecting electric utility*. Off-grid systems are exempt from this requirement. §143E(1)(d) (emphasis added).
2. The New York State Court of Appeals defined utility in the context of the relaxed public utility standard in *Cellular Tel. Co. v. Rosenberg*, 82 N.Y.2d 364, 371 (1993) (*citing* 2 Anderson, American Law of Zoning §12.32 at 568-69 [3d ed.] [internal quotations omitted]) as follows:

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) operation under a franchise subject to some measure of public regulation, and (3) logistic problems, such as the fact that the 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 the use has no alternative source and the supplier commonly has no alternative means of delivery.

3. Applying the *Rosenberg* definition to this Project, this Board finds
 - a. The Applicants are private businesses.
 - b. The Applicants are not monopolies.
 - c. The provision of electricity is an essential service, but a 5MWac ground mounted community solar facility alone does not provide an essential service.
 - d. The Applicants do not enjoy certain privileges such as eminent domain.
 - e. The Applicants are not franchises.
 - f. The Solar Facility will not be subject to public regulation within the meaning of *Rosenberg* (*see, infra*, ¶4).
 - g. The Applicants do not face the logistical problems outlined in *Rosenberg* (*see, infra*, ¶ 5).
4. To give meaning to the question of whether the Solar Project is subject to government regulation, this Board looks to *Rosenberg* decision. Every individual and business entity is subject to some measure of government regulation, but *Rosenberg* makes clear that the government regulation at issue must relate to standards of service or the fixing of rates. The New York State Public Service Commission does not regulate alternate energy facilities such as the Solar Project in this way.

In its letter brief, the Applicants stated that the Solar Project is subject to public regulation citing multiple provisions of the Public Service Law (“PSL”), but these provisions do not appear to “regulate” the Solar Project. The solar project meets the definition of an “alternate energy production facility” under PSL §2(2-b). Alternate energy production facilities are specifically excluded from the definition of “electric corporations” under PSL §2(13) and therefore are not governed as electric corporations under PSL §66. The Applicants reference PSL §66-p; but this section does not regulate renewable energy, it requires that the PSL establish a renewable energy program; and PSL §66-c(1), cited by the Applicants, appears to regulate energy corporations’ interactions with alternative energy production and other facilities, not the other way around. The Applicants points to no “fixing of rates” or “establishing of standards of service” as referred to in *Rosenberg*.

5. To give meaning to the question of whether the Solar Project faces logistical problems, this Board again looks to *Rosenberg* which stated, the “product of the utility must be piped wired, or otherwise served to *each user* and the supplier has no alternative means of delivery.” (emphasis added).

The mere existence of general logistical problems does not qualify an entity as a utility. The difficulties must be related to the ability to deliver the service to the user. A utility has a business purpose of providing essential services requiring wires, piping, or other specialized equipment 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, ducts and electromagnetic signals. It may be terrain, barriers created by areas that are densely inhabited and densely constructed, or natural barriers like rivers or forested lands or mountains or tall trees that create logistical difficulties.

The Applicants do not face the logistical difficulties of the type set forth in the *Rosenberg* case. Rhinebeck Solar LLC is a business that serves only one user – the utility to which it connects. While electricity is essential to homes and businesses for heat, light and power, the electricity provided by Carson Power is not essential to the utility it serves.

6. This Board also looked at Carson Solar LLC’s own explanation of what it is and does. Carson Solar LLC describes itself on its corporate website, stating “we develop and own solar and storage projects.” It is in the business of managing the financing and construction of solar panel arrays for the purpose of selling the energy produced to a utility.

Carson’s website describes “community solar” like the Solar Project proposed here as “small to mid-size group of solar panels (up to 30 acres) with access to the local electricity grid. The power is produced by the solar panels and then fed into the local power grid. On its website, it provides a link to find out more from the New York State Energy Research and Development Authority (NYSERDA).

The NYSERDA website makes clear differentiation between electric utilities and community solar providers:

To start saving, select a community solar subscription plan that works for you. *You will keep your current electric utility* and start seeing a credit on your monthly bill based on how much energy is generated by your community solar project. <https://www.nyserdera.ny.gov/All-Programs/NY->

Sun/Solar-for-Your-Home/Community-Solar (emphasis added).

Save money every month on your electric bill. You'll see credits every month on the electric bill you receive *from your utility*. <https://www.nyserda.ny.gov/All-Programs/NY-Sun/Solar-for-Your-Home/Community-Solar> (emphasis added).

NYSERDA's video explaining how community solar works differentiates between "your utility" and "your community solar provider."
https://www.youtube.com/watch?time_continue=111&v=mVclUvGvBWg&embeds_referring_euri=https%3A%2F%2Fwww.nyserda.ny.gov%2F&embeds_referring_origin=https%3A%2F%2Fwww.nyserda.ny.gov&source_ve_path=MTI3Mjk5LDIzODUx&feature=emb_title

Those who subscribe to a community solar project, like the one proposed here, receive a credit on their utility bills. There will be no direct line between the energy that will be produced by the Solar Project to any individual user.

7. The court cases of 1978 (*Consolidated Edison v. Hoffman*, 43 N.Y.2d 598) and 1993 (*Rosenberg*) 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 relaxed public utility standard for determining whether a variance should be granted.

Applying the utilities exception to each small alternate energy producer would lead to zoning by variance and yield unintended consequences for local municipalities denying them the opportunity to regulate development and meaningfully decide the character of their communities.

Member	Aye	Nay	Abstain	Absent
Kate Karakassis, Chair	✓			
John Bonavita-Goldman	✓			
Chris Carney	✓			
George Jahn			✓	
Chris Klose	✓			

Adopted: August 9, 2023

Zoning Board Chairperson: ~~11~~ 11

Secretary: Anne Parkin KATE KARAKASSIS