

APPROVAL OF MINUTES DATED March 23, 2023

John Dach/Solar Liberty- Use Variance

Due to minutes of above meeting being mailed to all members of the Zoning Board
I the undersigned do hereby approve said minutes as mailed, or disapprove with comments below.

Signed 

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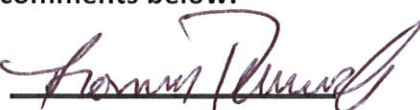
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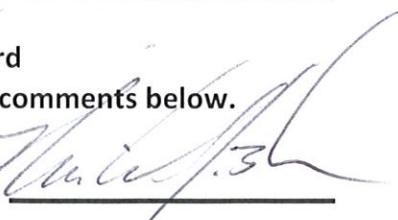
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**MEETING OF THE ZONING BOARD OF APPEALS
TOWN OF DUNKIRK MARCH 23, 2023
SOLAR LIBERTY ON BEHALF OF JOHN DACH
USE VARIANCE FOR LARGE SCALE SOLAR FARM**

The Town of Dunkirk Zoning Board of Appeals held a Zoning meeting at 5:37 p.m. on Thursday March 23, 2023 at the Town Hall, 4737 Willow Road, Town of Dunkirk with Scott Pagano presiding as Chairman.

PRESENT: Scott Pagano, Thomas Tarnowski, Michael Miller, Michael Bohn and Kenny Tarnowski.

ALSO, PRESENT: Supervisor Pagan, Councilwoman Penfold, Town Clerk, Rebeca Yacklon, Code Enforcement Officer, Ryan Mourer, Zoning Clerk, Kyle Coughlin, Joel Biscaro, John Davis Jr., Nathan Rizzo, Paul Lavoie, Adam Rizzo, James Dimmer, and John Dach.

The Meeting was opened with the pledge to the flag.

Chairman Scott Pagano read the legal notice that was posted on March 15, 2023:

”NOTICE OF ZONING BOARD OF APPEALS: Please take notice that the Town of Dunkirk Zoning Board of Appeals will hold a meeting at 5:30 p.m. on March 23, 2023 at the Town Hall, 4737 Willow Road, Town of Dunkirk, New York to consider the following appeal:

PETITIONER: Solar Liberty is seeking a use variance on behalf of John Dach to construct a commercial scale ground mounted solar system on Williams Street, in the Town of Dunkirk. This property is located on Section 97.01; Block 1; Lot 16 and Section 97.01; Block 1: Lot 20 of the Chautauqua County Tax Map in the R-2 General Residential District. In violation of the Town of Dunkirk Zoning Law – Article IV: Section 20 – Permitted uses and structures.

Any person may appear in person, agent, or attorney. Any material regarding this matter can be submitted to the Town Clerk’s Office. All interested persons shall be heard at said meeting. If you have any questions regarding the above, please contact me at the Town Clerk’s Office at (716) 366-3967.”

An affidavit of this posting is available in the clerk’s office.

Chairman Pagano stated that a letter in correspondence to the project was received by the Clerk’s Office. The letter was from Chautauqua County Department of Planning. The letter stated:

“Dear Chairperson Pagano,

This letter is in response to your municipal zoning referral received in full by this office on March 22, 2023 regarding a use variance approval to construct a 3.75 MW solar project at 3751 Williams Street, Tax Parcel 97.01-1-16 & 97.01-1-20. These parcels are located in the R2 Zoning District.

As one of the designated staff to the Chautauqua County Planning Board, I have reviewed the above noted referral. With regard to General Municipal Law 239-m this proposal is subject to the County since it is within 500 feet of a County Road and a farm operation in an Agricultural District.

I have reviewed the pertinent inter-community and county-wide considerations with respect to this proposal and its effect on the relevant concerns that are listed under General Municipal Law 239-1. Based on this review, I find that the proposed action would have no significant county-wide or inter-community impact and that the proposal would be a matter of local concern.

However, to assist the Town with its decision, I offer the following informal comments:

1. Use variances should be granted in strictly controlled , occasional circumstances when an unnecessary hardship is demonstrated. The formal criteria for granting a use variance was set forth by the New York State Court of Appeals in *Otto V. Steinhilber*. New York State codified those criteria into Town Law 267-b, which states:
 - a. No such use variance shall be granted by a board of appeals without a showing by the applicant that applicable zoning regulations and restrictions have caused unnecessary hardship. In order to prove such unnecessary hardship, the applicant shall demonstrate to the board of appeals that for each and every permitted use under the zoning regulations for the particular district where the property is located,
 - i. The applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence;
 - ii. That the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood.
 - iii. That the requested use variance, if granted, will not alter the essential character of the neighborhood; and,
 - iv. That the alleged hardship has not been self-created TWN 267-b (2)(b).
 - b. If the board of appeals does grant a variance, they shall grant the minimum variance that it shall deem necessary and adequate to address the unnecessary hardship proven by the applicant, and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community. TWN 267-b(2)(b)

Again, use variances should be used sparingly and only if all the above stated conditions are met and sufficiently demonstrated by the applicant. If the Town finds that the current zoning regulations are no longer relevant, then we would encourage the Town to examine this further and consider rezoning to ensure that allowed uses are compatible with its comprehensive plans and the community's welfare.

2. Loss of Agricultural Land – The proposed project would result in the conversion of approximately 16 acres of agricultural land. This land is currently within a NYS Agricultural District and is on land considered by the USDA to be either prime farmland or prime if drained. While this department recognizes its need for renewable energy, we also prioritize the preservation of the County's viable farmland and rural landscape. We

urge the Town to consider the impacts of this project and future projects on the local agricultural economy, and to discuss ways to mitigate agricultural impacts.

3. Decommissioning Plan – The applicant has not prepared or submitted a decommissioning plan for the project. I recommend that the Town requests a detailed decommissioning plan to ensure that it meets the Town’s requirements. The Town may also wish to ensure that the decommissioning plan includes a detailed decommissioning cost. I would also encourage the Town to work with the applicant on an agreement to periodically update the decommissioning costs and surety to ensure that they remain adequate to cover future costs. Chautauqua County’s Solar Energy Decommissioning Template (available at <https://planningchautauqua.com/>) recommends reviewing these costs every four (4) years.
4. Visual Impacts – Solar energy systems can result in adverse visual impacts to nearby properties. Screening and landscape requirements in local solar laws can help mitigate these visual impacts. The Town may find NYSERDA’s Model Solar Energy Law a helpful resource for how to address screening and visibility for solar projects. This model law can be found at the following address:
<https://www.nyserda.ny.gov/solarguidebook.com>
5. Landscape Cover -NYSERDA’s Model Solar Energy Local Law recommends that landscape cover under solar energy systems be made up of native perennial plant species that provide foraging habitat for birds and pollinators. I would encourage the Town to clarify with the applicant the type of landscape cover that would be used for the project, and to suggest that it conform to NYSERDA’s recommendation (if it does not already).

If you have any questions regarding this matter, please contact our office at (716) 661-8900.”

Chairman Pagano asked the applicant representatives of Solar Liberty if they would like to begin their presentation.

Paul Lavoie, general counsel on behalf of the applicant, Solar Liberty began a presentation for the Board. He presented members with a printed slide show that was added to the file for permanent record. He stated that the request was for a use variance for a 3.5MW solar system. He explained the location of the project shown in his presentation. He stated that Mr. Dach has faced a hardship with this property for a number of years. He has owned the property since 1995. He farmed the property from 1999-2009. Since he stopped farming the property, he has suffered significant losses. They showed the site’s financial history on Page 3 of the presentation. He could not sell the property, he tried with two different real estate agents. He tried many different avenues before this and none of them panned out. The only income he had received from this property was in 2019-2020 for the land from the Solar Liberty. Mr. Lavoie went into detail about the allowed uses within the district. (Listed on Pg. 5 of the presentation) He explained that there was not sewer or water in that area. Therefore, further limiting the potential uses of the property. He explained how that had contributed to Mr. Dach’s hardship stating that not only was the

property difficult to farm but it also had minimal residential uses available due to the uniqueness of the property.

Mr. Lavoie stated that solar had many benefits.

1. No noise pollution.
2. No moving parts.
3. No waste/odor generated by production.
4. Visual impact can be controlled by setbacks and vegetative screening. (The solar company met all setback requirements for the potential project.)

There would be minimal maintenance after construction. Maintenance involves 2-4 truck rolls per year. Mr. Lavoie stated that almost all tax revenue generated is unburdened by requisite services. He showed pictures of surrounding properties and discussed how solar will not detract from the neighborhood. He showed pictures of the potential project and what it would look like on that property.

Chairman Pagano asked the public if they had any comment

James Scott Dimmer a neighboring property owner stated that he owned a property mentioned within the presentation. He gave all ZBA Members a 17-page rebuttal on why he felt that the potential project was improper. He went through his responses with the ZBA. He asked the Board to review the information before making a decision.

John Davis, another neighboring property owner stated that he had no major concerns. His main concern would be any contamination that could occur to surrounding properties and mowing maintenance.

Joel Biscaro owns the landscaping business located across the street from the property in question. He stated that he felt that something on this property is better than nothing. He said he understood the hardship Mr. Dach has faced with that property.

Code Enforcement Officer, Ryan Mourer, told the board that they cannot compare the neighboring properties to this one. He stated that they needed to look at the hardship that is in front of them and that's it.

With no further comment Chairperson Pagano stated it was time to close the public portion of the meeting and go into the second part where the ZBA would have discussion.

Member Miller began the discussion. He stated that he had lived on Williams Street for 61 years. He went through paperwork and stated that this project originally dates back nearly 23 months. Most of the paperwork has all carried over from that original application. He wanted the public

to know that this is the first step. If the use variance is approved it will need to go to Planning Board where a more thorough review will be done. He stated that he is very familiar with solar because he has solar himself. He asked if any noise will be generated from the converters.

Nathan Rizzo from Solar Liberty stated that from 200 feet away no noise will be heard.

Member Miller continued discussion and wanted to address the comments from the County regarding “prime farmland”. He stated that he farms 3.4 acres himself and also works for a couple farmers. He stated that grape farming has its ups and downs. He road Mr. Dach’s property and its very wet. He talked to a couple of other farmers and to tile the field is very costly; \$1.62 per square foot. (This is the process where tuning or pipe is buried in the ground to convey sub surface water to an outlet such as a stream or ditch.) He stated that equipment costs are sky high. If you do not have an existing vineyard running, in his opinion you cannot bring one back. He believes this property is unique in nature and there aren’t any other options for Mr. Dach.

Chairman Pagano stated that he agreed with Mike but he had concerns regarding the Solar Law. He said that the Board’s had worked very hard on that law and did not want solar in residential districts. He stated he wanted to take Mr. Dimmer’s thoughts into consideration and to table the meeting today. He would rather not jump into a decision too fast.

All Members agreed to schedule a workshop and another meeting to discuss this in more detail. A motion to table the decision to the next meeting on April 27th was made by Chairman Pagano and second by Member Miller. The motion was carried.

ADJOURNMENT:

A motion was made by Member Miller to adjourn the meeting. The motion was seconded by Member Ken Tarnowski and carried. The meeting was adjourned at 6:45 p.m.

Respectfully submitted,

Kyle Coughlin
Secretary to Zoning