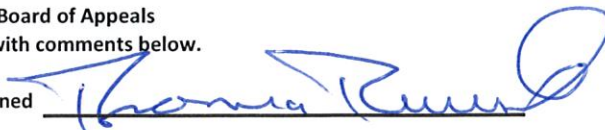


APPROVAL OF MINUTES DATED April 27, 2023

Solar Liberty/John Dach - Tier 3 Utility Scale Solar Project

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

Signed



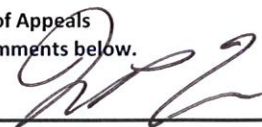
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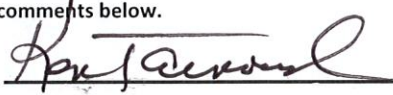
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**MEETING OF THE ZONING BOARD OF APPEALS  
TOWN OF DUNKIRK APRIL 27, 2023  
SOLAR LIBERTY – JOHN DACH – USE VARIANCE  
TIER 3 UTILITY SCALE SOLAR PROJECT**

The Town of Dunkirk Zoning Board of Appeals held a Zoning meeting at 5:15 p.m. on Thursday April 27, 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, Code Enforcement Officer, Ryan Mourer, Kyle Coughlin, Zoning Clerk, Sue Hazelton, Adam Rizzo with Solar Liberty, Nathan Rizzo with Solar Liberty, Paul Lavoie with Solar Liberty, John Davis Jr., and James Scott Dimmer.

The Meeting was opened at 5:15 P.M. and started with the pledge to the flag.

Chairman Scott Pagano mentioned that this is the second meeting for this particular project and is a continuation from March 23, 2023.

He explained that there were two legal notices posted in the paper the first one was on April 8<sup>th</sup>, 2023 but it needed to be corrected with new information. The corrected legal notice was posted on April 22<sup>nd</sup>, 2023. All residents located within 500 feet of the property also received both notices.

**“CORRECTION NOTICE OF ZONING BOARD OF APPEALS**

Please take notice that Town of Dunkirk Zoning Board of Appeals will hold a meeting at 5:15 p.m. on April 27, 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 Tier 3 Utility Scale Solar System on Williams Street, in the Town of Dunkirk. This property is located on Section 97. 01; Block 1; Lot 16, 97.01; Block 1; Lot 20, and Section 97.01; Block 1; Lot 15.2 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 the correction legal notice was because there was a third parcel added to the site plan of the project. They did this in order to meet setbacks. There will be 3 parcels instead of 2 parcels that were originally proposed.

Chairman Pagano read up the updated correspondence received by Chautauqua County due to changes in the Site Plan.

“Dear Chairperson Pagano,

This letter is in response to your municipal zoning referral received in full by this office on April 25, 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, & 97.01-1-15.2. These parcels are located in the R-2 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 a referral to the County since its within 500 feet of a County Road and a farm operation in an Agricultural District.

I have reviewed the pertinent inter-community and county-wise 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 – Use variances should be allowed only in strictly controlled, occasional circumstances when an unnecessary hardship is demonstrated. The formal criteria for granting a use variance were set forth by the New York State Court of Appeals in *Otto v. Steinhilber*. New York 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 zoning regulations for the particular district where the property is located,
    - i. The applicant cannot realize a reasonable return, provided that the 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 s 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 s 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 plan and the community's welfare.

2. Loss of Agricultural Land – This proposed project would result in the conversion of approximately 16 acres of agricultural land. This land is currently within NYS Agricultural District and is on land considered by the USRDA to be either prime farmland or prime if drained. While this department recognizes the 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 decommission 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 Local 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>.
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 confirm 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 explained that the items addressed within this letter are items that the Planning Board will address during their review, not for the Zoning Board's approval.

Chairperson Pagano mentioned to the public that a workshop was held on April 19<sup>th</sup> at 5:00 p.m. That workshop was advertised in the Observer on March 29<sup>th</sup>, 2023. The Legal Notice stated:  
“Notice of Zoning Board Workshop

Notice is hereby given that the Town of Dunkirk Zoning Board will meet on April 19<sup>th</sup>, 2023 at 5:00 p.m. at the Town Hall, 4737 Willow Road, Town of Dunkirk. The public is welcome to attend. However, the Zoning Board will not be taking any public comment up for discussion. If there are any questions, please contact the Town Clerk's office at 716-366-3967.”

Chairman Pagano asked Solar Liberty if they would like to present the changes and updates to the project.

Paul Lavoie Counsel on behalf of Solar Liberty began the presentation.

He stated that the changes were made to the site plan were due to changes needing to be made to the solar panels themselves and their ability to generate electricity. He stated that the panels proposed are 340-watt panels and they will extend onto a third parcel rather than just two. They are asking for the maximum number of panels incase they have issues producing enough electricity. He said that they would expect to use more efficient panels but there are a range of panels available.

Chairman Pagano asked what the difference was between the previous proposed panels and the current panels. He asked if these panels were taller than the previous ones proposed.

Mr. Lavoie stated that the would be the same height, 8 ft.

Nathan Rizzo with Solar Liberty stated that the changes that were made were from a site plan perspective to meet the appropriate setbacks. He stated that this was done after a meeting with the Code Enforcement Officer, Ryan Mourer. He explained that there was additional screening added to meet Planning Board standards. There were no other major changes.

Chairman Pagano asked if there were any other questions from the Board Members. There were no additional questions.

Chairman Pagano asked Code Enforcement Officer, Ryan Mourer if he had any comments he wanted to add.

CEO, Ryan Mourer stated that he did not have anything to add, a lot of time was spent working with Solar Liberty to get to this point.

A member from the public asked to make a comment.

James Scott Dimmer who owns property next to Mr. Dach's handed the Board information/ a memorandum as to why he feels this project is incorrect.

He explained that there were 3 memos located within the packet that addressed different issues he found with the proposed project/application. He read the information to The Zoning Board and requested that the meeting be adjourned so they could review the information.

He stated that he felt that this decision was not in the jurisdiction of the Zoning Board of Appeals and that it was in the jurisdiction f the Town Board due to the project being a Tier 3 Utility Scale Project. He continued to discuss other issues that he discussed at the meeting on March 23, 2023.

He cited different case law within his memo of other townships granting use variances that they should not have. He concluded his comments after he explained the different case law.

Chairman Pagano asked if there was any other public comment.

Supervisor Juan Pagan stated that this was a use variance hearing and that the Zoning Board of Appeals was within their proper jurisdiction to make a decision.

This concluded the public portion of the meeting. The second portion was then opened for Zoning Board Member discussion.

## **PART 2**

Chairman Pagano stated that they went through Mr. Dimmer's first memo and answered majority of the questions and concerns. He stated that most of the issues he cited with the project were in the Planning Board's hand when they review, if the project were to be approved.

Member Miller stated he wanted to share his thoughts with the board and the public. He stated that he had a Chautauqua County Soil book and that the soils located on this property were not considered prime farmland. He stated that they are not losing any PRIME farmland. He further explained that a person can try to grow anything anywhere, it's a matter of if it is financially feasible.

Another comment he wanted to address was that during a training session, the Zoning Board discussed this case with the trainer. The trainer explained that he was against use variances but due to the unique nature of this property, this would be a case they had potential in his opinion and one that he would consider.

Member Miller stated that he understood concerns about the solar law and how new it was but there was a reason they did not allow Tier 3 Solar in the R2. He stated that they considered it at one point but decided that rather than allowing it in the R2 District as a whole, they would rather property owners apply for use variances and have to show the burden of proof that a use variance would require. He stated this would then eliminate majority of the R2 qualifying for having Tier 3 solar projects.

Member Miller again addressed that many of Mr. Dimmer's concerns were for the Planning Board to address not for the Zoning Board.

He stated that he knows Mr. Dach and knows he experienced some health issues and that was why he was forced to lease out his vineyard. The individual he leased his grapes to is not well liked within the grape industry because he is known for ruining vineyards. He stated he knows this because he himself is a grape farmer and he works for a large grape farmer in pomfret. He said that when someone ruins a vineyard it is too expensive to bring back. Financially impossible for someone to do.

Member Miller stated he talked to 3 different farmers and they said if the land was drained, they would be able to put corn on it. With the land not being drained, and the expense to drain it being so high, it is not worth it to be farmed in its current state.

Member Kenny Tarnowski added that he felt the land was useless without any public utilities. It cannot be sold, there is a reason it was on the market for so long with no bids.

With no further discussion from the Zoning Board, they began reviewing the use variance application.

1. The applicant cannot realize a reasonable return, provided that the lack of return is substantial as demonstrated by competent financial evidence.

All Members agreed that no a reasonable return could not happen and there was proof provided in John Dach's Notarized affidavit.

2. The alleged hardship relating to the property is unique and does not apply to a substantial portion of the district or neighborhood.

All Members agreed that the hardship relating to the property is unique. It is one of the few properties without any access public utilities on the whole street.

3. The requested use variance, if granted will not alter the essential character of the neighborhood.

All Members agreed that this will not alter the characteristics of the neighborhood because it will not cause a disturbance to the land and there will be screening to minimize the impacts to the adjacent properties.

4. The alleged hardship has not been self-created.

All Members agreed that when Mr. Dach was sick and had to lease out his land, he did not do that with the intentions of his vineyard being ruined. He did what he had to do to try to maintain the property.

It was determined by the ZBA, based on the factors above, that the benefit to the applicant does outweigh the detriment to the neighborhood or community. The ZBA felt that they could approve the use variance with 1 stipulation. The stipulation was:

1. All three parcels must be combined into one.

Member Miller made a motion to grant the use variance for a Tier 3 Utility Scale Solar Project on parcels 97.01-1-16, 97.01-1-20, and 97.01-1-15.2 of the Chautauqua County Tax Map with the stipulation that these parcels be combined to one. The motion was second by Member Ken Tarnowski and carried.

A roll call vote was taken.

A YE:

Member Miller  
Member Tarnowski  
Chairman Pagano  
Member Tarnowski  
Member Bohn

NAY:

**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 5:38 p.m.

Respectfully submitted,

Kyle Coughlin  
Secretary to Zoning