

585.434.0790 phone
585.563.7432 fax
www.ZogLaw.com

**VIA EMAIL TO edhemminger@gmail.com; rlbplans@gmail.com;
john.robortella@gmail.com**

May 13, 2019

Planning Board
Town of Farmington
1000 County Road 8
Farmington, NY 14425

**Re: Application of Delaware River Solar to construct a 7 MW solar facility at 466 Yellow Mills Road
SEQRA Determination of Significance
PB # 1003-18 Preliminary Four-Lot Subdivision Plat
PB # 1004-18 Preliminary Site Plan
PB # 1006-18 Special Use Permit**

Dear Planning Board Members:

We represent a group of landowners and residents with respect to the following applications by Delaware River Solar, LLC (“Delaware”) to construct a 7 MW solar facility at 466 Yellow Mills Road (the “Project”):

**SEQRA Determination of Significance
PB # 1003-18 Preliminary Four-Lot Subdivision Plat
PB # 1004-18 Preliminary Site Plan
PB # 1006-18 Special Use Permit**

For the reasons set forth in this letter, we ask you to issue a Positive Declaration of Environmental Significance (“Pos Dec”) for the Project, or, in the alternative, deny Delaware’s applications for subdivision approval, site plan approval, and a special use permit.

The Project Warrants a Positive Declaration of Environmental Significance.

The primary purpose of SEQRA is “to inject environmental considerations directly into governmental decision making.”¹ To this end, SEQRA requires the preparation of an Environmental Impact Statement (“EIS”) when a proposed project “may include the potential for at least one significant adverse environmental impact.”²

Because the operative word triggering the requirement of an EIS is “may,” there is a relatively low threshold for issuance of a Pos Dec and preparation of an EIS.³ Moreover, a Type I action (as is the one here) carries with it the presumption that it is likely to have a significant adverse effect on the environment and is more likely to require an EIS. An EIS is required when the lead agency determines that the action as proposed may include the potential for at least one significant adverse impact to the environment.

To determine whether a proposed Type I action may have a significant adverse impact on the environment, the impacts that may be reasonably expected to result from the proposed action must be compared against the criteria found in 6 NYCRR 617.7(c). Included in these criteria are:

(i) a substantial adverse change in existing air quality, ground or surface water quality or quantity, traffic or noise levels; a substantial increase in solid waste production; a substantial increase in potential for erosion, flooding, leaching or drainage problems;

(ii) the removal or destruction of large quantities of vegetation or fauna; substantial interference with the movement of any resident or migratory fish or wildlife species; impacts on a significant habitat area; substantial adverse impacts on a threatened or endangered species of animal or plant, or the habitat of such a species; or other significant adverse impacts to natural resources;

(iv) the creation of a material conflict with a community's current plans or goals as officially approved or adopted;

(v) the impairment of the character or quality of important historical, archeological, architectural, or aesthetic resources or of existing community or neighborhood character;

¹ *Akpan v. Koch*, 75 NY2d 561, 569 (1990).

² 6 NYCRR 617.7(a)(1).

³ *Matter of Chemical Specialties Mfrs. Assn. v. Jorling*, 85 NY2d 382, 397 (1995); (*Omni Partners LP v. County of Nassau*, 237 AD2d 440 (2d Dept. 1997)).

(viii) a substantial change in the use, or intensity of use, of land including agricultural, open space or recreational resources, or in its capacity to support existing uses;

(x) the creation of a material demand for other actions that would result in one of the above consequences;

(xi) changes in two or more elements of the environment, no one of which has a significant impact on the environment, but when considered together result in a substantial adverse impact on the environment; or

(xii) two or more related actions undertaken, funded or approved by an agency, none of which has or would have a significant impact on the environment, but when considered cumulatively would meet one or more of the criteria in this subdivision.

6 NYCRR 617.7 (c)(1)(i)-(ii), (iv)-(v), (viii), (x)-(xii).

The Project has the potential for adverse impacts to drainage, wetlands and water resources, flora and fauna, traffic, historic resources, community character, property values, and a substantial change in use of the land. Consequently, the proposed action may have a significant adverse impact requiring a positive declaration of environmental significance and preparation of an EIS.

Drainage Issues and Impacts to Wetlands, Aquifer

The lead agency must issue a Pos Dec because the Project may result in a substantial adverse change in existing ground or surface water quality or quantity and an increase in the potential for drainage problems. 6 NYCRR 617.7 (c)(1)(i). The Project will place approximately 21,000 densely massed solar arrays on top of a principal, unconfined aquifer, in close proximity to federal and state wetlands.

It is undisputed that the Project will impact sensitive wetland resources.

The Ontario County Planning Board recognized that the Project is located in close proximity to sensitive wetland resources. The County Planning Board noted that “the south west portion of the parcel proposed for development is wooded with a floodplain along the stream and surrounding areas classified as state and federal wetlands. There are two additional wetland areas shown on the site plan. One off the Fox Road frontage and one along an existing drainage path that bisects parcel 4.”⁴

⁴ Ontario County Planning Board Draft Meeting Minutes, September 12, 2018, P. 16.

Moreover, the Project site includes two federally regulated and two state regulated wetlands.⁵ The Town of Farmington Comprehensive Plan's Future Land Use Map (#10) identifies this wetland system as an "environmentally sensitive area."

The Developer's wetland delineation report admits that the onsite wetlands are hydrologically connected to off-site wetlands and streams:

"[T]he forested wetland located along the western boundary of the Review Area drains naturally to the Northwest and is hydrologically contiguous with a larger wetland complex to the west of the Project site.⁶ This off-site wetland physically abuts a perennial stream channel that flows to the north and into other wetlands that are located to the north of Fox Road."⁷

It is also undisputed that the Project may have significant adverse impacts to surface water, subsurface water, and drainage. The Environmental Assessment Form states: "The natural drainage patterns of the existing site direct all stormwater towards the existing pond along Fox Road ... The existing pond along Fox Road was delineated by North Country Ecological Services, Inc., as a Federally protected wetland, though it is not mapped on the National Wetlands Inventory. This wetland discharges across Fox Road to Ganargua Creek." EAF, page 11.

The Ontario County Soil and Water Conservation District warned that "there is the possibility of concentrated flows due to impervious panel surfaces modifying flow patterns".⁸ Concerns regarding stormwater runoff were also echoed by the Town Conservation Board.⁹

The Ontario Country Agricultural Enhancement Board requested further study of impacts to surface or subsurface agricultural drainage systems and recommended approval conditions requiring site restoration to productive farmland (including surface and subsurface drainage infrastructure).

The April 9, 2019 letter states:

- The applicant should be required to determine if there are any surface or subsurface agricultural drainage systems that will be impacted by the proposed project. Damage or removal of such infrastructure can adversely

⁵ North Country Ecological Services, Inc. Wetlands Delineation Report, Pages 9 and 10.

⁶ Id. at Page 7.

⁷ Id.

⁸ Ontario County Planning Board Draft Meeting Minutes, September 12, 2018, P. 17.

⁹ Town of Farmington Conservation Board meeting minutes dated October 22, 2018.

impact the viability of the farmland remaining on the parcel and adjoining farmland which may be connected to the sites system.

- The Board recommends that conditions be placed on any approval that requires restoration of a site to productive farmland (including surface and subsurface drainage infrastructure) in a manner that is specified in the OC Soil and Water Conservation District on any successor agency and as may be required by the Town law or condition of local approval.

Agricultural Enhancement Board letter dated April 9, 2019.

Concentrated stormwater flows resulting from densely massed impervious solar array surfaces will impact stormwater flow in and around the Project site. These impacts may be exacerbated by differences in soil and slope characteristics on the Project site. This indicates that the Project may have potentially significant adverse impacts to onsite and offsite surface water and drainage.

Moreover, most of the Project site contains moderate to high permeability soils.¹⁰ These soils lay on top of a principal unconfined principal aquifer, which recharges from surface water that percolates through the soils when water seeps in from pores in the ground's surface directly above the aquifer.¹¹ Therefore, the Project may result in potentially significant adverse impacts to the aquifer.

For these reasons, the Planning Board as lead agency must issue a pos dec for this Project.

Removal or Destruction of Vegetation and Fauna

A lead agency must consider whether a proposed action could cause, among other things, "the removal or destruction of large quantities of vegetation or fauna." 6 NYCRR 617.7 (c)(1)(iii). This section is not limited to impacts to threatened or endangered species.

The Developer's application for site plan approval admits that that proposed action would result in the physical disturbance of at least 1.1 acres and that the project will require creation of an access road, burying of electric cables, installation of a steel post support structure for 21,000 solar arrays, construction of a concrete pad for each solar system and installation of inverter and transformer equipment.

¹⁰ Ontario County Planning Board Draft Meeting Minutes, September 12, 2018, P. 16.

¹¹ Appendix J--Aquifer Map, DRS Response to Project Questions, dated November 28, 2018.

The physical disturbance of vegetation or fauna on the project site may have a potentially significant adverse environmental impact on the environment, requiring issuance of a pos dec.

Traffic Impacts

The Project may cause a substantial adverse change in existing traffic or noise levels pursuant to 6 NYCRR 617.7 (c) (1) (i). The Project is located several hundred feet from the well-traversed intersection of Yellow Mills Road and Fox Road. The location of the proposed Project raises serious safety concerns as the it is located in close proximity to a well-traversed intersection. Inadequate landscape buffers and glare from the Project's densely massed solar panels will distract drivers and create safety issues for drivers and pedestrians. These factors indicate that the Project "may" have "the potential" for significant adverse traffic impacts and requires preparation of an EIS.

Impacts to Historic Resources

The Project may impair the character or quality of important historical, archeological, architectural, or aesthetic resources or of existing community or neighborhood character pursuant to 6 NYCRR 617.7 (c) (1)(v). The project is in close proximity to two historic cobblestone houses, one located to the northwest of the project site at 4740 Fox Road and the other located across the street from the project site at 595 Yellow Mills Road.

SEQRA review is not confined to historic resources which are listed or eligible for listing on the National or State Register. 6 NYCRR 617.7(c)(i)(v). The Town considers 4740 Fox Road and 595 Yellow Mills Road to be "notable historic properties." See the Town's Comprehensive Plan, Map No. 12 "Historic Buildings and Grounds". Furthermore, a registered Public Historian identified these properties as important historic resources.¹² The Public Historian further states that "seven percent of all cobblestone structures in the state are located in Ontario County." As these structures have unique historic value, "the proposed action should be required to provide supplemental information that identified what, if any visual or aesthetic impacts, it may have upon the environmental setting, including any impacts upon these historic structures."

Furthermore, the Project site is contiguous to an ancient glacial drumlin, which is a "unique natural resource" and an environmentally sensitive natural feature.¹³ The drumlin dominates the southern portion of the parcel.¹⁴

¹² Town of Farmington Historian letter, October 29, 2018.

¹³ Town of Farmington Comprehensive Plan, P. 4-3.

¹⁴ Schultz Associates Soils Report, P.5.

Stormwater flows from the Project may impact the drumlin, eroding this environmentally sensitive, natural feature.

Therefore, the Project has the potential to impair the character or quality of important historical, archeological, architectural, or aesthetic resources, requiring a positive declaration of environmental significance.

Impacts to Neighborhood Character and Property Values

The Project will have a substantial adverse effect upon adjacent property, and the character of the neighborhood. 6 NYCRR 617.7 (c) (1)(v).

First, the Project will significantly impact the character of the neighborhood because it will replace agriculturally zoned prime agricultural land with solar arrays, transforming rural parcels into industrial uses. Furthermore, siting arrays near a roadway will dominate and interfere with the development and use of neighboring property as the arrays will be perceived an eyesore, discouraging more desirable future residential and agricultural development near the Project parcels.

Additionally, siting the Project on prime agricultural farmland containing valuable wetland and water resources directly contravenes the goal of the Town's Comprehensive Plan, which seeks to balance future development goals and natural resource protection.¹⁵

Finally, the Project is out of character with the surrounding agricultural residential neighborhood and will become an external obsolescence, driving down property values.¹⁶

The developer did not provide any studies regarding impacts to property values in Ontario County or the Finger Lakes. Rather, it attempted to refute these facts by offering self-serving statements of alleged communications with officials from other counties and a self-serving study from a North Carolina project.¹⁷

The developer relies on an alleged conversation with a Sullivan County assessor to argue that property values will not be impacted by the Project.¹⁸ However, the demographics and economics of Sullivan County and Ontario County are very different, making it unreasonable to rely on Sullivan County data to estimate how property values in Ontario County will be impacted by the Project. The developer also relies on its supposed conversations with the Tompkins County assessor about solar projects which were much smaller in size

¹⁵ Town of Farmington Comprehensive Plan, P. 3-1.

¹⁶ Rowe Realty letter dated March 20, 2019.

¹⁷ Yellow Mills Solar Project Property Value Impact Analysis dated November 28, 2018.

¹⁸ Id. at P 2.

(2MW) to suggest that the Project will not impact property values.¹⁹ However, a 2MW solar project is not comparable to an industrial scale 7MW solar facility, and potential impacts to property values in Farmington cannot be determined by reviewing projects that are not comparable in size.

Finally, the developer relies on a North Carolina study to support its position that the Project will not negatively impact property values.²⁰ However, it does not make sense to compare the impacts of a project in upstate New York, to projects in North Carolina, as property valuation and real property taxation differ radically between these two states.

Therefore, the Project has the potential to result in adverse impacts to existing community or neighborhood character, requiring a positive declaration of environmental significance.

Substantial Change in Use of Land

The Project will result in a substantial change in the use, or intensity of use, of land pursuant to 6 NYCRR 617.7 (c) (1) (viii) because it will convert 30 acres of prime agricultural farmland to a 7MW commercial scale industrial solar facility.

While the Town encourages industrial growth and economic development, the Comprehensive Plan's Future Land Use Plan (#10) makes it clear that this parcel should remain an active agricultural site.

The Town of Farmington's Farmland Protection Plan identifies the parcel as prime farmland. Similarly, the Ontario County Agricultural Enhancement Plan-2018 identified the property as priority land for protection.²¹ The Ag Board expressed concern about the potential for the cumulative significant loss of prime agricultural land where commercial solar PV systems are allowed uses in zoning districts (such as A-80) where agriculture is the predominant land use and is a priority for protection.²² These concerns were echoed by the Town Conservation Board.²³

This Project will cause a substantial change in land use, replace 30 acres of prime agricultural land with industrial solar arrays, and transform rural parcels into industrial uses. These factors indicate that the Project "may" have

¹⁹ Id.

²⁰ Id. at P. 3.

²¹ Ontario County Agricultural Enhancement Board Letters dated October 2, 2018 and April 9, 2019.

²² Id.

²³ Town of Farmington Conservation Board meeting minutes dated October 22, 2018.

“the potential” for significant adverse land use changes and requires further study.

For the reasons cited, there is a possibility that the proposed action may cause at least one significant environmental impact in many of the areas enumerated in 6 NYCRR 617.7(c). Because the action may include the potential for at least one significant adverse environmental impact, 6 NYCRR 617.7 (a) (1) requires the lead agency to issue a positive declaration of environmental significance. Therefore, under SEQRA, the Applicant must be required to prepare an EIS.

CONCLUSION

For the foregoing reasons, we request that the Planning Board classify the action as a Type I action pursuant to SEQRA, issue a positive declaration of environmental significance and require preparation of an Environmental Impact Statement.

Thank you for reviewing this letter. If you have any questions please do not hesitate to contact me.

Sincerely,



Frances Kabat