



Boylan Code
Attorneys at Law

July 10, 2019

VIA U.S. MAIL

Jeffrey D. Graff
Town of Farmington Town Attorney
26 E Main St. #202
Clifton Springs, NY 14432

**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 Mr. Graff:

We are counsel for Delaware River Solar (“DRS”) and submit this letter in response to the letter submitted to the Town of Farmington Planning Board (the “Board”) by attorney Frances Kabat, Esq. on June 5, 2019 (the “Kabat Letter”). The Kabat Letter asserts legal and other arguments requesting that the Board issue a Positive Declaration of Environmental Significance (“Pos Dec”). As demonstrated below and in the prior submissions made by DRS, the relevant factual information submitted to the Board demonstrates that a Negative Declaration of Environmental Significance (“Neg Dec”) is the proper determination for this project. The factual information submitted to the board strongly supports a Neg Dec.

In the alternative, the Kabat Letter argues that if the Board issues a Neg Dec it should deny the applications submitted by DRS for subdivision approval, site plan approval, and a special use permit. The Board has repeatedly stated that its current review is limited to the pending SEQRA determination. For that reason, DRS will reserve any response regarding the substantive merits of the pending applications for subdivision approval, site plan approval, and a special use permit until such time as the Board concludes its SEQRA review and takes up those pending applications.

Independent Judgment of the Board

Rather than making a factual argument for a Pos Dec based on legitimate environmental considerations, the Kabat Letter begins by incorrectly arguing that DRS is seeking to strip the Board of its independent judgment. The Kabat Letter characterizes the submission of information from the New York State Department of Agriculture and Markets (the “NYSDAM”) as an attempt by DRS to strip the Board of its independent judgment, despite the fact that the Board *specifically requested* that information.

On January 16, 2019, the Board approved a resolution that continued the public hearing on the proposed community solar project until April 17, 2019, for the express purpose of receiving information from the NYSDAM:

BE IT FURTHER RESOLVED, that the Planning Board continues to determine that a copy of the Notice of Intent filed with the NYSDAM be provided to the Board, as it is considered important documentation that examines and addresses impacts to land, farm enterprises and agricultural resources with the Agricultural District and that the applicant must demonstrate how such impacts will be avoided or minimized.

See Planning Board Minutes of January 16, 2019, at p. 20.

On April 12, 2019, the Commissioner of the NYSDAM issued a letter to DRS with the information that was requested by the Board during its meeting on January 16, 2019, specifically stating that: “[b]ased on all relevant information before me, I have determined that the proposed action would not have an unreasonably adverse effect on the continuing viability of farm enterprises within the district or State environmental plans, policies and objectives.” DRS Project Correspondence #79. DRS submitted the NYSDAM letter to the Board at its April 17, 2019, meeting as requested.

DRS is well-aware of the fact that the decision whether to issue a Neg Dec or a Pos Dec lies exclusively with the Board, and DRS respects the independent judgment of the Board. For that reason, DRS has tried to respond to each and every request for information from the Board. The April 5, 2019, letter from the NYSDAM is an important piece of factual information for the Board to consider, which is why DRS has highlighted its conclusion that the proposed project will not have an “unreasonably adverse effect on the continuing viability of farm enterprises.” The NYSDAM is the state agency tasked with determining the impact of the project on agricultural resources. For that reason, its determination should be considered by the Board when it makes its own independent assessment. The ultimate decision lies with the Board and it is disingenuous for Ms. Kabat to claim that DRS has argued otherwise.



Impacts to Land

The Kabat Letter also argues that a Pos Dec should be issued because (1) the mitigation measures approved by the NYSDAM are “not dispositive,” and (2) DRS has not provided the Board with a geotechnical study. Both arguments are devoid of any merit and ignore the discussions had in the prior public hearings.

Once again, the Kabat Letter raises the specious argument that the Board is abdicating its SEQRA responsibilities if it considers the mitigation measures approved by the NYSDAM. As stated above, that is not true. The information received from the NYSDAM has been submitted for the Board to consider in its decision-making process along with all the other information received in support of the project, and in opposition to the project. It is the Board’s responsibility to weigh all submitted information, consider its relevance and validity, apply the relevant law and regulations to the relevant information, and then make an informed determination.

The Kabat Letter also argues that the mitigation measures approved by the NYSDAM “indicate that the project may have significant adverse impacts on Class 1-4 soils,” but the letter from NYSDAM does not make any such statement or reach any such conclusion. Rather, the NYSDAM letter concludes that the project will “not have an unreasonably adverse effect on the continuing viability of farm enterprises.” That determination “is due, in part,” on the approved mitigation measures. The NYSDAM never states or intimates that the proposed project may have a significant adverse impact on Class 1-4 soils. The referenced mitigation measures are an incorporated part of the project. For that reason, their implementation demonstrates the lack of a significant adverse impact on land.

Finally, the Kabat Letter attempts to paint DRS as unwilling to provide needed information to the Board, namely a geotechnical study. As the Board is well-aware, a geotechnical study has been requested and DRS has commissioned a professional geotechnical study. DRS anticipates that the geotechnical study will be completed shortly and then submitted to the Board and made available for the public to review in advance of the Board’s meeting on July 17, 2019.

Impacts to Agricultural Resources

The Kabat Letter attempts to manufacture a significant adverse impact on agricultural resources by arguing, without support, that the proposed community solar project will (1) cause a significant impact via land disturbance, and (2) fragment critical masses of farmland. Neither argument is legitimate.

The total land disturbance (as shown in the Soil Disturbance table on Preliminary Site Plan Sheet S-2) is only 1.12 acres, of which a mere 0.03 acres involves actual ground penetration for the steel racking and fence posts. These posts are driven into the ground, require no cement, and can be



removed as easily as they are installed, resulting in no permanent ground disturbance. Additionally, a concrete pad will be set for the inverter and transformer stations and can also be removed entirely at decommissioning. In sum, the potential impacts are minimal, totaling only 1.1 acres, only .03 of which involve ground penetration, and none are permanent impacts.

Second, the proposed community solar project will not “fragment critical masses of farmland.” The project area is currently being used as pasture and will be able to return to that use when the project is decommissioned. The project will allow the farming operation that currently exists on the property to continue. As DRS has documented and shown to the Board in detail, the cattle farm will be accommodated with a new cattle fence and fence realignments, and several paths where cattle and farm equipment can cross through and around the project area, ensuring, as verified by the cattle farmer themselves, that the proposed action will not impede on their farm operations. Furthermore, the Area Variance being requested will move the project areas closer together, allowing the more contiguous grazing area. Moreover, as previously mentioned, the NYSDAM, the state agency tasked with assessing impacts on agricultural resources, has already concluded that the project will “not have an unreasonably adverse effect on the continuing viability of farm enterprises” in the area.

Impacts to Aesthetic Resources and Consistency with Community Plans

The Kabat Letter argues that the proposed community solar project will impact aesthetic resources because it “may be visible from publicly accessible vantage points” as per question 9 on the EAF relating to impacts on Aesthetic Resources. As per DEC Guidance, said question relates to “scenic and aesthetic resources that are officially designated and publicly accessible.” However, DRS is unaware of any officially designated vantage points in the area of the Project.

Nonetheless, DRS has designed the Project as if there were officially designated vantage points involved (even though there do not appear to be any present). Significant screening has been proposed by DRS. The visual impact of the project is an issue that has been raised by the Board and DRS has completed a new landscaping proposal with enhanced screening, which DRS believes addresses and resolves the Board’s questions about screening.

The proposed community solar project is consistent with the Town’s land use plans because the Town Code expressly permits the proposal, subject to a special use permit. The project enjoys a legal presumption of consistency with the community plan because it is specially permitted use. The New York Court of Appeals has specifically held that “[t]he inclusion of the permitted use in the ordinance is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood.” *N. Shore Steak House, Inc. v. Bd. of Appeals of Inc. Vil. of Thomaston*, 30 N.Y.2d 238, 243 (1972). As a result, the Kabat Letter incorrectly concludes that the proposed project is not consistent with the character of the



neighborhood because the proposed solar array is a permitted use within the zoning district, subject to the issuance of a special use permit. Moreover, any concern about the visual consistency of the project is addressed in the enhanced screening proposed by DRS.

Impacts on Surface Water, Drainage Patterns, and Groundwater

The Kabat letter argues that the proposed community solar project may have a significant adverse impact on surface water, drainage patterns, and groundwater because the project site is near wetlands and will include 21,000 “impervious” solar panels. DRS has already submitted a comprehensive wetland and waterbody study demonstrating that the solar arrays will not disturb any wetlands, will comply with all buffers required as a result of those wetlands, and will not alter any surface water flows.

Moreover, the Kabat Letter fundamentally misunderstands the nature of the project when it claims that the “impervious” solar panels will impact drainage and groundwater. The solar panels stand approximately three feet above the ground and are angled toward the ground. As a result, all water runoff from the solar panels will fall on the ground and the absorption area will be minimally impacted. The project area is 35 acres, and only 1.1 acres will be disturbed. The panels will actually improve water absorption because they will decrease the speed at which rainwater hits the ground.

Impacts on Plants and Animals

The Kabat letter claims that the Board found that proposed community solar project may impact plant and animals, but no such finding was made by the Board. If the Board does feel that that the project has a may have a potential significant impact on plants and animals, DRS would be welcome the opportunity to address any such concerns.

Impacts on Traffic

Finally, the Kabat Letter attempts to argue that the traffic study done by SRF Associates indicates that the proposed community solar project will have a negative impact on traffic conditions. The study indicates that the intersection of Fox Road and Yellow Mills Road has an elevated crash rate, but that is due to a “pattern of northbound and southbound drivers failing to yield the right of way to eastbound and westbound drivers.” Nevertheless, the study concluded that the elevated crash rate “does not warrant corrective action.” Regarding the proposed community solar project, the study concluded that “the proposed project will not have any potentially significant adverse impact on traffic operations” because the project will only generate one additional vehicle trip during peak hours, and even then only on the “two maintenance days per year that is anticipated for the proposed project.”

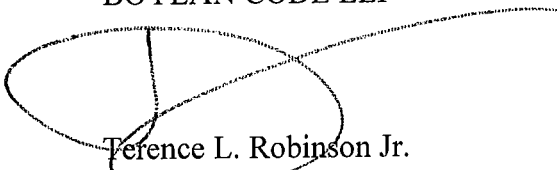


Conclusion

The Board has conducted a thorough and exhaustive collection of relevant information all in compliance with the legal requirements of SEQR. With the submission by DRS of the geotechnical report and the enhanced screening plan, the Board now has sufficient information to make a SEQRA determination. Despite vocal public concern over the proposed project – including the numerous submissions made by Ms. Kabat, generally within hours of a public hearing to deny DRS the opportunity to timely respond – the Board is tasked with reviewing the factual information it has received when making its SEQRA determination. Nothing in the Kabat Letter supports a Pos Dec. Rather, the factual information submitted to date, including numerous professional studies commissioned by DRS and the findings of the NYSDAM, demonstrate that a Neg Dec is appropriate because the proposed project will not have a significant adverse environmental impact. For that reason, DRS believes that the law merits a Neg Dec and thus requests that the Board issue a Neg Dec and proceed to the consideration of the pending applications for site plan approval, subdivision, and a special use permit.

Sincerely,

BOYLAN CODE LLP



Terence L. Robinson Jr.
~~Donald A. Young~~

TLR/sms

cc:

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