

Town of Plympton Zoning Board of Appeals
Minutes For Meeting and Hearing of December 15, 2022

Scheduled Hearing: R&R Renewables, LLC, ZBA Case No. 22-1027

Persons in Attendance

Board Full/Voting Members:

Colleen Thompson, Chair
Ethan C. Stiles, Esq., Clerk
Suzanne Jafferian

Board Alternate Members:

Dave Alberti
Carolyn DeCristofano

Counsel:

Amy E. Kwesell, Esq., Town Counsel
Michael J. Barone, Esq., Attorney for R&R Renewables

Other Persons Present :

Roy Morrison, Manager, R&R Renewables. LLC
Luanne Baker, R&R Renewables. LLC
James A. Pavlik, P.E., Outback Engineering, Inc.
Charles F. Burns, Jr., Property Owner

Location: Deborah Sampson Room, Plympton Town House (in-person only)

Meeting Discussion

The Chair Opened the Meeting at 5:38PM

The Clerk submitted two vendor warrants and recited their purpose :

The first was for \$219.80 to the Clerk for reimbursement for payment of certified mailing postage of the Notice of Hearing scheduled for this date to the individuals listed on the list of Certified Abutters filed with the Application by R&R Renewables.

The second was for \$90.00 to Express Newspapers for publication of the Notice of Hearing for R&R Renewables in the Plympton-Halifax-Kingston Express newspaper on November 18 & 25, 2022.

Vendor Warrants Approved Unanimously

The Chair read a letter from Ann Sobolewski, (Chair of the Planning Board), to the Board giving her personal support to the request for a variance sought by R&R Renewables.

Ms. DeCristofano presented a draft of public education materials and a Powerpoint presentation to assist members of the public with the requirements to obtain a variance and the hearing process. The Chair suggested that a meeting should be scheduled specifically for this purpose.

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A Business Meeting was scheduled for January 12, 2023 at 2-4PM.

[Meeting was not held due to illness of a Board Member.]

Meeting adjourned at 6:02 P.M.

Hearing Discussion

The Chair Opened the Hearing for R&R Renewables, LLC at 6:02 P.M.

The Chair began the meeting by reciting that the statutory prerequisites had been met:

- The Notice of Hearing was Read into the Record
- The Notice of Hearing had been given to all abutters to the Owner's parcel by certified mail
- The Notice of Hearing had been published twice in the Plympton-Halifax-Kingston Express newspaper on November 18 & 25, 2022.

Attorney Barone began the presentation on behalf of the Applicant. He informed the Board that the Application's purpose was to install a medium ground mounted solar array on 1 acre on the parcel identified at 117 Lake Street, Assessors ID : 2-3-6. This array was to be built on the area indicated on the plans filed with the Application. He informed the Board that there was already a 1 Megawatt solar array existing on the property which was not related to the proposed array.

Attorney Barone asked for two alternative forms of relief :

- A. A Finding that the proposed array will be an Extension of a prior non-conforming use pursuant to Section 300-6.2(B) or
- B. Variances from setbacks prescribed in the current Zoning Bylaws :
 - 1. Requirement of a 600' setback from any public way, Section 300-6.10(E)(4)
 - 2. Requirement of a 300' vegetative buffer setback from abutting properties with the 150' closest to abutting properties being undisturbed and the remaining 150' being able to be selectively cleared, Section 300-6.10(E)(6)(a)(1)

Attorney Barone recited that the proposed array would be 338' from Lake Street and would have 290' of buffer on the front and 180' on the side.

He continued that the lot was large and unique with "strange jogs and bends". Literal enforcement of the bylaw may create other non-conformities and the proposed usage would not require the need to remove or replant and can utilize much of the existing infrastructure created to service the existing 1 Megawatt array. The proposed array would not affect traffic patterns or need town services. He suggested that this lot was larger in size than those contemplated by the by-law.

Attorney Kwesell opined that the first relief option was not warranted. The existing non-conforming use was allowed by a Special Permit from the Planning Board, not a Variance from the ZBA. Because the proposed array would be a new project and would not be piggybacking on the existing array, it cannot be extended via the ZBA.

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She further opined that the first requirement for a variance to be granted was not met. The dimensional non-conformity was irrelevant, the land was not unique for the zoning district in which it was located.

The Chair entered and read Ms. Sobolewski's letter, requesting the ZBA grant the variance sought by R&R Renewables, into the record.

Mr. Alberti questioned the extent that the new array would impact the existing electrical infrastructure as in new poles, lines and transformers would need to be added to connect this array to the existing grid.

Attorney Barone stated that the non-conforming use had not changed. He then noted that the Dover Amendment, G. L. c. 40A, § 3, prohibited municipalities from unduly restricting the construction of solar array. He viewed the 600' setback requirement in particular as one that few lots in Plympton could meet.

Mr. Morrison, representing the Applicant stated in response to Mr. Alberti's question that he received approval from Eversource to hook into the exiting power lines and all that would be required would be to upgrade a pole with a transformer.

Attorney Kwesell responded to Attorney Barone that the Dover Amendment prohibited unnecessary regulation, it did not prohibit municipalities from any regulation of solar. In the case that Attorney Barone cited, Tracer Lane II Realty, LLC v. Waltham, 489 Mass. 775 (2022), the Supreme Judicial Court noted that Waltham's regulations restricted solar to 1-2% of the total land area of Waltham. There was already a large solar array present on the property. She further noted that the Zoning Bylaw had been approved by the Attorney General's Office.

Ms. DeCristofano suggested that the applicant should submit documentation from Eversource regarding the approval to connect to the existing grid.

The Applicant submitted additional plans at the hearing showing the proposed array's location in relation to the existing array and the full parcel. Its representative indicated it would be hard to place the array elsewhere without clearing significant vegetation, managing road access and storm water runoff. The new array would not be seen from the street and a larger array on the existing project would be more visible.

Attorney Kwesell repeated that increasing the existing non-conformity finding was off the table, noting that the existing non-conformity of the current array was 375' from Lake Street but the proposed array would only be 338' from Lake Street.

Mr. Burns informed the Board that R&R Renewables only leased 1 acre of that 40 acre part of the parcel which runs by the eastern side of Lake Street. He uses other parts of the 40 acre parcel for a barn and a cattle field for his cows. A medium-sized array is allowed as of right on a lot of 8-20 acres and he has acres appropriate for a large-sized array.

The Board Closed the Evidentiary Portion of the Hearing at 7:05 P.M.

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The Board began the Deliberation Portion of the Hearing by introducing a Motion that the Proposed Use was Not an Extension of an Existing Non-Conforming Use because the existing solar array was not owned by the Applicant.

The Motion passed Unanimously

The Board then turned to the three statutory requirements for granting a variance, which the Chair read aloud:

1. That owing to circumstances relating to the soil conditions, shape or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located, including the location of the existing house on the Property and the hills and trees on the Property which do not generally affect lots in the AR district;
2. A literal enforcement of the 100-foot setback requirement of the Zoning Bylaw would involve substantial hardship to the Applicant as the pool would have to be constructed in an area on the Property that is more difficult to supervise and thus less safe and
3. That, subject to the conditions listed below, desirable relief may be granted without substantial detriment to the public and without nullifying or substantially derogating from the intent or purpose the Zoning Bylaw, noting no opposition to the Application from abutters.

The Clerk asked what was to prevent another application for solar array elsewhere on this parcel in the future, Attorney Kwesell replied that neither the Applicant nor the Property Owner could be compelled to record an enforceable deed restriction limiting further solar.

No members of the public spoke in opposition to the Application. Mr. Alberti pointed out that Ms. Sobolewski serves with him on the Bylaw Review Committee and helped draft the existing Zoning Bylaws but is in favor of this project.

The lease of the land was contingent on obtaining approvals for the solar array. This made hardship tenuous because the proposed lessee, R&R Renewables in this case, could look elsewhere to build. According to Attorney Kwesell, hardship implies an inability to use land.

Mr. Burns estimated that \$100,000 could be generated in revenue from the proposed solar array during the lifetime of the lease. The array was rated to generate around 150 Kilowatts. [The plans indicate that 150kW is AC, 216kW DC is also being generated.]

Mr. Morrison commented that he had never seen a 600' setback and deemed that restriction as "arbitrary."

Ms. Baker observed that R&R Renewables was in the business of building smaller arrays to limit the environmental damage caused by large scale arrays. The planning board had encouraged R&R Renewables to apply for a variance but did not deny it relief.

Attorney Kwesell found it difficult to see how the Applicant could satisfy the first requirement for a variance given the existing array already in place.

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Moreover, she found that this Application would require a Use Variance, not just a Dimensional Variance. The Applicant already had a large scale facility on the property and would need a variance to build a medium scale facility on the same lot. The Bylaw, 300-6.10(B)(4) only permits one facility on a lot. G. L. c. 40A, § 10 in its second sentence specifically prohibited the Board from granting a Use Variance unless permission was granted in the bylaw. 300-6.10 did not give the Board authority to grant Use Variances.

By this point all voting members of the Board had expressed their doubts whether the Applicant could meet the first variance requirement. Additionally it was observed that because the Bylaws in their current form would deny the Applicant relief even if the three requirements could be met, revisions may have to be proposed and passed which may permit such a project as the Applicant's. No Board member had voiced opposition beyond the requirements of the existing Bylaws which the Board is required to uphold as voted on and approved at Town Meeting. The Chair suggested that the hearing be continued so that the Applicant could consider its options and be given a further opportunity to address issues raised by the Board and Town Counsel.

The 100 day deadline for the Board to make a decision on the Application was determined to be February 4, 2023. Any continuance beyond that date would require the Applicant to waive the deadline in writing. The Applicant supported the continuance to January 25.

Motion to Continue the Hearing until January 25 at 5:30 P.M. was approved unanimously.

The Hearing was adjourned at 8:30 P.M.

Respectfully submitted,

Ethan C. Stiles, January 25, 2023

