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April 9, 2020

Via Email

Honorable Thomas J. Buchanan
Schenectady County Judicial Building
612 State Street
Schenectady, New York 12305

Re: Susan L. Biggs and Lynne A. Bruning v. Eden Renewables, LLC, et al
Index No.: 2019-2217

Dear Judge Buchanan:

Respondents Eden Renewables LLC and Richard B. Murray (the “Eden Respondents”) submit this letter to identify new arguments raised in Petitioners’ Reply Memorandum of Law (the “Reply”) and to highlight portions of the record rebutting those arguments. Counsel for the Town of Duanesburg Planning Board (the “Board”) joins in this submission. Respondents respectfully submit that neither oral argument nor a formal sur-reply is necessary for the Court to conclude that the Board complied with the procedural requirements set forth in the Town Code and that its determination is supported by substantial evidence.

The Newly Raised Arguments

The Reply shifts the thrust of Petitioners’ argument from contending that the Board failed to make sufficient written findings, to asserting that the Board’s written findings are not supported by substantial evidence. By abandoning their initial argument, Petitioners’ Reply implicitly concedes that the unanimously adopted resolution approving the Eden Respondents’ site plan and special use permit for the construction of two community solar energy fields (the “Project”) satisfies the requirements of the Town Code.

For the first time on Reply, Petitioners argue that the Board did not adequately consider: (1) whether the aesthetic impacts of the Project could adversely affect Petitioners’ property value, (2) whether the aesthetic impacts of the Project could affect the character of Petitioners’ residential neighborhood, (3) whether the vegetation and evergreen planting would eliminate aesthetic impacts of the Project, (4) whether adjacent or neighboring properties would be protected against glare or unsightly features of the Project, and (5) whether the Project would adversely impact drainage and flooding. A review of the record demonstrates that the Board considered each of these issues, imposed conditions upon the Eden Respondents to address Petitioners’ concerns, and based its determination upon substantial evidence.

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Substantial Evidence in the Record Supporting the Board's Determination

The Board adequately considered the effect of the Project on the character of the neighborhood and the values of the surrounding property by siting the Project to eliminate, or reduce to the maximum extent possible, the Project's impacts on neighboring properties. Petitioners' argument concerning neighboring property values is inextricably entwined with their argument concerning the Project's visual impacts. As the record demonstrates, the Board's conclusions: (1) that "no aesthetic impacts are anticipated as the project area will be largely screened from view by natural vegetation and evergreen plantings," (2) that the Project will not "change the community character as it has been sited to not be visible to the maximum extent possible to surrounding homes and roadways," and (3) that the Project "is consistent with the Town Comprehensive Plan," are supported by substantial evidence in the record.¹ This substantial evidence includes: (1) a "visual impact assessment" and "supplementary visual impact assessment" performed by Travis J. Mitchell, PE, of Environmental Design Partnership, the Eden Respondents' professional engineer, (2) the advice of Douglas P. Cole, PE, the professional engineer designated by the Board, and (3) the Board's condition that the Eden Respondents prepare an evergreen landscaping plan sufficient to screen the visibility of the solar array from neighboring residences even if all existing vegetation between the neighboring residences and the solar array were removed.²

The visual impact assessment and supplementary visual impact assessment conclude that the "existing Biggs and Otis residences will be adequately screened by existing vegetation, distance and topography such that the proposed solar array will not be visible."³ On September 10, 2019, Professional Engineer Cole wrote to the Board that the illustrations and figures provided in the supplementary visual impact assessment support Professional Engineer Mitchell's conclusion that the Biggs residence will be adequately screened.

The evergreen landscaping plan is designed to screen the visibility of the solar array from neighboring residences even if all existing vegetation between the neighboring residences and the solar array were removed.⁴ Moreover, contrary to statements in Petitioners' Reply, the requirements of the evergreen landscaping plan are included in the Resolution itself. Paragraph 2(f) of the Resolution provides that:

The Planning Board hereby requires that the Project provide evergreen landscaping showing the establishment of a substantial evergreen buffer on the [Eden Respondent's] property within 10 feet of the boundary currently containing houses within 600 feet of the project site boundary for a length of approximately 1600 feet at the back of the parcel with 2 staggered rows

¹ See Exhibit 20 at pg. 4; see also Exhibit 19 at pgs. 3-5.

² See Exhibit 16 at pgs. 3, 6-8.

³ Id.

⁴ See Exhibit 16 at pg. 3.

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of trees planted 20 feet on center with the trees having the height at time of planting of 6 to 7 feet and with the trees being species spruce and fir evergreens. The [Eden Respondents] shall also provide a maintenance and replacement agreement for the evergreens buffer to be planted.⁵

Thus, the Board considered Petitioners' objections, evaluated an initial and supplementary visual impact assessments, and conditioned approval of the Project upon evergreen landscaping designed to screen the Project from Petitioners' view. Contrary to the Reply, the basic requirements of the evergreen landscaping plan are set forth in the Resolution itself. The Board's determination was based upon substantial evidence.

The Board's conclusions that the Project's "layout ensures the solar panels will not reflect solar radiation or glare onto adjacent buildings, properties, and roadways" and "that the solar panels include a non-glare coating . . . such that the panels will not misdirect or reflect solar rays onto neighboring properties or public roads in excess of that which already exists" are supported by substantial evidence.⁶ In addition to screening provided by existing vegetation and the evergreen landscaping proposal, the Project's solar panels minimize glare through the use of translucent coating materials.⁷ Grass produces more glare than the Project's solar panels.⁸ In addition, Part 2 of the Eden Respondent's Full Environmental Assessment Form, response to question 15(d), indicates that the Project will not result in light shining onto adjoining properties.⁹

Finally, the Board's determination that the Project will not create any permanent impacts to groundwater or surface water is supported by substantial evidence.¹⁰ The Eden Respondents submitted to the Board: (1) guidance from the New York State Department of Environmental Conservation concerning Solar Panel Construction Stormwater Permitting/[Stormwater Pollution Prevention Plan] SWPPP Guidance (the "SWPPP Guidance")¹¹, and (2) a Stormwater Pollution Prevention Plan created pursuant to the SWPPP Guidance.¹² On July 9, 2019, Professional Engineer Cole wrote a letter to the Town stating, among other things: (1) that the Eden Respondents had submitted a Basic SWPPP for construction activities containing the required erosion and sediment control measures, and (2) that the SWPPP was not required to contain post construction stormwater management facility information because the Project is proposed to disturb less than one acre during construction.¹³

⁵ Id.

⁶ See Exhibit 19 at pgs. 4-5.

⁷ See Exhibit 14 at pg. 22.

⁸ Id.

⁹ See Exhibit 10 at pg. 12.

¹⁰ See Exhibit 19 at pg. 3.

¹¹ See Exhibit 10 at pgs. 147-148.

¹² See Exhibit 10 at pgs. 14-126.

¹³ See Exhibit 12 at pg. 5

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On September 5, 2019, Engineer Mitchell wrote a letter to Board Chairman Phillip Sexton stating:

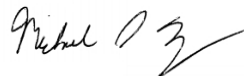
Relative to Stormwater Runoff from the project. The proposed project has been designed in compliance with New York State Department of Environmental Conservation requirements and guidelines relative to stormwater runoff. The Town Designated Engineer has reviewed the applicability of stormwater design requirements and guidelines and determined that the proposed project is in compliance with the same.¹⁴

Professional Engineer Cole was copied on the letter and never disputed the accuracy of the statements therein. Substantial evidence supports the Board's conclusion that the Project will not create any permanent impacts to groundwater or surface water.

Conclusion

The Board considered each of the issues raised by Petitioners, imposed conditions upon the Eden Respondents to address Petitioners' concerns, and based its determination upon substantial evidence. Specifically, substantial evidence supports the Board's findings: (1) that the aesthetic impacts of the Project will not adversely affect Petitioners' property value, (2) that the aesthetic impacts of the Project will not affect the character of Petitioners' residential neighborhood, (3) that no aesthetic impacts are anticipated because the Project area will be largely screened from view by natural vegetation and evergreen plantings, (4) that the adjacent or neighboring properties will be protected against glare or unsightly features of the Project, and (5) that the Project will not adversely impact drainage and flooding. For these reasons, and the reasons set forth in Respondents' answers and opposition briefs, Respondents respectfully request that the Court enter judgment in favor of Respondents.

Respectfully submitted,



Michael D. Zahler

MDZ

cc: Douglas H. Zamelis, Esq.
John J. Henry, Esq.
(via Email).

¹⁴ See Exhibit 16 at pg. 2.