

Could Zoning Ordinances Slow New Jersey's Solar Installation Frenzy?

PV developers and investors should familiarize themselves with the laws that govern project development.

■ Charles H. Sarlo

Although New Jersey is recognized as the U.S.' second leading state in solar energy development, many solar developers and financial investors seeking to do business in New Jersey do not account for a potentially complex entitlement derived from a state statute known as the Municipal Land Use Law (MLUL). This entitlement can alter the development timetable and, thus, projects' financial pro forma.

New Jersey is recognized as a "home rule" state, in that land use permitting is subject to local municipal jurisdiction and not necessarily county or state jurisdiction. Therefore, solar project developers must familiarize themselves with the municipal-specific local zoning ordinances and properly interpret what the ordinances say and do not say.

With more than an estimated 8,000 solar projects installed across the state of New Jersey totaling some 259,674 kW, this second-generation wave of solar system installations has garnered such public awareness that the installations are increasingly coming under regulatory review, notwithstanding that the actual municipal zoning regulations and zoning officers have not yet caught up with this form of real estate development.

In New Jersey, not so long ago, there was some debate as to whether a solar panel was nothing more than a mechanical piece of equipment or whether the solar array was considered an alternative energy generation system. On one hand, some would argue that a solar panel was no different than a rooftop air conditioner and, thus, not subject to the MLUL and, by extension, local zoning ordinances.

On the other hand, others would argue that such a system that produces alternative energy was actually a separate and distinct use apart from the principal use at the site and, thus, required certain variance relief. Because the industry was new, there was a lack of express statutory provisions to provide any meaningful guidance.

New Jersey is principally a "behind the meter" installation state, in that solar systems are generally being installed on the same property at which the power will be consumed. Therefore, the MLUL's reference to an "electric power generator" provided some support that solar systems were not an alternative energy generation system.

Pursuant to N.J.S. 48:3-51, an electric power generator is defined as an "entity that proposes to construct,

own, lease or operate, or currently owns, leases or operates, an electric power production facility that will sell or does sell at least 90 percent of its output, either directly or through a marketer, to a customer or customers located at sites that are not on or contiguous to the site on which the facility will be located or is located."

Conversely, since the early 1990s, New Jersey construction and zoning officials have known that another rooftop installation - the cell tower/ antenna - required zoning approval. In 2001, three solar installations are reported to have taken place - with a somewhat lineal ramp-up to 3,139 solar installations in 2010.

It would appear that, without question, a significant majority of these solar installations did not receive planning or zoning board approval, although they may have received a proper construction permit. In these instances, the question is whether the municipality is estopped from revoking the permit for a lack of land use approvals, particularly in instances where there is an attack on the validity of the permit.

Beneficial uses?

In order for an estoppel to be applied against a municipality in the zoning or planning context, the municipality's administrative officials must have made an erroneous and debatable interpretation of applicable ordinance in good faith and within the ambit of their duty, upon which the applicant relied in good faith.

Potentially problematic is that an administrative official's "good faith" can only be satisfied by demonstrating that when the permit was issued, there existed an issue of construction of the zoning ordinance or statute that was sufficiently substantial to render



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doubtful a charge that the administrative official acted without any reasonable basis. In the instance where an applicant did not advise the construction or zoning official of the need for a variance, one would be prohibited from arguing that the applicant acted in good faith.

In 2010, the New Jersey State Legislature (through S.1202/A.3062) indirectly clarified that solar development requires local land use board approval. The MLUL was amended to add wind and solar energy facilities or structures as being “inherently beneficial uses.” The phrase used - “wind, solar or photovoltaic energy facilities or structures” - means “a facility or structure for the purpose of supplying electrical energy produced from wind, solar or photovoltaic technologies, whether such a facility or structure is a principal use, a part of a principal use or an accessory use or structure.”

Bill S.921/A.2289 was also signed into law. This law exempts solar panels and canopies or arrays thereof from being included in the calculation of impervious coverage, but it excludes the base or the foundation of the solar panel base, plate, canopy or array.

In assessing whether a solar system requires variance relief from a local municipality’s zoning law, the first place to start is with the principal permitted uses allowed in the zoning district in which the proposed site is located.

Today, it is unlikely that one would find a local zoning ordinance to permit solar systems as a principal permitted use except potentially in areas declared as an area in need of redevelopment or redevelopment areas, or as permitted under the MLUL, which designated solar systems to be a principal permitted use in areas zoned for industrial use and on tracts of land consisting of 20 contiguous acres under common ownership.

Therefore, one should also look to ascertain whether the local zoning restricts the use of the property to one principal permitted use, a land use

policy to which most local jurisdictions adhere. If such restriction exists, a use variance would be required not only for the proposed use, but also to permit two principal permitted uses on the same property.

Alternatively, one may seek to classify the proposed solar system as an “accessory use.” However, both case law and most local jurisdictions define an accessory use to be a use that is “customarily incidental and subordinate” to the principal use of a lot or building and located on the same lot thereof.

Notwithstanding New Jersey’s status as the second leading state in terms of solar development, it would be hard to argue in either the residential, commercial or industrial context that solar systems are currently “customarily incidental and subordinate” to the principal use of a lot or building.

Thus, unfortunately, New Jersey’s zoning law maze generally leads one to the conclusion that solar systems require one or more use variances, which is unquestionably considered to be the hardest variance to obtain. However, the state’s recent classification of solar systems as being an inherently beneficial use is of benefit, as it presumptively satisfies the “positive criteria” (or special reasons) needed to legally prove that a use variance should be granted by the municipality’s zoning board of adjustment.

In addition to proving the positive criteria, an applicant for a variance must also prove the two-prong negative criteria: whether the variance can be granted without substantial detriment to the public good, and that the municipal zone plan will not be substantially impaired. With regard to the first prong, the focus is on the impact of the proposed use variance on the adjacent properties and whether it causes such damage to the character of the neighborhood as to constitute a substantial detriment to the public good.

With regard to the second prong of the negative criteria, the focus is on

the extent to which the grant of a variance would constitute an arrogation of the governing bodies’ authority. The court also requires an “enhanced quality of proof,” which requires a reconciliation of the proposed use with the zoning ordinance’s omission of the use from those permitted in the zoning district.

This “enhanced quality of proof” requirement is not intended to apply where a particular use was specifically addressed by the municipality’s master plan and/or zoning ordinance.

Although a use variance may be front and center in a solar system development application, one must also consider whether variances from the “bulk requirements” of the zone are needed. Bulk requirements include, in part, setbacks and lot coverage.

Thus, the installation of a rooftop solar system would need to be set back from all of the property lines as required by the zoning ordinance; otherwise, bulk variance approvals are required. As a result of the recent amendments to the MLUL, the solar panels and canopy area can be excluded from the lot coverage calculation, but not the structural supports or foundation system.

For all variances, and for each and every variance, both the positive and negative criteria must be established, generally through the testimony of a licensed professional planner with the guidance of an experienced land use attorney.

Additional considerations

Other land use requirements to consider in terms of applicability include height requirements, design standards included in a municipality’s zoning ordinance and site plan requirements. Although one may question how or why a site plan review may be required for the installation of a rooftop solar system, many municipalities’ site plan requirements are intentionally broad so as to require as many developments as possible to obtain site plan approval.

A common site plan ordinance provision may be that a site plan approval is required if there is a change in use, a change in tenancy or a more intensive use of the property. One can also infer that the MLUL requires site plan approval for the installation of rooftop solar systems, as it defines "site plan" to mean a development plan showing, in part, proposed walkways, utility services, structures and screening devices.

In the event that non-ground-mounted systems require site plan approval, one should seek a waiver from such a requirement as may be applicable. If a use variance is not required, the applicability of site plan approval may alter which local land use board, planning board or zoning board has jurisdiction to hear the matter.

Although the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010 provides continued financial incentives to solar developers and property owners, the financial provisions contained in the act have sunset provisions. Accord-

ingly, financial pro formas utilizing the act's financial incentives must consider New Jersey's land use approval statutory process and time frames.

Pursuant to the MLUL, a local land use board has up to 45 days to deem an application administratively complete; up to 120 days to render a decision for a use variance or up to 95 days to render a decision on bulk variances; up to 45 days to memorialize its decision in the form of a resolution; and a 45-day appeal period for any opposition from the date of publication of the resolution.

Given that federal legislation permits a 100% depreciation bonus on new equipment placed in service through the end of this year and has extended the U.S. Department of Treasury's Section 1603 30% cash-grant program through the end of the year, solar developers and property owners must adequately consider a realistic development and construction schedule before blindly factoring in the financial incentives permitted under the federal legislation.

In sum, looking forward, solar de-

velopment is and will continue to take on the similar complexities of real estate development approval in New Jersey, and thus, financial pro formas and project scheduling must be realistic as to the nature and time schedules of New Jersey's regulatory landscape.

Looking back, the investors behind the 8,000-plus solar installations from 2001 through 2010 need to assess whether proper zoning approvals were secured or if there is the potential for the municipality to retroactively revoke the construction permit and jeopardize their financial investment. ☞

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