APPROVED

ANDOVER ZONING BOARD OF ADJUSTMENT

July 19, 2022

Members present: Jon Warzocha, Co-Chair; Jeffrey Dickinson, Co-Chair; Jeff Newcomb; and Katherine Stearns

Also present for duration of appropriate items: Russell & Paula Higgins; Greg Stetson; Andrew Kellar; Jeffrey Christensen; Donna Crisp Duclos; Wendy McLeod; Robert Peters; John Lyons Andrew Guptill; and Lisa Meier, Secretary

The meeting was opened by Co-Chair Jon Warzocha at 7:02 p.m. at which time he distributed a Zoning Board of Adjustment Rules of Procedure.

Roll call was completed.

Public hearing: A request from Overlook Drive Solar, LLC for a Variance from Article V, Section B.1, B.3 of the Andover Zoning Ordinance to permit a ground based solar array and to permit a change in use where 50’ of frontage on a street is required. The property is Tax Map 11, Lot 554,572 and is in the Agricultural & Residential Zone

Warzocha opened the public hearing at 7:05 p.m. and Meier read the public hearing notice. Andrew Keller of NH Solar Garden stated they have been in New Hampshire over ten years and previously came before the Andover Planning Board regarding a community solar project. Keller indicated that test pits have been completed along with Phase I ESA (Environmental Site Assessment). Keller also indicated they have a completed Site Plan Review application for the Planning Board. Warzocha asked Keller if he is representing the project and is he the agent of the company owner and Keller replied yes to both questions. Keller indicated that this property was previously utilized as a gravel pit and has easement access due to no road frontage and stated that this type of request is a perfect example of why there is a variance available. Warzocha responded that solar is not a permitted use. Keller reviewed all five criteria for the Variance:

1. The variance will not be contrary to the public interest. This would not alter the essential character of the neighborhood as it is a back lot which will be screened from view of residences along Overlook Avenue. The lot was previously a gravel pit, which is a greater burden on the land that a solar farm. The lot north of the property supports an industrial use and other properties in the neighborhood are more heavily used such as CWS Fence and Guardrail and the decommissioned town landfill. The requested will not threaten the public health, safety, or welfare of Andover; in fact, as a renewable energy generator, the proposed use will contribute to cleaner air and generate energy for Andover without increasing noise or pollution as other types of energy generation would. Although the lot has no frontage along a public street, it does have access over a right-of-way and the use of a Solar Farm will not result in any significant increase in traffic to the area. A Solar Farm is a passive use of the property, less intense, less burdensome, with less noise and less smell than agricultural and farming uses which are permitted as of right in the AR Zone. Therefore, neither the change of use nor the lack of frontage will be contrary to the public interest.
2. The spirit of the ordinance is observed by granting the variances. The requirement that the variance not be “contrary to the public interest” is “related to the requirement that the variance be consistent with the spirit of the Zoning Ordinance,” Malachy Glen, 155 NH at 105. For the reasons discussed above, allowing a Solar Farm on the property would observe the spirit of the Ordinance. The variance would allow for the property to be used for its highest and best use, i.e., as a renewable energy system, in a way advantageous to the applicant, the environment, and the general public and without any burden or detriment to any neighbor the town or the public at large. Furthermore, the Solar Farm is a relatively passive use compared to several of the uses permitted as of right in the AR District. These uses include general farming and agricultural uses including horticulture, dairying, livestock, and poultry farming, and accessory uses and buildings. A solar farm is, functionally, similar to a greenhouse, although requiring less activity for use and maintenance. It is not contrary to the spirit of the Ordinance to allow a use that is similar to, but less intensive and less burdensome, than the expressly permitted uses. Moreover, Article I.C expressly recognizes that encouraging the use of solar is one of the purposes of the Ordinance. A use consistent with the express purpose of the Ordinance cannot be contrary to the spirit of the Ordinance.
3. Substantial justice will be done by granting the Variance. The “substantial justice” element of a variance is guided by two rules; that any loss to the individual is not outweighed by a gain to the general is an injustice, and whether the proposed development is consistent with the area’s present use. Malachy Glen, 155 NH at 109. As noted above, granting this variance will allow for the upgrade and improvements of the property in a way most beneficial to the applicant and to the public at large. Denying the variance, on the other hand, would be detrimental to the applicant and the public. It would harm the applicant by denying a reasonable use of the property, preventing the beneficial increase in value of the property and associated tax base. While solar farms are not expressly permitted in the AR Zone, larger building such as those used for dairying and poultry farming are permitted. As an accessory use to these buildings, the solar farm could be mounted to the roof of a building used for farming if built on the property. Further, Andover would be harmed by preventing the generation of renewable and less polluting energy, in line with the Ordinance’s stated purpose of “encouraging(ing) the installation and use of solar, wind, or other renewal energy systems.” The State has also recognized that solar energy systems are reasonable and that the installations of such systems “shall not be unreasonably limited by use of municipal zoning powers”. RSA 672:1,III-a. On the other hand, there is no benefit to the public in denying the application and preventing the improvement of the property. The solar farm will not produce any noise, smell, or hazard; result to any meaningful increase in traffic, or result in any of the other harms the Ordinance is designed to prevent. Nor is there any benefit to maintaining the property as a former gravel pit. The harm to the applicant of strict enforcement of the Ordinance will outweigh the nonexistent benefit to the public. Granting the variance will therefore result in substantial justice.
4. The values of surrounding properties will not be diminished. The proposed solar farm is consistent with the surrounding area and neighborhood. Although the use of the property will change from its current status of a former gravel pit, the use as a solar farm is a more desirable use than a gravel pit. Similarly, a solar farm is less likely to adversely impact its neighbors than many of the agricultural uses that are expressly permitted in the zone. There is no reason to believe that the solar farm will reduce the value of the surrounding properties.
5. Literal enforcement of the provisions of the Zoning Ordinance would result in an unnecessary hardship. Because of the special conditions of the property that distinguish it from other properties in the area, no fair and substantial relationship exists between the general public purposes of the Zoning Ordinance provision and the specific application of that provision to the property. The entire property is landlocked with no frontage on a public street. The topography of the site presents further challenges. As a result, it would be particularly difficult and impractical to develop the property for any of the expressly permitted uses of the AR Zone. On the other hand, the property is particularly well-suited for the proposed solar farm. The topography allows for more effective use of solar panels, and the fact that the property is already mostly cleared means that there would be little, if any, need to remove trees. The lack of frontage is similarly suitable. The solar farm, once constructed, does not require significant access. Most, if not all the uses expressly allowed as of right now in the AR Zone would involve greater increases in traffic than the solar farm. Further, the proposed solar farm supports the Ordinance’s express purpose of encouraging the installation of solar energy systems. The fact that, despite the express public purpose, no district expressly allows solar farms suggest that this omission is not indicative of an intent to exclude solar farms but instead merely that solar farms were no considered in drafting the Ordinance. Accordingly, there is no fair and unsubstantial relationship between the purposes of the Ordinance provision and their application to the property. The use of the property as a solar farm instead furthers one of the Ordinance’s stated purposes. B – The proposed ground based solar farm is a reasonable use – A landowner need not establish that a variance is “necessary” for a property’s use, only that the proposed use is reasonable given the particular conditions of the property. See Harborside Assocs., 162 NH at 519. “This factor, however, does not require the landowner to show that he or she has been deprived of all beneficial use of the land.” Harrington v Town of Warner, 152 NH 74, 80-81 (2005) (emphasis added). The question of whether the property can possibly be used differently from what the applicant has proposed is not a material consideration. Malachy Glen, 155 NH 15 108. Although a solar farm is not an expressly permitted use in the AR Zone, such use is similar to other permitted uses in the AR Zone such as a green house. As discussed earlier, a rooftop solar farm would be permitted in the AR Zone as an accessory use. Furthermore, the State has recognized that solar energy systems are reasonable and that the installation of such systems “shall not be unreasonably limited by use of municipal zoning powers”. RSA 672:1, III-a.

Dickinson asked if Keller is the owner or agent and the response was an agent to the landowner; however, the LLC will hold the project in place for twenty years. Dickinson asked Keller to elaborate on the groundwater issues and the response was there is contamination from the landfill; however, it does not harm it but does make the property suitable compared to having it as a residential property. Warzocha asked if there is groundwater management zone and the response was Keller will share the report. Dickinson asked what the foundation for the array would be and the response was either an earth screw or a W6 x 9 I-beam. Dickinson asked if there was an interconnection study done and the response was yes and it is due back by the 15th. Warzocha asked what the generation capacity is and the response was 1 megawatt. Dickinson asked if there was any discussion to sell power to NHEC and the response was it is all based on RSA’s as it is under state law. Dickinson asked if there were any fees for wheeling and the response was that they can charge the customer a fee. Dickinson asked if there has been any discussion with anyone in Andover yet and the response was not yet as this would be net metering and you are not allowed to double-dip. Dickinson asked about access to the site for emergency vehicles and Keller responded that they have been working with the town for access for all services to the site and that the pit is bermed; therefore, it would be contained in the event of a fire. Dickinson replied that the issue is the smoke and not containment. Keller stated that this needs to be addressed. Stetson stated that they had gone to another town when their solar panels were put on-line and that NHEC would have to turn the power off and direct them from there as to how to proceed and Dickinson stated that the Fire Department needs to understand this. Stetson asked Dickinson to provide documentation regarding toxicity. Warzocha stated that the board needed to deliberate the criteria. Dickinson asked about decommissioning at end-of-life mechanism and the response was the LLC is bonded and this would be handled at the Planning Board and landowner level. Stearns asked when the property was last used as a gravel pit and the response was a permit was found from 2013. Stearns asked how many acres there are and the response was the total acreage is 7.00 acres and of that, 2.60 acres will be disturbed. Stearns asked how often the location would be checked and the response was it is connected to the internet so an alert will go to the cellphone; otherwise, it would be check two to three times per year. Stearns asked how you get to the site and the response was all the way out Overlook Avenue and the applicant would be driving across their own property to get to this lt. Warzocha asked if it would be gated and have lights. The response was yes, it would be gates and no there would be no lighting. Stearns asked if a solar farm is an agricultural or commercial use and the response was the courts have not determined this; however, they are treating it as an agricultural use and it is an evolving area of law at this time. Warzocha states he has seen solar farms as commercial rather than agricultural in his dealings as an engineer. Dickinson stated this is a commercial power plant. Warzocha stated the property was previously used commercially but not for the last ten years and if this is commercial, a Variance would be needed. Warzocha opened the meeting up to public comment. Dickinson asked if the LLC has approached the town for a pilot and the response was yes. Warzocha asked if the property is in current use and the response was no. Warzocha stated that he failed to advise the applicant about a less than full board. Warzocha advised the applicant that as there is only a 4-member board present, the applicant can opt to hold out for a full 5-member board; however, if he decided to move forward with a 4-member board, if the application is denied, they could not ask for a rehearing based on not having a full 5-member board. The applicant opted to move forward with a 4-member board. Duclos stated that one of the Planning Board’s projects this year is a Solar Ordinance and asked if this project would impact the Zoning Ordinance. Warzocha responded that each application is independent of itself. Russell Higgins asked if this is a taxable entity and who would pay the taxes the LLC or landowner and the response was yes, it is taxable and the landowner would pay the taxes. Higgins asked who would pay for the extension of the road and the response was the agreement was the landowner preps the area and the town outs in a hammerhead. Higgins stated that he does not believe it is fair for the town to bear the cost of the upgrade and Warzocha replied that they don’t need the town to upgrade the road as there is an easement and there is sufficient access to do this project; it just gives the town the ability to do what the landowner already has the ability to do. Stetson stated that the town would get an easement; however, it has nothing to do with this project. Higgins stated that he believes this would change the nature of the community if the application is approved. Higgins stated that all abutters were not notified of this public hearing and indicated which abutters that is. Warzocha continued the public hearing at 8:13 p.m. due to needing to verify the abutter list. This application will get re-noticed after verifying the abutter list and the public hearing will be held August 16, 2022.

Approval of February 15, 2022 minutes

Stearns – motion to approve as amended

Dickinson – Second

Unanimous – vote to approve as amended

Approval of April 19, 2022 minutes

Stearns – motion to approve as amended

Dickinson – Second

Unanimous – vote to approve as amended

Approval of May 17, 2022 minutes

Stearns – motion to approve as amended

Warzocha – second

Unanimous – vote to approve as amended

There being no further discussion, the meeting was continued at 9:15 p.m.

Respectfully submitted,

Lisa Meier, Secretary

Andover Zoning Board of Adjustment