

THE STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY

CITY OF ROCHESTER  
ZONING BOARD OF ADJUSTMENT

**MOTION FOR REHEARING**

In re: One80 Solar, LLC  
68 Flagg Road, MLB 0262-0058 (David and Nancy Hussey)  
Case No. 2019-07

NOW COMES One80 Solar, LLC (hereinafter “movant”), a solar energy company proposing to develop a certain photovoltaic power station for the generation and distribution of electricity on land owned by David and Nancy Hussey located at 68 Flagg Road, Rochester, Strafford County, New Hampshire (hereinafter “Property”) and submits this Motion for Rehearing and in support thereof states as follows:

1. The movant submitted a Variance Application (hereinafter “Variance”) to the City of Rochester Zoning Board of Adjustment (hereinafter “Board” or “this Board”) from Article 42, Section 18.a of the City of Rochester Zoning Ordinance (hereinafter “Ordinance”) on or about March 20, 2019 to permit the installation and operation of photovoltaic arrays, equipment, and associated power station for the generation and distribution of electricity (hereinafter “Proposal”) on the Property.
  - a. Article 42, Section 18.a establishes the applicability of use regulations of properties within all zoning districts within the City of Rochester.
  - b. The Proposal is not specifically permitted under the Ordinance for any zone within the City of Rochester.
  - c. Additionally, the use that the Proposal most closely resembles (but is distinct from) is “utility-power generation” as defined under Ordinance Chapter

42.2.b.274. *See* Article 42, Section 18.h. Utility-power generation is not specifically permitted under the Ordinance for properties in agricultural zones.

*See* Table 18-D.

2. The Variance was considered at a public meeting by this Board on April 10, 2019.
3. Following the public meeting and Board deliberation, the Board denied the Variance at the meeting on April 10, 2019 on the grounds that the movant had not satisfied the hardship element required for variances per RSA 674:33.
4. Through this motion for rehearing, the movant respectfully requests this Board rehear the Variance because the Board did not sufficiently consider the unnecessary hardship created for the movant as a result of denying the Proposal on the Property, particularly when taking into account the unique nature and special conditions of the Property as evidenced by physical data of the Property. The movant requests this Board conclude that-- because of the conformity of the proposed use with the general public purposes of the Ordinance, the special conditions of the Property, and the reasonable nature of the proposed use—the Variance is appropriate and necessary for the movant to enable reasonable use of the Property.

#### **Variance Requirements of the Ordinance**

5. The City of Rochester adopts variance procedures articulated under RSA 644:13, per Ordinance Chapter 42.
6. Zoning boards of adjustment are authorized to authorize variances from zoning ordinances when applicants demonstrate: (1) the variance will not be contrary to the public interest; (2) the spirit of the ordinance is observed; (3) substantial justice is done; (4) the values of surrounding properties are not diminished; and (5) literal enforcement of

the provisions of the ordinance would result in unnecessary hardship.” RSA 674:33 (I)(2).

- a. The statute articulates “‘unnecessary hardship’ means that, owing to special conditions of the property that distinguish it from other properties in the area: (A) no fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and (B) the proposed use is a reasonable one.” RSA 674:33 (I)(2)(b)(1).

### **Property Facts**

7. The Property consists of a 20.55- acre vacant parcel of land with no structural improvements thereon.
8. According to city assessment records, the Property is located within an agricultural zone.
9. The Property has diverse topographical features including cleared vacant land; dense wooded areas; floodplains; wetlands; and is located within and among the Isinglass River, said river also bisecting and/or crossing the Property.
  - a. The portion of the Property upon which the Proposal shall be placed is a previously cleared, relatively flat portion of vacant land.
  - b. The cleared, relatively flat portion of the Property upon which the Proposal shall be placed is surrounded on all sides by dense, mature wooded areas.
  - c. The Property is surrounded on three (3) sides by the Isinglass River. Additionally, the Isinglass River runs through and/or bisects at least a portion of the Property.
  - d. The easterly, northerly, and northwesterly portions of the Property are within designated flood zones.

- e. The Property has a large area of wetlands, particularly on the easterly and northerly portions of the parcel.
10. Due to its unique placement among the Isinglass River, in the midst of wetlands, and within flood zones, the Property is subject to several protective restrictions, setbacks, and buffers, including but not limited to State of New Hampshire shoreline protection setbacks and wetlands setbacks.
- a. These additional restrictions, setbacks, and buffers significantly reduce building envelope(s) on the Property as these reductions appear on all sides of the Property.
  - b. Additionally, these restrictions, setbacks, and buffers limit the agricultural uses that may be carried out on the Property, particularly due to the presence of nearby water and other significant natural resources which may be negatively impacted by fertilizers and other agricultural sources and by-products.

**The Movant Satisfies the Requirements for a Variance Articulated by the Ordinance, Including Hardship**

11. This Board did not find issue with the movant's original application with regard to any requirement for a Variance articulated under the Ordinance with the exception of the hardship requirement at the public meeting of April 10, 2019.
- a. The movant incorporates the original application with respect to those satisfactory requirements for a variance into this appeal.
12. While there are no issues with the satisfactory requirements, the movant shall, for purposes of convenience, articulate the manner in which the Property satisfies each of the variance criteria.

*The Granting of the Variance Will Not be Contrary to the Public Interest*

13. To be contrary to the public interest, the variance must unduly, and in a marked degree, conflict with the ordinance such that it violates the Ordinance's basic zoning objectives. *Chester Rod & Gun Club v. Town of Chester*, 152 N.H. 577, 581 (2005).
  - a. One way to determine whether granting a variance would violate basic zoning objectives is to evaluate whether it would alter the essential character of the locality. *Id*; see also *Harrington v. Town of Warner*, 152 N.H. 74, 78 (2005).
  - b. Another approach to determining whether the variance would violate basic zoning objectives is to examine whether granting the variance would threaten the public health, safety or welfare. *Chester*, 152 N.H. at 581; see also *Harborside Associates, LP v. Parade Residence Hotel, LLC*, 162 N.H. 508, 515 (2011).
14. In this matter, the Variance is in harmony with the basic zoning objectives of the Ordinance and will not be contrary to the public interest for several reasons.
  - a. The approval of the Variance will encourage the Property to be utilized at its highest and best use.
    - i. The Property is currently a vacant lot of land, accessible only by a gravel access way, with diverse topographical features due to its unique physical location. The Proposal will allow the Property to be used in a productive and profitable manner without additional clearing or invasive physical alteration of the Property's land.
    - ii. Additionally, the City of Rochester will receive additional tax revenue from the Property as a result of the Proposal without any significant or noteworthy visual change to the Property from its current form.

- iii. In this way, the approval of the Variance shall ensure highest and best use of the Property as well as the best interests of the movant, property owner, surrounding property owners and abutters, and the general public.
- b. The Variance is in harmony with the basic zoning objectives of the Ordinance because the Proposal shall in no way alter the essential character of the locality.
  - i. Because the Proposal will not require additional clearing or invasive alteration of the land of the Property, and the Proposal arrays and associated equipment shall be placed on the previously cleared portion of the Property surrounded on all sides by mature wooded areas, the Property shall appear to the surrounding area to be in the same form as it currently exists.
  - ii. Additionally, following installation, the Proposal shall require minimal amounts of upkeep and maintenance. The arrays and equipment associated with the Proposal are more or less silent when in operation.
    - 1. This means that the surrounding public will not face negative impacts on traffic, noise, water usage, sewage, parking, lighting, or any related nuisance for the duration of the Proposal.
  - iii. The arrays and equipment associated with the Proposal have a very low profile, resulting in minimal impact to airspace and the surrounding environment, and are entirely non-toxic with no negative side effects to the environment or surrounding area.
- c. The Variance shall not threaten the public health, safety, or welfare.

i. The Proposal will offer a new, alternative, safe, clean energy source for the surrounding areas which will benefit the public interest.

1. In the short term and the long term, the photovoltaic arrays will allow the surrounding areas to reduce reliance on traditional energy sources and reduce negative environmental impacts.

ii. Further, the arrays and equipment associated with the Proposal create no toxic or negative side effects to the environment or surrounding areas.

iii. Additionally, the Proposal does not threaten health, safety, or welfare because the specific location of the arrays and all associated equipment of the Proposal shall be contained securely by a six (6) foot high chain fence with gate, in addition to the natural barriers created by the physical features of the Property like the mature wooded surroundings and the Isinglass River.

15. In sum, the Variance will not be contrary to the public interest because it will enable the Property to be utilized to a highest and best use; is in harmony with the basic zoning objectives of the Ordinance; and shall in no way threaten the public health, safety, or welfare.

***The Granting of the Variance is Not Contrary to the Spirit and Intent of the Ordinance***

16. 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 ordinance." *Chester Rod & Gun Club v. Town of Chester*, 152 N.H. 577, 580 (2005).

a. "The public interests are protected by standards which prohibit the granting of a variance inconsistent with the purpose and intent of the ordinance, which require

that variances be consistent with the spirit of the ordinance, or which permit only variances that are in the public interest." *Id.* at 581; *Nine A, LLC v Town of Chesterfield*, 157 NH 361, 366 (2008).

17. The Variance is not contrary to the spirit of the Ordinance primarily because the Variance is consistent with the public interest. All previously stated reasons for the Variance being consistent with the public interest within this document are incorporated hereinto this section for purposes of this evaluation.

18. Additionally, the Variance will not be contrary to the spirit and intent of the Ordinance because the proposed Variance works to further the objectives and purpose of the Ordinance as articulated under Chapter 42.1.

a. Specifically, the Proposal shall contribute to:

- i. Preservation and enhancement of the value of land and buildings;
- ii. Fostering of economic development and opportunities for business growth;
- iii. Conservation of natural resources;
- iv. Preservation of the City's rural character and scenic beauty;
- v. Fostering the creation and preservation of wooded areas and open spaces;
- vi. Encouragement of innovation and flexibility in the development of land;
- vii. Recognition and respect of the rights of property owners to enjoy and develop property to highest and best use;
- viii. Prevention of overcrowding and overdevelopment of land;
- ix. Creation and facilitation of adequate infrastructure and utilities, and create alternative options for energy and utilities;



- x. Enhancement of the sense of community by creating locally generated power that benefits the local and surrounding community; and
- xi. Making Rochester a more attractive, vibrant, and healthy community for its residents, businesses, property owners, and visitors by encouraging and making available innovative, alternate, and technologically advanced energy sources.

See Ordinance Chapter 42.1.c.

19. Furthermore, the Variance will not be contrary to the spirit and intent of the Ordinance because the Proposal works to further the objectives of agricultural districts as specifically articulated under Ordinance Chapter 42.5.d.

- a. Under this section, the Ordinance is clear that the objectives of agricultural districts are to:
  - i. Preserve the rural character of outlying areas of the city;
  - ii. Maintain natural and scenic qualities embodied in forests, fields, wetlands, streams, and ponds;
  - iii. Promote the preservation of open space;
  - iv. Preserve and promote agricultural activity; and
  - v. Permit the establishment of recreational, resort, and tourism facilities based upon natural and cultural resources.
- b. The Proposal satisfies all these objectives because:
  - i. Construction of the Proposal requires no additional excavation or clearing of the Property;

- ii. The arrays and equipment associated with the Proposal will have a lower profile and less impact on air space and ground disturbance than a building or other permitted structure on the Property;
  - iii. The Proposal shall produce no noise or audible environmental pollution;
  - iv. The Proposal will encourage the preservation and continued non-disturbance of forests, vegetation, open space, and wetlands existing on the Property; and
  - v. The Proposal shall produce no permanent impacts on the Property, in contrast with any other potential development of the Property.
20. In sum, the Proposal is consistent with the public interest and the spirit and intent of the Ordinance.

***The Approval of the Variance Shall Result in Substantial Justice***

21. The New Hampshire Supreme Court has held that as to the substantial justice prong of variances, “the only guiding rule on this factor is that any loss to the individual that is not outweighed by a gain to the general public is an injustice.” *Malachy Glen Associates, Inc. v Town of Chichester*, 155 N.H. 102, 109 (2007). If the general public would realize no appreciable gain from a denial of the Variance, that would be an injustice. *Id*; see also *Lone Pine Hunters’ Club v. Town of Hollis*, 149 N.H. 668, 670 (2003).
22. In this matter, the denial of the Variance would create a harm to the movant that far outweighs any potential benefit of the public.
- a. A denial of the Variance would prevent the movant from being able to utilize the Property to a highest and best use while maintaining the unique topography and physical features of the Property.

- b. The Property, due to its unique topography, orientation, and location, has a restricted building envelope that would be difficult to accommodate alternate construction and/or structures without significantly disturbing the existing features of the Property, creating noticeable impact on the surrounding area, and imposing great cost and expense on the movant and/or property owners.

23. Additionally, denial of the Variance would not yield a gain to the general public.

- a. Denial of the Variance would eliminate the ability of the general public to access and/or benefit from alternate energy sources; namely, photovoltaic solar energy.
- b. Denial of the Variance would likely cause the Property to be developed in a more intrusive manner permitted by right—such as land development and/or construction of building(s)—than the Proposal, resulting in permanent alteration of the Property that would likely impact the surrounding area to a far greater degree.
- c. The Proposal would allow the Property to visually remain, more or less, in its existing state, and therefore would continue to enhance the surrounding area.
- d. Generally, the Proposal poses no risk, threat, or inconvenience to the general public, and therefore the general public would realize no appreciable gain in denying the Variance.

24. As the movant would suffer measurable loss and the public would realize no appreciable gain by the denial of the Variance, substantial justice is served through the granting of the Variance.

***Surrounding Property Values Will Not Diminish as a Result of the Granting of the Variance***

25. Zoning boards, when considering variance applications, must consider whether the granting of the variance would diminish the values of surrounding properties. RSA 674:33, I (a) (2) (D).

26. In this matter, the granting of the Variance would not diminish the values of surrounding properties because the Proposal would be unobtrusive to surrounding properties; would maintain the existing condition of the Property; and would impose no risk to the general public or surrounding property owners.

- a. Values of surrounding properties will not diminish as a result of the granting of the Variance because the arrays and equipment associated with the Proposal would be located on the already cleared portion of the Property and—due to the inherently low profile of the proposed arrays and equipment-- would be entirely surrounded by a secure six (6) foot high fence with gate and mature wooded areas, effectively shielded from view, and separated from many of the abutting parcels by the Isinglass River.
- b. No additional clearing or land development of the Property is required to facilitate the installation and/or operation of the Proposal.
- c. The Proposal bear no risk to the general public or surrounding property owners because the proposed arrays and equipment associated with the Proposal are inherently environmentally friendly; will create no noise or emissions; shall be contained in a secure site restricted by a fence and reinforced by the existing mature wooded areas and other natural features of the Property; and shall be designed to mitigate any stormwater runoff.

27. Additionally, granting the Variance ensures that the proposed arrays and equipment associated with the Proposal erected on the Property are cohesive and unobtrusive to the surrounding properties—resulting in no negative impact to surrounding property values-- whereas alternative structures or improvements on the Property that could be erected by right may pose risk to or negative impact on surrounding property values.
28. In general, the granting of the Variance would not diminish surrounding property values, and would serve to at least maintain, if not raise, surrounding property values.

***Literal Enforcement of the Provisions of the Ordinance and Refusal of the Variance Would Result in Unnecessary Hardship to the Movant.***

29. RSA 674:33 (I)(2) articulates “‘unnecessary hardship’ means that, owing to special conditions of the property that distinguish it from other properties in the area: (A) no fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and (B) the proposed use is a reasonable one. RSA 674:33 (I)(2)(b)(1).
30. In this matter, the Property has special conditions that distinguish it from other properties in the area and make it unique in its surroundings. See *Malachy Glen Associates, Inc*, 155 N.H. at 107.
- a. The Property has unique physical and topographical features that are distinct and special from surrounding properties.
    - i. All previous assertions with regards to the special conditions and unique qualities of the Property within this document are incorporated herein for purposes of this criteria.
    - ii. The 20.55-acres that make up the Property boast a special variety of natural features unique to the area, and consists of cleared open space;

dense wooded areas; floodplains; wetlands; and is located within and among the Isinglass River, said River also bisecting the Property.

- iii. The easterly side of the Property is in close proximity to the vibrant commercial area with many commercial businesses, structures, and uses along NH Route 125, a major state highway in New Hampshire. Additional commercial uses and areas are also located directly to the north, west, and south of the Property.
- iv. The location of the Property is also in close proximity to significant residential developments, particularly on the westerly and southerly side of the Property; although residential development surrounds the Property to at least some degree on all sides.
- v. In essence, the Property is, more or less, a natural respite with diverse physical features quintessential of New Hampshire lying within and amongst significant commercial and residential development. For these reasons, it is clear the Property is unique and special in its surroundings.

31. Due to these special conditions of the Property, no fair and substantial relationship exists between the general public purposes of the Ordinance provision and the specific application to the Property.

- a. All previous assertions with regards to the general public purposes of the Ordinance are incorporated herein for purposes of this criteria.
- b. The general public purposes of the Ordinance articulated under Chapter 42.1 aim to preserve the natural beauty of Rochester while encouraging economic

development, sustainable and innovative progress, and fostering a sense of community and community pride in the City.

- c. The specific public purposes of the Ordinance with regard to agricultural zones as articulated under Chapter 42.5.d aim to maintain the natural beauty of the rural, outlying areas of the City and to encourage appropriate development in these areas.
- d. Because photovoltaic solar energy and related forms of solar energy are relatively new technologies, the Ordinance does not address solar energy or consider the cohesiveness of solar energy with regards to the articulated purposes of the Ordinance. However, despite the lack of mention of solar energy within the Ordinance, solar energy solutions like the Proposal satisfy all of the above-described purposes and objectives of the Ordinance in maintaining Rochester's beauty, encouraging and fostering beneficial development, and creating a vibrant and sustainable community.
- e. The unique topography and natural features of the Property shall be almost entirely preserved through the Proposal in a safe, financially beneficial, publicly responsible manner. Such a use is undoubtedly well within the general public purposes of the Ordinance as well as the specific purposes for agricultural zones.
- f. Furthermore, the refusal of the Variance would likely lead to alternate use and/or development of the Property currently permitted under the Ordinance by right that would be far less cohesive with the overall objectives of the Ordinance as the Proposal.

- g. In essence, it is clear that due to these special conditions of the Property, no fair and substantial relationship exists between the general public purposes of the Ordinance provision and the specific application to the Property.

32. Additionally, the Proposal is a reasonable use of the Property.

- a. Whether a proposed use is reasonable does not require the landowner or movant to show that he or she has been deprived of all beneficial use of the land. Rather, this analysis must be applied consistent with New Hampshire case law policy of being “more considerate to the constitutional right to enjoy property.” See Harrington, 152 N.H. at 80-81.
- b. In this matter, the Proposal is a reasonable use of the Property because it is appropriate for the existing condition, topographical features, and location of the Property.
- c. Additionally, the proposed use is reasonable because it enables the movant and property owners to enjoy the Property and utilize the Property to a highest and best use while maintaining the natural beauty and features of the Property, which is of great importance to the movant, property owners, abutters, and general public.
- d. Further, the proposed use is reasonable because it accomplishes the general objectives and purpose of the Ordinance together with the specific objectives and purpose of the Ordinance as to agricultural zones.

33. For these reasons, literal enforcement of the provisions of the Ordinance and refusal of the Variance would result in unnecessary hardship to the movant.




34. The movant reserves the right to amend, modify, and supplement this Motion for Rehearing up until thirty (30) days after the issuance of a written decision pursuant to RSA 677:2 and/or at or before the hearing thereon.

WHEREFORE, the movant respectfully requests this Honorable Board grant a rehearing in this matter.

Respectfully submitted,  
One80 Solar, LLC

By Its Attorneys:  
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Dated: May 10, 2019

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