TOWN OF KIRKWOOD
ZONING BOARD OF APPEALS
March 28, 2024

A Zoning Board of Appeals meeting was held on March 28, 2024 at 7:00 p.m. at the Joseph A. Griffin Town Hall on the Appeal of an Interpretation issued by the Town of Kirkwood Code Enforcement Office by Norbut Solar Farm, LLC regarding property located at 165 Foley Road in the Town of Kirkwood known as Tax Map No. 147.00-1-2.11 and located in an Agricultural/Rural Residence and Resident 1 Zoning Districts.

Present:	Duane Travis, Chairman	Chad Moran
	Mike Maciak, Member	Gina Middleton
	Marc Latini, Member	
Absent:	Bruce Nemcek, Member	

Chairman Travis called the meeting to order at 7:00 pm.

Chairman Travis explained this is an informational session only, there will be an open public hearing on April 15, 2024 on the interpretation itself. The audience will not be able to ask questions or interject any comments at this time.

APPROVAL OF MINUTES:

Motion by Mike Maciak and seconded by Marc Latini to approve the minutes of the November 20 2023 meeting as submitted. All voted in favor. Motion carried.

Ms. Middleton explained this is subject to a public hearing, which will be April 15, 2024. After that public hearing the actual interpretation will occur. Tonight, the board will hear arguments from both sides and will have an opportunity to review in between meetings. The public will also have the opportunity to review any information, ask any questions they have. After that an interpretation will be made.

Ms. Middleton further explained we are here based on an appeal of the interpretation of the Code Enforcement Officer relating to Section 304 of the Zoning Code. Section 304 states where a district boundary line divides a lot the regulations for either portion of the lot may, at the owner's discretion, extend to the entire lot, but not more than 25 feet beyond the boundary line of the district. The issue here is in the appeal to the interpretation, Norbut Solar Farm asked for an area variance to vary that 25-foot provision to request an extension via the area variance. That provision is not subject to an area variance because it is not a physical or dimensional requirement of the zoning code. Norbut appealed that determination and is asking the Zoning Board of Appeals to overturn that and allow the area variance application.

Ashley Champion, an attorney with Norbut Solar Farm addressed the board. Ms. Champion explained this process is a data overview, meaning this board should be viewing whether or not this provision is subject to an area variance or a use variance regardless of the Code Officer's interpretation. You are looking at it like a first instance, your best judgement as to whether or not the area variance is an appropriate mechanism. Ms. Middleton commented it is an overview but they can still consider his interpretation but basing it more off the evidence as they view it.

Ms. Champion showed the Board members the site plan map showing the lot designation split from agricultural to residential zoning. It shows the panels on the agricultural property and the utilities on the residential.

Ms. Champion explained this is not a proceeding whether or not the variance is appropriate, whether or not they have met the standards for a variance or if a variance should be granted. There is also a special permit process with the Planning Board where they are the final arbiters if solar is appropriate at this site. Many processes have to be completed first with several boards and Broome County is involved. That is not what they are asking for now, no approval to move forward. They are trying to understand the appropriate process by which the application may proceed.

Ms. Champion reviewed Section 304 of the Zoning Code. This lot would be subject to that provision, it is a split lot. There are many of these kinds of lots within the Town of Kirkwood. It allows a property owner to slide the applicable zoning regulations that apply to one part of the lot to the rest of the lot, at a maximum of 25 feet. The owner may, at their discretion, extend the entire lot, the regulations for either portion, but not more than 25 feet beyond the boundary line of the district. They have applied for an area variance to extend the 25-foot limitation. Whether it is by 1 foot or 1000 feet the issue is can you extend that 25-foot limitation by area variance. The Town Attorney and the Code Officer are saying no, you need a use variance because what you are asking to do is to construct solar in a residential zone. In the actual relief they are requesting, which is an extension of that 25 feet, they don't need, anywhere in this appeal, the word solar to be mentioned. They are not looking for approval of a solar project on residential land, they are not looking for approval of a solar project period. They are looking for this board to say yes, the district regulations that apply in the agricultural zone may be applied in the residential portion of this split zoned property beyond the 25-foot limit.

Ms. Champion explained that the Town Attorney has focused on the fact that yes, the provision says 25-feet but it clearly isn't subject to an area variance because it isn't a requirement, the owner has the right to extend the property up to 25 feet, they don't have to would be the inverse. That is their analogy of other scenarios in the code that are called "you must" or "at least" type of provisions, a requirement. The must dos are a requirement of an area variance. Then there are the "at most" or "you may" types of limitations. You may extend the regulations of the split zoning of a parcel up to 25 feet, you don't have to at the owner's discretion. In order to vary any of those "you may" maximum upward thresholds, the area variance is the appropriate mechanism. You wouldn't say because you may construct a two-story home and you want to construct a three-story home that you need a use variance because it is at the owner's discretion whether or not to construct a two-story so it is not a requirement subject to review under the area variance standards. Their situation is the same, when the Town Attorney says it is not a requirement because it is at the owner's discretion, it is in line with half of the area requirements under any zoning code which again are those where you may reach a maximum amount, an upward limitation, not that you must need a requirement minimum.

Ms. Champion explained that the code says the owner may have discretion applied regulations from one portion of the split zoned parcel to the entire lot but not more than 25 feet. It seems that the legislative intent was to allow wholesome development on the entire lot and then there is the 25-foot threshold. They took a look at the parcels in the town, dozens of them, there were maybe a handful where that scenario would ever come to fruition, where you have an entire lot and the 25-foot threshold meeting together where there would be a fulsome way to the intent of what they believe the statue to be. They aren't relying on that point, it is just an aside. The primary issue is that the 25-foot requirement is a requirement, you can only step into the lot 25 feet, they are looking for an extension of that. They aren't looking for permission to operate a solar farm in a residential zone, they are looking for the application of the neighboring agricultural zone to be extended.

Ms. Champion reviewed in length, the Wen Mei Lu v. City of Saratoga Springs case regarding a dog kennel, which is included in their appeal and included in the file. She stated that case and this project are the same scenario, split zoned. Dog kennels were permitted in one zone, not permitted in the other. The kennels was constructed on the parcel that permitted them but the accessory structures that supported the kennel, the parking lot and the access road were constructed on the portion of the property where dog kennels were not permitted.

The ZBA said that was ok, there was a lawsuit and the court agreed, these are accessory structures to the kennel. The kennel itself is located in the appropriate zone of the split lot, it makes sense to be able to access and to have the supporting structures on the other portion of the parcel, notwithstanding it is beyond the split zoned lot and most of the extension lines. Even if this board does not deem it appropriate to apply an area variance, they haven't applied for the area variance, it is just what is the appropriate process here, that case says you don't even need to. The Board has the discretion in its judgement to say all principle structures are on the appropriate zone, all the solar generation equipment is located on the AR zoned property. They have an access drive and utility poles that are in the residential zoned. Driveways and utility poles are permitted in residential zones, which is what was said in the kennel case. None of the solar project, everything within the fence line, the panels, the solar generation infrastructure will be on the agricultural zoned land. It will just be utility poles and the driveway that will be in the residential zoned.

Mike Maciak asked who would own the poles and Ms. Champion explained the applicant pays for all the poles but NYSEG owns some of them and the applicant owns some of them. NYSEG ultimately has control of the facilities.

Ms. Middleton explained that the Town did submit a response letter and copies are available if anyone would like to see it and there is a response letter from the Code Enforcement Officer regarding the appeal that is available.

Ms. Middleton explained in regard to the area variance issue with respect to Section 304, the "you may" issue, yes, it is discretionary, with the most obvious difference being that if I am constructing a two-story residence and I want to do a three-story residence I am still constructing a residential premise. Inherently at the base of the concept it doesn't alter the underlying use of the property, the permitted use, which is the purpose of the zoning.

Ms. Middleton stated Town Law § 267 defines a use variance as an authorization by the zoning board of appeals for the use of land for a purpose which is otherwise not allowed or is prohibited by the applicable zoning regulations. In contrast, an area variance is also defined as an authorization by the zoning board of appeals for the use of land in a manner that is not allowed by the dimensional or physical requirements of the applicable zoning regulations. The inherent difference being an area variance is going to be a variance from a dimensional or physical requirement and it is not going to alter the underlying use of the property.

Ms. Middleton explained that from the Town's perspective, in terms of first off being a requirement, there are other items within the zoning code that do allow for some discretion. You may build up to two-stories, you can do only one. However, if you are getting a variance on that piece the underlying use of the property is going to remain residential, it isn't going to allow you to then construct a three-story commercial premise on a residential property. More detail is outlined in the Town's response which is included in the file.

Ms. Middleton went on to say in this instance by allowing or by deciding to do an area variance, if the Zoning Board allowed that, it would allow a commercial use that would not otherwise be allowed on about 1000 feet of a property, that is overwise specifically prohibited by the zoning code. That is the difference and that is the primary crux of the issue between Norbut and the Town with the interpretation issue.

Ms. Champion commented that she sees what Ms. Middleton is saying, the two-stories to three-stories doesn't allow commercial development instead of a residential development but there is a little bit of where they are conflating that beyond 25 feet allows us to do something that is not otherwise contemplated. The provision allows the uses, that would not otherwise be appropriate in one zoning district to be allowable in that zoning district based on an extension of that neighboring zoning district. Uses that were not otherwise being permitted

in a residential zoning district but are permitted in a neighboring portion of the same split lot, the ag district, are with provision 304, now permitted in the residential zoning district. The town code permits ag zoning to apply to the residential portion of the district for up to 25 feet. In that 25 feet, things that are permitted in the ag district that wouldn't overwise be permitted in a residential district are permitted. It is moving the district boundary. It isn't saying you now have the right to use the residential portion of the property in a way that you don't otherwise have the right. They are looking to extend the 25-foot dimensional requirement, under the mechanism that already exists in your code. Chad Moran asked how much further and Ms. Champion stated 1000 feet.

Ms. Middleton commented she understands but doesn't agree with that. The underline difference is every other zoning extension and every other provision is going to not extend an otherwise not allowable use or extend that boundary in a matter that effectively allows the use that would not otherwise be allowed. Ms. Champion asked isn't that what Section 304 does and Ms. Middleton stated she agrees Section 304 extends it to 25 feet and that it explicitly stops at 25 feet.

Ms. Middleton explained that the district boundary line provides specific limits to more than 25 feet. In terms of statutory interpretation, it seems fairly clear that this was very expressly limited to not more than 25 feet. It was very clear and there was an argument on interpretation, because of the way it is applied in the Town of Kirkwood that it essentially rendered it useless or meaningless based on a few of properties that it would apply because it stops at that 25 feet. From our point, rendering a statute meaningless, dictionary definition meaning it doesn't apply to anything. Here it is very clear that there are provisions of the property, pieces of properties within the Town of Kirkwood to which it would still apply. In terms of statutory interpretation, it is our position that we wouldn't even get to the issue of whether it is meaningless because the language is clear, it is unambiguous, there is no ambiguity to look at.

Ms. Middleton explained lastly, she does agree with the case law that was discussed, what it essentially says. But that one was up to the Zoning Board interpretation and it is up to your discretion as to whether you choose to extend it in the manner that it is being discussed in that case. By extending, we would be contradicting zoning that prohibits commercial use on a residential property, which is one of the primary purposes of the zoning. The extent to which the uses would be extended would be more substantial in that particular case because that case was part of the parking lot and part of a driveway. The court noted specifically that is a small area and in this instance one of the big issues is an installation of several utility poles which are more substantial than just a singular driveway or a couple of parking spaces.

Ms. Middleton commented that the letters have more details and if the board has any questions she will be prepared to answer them at the next meeting.

Ms. Champion reiterate the request they are making, they are not looking for an analysis or a decision from the Board as to whether or not this is an appropriate use of the land.

Chad Moran asked if the pole removal was part of the decommissioning plan and Ms. Champion explained yes, if there was no utility for them, if NYSEG doesn't need them for some other purpose in the area, then yes. There may be some utility infrastructure that NYSEG does not want removed. Also, a driveway may be left.

Motion by Marc Latini and seconded by Mike Maciak to schedule a public hearing for April 15, 2024 at 7 PM.

Roll Call Vote:	Marc Latini	Yes
	Mike Maciak	Yes
	Duane Travis	Yes

Motion Carried.

Motion by Mike Maciak and seconded by Marc Latini to adjourn the meeting. The meeting was adjourned at 7:40 pm.

Respectfully Submitted,

Mary Kay Sullivan, Secretary
Zoning Board of Appeals