

**Minutes of Meeting
Zoning Board of Appeals
Whately Town Offices
Whately
May 2, 2017**

Members Present: Roger Lipton, Debra Carney, Bob Smith

Members Absent: Kristin Vevon, Fred Orloski (alternate)

Staff Present: Mary McCarthy, Secretary

Attending: Frank Gromaski, 187 Christian Ln.; Bob Clogston, 317 State Rd.; Brian Grybko, 213 Christian Ln.; Bill Orloski, 214 Christian Ln.; Betty Orloski, 192 River Rd.; Richard Tillberg, 192 River Rd.; Gary Grybko, Dan Denehy, Richard Korpiewski, 19 State Rd.; Joseph Liseno, 197 River Rd.; James M. Pasiecznik, 207 River Rd.; Kelley Pike, SVE Associates, 439 West River Rd., Brattleboro; Alan Seewald, Attorney for Long Plain Solar, 71 King St., Northampton; Julie Beauchemin, Nexamp, 4 Liberty Sq., Boston; Chris Clark, Nexamp, 4 Liberty Sq., Boston

Public Hearing, Long Plain Solar, LLC (continued from April 6, 2017:

Special Permit application for a 2,595 kW Large Ground-Mounted Solar Facility to be developed by Nexamp, Inc. and constructed on premises located off Christian Lane (Map: 21, Parcel: 15) and owned by Scott Hutkoski and Wayne Hutkoski of Whately.

The meeting was not recorded.

Roger opened the hearing at 6:45pm.

Roger noted that the board had held a site viewing on April 15, 2017, and that several participants had attended. He noted that when the board had visited the site, he found the location to be farther back from the road than he had expected. Kelley Pike, of the engineering firm SVE Associates, explained that since the viewing her company has extended the length of the planned arborvitae screen.

In answer to questions, Julie Beauchemin, of Nexamp, said that the anchor tenant is unknown at this time, but will be either the town or “a large off-taker”. Regarding net metering credits, she said that if a customer’s electric bill is \$100 per month, the customer will be offered a \$100 gift card for the price of \$85. Customers will be able to sign up for the offer until the project is fully subscribed, she said. Customers will not be limited to residents of Whately, but will include “any residents within the territory of Eversource West”, she said, adding that the company plans to reach out to the Whately Town Administrator and the Planning Board to inform town residents. Asked to estimate

how many homes the project will serve, Ms. Beauchemin replied that this is a 2 mW project, with a 1 mW anchor tenant, and that residents would be expected to use about 5-7 kW. Once the project is fully subscribed, she said, residents will be able to tap into other Nexamp projects in the area.

When asked why there would be no priority for Whately residents for the first 3 to 6 months, the board was told that 3 to 6 months would probably be too long, but that Nexamp would consider a shorter “Whately first” subscription period that could be made binding as a condition of approval. It was noted that after the granting of the required permits and approvals, 2 to 5 months is a normal subscription time.

Richard Korpiewski asked how long a time the customer contracts would lock in, and was told that the company would ask for 6 months’ notice, and that this could be provided in writing. Gary Grybko asked how residents can subscribe to something that has not yet been built, and was told that Nexamp can get financing part way through the construction phase.

Richard Tillburg noted that he’d thought each Whately resident would get 15% off his or her monthly electric bill, but has just learned that the discount will work differently. He asked for a written explanation of how, exactly, it would work. Board member Bob Smith explained that the discount arrangement is explained on the website, www.nexamp.com., and a representative of Nexamp referred attendees to another part of the Nexamp site, www.solarizemybill.com. The representative noted that Nexamp will own the system for 20 years, but that it may last for 40 years.

Attorney Alan Seewald addressed the function of the ZBA’s special permit hearing, noting that the board can only deny the project for reasons of welfare, health, and safety. The Planning Board’s site plan review, he said, is where the process is tweaked, and the minutiae are fine-tuned. He cautioned the ZBA not to potentially put itself in conflict with the Planning Board. ZBA member Bob Smith concurred, explaining that the ZBA decides on *use* – meaning it decides on whether the property in question can be *used* as planned according to the town bylaws.

Attorney Shannon Leland, representing Jane Grybko, read from bylaw section 171-31 and then asked whether this project can go forward *without* adversely affecting the area. She said that the words, “unreasonably regulated” are key here, and that there are many other things that must be considered – not just health, safety, and welfare. She argued that although there is no list of items that can be reasonably regulated, this means that *any* item of reasonable regulation is allowed for solar plant development. The environment must be considered in these cases, she said. She argued that frontage should be considered since this project is made of 8,000 structures (the solar panels) so the dimensional requirements must be satisfied. The only way around this is a variance, she said – it is not part of the special permit process. She ended by saying that there are significant adverse effects to this scenic, agricultural, and wildlife-rich area, and said it is wrong to ask the ZBA to approve the project and let the Planning Board work out the details later.

Attorney Lesser addressed Chapter 40A Section 3 (solar) versus Chapter 40A Section ____ (religious). He noted that the religious section has a list of reasons for denial and so is more restrictive than Section 3 (solar), which states that solar projects can only be stopped for reasons of health, safety, and welfare. He noted that Nexamp has offered Jane Grybko a green vinyl fence as a visual screen, and will use a screen of 15-ft arborvitaes to screen the project from the neighbors. He stated that the project meets all 5 pages of the standards, and that the area is zoned to allow this use. He noted that there are zones in Whately where such a project is not allowed, but that it is allowed in this area and therefore the board should grant it. Attorney Shannon commented that it is only allowed with a special permit, which can only be granted if there is not to be significant impact.

Gary Grybko asked about the driveway, which Nexamp said will be 3-ft off the property line. Brian Grybko submitted a photo showing the line at his property, saying there is bound to be encroachment and that there should be at least 7-ft between the property line and the driveway. Roger noted that bylaw dimensional limitations do not address setbacks from property lines.

Roger paused to summarize, then added that the board would accept a petition from Whately residents provided the attorneys for Nexamp and Long Plain Solar LLC did not object to it. Richard Tillburg submitted the petition, which he said bore 55 signatures. Roger noted that there may not be a precedent for submission of a petition at a ZBA hearing, and gave the text to the Nexamp attorney to review in case there was any objection. The board reviewed the petition as well, and the secretary made several copies available to the attendees. Everyone who asked for a copy received one. Mr. Tillberg stated that the petitioners are not asking for a denial, but are asking for the ZBA to make Nexamp satisfy the requirements of a special permit for the project. He said they wanted the project to be made as compatible as possible, noting that the petitioners would certainly consider other ideas for achieving this. He then read the petition aloud.

The petition described the idea of using a berm with plantings on top, instead of a fence, to provide a more natural visual screen. Kelley Pike, of SVE Associates, objected, stating that a berm would change the entire hydrology and would impact drainage. She described pipe installation that would be required to fix the resulting drainage problem. Brian and Jane Grybko stated that the water does not drain from their property. Richard Tillberg commented that the petition requests that the town hire a third party to study the drainage. Attorney Alan Seewald commented that this type of discussion is outside the purview of the ZBA – that it belongs to the Planning Board's site plan review process.

James Pasiecznik stated that, at the April 6, 2017 meeting, he had asked whether the property is in 61A and Attorney Lesser had answered that it is not. Mr. Pasiecznik said that he has since found out that it is indeed in 61A. He mentioned a 90-day time delay. Mr. Lesser replied that 61A requires a letter to the Selectboard giving opportunity to buy

the land. Although there is a time of delay, he said, it is not as long as the 90 days mentioned by Mr. Pasiecznik.

An attendee asked about the amount of money for the eventual decommissioning of the project and restoration of the property. The reply was that the budget development is still ongoing, and there is no exact amount at this time.

Gary Grybko expressed concern that the gravel access road will be only 3' from his property and asked about a zoning bylaw that might prevent this. Roger and Debra advised that there is no such provision in the solar bylaw. Jane Grybko expressed concern that her family would not be able to use the road to their garage, which has a business, and Bob stated his understanding that the easement agreement with Ed Farrick doesn't prevent the Grybkos from getting Mr. Farrick's permission to use the road. Nexamp confirmed that interpretation, stating that the Grybkos can use the road with permission from Ed Farrick and from the Hutkoski brothers. Nexamp also clarified that the fence used to keep construction traffic off the Grybko property will be removed after construction is completed. Jane Grybko read from a document (which she kept) that she had written in opposition to the project as a follow-up to the April 6, 2017 hearing session.

Roger moved to close the public comment portion of the hearing, Debra seconded, and the members voted unanimously to end public comment. Roger noted that the roles of the Zoning Board of Appeals and the Planning Board are distinct and should not be mixed. He explained that the ZBA decides whether to grant projects allowed by special permit, and whether to impose any conditions on the projects they grant. He noted that courts won't support "not in my backyard" denial arguments.

Bob noted that Yankee Candle was an unprecedented project but has been a large contributor to Whately. He noted that his own house had had its view interrupted by Gary Grybko's house when that was built, adding that that's how it goes – you can't control what's not on your property. Bob explained that the town had a chance to vote *not* to approve solar projects in the AR-2 zone, but voted to allow it. He said he was leaning toward granting the special permit, although it was a hard decision.

Debra commented that the law is very clear, making it easier to vote for the special permit. She added that the Planning Board will be very thoughtful when considering their part of the process. She asked Attorney Lesser whether Nexamp would still work with the Grybko family if they were to change their mind about participating in the driveway sharing arrangement, and he replied that Nexamp would be willing to work with them.

Roger moved that the board vote to approve the special permit, with the following condition:

The applicant shall market net metering credits for the community solar portion of the project solely to the residents of Whately for a period of time equal to the earlier of fifty days or until the project is fully subscribed, beginning upon the date of site plan approval by the Planning Board.

Debra seconded the motion, and the board voted unanimously to approve the special permit. The board wrote the decision.

Debra, Roger, and Bob are all available for a June 1, 2017 meeting, if necessary.

Documents Reviewed (kept in the ZBA files)

1. A 6-page document headed, "Petition", requesting that the Whately ZBA refuse to issue a Special Permit for the Long Plain Solar Array project. Four pages bear signatures. An "Attachment to Petition" appears on the last two pages and explains the position of the signers.
2. A letter headed,
JANE GRYBKO'S STATEMENT
5/2/17 Continued Hearing on Long Plain Solar LLC 's Special Permit Application

Mary C. McCarthy
Secretary
Zoning Board of Appeals
Town of Whately, Mass