

**TOWN OF JACKSON
PLANNING BOARD SPECIAL MEETING
September 18, 2024**

The Town of Jackson Planning Board met on September 18, 2024 at 6:30 pm at the Town of Jackson Town Hall to continue the discussion on the site plan review of the Jackson Solar 1, LLC project. The following people were in attendance-

Board Members:

- Kelly Donahue
- Erik VandenBerg
- Mark Mahoney
- Irene Headwell
- Amy Maxwell [entered at 6:52 pm]
- Steve Chuhta

Others Present:

- Jay Skellie
- Lewis Steele
- Alita Giuda and John Ahearn
- Gary Ackley
- Dan Shaver
- Teresa Bakner & Steve Lefevre (via video conf.)

SITE PLAN DISCUSSION – JACKSON SOLAR 1, LLC

Following the discussion at the September 3rd regular Planning Board meeting, Chair Donahue reopened the discussion on the Jackson Solar 1, LLC site plan project and the Town’s path forward in regards to its review. Chair Donahue welcomed Steve Lefevre of Barton and Loguidice to give a brief update on the engineering review of the preconstruction drawings. Steve stated that he sat in on an hour-long call with Mill Creek Renewables where routes were proposed for stormwater management. They have provided B&L with an updated SWPPP and site plans. Steve advised that there is still a small issue with the impervious slope on the site that DEC has offered differing guidance on how to resolve. Mill Creek Renewables advised they will be hiring a company to handle reviews of erosion sediment control. Board member Chuhta requested we receive the name of the company that will be handling erosion sediment control reviews.

At this time, the Planning Board Clerk read aloud two (2) resolution options to proceed with the Jackson Solar 1, LLC project. Resolution option A resolves that the Planning Board has determined that the purpose of it’s April 2023 resolution was to confirm that all conditions of approval necessary for the signature of the site plans were met with the understanding that the project may not be completed in the summer of 2024; that the solar law and site plan review law are somewhat ambiguous as to whether the Planning Board can grant multiple extensions or “reapprovals” of the project as these solar projects appear to take years to obtain the collateral approvals from the State agencies and utilities involved, as well as having membership interests in the project be transferred to other entities; that the moratorium on solar projects clearly states

that it does not apply to projects that have already been approved by the Planning Board as this project has been; and that the Planning Board hereby continues its practice of extending the approval of the solar project or reapproving it granting the project until September 18, 2025 to complete the construction of the solar project.

Resolution option B resolves that the Planning Board has examined the site plan review law and has determined that it lacks the authority to grant a further extension to the approval last granted on May 2, 2023 and that no such extension was requested by the solar project sponsor; that the moratorium on solar projects clearly states that it does not apply to projects that have already been approved by the Planning Board as this solar project has been; and that the application for the solar project is complete, including the issuance of a negative declaration for this solar project, and that procedurally the only requirement for a reapproval is a public hearing while there have been no substantive changes to the project and a further referral to County Planning is not technically required the Town Planning Board Clerk will send a copy of the latest plans and this resolution to County Planning, as well as publishing and filing the notice of public hearing as required by the site plan review law and solar law.

Board members considered both resolution options presented. Board member Mahoney spoke to say that he believes the order of conditions that were originally written for the project were pretty good and detailed necessary actions that needed to be taken. He questioned the intent of bringing this issue forward, as stalling will just prolong the process and stopping the project won't happen. He added that the Planning Board has already put thousands of hours into reviewing this project already. Board member VandenBerg stated he believes that it's obvious that the project sponsors would have needed to ask for extension for the construction of the project and he does not want to allow bad behavior from applicants. Board member Chuhta stated he would like to move forward with the project as is.

[Board member Amy Maxwell enters at 6:52 pm.]

Board member Mahoney questioned the construction schedule and how long it would take the applicants to build at this point. Steve Lefevre stated construction would probably last around 12 months depending on when construction officially begins. Terresa Bakner stated she could add more time to the September 18, 2025 deadline that is in the resolution. Board member Maxwell stated that at the time the site plans were signed, the Board had found that the project sponsors had completed the necessary actions that were required in the order of conditions. At the time, they had advised the Planning Board of setbacks that would stall construction and it was well understood by the Board that construction may not be complete within a year. Board member Maxwell added that the Planning Board did not make the completion requirement clear to them, so it is a Planning Board oversight as well. Board members agreed that the Site Plan law is in need of updating.

On September 18th, 2024, Lewis Steele wrote an email to the Town Clerk and Planning Board Chair requesting to speak on this issue and address his concerns (see Attachment A for text of

the letter and Attachment B for text of letter from Couch White LLP sent by email on September 3rd, 2024 in response to the original letter from Lewis Steele). Lewis spoke at this time. He stated that his intent with bringing forth his concerns is to follow the law as it is written. He stated the minutes are clear that no further extensions would be granted for the project. He added that he believes the site plan for the project is no longer valid, and the Planning Board should not have the authority to allow them to proceed as is. As he believes the approval is no longer valid, he added that the project should need to wait the duration of the solar moratorium. Teresa Bakner stated that under the solar law, the Board would have to hold a public hearing, followed by a review and then they would be free to affirm they had met reapproval. She added that the moratorium does not apply to previously approved projects, as this project is. Chair Donahue questioned who would make a motion for one of the resolution options to move forward with. Board member Mahoney stated he does not believe the September, 2025 deadline is enough time to allow them to complete construction.

A **motion** was made by Amy Maxwell and seconded by Steve Chuhta to amend Resolution option A, striking the September 18, 2025 deadline for completion of construction and changing the date to May 1st, 2026.

Motion carried in favor 6-0.

A **motion** was made by Amy Maxwell and seconded by Mark Mahoney to approve Resolution option A as amended, confirming that the Planning Board hereby continues its practice of extending the approval of the solar project or reapproving it granting the project until May 1st, 2026 to complete the construction of the solar project.

Motion carried in favor 5-0 with Erik VandenBerg abstaining.

Roll Call:

| | | | |
|----------------------------|-----|-----------------|---------|
| Kelly Donahue, Chairperson | Aye | Mark Mahoney | Aye |
| Steve Chuhta | Aye | Erik VandenBerg | Abstain |
| Amy Maxwell | Aye | Irene Headwell | Aye |

Motion as amended:

Whereas, the Town of Jackson Planning Board adopted a resolution dated May 2, 2023 attached hereto as exhibit A;

Whereas, the purpose of the resolution was to confirm the satisfaction of all the conditions to the signing of the site plan review by the chair of the Planning Board;

Whereas, the resolution also set forth the remaining conditions to be satisfied before the commencement of construction;

Whereas, one of these conditions involved Barton and Loguidice, the Town's Designated Engineers for the project, reviewing the construction plans for the solar project and

confirming that no substantial changes had been made deviating from the Plans approved by the Planning Board;

Whereas, after the submission of a number of sets of final plans and extensive discussion over compliance with the stormwater plan requirements, Barton and Lojudice has issued a final memorandum dated September 13, 2024 confirming the final changes that need to be made to the construction plans in order for the construction plans to be approved;

Whereas, although the solar company has commenced limited activities on the site such as mobilization and the start of the installation of soil erosion and sedimentation control features, no installation of the solar system has occurred to date;

Whereas, the Planning Board has been asked to confirm that the solar company remains authorized to proceed with the project;

Now therefore be it resolved, that the Planning Board has determined that the purpose of its April 2023 resolution was to confirm that all conditions of approval necessary for the signature were met with the understanding that the project may not be completed in the summer of 2024;

Be it further resolved, that the solar law and site plan review law are somewhat ambiguous as to whether the Planning Board can grant multiple extensions or “reapprovals” of the project as these solar projects appear to take years to obtain the collateral approvals from the State agencies and utilities involved, as well as having the membership interests in the project be transferred to other entities;

Be it further resolved, that the moratorium on solar projects clearly states that it does not apply to projects that have already been approved by the Planning Board as this project has been; and

Be it further resolved, that the Planning Board hereby continues its practice of extending the approval of the solar project or reapproving it granting the project until May 1st, 2026 to complete the construction of the solar project.

A **motion** was made by Kelly Donahue and seconded by Mark Mahoney to adjourn the meeting at 7:24 pm.

Motion carried in favor 6-0.

Next Meeting: Tuesday, October 1st, 2024 @ 6:30 pm

Adjourned: 7:24 pm

Respectfully submitted,

Molly Dixson, Town of Jackson

Attachment A

Dear Planning Board members and Town of Jackson Attorneys:

This will write again prior to this evening's Planning Board meeting.

I would respectfully request that I be allowed to address the Planning Board before it votes on any Solar 1-related motion(s) this evening.

Following up on the discussion at the last regular Planning Board meeting, I understand that the Planning Board will take up tonight which of two resolution options it wishes to proceed with. As I understand it, one option proceeds from the premise that there is no reason to change where we are this evening. The other possible option, as I understand it, assumes that the Solar 1 site plan was issued but is no longer valid because of the passage of time and that the remedy for this is to simply have another Public Hearing and then another vote by the Planning Board on the site plan. I am not sure of the exact text of the resolution options as I have not seen the resolution.

I would like to address the issues here and the arguments at the last Planning Board meeting.

Article 800 of the site plan statute explicitly provides that the "[a]pproval of a site plan shall be valid for a period of one (1) year from the date issued by the Planning Board. The applicant may apply for a one-year extension by writing to the Planning Board at least thirty (30) days prior to the expiration of the initial one-year period". Further, by the explanation of its purpose, the local law makes clear that the meaning of this language is to require the applicant to complete the approved land use activity (which activity is the project set forth in the site plan) within one, or at most – subsequent to a timely letter of extension -- two years from the date of the issuance of the site plan. However, even though the permit has been issued, this has not occurred and the site plan approval is now invalid.

The applicant here claims that the clear and specific title of Article 800 should be disregarded as this is "only the literal" meaning of the statute. However, the basic tenets of statutory construction include that one first start with what the words of the statute say (their literal meaning) and also that, if at all possible, statutory provisions be construed harmoniously. Realizing that the title of Article 800 gives purpose and meaning to the subsequent language of the statute these terms must be interpreted harmoniously and not divergently. Nor is there any authority for the "title" of a statutory provision to be ignored.

Further, It should also be pointed out that the "title" of the Article does not control whether the site plan is invalid or not. That is to be determined by the balance of the statutory provision. And remember that this particular language sets forth the length of time that a site plan is valid.

Regarding this, nobody really disagrees that the site plan of the Solar 1 project is no longer valid because of the passage of time. There is only the claim by the applicant's attorney that because the building inspector and/or county code enforcement officer has not given their separate approvals for the project to begin operation, the Planning Board has not "issued" the site

plan. Of course, however, the Planning Board did not set any such condition for the site plan to be issued. Therefore, the actions or inactions of these two officials have no relevance to whether the site plan is invalid.

The question becomes then what to do about the fact that the site plan is no longer valid. Remember, If the site plan is no longer valid, it is invalid -- no longer in existence -- and there is no longer any authority for the applicant to construct the project.

Again, what to do now? As indicated above, since the site plan is no longer valid it is now invalid and it thus no longer exists, the applicant is simply required to seek approval of a new site plan; the first part of this which is the submission of a new site plan application.

However and importantly, since our Solar moratorium is currently in effect, no new application for site plan approval can lawfully proceed until such time as that moratorium expires.

Some of us may not like how this has turned out. However, because the meaning of a statute is not liked, that does not mean that we should not pay attention to it. It means, as Supervisor Skellie has advised, that we consider whether to change the statute.

As indicated in my last letter, starting the site plan review process from the beginning will ensure that any site plan for the Solar 1 project will be consistent with current conditions and standards for new solar projects. Remember here that one reason that the current solar moratorium was issued was because the Town Board, based on the Planning Board's advice, felt that the current conditions and standards for solar plan approvals were outdated. This will deal with that situation.

Thank-you and respectfully,

Lewis Steele

Attachment B

Dear Chairperson Donahue,

This firm represents Jackson Solar 1, LLC. We write this letter in response to the email submitted by Mr. Lewis Steele earlier today regarding the site plan approval granted to this project on May 21, 2021. Based on the extensive review completed by the Town of Jackson Planning Board since its approval, as well as the proper interpretation of the Town of Jackson Site Plan Law, Local Law 2 of 2017 (“Site Plan Law”), the site plan approval is final and binding, and “completion” of construction is not necessary to keep the site plan approval in effect.

Preliminarily, we disagree that the Site Plan Law requires that construction be complete within the timeframes set forth in Mr. Steele’s emails. Article 800 is entitled “Extension of Time for Applicant to Complete Approved Land Use Activity,” however, nowhere in Article 800 or even the language of the entire Site Plan Law itself is there a deadline to complete, or even to begin construction. The Site Plan Law contains an extension requirement but is silent with respect to construction or completion of a project.

“By accepted canons of construction the generalities of the article heading must yield to the specifics of the section itself.” *Rivers v. Sauter*, 26 N.Y.2d 260, 262 (1970). The language within Article 800 governs, regardless of what the particular heading of the Article says. *Neumann v. City of New York*, 122 N.Y.S. 62, 66 (2d Dep’t 1910) (stating that the title of a law not discussed “in the act itself” cannot “extend the purview” of the law to include the title’s content) This is particularly the case where, as here, the Site Plan Law has no other discussion even hinting at the drastic and draconian outcome of requiring full construction after the extension expires, or else a new site plan approval must be obtained.

As this Board may be aware, “[s]ince zoning regulations are in derogation of the common law, they must be strictly construed against the municipality which has enacted and seeks to enforce them.” *Allen v. Adami*, 39 N.Y.2d 275, 277 (1976). Here, if there is an ambiguity within ALBANY, NEW YORK CITY & SARATOGA SPRINGS, NY | HARTFORD, CT 540 Broadway | PO Box 22222 | Albany, NY 12201 couchwhite.com Chairperson Donahue September 3, 2024 Page 2 the Site Plan Law with respect to extensions and the requirement to construct the solar facility, that ambiguity must be resolved in favor of Jackson Solar 1, LLC. *Id.*

Indeed, given the harsh outcome of requiring a new approval, which could, as here, result in construction being delayed for at least a year, and potentially loss of an approved development and its significant time and financial investment to date, the law must be clear on its face to warn an applicant of this requirement. If full construction were required within the two year period described in the language of Article 800, the Site Plan Law should “clearly set forth” such a requirement to protect Jackson Solar 1, LLC’s significant investment. *Riedman Acquisitions, LLC v. Town Bd. Of Town of Mendon*, 194 A.D.3d 1444, 1447 (4 Dep’t 2021) (determining that ambiguity must be resolved in favor of landowner and finding that significant loss of zoning amendment should be clearly stated in zoning law).

Therefore, given the dearth of language within the Site Plan Law itself imposing a requirement to construct the project in full, we believe that the Jackson Solar 1, LLC project (the “Project”) has a fully vested site plan approval. As this Board may recall from their thorough review of this matter in May 2023, there is no further action required to extend site plan or keep the site plan approval in effect beyond the steps taken at that time. The original approval was extended in May 2022, and after that point, Jackson Solar 1, LLC consulted with the Planning Board on how to finalize the site plan approval without another extension.

This was particularly tricky for the Town of Jackson as typically obtaining a building permit would vest the site plan approval and obviate the need for any further extensions. However, the Town of Jackson does not have a building inspector that would issue them, and Washington County, who does issue building permits for the Town, said that no building permit is required for a solar installation. Further, no building inspector or zoning board of appeals (“ZBA”) has been established in the Town which would allow for an interpretation of the Code. With this unique situation, we requested that the Planning Board confirm that all conditions necessary for construction have been satisfied such that the approval would be final and the site plans could be signed.

With no other guidance in the Site Plan Law, or official or ZBA to seek an interpretation from, Jackson Solar 1, LLC sought signature of the site plans. Signed site plans also are an indication that the site plan approval itself has been vested per the Site Plan Law, which states that once “all conditions have been met!...the Planning Board shall endorse its approval on a copy of ' Even if the title of Article 800 were considered in an interpretation of when a site plan approval expires, the requirement to get conditionally approved site plans signed once all conditions are met would have to be harmonized with the title of Article 800, as the site plan is not “approved” finally until all conditions are met per Section 411.2.

Any ambiguity here would have to be resolved in favor of the landowner. ALBANY, NEW YORK CITY & SARATOGA SPRINGS, NY | HARTFORD, CT 540 Broadway | PO Box 22222 | Albany, NY 12201 couchwhite.com Chairperson Donahue September 3, 2024 Page 3 the site plan and immediately file it and a written statement of approval with the Town Clerk.” Site Plan Law Section 411.2. Jackson Solar 1, LLC and this Planning Board reviewed each and every condition included in the approval resolution. This Planning Board then ensured its satisfaction with such condition, and discussed this review in detail in the May 2, 2023 minutes and resolution. Further, upon adopting the resolution, the site plans were signed on May 2, 2023. A copy of the minutes and resolution is attached for the Planning Board’s reference. Because the language of the Site Plan Law provides no other clear steps on what must occur after the signing of the site plans, and because there is no building inspector to interpret the Site Plan Law or issue a building permit, this is the pathway to finalizing site plan approval. The Project’s site plan approval has accordingly not expired, it was vested via signature of the Planning Board chair.

Should you have any questions, please do not hesitate to contact me. Thank you for your time and consideration.

Very truly yours,
Alita J. Giuda, Esq. Partner