

Public Utility Variances

History, Modern Cases, Local Relevancy

General Use Variance vs. Public Utility Variance

- **General Test (4 legal tests)**

- No reasonable return
- Unique circumstances
- No self-created hardship
- Does not alter the essential character of the neighborhood

- **Public Utility Test (2 legal tests)**

- Utilities are required to render safe and adequate service
- There are compelling reasons, economic or otherwise, which make it more feasible to seek the variance than to seek alternate locations

Consolidated Edison Co. v. Hoffman (1978)

- Established the Public Utility Variance Exception
- A utility must show they are a public necessity
- The unnecessary hardship requirement = not appropriate
- Where the intrusion or burden on the community is minimal, the showing by the applicant should be correspondingly reduced

Cellular Telephone Co. v. Rosenberg (1993)

- Applied the Public Utility Variance standard to cellular telephone facilities
- Definition of public utilities:
 - “a private business, often a monopoly, which provides services so essential to the public interest as to enjoy certain privileges such as eminent domain and be subject to such governmental regulation as fixing of rates, and standards of service”
 - 2 Anderson, American Law of Zoning § 12.32, at 568-569 [3d ed]

Characteristics of a Public Utility

- The essential nature of the services offered which must be taken into account when regulations seek to limit expansion of facilities which provide the services;
- Operat[ion] under a franchise, subject to some measure of public regulation;
- Logistic problems, such as the fact that "[t]he product of the utility must be piped, wired, or otherwise served to each user * * *[,] the supply must be maintained at a constant level to meet minute-by-minute need[, and] [t]he user has no alternative source [and] the supplier commonly has no alternative means of delivery.

West Beekmantown Neighborhood Assn. v. Town of Beekmantown ZBA (2008)

- The court found that because the wind farm will generate electricity, “a useful public utility”, that it is considered an essential service
- Case-to-case basis, public utility classification standard can apply to a large variety of projects
- Because wind is a public utility, renewables, including solar, should be as well, right?

Freepoint Solar, LLC v. Town of Athens ZBA (2022)

- Local boards may not deny an application based solely on community objection
 - Biggs v. Eden Renewables, LLC (2020)
- “There is usually no question that the activities of heavily regulated electric and gas companies ... involve the activities of public utilities.”
 - West Beekmantown Neighborhood Assn. v. Town of Beekmantown ZBA (2008)

Freepoint Public Utility Variance

- Denied, failed to meet both legal tests
 - Via resolution
- Provided extensive reasoning for the denial of each test
- Final decision as of 7/12/2023

Freepoint cont.

- The ZBA may have abused their discretion in their decision
- Public Necessity is not solely a question of local need
 - Con. Edison (1978)
- ZBA did attempt examination of a wider service area
 - Determined (without proof) the larger project would fully address the needs of the County
- Public necessity must be viewed in a broader consideration of the general public need for the service

Climate Leadership and Community Protection Act (CLCPA)

- ZBA stated the project is not needed to meet NYS climate goals
- Since the state has already hit 2025 goal, Freepoint project is not necessary
- However, we still need 20 GW to meet the 2030 goals

St. Lawrence County Relevance

- Public Utility Variances may be seen in a number of towns that restrict solar in certain areas
- For any town that does encounter one of these variances, following precedent that has been set in the aforementioned cases is likely a good course of action
- Regardless, this is very new territory

Sources

- [Consolidated Edison Co. of New York v. Hoffman](#) (1978)
- [Cellular Telephone Company v. Rosenberg](#) (1993)
- [West Beekmantown Neighborhood Assn. v. ZBA of the Town of Beekmantown](#) (2008)
- [Freepoint Solar, LLC v. ZBA of the Town of Athens](#) (2022)
- [Biggs v. Eden Renewables, LLC](#) (2020)
- [Zagoreos v. Conklin](#) (1985)
- [The Intersection of New York's Public Utility Use Variance Standard and the Climate Leadership and Community Protection Act](#) – New York Law Journal
- [Town of Athens, NY - Planning and Zoning \(townofathensny.com\)](#) – Town of Athens, NY Planning and Zoning webpage (Freepoint Solar Information)