

Public Utility Variance Standard

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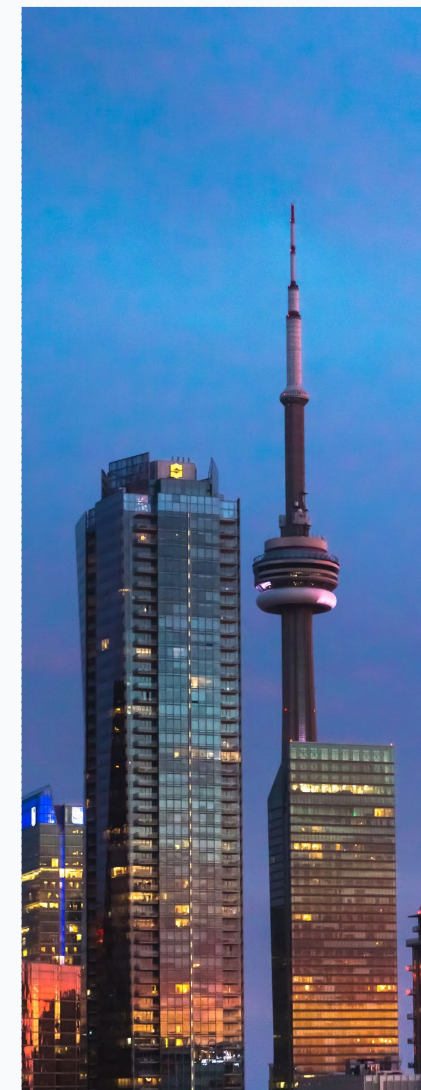
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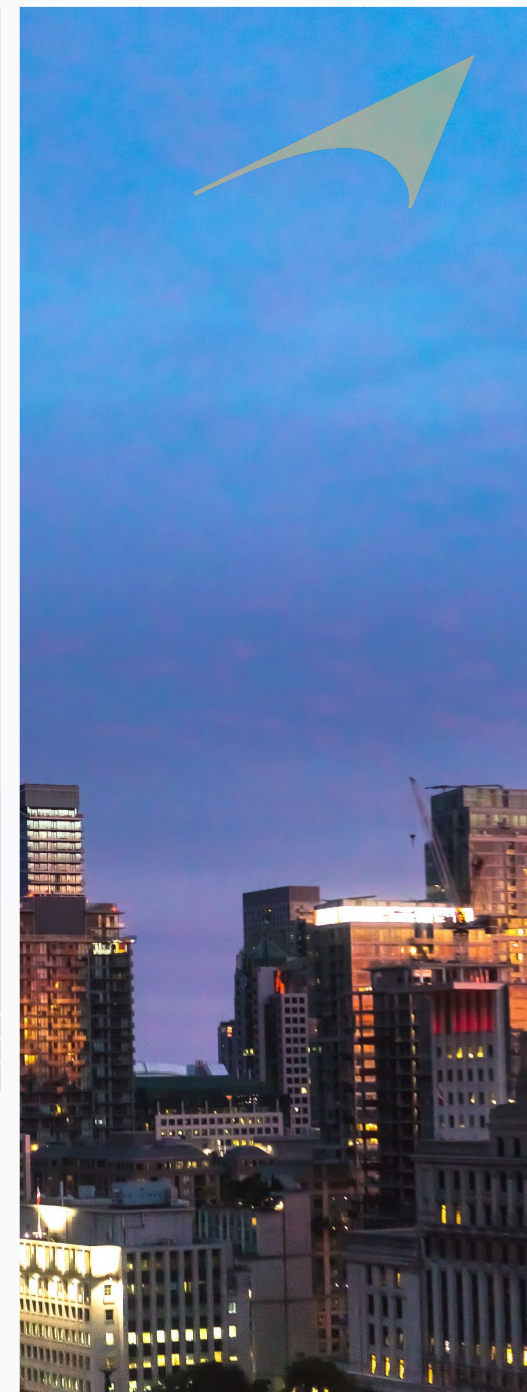
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Introduction to the Land Use Practice

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What is the Public Utility Variance Standard?



- Planners are used to the variance standards set out in the zoning enabling statutes (such as Town Law Article 16). And most planners are aware that local municipalities cannot deviate from those standards. *Cohen v. Bd. of App. of Village of Saddle Rock*, 100 N.Y.2d 395(2003).
- But the Court of Appeals has carved out a significant exception for zoning variances requested by “Public Utilities.” Rather than the standard variance rules, a public necessity test is applied.

Public Utility vs. Local Zoning



- There has always been tension between local zoning rules, which are based on local plans and serve the local community, and the needs of public utilities which serve a broader set of constituents.
- Thus courts have long noted public necessity requires that utilities be treated differently under zoning laws. See Robert H. Twichell, *Zoning and the Expanding Public Utility*, 13 *Syracuse L. Rev.* 581 (1962) (noting that “[b]ecause they are essential to the public health, safety and welfare, it has been stated that public utilities enjoy a favored position in relation to zoning regulations.”).

Gas Company Expansion

- An early case involved a gas manufacturing plant and storage needed to serve a growing post-war population, *Long Island Lighting Co. v. Griffin*, 272 A.D. 551, 553 (2d Dept. 1947). The ZBA denied the application because the utility did not show any unnecessary hardship, the key criteria for a use variance at the time. The court overruled, noting the need for additional supply and thus the public necessity.
- The court also implied there was a preemption issue because the utility had a franchise, “and no town zoning ordinance enacted subsequent to the granting of such franchises can serve to nullify that right.” 272 A.D. at 554. Later cases did not apply preemption but noted local concerns were not paramount.

The Court of Appeals Creates the PUV Standard



- The Court of Appeals first formally articulated the PUV Standard in *Consol. Edison Co. of New York v. Hoffman*, 43 N.Y.2d 598, 610 (1978). ConEd had to upgrade the cooling system at a nuclear facility, requiring both use and area variances. After the Buchanan ZBA denied the variances, the Supreme Court reversed and the Appellate Division affirmed the reversal, largely on federal preemption grounds as the upgrade had been approved by federal regulators. The Court of Appeals affirmed, but first noted it was unnecessary to go past state law to reach that conclusion.

The Hoffman PUV Standard



- The court stated the traditional tests for use and area variances, "are not appropriate where a public utility such as Con Edison seeks a variance, since the land may be usable for a purpose consistent with the zoning law, the uniqueness may be the result merely of the peculiar needs of the utility, and some impact on the neighborhood is likely."
- The court noted that zoning boards had to look at more than local values, and in particular at the role placed on utilities by the public service law.
- This required wider consideration is an essential takeaway for planners

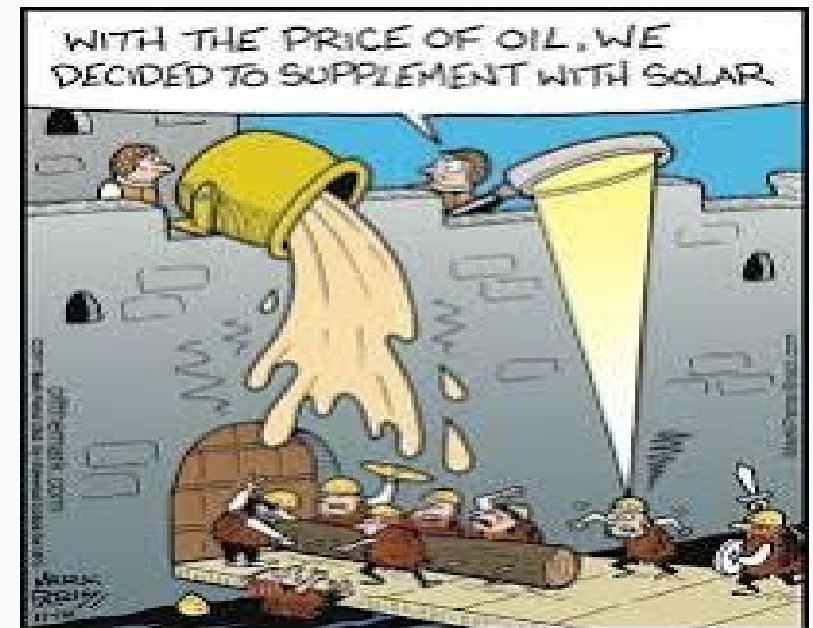
The PUV Standard

- To be granted such a use variance, the utility should be required to show that denial of the variance would cause unnecessary hardship, but not in the sense required of other applicants.
- the utility must show that project is a public necessity in that it is required to render safe and adequate service, and that there are compelling reasons, economic or otherwise, which make it more feasible to use that location.
- Further where the intrusion or burden on the community is minimal, the showing required by the utility should be correspondingly reduced.



What is a Public Utility?

- The rules for what are considered Public Utilities are much broader than might be expected. They not only include the well-known private utilities such as Con Ed and NYSEG, but they also include the cellular telephone companies and renewable energy projects.



Determining Public Utility Status



- The issue arose in *Cellular Tel. Co. v. Rosenberg*, 82 N.Y.2d 364 (1993) where a use variance was denied to a cellular telephone company under the traditional use variance test, in part because of a lack of evidence “that there exists a public necessity for its service, or what the need of the broader public is relating to such service, or that it is a public utility relating to the zoning ordinance.” 82 N.Y.2d at 370-2.

Determining Public Utility Status



- The Court identified three key Characteristics: “(1) 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, (2) ‘operat[ion] under a franchise, subject to some measure of public regulation,’ and (3) 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.’” 82 NY2d at 371 (internal citations omitted).

Rosenberg Test

What about Renewables?

- Every court that has addressed the question has found renewables to be public utilities
- Wind: W. Beekmantown Neighborhood Ass'n, Inc. v. Zoning Bd. of Appeals of Town of Beekmantown, 53 A.D.3d 954, 956 (3d Dept. 2008) Wind Power Ethics Grp. (WPEG) v. Zoning Bd. of Appeals of Town of Cape Vincent, 60 A.D.3d 1282, 1283 (4th Dept. 2009)



What about Renewables?

- Solar: Delaware River Solar, LLC, et al. v. Town of Aurora Zoning Bd. of Appeals, Index No. 808123/2022 (Sup. Ct. Erie Cty. Nov. 7, 2022); Cipriani Energy Grp. Corp. v. Zoning Bd. of Appeals of the Town of Minetto, New York et al., EFC-2022-0043 (Sup. Ct. Oswego Cty. Apr. 12, 2022)
- Road use: The PUV Standard has also been applied to find public utility status applicable to non-zoning statutes. See Alle-Catt Wind Energy LLC v. Town of Farmersville, New York et al., Index No. 89872 (Sup. Ct. Cattaraugus Cty. June 26, 2021) (where the court determined a wind developer company to be a public utility for purposes of a local road use statute).

PUV and Renewables



- Most cases under the public utility variance have involved renewable projects. In every case the courts have found that the applicant was properly classified as a public utility for zoning purposes and thus entitled to the public utility variance.
- Because only limited areas can host renewable properties, and State laws like the CLCPA are creating significant demand for these projects, municipalities may want to focus on managing impacts rather than attempting to zone out such projects.



THANK YOU!

Questions?

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