

**MINUTES OF THE HARDYSTON TOWNSHIP ZONING BOARD OF ADJUSTMENT
MEETING HELD DECEMBER 1, 2011**

CALL TO ORDER: Chairman Murphy called the meeting to order at 7:30 p.m. and read the following Statement of Compliance:

STATEMENT OF COMPLIANCE: Pursuant to the Open Public Meeting Act, Chapter 231, P.L. 1975, adequate notice as defined in Section 3D of Chapter 231 P.L. 1975 was made to the New Jersey Herald, and a copy is posted on the bulletin board at the Hardyston Township Municipal Building.

ROLL CALL:

- William Walsh – Present
- Santo Verrilli – Present
- Gerald Laughlin – Present
- Candace Leatham – Present
- James Homa – Excused
- Mary Ann Murphy – Present

OTHERS PRESENT: Richard Briigliodoro, Esq.

APPROVAL OF MINUTES:

A motion to approve the *Minutes of the Hardyston Township Zoning Board of Adjustment Meeting Held November 3, 2011*: A motion to approve was made by Candace Leatham and seconded by William Walsh. Roll Call: William Walsh – yes; Santo Verrilli – yes; Gerald Laughlin – yes; Candace Leatham – yes; Mary Ann Murphy - yes. The motion carried.

APPROVAL OF RESOLUTIONS: ZB-6-11-01, County Wicklow Holdings, LLC, “D” Variance, Preliminary and Final Site Plan, “C” Variance, Solar Energy Facility, Block 62 Lot 6: A motion to adopt the memorializing resolution was made by Santo Verrilli and seconded by Candace Leatham. There was no discussion. Roll Call: William Walsh – yes; Santo Verrilli – yes; Gerald Laughlin – yes; Candace Leatham – yes; Mary Ann Murphy - yes. The motion carried.

APPLICATIONS: There were no applications scheduled.

PUBLIC PARTICIPATION: No members of the public addressed the Board.

DISCUSSION: Township Email policy was reviewed.

BILLS: A motion to pay the bills cited below was made by Santo Verrilli and seconded by William Walsh. Roll Call: William Walsh – yes; Santo Verrilli – yes; Gerald Laughlin – yes; Candace Leatham – yes; Mary Ann Murphy - yes. The motion carried.

Richard Briigliodoro, Esq., Weiner Lesniak, LLP

INVOICE 147375	ZB-6-11-01/ZBC-6-11-01, County Wicklow Holdings, LLC	\$615.00
INVOICE 147374	ZB-11-10-1, Edgewater Commons Office Park, LLC,	795.00
INVOICE 147373	ZB-8-08-1, SJZ, LLC	480.00

INVOICE 147372	Zoning OE	300.00
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Michael G. Vreeland, P.E., P.P.,

INVOICE WO855H	Zoning OE	\$420.00
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INVOICE WO868D	ZB-6-11-01, County Wicklow, LLC	105.00
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CORRESPONDENCE: There was no correspondence received.

ADJOURNMENT: Having no further business, a motion to adjourn was made by Santo Verrilli and seconded by William Walsh. All were in favor. The motion carried. The meeting adjourned at 7:45 p.m.

Minutes respectfully submitted by:

Anne-Marie Wilhelm

Anne-Marie Wilhelm
Land Use Administrator

**RESOLUTION
TOWNSHIP OF HARDYSTON
ZONING BOARD OF ADJUSTMENT
IN THE MATTER OF
COUNTY WICKLOW HOLDINGS, LLC
DECIDED ON NOVEMBER 3, 2011
MEMORIALIZED ON DECEMBER 1, 2011
USE VARIANCE, ANCILLARY "C" VARIANCE RELIEF,
PRELIMINARY AND FINAL SITE PLAN APPROVAL**

WHEREAS, County Wicklow Holdings, LLC (hereinafter "County Wicklow" or "Applicant") has made application to the Township of Hardyston Zoning Board of Adjustment (hereinafter "Zoning Board" or "Board") for use variance approval, ancillary "c" variance relief and preliminary and final site plan approval for property known and designated as Tax Block 62, Lot 6 as shown on the Tax Map of the Township of Hardyston, and which premises are commonly known as 240 North Church Road, Hardyston, New Jersey in the I-2 Light Industrial Zone District (hereinafter "I-2 Zone"); and

WHEREAS, public hearings were held on September 1, 2011, October 6, 2011, and November 3, 2011; and

WHEREAS, the Applicant was represented by George F. Sweeney, Esq. (hereinafter "Sweeney").

NOW, THEREFORE, the Zoning Board makes the following findings of fact, based on evidence presented at its public hearing, at which time a record was made.

The application before the Board is a request for use variance approval, ancillary "c" variance relief and preliminary and final site plan approval in order to permit the construction of a solar facility. The subject property is currently developed with an industrial building and related improvements. The Applicant proposes to install approximately 3,220 ground mounted solar panels and approximately 540 roof mounted solar panels on the existing building, inverter/transformer structure, 8-foot high chain link fence and other related improvements.

THE SEPTEMBER 1, 2011 HEARING

Testifying on behalf of the Applicant was Kenneth D. Dykstra, P.E., L.S., P.P. (hereinafter "Dykstra"). The Zoning Board accepted Dykstra as an expert witness in regard to engineering testimony and planning testimony. The Board notes that Dykstra has previously appeared before the Zoning Board and has been qualified as an expert witness. Dykstra testified that the subject property is approximately 8.8 acres in area and is located in the I-2 Zone. He stated that located on the property is a 12,000 square foot building inclusive of a 10,000 square foot area for warehousing and manufacturing purposes and a

2,000 square foot area for office space. Dykstra also stated that there is a small parking lot located in front of the building with a loading area in the rear of the building. Dykstra testified that the property is actually underdeveloped as there is only 10% impervious coverage on site at the present time. He also related that the Hardyston Township Code permits 50% impervious coverage in the I-2 Zone. Dykstra also testified that approximately 4.8 acres of the site would be disturbed inclusive of 3.6 acres of the site which would be cleared. He further explained that the site would be graded uniformly in order to permit the installation of racking systems for the ground mounted solar panels. He also indicated that 540 solar panels are proposed for placement on the roof of the principal building which could supply most of the building's power.

Dykstra further testified that the property is ideally suited for the proposed use. More specifically, Dykstra contends that the proposed location of the ground mounted panels and the roof panels would have a good angle to the sun. Furthermore, once the facility is constructed, the use would be a passive use for solar energy. There would also be routine maintenance involved, but it would not result in an intense use of the property. Turf grass would also be located under the panels which would be maintained by the property owner. The height of the panels would range from 2 feet to 12 feet. An inverter and transformer would be located in a building to be located behind the existing building. The existing building would then serve as a buffer and no one would see the building other than the owner of the property. The Applicant is also proposing an 8 foot in height black chain link fence in order to provide security and to prevent access to the facility from the cemetery property.

Next, Dykstra discussed visual impact. Dykstra stated the Applicant would maintain a 23 foot band of trees on the ridge where what would be seen above the solar panels is a tree line. Dykstra also testified that there would be an array of anti-reflective panels, which are tinted blue, and will look like a sloping body of water from a distance. Dykstra also noted the orientation of the racking system is such that the visual impact is minimized. He stated the plane is facing toward the street and one would see very little of the racking system other than the very bottom of it. Dykstra also testified that the racking system can handle up to 20 degrees of slope or 36% grade. The Board had questions in regard to glare from the solar panels. Dykstra testified that the panels are set at 30 degrees, the panels will be anti-reflective and any glare which could occur would be well above the surface of the road.

In regard to potential detriments, Dykstra stated the obvious detriment is the clearing of trees which could be cut for an industrial use. Dykstra stated the intent is to add energy to the grid. He stated the State of New Jersey is encouraging these types of developments. Dykstra offered that the approval of this application would reduce the general public's reliance on fossil fuels and large electric generation facilities. He further stated that the facility would be a substantial power generator and would produce 0.81 megawatts of power which could supply enough energy for approximately 150 homes.

With reference to blending the facility into the natural environment, Dykstra stated that the tree line and the trees located in the southeast corner of the property are being maintained. Dykstra also represented that natural vegetation will also be maintained around the property.

In regard to the height of the proposed fence as being 8 feet, Kevin Byrne, a principal of County Wicklow Holdings, LLC testified that a 4 foot fence would not achieve the level of security needed by the Applicant and that a 4 foot fence would be easy to scale by virtually anyone.

Dykstra also testified in regard to the surrounding properties. Dykstra identified the cemetery, cell tower, the Hardyston Township DPW building and single family homes to the west, the quarry to the east and single family homes across the street. Dykstra also represented that the size of the facility was established to maximize the utilization of the property. The Applicant's goal was to provide as much power to the grid as possible. Dykstra also testified that additional development of the property could generate the need for another well and septic system resulting in more of an impact to the environment. He stated that solar projects do not use any water, do not need a septic system and do not increase run off. He further explained that in regard to stormwater management, the subject area would change from a wooded area to a grassy area and that runoff would be addressed via a recharge area. Dykstra also stated that the soils in the area are outstanding and are basically sand and gravel.

The Board Engineer, Michael G. Vreeland, P.E., P.P. (hereinafter "Vreeland"), expressed his concern about the stabilization of slopes. Dykstra responded by indicating that the initial project was scaled back to allow for an increase in the spacing between the rows. He stated this additional space would increase the ease of maintenance and the penetration of additional sunlight to facilitate turf growth. Dykstra also noted that the

Applicant plans to grade, stabilize and then install the racking system. He said once stabilization has been achieved, the panels could be installed.

Referencing the requirements of Hardyston Township Code Section 185-125F, the Board Attorney asked the Applicant how the facility would blend into the natural environment. Dykstra responded by stating that the color of the panels is a bluish tint, the tree line in a section of trees in the southeast corner of the property would be maintained, and a buffer is located in the back. He stated natural vegetation around the property would also provide screening. Dykstra noted the property is well oriented for the solar facility as it is essentially a bowl that faces to the south. He also confirmed that the owner would be responsible for maintenance.

Furthermore, referencing the requirements of Hardyston Township Code Section 185-125G, the Board Attorney inquired as to tree removal since the ordinance requires the placement of solar energy systems in such a manner so that tree removal is not required to the extent reasonably possible. Dykstra stated there is tree removal needed but it is in an industrial zone. He further acknowledged that the Applicant does not comply with the ordinance but that the Applicant would provide power to the grid which would serve the public good.

The meeting was opened up to members of the public and there were no members of the public present expressing an interest in this application.

THE OCTOBER 6, 2011 HEARING

The Applicant appeared at the October 6, 2011 hearing and the matter was adjourned to November 3, 2011.

THE NOVEMBER 3, 2011 HEARING

At the November 3, 2011 hearing, Kenneth Dykstra testified on behalf of the Applicant. Dykstra introduced an exhibit marked as A-3. Exhibit A-3 was identified as an Alternate Solar Facility exhibit, dated October 8, 2011 and prepared by Dykstra Walker Design Group. Dykstra testified that the Applicant has amended the application and has removed 490 ground mounted solar panels, thus representing a 13% reduction in the amount of ground mounted panels on site. As a result, the Applicant now seeks approval for approximately 2,730 ground mounted panels. He further indicated that the project would be a 0.71 megawatt project which would now support electricity for approximately 100 homes. In addition, Dykstra explained that the Applicant was providing increased landscaping to buffer the ground mounted solar panels from public view. Furthermore, the

dumpster enclosure was being buffered. Dykstra indicated that the Applicant has significantly revised the plan in order to address the Board's concern as to the visibility of the ground mounted solar panels. He further related that the solar facility is a passive use and he reiterated that the site is under-utilized with only 10% impervious coverage. He also indicated that the Applicant had agreed to eliminate the 8 foot in height fence and to replace it with a 4 foot in height fence consistent with the Ordinance which would act to enclose the ground mounted solar panels.

Next, testifying on behalf of the Applicant was Jason Dunn, P.E. and Certified Landscape Architect (hereinafter "Dunn"). Dunn testified that the Applicant intended to blend the building into the surrounding landscape. He has devised a landscaping plan inclusive of evergreen, deciduous trees and flowering ornamentals. Dunn stated that it was his intention to plant evergreen shrubs that would provide a year round presence like a juniper that should grow to 6 feet in height but not higher. The purpose of this planting would be to screen the lower racks of the ground mounted solar panels from public view. It is anticipated that this would address the issue of the visibility of these panels from North Church Road. Dunn also discussed planting trees around the existing building and indicated that it was his intention to plant variations of Oak, Maple and Spruce trees. He indicated that these trees would be approximately 14 to 16 feet in height at the time of planting and would grow to approximately 60 feet.

Dunn also testified that although the Applicant did not provide a calculation for the total number of trees to be removed, the Applicant was going to add 50 trees to the site.¹

Dykstra further testified that in regard to the elimination of the 490 ground mounted solar panels, this would enable the Applicant to preserve a number of additional trees on site. This will result in the total area of disturbance being reduced to 4.1 acres of which 2.9 acres would result in clearance.

Dykstra further testified that the soils on-site consist of sand and gravel and that all stormwater will go to a depressed area and will infiltrate into the ground. He also confirmed that this application would be subject to soil conservation district approval. Dykstra stated that the finished grade would be 3 to 1 slope which can be stabilized. He also stated that there will be a distance of 9 feet of separation between the rows of racks on the slope.

¹ The Hardyston Township Code does not require the Applicant to provide an inventory of all trees to be removed.

Next, Dykstra addressed the issue of the height of the rooftop solar panels. Under the Ordinance, the rooftop solar panels are not to exceed a height of 12 inches. However, on the back of the roof, the panels would be approximately 18 inches in height which would require variance relief. Board member Walsh expressed a concern with access to the roof for fire safety reasons. The Applicant agreed that it would meet with the fire department and satisfactorily address any concerns in order to enable the fire department to have safe access to the roof for firefighting purposes.

Board member Verrilli also raised an issue in regard to glare from the solar panels negatively impacting traffic along North Church Road. The Applicant agreed that it would remediate any issue involving glare from the solar panels which would negatively impact traffic along North Church Road. Dykstra also stated that the proposed use would be harmonious with the I-2 Zone as opposed to a higher intensity industrial use.

He also stated that the view will not be unattractive and would provide a nice blue appearance similar to viewing a water body. He also testified in regard to the Hardyston Township Master Plan which contains goals and objectives inclusive of protecting the gateways into Hardyston. Dykstra testified that the public will not be looking at the back of panels or the racking system. The panels on the western edge will be effectively shielded but the other panels will be visible. Approximately 3 acres will be disturbed for the solar panels.

The Board Engineer indicated that in accordance with the Township's Master Plan, some of the goals and objectives stated therein would be to minimize disturbance in order to protect steep slopes and to preserve and enhance the 9 gateways into Hardyston Township. The original plan would not have been in conformance with the Master Plan goals and objectives; however, now that the solar panels have been relocated away from the road, this would be beneficial for aesthetic purposes. The Applicant by increasing the buffer area and by adding more trees would also improve the visual impact. Furthermore, tree removal has been reduced. In addition, the Applicant agreed to remove approximately 3 rows of solar panels in the vicinity of the adjoining cemetery property and to move those solar panels over in the area of the existing detention basin.

The meeting was opened up to members of the public and there were no members of the public present expressing an interest in this application.

NOW, THEREFORE, the Zoning Board hereby makes the following conclusions of law, based upon the foregoing findings of fact.

The application before the Board is a request for use variance approval, ancillary “c” variance relief and preliminary and final site plan approval in order to permit the construction of a solar facility at this location. The subject property is currently developed with an industrial building and related improvements. The Applicant seeks to install approximately 2,730 ground-mounted solar panels and approximately 540 roof top mounted solar panels on the principal building structure at this location thereby resulting in a 0.71 megawatt project.

The within application for development involves property located at 240 North Church Road, Hardyston, New Jersey which property is also known and designated as Block 62, Lot 6 on the Tax and Assessment Map of the Township of Hardyston. The site is located in the I-2 Zone District.

The Applicant requires variance relief under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70(d)1 and pursuant to the requirements of the Hardyston Township Code, Section 185-125A which provides in relevant part that the solar energy system has been designed to meet the energy needs of the principal use of the property and not to generate excess power for commercial purposes. Thus, the Ordinance only permits the Applicant to provide for the energy needs for the principal use of the property.

Under the Municipal Land Use Law, a Board of Adjustment, when considering a “d” variance, cannot grant relief unless sufficient special reasons are shown and there is no substantial impairment of the intent and purpose of the zone scheme and Zoning Ordinance. In addition, the burden of proof is upon the applicant to establish the above criteria. It is the Board’s responsibility, acting in a quasi-judicial manner, to weigh all the evidence presented before it by both the applicant and all objectors, and reach a decision which is based upon findings of fact and conclusions of law and is not arbitrary, unreasonable or capricious.

The New Jersey Courts have been willing to accept a showing of extreme hardship as sufficient to constitute a special reason. The courts have indicated that there is no precise formula as to what constitutes special reasons unless the use is determined to be inherently beneficial, and that each case must be heard on its own circumstances. Yet, for the most part, hardship is usually an insufficient criteria upon which the Board can grant a variance. In addition, special reasons have been found where a variance would serve any of the purposes of zoning as set forth in N.J.S.A. 40:55D-2. However, in the last analysis, a variance should only be granted if the Board, on the basis of the evidence presented before it, feels that the public interest, as distinguished from the purely private interests of the applicant, would be best

served by permitting the proposed use. In these instances, the Board must also find that the granting of the variance will not create an undue burden on the owners of the surrounding properties. The Board also notes the special reasons requirement may be satisfied if the applicant can show that the proposed use is peculiarly suited to the particular piece of property. With regard to the question of public good, the Board's focus is on the variance's effect on the surrounding properties and whether such effect will be substantial. Furthermore, in most "d" variance cases, the applicant must satisfy an enhanced quality of proof and support it by clear and specific findings by this Board that the variance sought is not inconsistent with the intent and purpose of the Master Plan and Zoning Ordinance. The burden of proof is upon the applicant to establish the above criteria.

The Board finds that under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-4 inherently beneficial uses are defined to include wind, solar or photovoltaic energy facilities or structures. The Board therefore finds that the Legislature of the State of New Jersey has determined solar facilities such as the solar facility as proposed to be an inherently beneficial use. As a result, the positive criteria is satisfied as a matter of law.

Under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70(d) no variance or other relief may be granted under the terms of this Section, including a variance or other relief involving an inherently beneficial use, without a showing that such variance or other relief can be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and zoning ordinance. Therefore, the Board clearly understands that even in the case of an inherently beneficial use such as the proposed solar facility, an Applicant must still satisfy the negative criteria in order to be granted an approval by the Zoning Board.

In Sica v. Board of Adjustment of the Township of Wall, 127 N.J. 152;163 (1992) the New Jersey Supreme Court held:

The dispositive issue is not whether inherently beneficial uses should be subject to the negative criteria but whether a Board of Adjustment or Planning Board should balance the positive and negative criteria in determining whether to grant a variance. Id. at 163.

Furthermore, the New Jersey Supreme Court in Sica held:

Some balancing of benefits and burdens necessarily occurs when one considers whether a use variance will have a substantial detrimental effect on the public good and the zone plan. Without any balancing, a local Board's finding that an Applicant has not satisfied the negative criteria would always defeat an inherently

beneficial use, no matter how compelling the need for that use. (Citation omitted) Id. at 164.

As a result, the New Jersey Supreme Court in Sica established a procedure as a guide to a Zoning Board in order to balance the positive and negative criteria. First, the Board should identify the public interest at stake. Second, the Board should identify the detrimental effect that will ensue from the grant of the variance. Third, in some situations, the local Board may reduce the detrimental effect by imposing reasonable conditions on the use. Fourth, the Board should then weigh the positive and negative criteria and determine whether on balance, the grant of the variance would cause a substantial detriment to the public good. Id. 165, 166.

With that as a backdrop, the Board carefully considered whether or not variance relief could be granted without substantial detriment to the public good. The Board accepts the representations of the Applicant's expert, Mr. Dykstra, and agrees that the State of New Jersey is encouraging this type of development involving alternative energy sources. The Board also accepts the representations of the Applicant's expert that the approval of this application would help to reduce the general public's reliance on fossil fuels and large electric generation facilities. The Board also understands that the approval of this application would result in providing electrical energy to homes in the area, which has been estimated to be approximately 100 homes. As a result, the Board concludes that variance relief can be granted without substantial detriment to the public good.

Next, the Applicant is required to satisfy the second prong of the negative criteria which is that the granting of the variance relief will not substantially impair the intent and purpose of the zone plan and zoning ordinance. The Board examined the Township Master Plan and determined that some of the goals and objectives of the Township's Master Plan is to minimize disturbance and to protect steep slopes as well as to preserve and enhance the gateways into the community. North Church Road in this vicinity is considered to be a gateway into the community. The Board is satisfied that the Applicant has provided a landscape plan that is designed to significantly enhance the appearance of the site. The Applicant will also be adding approximately 50 trees to the site. The Applicant is also providing a uniform 23-foot dimension between the cemetery property and the proposed fence for the ground mounted array of solar panels and that there will be no clearing or disturbance within that setback. In addition, this will provide a relatively uniform tree line

along the ridge above the solar array. Furthermore, the inverter/transformer location has been adjusted to ensure that it will be blocked from public view by the existing building.

The stormwater infiltration area has been identified on the plans and given the highly permeable soils on the site and the fact that ground mounted solar arrays are considered to be pervious surface, there will be no negative stormwater impact as a result of the approval of this project. The Applicant has also reduced the number of ground mounted panels by eliminating approximately 490 ground mounted panels constituting a 13% reduction in the number of ground mounted panels on the site. The ground mounted solar panels have also been moved away from the road which would have the tendency to ameliorate any potential negative visual impact from the ground mounted solar panels. In addition, the Applicant is increasing the buffer area and adding a significant number of more trees to help minimize any negative visual impact. In view of the foregoing, the Board concludes that the Applicant has satisfied its proofs as to the second prong of the negative criteria and, thus, the Board determines that variance relief can be granted and will not substantially impair the intent and purpose of the zone plan and zoning ordinance.

The Municipal Land Use Law, at N.J.S.A. 40:55D-70c provides Boards with the power to grant variances from strict bulk and other non-use related issues when the applicant satisfies certain specific proofs which are enunciated in the Statute. Specifically, the applicant may be entitled to relief if the specific parcel is limited by exceptional narrowness, shallowness or shape. An applicant may show that exceptional topographic conditions or physical features exist which uniquely affect a specific piece of property. Further, the applicant may also supply evidence that exceptional or extraordinary circumstances exist which uniquely affect a specific piece of property or any structure lawfully existing thereon and the strict application of any regulation contained in the Zoning Ordinance would result in a peculiar and exceptional practical difficulty or exceptional and undue hardship upon the developer of that property. Additionally, under the c(2) criteria, the applicant has the option of showing that in a particular instance relating to a specific piece of property, the purpose of the act would be advanced by allowing a deviation from the Zoning Ordinance requirements and the benefits of any deviation will substantially outweigh any detriment. In those instances, a variance may be granted to allow departure from regulations adopted, pursuant to the Zoning Ordinance.

Those categories specifically enumerated above constitute the affirmative proofs necessary in order to obtain "bulk" or (c) variance relief. Finally, an applicant must also show that the proposed variance relief sought will not have a substantial detriment to the public good

and, further, will not substantially impair the intent and purpose of the zone plan and Zoning Ordinance. It is only in those instances when the applicant has satisfied both these tests, that a Board, acting pursuant to the Statute and case law, can grant relief. The burden of proof is upon the applicant to establish these criteria.

The Applicant requires one (1) "c" variance in regard to Hardyston Township Code Section 185-125D(1)(b) in regard to the height of rooftop solar panels where 18 inches are proposed in one portion on the back of the roof and a 12 inch maximum height is allowed. The Board clearly understands that the rooftop solar panels on the front of the roof will comply with the ordinance requirements, however, the rooftop solar panels on the back of the roof will not.

The Board reviewed the granting of ancillary "c" variance relief under the "c(2)" analysis.

Furthermore, under the c(2) criteria, the Board determines that it is appropriate to grant ancillary "c" variance relief. In Kaufman v. Planning Board for Warren Twp., 110 N.J. 551, 563 (1988), the New Jersey Supreme Court held:

By definition, then, no c(2) variance should be granted when merely the purposes of the owner will be advanced. The grant of approval must actually benefit the community in that it represents a better zoning alternative for the property. The focus of a c(2) case, then, will be not on the characteristics of the land that, in light of current zoning requirements, create a hardship on the owner warranting a relaxation of standards, but on the characteristics of the land that present an opportunity for improved zoning and planning that will benefit the community.

The Board notes that a variance is required due to the slope of the roof and the panels being located on the rear of the roof which will have no visible impact to the public and furthermore the difference between 12 inches and 18 inches for some of the panels on the rear of the roof would constitute a de minimis exception that would be entitled to variance relief. The Board also notes that the application should be granted under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70(c)(2) because the purposes of the act would be advanced by a deviation from the zoning ordinance requirements and the benefits of the deviation would substantially outweigh any detriment permitting the Zoning Board to grant variance relief in this instance. The Board also notes that the application can be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and zoning ordinance. Therefore, under

the c(2) analysis, the Board determined that the positive and negative criteria were met by the applicant and the granting of "c" variance relief as set forth herein is appropriate.

The Board also notes that the application as originally submitted required variance relief from Section 185-125D.(2)(a) which prohibits ground arrays from being installed in the front yard and from Section 185-56.B. where the Applicant originally proposed a fence with a height of 8 feet wherein the ordinance provides that fences greater than 4 feet are not permitted between the rear building line of the principal structure and the front lot line, within the side yard setback line or within the rear yard setback line. However, the Board notes that the Applicant has revised the application to eliminate the ground arrays in the front yard and has reduced the fence height to 4 feet, thus eliminating two of the "c" variances. Thus, the Board concludes that it is appropriate to grant the bulk variance relief in regard to the height of the rooftop solar panels on the back of the roof.

Furthermore, under Puleio v. North Brunswick Tp. Board of Adjustment, 375 N.J. Super 613, 621 (2005) and under Kessler v. Bowker, 174 N.J. Super 478, 484 (App. Div. 1979), "c" variances are subsumed within the granting of a "d" variance. More specifically, the Court in Puleio held:

"Generally, an application for a "c" variance and a "d" variance cannot coexist. If the application is for a use not permitted in the Zone, the bulk regulations designed for that zone cannot be applicable to the intended use. For example, an application for a gasoline service station in a residential zone should not be held to the bulk requirements of the residential zone. Lot area requirements and front and side yard setbacks for a residence were not contemplated to be made applicable to a service station. A Zoning Board, in considering a use variance, must then consider the overall site design. In essence, the "c" variances are subsumed in the "d" variance." Puleio supra. 375 N.J. Super at 621.

Therefore, the Board determines that to the extent it was required by law to separately consider the "c" variance for the height of the rooftop solar panels, it did so even though under the Puleio and Kessler cases, the granting of a "c" variance is subsumed within the granting of the "d" variance for this application. Therefore, under either scenario it was appropriate to grant the "c" variance requested by the Applicant.

With respect to the application for preliminary and final site plan approval, the Board determines that upon consideration of the plans, testimony and application, the Applicant has provided sufficient information for the Zoning Board to make an informed decision on this application. The Board determines that it is appropriate to grant preliminary and final site plan approval for the reasons set forth herein under the Municipal Land Use Law

pursuant to N.J.S.A. 40:55D-46 and N.J.S.A. 40:55D-50. The Board concludes that the Applicant has also satisfied the minimum requirements of the Municipal Land Use Law, case law and Township Ordinances so as to enable the Board to grant the relief being requested.

NOW, THEREFORE, BE IT RESOLVED by the Zoning Board of the Township of Hardyston that the application of County Wicklow Holdings, LLC for property known and designated as Block 62, Lot 6 as shown on the Tax Map of the Township of Hardyston, and located at 240 North Church Road, Hardyston, New Jersey in the I-2 Zone in order to permit the construction of ground mounted solar panels, roof mounted solar panels on the existing building and other related improvements is determined as follows:

1. Use variance relief is granted under the Municipal Land Use Law pursuant to N.J.S.A. 40:55d-70d(1) and the Hardyston Township Code
2. Ancillary “c” variance relief is granted pursuant to the Municipal Land Use Law under N.J.S.A. 40:55D-70c(2) as well as the Hardyston Township Code with regard to the height of rooftop solar panels.
3. Preliminary site plan approval is granted under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-46 and the Hardyston Township Code.
4. Final site plan approval is granted under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-50 as well as the Hardyston Township Code; and:

IT IS FURTHER RESOLVED that this application is granted subject to the following terms and conditions:

1. The development of this parcel shall be implemented in accordance with the plans submitted and approved titled “Preliminary and Final Site Plan, Block 62, Lot 6, 240 North Church Road (Sussex County Route 631) Township of Hardyston, Sussex County, New Jersey, prepared by Dykstra Walker Design Group, dated July 27, 2011 and last revised September 21, 2011 as well as in substantial compliance with Exhibit A-3 and marked in evidence during the hearing process and any subsequent revisions thereto as directed by the Zoning Board or the Board Engineer.
2. The Applicant represents that all of its representations and stipulations made by it or on its behalf to the Township of Hardyston Zoning Board are true and accurate and acknowledges that the Zoning Board specifically relied upon the Applicant’s representations and stipulations in the Boards granting of approval. If

said representations and stipulations are false, this approval is subject to revocation.

3. This approval is granted strictly in accordance with any recommendations set forth on the record by the Zoning Board throughout the course of the hearing process on September 1, 2011 and November 3, 2011.

4. The granting of this application is subject to and conditioned upon the Applicant complying with all terms and conditions as set forth in the Board Engineer's review report dated August 15, 2011.

5. The granting of this application is subject to and conditioned upon the Hardyston Township Fire Department's review and approval of the solar panels on the roof of the structure, in particular in regard to access to the roof for firefighting purposes.

6. The granting of this application is subject to and conditioned upon there being no glare from the solar panels that would negatively impact traffic along North Church Road. In such event that there is glare from the solar panels which negatively impacts traffic along North Church Road, the Applicant will remediate the issue so as to eliminate the glare.

7. The granting of this application is subject to and conditioned upon the Applicant relocating a minimum of 3 rows of solar panels along the common property line with adjacent Lot 35 in Tax Block 62 (cemetery) and relocating the rows of solar panels in the vicinity of the detention basin behind the building, which shall be subject to the review and approval of the Board Engineer.

8. The granting of this application is subject to and conditioned upon the Applicant installing a chain link fence 4 feet in height in order to enclose the ground mounted solar array.

9. The granting of this application is subject to and conditioned upon the Applicant submitting an amended grading plan which shall be modified to illustrate the grading required to install the inverter/transformer structure as well as the grading required to access the structure which shall be subject to the review and approval of the Board Engineer.

10. The granting of this application is subject to and conditioned upon the Applicant complying with Section 185-125J of the Hardyston Township Code with regard to signage and providing a detailed design on the plan.

11. The granting of this application is subject to and conditioned upon prior to the start of any construction, the approved limit of disturbance shall be established in the field to the satisfaction of the Board Engineer.

12. The granting of this application is subject to and conditioned upon the Applicant complying with Hardyston Township Code Section 185-125L "Abandonment" in regard to this application, which ordinance provisions are as follows:

Abandonment

1. A small wind energy system or solar energy system that is out of service for a continuous 12 month period will be deemed to have been abandoned.
2. The zoning officer may issue a "Notice of Abandonment" to the owner. The notice shall be sent via regular mail and certified mail, return receipt requested to the owner of record.
3. Any abandoned system shall be removed at the owner's sole expense within six months of the date on the "Notice of Abandonment" from the municipality. If the system is not removed within the six month period, the township may remove the system.
4. When the owner of a wind or solar energy system has been notified to remove the same and has not removed the system within six months after receiving notice, then the Township may pursue legal action to have the system removed at the owner's expense. If removed by the owner, a demolition permit shall be obtained from the construction office prior to the removal of the system. Upon removal, the site shall be cleaned, restored and landscaped to blend with the existing surrounding vegetation at the time of remove.

13. The granting of this application is subject to and conditioned upon Sussex County Planning Board approval, if required.

14. The granting of this application is subject to and conditioned upon Sussex County Soil Conservation District approval, if required.

15. The granting of this application is subject to and conditioned upon the Applicant providing an as-built plan, and an Affidavit verifying compliance with the terms and conditions of this approval.

16. The granting of this application is subject to and conditioned upon New Jersey Department of Environmental Protection (NJDEP) approval, if required.

17. Payment of all fees, costs and escrows due or to become due. Any moneys are to be paid by the Applicant within twenty days of said request by the Board Secretary.

18. Certification that taxes are paid current to date of approval.

19. Subject to all other applicable rules, regulations, ordinances and statutes of the Township of Hardyston, County of Sussex, State of New Jersey, or any other agency or entity having jurisdiction hereunder.

The undersigned secretary certifies that the within Resolution was adopted by the Hardyston Township Zoning Board of Adjustment on November 3, 2011 and memorialized herein pursuant to N.J.S.A. 40:55D-10(g) on December 1, 2011.



Anne-Marie Wilhelm, Board Secretary

IN FAVOR: William Walsh; Santo Verrilli; Gerald Laughlin; Candace Leatham; Mary Ann Murphy

AGAINST: 0

ABSTAINED: 0

BOARD MEMBERS ELIGIBLE TO VOTE: s/a