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Ed Lachterman
Acting Supervisor
Town of Yorktown
363 Underhill Avenue
Yorktown Heights, NY 10598

Re: Town of Yorktown Proposed Moratorium Large-Scale Solar

Dear Mr. Lachterman and Town Board Members,

This office represents ESNY-Yorktown, LLC and Ameresco Inc. (the "Applicant") with respect to solar development within the Town of Yorktown ("Town"). As you were advised by the Planning Board in their February 27, 2024 comment letter on the proposed moratorium, the Applicant received approval for the development of a solar canopy and associated battery storage system at the IBM facility located at 1101 Kitchawan Road, SBL 69.16-1-1. The March 4, 2021 Planning Board approval of the facility (the "Project") is attached hereto. As you may also know, the Applicant was issued a building permit on August 8, 2021, a copy of which is attached hereto. As part of the building permit application process, the Applicant provided the Town a building permit fee in the amount of $313,289.20. In reliance on these approvals and permits, the Applicant began construction soon thereafter, including completing the necessary pre-construction steps such as geotechnical drilling and testing in August of 2021. As of the date of this correspondence, the Applicant has completed approximately 70% of construction of the Project.

The current draft of the local law available on the Town's website provides that the moratorium is being enacted for the purpose of protecting the general health, safety, and welfare of the residents of the Town. It also indicates that this moratorium is being proposed because the Town has received "complaints" regarding the "design, construction and operation" of large-scale solar systems.

The purposes for which this local law is being proposed, namely, generalized opposition by the public, are entirely improper and legally invalid ground to impose a moratorium. The Courts have held, that in order for a moratorium to be valid, it must be enacted for a public purpose. Here, enacting a moratorium due to public opposition to a particular type of development that is currently authorized in a municipal land use code is far from a proper public purpose. Rather, the Courts have specifically held that land use rights cannot be impeded by a municipality simply due to generalized public opposition. "[A] municipality may not invoke its police powers solely as a pretext to assuage strident community opposition. To justify interference with the beneficial enjoyment of property the municipality must establish that it has acted in response to a dire necessity, that its action is reasonably calculated to alleviate or prevent the crisis condition, and

that it is presently taking steps to rectify the problem." *Matter of Belle Harbor Realty Corp. v. Kerr*, 35 N.Y.2d 507, 512 (1974).

What is more, even assuming *arguendo* that there is a need to protect public health and safety, with respect to solar facilities, the Town has failed to show, by any remote measure, how the development of solar facilities within the Town poses a health or safety concern to its residents or the general public. The Courts have been very clear that enactment of a moratorium for the purpose of preventing some unfounded and feigned detriment to public health and safety is an invalid public purpose. Similarly, the Courts have held that moratoria that are enacted upon such baseless support are null and void. Here, the Town is not responding to a genuine crisis or dire emergency, and instead is simply pandering to public sentiment that opposes solar. As such, a court would invalidate this local law. *See Cellular Tel. Co. v. Village of Terrytown*, 209 A.D.2d 57 (2d Dept. 1995).

Beyond its legal invalidity, the current draft of the proposed moratorium ignores vested rights. The Planning Board has already valiantly attempted to apprise the Town of the numerous solar development projects within the Town that have vested rights which would be impacted to their significant detriment by a moratorium. The Town should not be seeking to withhold Certificates of Occupancy from such projects. As noted above, the Project is approximately 70% constructed as of the date of this correspondence. Therefore, it has completed a substantial amount of construction and expended a significant amount of funds to advance and nearly complete the Project. As such, the Project and the Applicant clearly have vested rights to operate the Project under the current zoning, as approved. *See Matter of Temkin v. Karagheuzoff*, 34 N.Y.2d 324 (1974).

Rather than attempting to withhold the Certificates of Occupancy of projects that have already obtained vested rights, the Town should provide for an exception to the moratorium whereby projects that have already been issued a building permit are exempt from the moratorium. To provide such an exemption would prevent the Town and developers from engaging in unnecessary litigation for a court to ultimately find the moratorium does not apply to those with vested rights, and it would prohibit only new applications. The proposed moratorium refers to "any additional or new 'Large-Scale Solar Systems'". Language clarifying that this moratorium does not apply to Large-Scale Solar Systems that received a building permit prior to the enactment of the moratorium could be one way to make this clear that projects under construction are exempt.

Should you wish to discuss these matters further, we would be happy to do so.

Very truly yours,

John E. Ahearn, III, Esq.
Partner

Cc: Adam Rodriguez, Esq., Town Attorney (via email)