SOMERSET SOLAR, LLC

MATTER NO. 22-00026

§900-2.25 Exhibit 24

Local Laws and Ordinances

CONTENTS

TABLES

FIGURES

APPENDICES

ACRONYM LIST

§	Section
AES	The AES Corporation, Inc.
Building Code	New York State Uniform Fire Prevention and Building Code
CLCPA	Climate Leadership and Community Protection Act
dBA	A-weighted decibels
DC	direct current
Energy Code	New York State Energy Conservation Construction Code
ECMP	Environmental Compliance and Monitoring Plan
LCCs	Land Capability Classifications
MW	megawatt
NYCRR	New York Codes, Rules and Regulations
NRCS	Natural Resources Conservation Service (NRCS)
NYSAGM	New York State Department of Agriculture and Markets
ORES	Office of Renewable Energy Siting
PFAs	per-and polyfluoroalkyl substances
PUD	Planned Unit Development
Solar Law	Town of Somerset Solar Energy Systems Law
Town	Town of Somerset
WHO	World Health Organization
USCs	Uniform Standards and Conditions
USDA	United States Department of Agriculture

GLOSSARY TERMS

Applicant	Somerset Solar, LLC, a subsidiary of The AES Corporation, Inc. (AES), the entity seeking a siting permit for the Facility Site from the Office of Renewable Energy Siting (ORES) under Section (§) 94-c of the New York State Executive Law.
Application	Application under §94-c of the New York State Executive Law for review by the ORES for a Siting Permit.
Facility	The proposed components to be constructed for the collection and distribution of energy for the Somerset Solar Facility, which includes solar arrays, inverters, electric collection lines, and the collection substation.
Facility Site	The limit of disturbance (LOD) that will be utilized for construction and operation of the Facility, which totals about 696 acres on the Project Parcels in the Town of Somerset, Niagara County, New York (Figure 2-1).
Project Parcels	The parcels that are currently under agreement with the Applicant and Landowner, totaling about 1,784 acres in the Town of Somerset, Niagara County, New York, on which the Facility Site will be sited (Figure 3-1).
Project Site	The acreage of the Project Parcels under agreement between the Applicant and the Landowner, consisting of approximately 1,396 acres, in which the Applicant has performed diligence, surveys and assessments in support of Facility design and layout.

EXHIBIT 24 LOCAL LAWS AND ORDINANCES

This exhibit addresses the requirements specified in 19 New York Codes, Rules and Regulations (NYCRR) Section (§) 900-2.25 regarding local laws and ordinances.

Somerset Solar, LLC (the Applicant) has designed the Facility in a manner which is respectful of the interests of the host community. Consistency with local laws and ordinances has been achieved to the maximum extent practicable. The Applicant intends to operate the Facility and establish themselves as a long-term respected member of the local community and therefore has designed the Facility as a 'good neighbor'. This commitment has been implemented through ongoing stakeholder engagement and responsiveness in the Facility design. Prior to completing this Application, the Applicant has conducted outreach and consultation efforts with the Town of Somerset (Town) regarding the local requirements applicable to the Facility.

The Facility has also been designed to comply with 19 NYCRR §900-2.25 and the Uniform Standards and Conditions (USCs). The §94-c regulations requires that applicants consult with local municipalities to determine what local substantive requirements apply to a project and whether design changes to a project can obviate the need to request the Office of Renewable Energy Siting (ORES) elect to not apply those requirements. Outreach to the municipal stakeholders has included presentations to Town of Somerset, including Town Board members, as well as other public presentations designed to introduce the Applicant and the Facility to the community, providing Facility-specific information to the Town of Somerset and discussions regarding applicability of and compliance with local laws and ordinances.

In early stages of the community engagement in March 2021, the Applicant represented the Facility as a potential 'buildable area' envelope which highlighted all potential viable lands within the participating parcels. As the Applicant performed further diligence and refined the Facility design, a Facility draft site plan with detailed components was publicly presented to stakeholders on June 16, 2021 via a Virtual Open House, at a Virtual Community Meeting on December 15, 2021 with the host community, as well as being available on the Facility's website (https://www.aes.com/somerset-solar-project). The Facility draft site plan incorporated various components of stakeholder feedback received up until that point in the development including results from outreach with the Town for agreement on substantive and procedural requirements. A log of all consultations is located in Appendix 2-D.

The Applicant has researched potentially applicable local ordinances, laws, resolutions, regulations, standards and other requirements of a substantive nature required for the

construction or operation of the proposed Facility as a Utility-Scale Solar Energy System. On January 21, 2022, The Applicant submitted a letter to the Town identifying substantive provisions of the Town's Solar Energy Systems Law (Solar Law), which was in draft form and not formally adopted at that time, as well as the Town's proposed revisions to the Solar Law. In July 2022 the Applicant sent a follow-up letter to the Town of Somerset to consult with them regarding the information required by §900-1.3 of the §94-c Regulations. This letter (Appendix 24-B) outlined the applicable local ordinances, laws, resolutions, regulations, standards and other requirements of a substantive nature required for the construction and operation of the Facility, including a review of the Town's revised Solar Law that was formally adopted in March 2022. The letter discussed relevant portions of the Town Ordinance and Solar Law for which the Facility will be in compliance with, as well as identification of those provisions for which the Applicant may need to seek waivers. The Town Supervisor, in conjunction with counsel and the Town's consultant participated in two teleconference calls with the Applicant on August 10, 2022, and August 31, 2022, regarding substantive local laws. The Town did not advise the Applicant that there were any additional local substantive requirements not identified in the letters or consultations.

Outreach continues in accordance with §94-c requirements. The Applicant is also working with the Town of Somerset, and Niagara County with the intention of executing a payment in lieu of taxes agreement prior to construction of the Facility.

24(a) Substantive Requirements

This section identifies the local ordinances, laws, resolutions, regulations, standards, and other requirements applicable to the construction or operation of the proposed Facility that are of a substantive nature.

The proposed Facility is located within the Town of Somerset, Niagara County, New York. In addition to the Town of Somerset's general zoning law, per the Town's Solar Law, the Facility falls within the permitting requirements for Tier 4 Solar Energy Systems, which also include the requirements of Tier 3 Solar Energy Systems. The following local law requirements are applicable to the Facility:

- Part II, General Legislation
    - Chapter 96 Excavations (Exhibit 5)
        - §96-9 Standards and Conditions for Permit
        - §96-11 Certificates of Insurance
    - Chapter 131 Noise (Exhibit 7)
        - §131-3 Prohibited Acts

- Part II, General Legislation, Zoning, Article VI Establishing of Zones
  - Chapter 205 Zoning (Appendix 24-A)
    - §205-11 Regulations Applicable to all Zones
- Part II, General Legislation, Zoning, Article XXII Solar Energy Systems (Appendix 24-A)
    - §205-106 Applicability
    - §205-110 Permitting Requirements for Tier 3 Solar Energy Systems
      - 3.b Drainage (Figure 15-7)
      - 3.d Vehicular paths (Appendix 5-A)
      - 3.e Signage
      - 3.f Glare/Glint (Appendix 8-A, Attachment 8, Appendix A)
      - 3.g Lighting
      - 3.h Noise
      - 3.i Tree cutting
      - 4 Decommissioning
      - 6 Safety; applications shall include a safety plan (Appendix 6-B)
      - 7 Environmental and cultural resources
    - §205-112 Special Use Permit Standards
      - 1 Lot size
      - 2 Setbacks
      - 3 Height
      - 4 Fencing requirements
      - 5 Screening and visibility
      - 6 Agricultural resources
      - 7 Noise
      - 8 Hazardous materials
    - §205-113 Permitting Requirements for Tier 4 Solar Energy Systems
      - 1 Agricultural resources
      - 2 Waterfront protection, agricultural/agri-tourism, land of statewide importance and environmentally sensitive areas of the Town as denoted on Comprehensive Plan Vision Map
    - §205-115 Safety (Appendix 6-B)

24(b) Substantive Requirements Applicable to Interconnections in Public Rights of Way

The Applicant has determined that there are no substantive requirements in the local laws or regulations applicable to the interconnection to or use of water, sewer, or telecommunication lines in public rights of way that are applicable to the Facility.

24(c) Local Substantive Requirements Applicant Requests ORES Not Apply

Executive Law §94-c expressly preempts local procedural requirements, such as permits and approvals which would otherwise be required by the host municipalities for construction and operation of the Facility (e.g., site plan review, special use permit, building permit).

The Office may elect to not apply, in whole or in part, any substantive local law or ordinance which would otherwise be applicable if it makes a finding that it is unreasonably burdensome in view of the Climate Leadership and Community Protection Act (CLCPA) targets and the environmental benefits of the proposed facility. Although it is the Applicant's intent and desire to comply with all substantive local laws and ordinances, there are some substantive provisions of the local zoning ordinances that the Applicant has demonstrated are simply unworkable for the Project and are unreasonably burdensome under the statute and regulations, either because they preclude construction of the Project entirely, thereby minimizing the Project's environmental benefits, or, if applied to the Project, would cause a more significant impact on the community or the environment than if the requirement were not applied.

As noted above, the Applicant has generally designed the Facility to comply with local laws and has made design changes to the proposed Facility to bring it into compliance with the substantive provisions of the Towns' local laws. The Facility has been designed within the leased land available to adequately apply the §94-c setback requirements, with siting of Facility components in a manner that maximizes previously disturbed lands and useable open space, with a focus on minimizing environmental impacts to wetlands and stream resources.

For the provisions discussed below the Applicant determined that compliance with these provisions would be impracticable and could result in significant costs for no actual benefit to the community and potentially jeopardize the anticipated host community benefit, appear to conflict with the Town's Vision Map and Zoning Law, or that are considered unreasonably burdensome in view of the New York State's CLCPA.

For each local substantive requirement identified by the Applicant, a statement of justification is provided. The statements of justification demonstrate the degree of burden caused by the

requirement, why the burden should not reasonably be borne by the Applicant, that the request cannot reasonably be obviated by design changes to the Facility, that the request is the minimum necessary, and that the adverse impacts of granting the request are mitigated to the maximum extent practicable consistent with applicable requirements set forth in the Office's regulations.

Exhibits 6, 17 and 18 of the Application are incorporated by reference and provide an extensive overview of the Facility's environmental benefits, consistency with state energy policy, and contribution toward the CLCPA mandates; those discussions are incorporated by reference here to support waiver of the below provisions.

Overall, the Applicant submits that the below provisions are unreasonably burdensome in view of the CLCPA targets and environmental benefits of the proposed Facility—some provisions would threaten the feasibility of the Project, while others impose additional costs which are unnecessary and out of step with State standards. By contrast, the burdens imposed on the community if a waiver were granted for these provisions are minor to nonexistent, as described more fully below. For these reasons, ORES should grant the waivers requested herein.

(1) Town of Somerset Ordinances

§ 131-3(B): *Noise*

> "The use of any sound-emitting device inside or outside or a structure whereby the sound emitted from such device is audible on property being used for residential purposes at a point more than 100 feet from the real property boundary line of the property from which said sound emanates."

The Facility cannot be designed to comply with this requirement because: (1) the term "sound emitting device" is not defined, (2) the term audible is overly broad and unduly burdensome, and (3) it is unclear whether the 100-foot threshold is measured on the sound emitting property or on the property being used for residential purpose. Regardless of (1) and (3), the Facility cannot comply solely because of the use of the term "audible." Note that the Applicant believes that this provision's restrictions on sound levels from sound emitting devices was intended to apply to things such as stereos, speakers, etc. However, because this provision could be interpreted to apply to Facility components, a waiver is necessary.

This provision of town law requires that the Facility minimize noise impacts on adjacent properties such that there is no audible noise 100 feet from the property line. The Facility has been designed to comply with the general intent of this requirement, in that noise-generating facility components have been sited away from residences and receptors to minimize noise impacts from the Facility to the maximum extent practicable. However, given the use of the broad term "audible," and the

difficulties presented by measuring or showing compliance, the Applicant is requesting a waiver of the portion of this local law that requires there be "sound emitted from such device is audible on property being used for residential purposes at a point more than 100 feet from the real property boundary line of the property from which said sound emanates" which is unreasonably burdensome on the grounds of technology and the needs of and/or costs to ratepayers.

As fully outlined in Exhibit 7 Noise and Vibration and related appendices, the Facility was designed to comply with the USCs for noise from solar facilities set forth in 19 NYCRR §900-2.8(b)(2). While the Applicant will adhere to a maximum sound level of 45 A-weighted decibels (dBA) during a period of 8 hours (L_{8h}) outside nonparticipating residences and 55 dBA L_{8h} across any nonparticipating property lines, noise modeling shows that projected noise levels at most nonparticipating sensitive receptors fall below these limits. Further, the existing ambient noise levels on the Facility Site (Monitoring Location [ML] 3) range from 41 to 53 dBA equivalent continuous sound level (L_{eq})—meaning that the noise limits established under the USCs will require that the Facility noise levels at nonparticipating residences be near or below existing ambient noise levels in the community. Moreover, as shown in Appendix 7-A, anticipated daytime and nighttime noise levels modeled for the Facility show all nonparticipating residences in the Town of Somerset at noise levels equal to or below 40 dBA. Practically speaking, noise from the Facility should not be discernable at these receptors. However, the Applicant is requesting this waiver because of the practical difficulties and technological impossibility associated with enforcement of a local law that mandates no "audible" noise levels 100 feet from a property line.

Measuring compliance with this provision would require, in essence, 24/7 noise monitoring at a significant number of discrete locations along property boundaries between the Facility Site and all abutting residential lands, since the standard applies not just at the exterior of a discrete receptor (or class of receptors) but rather at any location along the parcel boundaries. Further, the standard of discernability is vague and unenforceable—the ability to discern noise levels will vary widely across listeners, atmospheric conditions, time of day, season, etc. Numerical noise standards are used under the USCs and in the prior Article 10 process as the best means of avoiding and minimizing potential noise impacts from a facility on the surrounding community. A vague, subjective standard of "audible" is simply unworkable—by definition, an unenforceable standard is unreasonably burdensome.

The need for this waiver cannot be obviated by design changes, and is the minimum necessary, because it simply removes the subjective, vague and unenforceable concept of audibility from the town's noise standard. The Applicant will adhere to the USCs for solar facilities, which will have

the practical effect of keeping noise levels at or below existing background noise for much of the area around the Facility, all of which will minimize or mitigate the adverse impacts of granting this waiver. The burden of doing the testing or monitoring necessary to achieve compliance with this standard—which would be considerable—should not be borne by the Applicant because even the question of compliance is undefined, and because the cost and logistical complexity of monitoring for compliance would far exceed any benefit to be derived from such an undertaking. On the grounds of technology, consumer needs, and project feasibility/viability, the Applicant respectfully requests a waiver of the portion of the provision that requires there be "no discernable difference from existing noise levels at the property line" from the Facility.

(2) Tier 3 Solar Energy Systems Waivers

§ 205-110: *Waterfront Development*[1]

1. "Tier 3 solar energy systems are primarily intended to collect energy for off-site distribution, consumption, and energy markets and by the Town's definition are large solar energy projects that can have a significant impact on the Town. Tier 3 Solar Energy Systems shall not be installed in environmentally sensitive areas, such as flood plains, wetlands and watershed protection areas as designated by the Town, County or other Agency, waterfront areas of the Town and wood lots or in areas of important soils and tourism related facilities. Specifically, Tier 3 systems are not allowed in Waterfront Protection, Agriculture/Agro-tourism and Environmentally Sensitive areas of the Town as denoted on the Vision Map of the Town of Somerset Comprehensive Plan (on file at the Town).

   All Tier 3 solar energy systems are permitted through the issuance of a special use permit within the Industrial, General Industry Zoning Districts, and Planned Unit Development Districts (as restricted above), and subject to site plan application requirements set forth in this Section. In order to ensure that the benefits of the community solar resource are available to the entire community, the Town of Somerset requires the applicant to enter into a Solar Energy System Host Community Agreement with the Town of Somerset.

   Notwithstanding Article XVA of Section 205 of the Town Code of the Town of Somerset, Tier 3 Solar Energy Systems shall be permitted through the process set forth in this Article. The requirements set forth in Article XV of Section 205 of the Town Code shall not be applicable to Tier 3 Solar Energy System within a Planned Unit Development District."

The Facility cannot be designed to comply with this requirement insofar as it limits the location of solar energy systems to (1) outside of "waterfront areas," (2) outside of Waterfront Protection

[1] The Somerset Facility is a Tier 4 solar energy system as defined in the Somerset Zoning Code. Pursuant to Zoning Code § 205-113, all Tier 4 Solar Energy Systems are also subject to Tier 3 requirements.

Areas, and (2) only Industrial, General Industry Zoning Districts, and Planned Unit Development (PUD) Districts. This provision is unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed facility.

Waterfront Area Restriction

The provision states, in relevant part, that "Tier 3 Solar Energy Systems shall not be installed in environmentally sensitive areas, such as flood plains, wetlands and watershed protection areas as designated by the Town, Niagara County or other Agency, ***waterfront areas*** of the Town and wood lots or in areas of important soils and tourism related facilities." [Emphasis supplied]. The term "waterfront area," identified in this provision, is not defined in the Solar Law. A vague, subjective standard of "waterfront area" is simply unworkable—by definition, an unenforceable standard is unreasonably burdensome.

Regardless, "Waterfront Area," is defined in Town Code §197-3, with respect to Waterfront Consistency, as "[t]he waterfront revitalization area delineated in the Town's Local Waterfront Revitalization Program." The Local Waterfront Revitalization Program, in turn, defines "revitalization area" as "all of the land area along the Lake Ontario shoreline." Accordingly, this provision would effectively preclude any solar development along any land bordering Lake Ontario, such as the PUD District which includes the former Somerset Generating Site and parcels behind the Babcock house. These areas represent the majority of the land proposed for the solar facility.

Such a result is contrary to the Town's Vision Map (see Appendix 3-A, Map 9 (page 66) of Comprehensive Plan) which identifies the Somerset Generating Site, where the Facility is proposed to be located, as Industrial/Business, "Shovel Ready" Business Area, Multiple Use, and Mixed Use – Ag / Ag Support Business. The prohibition on solar development in "waterfront areas" also contradicts § 205-113 (Tier 4 Solar Energy Systems) which restricts solar development to Industrial and General Industry Zoning Districts and PUD, which would include (not exclude) the Somerset Generating Site. Based on the Vision Map, almost all of the land designated as Industrial is in the waterfront area at and near the Somerset Generating Site.

Because the provision could be interpreted to effectively preclude development in the waterfront area, it is unreasonably burdensome. This provision limits solar development to PUD and Industrial Districts. The PUD District is on the waterfront and the Industrial District is too small and otherwise unsuitable for solar development due to a predominance of wetlands. Solar is not a permissible use in Agricultural District, which basically represents the remainder of the Town.

Since solar cannot be developed in waterfront areas or the Agricultural District, this provision effectively precludes large-scale solar development within the Town.

Although not controlling, an Order recently released by the New York State Board on Electric Generation Siting and the Environment is instructive. According to the Siting Board's recent Order in the *Hecate Greene* (Case 17-F-0619) proceeding, "[t]he Siting Board must balance the interests of the local community and the interests of the State's renewable energy goals and the benefits that will accrue to ratepayers." In *Hecate Greene*, The Town of Coxsackie's Solar Energy Collection Systems law (Solar Law) limits utility-scale solar generation facilities to the commercial and industrial districts. The Applicant requested waiver of a local law because the Rural Residential Zoning District, in which the Facility would be located, only allowed for agricultural uses, low-density residential development, and limited rural commercial and institutional uses. In waiving the local zoning restrictions, the Siting Board stated, "we must… consider the positive contributions the renewable Facility will have on the State, how it will help achieve the goals of the Legislature in establishing renewable energy thresholds for the purpose of reducing greenhouse gas emissions in an effort to combat climate change and its adverse impacts. Achieving these renewable energy goals will benefit all ratepayers."

The Siting Board reasoned that "to apply the local zoning law would eliminate the Facility's construction." Although the Facility did not conform to the zoning law, the Siting Board, after thoroughly reviewing the record, found that "the Facility will minimize environmental impacts to the maximum extent practicable" and that "permanent impacts to agricultural lands are limited and such lands may be returned to agricultural use at the end of the Project's useful life." The Siting Board further took into consideration the Applicant's efforts to work with the Municipalities and to address and mitigate the visual concerns of the Municipalities.

Although not explicitly stating such, the Office has relied on similar arguments granting waiver of such restrictive provisions (*see, e.g*. Matter # 21-02104: Bear Ridge Solar, LLC; Exhibit 24 [DMM 36]; Draft Permit Section 4.a.1 [DMM 47]).

The request is also the minimum necessary for facility construction. Solar is a permissible use in the PUD District which is in the "waterfront area," as the Applicant understands this term to mean. The Applicant is only asking ORES to waive this provision to the extent necessary to resolve any ambiguity and allow this provision to be read consistently with its other parts.

The degree of burden caused by the requirement is substantial. Because it effectively precludes solar development within the Town, the burden is essentially abandonment of the project. This

burden (*i.e.*, abandonment of the project) should not reasonably be borne by the applicant, the Applicant has devoted significant time and resources to develop a project that minimizes potential impacts and maximizes the use of previously industrial land on which the Somerset Generating Site was sited.

Because a restrictive reading of this provision would result in the project not being constructed, the request cannot reasonably be obviated by design changes to the facility. The majority of the Town of Somerset outside the PUD District is zoned Agricultural and does not permit siting of large-scale solar.

Waterfront Protection Area Restriction

The provision states that "… Tier 3 systems are not allowed in Waterfront Protection, Agriculture / Agro-tourism and Environmentally Sensitive areas of the Town as denoted on the Vision Map of the Town of Somerset Comprehensive Plan (on file at the Town)." As shown on the Town's Vision Map (see Appendix 3-A, Map 9 (page 66) of Comprehensive Plan), the western edge of the Waterfront Protection Area slightly overlaps the Multiple Use Site Expansion Area. A small amount of Facility components is located in the Multiple Use Site Expansion Area. The Applicant requests that the Office elect not to apply this provision insofar as it does not allow solar systems in this small portion of the Multiple Use Site Expansion Area.

The Waterfront Area restriction creates an ambiguity. As noted above, solar is a permissible use within the PUD District. The Multiple Use Site Expansion Area is within the PUD District. Accordingly, the provision both states that solar is permissible in this location and that it is not. The Applicant requests that the Office elect not to apply the provision insofar as it does not allow solar placement in that part of the Waterfront Protection Area that overlaps the PUD District – an area constituting only approximately 18 acres. Thus, the Applicant's waiver is the minimum necessary to allow Facility construction.

Through an iterative process, the Applicant has designed the Facility to adhere to local zoning and mitigate and/or minimize impacts to the maximum extent practicable. As part of this process, the Applicant has utilized all available areas within the former coal plant and also within the PUD District. Were the Applicant precluded from placing Facility components in the area in which the Waterfront Area overlaps the PUD District, it would be required to locate Facility components in the Town's Agricultural District. In this case, potential impacts including visual, wetland, noise, could increase whereas placement in the PUD District has already been evaluated and approved by the Town through zoning.

The degree of burden caused by the requirement, is that the Applicant would be required to move facility components into the Agricultural District. Although the Applicant has additional land under control in the Agricultural District just south of the PUD District and New York State (NYS) Route 18/Lake Road, this land has already been evaluated and determined to be not suitable for siting facility components. Therefore, the Applicant would be required to procure additional land from other landowners to maintain the current planned project capacity.

The burden should not reasonably be borne by the Applicant, the Applicant does not believe that the Town intended to keep solar components entirely outside of the waterfront area. This belief is based on the PUD District being located in the waterfront area and the specific allowance for solar in the PUD. It would be unduly burdensome for the Applicant to acquire additional land outside the PUD, perform the necessary studies, and make the necessary changes to the Application, especially given the likelihood that this is just an oversight in the Town code.

The request cannot reasonably be obviated by design changes to the Facility. As noted above, the Applicant does not have any additional land under its control suitable for solar placement. Moreover, the Applicant has utilized all land within the PUD District and there is no available space for additional components considering that a data center is also proposed in the PUD District. As noted above, the small amount of land in the Town's Industrial District is not suitable for solar development because it is mostly covered by wetlands.

Zoning District Restrictions

The relevant part of the provision states "[a]ll Tier 3 solar energy systems are permitted through the issuance of a special use permit within the Industrial, General Industry Zoning Districts, and PUD Districts (as restricted above), and subject to site plan application requirements set forth in this Section." The Facility is proposed to be located in the PUD and Agricultural Districts. The Applicant requests that the Office elect not to apply this part of the provision to the extent it does not permit placement of solar facility components in the Town of Somerset's Agricultural District.

The requirement that utility scale solar energy systems are only permissible in Industrial, General Industry and PUD Districts within the Town of Somerset is unreasonably burdensome is view of CLCPA targets and the environmental benefits of the proposed Facility. As noted above, the State of New York has stressed both the need to construct significant additional renewables, and the importance of siting those new generation assets in locations with reliable access to the existing electrical grid, avoiding the need to construct large new major transmission lines at significant

additional cost to ratepayers. It is critical, then, that ORES does not allow municipalities to bar solar development on open, undeveloped lands adjacent to existing transmission infrastructure.

Solar development is not allowed in the Agricultural Zoning District which, outside the site of the Somerset Generating Site, comprises the majority of the Town of Somerset as illustrated in the Town of Somerset Existing Zoning Map (Appendix 3-A, Map 6 (page 63) of Town Comprehensive Plan).

The Applicant examined land within the Industrial District and determined that it is not suitable for panel placement. Elevated railroad tracks, formerly used to transport coal to the former power plant, have effectively created wetlands throughout the parcels zoned Industrial Accordingly, under this provision, the Applicant is limited to developing the Project on land within the PUD District. However, the remaining amount of land within the PUD District is insufficient to develop the Project. Through an iterative design process, the Applicant has utilized all land available within the PUD. Land within the PUD District is also being used for construction of a data center, is otherwise not suitable for solar development (*e.g.*, wetlands) or was not offered to the Applicant by the current owner.

Moreover, this result cannot be obviated by design changes. As noted above, the Applicant examined the parcels within the Industrial District for Facility placement and determined this land was not suitable. In addition, the Applicant has utilized as much of the land within the PUD District as is available and suitable for Facility components. Accordingly, it is necessary that land south of NYS Route 18/Lake Road within the Agricultural District be utilized in order to develop the Project.

All land south of NYS Route 18/Lake Road on which the Facility will be located is currently owned by the landowners of the former coal generating plant. There is no other suitable land under similar control available to the Applicant.

To satisfy the Town's requirements and fit the Facility entirely within the PUD District, the Facility would need to be reduced to approximately 100 megawatt (MW).

The Applicant's request to allow siting of the Facility in Agricultural District is the only option to construct the Facility and the minimum necessary. The Facility has been designed to minimize environmental impacts to the maximum extent practicable and there are no permanent impacts to agricultural lands such lands may be returned to agricultural use at the end of the Project's useful life. See Exhibit 2 (a)(1); Exhibit 4(c); Exhibit 9 (a)(1); Exhibit 11(c), 11(f); Exhibit 12(d); Exhibit 14(e), 14(f); Exhibit 15(a)(9). In addition, as discussed in Exhibit 8, the Applicant requested

that the Town of Somerset provide input on any Visual Impact Analysis prepared in order to address and mitigate visual concerns. For these reasons, the Office should elect not to apply the Town of Somerset's zoning requirements.

The degree of burden caused by the requirement is that the Applicant would be required to limit solar development to available and suitable land within the PUD District. If this were the case, the size of the Facility would, as noted above, be decreased by 25 MW. A decrease of even this amount of MW can be fatal to a project with total capacity in the 100 MW range, such as Somerset.

The burden should not reasonably be borne by the applicant. Limiting the Project to the PUD District would, as noted above, substantially reduce the size of the Project and threaten the Project's economic viability. The Applicant has spent a substantial amount of time and money to develop the Project utilizing, to the maximum extent practicable, a brownfield site.

The request cannot reasonably be obviated by design changes to the Facility. As discussed above, there is no additional land available in the PUD District suitable or available for placement of solar components. To maintain the planned capacity, it is necessary that parcels within the Agricultural District be utilized.

§205-110: *Decommissioning.*

3.iii. Security

> (a) "The deposit, executions, or filing with the Town Clerk of cash, bond, or other form of security reasonably acceptable to the Town Attorney and/or engineer and approved by the Town Board, shall be in an amount sufficient to ensure the good faith performance of the terms and conditions of the permit issued pursuant hereto and to provide for the removal and restorations of the site subsequent to removal. The amount of the bond or security shall be 125% of the cost of removal of the Tier 3 Solar Energy System and restoration of the property with an escalator of 2% annually for the life of the Solar Energy System. The decommissioning amount shall not be reduced by the amount of the estimated salvage value of the Solar Energy System. This security amount shall be reviewed periodically and updated/renewed as necessary (determined at the time of the first security agreement). This "security" shall be in place prior to the start of construction."

The requirement to file a decommissioning plan is procedural and supplanted by the §94-c process. A decommissioning and restoration plan has been prepared for the Facility and is included Appendix 23-A. In addition, to the extent that this provision's requirement that security be posted in an amount equal to 125 percent (%) of the decommissioning costs (with a 2% escalator) is considered substantive; the Applicant respectfully requests waiver as this

requirement is unreasonably burdensome in light of CLCPA targets. ORES' regulations require that the Applicant post security in an amount equal to 115% of decommissioning costs, an amount sufficient to guarantee removal of the system and site restoration. Amounts greater than this is unnecessary impacts project economics and including amounts anticipated to benefit local communities through host community agreements. Exhibit 23 contains a description of the security to be posted by the Applicant for decommissioning of the Facility.

Moreover, this requirement fails to adjust for salvage value. Components of solar facilities have resale value and may be sold in the wholesale market. Salvage materials involved in solar projects (steel, copper, silicon), have historically trended upward and these materials have been reused, reclaimed, or re-purposed for years. There is no evidence to suggest that these materials will not be salvageable at the time of decommissioning, and accounting for scrap value of materials is a standard decommissioning practice across the country. These materials are relatively easy to decommission, meaning the cost to decommission the materials and obtain value is not an impediment to realizing their value.

Here, the Gross Decommissioning Costs are [redacted] The net decommissioning cost for the Facility is [redacted] accounting for salvage) and, therefore the contingency is [redacted]. Thus, the Applicant will be required to obtain a letter of credit or similar financial security mechanism totaling over [redacted] and pay the costs of maintaining that security over the life of the project—this is already a significant expense.

Utilizing the Town of Somerset's provision, the amount of decommissioning security increases substantially from [redacted]. Moreover, the Applicant is required by the regulations (19 NYCRR §900-10.2(b)) to update the letters of credit every fifth year specifying changes (due to inflation or other cost increases) to the structure of the letters of credit (or other financial assurance approved by the ORES). The Somerset law would require that this amount be increased by 2% annually to account for inflation—even if actual costs decrease over the Project's lifespan. This added cost is substantial, and it is wholly unnecessary for a solar project. Over the 35-year project life, escalating the decommissioning security 2% results in approximately [redacted]

annually and over an additional [redacted] over the 35-year life of the Project.

Unlike a wind facility which must be removed using specialized equipment, such as cranes, disassembly and removal of PV modules is fairly straightforward. Moreover, the Applicant's decommissioning estimate is conservative, and includes all overhead, contractor margin, expenses, fees, transportation, equipment, and labor to restore the Project to the most practical extent back to predevelopment conditions, with a 15% contingency to cover unforeseen expenses. Thus, there is no basis for a higher contingency percentage, which will only serve to add unreasonable and unnecessary cost to the project over its lifespan.

ORES has determined that "a 15% contingency is reasonable based on careful consideration of the best practices for siting renewable energy projects." There is no basis to require more for this Project. Moreover, the Applicant will already be required to periodically review decommissioning costs and adjust the financial security to reflect inflation and cost increases– thus, the concept of inflation adjustment is already built into the Applicant's required review process, and the additional 2% annual inflation requirement is redundant and unnecessary.

Overall, the costs of applying unnecessarily and unreasonably high decommissioning contingency requirements such as this one will translate into higher energy costs for consumers, as they will drive up the costs of building and operating solar facilities over their lifetimes. Given that ORES has already determined a lower contingency is appropriate, the benefits of applying this provision are negligible. This is not the type of requirement which could be accommodated by a design change to the Facility, nor is there a particular adverse effect of waiving this requirement on the community. The Applicant will already be required to provide over [redacted] in decommissioning financial security to protect the Towns in the event that the Facility owner does not conduct decommissioning and site restoration on its own—a contingency which is itself unlikely. There is no basis to impose additional financial burdens on the Project by requiring more financial security which ORES has already adjudged to be unnecessary.

In short, the granular nature of the §94-c decommissioning cost estimate requirements ensures a fair estimate of the decommissioning cost, and therefore the 15% contingency required in §900-2.24 will be used. Utilizing 125% would result in undue economic burden for the Facility in decommissioning surety carrying cost during the Facility's operations. The Applicant's request is the minimum amount necessary as the Applicant is not requesting complete waiver of this

provision, but rather only waiver of the significant additional amounts of security with an annual escalator.

Lastly, the request is also the minimum amount necessary. The waiver request is limited to the requirements for 125% of estimated decommissioning costs and the 2% annual escalator and, as explained above, these requirements are unnecessary and unreasonably high. The Applicant will comply with the provision in all other respects. The Applicant will post security in an amount sufficient to ensure the good faith performance of the terms and conditions of the permit issued pursuant hereto and to provide for the removal and restorations of the site subsequent to removal.

The degree of burden caused by the requirement is substantial. As discussed above, adhering to the Town's decommissioning requirements would require the Applicant to expend significant additional amounts of security. Significant and unnecessary increases in Project costs can threaten a project's economic viability. The decommissioning costs proposed by the Applicant are sufficient to provide for removal of Facility components and are consistent with ORES requirements. For these reasons, the burden should also not reasonably be borne by the applicant.

The request cannot reasonably be obviated by design changes to the facility. Design changes will not alter the fact that the Town's decommissioning requirements will impose a significant additional economic burden.

Special Use Permit Standards Waivers

§205-112 (1)(b): *Setbacks.*

> "Setbacks – All Tier 3 Solar Energy Systems shall be setback a minimum of 200 feet from the fence surrounding the solar panels and equipment to all non-participating property lines and to the edge of any road ROW. This setback shall be a minimum of 50 feet from a participating property line. Additionally, the setback from the fence line shall be a minimum of 400 feet from a dwelling unit on an adjoining non-participating property. The setback to any off-site participating dwelling unit shall be 100 feet."

The Facility cannot be designed to comply with this requirement. Based on the Applicant's experience, the proposed 200-foot property line setbacks and 400-foot setbacks from residences are in excess of similar state and local standards, as well as the Town's zoning requirements for other technology and uses. In addition, these setbacks are in excess of what may be required or considered reasonable to minimize potential environmental or other impacts associated with solar, in particular at the former Somerset Generating Site.

With a maximum height of 7.1–10.2 feet for solar panels, setbacks greater than 20–40 times the equipment height far outweigh the potential impact from solar or any other Town zoning requirements for other technologies and could be read to have the sole purpose of limiting potential development. A local zoning setback typically has the purpose of ensuring that a permitted land use is maintained an appropriate distance from neighboring permitted uses. In this case, vegetative screening will be placed at the property line and solar panels operate with minimal sound, no emissions, and no other potential risks that require a setback distance greater than any other permitted use in the Town. The effect of such a setback limits the amount of available land for panels, requiring the use of other locations in order to generate the same amount of renewable electricity. The Applicant will comply with setbacks established by ORES and other local zoning laws that have appropriately balanced the benefits associated with solar projects with minimizing impacts by suggesting 100-foot setbacks from non-participating property lines and 250 feet from non-participating occupied residences. ORES' standards are based on extensive research and local experience.

Relief from the Town's setback requirements is limited and sought for the following parcels:

Areas 1 and 2 (Parcel ID: 7.00-03-28)

- Fence is within 200 feet of property (interconnection gen-tie line extends onto property) Kintigh Substation, New York State Electric and Gas, non-participating property (7.00-3-26)
- Fence is within 200 feet of property line of New York State Electric and Gas Transmission Line, a non-participating property (7.00-3-27.1)
- Fence is within 200 feet of property line of non-participating property (7.00-3-19)
- Fence is within 200 feet of property line of non-participating property (7.00-3-2.111)
- Fence within 200 feet of ROW (NYS Route 18/Lake Road)

Adhering to the Town's setback requirements would decrease the usable space on this parcel by approximately 100 acres requiring removal of approximately 8.9 MW (direct current [DC]) of renewable energy generation potential.

Area 3 (Parcel ID: 8.00-01-1.12)

- Fence is within 200 feet of property line of non-participating property (8.00-1-18.2)
- Fence is within 400' of dwelling on non-participating property (8.00-1.21)
- Fence within 200 feet of ROW (County Route 65/Hosmer Road)

Adhering to the Town's setback requirements would decrease the usable space on this parcel by approximately 19 acres requiring removal of approximately 2.3 MW (DC) of renewable energy generation potential.

Area 4 (Parcel ID: 8.00-01-1.2)

- Fence within 200 feet of property line of non-participating properties (8.00-1-18.2 and 8.00-1-36), Fence is within 400 feet of dwelling of non-participating property (17.00-1-1)
- Fence within 200 feet of ROW (NYS Route 18/Lake Road)

Adhering to the Town's setback requirements would decrease the usable space on this parcel by approximately 36 acres requiring removal of approximately 5.7 MW (DC) of renewable energy generation potential.

Area 5 (Parcel ID: 8.00-01-1.2)

- Fence within 200 feet of non-participating property line of non-participating property (8.00-1-36)
- Fence within 400' of dwelling on non-participating properties (8.00-1-52, 8.00-1-31.112 and 8.00-1-31.22)
- Fence is within 50 feet of property line of participating property (8.00-1-1.2)
- Fence within 200 feet of ROW (NYS Route 18/Lake Road)

Adhering to the Town's setback requirements would decrease the usable space on this parcel by approximately 17 acres requiring removal of approximately 4.2 MW (DC) of renewable energy generation potential.

Area 6 (Parcel ID: 8.00-01-1.2)

- Fence within 200 feet of property line on west side of non-participating property (8.00-1-38).

Adhering to the Town's setback requirements would decrease the usable space on this parcel by approximately 26 acres requiring removal of approximately 2.1 MW (DC) of renewable energy generation potential.

Area 7 (8.00-01-1.2)

- Fence is within 200 feet of property line of non-participating property (owned by Town) (8.00-1-7.2)
- Fence is within 200 feet of (non-road [e.g., right-of-way, parcel easement]) non-participating property (includes non-road, ROW) (2.00-1-1.111)
- Fence within 200 feet of property line of non-participating properties (2.00-1-32.2, 2.00-1-32.12 and 2.00-1-32.11)
- Fence within 400 feet of non-participating property (2.00-1-32.2)

Adhering to the Town's setback requirements would decrease the usable space on this parcel by approximately 11 acres requiring removal of approximately 6.8 MW (DC) of renewable energy generation potential.

Area 8 (8.00-1-1.11)

- Fence is within 200 feet of non-participating property (8.00-1-1./A)
- Fence is within 50 feet of property line of participating property (8.00-1-1.11) (in a few areas)
- MV line/LOD (outside fence) is within 200 feet of the ROW for NYS Route 18/Lake Road

Adhering to the Town's setback requirements would decrease the usable space on this parcel by approximately 39 acres. Utilizing the Town's setback would not require removal of MW (DC) of renewable energy generation potential. However, for consistency across parcels, ORES setbacks were used. Moreover, the property lines at issue, where the fence will be located at less than the Town's setbacks, are for participating properties and within the coal plant site. These properties are under the control of the landowner Somerset Operating Company, LLC.

Accordingly, if the Facility were to comply with the local setbacks, land available for PV infrastructure placement would shrink to 1,016 acres available for Facility components compared to the 1,264 acres available for panels under the §94-c setback requirements, or a reduction of the size of the Facility by approximately 20%. Under these circumstances, Facility capacity would be reduced between 25-30 MW.

To maintain the proposed 125 MW of capacity for the Somerset Solar Project, the Applicant would be required to obtain approximately 248 additional acres of buildable land (i.e., minimal environmental, cultural, or visual resources present with enough area available to satisfy local setback requirements) within the Town's Agricultural District because, as discussed above, all suitable and available land within the PUD District has been used. The parcels selected by the Applicant for the Facility have been thoughtfully selected to minimize impacts within the Town. See Exhibit 2 (a)(1); Exhibit 4(c); Exhibit 9 (a)(1); Exhibit 11(c), 11(f); Exhibit 12(d); Exhibit 14(e), 14(f); Exhibit 15(a)(9). With this amount of additional acreage, impacts, such as environmental, visual and noise, could increase significantly.

No design change could bring the Facility into compliance with these setbacks, since they are tied to property lines and since the provision imposes such a large setback distance relative to the USCs. The request is the minimum necessary because the Facility already complies with a 100-foot setback, at its closest point, and for several parcels will be set back between 110 and 200

feet from non-participants in other areas of the Facility Site. For all of these reasons, the Applicant cannot reasonably bear the burden of enforcement of this requirement.

§205-112 (f)(i): *Agricultural Resources.*

> "Any Tier 3 Solar Energy System shall not be permitted on any property, lot, parcel that contains 50% or more land classified as Prime Farmland soils or Farmland soils of Statewide importance. Prime farmland is determined and classified by the US Department of Agriculture (USDA) and the percentage of Prime Farmland and Farmland of Statewide Importance is calculated using USDA maps and online data tools, including any amendments made to those maps and data. It is the responsibility of the developer and/or landowner to provide written evaluation, data and mapping to the Planning Board that this 50% requirement is met. The evaluation must contain data and maps that are supported, approved and/or published by the USDA, NYS Agriculture and Markets and/or Niagara County Soil and Water Conservation District (NCSWC). The Planning Board may require that this evaluation be reviewed by the town engineer, consultant, or local agricultural services agent, where the cost of this review will be the responsibility of the developer or landowner."

The Facility cannot be designed to comply with the substantive requirements of this provision. The prohibition of any solar energy systems on any property, lot, parcel that contains 50% or more land classified as prime farmland or farmland of statewide importance soils is unreasonably burdensome in view of CLCPA targets and the environmental benefits of the proposed Facility.

The USDA Natural Resources Conservation Service (NRCS) has identified eight Land Capability Classifications (LCCs) for soil types based on soil characteristics and topography. The NRCS does not discern between current land use in its designation, and therefore forested areas may be considered prime farmland. The LCC classes of I and II generally comprise what may be referred to as prime farmland, while class III soils are generally considered farmland of statewide Importance. Soils designated as prime farmland if drained generally meet prime farmland criteria except for depth to seasonal high-water table and are suitable for drainage improvement.

The NYS Department of Agriculture and Markets (NYSAGM) administers the New York State Agricultural Land Classification System (LCS) which incorporates LCC information and additional scientific soil and crop data for rating soil types in each county, with Mineral Soil Groups 1–4 representing the most productive soils (i.e., prime farmland), and Mineral Soil Groups 5–10 being the least productive.

The NRCS and NYSAGM have designated the following acreages of agricultural soils within the Facility Site and the Town, summarized in Table 24-1.

Table 24-1. Soil Types and Percentages Within Facility Site and Town of Somerset

Agricultural Soil Classification	Facility Site (acres)	Percent (%) of Facility Site	Town of Somerset (acres)	Percent (%) of Town	Percent (%) of Facility Site Within Town
Natural Resources Conservation Service Land Capability Classifications Designations					
Prime Farmland	356	51%	8,764	37%	4%
Prime Farmland if Drained	293	42%	9,983	43%	3%
Farmland of Statewide Importance	13	2%	4,085	17%	0.3%
Not Prime Farmland	34	5%	640	3%	5%
Total	**696**	**100%**	**23,472**	**100%**	**3%**
New York State Department of Agriculture and Markets Designations					
Mineral Soil Group 1	11	2	-	-	-
Mineral Soil Group 2	100	14%	3,225	14%	3%
Mineral Soil Group 3	241	35%	4,030	17%	6%
Mineral Soil Group 4	186	27%	2,907	12%	6%
Total	**538**	**78%**	**10,162**	**43%**	**5%**

Figure 24-1 is a map showing the Facility Site and parcel boundaries layered upon prime farmland, prime farmland if drained, or farmland of statewide importance designations.

Utilizing the NRCS classifications, within the Facility Site approximately 662 acres (95%) of agricultural soils are classified as prime farmland (includes prime farmland, if drained). Under NYS Agriculture Land Classification's Mineral Soil Groups (MSGs) 1–4, *i.e.* prime farmland, approximately 538 acres of the Facility Site, or 78% is classified as prime farmland.

Within the PUD District, where large-scale solar is a permitted use, approximately 997 acres of the total 1,147 acres available are classified as NYS Agriculture Land Classification's MSGs 1–4. Accordingly, this provision creates a contradiction by, on the one hand permitting large-scale solar in the PUD District and prohibiting solar placement on MSGs 1-4 within the PUD.

Outside the PUD District, *i.e.*, south of NYS Route 18/Lake Road, Figure 24-1 shows that all parcels within the Facility Site have more than 50% of at least one of these three soil designations.

Indeed, Table 24-1 and Figure 24-2 show that 97% of the Town of Somerset is comprised of these three soil designations (sum of prime farmland, prime farmland if drained, and farmland of statewide importance). Given the amounts of these soil types within the Town, prohibiting placement of Facility components on such parcels would effectively preclude solar development within the Town (outside of the Industrial and PUD District). The land within the Industrial District is not suitable for placement of solar facilities or is otherwise not available. Given the data center is partially constructed and operational (completion of construction and full operations anticipated in Quarter 2 of 2023) and the presence of coal ash disposal areas, there is approximately 1,062 acres available for solar development within the PUD District. Given that the land available within the Industrial and PUD Districts is not suitable or available for construction of large-scale solar, the Town's law effectively precludes such development.

Moreover, this provision is inconsistent with the ORES regulations and the State's general policy as it relates to renewable energy development on agricultural lands. The Uniform Standards and Conditions (USCs) do not prohibit the siting of solar facility components on prime farmland - rather, they acknowledge that some siting will necessarily occur within USDA MSG 1 through 4, and thus require that construction activities adhere to the NYSAGM Guidelines for Solar Energy Projects Construction Mitigation for Agricultural Lands (dated 10/18/2019) to the maximum extent practicable, and that a third-party agricultural monitor be retained to oversee construction in such areas (19 NYCRR §900-6.4(s)(1)). In general, NYSAGM and other State agencies involved in Article 10 and §94-c permitting have required applicants to avoid and minimize impacts to agricultural resources, including prime farmland soils, but have never imposed a blanket prohibition on locating components on prime farmland soils. In fact, in its response to comments on the draft §94-c regulations, ORES stressed the need to balance potential impacts to agricultural resources with the State's need for renewable energy facilities and the environmental benefits that they provide —those benefits extend to agriculture, which faces a number of threats due to climate change. ORES stressed that the two uses – farmland and renewable facilities – can coexist and still maintain economic viability, particularly when crop production and prices are affected by severe weather events or the global economy, which can reduce income for farmers and agricultural communities."

Notably, this restriction contradicts other provisions of the Town Law. For example, as discussed above, utility scale solar facilities are a permitted use only in Industrial and Planned Development Districts. With this zoning restriction, there is essentially no need for a soil type restriction. Conversely, given the relatively small amount of acres in the PUD and Industrial Districts, further

restrictions such as soil type would even further preclude solar development within the Town. Basically, if the ORES were to not apply the zoning restrictions, as discussed above, thereby allowing development in Agricultural districts, large-scale solar development would still be precluded in the Town.

Lastly, the request is the minimum necessary and the adverse impacts of granting the waiver have been minimized to the maximum extent practicable because the Applicant has designed the Facility to avoid and minimize impacts to prime farmland soils. Placement of solar facility components on land meeting the soil types identified in this provision is limited to a few parcels south of NYS Route 18/Lake Road land and under ownership by the former coal generating facility.

On a Town-wide scale, the quantity of prime farmland soils or farmland of statewide importance to be impacted is minimal and will not have a significant impact on the overall availability of prime farmland soils in the Town. As demonstrated in Exhibit 15, the Facility will not have a significant impact on agricultural resources within the Facility Site or the broader Study Area.

The degree of burden caused by the requirement would be a prohibition on construction of the Facility. This burden should not reasonably be borne by the applicant. The Applicant has spent substantial time and money developing the Project minimizing impacts and maximizing use of a previously disturbed coal plant site.

The request cannot reasonably be obviated by design changes to the facility. Given the predominance of Prime Farmland and Farmland of Statewide Importance within the Town, the Facility cannot be redesigned to comply with this requirement.

§ 205-112: *Hazardous Materials*.

> "The project components shall not contain any hazardous materials that could contaminate soils or the air by their release (units shall not contain cadmium, lead or other hazardous substances such as PFAS substances used in coatings, etc.). MSD sheets for all materials considered hazardous shall be provided to the Barker Fire Department, Code Enforcement Officer and Town Hall."

This provision is overly broad, and the Facility cannot be designed to comply with this requirement. As applied to the proposed facility, it is unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed facility.

There are technological limitations (including governmentally imposed technological limitations) related to necessary facility component bulk, height, process or materials that make compliance by the applicant technically impossible, impractical or otherwise unreasonable per-and

polyfluoroalkyl substances (PFAS) are used in a variety of products including waterproof coating and fire retardants. Accordingly, it may not be possible to construct the Facility using components that have no PFAS and is, therefore, unreasonably burdensome. Indeed, the limitation on all "hazardous substances," an undefined term, could essentially rule out panels and associated equipment from any manufacturer and effectively preclude solar development within the Town.

Although not directly on point, the Siting Board addressed a similarly restrictive local law in the *Hecate Greene* (Case Number 17-F-0619) proceeding. The local law stated: "[n]o unreasonable glare or heat shall be produced that is perceptible beyond the boundaries of the lot on which such use is situated. The design, construction, operation and maintenance of any utility-scale solar energy system shall prevent the misdirection and/or reflection of solar rays onto neighboring properties, public roads and public parks in excess of that which already exists." According to the Siting Board, "[a]s we interpret the local law, any glare from the Facility, no matter how minor, would result in an apparent violation of the local provision. The same reasoning applies to the Town of Somerset's provision. Any hazardous substances, no matter how minor, would result in violation of the law.

General measures to minimize impacts from construction and operation of the Facility include compliance with the applicable local, state, and/or federal regulations that will govern Facility construction and operation, as well as the commitments made by the Applicant throughout this §94-c Application process and in the Siting Permit Conditions approved by the ORES. The Facility has been designed in a manner to minimize potential impacts.

§94-c regulations require public input into the environmental review of proposed development projects so that potential adverse impacts can be identified prior to implementation and avoided, minimized or mitigated to the greatest extent practicable. Potential adverse impacts are identified, avoided, minimized and mitigated to the maximum extent practicable.

One of the advantages of producing electricity from solar is that it does not produce gaseous, liquid, or significant solid waste during operation. Solar energy facilities do not require the use or storage of combustible fuels.

The Applicant is committed to developing and operating the Facility in a safe and environmentally responsible manner. In addition to the mitigation measures described/referenced above, an Environmental Compliance and Monitoring Plan (ECMP) will be implemented during Facility construction. The ECMP will be developed prior to construction and approved by the ORES prior to implementation as part of the Facility's compliance filings for the Siting Permit. The ECMP will

identify specific measures to protect sensitive environmental resources, identify measures to limit long-term impacts to agricultural land, and outline steps to adhere to all relevant permit conditions. The AES Corporation, Inc. (AES) Construction Manager will be responsible for overseeing all aspects of Facility construction, including overseeing Engineering, Procurement and Construction (EPC) contracts and other Facility agreements, overseeing the EPC contractor implementation, ensuring compliance with Facility regulatory approvals, on-site construction representation for monitoring Facility Site work, and assisting with communication with local officials, citizen groups and landowners. The AES Construction Manager also will oversee overall Facility Site construction, including safety and environmental performance and schedule, cost and quality performance, project plans of the day, monthly management meetings, overall project direction, and EPC contractor guidance and quality control. Additionally the AES Construction Manager will provide oversight and compliance monitoring for all environmental commitments and permit requirements during construction as identified in the Siting Permit issued for the Facility and related to public health and safety, including ensuring twice-weekly inspections of construction work sites are performed, required consultations with the ORES or other NYS agencies as completed needed, and ensuring regular reporting and compliance audits are issued.

An independent, third-party Environmental Monitor, which also will serve as the Agricultural Monitor for the Facility, will be responsible for overseeing compliance with Siting Permit conditions and permit requirements. It is anticipated that these two roles can be performed by the same staff person, whom will be required to have the qualifications necessary to oversee threatened and endangered species presence and reporting obligations, stormwater requirements, and oversight of agricultural lands and associated commitments to preserving agricultural soils. The Environmental Monitor will have stop work authority over all aspects of Facility construction activities and will have a daily presence on the site at all times there are ongoing construction or restoration activities. They will be responsible for providing daily and weekly Stormwater Pollution Prevention Plan reports as needed and are responsible that all contractors receive required environmental training.

Once construction is complete, the ECMP will be revised to eliminate construction-only obligations; the remaining obligations will be integrated into the Operation and Maintenance (O&M) Plan. In addition to environmental inspections and/or monitoring that may be required, standard inspections will examine solar panels for wear and tear and any issues. Details regarding the inspection protocol and schedule will be provided in the O&M Plan.

For the reasons discussed above, the request cannot reasonably be obviated by design changes to the Facility. Design changes will not cure any issues regarding unavailability of solar facility components satisfying the Town's vague requirements.

The request is the minimum necessary, and the adverse impacts of granting the request shall be mitigated to the maximum extent practicable. The Applicant will endeavor to use Facility components that do not have, or have the minimal extent practicable, any potential hazardous substances.

The degree of burden caused by the requirement is abandonment of the Project if solar components cannot comply with the overly broad restrictions contained in this provision.

The burden should not reasonably be borne by the Applicant. The Applicant has expended substantial time and money to develop a Project that minimizes impacts and utilizes a previously disturbed brownfield site. The Applicant will attempt to procure Project components that minimizes any potential release of hazardous materials but cannot commit to compliance with this provision because of its overly broad and ambiguous requirements.

The request cannot reasonably be obviated by design changes to the Facility. If no solar components can comply with this provision, there are no possible design changes to bring the Project in compliance.

Tier 4 Solar Energy Systems Waivers

§205-113 - Permitting Requirements for Tier 4 Solar Energy Systems

> "All Tier 4 solar energy systems are permitted through the issuance of a special use permit within the Industrial, General Industry, and Planned Unit Development Districts, and subject to site plan and special use permit requirements set forth in this Section and in addition to the Tier 3 requirements set forth above.
>
> Notwithstanding Article XVA of Section 205 of the Town Code of the Town of Somerset, Tier 4 Solar Energy Systems shall be permitted through the process set forth in this Article. The requirements set forth in Article XV of Section 205 of the Town Code shall not be applicable to Tier 4 Solar Energy System within a Planned Unit Development District.
>
> In order to ensure that the benefits of the community solar resource are available to the entire community, the Town of Somerset shall require all Tier 4 applicants to enter into a Solar Energy System Host Community Agreement."

This §205-113 contains the same zoning restrictions applicable to Tier 3 solar systems and found in §205-110(a)(1). Although the Facility is currently proposed in the PUD and Industrial Districts, portions of the Facility are proposed in the Agricultural District. The Facility cannot be designed

to comply with this requirement insofar as this provision limits placement of solar energy systems to Industrial, General Industry, and PUD Districts for the same reasons set forth above with respect to §205-110(a)(1) and Tier 3 systems.

§ 205-113(1) - *Agricultural Lands.*

> "Any Tier 4 Solar Energy System shall not be permitted on any property, lot or parcel that contains 25% or more land classified as Prime Farmland or Farmland of Statewide Importance."

The Facility cannot be designed to comply with this requirement for the reasons set forth in the waiver discussion for Tier 3 Solar Energy Systems above in this section.

§ 205-113(D)(2) - *Waterfront Development.*

> "Tier 4 systems shall not be allowed in the waterfront protection, Agricultural / Agri-tourism, Land of statewide importance and Environmentally Sensitive areas of the Town as denoted on the Vision Map of the Town of Somerset Comprehensive Plan (on file with the Town Clerk). They also cannot be located within one-half mile of any other Tier 3 or Tier 4 system."

At this time, the Facility cannot be designed to completely comply with this requirement. "Land of statewide importance" is not depicted on the Town's Vision Map (see Appendix 3-A, Map 9 (page 66) of Comprehensive Plan), nor could the Applicant find this term defined in the existing code or Solar Law. A vague, subjective standard of "Land of statewide importance" is simply unworkable — an unenforceable standard is unreasonably burdensome.

According to the Town's Vision Map, the Facility is located in the Industrial/Business, Multiple Use, Mixed Use-Ag/Ag Support Business, and Shovel-Ready Business Areas. Given these designations, it is unlikely that any of these areas constitute "Land of statewide importance." Accordingly, waiver of this provision is unlikely to frustrate the Town's vision.

In addition, in the Vision Map, the Waterfront Protection Area also slightly overlaps the Multiple Use Site Expansion Area. The Facility cannot be designed to comply with this requirement for the same reasons set forth above with respect to §205-110(a)(1) and Tier 3 systems.

The Facility will comply with the remainder of this provision. Accordingly, the requested waivers are the minimum amount necessary.

The degree of burden caused by the requirement, is that the Applicant would be required to move facility components into the Agricultural District. Although the Applicant has additional land under control in the Agricultural District just south of the PUD District and NYS Route 18/Lake Road, this land has already been evaluated and determined to be not suitable for siting facility

components. Therefore, the Applicant would be required to procure additional land from other landowners to maintain the current planned project capacity.

The burden should not reasonably be borne by the Applicant, the Applicant does not believe that the Town intended to keep solar components entirely outside of the waterfront area. This belief is based on the PUD District being located in the waterfront area and the specific allowance for solar in the PUD. It would be unduly burdensome for the Applicant to acquire additional land outside the PUD, perform the necessary studies, and make the necessary changes to the Application, especially given the likelihood that this is just an oversight in the Town code.

The request cannot reasonably be obviated by design changes to the facility. As noted above, the Applicant does not have any additional land under its control suitable for solar placement. Moreover, the Applicant has utilized all land within the PUD District and there is no available space for additional components considering that a data center is also proposed in the PUD District.

24(d) Summary Table of Applicable Local Substantive Requirements and Compliance Assessment

Table 24-2 below provides a list of the substantive requirements in the Town of Somerset Zoning Law and the 2022 Solar Law Amendment that may be applicable to the Facility and a description of how the Applicant plans to adhere to those requirements.

Table 24-2. List of Applicable Substantive Requirements to the Facility and Plans to Adhere to the Requirements.

LOCAL SUBSTANTIVE LAW	COMPLIANCE
§ 96-9(A)(1): Standards and conditions for permit – Excavation	The Facility will be designed to comply with this requirement.
§ 96-11: Certificates of insurance	The Facility will be designed to comply with this requirement.
§ 131-3(A), (C), (D) and (I): Noise	The Facility will be designed to comply with this requirement. The Town zoning code provides an exception for sounds caused by construction activity between the hours of 7:00 a.m. and 11:00 p.m.
§131-3(B): Noise	The Facility cannot be designed to comply with this requirement.

LOCAL SUBSTANTIVE LAW	COMPLIANCE
§ 205-11(P)(1) – (4): Fences	The Facility will be designed to comply with this requirement.
§ 205-11(Y): Exterior Walls	The Facility will be designed to comply with this requirement.
2022 Solar Law (incorporated in Somerset Zoning Code, Article XXII)	
§ 205-116: Applicability – Conformance with NYS Uniform Fire Prevention and Building Code ("Building Code"), the NYS Energy Conservation Code ("Energy Code"), and the Town Code.	The Facility will be designed to comply with the Building and Energy Codes. The Applicant will comply with the Town Code except as discussed herein.
§ 205-110(A): Location of Solar Energy Systems	The Facility cannot be designed to comply with the substantive requirements contained in this section.
§ 205-110(3)(b): Drainage	The Facility will be designed to comply with this requirement.
§ 205-110(3)(d) – Vehicular Paths	The Facility will be designed to comply with this requirement.
§ 205-110(3)(e) – Signage	The Facility will be designed to comply with this requirement.
§ 205-110(3)(f) – Glare/Glint	The Facility will be designed to comply with this requirement.
§ 205-110(3)(g) – Lighting	The Facility will be designed to comply with this requirement.
§ 205-110(3)(h) – Noise	The Facility will be designed to comply with this requirement. However, the reference to the World Health Organization (WHO) is not appropriate in this context as the WHO does not provide guidelines for solar. In addition, the provision creates an unambiguous and potentially unenforceable standard if it relies on some future guidelines by reference. Accordingly, the Facility will comply with this requirement except with respect to recommendation from the WHO.

LOCAL SUBSTANTIVE LAW	COMPLIANCE
§ 205-110(3)(i) – Tree Cutting	The Facility will be designed to comply with this requirement to the maximum extent practicable. AES interprets the 10% standard to be a guideline and not a requirement.
§ 205-110(4) – Decommissioning: Security	To the extent that this provision's requirement that security be posted in an amount equal to 125% of the decommissioning costs (with a 2% escalator) is considered substantive, AES cannot comply. ORES' regulations require that AES post security in an amount equal to 115% of decommissioning costs, an amount sufficient to guarantee removal of the system and site restoration. Amounts greater than this will jeopardize Project economics and amounts anticipated to benefit local communities through host community agreements. Exhibit 23 will contain a description of the security to be posted by AES for decommissioning of the Facility.
§ 205-110(6)(1)(k) – Safety: Soil Removal	The Facility will be designed to comply with this requirement.
§ 205-112(1)(a) – Lot Size	There are no substantive requirements regarding lot size. Compliance with setback and other requirements are discussed herein.

LOCAL SUBSTANTIVE LAW	COMPLIANCE
§ 205-112(1)(b) – Setbacks	The Facility cannot be designed to comply with this requirement. Based on our experience, the proposed 200-foot property line setbacks and 400-foot setbacks from residences are in excess of similar state and local standards, as well as Somerset zoning for other technology and uses. In addition, this setback is in excess of what may be required or considered reasonable to minimize potential environmental or other impacts associated with solar, in particular at the Somerset Generating Site. With a maximum height of 12-15 feet for solar equipment, setbacks greater than 12-20 times the equipment height far outweigh the potential impact from solar or any other Somerset zoning requirements for other technologies and could be read to have the sole purpose of limiting potential development. A local zoning setback typically has the purpose of ensuring that a permitted land use is maintained an appropriate distance from neighboring permitted uses. In this case, vegetative screening will be placed at the property line and solar panels operate with minimal sound, no emissions, and no other potential risks that require a setback distance greater than any other permitted use in the Town. The effect of such a setback limits the amount of available land for panels, requiring the use of other locations in order to generate the same amount of renewable electricity. AES will comply with setbacks established by ORES and other local zoning laws that have appropriately balanced the benefits associated with solar projects with minimizing impacts by suggesting 100-foot setbacks from non-participating property lines and 250 feet from non-participating occupied residences. ORES' standards are based on extensive research and local experience.
§ 205-112(1)(c) – Height	The Facility will be designed to comply with this requirement.
§ 205-112(1)(d) – Fencing Requirements	The Facility will be designed to comply with this requirement.

LOCAL SUBSTANTIVE LAW	COMPLIANCE
§ 205-112(1)(e)(ii)(c)	The Facility will be designed to comply with this requirement.
§ 205-112(1)(f)(i) – Agricultural Resources: Prime Farmland Restriction	The Facility cannot be designed to comply with this requirement. This provision prohibits placement of solar energy systems on parcels containing 50% or more land classified as prime farmland soils or farmland soils of statewide importance. There does not appear to be a basis for this provision and solar development is the only land use identified in the zoning law that is subject to such a specific provision. To the extent that the Facility is proposed on land containing these soil types, the land is being leased by willing landowner; and will be preserved and returned to its previous use upon decommissioning of the Facility. The same cannot be said for industrial/commercial buildings or residential developments. Some current uses of land, like at the Somerset Generating Facility, may not be consistent with a restriction based on the soil content. Moreover, this restriction appears to be in conflict with other provisions of the Town Law. For example, as discussed herein, utility-scale solar facilities are a permitted use only in Industrial and Business Districts. With this zoning restriction, there is essentially no need for a soil type restriction. Conversely, given the relatively small number of acres in the Industrial and Business Districts, further restrictions such as soil type would even further preclude solar development within the Town
§ 205-112(1)(f)(ii) – Agricultural Resources: Compliance with NYSAGM Guidelines	The Facility will be designed to comply with this requirement.
§ 205-112(1)(f)(iii) – Agricultural Resources: Vegetation	The Facility will be designed to comply with this requirement.
§ 205-112(1)(f)(iv) – Agricultural Restoration Requirements	The Facility will be designed to comply with the substantive requirements of this provision.

LOCAL SUBSTANTIVE LAW	COMPLIANCE
§ 205-112(1)(g) – Noise	The Facility will be designed to comply with this requirement.
§ 205-112(1)(h) – Hazardous Materials	This provision is overly broad, and the Facility cannot be designed to comply with this requirement. PFAS are used in a variety of products including waterproof coating and fire retardants. Accordingly, it may not be possible to construct the facility using components that have no PFAS.
§ 205-113 – Permitting Requirements for Tier 4 Systems: All Tier 4 solar energy systems are permitted through the issuance of a special use permit within the Industrial, General Industry, and Planned Unit Development Districts, and subject to site plan and special use permit requirements set forth in this Section and in addition to the Tier 3 requirements set forth above. Notwithstanding Article XVA of §205 of the Town Code of the Town of Somerset, Tier 4 Solar Energy Systems shall be permitted through the process set forth in this Article. The requirements set forth in Article XV of § 205 of the Town Code shall not be applicable to Tier 4 Solar Energy System within a Planned Unit Development District In order to ensure that the benefits of the community solar resource are available to the entire community, the Town of Somerset shall require all Tier 4 applicants to enter into a Solar Energy System Host Community Agreement.	The Facility cannot be designed to comply with this requirement. Based on the Town's existing zoning map, limiting solar development to Industrial, General Industry, and Planned Unit Development Zones would effectively preclude solar development within the Town. The vast majority of the Town is currently zoned Agricultural with Industrial and Business Zones comprising relatively few parcels around the Village of Barker and at the western Town boundaries in the vicinity of the Somerset Generating Facility. Assuming parcels were available in these zones, and there were landowners willing to enter leases (or land sales) for placement of panels on their property, the amount of land available is insufficient for large-scale solar development.
§ 205-113(1) – Prime Farmland	The Facility cannot be designed to comply with this requirement.

LOCAL SUBSTANTIVE LAW	COMPLIANCE
§ 205-113(2) – Location of Tier 4 Systems	At this time, the Facility cannot be designed to comply with this requirement. "Land of statewide importance" is not depicted on the Town of Somerset's Vision Map (see Appendix 3-A, Map 9), nor could AES find this term defined in the existing code or Proposed Solar Law. If the term "Land of statewide importance" is defined in the Town code in advance of Application filing, AES can engage in further discussions with the Town regarding compliance. If the term "Land of statewide importance" refers to "farmland of statewide importance, AES requests that the Town confirm. In addition, in the Vision Map, the Waterfront Protection Area also slightly overlaps the Multiple Use Site Expansion Area. If this is clarified, AES will further discuss compliance with the Town.

24(e) Agencies with Review, Inspection, or Certification Responsibilities

It is the applicant's understanding that a municipal official for the Town of Somerset is responsible for reviewing and approving consistency with State code requirements, inspecting construction work, and certifying compliance with the New York State Fire Prevention and Building Code and Energy Conservation Code of New York State.

Table 24-3 below, provides the name and contact information of the local Code Enforcement Officer for the Town of Somerset.

Table 24-3. Local Contact Information for Review and Approval of Building Permits

Town	Contact Information
Somerset	Mark Remington Town Hall 8700 Haight Road PO Box 368 Barker, NY 14012 (716) 572-3896

The Town of Somerset has adopted and incorporated the New York State Uniform Fire Prevention and Building Code for administration into its local electric, plumbing and building codes. The Applicant requests that the Office authorize the exercise of the electric, plumbing and building permit application, inspection, and certification processes by the Town of Somerset. The Town has committed to engaging a qualified third-party consultant to provide these services. The Applicant agreed to reimburse the Town for expenses relating to confirmation of code compliance.

24(f) Zoning

The Town of Somerset has adopted zoning district designations. The following districts are established within the Town.

Agricultural District	A
Single-Family Residential District	R-1
Single- and Two-Family Residential District	R-2
Lake Shore Residential District	RLS
Business District	B
Industrial District	I
General Industrial District	GI
Planned Unit Development District	PUD

The Facility is within the Town and is located in the PUD and Agricultural Zoning Districts. As noted in section 24(b) of this exhibit, Tier 3 and Tier 4 Solar Energy Systems are allowed only in Industrial, General Industry, and PUD Districts through approval of a special use permit. Land designated as Industrial was not suitable for solar placement. As discussed in section 24(c) of this exhibit, the Applicant is requesting to waive the zoning restrictions for the Facility in terms of developing within a small portion of the Agricultural District.

FIGURES