

**Town of Moretown Development Review Board 79 School Street
Moretown, Vermont 05660**

**Dissenting Opinion re: Application No. 19-38:
Application of David W. Butsch and Linda L. Butsch**

Hearing Held October 24, 2019

The applicant wishes to integrate a ground mounted solar panel array, of approximately 5000 watts in size, on a wooden pergola, in order to raise the solar array to a level to permit him to park two vehicles beneath. The applicants wish to site this solar array adjacent to a public highway, and at less distance from the centerline of this highway than the zoning regulations would permit, if those regulations were applicable here. The board has rejected the application, characterizing it as a pergola, or similar structure used primarily for parking, which has the effect of invoking zoning jurisdiction--and therefore the Development Review Board's own jurisdiction--over the project. For the reasons that follow, DRB alternate members Gregory Nagurney and Craig Oshkello respectfully dissent from this decision.

Ground mounted solar panel arrays are exempt from zoning regulations. 24 V.S.A § 4413(b). Instead, they are regulated wholly according to the provisions of 30 V.S.A. § 248. *Id.* They also may be subject to the requirements of other statutes and agency regulations for reasons not at issue here. Therefore, the dissent believes the matter is at an end, or should be, because the DRB derives its authority from the zoning regulations, which are without force here.

The majority does not view the matter similarly. Rather, they contend that the utilization of a pergola as the ground support for the panels moves the proposed project within their jurisdiction. They derive their support for their position from the applicants inclusion of various proposed pergola designs with their application for a ground mounted solar panel array. Therefore, they argue, the application is primarily, or at least ultimately, an application for the creation of a parking structure, albeit one underneath a solar panel roof. This argument is not without initial appeal, given the framing of the applicants' project as presented to the board. Nevertheless, one wonders: had the applicants claimed the immunity afforded by 24 V.S.A § 4413(b), would the DRB have concluded it had grounds to intervene?

Moving beyond the dictates of the controlling statute, another argument on the applicants' behalf is encountered when one considers the question posed in the prior paragraph in


the context of exactly what types of ground mounted solar projects would have skirted the DRB's determination that it had the necessary jurisdiction to intervene. Several zoning-exempt alternative projects come to mind, all of which would still permit the secondary use of the panels to shield cars parked underneath from the elements, but none of which would be preferable. For example, a panel mounted atop a single galvanized steel pole, set in concrete, would seem to avoid DRB jurisdiction. As would steel I-beams pounded into the ground at all four corners of the panels. One can even imagine, if the panels were not high enough to permit easily parking beneath them, that the ground below them could be altered by excavation to make the necessary headroom. No portion of the zoning regulations seems to prohibit any of these examples.

The DRB is a quasi-judicial body tasked with interpreting and applying the Moretown Zoning Regulations. In so doing, its first order of business is to apply the law as it is written. However, in so doing, the DRB may not produce an "absurd" result. *State v. Tuma*, 2013 VT 70, ¶ 8. The majority, however inadvertently, has glanced past the realization created by their decision in this matter in much the same way that they have misconstrued the exemption required by 24 V.S.A § 4413(b). For this reason, we respectfully dissent.

Dated at Moretown, Vermont, this 5 day of December, 2019.



GREGORY NAGURNEY,
Alternate Member



CRAIG OSHKELLO,
Alternate Member