STATE OF VERMONT
BEFORE THE
PUBLIC UTILITY COMMISSION

Petition of Chelsea Solar LLC, pursuant to 30 V.S.A. § 248, for a certificate of public good authorizing the installation and operation of the "Chelsea Solar Project," a 2.0 MW solar electric generation facility located off Willow Road in Bennington, Vermont	))))))	**Docket No. 17-5024-PET**

CHELSEA SOLAR LLC'S OPPOSITION TO MOTION TO STAY

Here we go again. On January 31, 2018, the Town of Bennington (the "Town") filed a motion to stay these proceedings (the "Motion"). The Town filed almost identical stay motions in other Public Utility Commission ("PUC") proceedings. *See*, dockets 8454 (Apple Hill Solar) and 17-3727-PET (Battle Creek Solar). The motions are a transparent effort to abuse the PUC's process by hoping to stall the PUC proceedings to pressure the plaintiffs into dropping the suit in *PLH LLC et al. v. Town of Bennington et al*., Vermont Superior Court Docket No. 78-1-18-Cncv (the "Suit").

The Town's tactics appear consistent with the basic attitude expressed in an email chain from October 2017, *see* **Attachment A**. Brad Wilson of Ecos Energy sent the Town and the Bennington County Regional Commission ("BCRC") a list of issues with the Town's anti-solar energy amendment to its Town Plan. The Executive Director of the BCRC told the Town's Assistant Manager, who was managing the energy amendment process, "Brad raises some interesting points for discussion. Let's review them once we get his formal statement." The Town's response sent 6 minutes later was: "Brad is very self-serving and I don't want to waste any effort on trying to please him or his billionaire client." While the Town's response was not surprising given the hold a group of NIMBY's have on Town government, the BCRC's further

response was surprising, particularly since it is supposed to impartially and fairly adjudicate the appropriateness of the energy amendment under Act 174: "OK by me. It will be fun to see how it plays out on appeal – will tie the PUC in knots; I am pretty sure the PSD will back the town 100 percent." That last sentiment succinctly describes the Town's tactics here and in Dockets 8454 and 17-3727—let's "*tie the PUC in knots.*"

Of course, the Town's current tactics are not an isolated event. The Chelsea Solar project began what has become a long journey when the Town decided, based upon false information, to at the midnight hour oppose Chelsea Solar LLC's ("Chelsea's") first CPG application. Making matters worse, during the long year rehearing process after the PUC denied the initial CPG application solely based upon an interpretation of the Town Plan, the Town stayed silent even though it knew that the basis on which the PUC denied the first CPG application was, in the words of the Town's attorney, simply not credible. *See* Exhibit CS-BW-12, Transcript, August 14, 2017, Select Board hearing at 21):

> the Town Plan I do not think can credibly be construed to bar alternative energy projects in the rural [conservation] district because of the preceden[ts], because of the language of the plan, because of the way the zoning by-laws allow specific uses in that area and because of the planning that's been underway for the future that includes a number of properties in that area for solar energy.

That position was reiterated by the Town's representative in its rule 30(b)(6) deposition conducted in Docket 8454, *see* Exhibit CS-BW-25 at 7.

In any case, the Motion should be denied. It does not meet the standards for a stay and is based on a flawed jurisdictional argument. Moreover, there is nothing in the Suit that militates against this CPG proceeding moving forward. Other than vague references, the Motion simply does not state how the Suit affects these proceedings, or the purported hardship the Town would suffer by moving forward here. The Motion fails to provide even one single concrete example of

how the Suit might have an impact on these proceedings. The PUC has already denied the Town's stay motion in docket 8454; it should do so here on the same basis.

> The Commission is not a defendant in the [Suit]. The issues complained of in the counts for which [Chelsea] is a plaintiff have not been presented in this proceeding by any party. These issues have only entered the dialog in this proceeding because of the Motion filed by the Town requesting a stay in these proceedings.

See, Docket 8454, *Order Denying Motion for Emergency Stay and Scheduling Order* (February 9, 2018) at 2.

I. <u>The Jurisdictional Basis For The Motion Is Flawed</u>.

The Motion trips at the starting gate from its frivolous jurisdictional argument. The Motion's premise is that the PUC has jurisdiction over the claims in the Suit and therefore under the primary jurisdiction doctrine, the PUC, not the Superior Court, should be where the claims are litigated because the PUC has expertise in the utility area.

As a threshold matter, the Town's assertion that the PUC *should* decide all issues involving the Chelsea Solar project cannot be squared with it simultaneously telling the PUC that the PUC *should not* move forward. Putting that illogical position aside, the Town's motion is properly directed to the Superior Court not the PUC. If the Town's position has any merit, then the Town should make a motion before the Superior Court to stay the Suit, not seek to stay the agency that it asserts should decide.

But the Town's jurisdictional argument has even greater problems. Under the doctrine of primary jurisdiction there are three basic requirements—the agency must have personal jurisdiction over the parties involved in the Suit, it must have subject matter jurisdiction over the issues in the Suit, and it must have a special expertise related to the issues that support the

Superior Court deferring to the agency. *Gallipo v. City of Rutland*, 2005 VT 83, ¶44. Here the PUC meets none of those requirements.

The PUC is a creature of statute and its jurisdiction is limited. The PUC has no "power to decide constitutional issues." *Westover v. Barton*, 149 Vt. 356, 359 (1988). That power is reserved solely for the courts. *Id.* The PUC has no jurisdiction over the merits of a plan certified under Act 174 and no jurisdiction over the process used to certify the plan. *See* 30 V.S.A. 248(b)(1)(C) (PUC has no power to decide "whether the determination of energy compliance should or should not have been affirmative under 24 V.S.A. § 4352.") While the PUC has certain jurisdiction over complaints made ***against*** utility generators, it does not have general jurisdiction over civil complaints just because the plaintiff is or may in the future operate an electric generating facility. Furthermore, the PUC has no jurisdiction over the Town or the other defendants as defendants in a civil suit. Nor does the PUC have jurisdiction over a civil suit brought by PLH LLC, a landowner, against non-utility companies.

The PUC also has no jurisdiction over torts merely because the defendant is a utility. *See, Trybulski v. Bellows Fall Hydro-Elect. Corp.*, 112 Vt. 1 (1941) (Board did not have jurisdiction to assess damages for injuries to private landowners' properties allegedly caused by improper maintenance and operation of dam by hydro-electric company). Here, of course, the defendants are not utilities, depriving the PUC completely of jurisdiction.

A summary list of the counts in the Suit is attached hereto as **Schedule 1**. It lists each count and the parties involved in each count. The Suit is primarily directed at the Town's recent energy amendment to its Town plan and the Act 174 certification process, which does not apply to the Chelsea Solar project because those changes were passed after the Chelsea CPG application was filed in this docket.

The Chelsea related counts are (1) a constitutional challenge to the Town's screening ordinance and the Town Plan's 2016 amendment which essentially incorporates the Town's screening ordinance, *see* counts II and X, (2) one for damages related to alleged violations of constitutional rights, *see* counts VIII, XII, XX, XXI, XXVI and (3) damages in tort based upon the same unconstitutional actions, *see* counts XVIII and XIX, (4) a constitutional challenge to the setbacks in 30 V.S.A. §248(s)(1), *see* count XXV, (5) a constitutional challenge to 30 V.S.A. §248(b)(1)(B)'s requirement regarding recommendations of a municipality, *see* count XI, (6) a constitutional challenge to the Town's 10-acre limit, *see* count XXIV (which is only relevant if the Town challenges the submitted testimony in this docket that the 10-acre rule is inapplicable), and (7) a declaration regarding the applicability of certain Town imposed restrictions since the filing of Chelsea's first CPG application, see count XXIII, which is a request for a specific remedy due to the alleged constitutional violations (which is only relevant if the Town challenges the submitted testimony in this docket that the 10-acre rule is inapplicable).

The PUC has no jurisdiction over either the parties to those counts or the subject matter, much less primary jurisdiction. *Trybulski v. Bellows Fall Hydro-Elect. Corp.*, 112 Vt. 1 (1941); *Westover v. Barton*, 149 Vt. 356, 359 (1988). Moreover, the courts, not the PUC, are the experts in constitutional matters. *Id*.

To be sure, if the Superior Court declares the setbacks in 30 V.S.A. §248(s) unconstitutional, then the Chelsea project would not be constrained by those setbacks. However, that would still not constitute a reason to stay these proceedings as the currently proposed setback meets the setbacks in 30 V.S.A. §248(s). Thus such a declaration would be irrelevant to what is currently before the PUC.

In addition, if the Superior Court declared the screening ordinance and the Town Plan's 2016 screening requirements unconstitutional that would still not be a cause for a stay. Certainly such a declaration would make 30 V.S.A. §248(b)(1)(B) irrelevant, but until the Town actually files testimony regarding screening there is no evidence in the record challenging Chelsea's testimony that the plan for the Project satisfies 30 V.S.A. §248(b)(1)(B) and other aesthetic criteria. In other words, there is no controversy in this Docket concerning the Town's screening ordinance because only the Petitioner has filed testimony on the topic. In addition to providing expert testimony as to how the Project satisfies the screening ordinance, the Petitioner has filed photographic evidence of other ground-mounted solar facilities in Bennington that the Town has acknowledged satisfies its screening ordinance. But again, the Suit is not challenging the Project's conformance with the screening ordinance; it is challenging the constitutionality of the ordinance itself.

Further, even if the Town's screening ordinance is declared unconstitutional, the normal requirement regarding aesthetics under section 248 remains in place, which the Town would need to take a position on anyway. Similarly, the Town would need to respond to Chelsea's discovery, if any, regardless of the Suit.

Likewise, the remedy for constitutional violations Chelsea has asked for in count XXIII is only relevant if the Town challenges the expert testimony submitted by Chelsea that the 10-acre rule does not apply, and the PUC rules that the 10-acre does apply. Until the Town make's its position known, the Town is simply asking the PUC to engage in guesswork as to the Town's position. In any case, the question as to whether or not the 10-acre rule is applicable (PUC jurisdiction) is not the same as whether the provision is constitutional (Superior Court

jurisdiction). They are separate issues to be decided in separate forums. The fact that the issues may have some common facts is meaningless.

II. Even If The PUC Had Jurisdiction Over The Issues In The Suit Involving Chelsea, The Motion Fails To Meet The High Standard Required For A Stay.

Even if the PUC has jurisdiction over issues in the Suit that might tangentially affect the Chelsea project as proposed (which the Motion fails to provide even one concrete example as to what those might be), the Motion does not meet the high bar for a stay. The Motion relies on *In re Woodstock Cmty. Tr. & Hous. Vermont PRD*, 2012 VT 87, ¶36, 192 Vt. 474, 492, 60 A.3d 686, 701 (2012) ("*Woodstock*"). But *Woodstock* shows exactly why a stay is wholly inappropriate here.

Chelsea has *"a right to efficient consideration of its permit application." Id.* 2012 VT 87, ¶37 (emphasis added). Like here, *Woodstock* also involved a superior court suit and a permit application for a project. In *Woodstock*, neighbors opposing the project argued that the permit litigation before the Environmental Division should be stayed because of some collateral issues that were the subject of another suit in Superior Court. In *Woodstock*, "the ground for the stay asserted by neighbors related to the expenses of a trial, particularly the employment of expert witnesses." *Id*. at ¶36. There the neighbors argued that the collateral suit "could have as a result a blocking of the proposed project and they should not have to incur the expense of a trial in this action as long as that possibility was present." The Environmental Division denied the stay, which decision was affirmed by the Vermont Supreme Court.

The facts of *Woodstock* strongly show why the Motion must be denied. *First*, here there is no possibility that the Suit would result in blocking the Chelsea project.[1] *Second*, there are no

[1] The stay requested is a "suspension of proceedings until a specified event occurs in another case." *Woodstock* at ¶36 (internal quotations and citation omitted.) In *Woodstock* the Vermont Supreme Court cited *Stone v. Briggs*, 112 Vt. 410, 412-13, 26 A.2d 828, 830 (1942) as the example of when such

additional expenses that the Town would incur in this docket that would duplicate or be affected by what might be incurred in the Suit. The Town only needs to file testimony, if it desires to do so. But what testimony it files is its choice, and regardless of the outcome of the Suit, the Town would have the same necessity to file testimony if it has some objection to the project. The Town has no additional expenses of moving forward here.

Under *Woodstock*, the "party seeking a stay must make out a clear case of hardship or inequity in being required to go forward if there is a possibility that a stay will damage someone else." *Woodstock* at P36 (internal citations and quotations omitted). "Courts disapprove stays when a lesser measure is adequate to protect the moving party's interests." *Id*. (internal citations and quotations omitted).

Here there is more than a possibility that Chelsea will be damaged by a stay—it is a certainty. Indeed that is the reason for the Town's Motion. Chelsea will certainly be damaged by a stay, as costs for the project and lost revenue continue to build up. On the other hand, the Town will suffer no hardship or inequity from moving forward. The Town has not even stated in its Motion what hardship it would suffer by this CPG application moving forward. It certainly cannot be a clear case of hardship for the Town, to file its own testimony on issues of its choosing.

The Town "must make out a clear case of hardship or inequity in being required to go forward." It simply cannot do that because the Town has no burden moving forward in this docket, regardless of the existence of the Suit. Again, the Motion fails to provide even one single concrete example of how the Suit might have an impact on these proceedings.

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suspension is appropriate. In *Stone*, the other case was a bankruptcy proceeding, and the primary proceeding was a suit to collect on a judgment that would be discharged in the bankruptcy proceeding. If the bankruptcy proceeding discharged the judgment, then there would be no basis to proceed under the primary proceedings and the case would be dismissed. That is nothing like the situation in this docket. Here there is no specified event in the suit that affects these proceedings.

It would be clearly unreasonable and untenable for a stay to be issued in this docket.

III. The Town's Supplemental Filing in Docket 8454 Further Confirms The Lack Of Merit in the Town's Motion.

The Town filed supplemental comments in the Apple Hill Solar docket (8454) regarding a similar motion to stay. Chelsea will address those comments here for the sake of completeness. The Town's position is based upon its voluntary choice to ignore the facts. The Town has chosen to ignore schedule 1 attached, which merely clarified for the Town what parties are involved in each count in the Suit, because to do otherwise would simply not fit into the narrative that the Town advances. Chelsea is certainly prepared to stipulate that Schedule 1 accurately reflects the claims brought in the Suit. Such a stipulation would certainly fall within the "lesser measure[s]" described by the Vermont Supreme Court *In re Woodstock Cmty. Tr. & Hous. Vermont PRD*, 2012 VT 87, ¶36, 192 Vt. 474, 492, 60 A.3d 686, 701 (2012) ("*Woodstock*"). The Town's overt unwillingness to accept the schedule 1 clarification further drives home the point that the Town's Motion is purely an abuse of process, and interposed for delay and to further harm Chelsea and to "tie the PUC in knots".

Crucially, the Town has again passed on the opportunity to specify what issues in the Suit the PUC has jurisdiction over or to provide a concrete example of how the Suit might have an impact on these proceedings or the other proceedings before the PUC. As previously argued, the Town cannot do so because there are none. That is why the Town resorts to vague generalities and unsubstantiated conclusions, such as "nexus," "so intertwined," and "unnecessary expenditures." But such vagaries cannot substitute for the required specifics. Nor can the Town support its request for a stay by trying to argue issues that it claims it will place before the Superior Court, including ripeness and mootness. None of those issues affect these proceedings.

The Town's one attempt at specifics—its brief discussion of Act 174—further illustrates the frivolous nature of its Motion. Both the Town and Chelsea agree that Act 174 and the Energy Amendment do not apply here because these proceedings were commenced before their existence yet the Town, in a further effort to "tie the PUC in knots", is inviting the PUC make a ruling as to their application while at the same time requesting that the PUC stay the proceedings. Nor is the Town correct in its statement that there are no constitutional issues until the PUC rules on the application of the Energy Amendment to these proceedings (which, again, the Town agrees does not apply).[2] Whatever project companies may or may not be involved in specific constitutional issues, PLH LLC, the landowner of the project sites and the owner of sites of potential future projects is the plaintiff for all Act 174 and Town restriction-related constitutional claims as the result of its ownership of what is referred to in the Suit as the Eastern Industrial RR Parcel. Thus it is irrelevant to those issues what the Town seeks to get the PUC to rule on, which still has not been specified by the Town.

The Town's citation of *Save the Bishop's House v. Medical Center Hospital of Vermont, Inc*., 136 Vt. 213, 218 (1978) is also unavailing ("*Bishop's House*"). *Bishop's House* also shows why a stay is untenable here. *First*, as Chelsea has argued, the Town's stay request is appropriately directed to the Superior Court, not the PUC. In *Bishop's House* it was the Superior Court that issued a stay until the Environmental Board ruled on certain issues. Not the other way around. The Town is certainly able to proceed along a similar course. But the reality is that the

[2] The reasonable certainty of the occurrence of the perceived threat to a constitutional interest is sufficient to afford a basis for bringing a challenge, provided the court has sufficient facts before it to enable it to intelligently adjudicate the issues. *Buckley v. Valeo*, 424 U.S. 1, 113–118 (1976); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138–148 (1974) (holding some but not all the claims ripe). *See also Goldwater v. Carter*, 444 U.S. 996, 997. Here, there is a present and imminent threat in two ways. First, the Executive Director of the Bennington County Regional Commission has said he sees no impediment to the Town's Energy Amendment being certified. Second, the Town Plan has already been changed to incorporate the Energy Amendment, which contain restrictions given regulatory effect through section 248 for future projects on PLH LLC-owned land.

Town does not wish to do so because it knows that a stay in the Superior Court case is not its real goal. Its real goal is to hold this proceeding as a hostage and demand a ransom of dropping the Suit. *Second,* in *Bishop's House* the issue the Superior Court referred to the Environmental Board was whether an Act 250 permit was needed. Those facts are completely inapposite to those here. There is no dispute that a section 248 permit is needed for Chelsea to construct and operate an electric generating facility. *Third*, the Vermont Supreme Court's discussion of primary jurisdiction (cited in the Town's supplemental filing) involved solely the question of whether the Superior Court in the first instance should have issued an injunction prior to any determination of Act 250's applicability and "then excus[ing] this lack of determination by invoking the doctrine of primary jurisdiction." *Id*. at 218. The Vermont Supreme Court held that was "a clear misapplication of the doctrine." *Id.* So too here. The Town seeks to have the PUC turn the doctrine on its head, by simultaneously telling the PUC that it should decide all issues, but then asking the PUC to stay its hand. The Town is simply driving the wrong way on a one-way street.

But what *Bishop's House* does teach us is that here, like *Bishop's House*, the length of the stay requested is indeterminate because there is no way to know how long the stay will be in place. In such a case the movants must make out a clear case for such relief. In order to make out its case for such an indefinite stay, the PUC would need to decide (1) whether the Town has made a strong showing of likelihood of success on the merits; (2) whether the Town will suffer irreparable injury absent the stay; (3) whether the stay will substantially harm other interested parties; and (4) whether the stay will harm the public interest. The Town falls far short on each factor. Moreover, as previously argued, the Town has not even attempted to show exactly how the issues in the Suit would affect this proceeding. Finally as the Vermont Supreme Court stated

in *Bishop's House*, the party requesting the stay would need to provide adequate security. Here that would *at a minimum* require the posting of a bond sufficient to compensate Chelsea for the lost revenue and the costs suffered from the delay.

As Chelsea has argued, the Motion should be denied. It does not meet the standards for a stay and is based on a frivolous jurisdictional argument and, as indicated in the Town's refusal to recognize schedule 1—willful blindness. Moreover, there is nothing in the Suit that affects this CPG proceeding. Other than vague references, the Motion does not offer one concrete example of how the Suit might affect these proceedings.

Chelsea has "a right to efficient consideration of its permit application." *Woodstock*, at ¶37. The Town has simply not met the high burden of "a clear case of hardship or inequity in being required to go forward." *Woodstock* at P36 (internal citations and quotations omitted). Nor has the Town shown that no lesser measure would be adequate to protect its purported interests. *Id*.

It would be clearly unreasonable and untenable for a stay to be issued in this docket.

Respectfully submitted,

/s/Thomas Melone
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Attorneys for Chelsea Solar LLC

Dated: February 9, 2018

Schedule 1

PLH et al. v. Bennington et al., Vermont Superior Court Docket No. 78-1-18-Cncv

COUNT #	Plaintiff	Defendant
Count I-failure to adhere to process requirements applicable to new energy plan	PLH	Town of Bennington, Bennington Select Board, Bennington Planning Commission
Count II-Constitutional Challenge to Energy Amendment and 2016 Town Plan Solar amendment	PLH, Chelsea, Otter Creek	Town of Bennington, Bennington Select Board, Siting Committee Members, Bennington Planning Commission
Count III-Energy Amendment Failure to comply with 24 VSA 4352	PLH	Town of Bennington, Bennington Select Board, Bennington Planning Commission
Count IV—Energy Amendment violates 24 VSA Ch. 117	PLH	Town of Bennington, Bennington Select Board, Bennington Planning Commission
Count V-Violation of Equal Protection and due process	PLH	Town of Bennington, Bennington Select Board, Siting Committee Members, Bennington Planning Commission
Count VI-Declaration re APA	PLH	BCRC
Count VII—Injunctive Relief	PLH	BCRC
Count VIII--Damages	Chelsea, Apple Hill, Otter Creek	Town of Bennington, Bennington Select Board
Count IX—Screening Ordinance Violates 24 VSA 4414(15)	PLH, Otter Creek	Town of Bennington, Bennington Select Board
Count X—Constitutional Challenge to Screening Ordinance	PLH, Otter Creek	Town of Bennington, Bennington Select Board
Count XI-Constitutional Challenge to 30 VSA 248(b)(1)(B)	Chelsea, Otter Creek	Town of Bennington, Bennington Select Board
Count XII—Violation of Public Trust Doctrine	All plaintiffs	Town of Bennington, Bennington Select Board, Siting Committee Members, Bennington Planning Commission
Counts XIII-XVII-Anti-trust violations	PLH	Town of Bennington, Bennington Select Board, Siting Committee Members
Counts XVIII and XIX-Tortious Interference	All plaintiffs	Town of Bennington, Bennington Select Board, Siting Committee Members
Count XX-Civil conspiracy	All plaintiffs	All defendants
Count XXI-Damages under 42 USC 1983 and the Vermont Constitution	All plaintiffs	All defendants
Count XXII-Constitutional challenge to 24 VSA 4352(b)	PLH	BCRC
Count XXIII-Declaration re application of certain changes	Chelsea	Town of Bennington, Bennington Select Board
Count XXIV—Constitutional and statutory challenge to Bennington's Solar restrictions	PLH, Chelsea, Otter Creek	Town of Bennington, Bennington Select Board
Count XXV-Constitutional Challenge to setbacks in 30 VSA 248(s)(1)	PLH, Chelsea, Otter Creek	Town of Bennington, Bennington Select Board
Count XXVI—Damages from failure to consent to reduced setback	Otter Creek	Town of Bennington, Bennington Select Board

ATTACHMENT A

Michael Melone

From: Jim Sullivan <jsullivan@bcrcvt.org>
Sent: Thursday, October 19, 2017 10:26 AM
To: Dan Monks
Subject: RE: Bennington Energy Plan

OK by me. It will be fun to see how it plays out on appeal – will tie the PUC in knots; I am pretty sure the PSD will back the town 100 percent.

JS

James Sullivan
Director
Bennington County Regional Commission
111 South Street - Suite 203
Bennington, VT 05201
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jsullivan@bcrcvt.org

From: Dan Monks [mailto:dmonks@BenningtonVT.org]
Sent: Wednesday, October 18, 2017 5:29 PM
To: Jim Sullivan <jsullivan@bcrcvt.org>
Subject: Re: Bennington Energy Plan

Rob already said it is defensible, but that you never know how the PUC or court will rule. Brad is very self-serving and I don't want to waste any effort on trying to please him or his billionaire client.

Sent from my iPhone

On Oct 18, 2017, at 5:23 PM, Jim Sullivan <jsullivan@bcrcvt.org> wrote:

> Brad raises some interesting points for discussion. Let's review them once we get his formal statement and consider whether we need to get a legal opinion….
>
> James Sullivan
> Director
> Bennington County Regional Commission
> 111 South Street - Suite 203
> Bennington, VT 05201
> 802-442-0713 x5
> jsullivan@bcrcvt.org
>
> ---
>
> **From:** Catherine Bryars [mailto:cbryars@bcrcvt.org]
> **Sent:** Wednesday, October 18, 2017 12:21 PM
> **To:** 'Brad Wilson' <brad.wilson@ecosrenewable.com>
> **Cc:** 'Jim Sullivan' <jsullivan@bcrcvt.org>; 'Dan Monks' <dmonks@BenningtonVT.org>
> **Subject:** RE: Bennington Energy Plan
>
> Great, Brad. We'll look out for your formal comments next week and take the discussion from there.

Thanks, Catherine

Catherine Bryars | Regional Planner
Bennington County Regional Commission
111 South Street, Suite 203 | Bennington, VT 05201
(802) 442-0713 ext.310 | cbryars@bcrcvt.org

From: Brad Wilson [mailto:brad.wilson@ecosrenewable.com]
Sent: Wednesday, October 18, 2017 12:05 PM
To: Catherine Bryars <cbryars@bcrcvt.org>
Cc: 'Jim Sullivan' <jsullivan@bcrcvt.org>; 'Dan Monks' <dmonks@BenningtonVT.org>
Subject: RE: Bennington Energy Plan

Hi Catherine-

Yes, definitely! Early next week, I'll send you a document that details our concerns about the draft plan's compliance with required state standards. However, in the meantime I think I could briefly state that most of the items are ultimately going to relate back to the mechanism in the draft plan that deems every property in town (other than the 25 that were identified as preferred) unsuitable for commercial scale solar (*top of page 23 of the draft plan*). Some informal discussion follows:

Certainly, the standards and guidance allow and encourage a Town to identify specific properties that are unsuitable for a given type (or size!) of renewable generator. However, it is clear in the guidance and standards that marking sites unsuitable (for a particular size of solar generator in this case – greater than 150 kW, or "commercial scale") requires a deliberate approach (*see last paragraph spanning pages 19 and 20 in the Municipal Standards Guidance*). The designation of a property (or properties) as unsuitable cannot be arbitrary (*see section 13B of the Municipal Standards Checklist*).

The standards and guidance are very clear that local constraints leading to an unsuitable designation must be tied to specific resources that are described for protection in the Town Plan (*Pages 19 and 20 of the Guidance and Sections 12B, 12C, 13A, 13B of the Standards*). Act 174 has not changed the underlying Vermont law that zoning restrictions (and "de facto" zoning restrictions) are not applicable to energy generation projects. The Municipal Standards Overview document gives a reminder of this; it states, "zoning bylaws may not regulate projects regulated under Section 248," (*Overview, Page 2*). The plan absolutely can restrict development on a certain property if that property contains a specific resource that is identified as important and protected in the Town Plan and is supported by specific language, data, and reasoning (*Guidance 19 & 20 and Standards 12B, 12C, 13A, 13B*). A blanket prohibition on a certain type or size of generator in a large area of Town without being tied to specific protected resources is certainly a type of zoning restriction (if this type of restriction is included in the Town Plan instead of zoning bylaws, that would be a "de facto" zoning restriction).

The standards and guidance are also crystal clear that designating properties as unsuitable for a particular type or size of generator is only allowable if the policies also similarly prohibit other types of development on those properties (*Guidance 19 & 20 and Standards 13A*). The standards do not allow your plan to say commercial scale solar is prohibited here, but other types of development are acceptable. If a property has resources that must be protected from commercial scale solar, then those resources must also be protected from other forms of development.

The approach in the draft plan for identifying unsuitable sites clearly does not pass muster under these standards. These are required standards; there is no "N/A" option. Now comes a little bit of my own personal interpretation and you can take it or leave it. The guidance and standards do not say this

specifically, but I think a comprehensive reading of those documents reveals an intent that the unsuitable designation is powerful and therefore needs to be carefully and deliberately applied to specific properties in the same site-specific fashion that preferred sites are selected. The methodology (or lack thereof) included in the draft plan significantly misses the mark here.

I've never believed in raising problems without also trying to identify solutions. The Guidance and Standards discuss three types of property designations; preferred, unsuitable, and potentially suitable, and I think a key could be using all three designations as prescribed in the guidance. Right now, under current law/plan, I would say all properties in the Town are "potentially suitable" for commercial scale solar. A landowner is able to propose a commercial scale solar project on any property for review. Such a proposal won't necessarily receive preferred treatment, and it won't necessarily be approved/supported after review, but it isn't outright prohibited on almost every single property in the Town. I think a map prepared following the Guidance and Standards would continue to show most of the Town as potentially suitable, with smaller groups of specifically-selected properties shown as preferred and unsuitable. Projects on preferred sites will get preferred treatment under the siting standards. Projects on unsuitable sites will be clearly prohibited (along with other forms of development). And projects on potentially suitable sites would not receive preferred treatment but would be approved/supported after review only if proposed in accordance with all applicable standards and requirements. The Guidance specifically mentions inclusion of "potential (but not preferred) locations" (*Page 20*) but your draft plan does not implement this component.

I apologize, this email ended up being longer than I intended when I sat down to write it. I have a sense of how much time, resources, and effort went into preparing the draft, and it is not my intention to introduce arbitrary hurdles. I fully support Bennington's pursuit of a certified energy plan, but it must meet the required standards. I think the current draft fails to do so, and it is also true that the current draft proposes policies that harm development rights on a number of properties that we own. I'll follow up within a week with a formal and more comprehensive write-up, and I hope you'll feel free to write back at any time with questions or responses. I'm hoping we could hash out some of this discussion informally prior to the November 6 hearing. Unfortunately, I think my presence on November 6 may result in significant public discussion time being used for topics that are not particularly relevant to the draft plan. I will recommend that the draft plan needs additional work and changes before being recommended to the Select Board, but maybe we can save some time on November 6 by discussing the basis for that recommendation beforehand. I appreciate your consideration of my comments.

Thanks,
Brad

Brad Wilson
(612) 460-8605
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222 South 9th Street, #1600
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From: Catherine Bryars [mailto:cbryars@bcrcvt.org]
Sent: Wednesday, October 18, 2017 8:34 AM
To: Brad Wilson <brad.wilson@ecosrenewable.com>
Cc: 'Jim Sullivan' <jsullivan@bcrcvt.org>; 'Dan Monks' <dmonks@BenningtonVT.org>
Subject: Bennington Energy Plan

Hi Brad,

It was nice to see you again Monday evening.

At the meeting you mentioned concerns about the draft Bennington Energy Plan meeting certain Act 174 standards. BCRC would be happy to address your concerns if you let us know which specific standards you are wondering about.

You said you would be able to provide those concerns in writing within a week, so let's say we'll expect something from you by next Weds, Oct 25? We at BCRC and the Bennington Planning Commission appreciate your timeliness in this process.

Looking forward to hearing from you,
Catherine

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