STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 17-5024-PET

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 on Willow Road in Bennington, Vermont	

Order entered: 05/17/2018

ORDER GRANTING CHELSEA'S REQUEST THAT THE VESTED RIGHTS DOCTRINE APPLY TO THE REVIEW OF THE PETITION

I. INTRODUCTION

On March 9, 2018, Chelsea Solar LLC ("Chelsea") filed a brief in support of its proposed schedule in this proceeding in which it argued that it has a vested right to a review of the petition in this case under the Bennington Town Plan (the "Town Plan") in effect in 2014 because the petition in this case is a reconsideration of the petition in Docket 8302 ("Chelsea I"), which was filed on June 19, 2014.[1] On March 30, 2018, the Town of Bennington (the "Town") and the Vermont Department of Public Service (the "Department") filed briefs in opposition to Chelsea's vested rights argument. In this Order, I rule that Chelsea has a vested right to the laws that were in effect at the time the complete Chelsea I petition was filed on June 19, 2014.

II. BACKGROUND

On June 20, 2013, Chelsea executed a standard-offer contract for a 2.0 MW solar facility located in Bennington, Vermont.

On June 19, 2014, the Vermont Public Utility Commission ("Commission") accepted as administratively complete Chelsea's petition for a certificate of public good ("CPG") for a 2.0 MW project proposed on 15 acres of a 27-acre parcel at 500 Apple Hill Road in Bennington in Docket 8302.

[1] *Petition of Chelsea Solar*, Docket 8302, orders of 2/16/16, 4/14/17, and 4/17/17.

On February 16, 2016, the Commission issued an order in Docket 8302 denying the Chelsea I petition. The Commission denied the Chelsea I petition because it concluded that the project would unduly interfere with orderly development in the region and would have an undue adverse effect on aesthetics or on the scenic or natural beauty of the area.[2]

Between March 14, 2016, and January 24, 2017, Chelsea filed nine motions in Docket 8302 variously requesting that the Commission reconsider its February 16 denial, including a proposed amendment to the project on March 21, 2016, that would reduce the project footprint to 10.2 acres by using different, more efficient, solar panels.

On April 11, 2016, the Town passed an amendment to its 2010 Town Plan (the "2016 Town Plan Amendment").

On April 14 and 17, 2017, the Commission issued two orders denying the nine Chelsea motions.

In June 2017, Allco Renewable Energy Limited ("Allco"), representing Chelsea, filed an appeal of the Commission's denial orders in Docket 8302 with the Vermont Supreme Court.

On September 8, 2017, Chelsea filed a motion with the Commission in Docket 8302 requesting that the Commission vacate its denial decisions and reassess the Chelsea I project based on the project's further amendment, which included a change in the access drive to Willow Road, reducing the project footprint, and the Town's favorable determination that the neighboring 2.0 MW, 10-acre Apple Hill Solar project was not prohibited by the Town Plan.

On September 9, 2017, Allco moved that the Vermont Supreme Court remand its appeal of Docket 8302, to the Commission for the taking of additional evidence related to the proposed Willow Road project amendment.[3]

On September 22, 2017, the Vermont Supreme Court denied Allco's motion to remand.

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[2] The Commission's denial was based on its reading of the 2010 Bennington Town Plan, which was in effect at the time the Chelsea I petition was filed. Specifically, the Commission determined the Chelsea I project would violate three clear, written community standards in the 2010 Town Plan that sought to conserve the Rural Conservation district where the Chelsea I project was sited. The Commission determined that the 2010 Town Plan proscribed the following activity in the Rural Conservation district: (1) non-residential development; (2) development sited prominently on a hillside; and (3) development that did not minimize clearing of natural vegetation. The Chelsea I project was not residential, was visible on a hillside above the Vermont Welcome Center, and required clear-cutting 15 acres of trees.

[3] Motion of Appellant Allco Renewable Energy Limited for remand of the case to the Vermont Public Utility Commission, Vermont Supreme Court Docket 2017-195 related to the Commission's denial of the petition of Chelsea in Commission Docket 8302.

On October 12, 2017, the Commission issued an Order in Docket 8302 denying Chelsea's motion to vacate the Docket 8302 denials and assess the revised Willow Road project because the Commission did not have jurisdiction over Docket 8302. In recognition of Chelsea's efforts to revise the Chelsea project and Chelsea's representation that the Town now supported the Apple Hill project, and to promote judicial efficiency, the Commission encouraged Chelsea to dismiss its appeal and file a new petition reflecting its proposed Willow Road project that could rely upon evidence admitted in Docket 8302 to the extent it was applicable to the amended project (the "October 12 Order").

On October 17, 2017, Chelsea filed 45-day advanced notice of the Willow Road project in accordance with 30 V.S.A. § 248(f) and Commission Rule 5.402.

On October 20, 2017, Allco filed a voluntary dismissal of its appeal of the Commission's denials in Docket 8302 with the Vermont Supreme Court.

On November 28, 2017, Chelsea filed a new petition for the proposed project on Willow Road ("Chelsea II").

On December 4, 2017, the Commission provided notice to Chelsea that the Chelsea II petition was deemed administratively complete and initiated this case #17-5024-PET.

On March 7, 2018, I held a prehearing conference in this matter. The parties presented divergent proposed schedules for the proceeding that could not be resolved, and I directed the parties to file briefs on their proposed schedules.

On March 9, 2018, Chelsea filed a brief in support of its proposed schedule in which it states the position that it has a vested right to the applicability of the Bennington Town Plan in effect in 2014 and that issue preclusion bars a full relitigation of the Project (the "Chelsea Brief"). In support of the Chelsea II petition, Chelsea also filed several documents and testimony in this case that had previously been admitted into evidence in Docket 8302.

On March 30, 2018, the Town and the Department filed briefs (respectively, the "Town Brief" and the "Department Brief"). The Town and the Department both oppose Chelsea's position that it has a vested right to the Bennington Town Plan in effect in 2014.[4]

[4] The Vermont Agency of Natural Resources also filed a brief disagreeing with Chelsea's argument that issue preclusion bars a full relitigation of the Chelsea II project. I am deferring a ruling on issue preclusion and will only address the vested rights dispute in this Order.

On April 9, 2018, Chelsea submitted a second brief on the schedule and scope of this proceeding responding to the Town Brief (the "Second Chelsea Brief").

III. POSITIONS OF THE PARTIES

Chelsea

It is Chelsea's position that this proceeding is not subject to the 2016 Town Plan Amendment. Specifically, Chelsea disputes the relevance of the following "mass and scale" language in the 2016 Town Plan Amendment, which states that:

> Except for solar facilities located in preferred areas, solar facilities larger than 10 acres, individually or cumulatively, cannot be adequately screened or mitigated to blend into the municipality's landscape and are, therefore, explicitly prohibited.[5]

Chelsea argues that, consistent with *In re Jolley*[6] and *In re Molgano,*[7] it is entitled to the town plan that was in effect when it filed the Chelsea I petition. Chelsea further asserts that in the October 12 Order, the Commission extended the development of the Chelsea project that began when Chelsea received its standard-offer contract in 2013. Chelsea characterizes the October 12 Order as an "implicit" acknowledgement that the reconfigured project would be reviewed under rules applicable when the original Chelsea project began.[8] Chelsea asserts that it has reasonably relied on the "implicit" acknowledgement of the application of its vested right to the law at the time of the initial application in moving forward with the Chelsea II petition:

> To date Chelsea has spent hundreds of thousands of dollars in good faith reliance on the law at the time it undertook development. As a result, the Chelsea project is not affected by the post-2014 changes.[9]

The Town

The Town disagrees with Chelsea and argues that the Chelsea II petition is a substantial revision of Chelsea I and therefore the "newly filed application is . . . subject to the bylaws in effect at the time of its filing."[10] The Town asserts that applying the vested rights doctrine in this

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[5] Case no. 17-5024-PET, exh. CS-BW-19 at 5. The 2016 Town Plan Amendment would prohibit Chelsea II if the neighboring 10-acre Apple Hill solar project is approved first.

[6] *In re Jolley*, 2006 VT 132, 181 Vt. 190, 915 A.2d 282.

[7] *In re Molgano*, 163 Vt. 25, 653 A.2d 772 (1994) (Environmental Board could not base denial of application on zoning ordinance that was enacted after developer had obtained local zoning permit).

[8] Second Chelsea Brief at 1-2.

[9] Chelsea Brief at 10.

[10] Town Brief at 7 (quoting *In Re Appeal of Jolley Associates*, 181 Vt. 190, 197, 915 A.2d 282, 288 (2006)).

case would allow a developer to file successive applications under the rules in effect at the time of an initial filing and would "greatly diminish the ability of the Vermont municipalities to control development within their jurisdictions."[11]

The Department

The Department asserts that Chelsea does not have a vested right to a determination based on the 2014 version of the Bennington Town Plan and supports the position of the Town that Chelsea's rights vested on November 28, 2017, when the Chelsea II petition was filed and hence is subject to the 2016 Town Plan amendment.[12]

IV. DISCUSSION AND CONCLUSION

The vested rights doctrine springs from the fact that months, or even years, often pass between the time a landowner applies for a new land use permit and the time the project is completed. This time gap creates confusion about what laws apply when local zoning and town planning guidelines change after, or in response to, the landowner's application for development. In those circumstances, a landowner often asserts vested rights in the older laws that applied at the time of the landowner's application, while the local municipality often seeks to apply its new laws to the project. That is precisely the situation here.

In evaluating the application of the vested rights doctrine here, I conclude that Chelsea has a vested right to the laws that were in effect at the time it filed its Chelsea I petition on June 19, 2014. There are at least three reasons this is so. First, Vermont has adopted the minority rule of the vested rights doctrine, which provides greater protections for landowners from later changes in the law. Second, the Commission's October 12 Order was clearly intended to allow Chelsea to refile its petition and have that petition treated as a continuation of the previous petition, and Chelsea took actions in reasonable reliance on that Order. Third, the refiled petition does not request approval for a larger project, but instead proposes a project that has a significantly *smaller* footprint and thus raises fewer concerns for neighbors and other interested parties. It would be bad policy if vested rights were available only if a landowner refuses to make reasonable changes to a project to accommodate the concerns of others.

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[11] *Id.* at 9.
[12] Department Brief at 1-2.

First, the vested rights doctrine has both a majority and a minority rule, and the Vermont Supreme Court has adopted the more landowner-friendly minority rule that vests rights when a full and complete permit application is filed.[13] Under the majority rule, by contrast, rights vest at a later time and only if an applicant both received a permit and substantially relied on it in commencing work, or, alternatively, can show that an amendment was enacted to target its development. Vermont's minority rule is premised on providing landowners with certainty in the law and its administration, avoiding the litigation that a more complicated rule would engender, and the statutory directive of 1 V.S.A. § 213 that changes in the law cannot "affect a suit begun or pending at the time of their passage."

This statutory directive from 1 V.S.A. § 213 applies here. When developers seek reconsideration of a previously filed application, as Chelsea seeks here, the vested rights doctrine places them in the same legal position as when a complete application was first filed, without regard to any later changes in the law. The idea is to set in place the laws that apply to the project and avoid any mixing and matching of laws based on later changes to town plans or other regulations. As the Vermont Supreme Court has held, a landowner "may not simultaneously take advantage of the laws in effect at the time of the initial application and those in effect at the time of the reconsideration application—it is not a two-way street."[14] Here, it is undisputed that Chelsea submitted a complete application on June 19, 2014. To ensure that the 2016 revisions to the Town Plan do not "affect a suit begun or pending at the time of passage,"[15] Chelsea must have a vested right to the laws that were in effect at the time it filed its complete Chelsea I petition on June 19, 2014.[16]

Second, although the Town and the Department argue that the Chelsea I petition is irrelevant now that Chelsea has submitted the Chelsea II petition,[17] this argument ignores the Commission's October 12 Order. Chelsea did not make its decision to refile its petition in a vacuum. The context here is crucial. The October 12 Order allowed Chelsea to refile its petition and implied that the refiled petition would be treated as a continuation of the previous petition.

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[13] *Smith v. Winhall Planning Commission*, 140 Vt. 178, 181, 436 A.2d 760, 761 (1981).
[14] *In re Times and Seasons*, 190 Vt. 163, 167, 27 A.3d 323, 328 (2011).
[15] 1 V.S.A. § 213.
[16] *See Application of Seneca Mountain Wind, LLC*, Docket 7867, Order of 8/9/13 (Applicants have a vested right in a town plan after submitting a complete application).
[17] Town Brief at 5; Department Brief at 2.

As Chelsea correctly argues, the October 12 Order implicitly recognized that Chelsea had a vested right to the Town Plan that was in effect in 2014, when it filed the Chelsea I petition, rather than the Town Plan that was in effect on December 4, 2017, when the Commission deemed the Chelsea II petition to be complete. In the October 12 Order, the Commission explicitly offered to: (1) reconsider the project as proposed by Chelsea on September 8, 2017, if Chelsea filed a new petition in a timely fashion; (2) extend the commissioning deadline in Chelsea's September 2013 standard-offer contract to reflect the time needed to complete a refiled petition; and (3) promptly review the proposed amended project using testimony and exhibits already in evidence in Chelsea I, as appropriate. It was therefore reasonable for Chelsea to assume that the refiled petition was a continuation of the previous petition.

Further, Chelsea in fact took actions in reasonable reliance on the October 12 Order. In particular, Chelsea decided to dismiss its appeal of Chelsea I and invest instead in refiling for approval of the project through the Chelsea II petition.[18] Chelsea would not have taken these actions if the Town and the Department were correct that the Chelsea II petition extinguished Chelsea's vested rights.

I agree with Chelsea that the Vermont Supreme Court's decision in *In re Jolley* is controlling here and that "[t]his case fits squarely under *Jolley*."[19] In *Jolley*, as here, the developer obtained vested rights with an initial complete application, and the question was whether the developer "continued to retain this vested right" after its "application was denied on the merits but 'without prejudice' to [the developer's] ability to submit further applications for the project."[20] The Vermont Supreme Court concluded that the developer had a vested right to a zoning bylaw that existed at the time of its application because the denial without prejudice "was in essence, if not technically, a remand."[21] The same is true here. The Commission's October 12 Order, like a denial without prejudice or a remand, effectively offered to address a refiled petition as a continuation of the original petition. Thus, although the Town argues that this case is before the Commission after it was denied and there is no remand directing its further review,

[18] Chelsea's filings in support of Chelsea II include both information admitted into evidence in Chelsea I and new filings that reflect the Chelsea II amendment of the original project.
[19] Chelsea Brief at 2.
[20] 2006 VT 132, ¶ 11.
[21] *Id.* at ¶ 14.

this distinction does not affect the vested rights analysis. As in *Jolley*, here Chelsea "could have reasonably relied on the [Commission's] representation that the denial would not prevent it from reapplying."[22] The Commission's offer to reconsider the Chelsea project is akin to the denial without prejudice addressed in the *Jolley* decision because Chelsea could similarly reasonably rely that the Commission's denial of Chelsea I would not prevent Chelsea from applying for review of the amended Chelsea II petition. Because of the differences created by the October 12 Order, I am not persuaded by the Town's arguments that *Jolley* supports the conclusion that the vested rights doctrine does not apply in this case.

Nor am I persuaded by the Town's argument that *Jolley* is inapplicable because Chelsea II is an entirely new petition reflecting major project changes, while *Jolley* involved an amended application to remove a canopy. The Town asserts that, while there was an amendment in *Jolley*, the amendment in *Jolley* only replaced a canopy with other venting technology but did not modify the project so substantially as to require the filing of a new petition, as is the case here. The Town contends that because Chelsea II is a new petition, rather than an amendment of an existing petition, the vested rights doctrine is not applicable.

The Town is correct that the application for the proposed Chelsea II project is factually different from the application for the *Jolley* project. This case is a petition for a certificate of public good before the Commission pursuant to 30 V.S.A. § 248. The *Jolley* project was proposed in a building application before a zoning board. That said, the procedural and factual differences between this case and *Jolley* do not diminish the applicability of the vested rights doctrine in this case.

In *Jolley*, after the denial without prejudice, the developer was permitted to reapply for a building permit for a gas station redesigned without a canopy unaffected by the fact that the Town of Shelburne had amended its zoning scheme to prohibit gas stations. Similarly here, after the October 12 Order, Chelsea withdrew its appeal of Chelsea I and filed the smaller, redesigned Chelsea petition as a similar continuation of the Chelsea project originally contemplated by the September 2013 standard-offer contract. The only difference is that the procedural vehicle

[22] *Id.* at ¶ 16.

available to Chelsea to seek the approval of its amended petition was submission of a new petition, rather than an amendment of the original petition as in *Jolley*.

I am not persuaded that the fact that Chelsea filed a new petition is dispositive of the application of the vested rights doctrine. The Commission required the new petition as *the* vehicle to address the substance of Chelsea II amendments. While done in the procedural context of a new petition as instructed by the Commission, amending Chelsea I to reflect more efficient solar panels is not dissimilar from what occurred in *Jolley* where the project was also amended to use different venting technology. Chelsea II remains a 2.0 MW solar project in approximately the same location as Chelsea I, but with a smaller footprint than the Chelsea I project. As in *Jolley*, this refiled application "would not require the sort of substantial revision that should dictate a loss of vested rights."[23] The Commission recognized this continuation of project development in the October 12 Order by allowing Chelsea to refile relevant evidence from Chelsea I to support Section 248 review in Chelsea II. The new petition in this case simply ensures the thorough documentation of the proposed impacts of that technology change on the Section 248 criteria.

I do not find it unreasonable for Chelsea to have relied on the Commission's October 12 Order to further review the amended Chelsea project, once the Commission had jurisdiction. In response to the Commission's offer, Chelsea withdrew its appeal with the Vermont Supreme Court and filed a revised application as instructed by the Commission. Implicit in the October 12 Order was Chelsea's vested right for the Chelsea II project to be reviewed pursuant to the Town Plan in effect in 2014, rather than the Town Plan in effect in 2017.

Finally, the third reason I find that Chelsea has vested rights here is that the refiled petition does not request approval for a larger project, but instead proposes a significantly *smaller* footprint to the project that raises fewer concerns for neighbors and other interested parties. This fact is directly relevant to whether a project is the type of "substantial revision" that might lead to the loss of vested rights.[24] A change is more likely to be substantial if it increases the footprint of a project than if it decreases the footprint, and the change here is a decrease. If landowners lost their vested rights whenever they voluntarily made changes to accommodate the

[23] *Id.*
[24] *Id.*

concerns of others, then landowners would be less likely to make those changes. It would be bad policy to discourage reasonable efforts to address the concerns of project opponents.

For the foregoing reasons, I hereby determine that Chelsea has a vested right to the laws that were in effect at the time it filed its complete Chelsea I petition on June 19, 2014.

SO ORDERED.

Dated at Montpelier, Vermont, this 17th day of May, 2018.

Michael E. Tousley, Esq.
Hearing Officer

OFFICE OF THE CLERK

Filed: May 17, 2018

Attest: Judith C. Whitney
Clerk of the Commission

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: puc.clerk@vermont.gov)

PUC Case No. 17-5024-PET - SERVICE LIST

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