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: 08/30/2018

ORDER AFFIRMING THE HEARING OFFICER ORDER ON THE APPLICATION OF THE VESTED RIGHTS DOCTRINE

I. INTRODUCTION

On March 9, 2018, Chelsea Solar LLC ("Chelsea") argued that it has a vested right to review under the Bennington Town Plan in effect in 2014 because this case is a reconsideration of the petition in Docket 8302, which was filed on June 19, 2014.[1] On May 17, 2018, the hearing officer agreed and issued an order in this proceeding ruling that Chelsea has a vested right to the laws that were in effect at the time the first complete Chelsea petition was filed on June 19, 2014 (the "May 17 Order").

On May 23, 2018, the Town of Bennington ("Town") filed a motion with the Vermont Public Utility Commission ("Commission") for leave to take interlocutory appeal of the hearing officer's May 17 Order (the "Town's Motion").

On June 14, 2018, we granted the Town's Motion.

In this Order, we affirm the hearing officer's May 17 Order.

II. BACKGROUND

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

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

On June 19, 2014, the 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 (the proposed "Chelsea I" project).

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 and on the scenic or natural beauty of the area. Chelsea appealed that decision to 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 decision and reassess the Chelsea I project. Chelsea noted a number of amendments to the project, including a change in the access drive to Willow Road that reduced the project footprint. Chelsea also noted 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 October 12, 2017, the Commission issued an Order in Docket 8302 denying Chelsea's motion to vacate the Docket 8302 denial because the Commission did not have jurisdiction over that docket while it was on appeal at the Vermont Supreme Court. In recognition of Chelsea's efforts to revise the Chelsea I project into a smaller project and Chelsea's representation that the Town now supported the neighboring solar project in Docket 8454, and to promote judicial efficiency, the Commission encouraged Chelsea to dismiss its appeal and file a new petition reflecting its revised project that could rely upon evidence admitted in Docket 8302 to the extent it was applicable to the revised project (the "October 12 Order").

On October 20, 2017, Chelsea 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 a smaller project on the site of Chelsea I (the proposed "Willow Road" project).

On December 4, 2017, the Commission provided notice to Chelsea that the Willow Road petition was deemed administratively complete and initiated Case No. 17-5024-PET.

On March 7, 2018, the hearing officer held a prehearing conference in this matter. The parties presented divergent proposed schedules for the proceeding that could not be resolved, and the hearing officer 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 stated the position that it has a vested right to the applicability of the Bennington Town Plan in effect in 2014. In support of the Willow Road 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 in which they each opposed Chelsea's position that it has a vested right to the Bennington Town Plan in effect in 2014.

On May 17, 2018, the hearing officer issued the May 17 Order ruling that Chelsea has a vested right to the laws that were in effect at the time the Chelsea I petition was filed on June 19, 2014.

On May 23, 2018, the Town filed the Town's Motion for leave to take interlocutory appeal of the hearing officer's May 17 Order. Specifically, the Town asks that the Commission respond to the question: Does Chelsea have a vested right to review of its 2017 petition under the Town Plan in effect when its prior petition was deemed complete in 2014?

On June 6, 2018, Chelsea and the Department filed comments each stating that they did not object to the Town's Motion.

On June 14, 2018, we granted the Town's Motion.

On July 6, 2018, the Town and Chelsea filed legal briefs (the "Town's Brief" and "Chelsea's Brief," respectively), and the Department filed comments stating that it is not taking a position on the May 17 Order.

On July 20, 2018, the Town and Chelsea filed reply briefs (the "Town's Reply Brief" and "Chelsea's Reply Brief," respectively).

No other comments have been filed.

III. POSITIONS OF THE PARTIES

The Town

The Town argues that the May 17 Order is erroneous because it concluded that the vested rights doctrine entitles Chelsea to a review of the Willow Road petition under the version of the Town Plan in effect in 2014 when the Chelsea I petition was accepted as administratively complete. The Town asserts that by its claim of vested rights "Chelsea asks the [Commission] to hold other parties in suspension, rather than give consideration to the policy [the 2016 Town Plan Amendment] that the municipality developed and passed in good faith, as directed by the will of its voting residents, after Chelsea's petition [in Docket 8302] was denied."[2]

The Town argues that because Willow Road is a new petition that was filed after the Town adopted the 2016 Town Plan Amendment, the amendment is applicable to Willow Road.[3]

Chelsea

Chelsea contends that the Commission should affirm the May 17 Order because "the Project is not starting from scratch from either a legal or practical perspective." Chelsea argues that Case No. 17-5024 is a "continuation of the project in docket 8302" and the Commission chose another "procedural route—withdrawal of the appeal in docket 8302 and re-filing a petition for the reconfigured project in ePUC" as the means for continuing the original project.[4] Chelsea further asserts that "[i]f the Project petition were to be treated as an entirely new, untethered project from the original configuration, then the Commission's invitation to use testimony based upon the rules in effect in 2014 would make no sense."[5]

Chelsea argues that under the Vermont Supreme Court decision in *Jolley*[6] the May 17 Order properly applied the vested rights doctrine:

> The Town's claim regarding application of the 2016 Town Plan amendment is foreclosed by *Jolley*, which involved substantially identical circumstances. Here as in *Jolley*, the applicant had vested rights when it filed its first permit application. Here as in *Jolley*, the permit was denied. Here as in *Jolley*, the applicant re-filed its permit application amending it to address the issues that resulted in the earlier

[2] Town's Brief at 6.
[3] Town's Brief at 7.
[4] Chelsea's Brief at 7-8; *see also* Chelsea's Reply Brief at 2.
[5] Chelsea's Brief at 8.
[6] *In re Jolley Associates*, 2006 VT 132, 181 Vt. 190, 915 A.2d 282.

> denial. Here as in in *Jolley*, the applicant gave up its right to appeal in favor of a re-filing at the encouragement of the tribunal. The Vermont Supreme Court held that "reapplication [for a denied permit] would not require the sort of substantial revision that should dictate a loss of vested rights." Accordingly, the Vermont Supreme Court rejected the town's attempt to apply the town rules that were in effect at the time of the re-application.[7]

IV. DISCUSSION AND CONCLUSION

Under 1 V.S.A. § 213 the Vermont Legislature has set forth a policy on the effect of new legislation on pending applications as well as the applicability of a developer's vested rights:

> No act of the General Assembly shall affect a suit begun or pending at the time of its passage, except acts regulating practice in court, relating to the competency of witnesses, or relating to amendments of process or pleadings.

We agree with the conclusion in the May 17 Order that linked 1 V.S.A. § 213 and the vested rights doctrine as follows:

> 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." 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," 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.[8]

We also agree that it was reasonable for Chelsea to rely on the October 12 Order when it made the decision to withdraw its appeal of Docket 8302 from the Vermont Supreme Court. Our October 12 Order was thus "akin to a denial without prejudice"[9] that permitted Chelsea the opportunity to submit the new Willow Road petition. This allowed for the reconsideration and

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[7] Chelsea's Brief at 9 (citing *In re Jolley Associates*, 2006 VT 132, ¶ 16).

[8] May 17 Order at 6 (citing *In re Times and Seasons*, 190 Vt. 163, 167, 27 A.3d 323, 328 (2011); 1 V.S.A. § 213; and *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)).

[9] *Id*. at 8.

continued review of the development project foreseen in Chelsea's standard-offer contract and implied the application of the vested rights doctrine and 1 V.S.A. § 213 in this case.

Further, it makes sense to apply the vested rights doctrine here because Willow Road is a significantly smaller project than Chelsea I and thus raises fewer concerns for neighbors and other interested parties. We agree that it would be bad policy if vested rights were only available if a landowner refused to make reasonable changes to a project to accommodate the concerns of others.

In seeking reconsideration of the May 17 Order, the Town isolated a legal issue that is central to the Willow Road petition. Specifically, the Town asked the question, "Does Chelsea have a vested right to review of its 2017 petition under the Town Plan in effect when its prior petition was deemed complete in 2014?" Our answer is yes. Implicit in the October 12 Order was Chelsea's vested right that the Willow Road project be reviewed pursuant to the Town Plan in effect in 2014, rather than the Town Plan in effect in 2017.

For purposes of 1 V.S.A § 213 and the vested rights doctrine, the Willow Road petition is a continuation of the development process that began with Chelsea's standard-offer contract, continued with the review and denial of Docket 8302, was maintained in our October 12 Order, and resumed with the ongoing review of Case No. 17-5024-PET. Therefore, pursuant to *Jolley*, Chelsea has a vested right to review of the Willow Road petition under the version of the Town plan in effect when Chelsea I was filed.

We therefore affirm the hearing officer's May 17 Order and return this case to the hearing officer for further proceedings.

SO ORDERED.

Dated at Montpelier, Vermont this 30th day of August, 2018.

Anthony Z. Roisman) PUBLIC UTILITY
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)
Margaret Cheney) COMMISSION
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)
Sarah Hofmann) OF VERMONT

OFFICE OF THE CLERK

Filed: August 30, 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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