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May 13, 2019

Judith Whitney, Clerk
Vermont Public Utility Commission
112 State Street, 4th Floor
Montpelier, VT 05620-2701

Re: Case 17-5024-PET, In re Petition of Chelsea Solar LLC

Dear Ms. Whitney,

Enclosed please find the opposition filed in Vermont Superior Court that responds to the public comment filed in this case by Vermonters for a Clean Environment Inc. on May 7, 2019.

Please feel free to contact me with any questions.

Respectfully submitted,

/s/ Thomas Melone

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Attorney for Plaintiff

STATE OF VERMONT

SUPERIOR COURT
CHITTENDEN UNIT

CIVIL DIVISION
Docket No. 331-4-19 Cncv

PLH LLC,

Plaintiff,

v.

LIBBY HARRIS a/k/a LIBBY GARRISON
a/k/a LOIS PETROOK a/k/a LOIS SISTI
a/k/a LOIS WAGNER, the APPLE HILL
HOMEOWNERS ASSOCIATION INC.,
ESTATE OF EARL SENEAL, PAUL W.
BOHNE III and NANCY S. BOHNE,

Defendants.

**PLAINTIFF’S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT
APPLE HILL HOMEOWNERS ASSOCIATION’S MOTION TO STRIKE AND IN THE
ALTERNATIVE TO DISMISS THE COMPLAINT**

Plaintiff PLH LLC (“PLH” or “Plaintiff”) files this memorandum in opposition to the motion to strike, and in the alternative to dismiss, filed by Defendant Apple Hill Homeowners Association Inc. (“AHHA”). Even if the anti-SLAPP statute was constitutional (which it is not), this action and the AHHA motion “is far afield from the paradigm on which the statute was based,” *Felis v. Downs Rachlin Martin PLLC*, 2015 VT 129 at P51, 133 A.3d 836. This case is about *private property rights*, not the AHHA’s exercise of free speech or the right to petition. *See, e.g., Khan v. Alpine Haven Prop. Owners’ Ass’n*, 2016 VT 101, 203 Vt. 251 (2016). The AHHA’s motion should be denied and attorney’s fees and costs awarded to Plaintiff.

INTRODUCTION

Vermont’s anti-SLAPP statute, 12 V.S.A. § 1041, is intended to protect rights of free

speech and public participation by creating an early mechanism to dispose of *frivolous or sham* claims filed solely to silence protected speech. But the statute must steer clear of impairing the equally important rights to access the courts and to assert meritorious legal claims. It does not. Vermont's anti-SLAPP statute sweeps away both frivolous and legally viable claims. Indeed, stripped of its *ad hominem* attacks, the AHHA motion is almost entirely dedicated to disputing the *merits* of Plaintiff's private land use claims—*prima facie* proving that Plaintiff's claims are meritorious.

Vermont's anti-SLAPP statute allows a “defendant in an action arising from the defendant's exercise, in connection with a public issue, of the right to freedom of speech or to petition the government for redress of grievances under the U.S. or Vermont Constitution [to] file a special motion to strike” a complaint. 12 V.S.A. § 1041(a). The statute requires the court to “grant the special motion to strike, unless the plaintiff shows that: (A) the defendant's exercise of his or her right to freedom of speech and to petition was devoid of any reasonable factual support and any arguable basis in law; and (B) the defendant's acts caused actual injury to the plaintiff.” 12 V.S.A. § 1041(e)(1). The statute applies an exacting procedure requiring a plaintiff to make a showing higher than that sufficient to survive summary judgment. Worse, that procedure *does not even address the relative merits of plaintiff's claims*. As a result, the statute impairs rights of speech and petition rather than protecting them, and is unconstitutional on multiple grounds.

Once one accepts that Vermont's anti-SLAPP statute is materially different than a motion for summary judgment, one must also accept that the statute interferes with rights to trial by jury and access to the courts guaranteed in Chapter I, Articles 12 and 4 of the Vermont Constitution. In addition, Vermont's anti-SLAPP statute conflicts with court rules, in violation of separation of powers in Chapter II, section 4 of the Vermont Constitution. Vermont's anti-SLAPP statute also

violates the Common Benefits Clause in Article 7 by establishing a different classification for selective plaintiffs based upon the plaintiff's speech and the exercise of its right to petition, which classification is not justified by any necessity.

Vermont's anti-SLAPP statute also violates Article 2 of the Vermont Constitution by, as here, sweeping away valid property-rights claims for what the statute sees as a public purpose, and doing so without just compensation. Finally, because claims which might survive summary judgment cannot survive the anti-SLAPP statute, this Court should conclude that the statute bars meritorious claims, in violation of rights of free speech and petition.

Even setting aside the constitutional infirmity of the entire anti-SLAPP statute, the statute does not apply here. The Vermont Supreme Court has stated that "the anti-SLAPP statute should be construed as limited in scope and that great caution should be exercised in its interpretation." *Felis v. Downs Rachlin Martin PLLC*, 2015 VT 129 at P41, 133 A.3d 836 (2015). The Vermont Supreme Court has issued such a caution because the anti-SLAPP statute infringes on "the plaintiff's right to petition and free access to the courts." *Id.*

Here, the AHHA has failed to meet its two-part threshold burden under the statute to show that the action "arises from" (1) the defendant's exercise of free speech or right to petition, and (2) a public issue. The AHHA's motion is based on *ad hominem* attacks on Plaintiff and affiliated parties but it is devoid of relevant facts. Boundary, use and access disputes among neighbors is a private issue, not a public issue. *See, e.g., Khan v. Alpine Haven Prop. Owners' Ass'n*, 2016 VT 101, 203 Vt. 251 (2016).

The complaint against the AHHA is found in Counts I (participation in a scheme to deny access) and Count VII (whether Lot #1 is part of the AHHA). Counts IV, V, VIII (Harris' and AHHA's claims regarding what Plaintiff can and cannot do with Lot #1) do not involve the AHHA

once it is determined that Lot #1 is not part of the AHHA. In any event, all those counts relate to private, not public, land use rights. Moreover, the counts against AHHA do not involve any statements made by AHHA in connection with a public issue, which is also a pre-requisite. *Felis* at P52. The AHHA motion also conflates public controversy with matters of public interest. In *Felis*, P53, the Vermont Supreme Court cited with approval the United States Supreme Court's repudiation of that equivalency in *Time, Inc. v. Firestone*, 424 U.S. 448, 454, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976):

petitioner seeks to equate "public controversy" with all controversies of interest to the public. Were we to accept this reasoning, we would reinstate the doctrine advanced in the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), which concluded that the New York Times privilege should be extended to falsehoods defamatory of private persons whenever the statements concern matters of general or public interest. In *Gertz*, however, the Court repudiated this position, stating that "extension of the New York Times test proposed by the Rosenbloom plurality would abridge [a] legitimate state interest to a degree that we find unacceptable." 418 U.S., at 346.

Private land use issues such as stated in all the counts in which AHHA is mentioned are private issues, and are wholly outside the scope of proceedings before the PUC. *Vt. Elec. Power Co. v. Bandel*, 135 Vt. 141, 145, 375 A.2d 975, 978 (1977) ("This Court considers it settled law that proceedings under 30 V.S.A. § 248 relate only to the issue of public good, not the interests of private landowners who are or may be involved."). While the AHHA may see these private land use issues as some type of public controversy, they are not. Neither are they matters of public interest.

All but one of the Counts involving the AHHA relate to whether Lot #1 is a part of the AHHA. If it is not, then the AHHA has no rights or standing to enforce what they might believe are restrictive covenants. Whether Lot #1 is part of the AHHA is not a matter of public concern and is wholly unrelated to any exercise of free speech or the right to petition.

On the substantive issue of being a part of the AHHA, Lot #1 is clearly not. In between the subdivision shown on Compl. Exhibit A, and the creation of the wholly separate subdivision involving Lot #1 decades later, the Vermont Common Interest Ownership Act (“CIOA”) was enacted, see 27A V.S.A. §§ 1-101 *et seq.* Assuming that the subdivision shown on Compl. Exhibit A is a common interest community (“CIC”),¹ the transfer of Lot #1 did not satisfy the requirements of the CIOA that existed in 2001 when Lot #1 was created. Further, the Bohnes had no authority under the CIOA to amend a previously existing community to add Lot #1. Even if they did, they failed to comply with the requirements of the CIOA. One of those requirements is the existence of a separate declaration. It is only through the separate declaration that restrictive covenants may be imposed. *Khan v. Alpine Haven Prop. Owners' Ass'n*, 2016 VT 101, P33, 203 Vt. 251 (2016) (“[c]ovenants in individual deeds cannot constitute a ‘declaration’ of covenants”) quoting *Patch v. Springfield School District*, 2009 VT 117, ¶ 12, 187 Vt. 21.

The Bohnes also failed to prepare a public offering statement indicating their intention not to have Lot #1 be part of a CIC. Lot #1 does also not share the required common interests necessary for a CIC, such as roads. No common roads were created when the Lot #1 subdivision was created, indicating that not only is not Lot #1 not part of a CIC, but whatever restrictive covenants do apply were for the benefit of the Bohnes only and do not run with the land.

Here, one or more of the Defendants have trespassed on Plaintiff’s land, dumped their yard waste on Plaintiff’s land, mowed Plaintiff’s land, and removed Plaintiff’s no trespassing signs. In *Felis*, the Vermont Supreme Court explicitly called out suits, such as this one, regarding “a boundary dispute and personality conflicts between neighboring homeowners” as the type of suit

¹ The subdivision in Compl. Exhibit A may or may not be a CIC under the criteria set forth in *Khan v. Alpine Haven Prop. Owners' Ass'n*, 2016 VT 101, 203 Vt. 251 (2016). Discovery is necessary on that issue as it involves, at a minimum, a review of all deeds in the subdivision.

that should not be covered by the anti-SLAPP statute. *Id.* at P50. Simply put, the AHHA’s motion to strike seeks to deny Plaintiff the right to have access to the courts to determine what is a typical dispute among neighbors. It should be denied.

FACTS

Starting in or around 1973, Defendants Paul and Nancy Bohne began a series of subdivisions of their lands in Bennington, Vermont. Those subdivisions resulted, in part, in what is known as the Apple Hill development. See Complaint (“Compl.”) **Exhibit A**. Decades later the Bohnes engaged in two other subdivisions relevant here. The first subdivision was the creation of the Orchard Lot, shown on Compl. **Exhibit B** as the “lands of Mundt,” now owned by Defendant Harris. Defendant Harris acquired sole ownership of the Orchard Lot in two transfers. The first was by deed dated June 23, 2004 from Paul F. Mundt and Jean M. Mundt to Defendant Harris and Paul H. Garrison, see Compl. **Exhibit D**, and then by quit-claim deed dated June 5, 2006, from Paul H. Garrison. See Compl. **Exhibit E**.

The second subdivision was the creation of Lots #1-3 shown on Compl. **Exhibit B**. PLH LLC acquired Lot #1, a parcel of approximately 5.63 acres, by deed dated July 16, 2014 from Harry and Diane Olsson. See Compl. **Exhibit F**. The Olssons acquired Lot #1 by deed dated June 3, 2009, from Defendant Harris. See Compl. **Exhibit G**. A deed for Lot #1 dated March 1, 2010, was executed by Harris and the Olssons and labeled a corrective warranty deed. See Compl. **Exhibit H**. Harris acquired her interest in Lot #1 in two transfers—one from Garrison (see Compl. **Exhibit I**) and the other from Paul and Jean Mundt by deed dated June 23, 2004. See Compl. **Exhibit J**. The Mundts in turn acquired Lot #1 from the Bohnes by deed dated October 3, 2001. See Compl. **Exhibit K**. The deed to Hilde Liu recorded October 7, 1988, and cross-referred to in some deeds is attached as Compl. **Exhibit L** (The “Liu Deed”).

Defendant Senecal owns the lands shown as lot “37” on Compl. Exhibits A and C. Senecal acquired title in a quit-claim deed dated September 25, 2005. Compl. Exhibit M. The creation of Lot 37, like other subdivided parcels shown on Compl. Exhibit A as part of the Harwood Hill Orchards lots 1-43, is subject to an Act 250 permit and other restrictions of record that require the subdivision comply with the approved plans. The deed received by Senecal expressly states that it is “subject to all public easements of record which touch and concern these lands.” The 50-foot right-of-way on the approved Act 250 plan, Compl. Exhibit A and Exhibit C, is such a public easement of record. In addition, the deed to Senecal specifically states that it is subject to Vermont Permit EC-1542-8 which expressly shows the 50-foot right-of-way to PLH’s Von Nostrand Lands.

Compl. Exhibit A is the approved plan for the Act 250 permit and the subdivision under which Lot 37 was created. As shown on Compl. Exhibit C (which is a zoomed-in excerpt from Compl. Exhibit A), the approved plans require and provide for a 50-foot right-of-way for an extension to Russett Drive in order to allow PLH’s Von Nostrand Lands to connect to Russett Drive. Defendant Senecal has refused Plaintiff access across Lot 37 via the approved right-of-way shown on Compl. Exhibit A and C and that was a condition of the Act 250 permit and Vermont Permit EC-1542-8. Plaintiff is a beneficiary of the right-of-way across Lot 37, which is a “street” under the Bennington Land Use and Development Regulations. Indeed, the “R.O.W.” shown on Compl. Exhibit A and C *cannot reasonably be construed to be intended to benefit any other landowner besides Plaintiff*.

Defendant Harris owned the Orchard Lot and Lot #1 at the same time. Once Harris acquired title to both parcels the easement that Harris enjoyed for her Orchard Lot across Lot #1 was extinguished by operation of law under the doctrine of merger. A property owner cannot have

an easement in her own estate in fee. When in 2009 Harris transferred Lot #1 to the Plaintiff's predecessor in interest, the Olssons, Harris did not reserve or create a right of easement across Lot #1. Under the deed from Harris selling Lot #1, see Compl. **Exhibit F**, Harris is obligated to warrant and defend against unlawful claims. Harris' claim of an easement is an unlawful claim.

Harris has also claimed that Plaintiff has a cost sharing obligation for the pathway that Harris currently uses to access the Orchard Lot, which extends from the terminus of the public portion of Apple Hill Road and heads westly to the Orchard Lot, crossing Lots #1, #2, and #3. There is no such cost sharing obligation imposed in any deeds or other covenants that burdens Plaintiff's lands.

Plaintiff has granted access rights across Lot #1 to Chelsea Solar LLC ("Chelsea"), which is developing a solar energy system on the PLH Van Nostrand Lands. Harris and the AHHA have claimed that Chelsea cannot use the access granted by Plaintiff because the PLH Van Nostrand Lands are not being used for a single-family residential use. There are no deed restrictions or covenants burdening Lot #1 that restrict the granting of access across Lot #1. Indeed, as discussed above, any purported restrictions would have failed to comply with the CIOA, and would be void.

Harris and the AHHA have also claimed that Plaintiff cannot plant landscaping on Lot #1 to screen the solar energy system that Chelsea plans to build on the PLH Van Nostrand Lands. Harris and AHHA claim that no such landscaping is allowed on Lot #1 because the PLH Van Nostrand Lands would not be used for a single-family residential use. There are no deed restrictions or covenants burdening Lot #1 that restrict the planting of landscaping on Lot #1.

Harris sold Lot #1 to the Olssons by deed dated June 3, 2009. Almost a year later Harris and the Olssons executed what was called a "corrective deed" adding the following language to the Schedule A - "Any dwelling shall be no higher than one story above ground." No consideration

was exchanged between Harris and the Olssons for the corrective deed. It is therefore void for lack of consideration. Moreover, to the extent Harris argues that Lot #1 is part of the AHHA, then that purported additional covenant failed to comply with the CIOA and would be void.

Defendant AHHA has sent an invoice to Plaintiff asserting that Plaintiff owes an assessment to AHHA. Lot # 1 is not part of the AHHA.

Finally, even if there are restrictive covenants of some sort applicable to Lot #1, the AHHA has no standing to enforce them. Only the Defendants Bohnes have such standing.

ARGUMENT

I. Vermont's Anti-SLAPP Statute, 12 V.S.A. § 1041, Is Unconstitutional On Its Face And As Applied To Plaintiff.

Vermont's anti-SLAPP statute allows a "defendant in an action arising from the defendant's exercise, in connection with a public issue, of the right to freedom of speech or to petition the government for redress of grievances under the U.S. or Vermont Constitution [to] file a special motion to strike" a complaint. 12 V.S.A. § 1041(a). The statute requires the court to "grant the special motion to strike, unless the plaintiff shows that: (A) the defendant's exercise of his or her right to freedom of speech and to petition was devoid of any reasonable factual support and any arguable basis in law; and (B) the defendant's acts caused actual injury to the plaintiff." 12 V.S.A. § 1041(e)(1). The statute applies an exacting procedure requiring a plaintiff to make a showing higher than that sufficient to survive summary judgment. Worse, that procedure *does not even address the relative merits of plaintiff's claims and it singles out plaintiffs because of their speech.*

A. 12 V.S.A. § 1041 Is Unconstitutional As It Violates the Right to Jury Trial and the Right of Access to the Courts.

"Free access to the courts is an essential right recognized by our state constitution." *Jacobsen v. Garzo*, 149 Vt. 205, 209 542 A.2d 265 (1988), *see* Vt. Const. ch. I, art. 4 (remedy at law secured to all). As written, Vermont's anti-SLAPP statute, 12 V.S.A. § 1041, conflicts with

the right of access to the courts and to trial by jury because it precludes meritorious claims through its burden-shifting procedures. Because the statute is not the equivalent of a motion for summary judgment, it allows the disposal of claims with merit that could otherwise survive summary judgment. See *In re Deer View LLC Subdivision Permit*, 2009 VT 20, P3, 973 A.2d 1181 (“summary judgment, which does not entail presentation of witnesses or cross-examination, is constitutional [because] there is no genuine issue of material fact.”)

“[A]ny act which destroys or materially impairs the right of trial by jury according to the course of the common law, in cases proper for the cognizance of a jury, is unconstitutional.” *Plimpton v. Somerset*, 33 Vt. 283, 290 (1860). The highest courts of other States have struck down anti-SLAPP statutes on these grounds. In *Leiendecker v. Asian Women United of Minnesota*, 848 N.W.2d 224, 233 (Minn. 2014), the Minnesota Supreme Court held that the summary judgment standard could not be reconciled with the standard on the face of the anti-SLAPP statute:

the summary judgment standard and the statutory framework for evaluating an anti-SLAPP motion are mutually inconsistent. For summary judgment motions, a court evaluates the evidence to determine whether there are any genuine issues of material fact and whether either of the parties is entitled to judgment as a matter of law. An anti-SLAPP motion, by contrast, requires the court to make a finding about whether "the responding party has produced clear and convincing evidence that the acts of the moving party" are not immune.

Leiendecker, 848 N.W.2d at 231 (comparing Minn. R. Civ. P. 56.03 with Minn. Stat. § 554.02, subd. 2(3)) (citations omitted). In so doing, the Minnesota Supreme Court also recognized that failure to import summary judgment standards might result in the statute, as written, conflicting with the right to trial by jury. The Supreme Court of Washington struck down Washington’s anti-SLAPP statute on similar grounds. *Davis v. Cox*, 183 Wn. 2d 269, 351 P.3d 862 (Wash. 2015).

This Court should also decline to equate the anti-SLAPP statute with V.R.C.P. 56 because the two procedures are irreconcilable. See *Al Bahlul v. United States*, 767 F.3d 1, 15 (D.C. Cir.

2014) ("If, after applying ordinary principles of textual analysis, the statute is not genuinely open to two constructions, the 'canon of constitutional avoidance does not apply.'") (quoting *Gonzales v. Carhar*, 550 U.S. 124,154, 127 S. Ct. 1610 (2007)). Instead, this Court should hold that the statute, as written, materially differs from summary judgment, and as a result violates the rights of trial by jury and access to the courts.

Making matters far worse from a constitutional perspective, once the statute is found to apply, the plaintiff bears the burden of proof wholly divorced from the merits of plaintiff's claims. The likely success of plaintiff's claims might be high, as here, yet the plaintiff's path forward is turned on its head. The statute requires that the plaintiff show that "the defendant's exercise of his or her right to freedom of speech and to petition was devoid of any reasonable factual support and any arguable basis in law"—a "standard" if it can be called that which is vague and unworkable in a case such as this one where the merits of the claims are wholly unrelated to any speech. In practice that would mean, as here, that the defendants could immunize themselves and unrelated parties from lawful, meritorious claims from a plaintiff merely by speaking so long as its speech is not devoid of any reasonable factual support or any arguable basis in law.

At bottom, Vermont's anti-SLAPP statute impermissibly interferes with a plaintiff's rights to trial by jury and access to the courts guaranteed in Chapter I, Articles 12 and 4 of the Vermont Constitution. It is therefore unconstitutional.

B. The Anti-SLAPP Statute Violates Separation of Powers Principles.

This Court should conclude that the anti-SLAPP statute violates the rule of separation of powers. *See, Brady v. Dean*, 173 Vt. 542, 545 (2001):

Although the separation of powers doctrine does not, to be sure, "contemplate an absolute division of authority among the three branches," *In re D.L.*, 164 Vt. 223, 228, 669 A.2d 1172, 1176 (1995), it does ensure, at a minimum, that no branch will usurp the "core functions," *State v. Pierce*, 163 Vt. 192, 197, 657 A.2d 192, 195

(1995), or impair the "independent institutional integrity" of another. *D.L.*, 164 Vt. at 229, 669 A.2d at 1176.

(internal citations and quotations omitted).

It is the inherent power of the judicial branch to prescribe rules for practice and procedure in the courts which flows from Chapter II, section 4 of the Vermont Constitution. The provisions of 12 V.S.A. § 1041 encroach on the judiciary's power to set court rules by establishing additional (and substantial) procedural requirements for a meritorious claim to survive. And, the plaintiff is denied the ability to engage in the normal discovery process to pursue a meritorious claim. The anti-SLAPP statute is inconsistent with the civil rules. The Court should conclude that the statute offends separation of powers established in the Vermont Constitution.

C. Vermont's Anti-SLAPP Statute Violates The Common Benefits Clause.

The Common Benefits Clause of the Vermont Constitution guarantees equal protection of the laws. "The concept of government exercising its authority inequitably and without a rational basis or for the emolument of a particular group [or against a particular person] was anathema to that end." *In re Town Highway No. 20*, 2012 VT 17, P34. Government action is judged under a "more stringent test" under the Common Benefits Clause than the United States Constitution's Equal Protection Clause's rational basis test. *Baker v. State*, 170 Vt. 194, 205 (2000). Here, the Anti-SLAPP statute discriminates in two ways. First, it creates a special class of defendants that have greater rights than all other defendants in civil cases. Second, it creates a special class of plaintiffs that have far fewer rights than all other plaintiffs in civil cases primarily based upon the plaintiff's speech and the plaintiff's exercise of *its* constitutional right to have access to the courts. Both classifications ignore the merits of the claims at issue. A plaintiff could have a meritorious claim, indeed one that is facially likely to be successful, but the anti-SLAPP statute renders the merits irrelevant. Such classifications are only permissible "if a case of necessity can be

established overriding the prohibition of Article 7 by reference to the ‘common benefit, protection, and security of the people.’” *See, State v. Ludlow Supermarkets, Inc.*, 141 Vt. 261, 268 (1982). Such necessity does not exist here. The statute has no right to sweep away meritorious claims and a plaintiff’s constitutional rights to free speech and access to the courts merely because the defendant has participated in a public proceeding.

D. Vermont’s Anti-SLAPP Statute Violates Article 2 of the Vermont Constitution.

Vermont’s anti-SLAPP statute also violates Article 2 of the Vermont Constitution by sweeping away valid property-rights claims for what the statute sees as a higher public purpose, and does so without just compensation. Article 2 of the Vermont Constitution provides: “That private property ought to be subservient to public uses when necessity requires it, nevertheless, whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money.” Here, Vermont’s anti-SLAPP statute would elevate a defendant’s exercise of free speech and the right to petition to a public purpose banning Plaintiff’s private property claims, thereby constituting a taking of Plaintiff’s rights to use its property, all without just compensation.

E. The Anti-SLAPP Statute Violates Rights of Speech and Petition.

Last but certainly not least, Vermont’s anti-SLAPP statute violates the rights of speech and petition under the Vermont Constitution because it mandates the dismissal of claims that not only have merit, but also that would survive summary judgment. Although the right to free speech and the right to petition are separate guarantees, they are generally subject to the same constitutional analysis. “[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government.” *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 387, 131 S. Ct. 2488, 2494 (2011). “It is not necessary to say that the two Clauses are identical in their mandate

or their purpose and effect to acknowledge that the rights of speech and petition share substantial common ground. This Court has said that the right to speak and the right to petition are ‘cognate rights.’” *Id.*, 564 U.S. at 388.

It is clear that Vermont’s anti-SLAPP statute sweeps into its reach constitutionally protected first amendment activity. It does so because, while there is no constitutional right to bring frivolous claims, the anti-SLAPP statute does not sanction and frustrate only claims that are frivolous. Rather, the statute mandates dismissal of all claims potentially related to protected activity based upon criteria wholly divorced from the merits of plaintiff’s claim. The plaintiff must show “(A) the defendant’s exercise of his or her right to freedom of speech and to petition was devoid of any reasonable factual support and any arguable basis in law; and (B) the defendant’s acts caused actual injury to the plaintiff.” *Id.* Put another way, analyzing whether there was a scintilla of support for defendant’s statements in connection with protected activity is vastly different from an inquiry into frivolity of plaintiff’s claims.

The Vermont anti-SLAPP statute is also both unconstitutionally overbroad, and invalid because it imposes an impermissible content-based restriction on constitutionally protected speech. Where a statute imposes a content-based restriction on constitutionally protected speech, that statute is subject to the highest level of scrutiny. “The venerable right to petition one’s government to redress grievances extends back to the Magna Carta, where the Crown first formally recognized its duty to be accessible to all citizens.” *Vt. Soc’y of Ass’n Execs. v. Milne*, 172 Vt. 375, 379 (2001) “[T]he First Amendment’s hostility to content-based regulations is not limited to restrictions on particular viewpoints, but rather extends to government restrictions on ‘expression because of its message, its ideas, its subject matter, or its content.’” *Id.*, 172 Vt. 389 citing *Consolidated Edison Co. v. Public Serv. Comm’n*, 447 U.S. 530, 537, 100 S. Ct. 2326 (1980).

Any statute that purports to regulate protected first amendment activity based on its content is subject to strict scrutiny. *Burson v. Freeman*, 504 U.S. 191, 198 (1992). Under the strict scrutiny standard, a statute that burdens the right to petition is only valid if it is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. *Id.* Even assuming the statute as written is necessary to serve a compelling state interest, it is anything but narrowly tailored. To the contrary, the statute is vastly overbroad. A strategic lawsuit against public participation is a meritless suit filed primarily to chill a defendant's exercise of First Amendment rights. The Vermont statute, on the other hand, burdens any case where the defendants exercised their rights of free speech and to petition in connection with anything to do with plaintiff or someone connected to plaintiff.

Once the statute is found to apply, the plaintiff bears the burden of proof wholly divorced from the merits of plaintiff's claims. The likely success of plaintiff's claims might be high, as here, yet the plaintiff's path forward is turned-upside-down. The statute requires that the plaintiff show that "the defendant's exercise of his or her right to freedom of speech and to petition was devoid of any reasonable factual support and any arguable basis in law." Under this test, the statute interferes with petitioning activity such as here where the claims involve unrelated, meritorious, property disputes. In practice that would mean, as here, that the defendants could immunize themselves and unrelated parties from lawful, meritorious claims from a plaintiff merely by speaking so long as its speech is not devoid of any reasonable factual support or any arguable basis in law.

The standard imposed on the plaintiff is also unconstitutionally vague. The paradigm case of an anti-SLAPP suit is shown in *Cornelius v. Chronicle, Inc.*, 2019 VT 4—a newspaper publishes a story about a person and said person then files suit based upon the statements made in the

newspaper story. But that is nowhere close to this case. Outside of the paradigm case, the statute provides no clear guidance as to what would *not* be within its reach.

It is also self-evident that more narrowly tailored options exist to protect against true SLAPP actions, such as a mechanism for dismissal that requires a finding that an action is frivolous or a sham. While this Court need not articulate the precise constitutional boundary for anti-SLAPP protection, it should conclude that Vermont's anti-SLAPP statute, one of the most if not the most restrictive provisions on the books, fails constitutional scrutiny.

CONCLUSION ON CONSTITUTIONAL ISSUES

“A rule designed to tolerate certain speech ought not blossom to become a rationale for a rule restricting it.” *United States v. Alvarez*, 132 S. Ct. 2537, 2545 (2012). Contrary to protecting speech, Vermont's anti-SLAPP statute is a vehicle to restrict it by preventing meritorious claims from advancing in the courts. The anti-SLAPP statute conflicts with the right of trial by jury and access to the courts, violates the separation of powers doctrine, the Common Benefits Clause and restricts the constitutional right to speak and petition the courts for relief. Plaintiff respectfully requests that the Court hold the anti-SLAPP statute unconstitutional facially and as applied to Plaintiff.

II. Even If Vermont’s Anti-SLAPP Statute Was Constitutional, the AHHA Failed To Meet Its Threshold Burden.

Here, the AHHA has failed to meet its two-part threshold burden to show that the action “arises from” the defendant's exercise of free speech or right to petition, in connection with a public issue. *Cornelius v. Chronicle, Inc.*, 2019 VT 4, P10 (defendant must first show that the action arises from “exercises of free speech and connected to a public issue.”)

The AHHA’s motion is based on *ad hominem* attacks on Plaintiff and affiliated parties but it is devoid of relevant facts. The AHHA motion fails both the “arising from” test and the “public

issue” requirement. None of the counts in the complaint “arise from” the defendant’s protected exercise of free speech or the right to petition. They all arise from the property deeds themselves, not an exercise of free speech or the right to petition. Moreover, as the affidavit of Bill Knight (submitted by AHHA) shows, the disputed issues pre-date the AHHA’s and Harris’ participation in the solar proceedings. Likewise, none of the counts are connected to a public issue. The process under 30 V.S.A. § 248 regarding the solar farms does not address private issues. *Vt. Elec. Power Co. v Bandel*, 135 Vt. 141, 145, 375 A.2d 975, 978 (1977) (“This Court considers it settled law that proceedings under 30 V.S.A. § 248 relate only to the issue of public good, not the interests of private landowners who are or may be involved.”) Use, access, “boundary dispute and personality conflicts between neighboring homeowners” is a private issue, not a public issue. *Felis*, at P50.

A. The AHHA Fails To Show That The Counts Against The AHHA Meet The “Arising From” Requirement.

The AHHA’s motion is supported only by a succession of *ad hominem* attacks from which the AHHA hopes that this Court would conclude that the instant action to settle private property issues arises from an exercise of its rights to speech in connection with a public controversy created by the AHHA and Harris. The AHHA tries to make much of the various suits brought by Plaintiff and related entities in multiple jurisdictions, and those parties proper exercise of their right to petition and their rights under the rules of civil procedure. Being attacked by NIMBYs and supporters of the *status quo* of climate destruction comes with the territory of solar development. But this action is only about private property rights.

Nevertheless, Plaintiff sees no reason to leave the *ad hominem* attacks unrebuked entirely. Allco Renewable Energy Limited (“Allco”) has a corporate mission to combat climate change by seeking to enforce rights of small renewable energy generators generally, enforce laws that benefit

developers of small renewable energy systems on a broad scale, and open up markets broadly to small renewable energy generators by overcoming the traditional reluctance of utilities to purchase from those generators. Allco’s corporate mission also includes advancing the goals of fighting the devastating impacts from climate change by seeking to open up markets to small energy generators broadly, and by challenging utilities’ and state and local actions that are contrary to their obligations under federal law or that do not act sufficiently to address climate change. *See, e.g., Winding Creek Solar LLC v. Peevey*, 293 F. Supp. 3d 980 (N.D. Cal. 2017), *appeal docketed* (9th Cir. December 22, 2017) (declaring California’s implementation of the Public Utility Regulatory Policies Act (“PURPA”) under its Re-MAT program invalid); *Allco Renewable Energy Ltd. v. Mass. Elec. Co.*, 208 F. Supp. 3d 390 (D. Mass. 2016) *aff’d* 875 F.3d 64 (1st Cir. 2017) (declaring Massachusetts’ implementation of PURPA invalid); *Windham Solar LLC*, 156 FERC ¶ 61,042 (2016), *Windham Solar LLC*, 157 FERC ¶61,134 (2016) (declaring Connecticut’s implementation of PURPA invalid); *Allco Renewable Energy Ltd. v. USDA Forest Service*, Docket No. 1:18-cv-00445-JL (D. N.H. filed May 25, 2018) (challenging under the NEPA the USDA Forest Service’s approval of the Northern Pass transmission line).

Bill McKibben, the Schumann Distinguished Scholar at Middlebury College, in April 10, 2019’s Boston Globe wrote:

The basic stability of our planet has been upended in our lifetimes. Unless we act quickly, the changes we’ve seen so far will be mild by comparison with what comes next. Science ... makes clear that without an emergency transition away from coal and gas and oil, we can expect such rapid shifts that our ability to maintain civilizations will be in doubt... Unless we goose the pace with government action, the world that we some day power with clean energy would be a dirty world, a broken planet.²

²<https://www.bostonglobe.com/opinion/2019/04/10/the-clock-keeps-ticking-fight-save-planet/R8ZrHbh2yFqA8bNXe6wdjJ/story.html>.

Last Fall the U.S. Administration released the complete *Fourth National Climate Assessment* (the “Climate Report”). See, <https://nca2018.globalchange.gov/>, USGCRP, 2018: *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II* [Reidmiller, D.R., C.W. Avery, D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock, and B.C. Stewart (eds.)]. U.S. Global Change Research Program, Washington, DC, USA. [doi:10.7930/NCA4.2018](https://doi.org/10.7930/NCA4.2018).

The Climate Report assesses the current and increasing adverse impacts from the continued use of fossil fuels on the public health, safety and welfare of the United States, its citizens and residents, and individual areas of the United States:

Earth’s climate is now changing faster than at any point in the history of modern civilization, primarily as a result of human activities. The impacts of global climate change are already being felt in the United States and are projected to intensify in the future—but the severity of future impacts will depend largely on actions taken to reduce greenhouse gas emissions.

Climate Report, Vol. II, Overview at 2.

The Climate Report warns of thousands of deaths, more dire flooding and wildfires, mass displacement, more extreme weather events and an unprecedented economic loss from climate change.³ In response to the report, Vermont Senator Bernie Sanders stated bluntly that “[t]he future of our planet is at stake.”⁴

Last October the Washington Post reported: “The world has just over a decade to get climate change under control, U.N. scientists say.”⁵

The world stands on the brink of failure when it comes to holding global warming to moderate levels, and nations will need to take “unprecedented”

³ <https://www.nytimes.com/2018/11/23/climate/us-climate-report.html>.

⁴ <https://www.cnn.com/2018/11/27/politics/bernie-sanders-climate-change-report-cnntv/index.html>

⁵ https://www.washingtonpost.com/energy-environment/2018/10/08/world-has-only-years-get-climate-change-under-control-un-scientists-say/?noredirect=on&utm_term=.8aa65dd81535.

actions to cut their carbon emissions over the next decade, according to a landmark report by the top scientific body studying climate change.

The social cost of carbon continues to rise with each new storm, each new heatwave and each new flood. Governments have already burdened future generations with massive debt in order to, among other things, protect the use and extraction of fossil fuels. Just as the national debt clock continues to rise, so too does the cost of not being carbon-neutral. The question to ask ourselves is what type of planet do we want for our children, grand-children and great-grand-children.

The *Climate Report* provides overwhelming evidence that the continued use of fossil fuels endangers the public health, safety and welfare of the residents of Vermont and the residents of the Northeastern United States:

Changing climate threatens the health and well-being of people in the Northeast through more extreme weather, warmer temperatures, degradation of air and water quality, and sea level rise. These environmental changes are expected to lead to health- related impacts and costs, including additional deaths, emergency room visits and hospitalizations, and a lower quality of life. Health impacts are expected to vary by location, age, current health, and other characteristics of individuals and communities.

Climate Report, Vol. II, Ch. 18, at 117.

Last week yet another alarming report was issued by U.N scientists.⁶ As reported by the Washington Post: “One million plant and animal species are on the verge of extinction, with alarming implications for human survival.”

More plants and animals are threatened with extinction now than any other period in human history ... Nature’s current rate of decline is unparalleled, and the accelerating rate of extinctions “means grave impacts on people around the world are now likely.”

⁶ https://www.washingtonpost.com/climate-environment/2019/05/06/one-million-species-face-extinction-un-panel-says-humans-will-suffer-result/?utm_term=.38353c1063a0

With so little time remaining to curb carbon dioxide emissions before our nation crosses irrevocable climate thresholds, Allco makes no apologies for the suits it has brought and may bring challenging utilities and state and local policies that represent the *status quo* of climate destruction. The broad issue of challenging thus policies is a legal and a moral one. As a legal matter, “a stable climate system is quite literally the foundation ‘of society, without which there would be neither civilization nor progress.’” *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Ore. 2016)⁷ quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (quoting *Maynard v. Hill*, 125 U.S. 190, 211 (1888)). Such a fundamental constitutional right is at issue.

As a moral matter, protecting the climate for future generations is a value deeply rooted in this nation’s history and tradition, and is mirrored in the religious teachings of many faiths, including Christian, Jewish, Islamic, Hindu, and Buddhist.⁸ In the papal encyclical, *Laudato Si’*, Pope Francis issued a clarion call for climate action.⁹ Speaking at the White House in 2015, Pope Francis urged action: “[C]limate change is a problem which can no longer be left to a future generation. When it comes to the care of our ‘common home,’ we are living at a critical moment in history.”¹⁰

⁷ Certified for interlocutory appeal to the 9th Circuit, November 21, 2018).

⁸ See, e.g., “To the Jewish People, to all Communities of Spirit, and to the World: A Rabbinic Letter on the Climate Crisis,” signed by 425 Rabbis of all streams of Judaism, originally published May 2015, available at <https://theshalomcenter.org/RabbinicLetterClimate>; *Islamic Declaration on Global Climate Change*, International Islamic Climate Change Symposium, August 2015, available at <http://islamicclimatedeclaration.org/islamic-declaration-on-global-climate-change>; *Hindu Declaration on Climate Change*, November 23, 2015, available at <http://www.hinduclimatedeclaration2015.org>; see also, Mary Christina Wood, *Nature’s Trust: Environmental Law for a New Ecological Age* at 279-280 (citing multiple faiths as recognizing public trust obligations to present and future generations).

⁹ *Laudato Si’*, ¶ 53.

¹⁰ Transcript of Pope Francis White House Welcoming Ceremony, available at <http://www.popefrancisvisit.com/pope-francis-u-s-visit-speechtranscripts/#whitehouse>.

Similarly, the Framers recognized each generation's fundamental obligation to *preserve* the value and integrity of natural resources for later generations. The most succinct, systematic treatment of intergenerational principles is provided by Thomas Jefferson to James Madison:

The question [w]hether one generation of men has a right to bind another . . . is a question of such consequence as not only to merit decision, but place among the fundamental principles of every government I set out on this ground, which I suppose to be self-evident, 'that the earth belongs in usufruct to the living' . . . [.]¹¹

The writings of Theodore Roosevelt also furnish powerful expressions of the duty to future generations as the foundation of the American conservation ethic:

The "greatest good of the greatest number" applies to the number within the womb of time, compared to which those now alive form but an insignificant fraction. Our duty to the whole including the unborn generations, bids us restrain an unprincipled present-day minority from wasting the heritage of these unborn generations. The movement for the conservation of . . . all our natural resources [is] essentially democratic in spirit, purpose, and method.¹²

As the preeminent climatologist, Dr. James Hansen, has warned, "Failure to act with all deliberate speed in the face of the clear scientific evidence of the long term dangers posed is the functional equivalent of a decision to eliminate the option of later generations and their legislatures to preserve a habitable climate system."¹³

Allowing excessive carbon dioxide emissions to imperil the climate system jeopardizes the fundamental rights of all and of future generations. If fossil fuel emissions are not rapidly abated, then our children, grand-children and future generations will confront an inhospitable future. With so little time remaining to curb carbon dioxide emissions before our nation crosses irrevocable

¹¹ Jefferson to James Madison, September 6, 1789, *Papers of Thomas Jefferson*, Julian Boyd ed., XV at 392-98 (1950).

¹² Theodore Roosevelt, *A Book-lover's Holidays in the Open* 299-300 (1916).

¹³ James E. Hansen et al., *Scientific Case for Avoiding Dangerous Climate Change to Protect Young People and Nature*, NASA (Jul. 9, 2012), available at <http://pubs.giss.nasa.gov/abs/ha08510t.html>.

climate thresholds, challenges to state and local policies that fail to recognize the need for unprecedented change should continue.

But *this action* and AHHA’s motion are “far afield from the paradigm on which the statute was based,” *Felis v. Downs Rachlin Martin PLLC*, 2015 VT 129 at P51, 133 A.3d 836. An example of that paradigm is shown in *Cornelius v. Chronicle, Inc.*, 2019 VT 4—a newspaper publishes a story about a person and the person files suit based upon the statements made in the newspaper story. That is nowhere close to this case.

The legally protected interests that Plaintiff seeks to vindicate are not based upon any exercise of free speech or the right to petition by the AHHA or any other defendant in the PUC solar or other proceedings. The legally protected interests that Plaintiff seeks to vindicate are a matter of public record—embodied in the deeds and land rights related to its land.

B. The AHHA Fails To Show That The Counts Against The AHHA Meet The Matter Of Public Concern Requirement.

None of the issues in this action are a matter of public concern. Private land use issues such as stated in all the counts involving the AHHA are private issues, and are wholly outside the scope of proceedings before the Vermont PUC. *Vt. Elec. Power Co. v Bandel*, 135 Vt. 141, 145, 375 A.2d 975, 978 (1977) (“This Court considers it settled law that proceedings under 30 V.S.A. § 248 relate only to the issue of public good, not the interests of private landowners who are or may be involved.”). While the AHHA may see these private land use issues as some type of public controversy, they are not. Neither are they matters of public interest.

Here, one or more of the Defendants have trespassed on Plaintiff’s land, dumped their yard waste on Plaintiff’s land, mowed Plaintiff’s land, and removed Plaintiff’s no trespassing signs. In *Felis*, the Vermont Supreme Court explicitly called out suits, such as this one, regarding “a boundary dispute and personality conflicts between neighboring homeowners” as the type of suit

that should not be covered by the anti-SLAPP statute. *Felis* at P50. *See, e.g., Khan v. Alpine Haven Prop. Owners' Ass'n*, 2016 VT 101, 203 Vt. 251 (2016)

C. The Bill Knight Affidavit Establishes That This Action Does Not Arise From The Exercise Of Free Speech Or The Right To Petition.

The Bill Knight affidavit establishes that the dispute between the Plaintiff and the Defendants pre-dates any of the AHHA's or Harris' participation in the proceedings before the PUC. This action therefore by definition cannot arise from the AHHA's or Harris' participation in those or related proceedings.

The complaint against the AHHA is found in Counts I (participation in a scheme to deny access) and Count VII (whether Lot #1 is part of the AHHA). Counts IV, V, VIII (Harris' and AHHA's claims regarding what Plaintiff can and cannot do with Lot #1) do not involve the AHHA once it is determined that Lot #1 is not part of the AHHA.

With respect to Count I, in his affidavit Bill Knight states that the issue of access from Russett Drive dates back to "spring of 2013." Knight Aff. P6. The participation of the AHHA in the solar proceedings before the Vermont PUC did not occur until after October 31, 2017. Knight Aff. P14. Therefore the claim in Count I, by definition, cannot arise from the AHHA's participation in those or related proceedings.

Similarly, even though Counts IV, V, VIII do not involve the AHHA once it is determined that Lot #1 is not part of the AHHA, those issues were raised during the meetings between Brad Wilson and the AHHA that commenced in 2013 and eventually led to a memorandum of understanding in March 2015 more than two and a half years before the AHHA's participation in the solar proceedings before the PUC. Knight Aff. PP6, 8, 10, 12; Melone Aff. Exh. 1 at p.3. Therefore, this action as it relates to those counts by definition cannot arise from the AHHA's or Harris' participation in those or related proceedings.

Likewise, Count VII (whether Lot #1 is part of the AHHA) does not arise from the AHHA's participation in any proceedings. Rather it arises from the deeds themselves and the CIOA, which are private property interests, not a public issue. Those issues are irrelevant to a proceeding under 30 V.S.A. § 248. Harris herself admitted at the beginning of her participation in the first solar proceeding that the property dispute issues that had already been raised were properly adjudicated solely in this Court, and were not related to the PUC proceedings. *See, Melone Aff. Exhibit 1, p.3* ("Movant is aware that the PSB does not address property issues and Superior Court is the correct venue for litigating those issues.") Thus, the first person to raise the prospect of litigation of the issues in this action was Harris in 2015.

Although at one point Plaintiff believed that Lot #1 was part of the AHHA, upon further examination of the various deeds and the CIOA, it became clear that it was not. The relevant deed, Compl. Exh. K, states that the "premises are conveyed subject to those same restrictive covenants" set forth in the Liu Deed. The Liu Deed states: "The above-described lands and premises are conveyed subject to the following private building and zoning restrictions and covenants." None relate to the AHHA or the land being part of the AHHA. In addition, at the point in time when the deeds in both Exhibits K and L were executed by the Bohnes, they had no authority at all to cause any property owner to join the AHHA, even assuming the AHHA is a CIC. At that time, the AHHA was a separate non-profit corporation with its own charter.

The Bohnes also failed to prepare a public offering statement required by the CIOA indicating their intention not to create a CIC. Lot No. 1 does also not share the required common interests necessary for a CIC, such as roads. No common roads were created when the Lot #1 subdivision was created, indicating that not only is not Lot #1 not part of a CIC, but whatever restrictive covenants do apply were for the benefit of the Bohnes only and do not run with the land.

Here, as in *Khan v. Alpine Haven Prop. Owners' Ass'n*, 2016 VT 101, 203 Vt. 251 (2016), “there is no language in any of the deeds at issue indicating that the grantee has any relationship to anyone other than the grantor, nor is there language indicating that the covenants run with the land.” *Id.* at P27.

III. The AHHA Has No Standing To Defend Purported Land Use Issues Involved In Counts II, III, IV, V, VI And VIII, And Those Counts Do Not Arise From The AHHA’s or Any Defendant’s Exercise Of The Right Of Free Speech Or The Right To Petition.

Count II and Count III involve Harris’ purported easement across Plaintiff’s Lot #1 and whether, if Harris has an easement, Plaintiff has any obligation to share the costs to maintain her access. Harris raised those issues in discussions with Brad Wilson of Ecos Energy in 2014, long before her participation in the solar proceedings. These counts involve Harris only, and as such the AHHA has no standing to defend them. Moreover, these counts arise from the deeds themselves and not from any proceeding or Harris’ participation in any proceeding or public forum.

Count VI involves whether restrictive covenants are included in the recorded chain of title for Lot #1 and of so to what extent. That dispute with the restrictive covenant arises from the deed itself and not from any proceeding or Harris’ participation in any proceeding or public forum.

Count VIII is only against the sole potential beneficiaries of the purported restrictive covenants in the deed for Lot #1—Defendants Paul and Nancy Bohne. The AHHA has no legal claim or right to enforce a restrictive covenant on land that is not part of the AHHA (even assuming the AHHA is a CIC).

IV. If There Are Restrictive Covenants That Have Run With The Land And Are Applicable To Lot #1, 27 V.S.A. §544 Invalidates Them In Respect Of Solar Uses.

Even if AHHA had standing under Count VIII, its reading of 27 V.S.A. §544 is contrary

to the plain language of the statute. 27 V.S.A. § 544 states:

No deed restrictions, covenants, or similar binding agreements running with the land shall prohibit or have the effect of prohibiting solar collectors, clotheslines, or other energy devices based on renewable resources from being installed on buildings erected on the lots or parcels covered by the deed restrictions, covenants, or binding agreements.

The statute expressly covers both buildings on lots and also parcels. Moreover, 27 V.S.A. § 544(c) makes it clear that the statute’s invalidation of restrictions on solar collectors applies to both “commercial [and] residential property.” Furthermore, the statute emphasizes that the “legislative intent in enacting this section is to protect the public health, safety, and welfare by encouraging the development and use of renewable resources in order to conserve and protect the value of land, buildings, and resources.” Invalidating the alleged restriction on Lot #1 serves the legislative purpose.

27 V.S.A. § 544 was enacted in the Vermont Energy Act of 2009 (Act 45). In three adjoining sections of the Act, the Vermont Legislature invalidated all public and private prohibitions on the use of solar collectors on property—land and buildings, commercial and residential. Act 45, sec. 15b, added 24 V.S.A. § 2291a prohibited municipalities from prohibiting solar collectors on property—land and buildings.¹⁴ Act 45, sec. 15c, added 24 V.S.A. § 4413(g) invalidating by-laws that prohibited solar collectors on property—land and buildings.¹⁵ Sec. 15d.

¹⁴ “Sec. 15b. 24 V.S.A. § 2291a is added to read:

§ 2291a. RENEWABLE ENERGY DEVICES

Notwithstanding any provision of law to the contrary, no municipality, by ordinance, resolution, or other enactment, shall prohibit or have the effect of prohibiting the installation of solar collectors, clotheslines, or other energy devices based on renewable resources. This section shall not apply to patio railings in condominiums, cooperatives, or apartments.”

¹⁵ “Sec. 15c. 24 V.S.A. § 4413(g) is added to read:

(g) Notwithstanding any provision of law to the contrary, a bylaw adopted under this chapter shall not prohibit or have the effect of prohibiting the installation of solar collectors, clotheslines, or other energy devices based on renewable resources.”

enacted 27 V.S.A. § 544 doing the same but with respect to private restrictions.¹⁶

V. Plaintiff Is Entitled To An Award Of Attorney's Fees And Costs.

If the Court does not declare Vermont's anti-SLAPP statute unconstitutional, Plaintiff is entitled to an award of attorney's fees and costs under § 1041(f) because the AHHA's motion is frivolous or is intended solely to cause unnecessary delay. The affidavit of Bill Knight clearly establishes that the AHHA's motion is baseless and just a delay tactic because none of the counts arise from AHHA's or Harris participation in the solar or related proceedings. In addition, the application of the CIOA makes it clear that the AHHA's claims of some say over Lot #1 are frivolous.

VI. The AHHA's Alternative Motion to Dismiss Must Be Denied.

After having dedicated more than 20 pages of its motion to discussion of the disputed issues of law and disputed issues of material fact, the AHHA adds a two-paragraph alternative request to dismiss the complaint under V.R.C.P. 12(b)(6) (failure to state a claim upon which relief can be granted). "A motion to dismiss for failure to state a claim upon which relief can be granted should not be granted unless it is beyond doubt that there exist no facts or circumstances that would entitle

¹⁶ "Sec. 15d. 27 V.S.A. § 544 is added to read:

§ 544. ENERGY DEVICES BASED ON RENEWABLE RESOURCES

(a) No deed restrictions, covenants, or similar binding agreements running with the land shall prohibit or have the effect of prohibiting solar collectors, clotheslines, or other energy devices based on renewable resources from being installed on buildings erected on the lots or parcels covered by the deed restrictions, covenants, or binding agreements. A property owner may not be denied permission to install solar collectors or other energy devices based on renewable resources by any entity granted the power or right in any deed restriction, covenant, or similar binding agreement to approve, forbid, control, or direct alteration of property with respect to residential dwellings. For purposes of this subsection, that entity may determine the specific location where solar collectors may be installed on the roof within an orientation to the south or within 45° east or west of due south, provided that this determination does not impair the effective operation of the solar collectors.

(b) In any litigation arising under the provisions of this section, the prevailing party shall be entitled to costs and reasonable attorney's fees.

(c) The legislative intent in enacting this section is to protect the public health, safety, and welfare by encouraging the development and use of renewable resources in order to conserve and protect the value of land, buildings, and resources by preventing measures which will have the ultimate effect, whether or not intended, of driving the costs of owning and operating commercial or residential property beyond the capacity of private owners to maintain. This section shall not apply to patio railings in condominiums, cooperatives, or apartments."

[plaintiff] to relief.” *Powers v. Office of Child Support*, 173 Vt. 390, 395 (2002). “The purpose of a motion to dismiss is to test the law of the claim, not the facts which support it. on review this Court assumes all factual allegations pleaded in the complaint are true, and we disregard all of defendants' contrary assertions.” *Id.* (internal citations omitted.) “A motion to dismiss for failure to state a claim is not favored and rarely granted.” *Ass’n of Haystack Property Owners v. Sprague*, 145 Vt. 443, 446-447, 494 A.2d 122 (1985). “The trial court's proper course of action when granting a Rule 12(b) motion to dismiss prior to the service of a responsive pleading is to dismiss with leave to amend.” *Neal v. Brockway*, 136 Vt. 119, 122, 385 A.2d 1069 (1978).

AHHA provides no count-by-count discussion of the basis for its entitlement to a dismissal. Its motion should therefore be dismissed for that reason alone. But the earlier 20-plus pages of the AHHA motion undercuts its motion to dismiss. With respect to Count I, the motion’s discussion at pages 18-21 highlights various factual issues would be further examined in discovery and at trial and be the subject of both fact and expert witness testimony. Furthermore, the AHHA’s analysis regarding the right-of-way completely ignores the Bennington Land Use and Development Regulations which provide that a platted right-of-way is a “street” in Bennington. *See*, Bennington Land Use and Development Regulations, section 2.2.¹⁷ (“Street (Road): A town or state highway, or other right-of-way that provides access to four or more parcels, as shown on a subdivision plat approved by the Development Review Board. The word “street” shall mean the entire right-of-way.”)¹⁸ Thus, under Bennington’s land use regulations, the entire platted right-of-way across Lot 37 is a street, which benefits only one parcel—Plaintiff’s.

A material issue of fact and law is to what extent there are any restrictions on Lot #1 as

¹⁷ <http://benningtonplanningandpermits.com/permits/wp-content/uploads/2016/04/LUDR-042816.pdf>.

¹⁸ Plaintiff’s review of the records indicated that the right-of-way crosses only Lot 37. The AHHA, however, asserts that it may also cross Lot 36. If that is the case, Plaintiff would amend the complaint to add the owner of Lot 36 as a defendant.

discussed in detail above, and if so, who they benefit. It would have been quite easy for the Bohnes to spell out each restriction rather than creating an ambiguous cross-reference to restrictions that only apply to a different lot. Moreover, as discussed above, one of the requirements under the CIOA is the existence of a separate declaration, in which restrictions would be placed. It is only through the separate declaration that restrictive covenants may be imposed. *Khan v. Alpine Haven Prop. Owners' Ass'n*, 2016 VT 101, P33, 203 Vt. 251 (2016) (“[c]ovenants in individual deeds cannot constitute a ‘declaration’ of covenants”) quoting *Patch v. Springfield School District*, 2009 VT 117, ¶ 12, 187 Vt. 21. In addition, restrictive covenants cannot be incorporated by mere cross-reference in light of the CIOA and *Khan v. Alpine Haven Prop. Owners' Ass'n*, 2016 VT 101, 203 Vt. 251 (2016).

The Bohnes also failed to prepare a public offering statement required by the CIOA indicating their intention not to create a CIC and supporting the inference that the covenants, if applicable, were intended to solely benefit them. Lot # 1 does also not share the required common interests necessary for a CIC, such as roads. No common roads were created when the Lot #1 subdivision was created, indicating that not only is not Lot #1 not part of a CIC, but whatever restrictive covenants do apply were for the benefit of the Bohnes only and do not run with the land. Here, as in *Khan v. Alpine Haven Prop. Owners' Ass'n*, 2016 VT 101, 203 Vt. 251 (2016), “there is no language in any of the deeds at issue indicating that the grantee has any relationship to anyone other than the grantor, nor is there language indicating that the covenants run with the land.” *Id.* at P27.

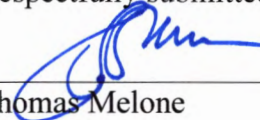
In any case, the AHHA has no standing to enforce any of the covenants because Lot #1 is not part of the AHHA.

CONCLUSION

For the reasons stated above, the AHHA's motion should be denied and the Plaintiff awarded attorney's fees and costs.

Dated: May 13, 2019

Respectfully submitted,



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Attorney for Plaintiff

STATE OF VERMONT

SUPERIOR COURT
CHITTENDEN UNIT

CIVIL DIVISION
Docket No. 331-4-19 Cncv

PLH LLC,

Plaintiff,

v.

LIBBY HARRIS a/k/a LIBBY GARRISON
a/k/a LOIS PETROOK a/k/a LOIS SISTI a/k/a
LOIS WAGNER, the APPLE HILL
HOMEOWNERS ASSOCIATION INC.,
ESTATE OF EARL SENEAL, PAUL W.
BOHNE III and NANCY S. BOHNE,
Defendants.

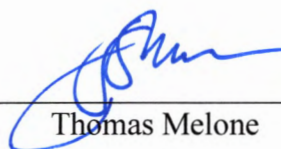
AFFIDAVIT OF THOMAS MELONE

I, Thomas Melone, being duly sworn hereby affirm and declare under penalties of perjury as follows:

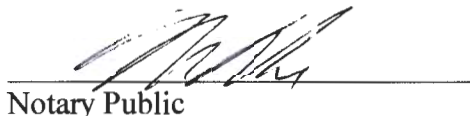
1. I am counsel for PLH LLC in the above-captioned case. The facts set forth herein are based on my personal knowledge and if called as a witness I could competently testify thereto.
2. Attached hereto as **Exhibit 1** is a true copy of the Motion to Intervene of Libby Harris dated March 19, 2015, in Public Utility Commission docket no. 8302.

I declare under penalty of perjury under the laws of the United States and the State of New Jersey that the foregoing is true and correct.

Dated: May 13, 2019


Thomas Melone

Sworn to and subscribed before me
this 13th day of May, 2019, at Ho-Ho-Kus, New Jersey.


Notary Public

MICHAEL J. MELONE
NOTARY PUBLIC OF NEW JERSEY
Comm # 50083003
My Commission Expires 5/22/2023

EXHIBIT 1

STATE OF VERMONT
PUBLIC SERVICE BOARD

Petition of Chelsea Solar LLC for a Certificate)
of Public Good Pursuant to 30 V.S.A. §248)
authorizing the installation and operation of a)
2.0 MW solar electric generation facility at)
500 Apple Hill Road, Bennington, Vermont) PSB Docket No. 8302

MOTION TO INTERVENE OF
LIBBY HARRIS

Now comes Libby Harris and moves to intervene in the matter referenced above pursuant to Public Service Board Rule 2.209(B).

1. Libby Harris is an adjoining property owner who has substantial, particularized interests protected by Section 248 and the incorporated criteria of Act 250 which may be affected by the outcome of the proceedings in this matter.
2. As an adjoining landowner, Movant received notice of Chelsea Solar LLC's application to the PSB via U.S. Mail when it was filed on June 19, 2014.¹
3. Movant attended the prehearing conference held on Aug. 25, 2014 and the site visit on the afternoon of Oct. 16, but did not attend the public hearing on the evening of Oct. 16, 2014.
4. Movant is a member of the Apple Hill Homeowners Association (AHHA).
5. Movant did not intervene by the deadline of Oct. 31, 2014 because she is a member of the AHHA which she believed was intervening on behalf of its members.
6. Movant was in a bad accident on Nov. 17, 2014 and sustained serious injuries including a bad concussion. Movant has had major surgery because of her accident. As a result of the concussion, Movant has not been able to focus and has had to withdraw from normal activity and rest a lot, under doctor's order.
7. Movant is now able to concentrate.
8. Movant has become aware that the AHHA motion to intervene was denied by the Public Service Board. Movant does not know when the denial occurred.

¹ <http://psb.vermont.gov/sites/psb/files/misc/Chelsea%20Solar%20->

9. Movant is aware that on March 2, 2015, the AHHA (Bill Knight, President) and Chelsea Solar, LLC (Michael Melone, Esq.) entered into a Memorandum of Understanding (MOU) resolving “all outstanding issues between them.” [Exhibit 1]
10. Movant’s name was on a draft of the MOU and after reading it, Movant requested to be removed from the agreement.
11. Movant did not attend the meeting of the AHHA where members agreed to sign the MOU with Chelsea Solar LLC.
12. Movant received a copy of the signed MOU on March 5, 2015.
13. Movant does not agree that all outstanding issues have been resolved.
14. As an adjoining landowner to Ecos Energy’s Apple Hill solar proposal, Movant received a letter from Apple Hill Solar LLC dated March 3, 2015 informing her that the petition for that second project in the area adjoining the Chelsea Solar LLC project has been filed with the PSB. [Exhibit 2]
15. Movant is aware that her Motion to Intervene is not timely.
16. Movant believes that the circumstances leading up to this Motion to Intervene, including
 - a. Her understanding that AHHA was intervening on behalf of its members, which include her
 - b. Her accident, concussion, surgery, and recovery
 - c. The PSB’s denial of AHHA’s intervention
 - d. The recently-signed MOU with Chelsea Solar LLC to which she does not agree
 - e. The recently-filed petition for Apple Hill Solar LLCcombine to create a special circumstance that merits her intervention as the only means to protect her interests that may be affected by the outcome of this proceeding.
17. Contrary to 30 V.S.A § 248(b)(1) the Project will unduly interfere with the orderly development of the region. According to the terms of the MOU with AHHA, the Project as proposed would utilize the same access road, Willow Road, as the Apple Hill proposal for both construction and decommissioning of both projects. In reversing the PSB and determining that Ecos Energy may proceed with two contiguous plants on the same parcel of land, the Vermont Supreme Court was clear that the plain language of the statute requires that the projects will “not share common roads.”² Movant believes that the MOU entered into between the AHHA and Chelsea Solar LLC creates a circumstance that violates the

² <http://info.libraries.vermont.gov/supct/current/op2013-308.html>

requirement for each project to “have separate access roads” and will therefore interfere with the orderly development of the region and raise legal issues that affect Movant’s interests.

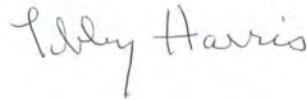
Additionally, AHHA’s deeds contain language governing the use of the AHHA lands which prohibit the use of the lands for “commercial purposes” and therefore interferes with the orderly development of the region. Movant is aware that the PSB does not address property issues and Superior Court is the correct venue for litigating those issues, should the PSB issue a CPG that violates her property interests. However, at this time, given the commercial nature of Chelsea Solar’s plans which conflict with the AHHA’s deed restrictions that AHHA has agreed through the MOU to allow Chelsea Solar LLC to override, and given the potential for the PSB to require Chelsea Solar LLC to use AHHA lands for construction, operations & maintenance and decommissioning the project via the road adjoining Movant’s property, Movant believes the only means by which she may be able to protect her interests is, first, through intervention in this docket. An evaluation of whether the Project will unduly interfere with orderly development of the region requires consideration of alternative sites. Movant has a substantial and particularized interest in the issue of the Project’s compatibility with orderly development as it directly and uniquely affects her property within the region. No other party will adequately protect these interests of Movant and there are no alternative means by which these interests may be protected. Intervention will not unduly delay these proceedings or prejudice the interests of existing parties or of the public.

18. The proposal is a major change to the aesthetics of the area and does not comply with 30 V.S.A. § 248(b)(5) Aesthetics, Historic Sites and Rare and Irreplaceable Natural Areas 10 V.S.A. § 6086(a)(8). Movant has lived in her home for eleven years. During that time she has experienced “fierce” winds that are buffered by trees that the applicant proposes to cut for the project. In the presence of Movant, the applicant has referred to its own study that shows there will be no increase in wind as a result of cutting the trees. Movant has been unable to determine that such a study exists. Movant is also aware that the project may result in an increase in noise from the highway, Route 7, as well as an increase in noise produced by more severe winds. Movant notes that the predominant wind that affects her property is from the southwest, which is the direction with the tallest trees closest to her home that the Project proposes to cut. Movant is aware that the AHHA requested that the wind issue be addressed through the MOU and that Chelsea Solar LLC declined to address the wind/noise issue. Movant may also experience a change in the view from her home that would be softened by planting trees and the location of those trees affects her interests. No other party will adequately protect these interests of the Movants and there are no alternative means by which these interests may be protected. Intervention will not unduly delay these proceedings or prejudice the interests of existing parties or of the public.

19. While intervention is not timely, the applicant has recently proposed a schedule that provides sufficient time for Movant to submit prefiled testimony and engage in discovery without unduly delaying these proceedings or prejudice the interests of existing parties or the public. Movant proposes to submit testimony either in April or on 5/18/15, with discovery 6/8/15 and responses to discovery 6/12/15. Movant's discovery on Chelsea Solar LLC could occur in April. The proposed schedule allows plenty of time for participation by Movant prior to the proposed technical hearing in late June or early July.

Wherefore, Movant prays that they be permitted to participate in this Docket No. 8302 as a party in accordance with PSB Rule 2.209(B).

Dated this 19th day of March, 2015 in Bennington, Vermont.



Libby Harris
531 Apple Hill Road
Bennington, Vt 05201
802 447 0314 home
802 375 4592 cell and text
libbyharris1@me.com

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding ("MOU") dated as of March 2, 2015 is between Chelsea Solar LLC ("Chelsea") and the Apple Hill Homeowners Association and its members (collectively, the "Landowners"). Chelsea and the Landowners are also referred to collectively herein as the "Parties" and individually as a "Party."

PRELIMINARY STATEMENT

On June 19, 2014, Chelsea filed a petition (Docket No. 8302) and supporting testimony and exhibits with the Vermont Public Service Board ("Board") requesting a certificate of public good ("CPG") under 30 V.S.A. § 248 to install and operate a 2.0 MW solar electric generation facility to be located at 500 Apple Hill Road in Bennington, Vermont ("Project").

On August 4, 2014 the Landowners filed a motion to intervene with the Board citing several issues they had with the Project. On September 26, 2014, Chelsea filed supplemental testimony addressing certain issues raised by the Landowners.

The Parties have now resolved all outstanding issues between them and as such wish to memorialize their mutual understandings in this Memorandum of Understanding and stipulate as to certain conditions, as set forth below.

STIPULATION

The Parties, having had an opportunity to fully review and assess the proposed Project, and the modifications to the Project, and in order to resolve all issues between them with respect to the Project, hereby stipulate and agree to the following conditions:

- 1) Chelsea agrees to construct the access driveway connecting the northeastern corner of the Project with Apple Hill Road at the end of the Project's construction timeline.

- 2) Chelsea will not utilize the Apple Hill Road access driveway for any decommissioning activities.
- 3) Chelsea agrees that it will not construct a permanent connection between Willow Road and Apple Hill Road through the Project property.
- 4) As stated in the SUPPLEMENTAL PREFILED TESTIMONY OF BRAD WILSON ON BEHALF OF CHELSEA SOLAR LLC, dated September 26, 2014, filed with the State of Vermont Public Service Board:

“A permanent access driveway will be constructed to connect the northeast corner of the property to Apple Hill Road. The permanent access driveway will be used for operations and maintenance (‘O&M’) traffic, as well as emergency vehicle access during project operation. No site clearing, site preparation, or construction traffic will utilize the permanent Apple Hill Road driveway, and no Project O&M traffic will utilize the temporary Willow Road driveway.”

- 5) Chelsea will provide contacts to the Landowners for the construction-period Project Manager and operations-period Asset Manager.

[SIGNATURE PAGES TO FOLLOW]

CHELSEA SOLAR, LLC

By:

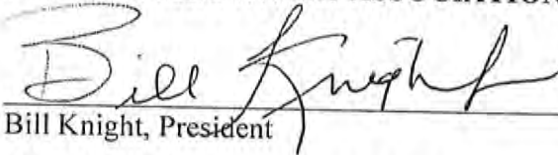


Michael Melone, Esq.

Dated: 3/2/15

APPLE HILL HOMEOWNERS ASSOCIATION

By:



Bill Knight, President

Dated: 3/2/2015

APPLE HILL SOLAR

March 3, 2015

To: Adjoining Landowners to the proposed Apple Hill Solar Project

Re: Petition of Apple Hill Solar LLC, pursuant to 30 V.S.A. § 248, for a certificate of public good authorizing the installation and operation of a 2.0 MW solar electric generation facility located at 1133 Willow Road in Bennington, Vermont

Dear Adjoining Landowners:

Apple Hill Solar LLC is submitting a Petition and supporting materials to the Vermont Public Service Board for approval of a solar energy project in Bennington, Vermont. The enclosed Petition briefly describes the project.

The purpose of this letter is to provide you with some information additional to that which is found in the Petition, as required under Public Service Board rules.

First, the Public Service Board has issued a *"Citizen's Guide to the Vermont Public Service Board's Section 248 Process,"* available at the following website:

<http://psb.vermont.gov/sites/psb/files/publications/CitizensGuideto248.pdf>

Second, the entire Petition and supporting materials (written testimony and maps, plans, and other exhibits) are available from the following sources:

Vermont Public Service Board
112 State Street
Montpelier, Vermont 05602
(802) 828-2358
Hours: M-F, 7:45-4:30

Bennington County
Regional Commission
Attention: Jim Sullivan
111 South Street, Suite 203
Bennington, VT 05201
Hours: M-W, 9:00-4:00

Bennington Planning and Permitting Dept.
Bennington Select Board
Attention: Dan Monks
P.O. Box 469
Bennington, VT 05201

Apple Hill Solar LLC
c/o Allco Renewable Energy Limited
Attn: Michael Melone
77 Water Street – 8th Floor
New York, NY 10005
(917) 328-2001
Hours: M-F, 9:30-6:00

Please do not hesitate to contact us should you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'M Melone', is positioned below the word 'Sincerely,'.

Michael Melone
Apple Hill Solar LLC
c/o Allco Renewable Energy Limited
77 Water Street – 8th Floor
New York, NY 10005

**STATE OF VERMONT
PUBLIC SERVICE BOARD**

Docket No. _____

Petition of Apple Hill Solar LLC, pursuant	)
to 30 V.S.A. § 248, for a certificate of public	)
good authorizing the installation and	)
operation of a 2.0 MW solar electric generation	)
facility located at 1133 Willow Road in	)
Bennington, Vermont	)

PETITION FOR CERTIFICATE OF PUBLIC GOOD

NOW COMES Apple Hill Solar LLC ("Apple Hill Solar"), and files this Petition, pursuant to 30 V.S.A. § 248 and Public Service Board ("Board") Rule 5.400, requesting the Board to issue a Certificate of Public Good for the so-called Apple Hill Solar Project (the "Project").

By this Petition, Apple Hill Solar represents as follows:

I. PETITIONER DESCRIPTION.

1. Petitioner is a Vermont limited liability company located at c/o Allco Renewable Energy Limited, 77 Water Street, 8th Floor, New York, New York, 10005.

II. PERMISSION TO PROCEED *PRO SE*.

2. Pursuant to Rule 2.201¹, the Petitioner petitions to proceed *pro se*. The Petitioner will be

¹ Rule 2.201 provides: (B) Pro se appearances. For purposes of these rules a person appearing pursuant to the authority of this section shall be known as a pro se representative. In its discretion, the Board may permit persons who are not attorneys to appear before it as follows: a partnership may be represented by a partner, and a corporation, cooperative or association may be represented by an officer thereof or by an employee designated in writing by an officer thereof. Such permission shall be given in all proceedings unless, because of their factual or legal complexity or because of the number of parties, the Board is of the opinion that there is a substantial possibility that the participation of a pro se representative will

represented by (i) its President, Thomas Melone and (ii) its Vice President and General Counsel, Michael Melone.

3. Mr. Thomas Melone is admitted as an attorney, and is in good standing, in the States of New York and New Jersey; has practiced law at the law firms of Cravath, Swaine & Moore and Hunton & Williams; and has practiced before the Vermont Supreme Court, and other courts and Federal and State regulatory boards, including the FERC, the Massachusetts Department of Public Utilities, the Minnesota Public Utilities Commission, the California Public Utilities Commission and the Iowa Utilities Board. Mr. Thomas Melone is also on the Board of Advisors of the Institute for Policy Integrity at New York University School of Law.
4. Mr. Michael Melone is admitted as an attorney, and is in good standing, in the States of New York and California; has practiced law at the law firms of O'Melveny & Myers and Morgan, Lewis & Bockius. Mr. Michael Melone is a graduate of Middlebury College in Vermont and New York University School of Law.
5. The participation of Petitioner's *pro se* representative will not unnecessarily prolong these proceeding and will not result in inadequate exposition of factual or legal matters.

III. THE APPLE HILL SOLAR PROJECT.

6. The Apple Hill Solar Project is a proposed 2.0 megawatt (MW) solar electric generation project to be located on a portion of a 27± acre undeveloped parcel of land located at 1133 Willow Road in Bennington, Vermont. The parcel has a general North to South slope, enhancing its value as a site for solar electric production.
7. The nameplate capacity of the Project is 2.0 megawatts (MW) AC. The expected net

unnecessarily prolong such proceeding or will result in inadequate exposition of factual or legal matters.

energy output of the Project is 3,538± megawatt hours of electricity (MWh) (3,538,000 kWh) per year. This is the equivalent of the annual electricity consumption of roughly 330 homes, based upon the average residential electricity use in Vermont.¹

8. The Project is being developed under the "Standard Offer" program. The Standard Offer contract was executed on May 12, 2014 with the SPEED Facilitator. The Standard Offer contract provides for the sale of the Project's output and other attributes (such as renewable energy credits), at a fixed price for a period of 25 years.
9. The Apple Hill Solar Project, as a renewable energy resource, would contribute to the State meeting its energy and sustainability goals, which include, by the year 2025, to produce 25 percent of the energy consumed within the state through the use of renewable energy sources, particularly from Vermont's farms and forests.
10. Apple Hill Solar will also contribute positively to the local and State economy through the use of in-state suppliers, contractors, and consultants, and the payment of local and state property taxes.
11. The Project's equipment consists of the following: individual polycrystalline solar photovoltaic panels, a metal support structure under the panels to create south-facing collector arrays, inverters, electrical lines in underground conduit connecting the panels to the collection equipment and switch gear enclosure, and underground electrical lines from the interconnection transformer to the GMP distribution system. The individual panels making up each solar array are anticipated to be approximately 310 watts each (depending upon the final selection of a solar installer and panel manufacturer).

¹Figure based on upon statewide average usage of 750 kWh/month. See http://publicservice.vermont.gov/consumer/cons_alerts_electric.html

12. The modules will be attached to a fixed mounting system composed of steel and aluminum support pieces. The mounting structure will be arranged in east to west rows with panels placed two high in landscape on each row. The panels will be tilted at approximately 30 degrees and will face solar south (195 degrees magnetic).
13. Inverters will convert the DC current generated by the solar panels into AC current. All electrical conduits and lines will run underground from the solar panels to the inverter enclosure. A medium voltage transformer will convert the AC inverter output to 12 kV for interconnection to the Green Mountain Power system. An automated recloser circuit breaker will provide electrical protection and be the official point of interconnection between the Project and the GMP grid.
14. In support of this Petition, Apple Hill Solar submits testimony and exhibits that address each of the § 248 (b) criteria.

Request for Relief

WHEREFORE, Apple Hill Solar respectfully requests this Board to:

- A. Hold a preheating conference as expeditiously as possible on the Petition on or around March 23;
- B. Hold technical hearings, if the Board determines such hearings are necessary;
- C. Render a decision on this Petition by August of 2015;
- D. Make findings as required by 30 V.S.A. § 248 finding that Apple Hill Solar shall be authorized to construct and operate a 2.0 MW solar electric generation facility located at 1133 Willow Road in Bennington, Vermont, and that the Project will promote the general good of the State of Vermont, and authorize Apple Hill Solar to undertake the actions described herein and in the attached testimony and exhibits and issue a Certificate of Public Good to that effect; and
- E. Take such other action as may be required for the expeditious review and approval of this Petition.

30 V.S.A. § 248(b) Criteria	Testimony	Exhibits
• Educational Services	Brad Wilson	n/a
• Municipal Services	Brad Wilson	n/a
• Aesthetics	Mark Kane	AHS -MK-2
• Historic and Archaeological Sites	Scott Mapes Mark Kane	n/a
• Rare and Irreplaceable Natural Areas	Dori Barton	n/a
• Necessary Wildlife Habitat and Endangered Species	Dori Barton	n/a
• Development Affecting Public Investments	Brad Wilson	AHS - ECOS-5
• Public Health and Safety	Brad Wilson	n/a
30 V.S.A. §248(b)(6)- Integrated Resource Planning	Brad Wilson	n/a
30 V.S.A. §248(b)(7)- Comprehensive Energy Plan	Brad Wilson	See 202(f) letter
30 V.S.A. §248(b)(10)- Transmission Facilities	Brad Wilson	AHS -ECOS-5
Other Evidence Not Associated with Specific 248(b) Criteria	Scott Mapes	AHS -SMM-4
• Prime Agricultural Soils		

**STATE OF VERMONT
PUBLIC SERVICE BOARD**

Docket No. _____

Petition of Apple Hill Solar LLC, pursuant
to 30 V.S.A. § 248, for a certificate of public
good authorizing the installation and
operation of a 2.0 MW solar electric generation
facility located at 1133 Willow Road in
Bennington, Vermont

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PETITIONER APPLE HILL SOLAR LLC'S INDEX OF EVIDENCE

30 V.S.A. § 248(b) Criteria	Testimony	Exhibits
30 V.S.A. § 248(b)(1) – Orderly Development of the Region	Mark Kane	AHS-MK-3, 4, 5 and 6
30 V.S.A. § 248(b)(2) – Need for the Project	Brad Wilson	n/a
30 V.S.A. § 248(b)(3) – System Stability and Reliability	Brad Wilson	AHS - ECOS-5
30 V.S.A. § 248(b)(4) – Economic Benefit to the State	Brad Wilson	n/a
30 V.S.A. § 248(b)(5) and (8) – Environmental Considerations	Mark Kane & Dori Barton & Scott Mapes	n/a
• Outstanding Resource Waters	Scott Mapes & Dori Barton	n/a
• Headwaters	Scott Mapes	AHS -SMM-2 and 5
• No Undue Air Pollution	Scott Mapes	AHS -ECOS-8 AHS -SMM-2
• Noise/Construction Impacts	Brad Wilson	n/a
• No Undue Water Pollution	Scott Mapes	n/a
• Water Conservation	Scott Mapes	n/a
• Waste Disposal	Scott Mapes	AHS -ECOS-8 and 10 AHS -SMM-2, 4 and 5
• Floodways	Scott Mapes	n/a
• Streams	Scott Mapes & Dori Barton	n/a
• Shorelines	Scott Mapes & Dori Barton	n/a
• Wetlands	Dori Barton	AHS -DB-2
• Sufficiency of Water/Burden on Existing Water Supply	Scott Mapes	AHS -SMM-3
• Soil Erosion	Scott Mapes	AHS -ECOS-10 AHS -SMM-2 and -4
• Traffic	Brad Wilson	n/a