

**IN THE SUPREME COURT
OF THE STATE OF VERMONT**

In re Petition of Chelsea Solar LLC	)	Docket No. 2019-226
	)	
	)	Appealed From:
	)	Public Utility Commission
	)	Docket No. 17-5024

**OPPOSITION OF CHELSEA SOLAR LLC TO THE MOTION OF THE
APPELLEES/CROSS-APPELLANTS REQUESTING A RULING ON THEIR ISSUE III**

On January 10, 2020, the Appellees/Cross-Appellants Apple Hill Homeowners Association, Maru Leon and David Griffin (the “Appellees”) filed a motion urging that in the event that this Court reverses the Public Utility Commission’s (“PUC’s”) holding that the separate Chelsea Solar and Apple Hill Solar projects are a “single plant,” this Court should also reverse the PUC’s holding that the Chelsea Solar project satisfied the orderly development and aesthetics criteria under 30 V.S.A. §248.

In their motion, the Appellees urge this Court to reverse the PUC on the basis that this Court did in *In Re Petition of Apple Hill Solar LLC*, 2019 VT 64—that the PUC purportedly made too much of the Town of Bennington’s withdrawal of opposition to the solar project. The Appellees attached to their motion a PUC hearing officer proposed decision on remand issued on January 6, 2020, proposing to deny a certificate of public good to the Apple Hill solar project.

This Court’s *Apple Hill* decision is not controlling here for two critical reasons. *First*, footnote 14 of the Court’s *Apple Hill* decision (which directs the PUC what to do on remand) lists four Town Plan goals, none of which are clear community standards under this Court’s precedent. The threshold issue of whether those goals constituted clear standards was not briefed in *Apple Hill* because of the posture of that case. Here that issue has been squarely presented. This Court has consistently followed the basic principle that a restriction on development is valid “*only if it is*

accompanied by some ability of landowners to predict how discretion will be exercised and to develop proposed land uses accordingly.” In re Handy, 171 Vt. 336, 349 (2000) (emphasis added). Here, as is demonstrated by the plain language of the town plan, which is vividly reinforced by the PUC’s constant flip-flopping, there is simply no standard that allows a landowner to predict what would or would not be permitted. Even the Town Planner had no clear answer in his deposition, effectively applying a Justice Potter Stewart “I know it when I see it” test to what is prominently visible.

Four goals from fn 14 of <i>Apple Hill</i>	
1. The purpose of the Rural Conservation Districts is to preserve this distinctive rural character and working landscape while accommodating very low density residential development	Invalid under <i>In Re Chaves A250 Permit</i> , 2014 VT 5, ¶¶40-42; <i>Regan v. Pomerleau</i> , 2014 VT 99, ¶16; <i>In re JAM Golf, LLC</i> , 2008 VT 110 ¶¶13-14. Not relevant in any case because in the Town’s Rule 30(b)(6) deposition where Town Planner was speaking for the Town, he stated commercial solar is treated like any other use—it is permitted subject to meeting the RCON zone’s design criteria. ASPC2, Tr. 7:1-4.
2. Development cannot be sited in prominently visible locations on hillsides	Invalid under <i>Chaves</i> , ¶¶40-42; <i>Regan</i> , ¶16; <i>JAM Golf, LLC</i> , ¶¶13-14. There is no definition of hillside nor the phrase “prominently visible,” and no objective standard to guide enforcement. This Court has held that a town plan restriction on construction on hillsides constituted a clear, written community standard only when a specific objective criterion regarding slope measurement was provided. <i>See, In Re Green Peak Estates</i> , 154 Vt. 363, 368 (1990) (enforcing specific standard prohibiting development on slopes in excess of 20 percent).
3. Earth-tone colors	Invalid under <i>Chaves</i> , ¶¶40-42; <i>Regan</i> , ¶16; <i>JAM Golf, LLC</i> , ¶¶13-14. The color and material goal has no real objective standard or specific requirement to guide enforcement.
4. Minimize clearing	Invalid under <i>Chaves</i> , ¶¶40-42. No one knows the bounds of what “minimize clearing” means.

All four goals are not clear community standards under Chaves for an additional reason—the town and regional plans expressed other goals, thus ambiguity is *by definition* created. *Chaves*, ¶42 (the town plan’s language did “not express unambiguous standards in that *both the town and*

regional plans also express other goals.”) (emphasis added.) Specifically, this Court noted that the town plan (as here) recognized the importance of the project’s proposed operations. *Id.*

As a result, remand on grounds similar to *Apple Hill* is not required and could only be done if this Court reversed its prior precedent on what constitutes a clear community standard that is enforceable against proposed development.

Second, the Appellees have no standing so this Court could just dismiss the cross-appeal. In *Apple Hill*, the developer did not appeal the intervenors’ standing, but here the developer has. As the record shows, the Appellees’ petitions to intervene were devoid of any evidence showing a substantial and particularized *legally protectable* interest that might be injured. Similarly, the PUC’s orders granting intervention do not find that either Intervenor had a substantial and particularized interest. PC85, PC91. Moreover, the Appellees’ evidence, which is contained in the Appellees’ printed case, is also devoid of any evidence showing a substantial and particularized legally protectable interest that might be injured. The Appellees’ testimony merely expresses their concerns without providing any evidence. Indeed, the evidence presented by the Appellees contains multiple photos from miles away from the solar project site where the project would be visible as only a tiny spec in the distance.

At bottom, the *Apple Hill* decision does not dictate the result in this case. As such the motion should be denied.

Dated: January 16, 2020

Respectfully submitted,



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