

**STATE OF VERMONT
SUPREME COURT**

In Re: Petition of Chelsea Solar, LLC

**Supreme Court
Docket No. 2019-226**

**APPELLEES AHHA and MACC's MOTION REQUESTING
THAT THE COURT ISSUE A DECISION ON
CROSS-APPEAL ISSUE III
EVEN IF THE COURT UPHOLDS THE PUC AND AFFIRMS
THE PUC's DENIAL ON THE SINGLE PLANT ISSUE**

NOW COME Appellees Apple Hill Homeowners Association ("AHHA") and Mount Anthony Country Club ("MACC"), by and through their counsel of record in the above-captioned appeal, and hereby respectfully request that even in the event that this Honorable Court upholds and affirms the PUC's Denial of a Certificate of Public Good on the basis that the project is a "Single Plant" with the contiguous Apple Hill Solar project, that the Supreme Court also decide AHHA and MACC's Cross-Appeal Issue III - Whether the PUC's conclusion, that the Bennington Town Plan and associated documents do not contain a clear written community standard under § 248(b)(1) and (5). The reason for and in support of their request, Appellees AHHA and MACC offer the following:

MEMORANDUM

I. Introduction

This case involves a denial of a Certificate of Public Good ("CPG") by the Public Utility Commission ("PUC") on the basis that this project, which is known as Chelsea Solar LLC (Willow Road), along with the contiguous project, which is known as Apple Hill Solar LLC, comprise a

Single Plant because the two projects share common infrastructure and a common access road. The PUC's denial of the CPG was appealed by the Petitioner.

Appellees AHHA and MACC filed a cross-appeal because, if the Court reversed the PUC on the single-plant issue, the remainder of the PUC's decision would result in an approval of the CPG. Thus, Appellees' cross-appeal requests that, if the case is reversed on the single plant issue, that the Court reverse and remand the case, just as it did in Apple Hill Solar, on the issue of whether the Town Plan constitutes a clear, written community standard intended to preserve the aesthetics or scenic, natural beauty of the area. *See In re Petition of Apple Hill Solar LLC*, Docket No. 2018-358, 2019 VT 64.

The basis for Appellees' Cross-appeal request for reversal and remand is that the PUC used the same incompetent evidence and made the same clearly erroneous findings here as they did in the Apple Hill Solar case. Thus, if the evidence did not support the PUC's findings and conclusion in the Apple Hill solar case (that the Town Plan does not constitute a clear, written community standard), then the very same evidence cannot possibly support the PUC's exact same conclusion in this Chelsea Solar case (that the Town Plan does not constitute a clear, written community standard). Consequently, the Court must reverse and remand the instant case for the exact same reasons that it reversed and remanded Apple Hill Solar: because the PUC's decision is an abuse of discretion because it is based upon the same incompetent facts and clearly erroneous findings.

II. Request for a Decision by the Supreme Court on Cross-Appeal Issue III
regardless of the Court's Decision on the Single Plant issue.

The Supreme Court's May 2019 decision in Apple Hill which remanded the case back to the PUC has resulted in the issuance just this week, of a Proposal for Decision by the PUC

Hearing Officer which is attached hereto for the Court's review. *See attached Exhibit CA-1 Petition of Apple Hill Soar LLC*, Docket No. 8454, Proposal for Decision on Remand Recommending Denial of the Petition.," dated 1/6/2020. The Proposal for Decision recommends that the PUC deny the Apple Hill Solar LLC petition because it fails to comply with the clear written community standards expressed in the Town Plan. Appellees concern is that should the Apple Hill Solar case get denied, that will eliminate the reason why and factual basis for the PUC denial in the instant case: that two plants are really a Single Plant. Therefore, Appellees AHHA and MACC respectfully request that the Supreme Court decide Issue III of the Cross-appeal (the Town Plan "clear written community standard" issue) now and rule that the present case should be reversed and remanded on that issue in the event that Apple Hill Solar gets denied (in a final decision) and Chelsea Solar remains the only proposed project, thereby eliminating the factual basis for the PUC's denial in this case.

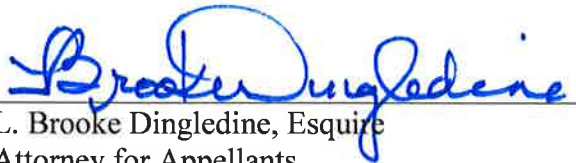
Although there certainly are arguments that such a ruling would not be ripe until an actual denial became a final decision, the incredibly onerous nature of the litigation related to these two solar projects has been overwhelming and borders on the deprivation of justice. Therefore, in the interests of justice and to serve judicial economy, AHHA and MACC respectfully request that the Court render a decision regarding Issue III of the Cross-appeal so that there will be no need for an appeal if and when there are not two viable projects proposed that could constitute a "Single Plant."

WHEREFORE, Appellees AHHA and MACC respectfully request that this Honorable Court render a decision on Issue III of Appellees Cross-Appeal, and reverse and remand this case to the PUC, in the event that the Single Plant issue in the interests of justice and to serve judicial economy.

DATED AT Barre, County of Washington and State of Vermont this 10th day of January, 2020.

APPLE HILL HOMEOWNERS ASSOCIATION and
MOUNT ANTHONY COUNTRY CLUB
Appellees

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**State of Vermont
Public Utility Commission**

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January 6, 2020

TO ALL PARTIES IN PUC Docket 8454

RE: Petition of Apple Hill 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 1133 Willow Road in Bennington, Vermont

Dear Parties:

Pursuant to 30 V.S.A. Section 8 and 3 V.S.A. Section 811, I am enclosing my Proposal for Decision in the above case.

If you have any comments, please file them on or before the close of the business day on January 27, 2020. Any comments will then be submitted to the Public Utility Commission along with the Proposal for Decision for final determination. If you wish, you may request oral argument before the Commission.

It should be emphasized that the enclosed Proposal for Decision is not a final decision of the Commission and may be subject to modification by the Commission.

Very truly yours,

A handwritten signature in black ink, appearing to read "M. E. Tousley", followed by a long horizontal flourish.

Michael E. Tousley, Esq.
Hearing Officer

Enclosure

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Docket No. 8454

Petition of Apple Hill 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 1133 Willow Road in Bennington, Vermont	Hearings at Montpelier, Vermont August 18, 2015 and March 22, 2018
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Order entered:

PROPOSAL FOR DECISION ON REMAND RECOMMENDING DENIAL OF THE PETITION

I. INTRODUCTION

This case involves a petition filed by Apple Hill Solar LLC (“Apple Hill” or “Petitioner”) with the Vermont Public Utility Commission (“Commission”)¹ requesting a certificate of public good (“CPG”) under 30 V.S.A. § 248 for the proposed construction and operation of a 2.0 MW solar electric generation facility at 1133 Willow Road, Bennington, Vermont (the proposed “Facility”).

The Vermont Supreme Court remanded the case to the Commission to: (1) assess the impact of the Facility on the orderly development of the region in light of the 2010 Bennington Town Plan (“Town Plan”) without consideration of the selectboard’s purported position on the subject; and (2) determine whether the Facility violates clear, written community standards in the Town Plan in assessing whether the Facility’s adverse effects are undue.²

In this proposal for decision on remand, I recommend that the Commission deny Apple Hill’s petition and CPG. The Facility would not be in the public good because the Facility is inconsistent with the Town Plan and would unduly interfere with the orderly development of the region and have an undue adverse impact on aesthetics and the scenic or natural beauty of the area.

¹ Pursuant to Section 9 of Act 53 of the 2017 legislative session, the Vermont Public Service Board’s name was changed to the Vermont Public Utility Commission, effective July 1, 2017. For clarity, activities of the Vermont Public Service Board that occurred before the name change will be referred to in Commission documents as activities of the Commission unless that would be confusing in the specific context.

² *In re Petition of Apple Hill Solar LLC*, 2019 VT 64, at ¶ 31 and ¶ 36. The 2010 Bennington Town Plan was amended in 2018 after the Petition was filed in 2015. This proposal for decision examined the 2010 Town Plan.

II. BACKGROUND

On March 15, 2015, the Petitioner filed a petition with supporting testimony and exhibits (the “Petition”).

On August 18, 2015, I conducted an evidentiary hearing in the Commission’s hearing room in Montpelier, Vermont. At the evidentiary hearing, all of the prefiled testimony and exhibits of the parties were admitted into the evidentiary record.

On April 4, 2016, Apple Hill filed a request to amend the Petition.

On May 24, 2017, I issued an order allowing for further discovery and a second evidentiary hearing to address Apple Hill’s proposed amendment to the Petition.

On March 22, 2018, I held a second evidentiary hearing in this proceeding and admitted all of the additional prefiled testimony and exhibits of the parties.

On July 2, 2018, I issued a proposal for decision recommending that the Commission approve the Facility as amended and issue a CPG.

On September 26, 2018, the Commission issued a final order adopting the proposal for decision and issued a CPG to the Petitioner.³

On October 25, 2018, Libby Harris and the Apple Hill Homeowners Association (“AHHA”) (together, the “Intervenors”) jointly filed notice with the Vermont Supreme Court of their appeal of the Commission’s September 26, 2018, decision.

On September 6, 2019, the Vermont Supreme Court issued a decision reversing the Commission’s September 26, 2018, decision, and remanded the case to the Commission for further proceedings consistent with its opinion.⁴ In its September 26, 2018, decision the Commission found that “the Town of Bennington Selectboard has determined that ‘the Town will not oppose Apple Hill on the grounds that the [Facility] fails to comply with the Town Plan in effect when the application was filed.’”⁵ The Vermont Supreme Court concluded that “the

³ *Petition of Apple Hill 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 1133 Willow Road in Bennington, Vermont*, Docket 8454, Order of 9/26/18.

⁴ *In re Petition of Apple Hill Solar LLC*, 2019 VT 64.

⁵ Docket 8454, Order of 9/26/18, findings 32 and 106.

Selectboard's decision not to oppose the [Facility] as violating the Town Plan, on which the [Commission] heavily relied, does not necessarily mean anything."⁶

On September 24, 2019, the Petitioner filed a motion to reargue with the Vermont Supreme Court.

On October 2, 2019, the Vermont Supreme Court denied the Petitioner's motion to reargue.

On October 26, 2019, the Vermont Supreme Court issued a mandate returning the case to the Commission for action consistent with its remand.

On October 30, 2019, the Commission issued an order appointing me to serve as hearing officer to address the remand from the Vermont Supreme Court and directed the parties to file comments proposing recommendations for additional proceedings in response to the Court's remand.

On November 13, 2019, the Intervenors filed comments on the remand stating that:

The Intervenors do not believe that any further pre-trial or trial process is necessary in this matter. The evidentiary record was deemed complete and in fact contains a great deal of documentary exhibits, prefiled testimony, rebuttal testimony, live testimony, and cross examination. The Supreme Court does not require further evidence to effectuate the directive of the Court. Therefore, there is no need for any further evidence to be submitted in this matter.

There is nothing more to be done, other than for the Hearing Officer to reconsider the evidence without regard to those portions of the record that the Supreme Court deemed irrelevant.⁷

On November 14, 2019, the Petitioner filed comments. The Petitioner requested that the Commission open a new case in ePUC, the Commission's electronic filing and case management system, to handle the filings related to the remand. Having been filed in March of 2015, before ePUC became available, this case is designated a legacy case and will continue to be processed in paper. The parties are encouraged to email copies of their paper filings to each other and the Commission, so that these filings may be available as electronic documents.

⁶ *In re Petition of Apple Hill Solar LLC*, 2019 VT 64, at ¶ 30.

⁷ Intervenors' Comments on the Remand Process at 1.

The Petitioner also recommended that I “issue a new proposal for decision that accounts for the Supreme Court’s ruling regarding findings without further filings from the parties.”⁸

No other comments on the remand process or the Petition were filed by the parties.

III. ADDITIONAL FINDINGS ON REMAND

Based upon the Petition and the accompanying record in this proceeding, I have determined that this matter is ready for decision. Based on the evidence of record, I report the following additional findings to the Commission in accordance with 30 V.S.A. § 8(c).

Description of the Facility

1. The Facility site abuts the site of the Willow Road Facility⁹ on a 27-acre parcel located on Apple Hill between Willow Road and Apple Hill Road. The Facility topographically slopes from a high elevation of 778 feet at the northeast corner to a low point of 675 feet near the southwest corner. The overall grade is approximately 10% with a total vertical change of 103 feet over 1,028 feet. Mark Kane, Petitioner (“Kane”) post-hearing affirmation 4/9/18 at ¶ 3; exhs. AHS-ECOS-3, AHS-MK-8, and AHS-ECOS-12.

2. Through a grid interconnection, the electricity generated by the Facility would be placed onto the distribution circuit of the local electric utility, Green Mountain Power Corporation (“GMP”). The grid interconnection would be accomplished over a distribution line extension to be constructed and owned by GMP but paid for by the Petitioner (the “GMP Line Extension”). The GMP Line Extension was developed to service two new 2.0 MW solar facilities on Apple Hill, the Apple Hill Solar Facility and the Willow Road Solar Facility. Exh. AHS-ECOS-5 at 5.

⁸ Petitioner’s Comments on the Remand Process at 1.

⁹ *Petition of Chelsea Solar LLC, pursuant to 30 V.S.A. § 248, for a certificate of public good authorizing the installation and operation of the “Willow Road Project,” a 2.0 MW solar electric generation facility on Willow Road in Bennington, Vermont*, Case No. 17-5024-NMP, Order of 6/12/19. The Commission denied the Willow Road petition because it concluded that the Willow Road Facility and the Apple Hill Facility were a single plant as defined in 30 V.S.A. § 8002. Chelsea Solar LLC has appealed the Commission’s denial of the Willow Road petition to the Vermont Supreme Court. Earlier versions of the Willow Road Facility were called the Bennington Solar Facility and the Chelsea Solar Facility. Because the Willow Road Facility has been denied a CPG, the single-plant analysis need not be conducted here.

3. The racking system would be painted a matte-black color like the color of the nonreflective solar panels. Wilson pf. supp.1 at 2-3.

4. The Facility requires 9.67 acres of clear cutting. Brad Wilson, Petitioner ("Wilson") pf. 3; Wilson pf.supp.1 at 2; exh. AHS-ECOS-23.

Orderly Development of the Region

[30 V.S.A. § 248(b)(1)]

5. The Facility would unduly interfere with the orderly development of the region, with due consideration having been given to the recommendations of the municipal and regional planning commissions, the recommendations of the municipal legislative bodies, and the land conservation measures contained in the plan of any affected municipality.¹⁰ This finding is supported by findings 6 through 26, below.

6. There are extensive public and conservation land holdings in the Town of Bennington, including portions of the Green Mountain National Forest, as well as significant areas of private conservation easements and recreation parks. Kane pf. at 5; exh. AHS-MK-3.

7. The Facility site is identified in the Town Plan as part of a Rural Conservation District. Rural Conservation Districts are located in valley areas outside the urban growth area and have been set aside to conserve their rural and open space character. Kane pf. at 5; exh. AHS-ECOS-13 at 16 and 25-26.

8. The purpose of the Rural Conservation Districts is to preserve traditional low-density rural and agricultural uses while accommodating low-density residential development in a manner that avoids the need for a public water supply and public sewer systems. Exh. AHS-ECOS-13 at 25-26, 29.

9. Approximately one-third of Bennington's land area has been designated as part of the Rural Conservation District in the Town Plan. Exh. AHS-ECOS-16 at 31.

10. The interchange at the junction of US Route 7 and VT Route 279 serves as the southwestern corner of the Rural Conservation District. The area immediately to the west of

¹⁰ This review of the impact of the Facility on the orderly development of the region considers the Bennington Town Plan without consideration of the Bennington Selectboard's position on the subject. *See In re Petition of Apple Hill Solar LLC*, 2019 VT 64, at ¶ 31. Also, because the Petition was filed in March of 2015, the 2018 change to Section 248(b)(1) requiring substantial deference to regional and municipal plans is not being applied.

Route 7 is in an Industrial Use District. The area immediately to the south of the interchange is a Mixed Residential District. The areas east of the Facility site are in Rural Residential, Rural Conservation, and Agricultural Districts, as identified by the Town Plan. The interchange highway complex thus serves as a boundary between minimally developed rural and agricultural areas in northeastern Bennington and developed urban and industrial areas in western, central, and southern Bennington. Exh. AHS-MK-3 at 31.

11. Commercial development has occurred within the Rural Conservation District, including the construction of two smaller, net-metered, 500-kW, commercial solar facilities approved by the Commission.¹¹ Kane pf. supp. 3 at 23; Wilson pf. reb. at 11.

12. The Town Plan addresses all the land area of the Town. It recognizes the need for continued growth and promotes further concentrated development that may occur in the urban growth area. The Town Plan also includes rural areas, including the Rural Conservation District, designated for less development. Specifically, the Town Plan states that although development will occur outside the urban growth area, it will be much less concentrated and shall not include new commercial uses unless such uses are compatible with the rural character of the area. Exh. AHS-ECOS-13 at 16.

13. The Town Plan articulates an energy policy with ten goals. Among others, these goals include: (1) ensuring a safe and reliable supply of energy to meet reasonable consumer demands; (2) decreasing reliance on non-local energy sources; (3) making energy choices that maintain or improve environmental quality; (4) encouraging the development of renewable energy resources; and (5) ensuring diversity in energy sources. AHS-MK-4 at 65.

14. The Town Plan includes a Parks and Open Space Plan (2007) that articulates Bennington's policy for use of its undeveloped open spaces – forests, fields, and parkland – now

¹¹ See *Petition of Kobelia Bennington GLC Solar, LLC for a certificate of public good, pursuant to 30 V.S.A. §§ 219a and 248, to install and operate a 500 kW group net-metered solar electric generation facility in Bennington, Vermont*, CPG #NMP-6523, 10/14/15 at 5 (finding that there are no land conservation measures contained in the applicable regional or town plans that would prohibit development in the area where the Facility is proposed); and *Application of ER Paper Mill Village Solar, LLC, for a certificate of public good for a 500 kW interconnected group net-metered photovoltaic electric power system in Bennington, Vermont*, CPG #16-0049-NMP, 11/17/16, at 5 (finding that the Facility was consistent with the Bennington Town Plan). These approvals are addressed in the discussion below.

being used for recreational activity. The Facility site is not a candidate for open space protection. Kane pf. at 5; exh. AHS-MK-3 at 91.

15. The Facility would be visible during winter leaf-off conditions from the Vermont Welcome Center south of the base of Apple Hill. Exh. AHS-MK-7 at AHS-06.

16. The Facility would be visible from the west to vehicles heading north on Route 7 during winter leaf-off conditions. Exh. AHS-MK-7 at AHS-10.

17. The Facility would be visible from the closest residence to the Facility, approximately 400 feet to the north-northeast, during winter leaf-off conditions. Exh. AHS-MK-7 at AHS-22.

18. The Facility would be visible from the Mt. Anthony Country Club, approximately 6,200 feet southwest of the Facility. Joseph Schoenig, Intervenor ("Schoenig") pf. at 13-15; exh. AHHA-JS-2 at 22-24.

19. The Bennington Battle Monument is approximately 1.1 miles south of the Facility site. The Monument's observation level, 200 feet above the ground, has four narrow viewing windows at compass bearings of 340°, 070°, 160°, and 250°. The Facility would be located between two windows at a bearing of 020° and would be minimally visible from the Monument. Kane pf. at 4; exh. AHS-MK-2 at 9.

20. The roadways associated with the interchange at the junction of US Route 7 and VT Route 279 are heavily traveled. The VTrans route logs indicate that approximately 9,000 vehicles pass through the interchange each day. Kane pf. at 4-5; exh. AHS-MK-3 at 5.

21. The Bennington Regional Plan (2007) ("Regional Plan") was developed by the Bennington County Regional Commission, which was established to assist towns with their planning efforts and to promote coordination of planning efforts among towns in the region. The Regional Plan assimilates the planning efforts of the individual towns to produce a document that presents common goals and a basic development concept for the region. Exh. AHS-ECOS-15 at 1.

22. The land use plan in the Regional Plan provides municipalities with a framework within which to develop their own plans. Municipalities' adherence to the Regional Plan

guidelines helps ensure that local planning occurs in a coordinated fashion and that the municipal plans are compatible with one another. Exh. AHS-ECOS-15 at 51.

23. The Regional Plan and the Bennington Regional Energy Plan articulate a number of goals supporting development of local renewable energy resources. Wilson pf. supp.1 at 16; exh. AHS-ECOS-15 Regional Plan at 6 and 65 and Regional Energy Plan at i, ii, 7, 32, and 36.

24. The Regional Plan considers the future land use of the region and advances regional goals. It states that "rural development must not be widely scattered throughout the countryside but should occur as relatively compact and cohesive units that serve to reinforce, rather than replace, the region's rural character." Kane pf. at 7; exh. AHS-MK-4 at 56.

25. The Regional Plan also states:

Future development should be concentrated in and around growth centers; that is, the urban centers and villages in the region. These centers of development and activity should be surrounded by a rural landscape of farmlands, forests, and small rural residential communities. Moreover, the demarcation between growth centers and the rural environment should be quite distinct. Growth centers require careful delineation to accommodate future growth while protecting the values of the rural countryside. If development is allowed to sprawl outward from urban areas and villages the intervening open lands will eventually disappear, and the region will have lost much of its distinctive rural character and appeal. The land use plan, therefore, directs new growth to urban and village areas and allows the type of development in rural areas that will not prove costly to municipalities nor detract from the region's rural character.

Exh. AHS-ECOS-15 at 51.

26. With regard to more extensive commercial development, the Bennington Regional Plan recommends that the towns in the region limit the number and size of commercial establishments and advises towns to place special emphasis on coordinating development along roadways. Exh. AHS-ECOS-15 at 56.

Discussion

The first question in this remand review is whether the Facility would unduly interfere with the orderly development of the region in light of the Town Plan without consideration of the selectboard's purported position on the subject. My review focuses on the language of the Town

Plan and the Regional Plan. I conclude that the Facility, because it is in the Rural Conservation District, would violate both plans and unduly interfere with the orderly development of the region.

The Petitioner argues that the Facility would not unduly interfere with orderly development because it is consistent with both the Town Plan and the Regional Plan. The Petitioner contends that, as amended, the Facility would not be visible and would not violate the Town Plan design standards.¹² The Petitioner also asserts that the Facility supports the goals of the Regional Plan.¹³

The Town Plan addresses all of the land area of the Town. It recognizes the need for continued growth and promotes further concentrated development in the urban growth area, not in the outlying rural areas. Specifically, the Town Plan states that “[a]lthough development will occur outside [the urban growth area], it will be much less concentrated and shall not include new commercial uses because such uses are incompatible with the rural character of the area.”¹⁴

Bennington’s Rural Conservation Districts are in valley areas outside the urban growth area and have retained their rural and open-space character. Considerable acreage of agricultural land exists in the Rural Conservation Districts, along with extensive woodlands and low-density residential development. The purpose of the Rural Conservation Districts is to preserve traditional rural and agricultural uses while accommodating low-density residential development. For example, the Town Plan states that “agriculture, forestry, very low density single-family residential development, and certain limited uses that are suitable in rural areas are permitted.”¹⁵

The highway interchange at the junction of US Route 7 and VT Route 279 serves as the southwestern corner of the Rural Conservation District in which the Facility is proposed. The area immediately to the west of Route 7 is in an Industrial District. The area immediately to the south of the interchange is part of a Mixed Residential District. The areas east of the Facility site are in Rural Residential, Rural Conservation, and Agricultural Districts. The interchange highway complex thus serves as a boundary between developed urban and industrial areas in the

¹² Petitioner’s Proposed Findings of Fact at 25-27.

¹³ *Id.* at 21.

¹⁴ Exh. AHS-ECOS-13 at 16.

¹⁵ Exh. AHS-ECOS-13 at 26.

western, central, and southern portions of Bennington, and minimally developed rural and agricultural areas in northeastern Bennington.¹⁶

The Town Plan makes the following design standards applicable to any new development in the Rural Conservation Districts:

Specific design standards *shall* apply to new development in the Rural Conservation Districts in recognition of the existence of a concentration of agricultural and forest lands and to protect the extraordinary scenic resources such lands and uses provide. Any use in the Rural Conservation District, including single family dwellings, *shall* require approval under those regulatory guidelines. Development in this area *cannot be sited in prominently visible locations* on hillsides or ridgelines, *shall* utilize earth tone colors and non-reflective materials on exterior surfaces of all structures, and *must* minimize clearing of natural vegetation.¹⁷

These design standards are specific land conservation measures, as contemplated by Section 248(b)(1).¹⁸ These land conservation measures are specifically applicable to the Facility site.¹⁹ While the Petitioner's amendment of the Facility reduces the visibility of the Facility on the hillside where it is proposed to be located, the Facility's clearing of 9.67 acres of existing vegetation in a prominently visible location on a hillside to build the Facility runs directly afoul of this provision in the Town Plan and orderly development of the region.

The Petitioner disagrees. It contends that:

- (1) The localized impacts of the Facility do not rise to the level of interfering with the orderly development of the region;
- (2) The Town Plan does not preclude commercial solar development within the Rural Conservation District;
- (3) The Facility is not sited on a prominently visible location on a hillside;
- (4) The Facility utilizes earth tones and non-reflective materials; and
- (5) The Facility has minimized clearing.

¹⁶ Exh. AHS-ECOS-13 at 31.

¹⁷ *Id.* at 26 (emphasis added).

¹⁸ *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*, Docket 8302, Order of 2/16/16, at 54.

¹⁹ Exh. AHS-ECOS-13 at 31.

I find these arguments unpersuasive.

Localized Impacts

The Facility would be visible at and near the Vermont Welcome Center for southwestern Vermont just above a major highway interchange. As the Intervenor asserts, “the black box will stick out like a sore thumb” on the principally forested Apple Hill.²⁰ The Facility would be visible to local and regional visitors entering Vermont by vehicle from other parts of Vermont, New York, Massachusetts, and beyond. What those visitors would see would deviate from the Regional Plan, which supports the Town Plan’s vision for that well-traveled part of Bennington. I am not persuaded that the Facility would have solely a localized impact.

Nor am I persuaded that the Facility supports the goals of the Regional Plan as the Petitioner asserts. While the Regional Plan restates energy goals, some of which would be supported by the Facility, the Regional Plan cautions against precisely the sort of development the Facility would create.

The Facility would break down the demarcation between the urban growth area and the Rural Conservation District. The Facility would be an example of the sprawling-out of an urban center with the result that the views towards the Facility would cause Apple Hill to lose some of its rural character and appeal. Despite the efforts of the Petitioner to make the Facility more compact, the Facility would nonetheless appear to be further growth along the highway, breaking down the distinction between urban and rural. These Facility impacts violate the Town Plan and the Regional Plan and would have a regional impact.

Commercial Solar Development

The Town Plan states: “Although development will occur outside the [urban growth area], it will be much less concentrated and shall not include new commercial uses because such uses are incompatible with the rural character of the area.”²¹ In its decision in Docket 8302, the Commission held that this language permitted only limited residential development, not

²⁰ Intervenor’s Comments on Proposal for Decision, 7/23/18, at 11.

²¹ Exh. AHS-ECOS-13 at 16.

commercial solar facilities, in the Rural Conservation District.²² The Petitioner contends that this interpretation is incorrect and that this language allows for commercial solar facilities.

Although the design standards for the Rural Conservation District do not mention commercial solar facilities, they do specifically apply to *any* development in that district.²³ Any development in the Rural Conservation District shall observe the Town Plan's design standards in order to preserve the rural character of the district. The Petitioner is correct that the Town Plan does not state that it forbids commercial solar development.²⁴ That does not, however, mean that the Facility as a commercial solar development is necessarily permissible. Any development in the Rural Conservation District must meet the design standards to ensure that the development is compatible with the rural character of the area. Because the Facility would clear-cut 9.67 acres of existing forest in a prominently visible location on a hillside, as explained below, the Facility would violate the design standards and be impermissible under the Town Plan.

The Petitioner accurately observes that two smaller, net-metered, 500-kW commercial solar facilities, Kobelia Bennington and ER Paper Mill Village,²⁵ were approved for installation by the Commission in the Rural Conservation District and argues that therefore this Facility should also be approved.²⁶ This argument is unpersuasive for two reasons.

First, the locations, size, and character of these two much smaller plants are different from the Facility. Both approved projects are in open fields previously in regular agricultural use. They are both located in the Rural Conservation District, which includes about one-third of Bennington, but are distant from Apple Hill and the urban growth center. Kobelia Bennington is approximately 1.5 miles from Apple Hill and ER Paper Mill Village is approximately 3.8 miles

²² Docket 8302, Order of 2/16/16, at 57 n. 42.

²³ Exh. AHS-ECOS-32 at 7. The Town Planner made this conclusion in his capacity as a representative of the Town under Vermont Rule of Civil Procedure 30(b)(6).

²⁴ Exh. AHS-ECOS-32 at 5-6. The Town Planner made this conclusion in his capacity as a representative of the Town under Vermont Rule of Civil Procedure 30(b)(6).

²⁵ See n. 11, above

²⁶ See *In re Petition of Apple Hill Solar LLC*, 2019 VT 64, at ¶ 25 citing *In re Stowe Cady Hill Solar, LLC*, 2018 VT 3, at ¶ 25 ("We will . . . find error when a regulation is inconsistently applied [by an agency]. A fundamental norm of administrative procedure requires an agency to treat like cases alike.").

from Apple Hill.²⁷ Neither project involved the prominently visible clear-cutting of trees on a hillside. Both projects are 500-kW net-metered facilities vice a 2.0 MW solar electric generation facility. Consequently, both projects take up less than half the acreage of the Apple Hill facility, 4.3 acres and 3.5 acres.²⁸ The Commission also found that:

The visibility of [Kobelia Bennington] is expected to be minimal due to surrounding vegetation and topography. Most of the potential views of the Project will be from portions of roadways south of Route 9 and would be brief and filtered.²⁹

And,

[ER Paper Mill Village] will be minimally visible from the surrounding area, including Murphy Road. However, visibility from the road will be limited and proposed landscape screening will further mitigate any adverse effect on views from this area.³⁰

Second, these cases were uncontested net-metering proceedings and their conformity with the Town Plan was not challenged by the parties or by the Commission. Each case was reviewed using the Town Plan under its own facts.

I am not persuaded by the Petitioner's argument that because commercial solar development was approved in those cases, the Facility must necessarily be approved. The Commission is not bound here by those case-specific facts but by the facts in this case. In this case, the facts indicate that the Facility would deviate from land conservation measures in both the Town Plan and the Regional Plan.

Prominently Visible on a Hillside

The Petitioner challenges any reliance on the Town Plan's requirement that development in the Rural Conservation District cannot be sited in a prominently visible location on a hillside. According to the Petitioner, this requirement is vague and not clearly defined.³¹ The Petitioner asserts that the Facility would not "alter the natural appearance of the topography as viewed from

²⁷ CPG #NMP-6523, Order of 10/14/15 at 4 and CPG #16-0049-NMP, Order of 11/17/16 at 4.

²⁸ *Id.*

²⁹ CPG #NMP-6523, Order of 10/14/15 at 5.

³⁰ CPG #16-0049-NMP, Order of 11/17/16 at 9.

³¹ Petitioner's Proposed Findings of Fact at 26.

the highway” and would not “significantly impact the natural appeal of the hillside view.”³² The Petitioner does not agree that the Facility site on Apple Hill is necessarily on a hillside and further argues that “the [Facility] will not be visible and therefore, could not conceivably be sited in a prominently visible location.”³³

These arguments by the Petitioner are simply counterfactual. The Facility, including the access drive, would clear-cut nearly 10 acres of trees from the hillside of Apple Hill. That hillside topographically slopes with a 10% grade and a total vertical change of 103 feet over 1,028 feet. The Facility would be visible both from the neighboring highway and the Vermont Welcome Center as well as across the valley at the Mt. Anthony Country Club and the Bennington Battle Monument. While the Petitioner’s amendment to the Facility would reduce its visibility, particularly from neighboring viewpoints, it would nonetheless remain a large black rectangle in the center of what was once a forested hillside at the southeastern corner of the Rural Conservation District. The Facility would be prominently visible on a hillside location.

Earth-Tone Colors and Non-Reflective Materials

The Petitioner argues that the Facility meets this design standard and therefore should be approved. The Facility would feature black solar panels resting on a galvanized frame painted black to match the solar panels, and the Facility fence would be wrapped in a black or dark-green mesh fabric. Because the Facility would be a commercial development incompatible with the rural character of the area and be prominently visible on a hillside location, as discussed above, it would unduly interfere with the orderly development of the region. Therefore, there is no need to address this argument.

Clearing Minimized

The Town Plan design standards require that any development minimize clearing of natural vegetation. The Petitioner asserts that the Facility as amended meets this design standard because the cleared area of the Facility was reduced from 10.6 acres to 9.67 acres. Because the

³² Petitioner’s Proposed Findings of Fact at 26.

³³ *Id.* at 27.

Facility would be a commercial development incompatible with the rural character of the area and be prominently visible on a hillside location, as discussed above, it would unduly interfere with the orderly development of the region. Therefore, there is no need to address this argument.

Having given the conservation measures contained in the Town Plan and the Regional Plan due consideration, I recommend that the Commission conclude that the Facility would unduly interfere with the orderly development of the region.

Aesthetics

[30 V.S.A. § 248(b)(5) and 10 V.S.A. § 6086(a)(8)]

25. The Facility, including the GMP Line Extension, would have an undue adverse impact on aesthetics and on the scenic or natural beauty of the area. This finding is supported by findings 26 through 28, below, and findings 6 through 20, above.

26. The Facility site is almost entirely wooded with northern hardwood species. The site on Apple Hill slopes at a 10% grade from the northeast corner to the southwest corner, falling approximately 103 feet over this distance. The topography also exhibits some slight undulations along the slope. Kane pf. at 3-5; exh. AHS-MK-2; Kane post-hearing affirmation 4/9/18 at 2.

27. The Facility will be visible to the public on nearby heavily traveled highways. The unique form and visual qualities of the Facility relative to the existing conditions and topography would create visual incongruities. Wilson pf. supp.1 at 2; Kane pf. supp.3 at 19; exhs. AHS-MK-2 at 18-19, AHS-MK-7, AHS-MK-11, and AHS-MK-12.

28. The Town Plan defines the characteristics of the Rural Conservation District, where the Facility would be built, as a transitional land use area between more developed urban growth areas and forested lands. The primary purpose of the district is to “preserve the distinctive rural character” of the area. Kane pf. supp.3 at 22-23.

Discussion

The second question in this remand review is whether the Facility would violate a clear, written community standard under the Quechee test.³⁴ In order for a provision to be considered a clear, written community standard, it must be “intended to preserve the aesthetics or scenic beauty of the area” where the proposed facility would be located and must apply to specific resources in the proposed facility area.³⁵ A clear, written community standard must be more than simply “general in nature” and must do more than seek “to promote good stewardship of scenic resources without identifying specific actionable standards.”³⁶

The Town Plan design standards for the Rural Conservation District create four specific requirements: (1) development shall not include new commercial uses unless such uses are compatible with the rural character of the area,³⁷ (2) no development may be sited in prominently visible locations on hillsides or ridgelines,³⁸ (3) any development must utilize earth-tone colors and non-reflective materials on exterior surfaces of all structures,³⁹ and (4) any development must minimize the clearing of natural vegetation.⁴⁰

The Petitioner argues that the design standards are not a clear, written community standard. The Petitioner asserts that the language of the design standards is vague and general, lacking any definition or guidance.⁴¹

The Petitioner sought further definition of the language of the Town Plan and looked to the related land use regulations. The Petitioner cites example 4B in the Town’s land use regulations for the Rural Conservation District (Figure 1, below) as further defining what

³⁴ See *In re Rutland Renewable Energy, LLC*, 2016 VT 50 at ¶ 13 (Observing that the Commission uses a modified Quechee test in exercising its regulatory power over facility siting. The test first asks whether the project will have an adverse effect on scenic and natural beauty in the area in which it is located. It then asks whether the adverse effect is undue. An adverse impact on scenic and natural beauty is not undue if three conditions are met: (1) the project must not violate a clear, written community standard intended to preserve the aesthetics or scenic, natural beauty of the area; (2) the project must not offend the sensibilities of the average person; and (3) the petitioner must take generally available mitigating steps that a reasonable person would take to improve the harmony of the proposed project with its surroundings.).

³⁵ *In re Halnon*, NM-25, Order of 3/15/01 at 22.

³⁶ *Joint Petition of Green Mountain Power Corporation, et al*, Docket 7628, Order of 5/31/11 at 83.

³⁷ Exh. AHS-ECOS-13 at 16.

³⁸ *Id.* at 26.

³⁹ *Id.*

⁴⁰ *Id.*; see also Docket 8302, Order of 2/16/16, at 56.

⁴¹ Petitioner’s Proposed Findings of Fact at 66; Petitioner’s Post-Technical Hearing Reply Brief at 6, 8.

“prominently visible on a hillside” means.⁴² Example 4B is a photo of a prominently visible residence in the center of an opening of a forested hillside above a farmyard on the valley floor.



**Figure 1. Bennington Land Use Regulations, Exh. AHS-ECOS-19
Example 4B. A large swath of trees was cut and the house was sited
in the center of the opening significantly impacting the natural appeal of the hillside view.**

Example 4B may be compared with the 3D overview simulation of the Facility on Apple Hill that the Petitioner prepared in exhibit AHS-MK-11 (Figure 2, below). While the slopes of the two hillsides and the perspectives are different, both the photo and the simulation appear to show facilities that “significantly impact the natural appeal of the hillside view.”

⁴² Exh. AHS-ECOS-19 at 4; Kane pf. supp. 3 at 26.

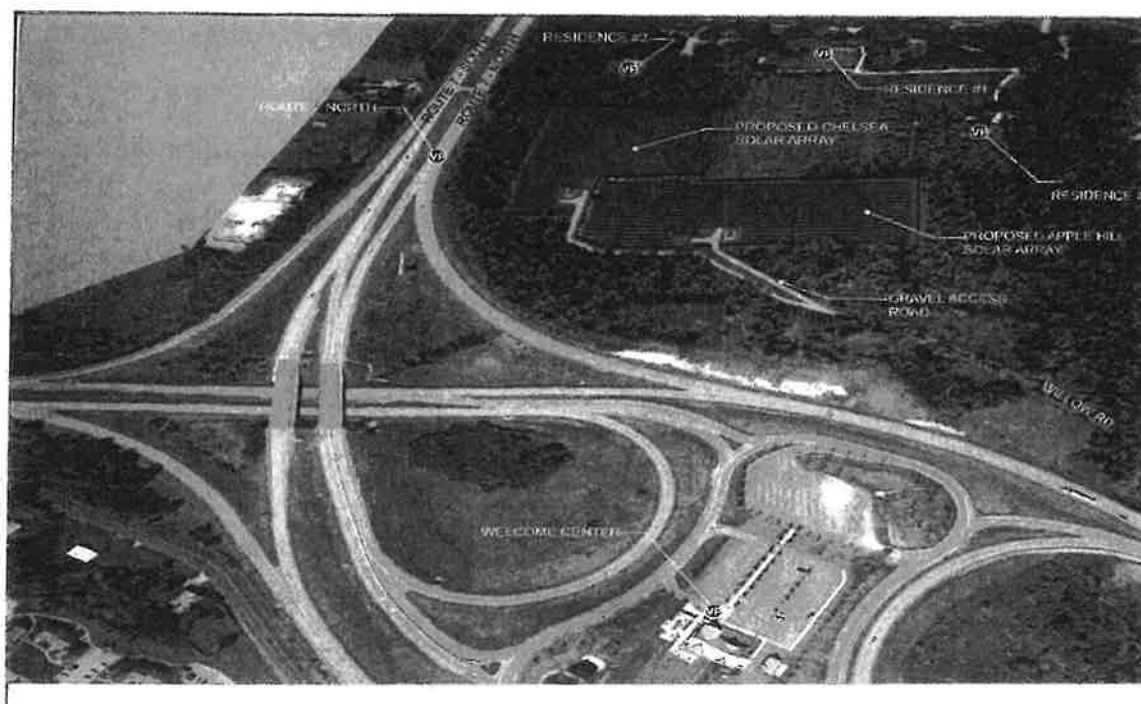


Figure 2. Exh. AHS-MK-11 3D Visual Simulation of Apple Hill Facility and the Willow Road Facility above the Vermont Welcome Center

Finally, in addressing the design standards, the Petitioner contends that “while the broader landscape is clearly scenic, the presence of the Facility does not undermine or degrade its visual quality.”⁴³ In my opinion, the Facility would degrade the visual quality of Apple Hill. I am also not persuaded by the Petitioner’s argument that the design standards are too vague and general to be applied as a clear, written community standard.

The Town Plan language is specific in nature, is specifically applicable to the Facility site, seeks to conserve scenic resources by identifying specific actionable requirements, and thus constitutes a clear, written community standard.⁴⁴ Consistent with my discussion of the Town Plan language as a land conservation measure under Section 248(b)(1), above, I also conclude here that the Facility violates this clear, written community standard.

The Facility violates two specific requirements in the Town Plan design standards for development in the Rural Conservation District. First, Apple Hill is not proposing a new

⁴³ Petitioner’s Post-Hearing Brief in Support of its Section 248 Petition for a Certificate of Public Good at 21.

⁴⁴ Docket 8302, Order of 2/16/16, at 58 (citing *Joint Petition of Green Mountain Power Corporation, et al*, Docket 7628, Order of 5/31/11, at 83 (“It is appropriate for us to rely on the Town Plan as the primary source of clear, written community standards”)).

commercial use that is compatible with the rural character of the area.⁴⁵ Rather, the Facility would be a further extension of the industrial growth of Bennington beyond the urban growth area and would appear as such. Second, while Apple Hill has developed an extensive visual screening plan, the Facility would nonetheless remain prominently visible on a hillside above the Vermont Welcome Center.

The Facility would have an adverse impact on aesthetics because the 9.67-acre of clear-cutting for the Facility would be visible from various public and private views, making it significantly out of context with the currently wooded view of Apple Hill and the less developed Rural Conservation District beyond it. Having concluded that the Facility would have an adverse aesthetic impact,⁴⁶ I now also recommend that the Commission conclude that the Facility would have an undue adverse impact on aesthetics and on the scenic or natural beauty of the area. The Facility would violate a clear, written community standard because it would be incompatible with the rural character of the area and would be prominently visible on a hillside.

IV. CONCLUSION

Based upon the evidence in the record, I recommend that the Commission conclude that the Facility:

(a) would unduly interfere with the orderly development of the region, with due consideration having been given to the recommendations of the municipal and regional planning commissions and the land conservation measures contained in the plan of the affected municipality; and

(b) would have an undue adverse effect on aesthetics and on the scenic or natural beauty of the area.

I therefore recommend that the Commission deny Apple Hill's petition and request for a CPG. The Facility would not be in the public good because the Facility is inconsistent with the

⁴⁵ Kane pf. supp. 3 at 23 ("[O]ther, non-residential uses, have been approved in the Rural Conservation District that ostensibly have not compromised the 'distinctive rural character'").

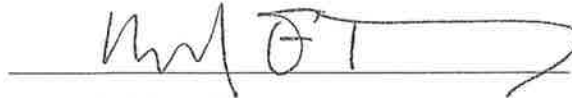
⁴⁶ Docket 8454, Order of 9/26/18 at 41 (concluding that the Facility would have an adverse impact).

Bennington Town Plan and would unduly interfere with the orderly development of the region and have an undue adverse impact on aesthetics and on the scenic or natural beauty of the area.

To the extent the findings of fact and conclusions of law in this proposal for decision are inconsistent with any proposed findings of fact or conclusions of law submitted by any party, such proposed findings or conclusions of law, having been considered, are not adopted.

This proposal for decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811.

Dated at Montpelier, Vermont, this 6th day of January, 2020.

A handwritten signature in black ink, appearing to read "Michael E. Tousley", written over a horizontal line.

Michael E. Tousley, Esq.
Hearing Officer

V. ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the Public Utility Commission of the State of Vermont that:

1. The findings, conclusions, and recommendations of the hearing officer are adopted.
2. The Petition of Apple Hill Solar LLC for a certificate of public good pursuant to 30 V.S.A. § 248 is denied.

Dated at Montpelier, Vermont, this _____ day of _____, 2020.

Anthony Z. Roisman

) PUBLIC UTILITY
)
)
)

Margaret Cheney

) COMMISSION
)
)
)

) OF VERMONT
)
)
)

Sarah Hofmann

OFFICE OF THE CLERK

Filed:

Attest: _____
Clerk of the Commission

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

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Commission within 30 days. Appeal will not stay the effect of this Order, absent further order by this Commission or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Commission within 28 days of the date of this decision and Order.