
IN THE SUPREME COURT OF THE STATE OF VERMONT

DOCKET NO. 2019-226

IN RE PETITION OF CHELSEA SOLAR, LLC

(Apple Hill Homeowners Assoc. & Mt. Anthony Country Club)

APPEALED FROM:

Public Utility Commission DOCKET NO. 17-5024-PET

**REPLY BRIEF OF APPELLEES
AHHA and MACC**

**APPLE HILL HOMEOWNERS ASSOC. and
MT. ANTHONY COUNTRY CLUB,
Appellees**

By: L. Brooke Dingleline, Esq.
Valsangiacomo, Detora & McQuesten, P.C.
P.O. Box 625
172 North Main Street
Barre, VT 05641
(802) 476-4181, Ext. 311
Lbrooke@vdmlaw.com

TABLE OF CONTENTS

Table of Authorities.....	ii
Argument.....	1
I. The PUC’s conclusion, that the Chelsea Solar project and the Apple Hill Solar project are a single plant under the definition contained in 30 V.S.A. §8002(14) as interpreted by the Vermont Supreme Court, was NOT clearly erroneous.....	1
II. 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) was clearly erroneous.....	4
A. Clear Written Community Standard – <i>Rutland Renewable Case</i>	4
B. Orderly Development - Chelsea Solar I, Docket No. 8302.....	6
C. Aesthetics - Chelsea Solar, LLC, Docket No. 8302.....	7
III. The Department of Public Service and the Town’s Expert Witness Testimony.....	10
IV. Conclusion.....	10

TABLE OF AUTHORITIES

Cases

<i>Dellinger v. Hagest</i> , 157 Ind. App. 158, 165, 299 N.E.2d 222 (1973).....	4
<i>Driscoll v. Gheewalla</i> , 441 A.2d 1023 (Me. 1982).....	3,4
<i>In re Carrier</i> , 155 Vt. 152, 582 A.2d 110 (1990).....	3,4
<i>In re Crescent Beach Ass'n</i> , 126 Vt. 140, 141, 224 A.2d 915, 916 (1966)	4
<i>In re Rutland Renewable Energy, LLC</i> , 2016 VT 50, 202 Vt. 59, 147 A.3d 621	5
<i>Klein v. Colonial Pipeline Co.</i> , 55 Md. App. 324, 339, 462 A.2d 546, 555 (1983)	3
<i>Kollock v. Sussex County Board of Adjustment</i> , 526 A.2d 569 (Del. Super. Ct. 1987).....	3
<i>Petition of Chelsea Solar</i> , Docket 8302, 2016 WL 722444.....	5,6,7
<i>Rocchi v. Zoning Board of Appeals</i> , 157 Conn. 106, 111, 248 A.2d 922, 925 (1968).....	4
<i>Silsby v. Allen's Blueberry Freezer, Inc.</i> , 501 A.2d 1290, 1295 (Me. 1985).....	3,4

Statutes

24V.S.A. §4403(5).....	5
30V.S.A. §248(b)(5).....	10
30V.S.A. §8002(14).....	1

Other

V.R.C.P. Rule 11.....	2,3
-----------------------	-----

Argument

I. The PUC's conclusion, that the Chelsea Solar project and the Apple Hill Solar project are a single plant under the definition contained in 30 V.S.A. §8002(14) as interpreted by the Vermont Supreme Court, was NOT clearly erroneous.

Appellees AHHA and MACC wish to draw this Honorable Court's attention to the following glaring omissions by the Appellant developer: Not once in all the argument and materials that the developer has submitted in this appeal, has Chelsea Solar LLC provided any explanation as to why it provided false information to the Supreme Court in 2013 by drawing a make-believe road from the cul-de-sac terminus of Russett Drive to the Chelsea Solar LLC project site, claiming that it was accessing the project site from Russett Drive from the north. Obviously, this misrepresentation was advanced in support of the developer's argument that the two side-by-side projects¹ were separate plants because they were accessed by separate roads. However, such representation was utterly false and known to be so by the developer at the time, because the road simply does not exist, nor has the developer ever had any rights or authority to build the make-believe extension to Russett Drive.

Of particular note, the developer has failed to dispute the sworn testimony of Earl Senecal's son, that his father Earl (now deceased) refused to grant the Melones an easement across his private land when he was

¹ The two projects are currently known as Apple Hill Solar, LLC and Chelsea Solar ("Willow Road"). The Chelsea Solar LLC project was formerly known as "Bennington Solar LLC."

approached by the Melones in the Spring of 2013 for such an easement. In addition, the developer has failed to provide any evidence whatsoever to dispute the sworn testimony of Bill Knight, President of AHHA, who had to stop the contractor from entering the privately owned lands of Earl Senecal with heavy equipment apparently to commence construction of a road to connect Russett Drive to the project site. Thus, the state of the undisputed evidence is that the developer possesses no interests in the lands over which they appear to have attempted to build a road.

Moreover, the Apple Hill subdivision is subject to Act 250 jurisdiction and no permit amendment has issued which would permit the developer to commence construction of a road to access their project property through a private residential subdivision that has deed restrictions and/or covenants prohibiting commercial uses of the subdivision property. Most shocking of all is that the fake drawing, which was provided to this Honorable Court in 2013, has remained uncorrected for over 5 years. See SPC 01.

The Vermont Rules of Civil Procedure Rule 11 states in relevant part:

(b) Representations to Court. -- By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other document, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

...

(3) the allegations and other factual contentions have evidentiary support, or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery;

V.R.C.P. Rule 11. Despite the requirements of Rule 11, there has been no

explanation, correction or withdrawal of the fake drawing (see SPC 01) by the developer who misrepresented and continues to mispresent a material fact upon which the Court relied on determining whether the two projects were a single plant. Now that the developer's falsehood has been discovered by the PUC, instead of correcting the record, the developer attempts to convince this Court to turn a blind eye to its submission of false evidence and apply *res judicata* to prohibit the PUC from revisiting the 2014 single-plant determination.

However, the undisputed facts described above belie the application of *res judicata*. This Court provided an instructive explanation of *res judicata* in *In re Carrier*, 155 Vt. 152, 582 A.2d 110 (1990). While *Carrier* is a zoning case, the holding is applicable to the case at bar:

Although *res judicata* does not apply to administrative proceedings as an inflexible rule of law, see, e.g., *Klein v. Colonial Pipeline Co.*, 55 Md. App. 324, 339, 462 A.2d 546, 555 (1983), the principles of *res judicata* and collateral estoppel generally apply in zoning cases as in other areas of the law. *Kollock v. Sussex County Board of Adjustment*, 526 A.2d 569, 572 (Del. Super. Ct. 1987). Thus, as a general rule, a zoning board or planning commission "may not entertain a second application concerning the same property after a previous application has been denied, unless a substantial change of conditions had occurred or other considerations materially affecting the merits" of the request have intervened between the first and second application. *Silsby v. Allen's Blueberry Freezer, Inc.*, 501 A.2d 1290, 1295 (Me. 1985). This rule, which provides some finality to zoning determinations and protects the integrity of the process, *Driscoll v. Gheewalla*, 441 A.2d 1023, 1027 (Me. 1982), has been applied consistently to zoning variances and special exceptions, and we believe it is equally applicable to planning commission proceedings. See *Dellinger v. Hagest*, 157 Ind. App. 158, 165, 299 N.E.2d 222, 226 (1973); *Silsby*, 501 A.2d at 1295.

Accordingly, a planning commission (or a court acting as a planning commission) may grant a second application for site plan approval when the application has been substantially changed so as to respond to objections raised in the original application or when the applicant is willing to comply with conditions the commission or court is empowered to impose. Cf. *In re Crescent Beach Ass'n*, 126 Vt. 140, 141, 224 A.2d 915, 916 (1966) (successive applications to operate private beach must be different in content and show changed circumstances); *Rocchi v. Zoning Board of Appeals*, 157 Conn. 106, 111, 248 A.2d 922, 925 (1968) (relocation of access road to city landfill and addition of buffer zone created substantial changes in second application for special exception); *Driscoll*, 441 A.2d at 1028 (modified proposal for zoning variance filed less than one month after first application contained significant changes in setbacks and building dimensions, and therefore was not barred by ordinance requiring six-month delay between successive applications).

In re Carrier, 155 Vt. 152, 157-58, 582 A.2d 110, 113-14 (1990).

As argued previously in the Brief of Appellees AHHA and MACC, the recently discovered true facts are far different than the make-believe facts that were provided to the Supreme Court in 2013 by the developer. Thus, the developer cannot now be permitted to argue that the PUC is barred from examining the true facts when falsehoods were provided to the Supreme Court and which formed the basis of their decision.

II. 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) was clearly erroneous.

A. Clear Written Community Standard – *Rutland Renewable Case*

Appellees also wish to point out to the Court that the issue of whether there is a clear written community standard contained in the Bennington Town

Plan, is not governed by *In re in re Rutland Renewable Energy, LLC*, 202 Vt. 59. The Court in *Rutland Renewable* explained that the “solar siting standards” at issue in that case, were not adopted as a zoning ordinance but were instead adopted as a “supporting plan” under [24 V.S.A.] § 4403(5) without the process required for the municipal plan.” *Id.* at 68. The *Rutland Renewable Court* held that the solar siting standards were a “de facto zoning requirement” that “could not be considered a community standard because they did not identify an area, and the specific resources in that area, to be protected.” *Id.* at 68.

In stark contrast to the *Rutland Renewable* case, the Bennington Town Plan contains a clear written community standard applicable to this project because it does identify an area (the RCON district), and the specific resources in that area, to be protected.” *Id.* at 68. Moreover, the clear written community standard in this case is contained in a duly enacted Bennington Town Plan.

In addition, the PUC has previously ruled directly on the Bennington Town Plan in the first Chelsea Solar, LLC case, which was denied by the PUC. Docket No. 8302. See SPC at 112 (excerpt of Petition of Chelsea Solar, LLC, Docket No 8302 Discussion and Decision of the PUC). One will recall that the case at bar is the “do-over” case that the PUC encouraged the developer to refile after they denied Chelsea Solar on Orderly Development and Aesthetics criteria in Chelsea Solar I, Docket 8302, for violation of the clear written community standard contained in the Town Plan with regard to the standards articulated for the RCON district.

B. Orderly Development - Chelsea Solar I, Docket No. 8302

In the first Chelsea Solar, LLC case (Docket No. 8302) which was denied by the PUC, the PUC considered the Bennington Town Plan language which is at issue in this case and rejected the Hearing Officer's recommendation, stating as follows:

The Town Plan addresses all of 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 designated for less development. 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." SPC 118.

A more complete and accurate characterization of the Rural Conservation Districts is that only limited residential development is permitted in the Rural Conservation Districts. While limited residential development is permitted, commercial development is prohibited with certain rural exceptions. SPC 119.

Bennington's Rural Conservation Districts are located in valley areas outside the Urban Growth Area and have retained their rural and open-space character. 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." SPC 120.

The 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 Project 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 Project 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 western, central, and southern portions of Bennington, and

minimally developed rural and agricultural areas in northeastern Bennington. SPC 119.

The Town Plan makes the following design standard 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. SPC 119-20.

This land conservation measure is made specifically applicable to the Project site by the Town of Bennington's Land Use Plan. While Chelsea has taken steps to limit the visibility of the Project on the hillside where it is proposed to be located, the clearing of 10.6 acres of existing vegetation runs directly afoul of this provision in the Town Plan and its vision for orderly future development. SPC 120.

Rather, we find, based on our review of the Town Plan, that the Project will unduly interfere with the orderly development of the region because the Town Plan articulates specific land conservation measures applicable to the Project site that would be violated if the Project were to be constructed. SPC 121.

C. Aesthetics - Chelsea Solar, LLC, Docket No. 8302

Turning to the PUC's decision on aesthetics in the prior Chelsea Solar, LLC case, Docket No. 8302; the PUC similarly rejected the recommendation of the Hearing Officer with regard to Aesthetics, stating:

The aesthetic impact of the Project would be undue

because it would violate clear, written community standards found in the Town Plan and thus fails the first prong of the second part of the Quechee test, which states:

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 project would be located and must apply to specific resources in the proposed project area. A clear, written community standard must be more than simply "general in nature" and do more than seek "to promote good stewardship of scenic resources without identifying specific actionable standards. SPC 123.

The Town Plan language for the Rural Conservation District creates four specific requirements: (1) only limited residential development is permitted, (2) no development may be sited in prominently visible locations on hillsides or ridgelines, (3) any development must utilize earth-tone colors and non-reflective materials on exterior surfaces of all structures, and (4) any development must minimize the clearing of natural vegetation. SPC 123.

The Project violates three of these four specific requirements in the Town Plan for development in the Rural Conservation District. First, Chelsea Solar is not proposing a limited residential development. Second, while Chelsea has developed an extensive visual screening plan, the Project would remain visible on a hillside above the Vermont Welcome Center. And third, the Project calls for clear-cutting 10.6 acres of a densely forested and undeveloped 27-acre parcel. These proposed actions would violate this clear, written community standard in the Town Plan, and we therefore conclude that the Project fails the Quechee test. SPC 124.

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."⁴⁸ The Town Plan also makes the following design standard applicable to any new development in 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. SPC 124 (*emphasis added*).

In this case, we find that the Town Plan language is specific in nature, is specifically applicable to the Project site, and seeks to conserve scenic resources by identifying specific actionable requirements and thus constitutes a clear written community standard. SPC 125.

Chelsea further characterizes the Town Plan provisions describing the Rural Conservation District as "vague, amorphous" and "nebulous. Chelsea maintains that these provisions are actually "zoning bylaws." Chelsea argues that it would be "frivolous" to rely on the standards in the Town Plan for the Rural Conservation District because they "compel a specified outcome contrary to the intent of the Legislature in providing an exemption from zoning by-laws for Projects reviewed under Section 248, as well as to established Vermont law." We find this case distinguishable from our decision in *Cold River*, where *de facto* zoning bylaws were at issue. SPC 125.

In *Cold River* we found that Town of Rutland's solar siting standards (the "Standards"), newly crafted in support of the Rutland Town Plan, were a *de facto* zoning bylaw and could not be relied upon as a clear, written community standard "for purposes of aesthetics review under § 248 because the Standards fail to identify this particular parcel as a scenic resource worthy of protection." Rather than being established as a site-specific set-aside for the purposes of aesthetics and conservation, as is the case here, the Standards in *Cold River* were a town-wide setback rule for solar projects. The Board concluded that:

In the instant case, recognizing the setback requirements in the Standards as a clear, written community standard would be tantamount to taking what is in substance a zoning bylaw, and by simply calling it something else, facilitating the circumvention of Section 248's zoning

bylaw exemption. In turn, this would amount to effectively condoning a mechanism that would frustrate the legislated policy behind exempting Section 248 projects from local zoning in the first instance. SPC 125-26.

The factual circumstances are different here. The standards for the Rural Conservation District were established to conserve the rural character of a particular area of Bennington, not to create town-wide setbacks for solar projects. The Rural Conservation District provisions in the Bennington Town Plan are not *de facto* zoning bylaws as argued by Chelsea. Further, the Rural Conservation District language identifies specific actionable requirements. The Town Plan's language limiting development in the Rural Conservation District represents a clear, written community standard appropriately considered in a review under Section 248(b)(5) and the first prong of the second part of the Quechee test. SPC 126.

III. **The Department of Public Service and the Town's Expert Witness Testimony**

In addition to the above and forgoing, AHHA and MACC have provided the testimony of the Department of Public Service's aesthetic and orderly development expert, David Raphael (SPC 42-88) and the pre-filed testimony of the Town's Planning Director, Dan Monks in its Supplemental Printed Case (SPC 99-111) for the court's review.

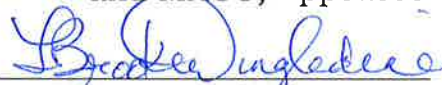
IV. **CONCLUSION**

Given the overwhelming record evidence, it is crystal clear that the Bennington Town Plan does in fact, contain a clear written community standard that cannot be ignored or discounted by the PUC. This case must be reversed and remanded back to the PUC, for the exact same reasons that the Court reversed and remanded the Apple Hill Solar case. The Town's settlement

and withdrawal from this case does not mean that they support any particular solar project. The PUC's reliance on this evidence and other incompetent evidence necessitates a reversal of the PUC's tainted decision. Just like in Apple Hill Solar, the Town's withdrawal from the case means nothing. Consequently, the Court should reverse and remand the case back to the PUC.

Respectfully submitted,

AHHA and MACC, Appellees


By: L. Brooke Dingleline, Esquire
Valsangiacomo Detora & McQuesten
P.O. Box 625
172 North Main Street
Barre, VT 05641
(802) 476-4181, Ext. 311
Lbrooke@vdmlaw.com