

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Investigation pursuant to 30 V.S.A. §§ 30 and	)	
209 into whether the petitioner initiated site	)	Case No. 20-1611-INV
preparation at Apple Hill in Bennington,	)	
Vermont, for electric generation in violation of	)	
30 V.S.A. § 248(a)(2)	)	

INTERVENORS'
BRIEF

NOW COME Intervenor Apple Hill Homeowners Association (“AHHA”), Mount Anthony Country Club (MACC), and Libby Harris, by and through their attorneys of the firm Valsangiacomo, Detora & McQuesten, P.C., and hereby file this initial Brief regarding whether the Developer’s site work to date constitutes site-clearing activities without a certificate of public good in violation of 30 V.S.A. § 248(a)(2); and, whether the Commission should issue further injunctive relief (in the form of a preliminary or permanent injunction) and, if so, the scope of that relief.

I. INJUNCTIVE RELIEF and its SCOPE

The Commission should issue further injunctive relief in the form of a preliminary and permanent injunction and order Thomas Melone and all entities that he owns or controls, and his and their contractors, lessors (including for the purpose of farming or horticulture), agents or assigns, to cease further site preparation on the project sites. Such injunction should include an order prohibiting the cutting or removal of trees on the entire 32.3 acre project tract, including the apple trees located on the Apple Hill Residential Subdivision Lot #1, which is owned by PLC LLC, and which is proposed as part of the solar project sites, where the mitigation screening will

be maintained and significantly added to. Intervenor AHHA, MACC and Libby Harris offer the following findings to aid the PUC in its consideration of this matter.

II. FACTUAL FINDINGS

1. PLH, LLC, is an entity solely owned and controlled by Thomas Melone, as are all of the developer's other LLC's and corporate entities involved in these solar projects.

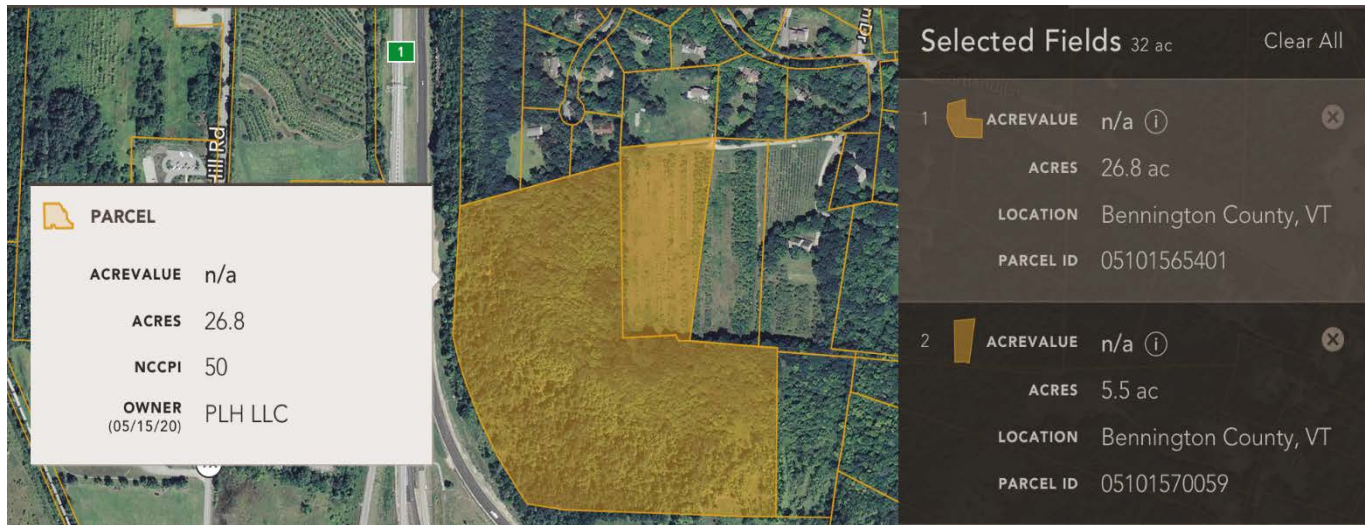
2. PLH LLC is the title record owner of **32.3 acres of land** upon which PLH LLC and its related corporate entities (the Melone Entities), have been endeavoring to develop two commercial solar projects since 2013, at which time, Thomas Melone, Esq. provided false information to the Vermont Supreme Court, claiming that a make-believe road named Russet Drive existed, and which false representation served as the basis for the Supreme Court's decision to reverse the PSB, holding that the Apple Hill And Chelsea Solar projects were separate plants with separate access roads and separate infrastructure, entitled to two separate standard-offer contracts.

3. The solar power projects proposed since 2013 by the Melone Entities are two side-by-side 2.0 MW (total of 4.0 MW) solar electric generation facilities known as the Apple Hill Solar, LLC project and the Chelsea Solar, LLC.

4. The Melone Entities' Petitions for the Apple Hill Solar, LLC and Chelsea Solar, LLC projects include the **Van Nostrand Lands (26.8 acres)** as well as **Lot #1 of the Apple Hill Residential subdivision (5.5 acres), for a total proposed Project Site area of 32.3 acres.** Lot #1 is essential to the Melone's proposal to screen the project from the residential views north of the site, including and primarily from the abutting lot to the north, owned by Libby Harris, which

is known as “the Orchard Lot”.

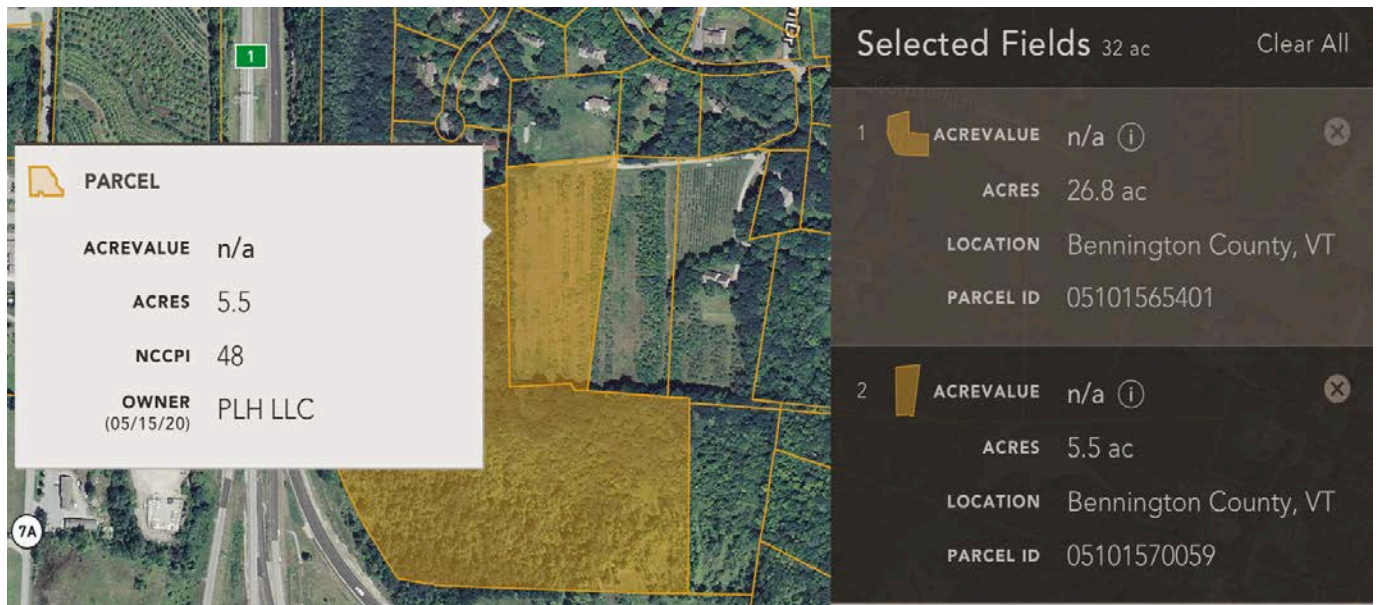
5. Intervenor’s Exhibit 11 depicts the two parcels which comprise the entire 32.3 acre project tract. The first illustration in Intervenor’s Exhibit 11 depicts the 26.8 acre parcel known as the Van Nostrand lands:



www.acrevalue.com

Intervenors’ Exhibit 11.

6. The second illustration in Intervenor's Exhibit 11 depicts the 5.5 acre parcel known as "Lot #1" of the Apple Hill Residential subdivision development, which Attorneys Thomas and Michael Melone repeatedly and erroneously refer to as "The Orchard Lot" or, more recently, relatedly and erroneously refer to as "The Horticultural Lot":



www.acrevalue.com

Intervenor's Exhibit 11.

7. With regard to the Melone Entities' inclusion of Lot #1 in the proposed commercial solar energy project sites, Melone's Petitions propose **to maintain the existing apple orchard trees on Lot #1 for screening and to add the following plantings to bolster the natural vegetation:**

- **10-12 large (20-24 feet) conifers along the northern edge of the Project (along the southern boundary of Lot #1); and,**
- **742 mixed deciduous shrubs and trees along the southern boundary of the Harris property (along the northern boundary of Lot #1) "to strengthen the screening provided by the remnant orchard."**

The Melone Entities' explicitly stated purpose of these plantings was to screen the Project from the most proximate residential neighbor to the north, Libby Harris.

8. On September 6, 2019, the Vermont Supreme Court reversed and remanded *Petition of Apple Hill Solar, LLC* back to the PUC to: (1) assess the impact of the Facility on the orderly development of the region in light of the 2010 Bennington 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 aesthetic effects are undue.

9. On January 6, 2020, in *Petition of Apple Hill Solar, LLC*, PUC Docket No. 8454, the PUC Hearing Officer issued a Proposal for Decision on Remand from the Vermont Supreme Court, recommending that the PUC Deny Apple Hill Solar LLC Petition and CPG stating that 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." The PUC scheduled Oral Argument on the Hearing Officer's Proposal for Decision on Remand for March 25, 2020.

10. On March 23, 2020, after seven years of litigation, the Melone Entities filed a Proposed Amendment to the *Petition of Apple Hill Solar, LLC*, Docket No. 8454, trying to alter the application which was before the Public Utility Commission on a limited remand by the Vermont Supreme Court and scheduled for Oral Argument before the PUC on the morning of March 25, 2020.

11. The Proposed Amendment was filed with the PUC by the Melone Entities and served on the other parties' counsel, including Libby Harris' attorney of record, at 4:29

pm on March 23, 2020 by electronic mail only, with pdf documents attached containing more than 80 pages of Proposed Amendment documents.

12. The Proposed Amendment represented, *inter alia*, that the Melones now intended to use Lot #1 to plant and cultivate commercial hemp and to build a hemp processing facility structure measuring 160 feet long, 30 feet high and 16 feet deep, located directly in front of Libby Harris' house for the purpose of obstructing her view, in violation of 24 V.S.A. §3817.

13. The massive hemp processing facility structure is proposed to be located at the far northeast corner of Lot #1 along the southern boundary of the Harris property (northern boundary of Lot #1) where the 742 mixed deciduous shrubs and trees were to be planted for screening of the solar projects. The Melone Entities claim that their construction of the hemp processing facility structure eliminates the need for maintaining the apple orchard trees and planting 742 trees and shrubs on Lot #1 for the proposed mitigation screening because the structure will completely block Libby Harris' view of the project.

14. The Proposed Amendment also represented that the Van Nostrand Lands would be clear cut and sheep would be placed on the parcel and sheep barns would be built directly in view of the Visitor's Center to block the solar arrays from view, thus eliminating the need for any of the screening proposed for the project from the south.

15. Unbeknownst to any other party or to the PUC, on March 24th, 2020, Thomas Melone, Esq. and/or Michael Melone, Esq. mailed or caused to be mailed, paper copies of the 80+ pages of the Proposed Amendment filing directly to Libby Harris, a represented party, from the ALLCO offices in New York City, the epicenter of the Covid-19 Pandemic. The

Melones did not mail paper copies of the Proposed Amendment filing to any other party or attorney of record.

16. The Melone Entities' Proposed Amendment electronic filing was taken up by the PUC the morning on March 25, 2020 prior to the Oral Argument on the PUC Hearing Officer's Recommendation for Decision on Remand. The PUC Denied the Melone Entities' Proposed Amendment to the project, ruling that the PUC lacked jurisdiction to entertain such an amendment to a Petition which was before it on a limited remand from the Supreme Court; and, in any event, the Proposed Amendment was untimely.

17. Then, on March 27, 2020, Libby Harris received a large surprise mailing at her home in Bennington, Vermont, where she was isolating and sheltering in place due to her vulnerability to the Covid-19 virus because of her age and health issues, both of which are known to the Melones. The mailing contained paper copies of the 80+ pages of documents comprising the Proposed Amendment filing which the Melones had electronically filed with the PUC on March 23rd and which had been emailed only, to all the parties' counsel of record, including to Libby Harris' attorney.

18. The Melones intentional direct mailing of paper copies of the Proposed Amendment documents to Libby Harris, under the Covid-19 Pandemic circumstances referenced above, containing shocking, outrageous and unlawful threats to harm Ms. Harris' property value, her rights under the Covenants, deed restrictions and Common law, and her quiet enjoyment of her property, were all for the improper purpose of bullying, intimidating and scaring Ms. Harris into withdrawing her opposition to the solar energy projects.

19. On April 7, 2020, the Vermont Agency of Natural Resources filed a response

to the Melone Entities' Proposed Amendment to the Apple Hill Solar, LLC Petition seeking a Cease and Desist Order from the Public Utility Commission, arguing that the clear cutting activities described in the Amendment are a pretext to constructing the Apple Hill solar project and constitute site preparation in violation of 30 V.S.A. § 248(a)(2) which prohibits site preparation or construction prior to the issuance of a certificate of public good. ANR also sought to protect rare, threatened and endangered species that were the subject of a Memorandum of Understanding between the Melone Entities and ANR. The PUC denied ANR's Request as moot, since the Melones' Proposed Amendment to the Petition was denied by the PUC.

20. On May 7, 2020, in *Petition of Apple Hill Solar, LLC*, PUC Docket No. 8454, the PUC issued a Final Order on Remand Adopting the Hearing Officer's Recommended Decision and DENYING the Petition of Apple Hill Solar, LLC for a Certificate of Public Good for the installation and operation of a 2.0 MW solar electric generation facility at 1133 Willow Road in Bennington, Vermont, finding all 30 arguments raised by the Melone Entities to be unpersuasive.

21. On June 4, 2020, in *Petition of Apple Hill Solar, LLC*, PUC Docket No. 8454, the Melone Entities filed with the PUC, a Motion to Reconsider the Final Order on Remand Denying the Petition and CPG.

22. On June 19, 2020, it was reported to the PUC by Annette Smith of Vermonters for a Clean Environment, that tree clearing was occurring on the Apple Hill and Chelsea Solar sites and that the area of Apple Hill set aside for rare, threatened, and endangered species was being disturbed by the tree-clearing activity. The PUC requested immediate Comments/Replies from the Parties regarding whether site preparation had

illegally commenced without a CPG and whether any rare, threatened, or endangered species areas were being disturbed.

23. Thomas Melone of Allco Renewable Energy Limited, Apple Hill Solar LLC, and Chelsea Solar LLC filed a response with the PUC claiming that the ANR inspection confirmed that NO rare, threatened, or endangered species areas were being disturbed and that the rare, threatened, or endangered species area was cordoned off to prevent intrusion.

24. On June 23, 2020, ANR filed comments stating that it “has confirmed that site clearing activity is occurring on the 27 [sic]- acre parcel on which the Apple Hill and Willow Road solar projects are proposed to be constructed.” Contrary to Thomas Melone’s representation to the PUC, ANR cited its specific concern that the site clearing presents a substantial and immediate harm to “very rare” and “rare” plants at the site and stated that it believed that a cease-and-desist order may be necessary to prevent irreparable harm to the plants.

25. On June 24, 2020, the Commission opened an investigation in response to these filings as Case No. 20-1611-INV, and captioned the case: *Investigation pursuant to 30 V.S.A. §§ 30 and 209 into whether the petitioner initiated site preparation at Apple Hill in Bennington, Vermont, for electric generation in violation of 30 V.S.A. § 248(a)(2)* (hereinafter “the PUC Investigation Case”).

26. On June 25, 2020, in the PUC Investigation Case, ANR filed additional comments with supporting affidavits and exhibits and requested that the Commission issue a temporary restraining order pursuant to Commission Rule 2.406.

27. On June 26, 2020, in the PUC Investigation Case, the Commission held an evidentiary hearing which resulted in the PUC issuing a Temporary Restraining Order to

stop Allco, its affiliates and contractors, from conducting site preparation in violation of Section 248(a)(2) and to prevent Allco's ongoing site clearing from having an undue adverse effect on "rare" and "very rare" plants on the 27-acre Apple Hill site. The TRO was communicated orally to the parties at the conclusion of the hearing by the PUC and the parties were advised that a written order would issue that evening. At 10:31pm, the PUC issued its written Decision and TRO, which was emailed to the parties, including directly to Thomas Melone, stating in part:

In this order, pursuant to 30 V.S.A. §§ 8, 10, 30, 203, 209, and 248(a)(2), and Commission Rule 2.406, the Vermont Public Utility Commission ("Commission") issues a temporary restraining order against Allco Renewable Energy Limited, PLH Apple Hill Solar LLC, and PLH Chelsea Solar LLC, and its affiliates, subsidiaries, and contractors (collectively, "Allco" or "petitioner") from any further tree clearing on any of the property for the proposed projects identified in any Certificate of Public Good ("CPG") applications and any property identified in those applications as intended to be part of the projects, including any amendments to those applications that have been approved by the Commission, in the Apple Hill area in Bennington, Vermont ("the Apple Hill site").

28. The PUC determined that the "petitioner's claim in his affidavit that his activities are solely for farming purposes is not credible," pointing to Thomas Melone's own testimony at hearing that, although the sheep may end up being used for some farming purposes, Melone was putting the sheep in this location "primarily" to serve the proposed solar projects. Thus, the PUC concluded that this does not qualify as farming, relying on the Vermont Agency of Agriculture, Food and Markets' definition of a farm which is land that is "devoted *primarily* to farming."

29. The PUC also recounted Thomas Melone's testimony at hearing admitting that the clearing activities are a prerequisite to building the solar projects that have not received CPGs. Thus, the PUC concluded that the petitioner's activities constitute site

preparation without a CPG in violation of 30 V.S.A. § 248(a)(2).

30. The PUC then issued the following Temporary Restraining Order:

V. ORDER

Based on the foregoing, the Commission, pursuant to Board Rule 2.406, issues the following temporary restraining order and notice of hearing:

1. Allco and its affiliates and contractors shall immediately cease all tree clearing on the Apple Hill site;
2. Allco shall be prepared to show cause during this investigation why the tree-clearing activity shall not be considered site preparation as defined in Title 30; and
3. Allco shall cooperate fully with the Commission in its further investigation of this matter.
4. Pursuant to 30 V.S.A. §§ 8, 10, 203, and 209, and Commission Rule 2.406, an evidentiary hearing on whether to grant a preliminary injunction will be held by videoconference before the Public Utility Commission on July 9, 2020, at 9:30 A.M. This hearing will address whether the restraining order should be lifted and whether Allco's tree-clearing activities were site-clearing operations without a certificate of public good in violation of 30 V.S.A. § 248(a)(2).

31. The very next morning, Saturday, June 27, 2020 at 9:28am, in the PUC Investigation Case, Thomas Melone electronically filed a Motion for Clarification with the PUC, the contents of which evidence Thomas Melone's receipt of the PUC's written TRO prohibiting site clearing by the Melone Entities or their contractors. A few hours later, by noontime, Melone's contractor was actively bulldozing the site in violation of the TRO.

32. **On June 29, 2020, Michael Melone received acknowledgement of a Hemp Registration for 32 acres for PLH Vineyard Sky LLC in accordance with Title 6, chapter 34. Such Application was submitted to the State of Vermont on June 26, 2020, the very day of the TRO hearing before the PUC.** See Intervenor's Exhibit 10 – Hemp Registration.

33. Appellants' claim that the PUC may not enjoin site-clearing activities on the

Apple Hill/Chelsea Site if the site-clearing is for agricultural activities. However, Melone testified at the TRO hearing that they are “unlikely to do any sheep farming or hemp growing in 2020.” PUC’s 6.26.20 Order at 5; *see also* Tr. (06- 26-2020), at 71-73.

34. This testimony, at the June 26, 2020 hearing is totally consistent with the Prefiled Direct Testimony of Melone’s witness Christopher Little, which was filed by Michael Melone with the Amendment “request” on the eve of the March 26 oral argument on remand. Mr., Little’s prefiled testimony states that: “For the Orchard Lot [sic., actually referring to “Lot #1” in the Apple Hill Residential subdivision], PLH or its lessee plans to grow hemp . . . **and will register the site for the 2021 growing season** with the Agency of Agriculture, Food and Markets.” See Intervenor’s Exhibit 2, Christopher Little Prefiled Testimony March 23, 2020, page 3, lines 14-16.

35. Therefore, Thomas Melone’s latest claims, that he intended to register for the 2020 season, not the 2021 season, is simply not credible.

36. On July 1, 2020 Thomas Melone filed a Motion to Vacate the Preliminary Injunction Hearing, claiming that the PUC has no jurisdiction over any of the Melone Entities, that the PUC has no authority to issue an injunction or to regulate their activities.

37. On July 31, 2020, the PUC Denied the Melone Entities’ Motion to Reconsider the Final Order on Remand in *Petition of Apple Hill Solar, LLC*, PUC Docket No. 8454.

38. On August 16, 2020, in the PUC Investigation Case, Melone filed a Motion to Dissolve the TRO, which makes numerous constitutional claims and argues that the right to farm is an unregulated activity which cannot be enjoined by the PUC.

39. Melone’s Motion to Dissolve also made the blatant claim that the PUC can’t enjoin their cutting of the apple orchard (which is located on Lot #1), because it isn’t part of

the “site preparation area.” Well, in a sense Mr. Melone may be right: the trees are actually part of the project screening, so “preparing” the site would not include cutting down the trees that are remain on the property to serve as a visual buffer. Thus, if Melone’s intention is to cut the trees and plant hemp instead, such a position should result in the dismissal of the Petition, which would now contain false representations of material fact regarding the screening buffer proposed as part of the project which specifies that the apple orchard trees, which are located on Lot #1, will remain intact and that 742 mixed deciduous trees and shrubs will be planted along the northern boundary of Lot #1 to fill in the screening effect of the remnant orchard, the purpose of which is to screen the project from the view of residences to the north, primarily Ms. Harris’ Orchard Lot.

40. On August 31, 2020, the PUC held a Status Conference in the PUC Investigation Case to discuss the Preliminary Injunction Hearing scheduled for September 8, 2020, to take evidence on whether the Melone Entities commenced construction on the site without a CPG and whether any rare, threatened or endangered species were compromised. The Status Conference resulted in the cancelation of the Preliminary Injunction Hearing scheduled for September 8, 2020, due to Melone’s request to conduct discovery. Melone was provided the opportunity to work out a schedule with the parties upon whom he sought discovery, ANR.

41. But Thomas Melone did not conduct his requested discovery of ANR for which the PUC canceled the September 8th Preliminary Injunction Hearing. Instead, on September 9, 2020, Thomas Melone electronically filed with the PUC, a Notice of Appeal to the Vermont Supreme Court, purporting to appeal the PUC’s issuance of the Temporary Restraining Order in PUC Case No. 20-1611-INV with no right of appeal and without even

asking for permission to take an interlocutory appeal.

42. After failing at the Supreme Court on his unauthorized appeal, Mr. Melone has enjoyed all of the discovery that he wanted. However, there is no information that has surfaced which would alter in any way, these very simple facts about Thomas Melone: he deliberately disregarded and intentionally violated a PUC Order, despite the fact that he was given oral notice from this tribunal at the hearing that a TRO was being issued and a written decision would follow and despite the fact that even though Melone received such written Order and even filed a Motion for Clarification, arguing with the Order, he deliberately allowed his contractor to continue to bulldoze the forest in direct violation of the PUC's TRO Order.

43. The evidence in this matter clearly demonstrates that Thomas Melone intentionally and deliberately violated the PUC's TRO Order. It is clear that maintaining the rule of law in a civilized society requires a harsh response to such intentionally illegal and belligerent behavior by bad actors.

WHEREFORE, in the interests of justice and to preserve the rule of law, a permanent injunction should be issued against Thomas Melone and all of his corporate entities that will prevent him from any further action on the 32.3 acres of land, including Lot #1 of the Apple Hill Residential Subdivision land, until and unless he receives a CPG for the projects

DATED AT Randolph, County of Orange and State of Vermont this 29th day of January,
2021.

APPLE HILL HOMEOWNERS ASSOCIATION,
MOUNT ANTHONY COUNTRY CLUB and
LIBBY HARRIS, Intervenor

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