

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

Petition of Randolph Davis Solar LLC for a	)	
certificate of public good pursuant to 30 V.S.A.	)	
§§ 248 and 8010, authorizing installation and	)	Case No. 21-2939-NMP
operation of a 500 kW (AC) photovoltaic group	)	
net-metering system in Randolph, Vermont	)	

**PETITIONER’S RESPONSE TO LANDOWNERS’
MOTION TO DISMISS/MOTION FOR STAY**

NOW COMES Randolph Davis Solar LLC (the “Petitioner”) and responds to intervenors Joan Allen’s and Michael Binder’s (the “Landowners”) motion submitted on March 1, 2022 asking the Hearing Officer to dismiss or, in the alternative, to stay (the “Motion”) the Vermont Public Utility Commission’s (“Commission” or “PUC”) review of the Petitioner’s application for a 500 kW (AC) photovoltaic group net-metering system in Randolph, Vermont (the “Project”).

The Motion asserts that the filing is incomplete because purportedly Exhibit RDS MS-2A does not indicate where “excavated structures” will be located and as such does not satisfy Rule 5.107 (C)(5)(e), which calls for “[d]etailed plans for any drainage of surface and/or sub-surface water and plans to control erosion and sedimentation both during construction and as a permanent measure.” Motion at 1. The Motion asserts: “In order to evaluate the mitigation of stormwater runoff, and in order to evaluate the project’s conformance with the Randolph Town Plan, the location and underlying slopes of these structures should have been included in the site plan.” Motion at 1.

As an initial matter, and as explained in the February 25, 2022 supplemental testimony of Ms. Staskus, Exhibit RDS MS-2A is the same Site Plan layout shown in Exhibit RDS MS-2 (rev 2/9/22), with information added in yellow to more clearly highlight areas with slopes exceeding 25%, per the request of the Hearing Officer. *See* Staskus 2/25/22 supp. pf. at 2.

With respect to the issue of excavation, the area that will involve excavation activity will be that to set the underground electric collection cable in conduit in the ground. This trench is within the rows of the array which are now all located outside of slopes greater than 25% and still within the original Limit of Disturbance. *See* Staskus 8/8/21 pf. at 8.

The Petitioner has designed a solar installation that complies with all necessary construction permit requirements, the State's 2020 *Standards and Specifications for Erosion Prevention and Sediment Control*, and will be installed in compliance with state construction standards. To further demonstrate this could be achieved, the Petitioner obtained a site specific topographic survey and with that information re-arranged the original solar panel rows found to be proposed on slopes greater than 25% to areas within the original Limit of Disturbance and not on slopes greater than 25%.

Petitioner also highlights the fact that in response to Mr. Binder's multiple requests that the Randolph Selectboard rescind its Preferred Siting for the Project, the Selectboard, on March 3, 2022, re-confirmed its approval and concluded that no further action will be taken. See Exhibit RDS MS-16 (Randolph Selectboard Minutes 2022-03-03).

The Motion is without merit and should be rejected for these and multiple other reasons, set forth below.

1. The Motion to Dismiss is Not Accompanied by a Memorandum of Law as Required by Commission Procedural Rule 2.206

Commission Rule 2.206 provides in relevant part: "*Motions not made during the hearing shall be in writing and, if they raise a substantial issue of law, shall be accompanied by a brief or memorandum of law.*" (emphasis added). The Landowners' Motion seeks to dismiss this entire proceeding, and so by its very nature, raises a substantive issue of law.

The Motion is not accompanied by a brief or memorandum of law, and therefore should be rejected. See *id.*; *Dubie v. Cass-Warner Corp.*, 125 Vt. 476, 480, 218 A.2d 694 (Vt. 1966) (motion to dismiss not briefed waived the issue raised).

2. The Motion to Dismiss Fails to Satisfy V.R.C.P. 12(b)

Commission Rule 2.105 provides that procedures not otherwise governed by the Commission's Rules of Procedure are governed by the Vermont Rules of Civil Procedure ("V.R.C.P."). The Commission rules do not address procedures for motions to dismiss. As such, motions to dismiss are governed by the Vermont Rules of Civil Procedure.

It is long settled law in Vermont that "[a] motion to dismiss for failure to state a claim is not favored and rarely granted." *Gilman v. Maine Mutual Fire Insurance Co.*, 2003 VT 55, ¶14,

175 Vt. 554, 830 A.2d 71 (citing *Ass'n of Haystack Prop. Owners, Inc. v. Sprague*, 145 Vt. 443, 494 A.2d 122 (1985)). When considering a motion to dismiss, the Commission "accepts all factual allegations pleaded in the [petition] as true and all reasonable inferences from those facts." *Id.* (citing *Richards v. Town of Norwich*, 169 Vt. 44, 48-49, 726 A.2d 81, 85 (1999); *Ass'n of Haystack Prop. Owners*, 145 Vt. at 444, 494 A.2d at 123). The Commission "should not dismiss a cause of action for failure to state a claim upon which relief may be granted 'unless it appears beyond doubt that there exist no circumstances or facts which the [petitioner] could prove about the claim made in [its petition] which would entitle [petitioner] to relief.'"

The Landowners' Motion falls far short of meeting the applicable dismissal standards and should be rejected.

3. The Stormwater Runoff Issue Raised by Landowners' Motion is Beyond the Permissible Scope of Landowners' Participation in this Case, Untimely, and Better Addressed by ANR

The Landowners' Motion now purports to raise "mitigation of stormwater runoff" as a new substantive issue. Yet, the Landowners' motion to intervene does not mention erosion control or stormwater. Instead it simply lists the following:

"Orderly Development, Town Plan
Wildlife habitat and wildlife use of the property
Vernal pool
Water and Chemicals
Possible blasting
Possible fencing
Possible herbicide use"

Nor did Landowners timely submit the required hearing request form with the detail required by Commission Rule 5.119. Rule 5.119(B) provides in relevant part:

Requests [for hearing] must be supported by more than general or speculative statements. For example, it is not sufficient to state that an application "violates Section 248(b)(5)." Instead, a party should state with specificity why the project raises a substantive issue under the Section 248 criteria. For example: "The application raises an issue under the aesthetics criterion under Section 248(b)(5) because the applicant has not proposed adequate mitigation to screen the western portion of the project from Maple Street."¹

¹ Rule 5.119(B).

The list identified in the intervention motion does not include the specificity required by the clear language of Rule 5.119(B). Even if it did, such a request is untimely. Rule 5.118 requires that requests for hearings must be submitted within 30 days of an application having been deemed complete. In this case, the application was deemed complete on August 18, 2021, and the Landowners' request was filed 195 days later. Commission Rule 2.206 provides that "[t]he Commission may decline to consider a motion not made within a reasonable time after the issue first arises with respect to the moving party." The alleged stormwater mitigation concerns now raised more than six months after the petition was submitted in this case were not made within a reasonable time and should be disallowed.

Petitioner's Site Plans provide the detail required by Commission Rule 5.107(C)(5)(e) for erosion control. The erosion prevention and sediment control ("EPSC") measures set forth in detail on Sheet 2 of Exhibits RDS MS-2 and MS-2A, are similar or identical in nature and detail to the Site Plans and EPSC sheets regularly submitted to and accepted by the Commission in solar net-metering proceedings for which CPGs are issued by the Commission.

The Agency of Natural Resources ("ANR") addresses the adequacy of planned or required erosion control measures that would apply under the Agency's *Vermont Standards and Specifications for Erosion Prevention and Sediment Control* (2020) and the Agency's DEC Construction General Permit. On October 21, 2021 the ANR filed timely comments on its review of the complete application and offered comments "on substantive issues under applicable Section 248 criteria or within the Commission's jurisdiction to resolve." These comments requested an additional condition for a stream, as well as concurrence with the Petitioner's proposed CPG conditions 12 through 15. As well, the CPG Condition 2 states site preparation and construction shall be in accordance with the plans and evidence submitted, which include testimony and plans stating:

Project installation will be performed in accordance with the Vermont Standards and Specifications for Erosion Prevention and Sediment Control (2020). The Project will apply for coverage under the Agency of Natural Resources DEC Construction General Permit.

4. The Steeps Slopes Prohibition in the Randolph Town Plan is Preempted and Not an Actionable Standard at the Local Level for Preferred Siting or Under Section 248 Review

The Motion states that the Project must be “in conformance” with the Randolph Town Plan language regarding placement of solar arrays on slopes exceeding 25%. Motion at 1, 2. As discussed in the following sections of this response, “conformance” with the Randolph Town Plan is not the legal standard.

There are two criteria potentially implicated by arguments that a solar project is not in conformance with the Randolph Town Plan – Section 248(b)(1)(does not unduly interfere with orderly development of the region), and Section 248(b)(5)(does not violate a clear community standard). There is not a substantive issue under either criterion. The legal standard is not conformance, it is due consideration. Even having duly considered the Town Plan, the Project does not unduly interfere with orderly development of the region or have an undue adverse impact on aesthetics.

a. Conformance with the Town Plan is not the Legal Standard for Section 248(b)(1) with Respect to Orderly Development of the Region; Municipalities Cannot Prohibit Solar at Any Location

“In contrast to the Act 250 permitting context, where compliance with duly adopted local or regional plans is a prerequisite to an Act 250 permit, see 10 V.S.A. § 6086(a)(10), for purposes of § 248 review, land-conservation measures in municipal plans are entitled only to ‘due consideration.’ 30 V.S.A. § 248(b)(1).” *In re Apple Hill Solar LLC*, 2021 VT 69, ¶ 31. Town plans cannot be used under Section 248(b)(1) or (b)(5) to “prohibit” solar. “[M]unicipalities play an advisory rather than controlling role in the § 248 process.” *Id.*, ¶ 58 (citing *City of S. Burlington v. Vt. Elec. Power Co.*, 133 Vt. 438, 447-48, 344 A.2d 19, 24-25 (1975)) (“recognizing that municipalities’ role in § 248 matters is advisory” and that § 248 “did not give ‘single municipalities the power to subvert utility projects statewide in scope and broadly entrusted to a single planning and supervisory agency’”). See also *In re Petition of Rutland Renewable Energy LLC*, 2016 VT 50, ¶ 38 (ruling that Rutland Town solar setback mandate was a de facto zoning standard, which is preempted by § 248, “an aspect of the statutory

structure that further undermines any suggestion that the [Commission] owes deference to the Town's solar siting standards").

While municipalities may enact enhanced energy plans as a tool to give town plan provision "substantial deference" in § 248 proceedings, here, the Town of Randolph deliberated and chose not to enact an enhanced energy plan. See Section 5 of this response, below. The solar siting language in the Randolph Town Plan is entitled to due consideration only.

b. 248(b)(1) Orderly Development Criterion Speaks to Land Conservation Measures Only, Not Environmental Erosion Control Measures; Further, Installations Must be Shown to Unduly Interfere with Orderly Development of the Region, Which Threshold is Not met in this Case

"[P]rovisions in ... town and regional plans may be relevant to the 'orderly development' analysis if they contain 'land conservation measures.'" *Id.*, ¶ 43 (citing 30 V.S.A. § 248(b)(1)), and if they unduly interfere with orderly development of the region. *In re Petition of Rutland Renewable Energy LLC*, 2016 VT 50, ¶ 11. Neither circumstance is presented here.

The 25% slopes language in the Randolph Town Plan is not a "land conservation" measure. Rather, as Landowners concede, it is clearly intended to mitigate stormwater runoff, an environmental issue applicable under Section 248(b)(5), and something that is adequately addressed via the stormwater permit that the Project will obtain.

Further, even if the 25% slopes language were directed at land conservation measures, which it is not, Landowners have failed to demonstrate that siting the Project array on slopes greater than 25% unduly interferes with orderly development of the region. See *In re New Haven GLC Solar, LLC*, 2017 VT 72, ¶ 33, 175 A.3d 1211 ("even if the project violated a mandatory provision of the town plan limiting the size of power generation facilities, which it did not, the Town had failed to show how such a violation would interfere with the orderly development of the region").

Finally, and in any event, the Petitioner has re-designed the Project so that the Project array is not located on slopes exceeding 25%. As such, the issue is moot.

c. **The 25% Slopes Language in the Town Plan is Inapplicable Under the Quechee Aesthetics Test Because it is Not a Measure to Protect the Scenic and Natural Beauty of the Project Site**

As the Supreme Court recently explained in its order remanding the PUC's denial of the Bennington Apple Hill Solar Project, the Court

recognize[s] that Act 250 and § 248 involve distinct regulatory regimes, and, as neighbors argue, tests imported from Act 250 may apply differently in the § 248 context. For that reason, [the Court has] modified the Quechee test in the context of § 248 proceedings so that local standards that might otherwise appear to be clear, written community standards cannot operate to preclude a certificate of public good under § 248 for a solar development project.

Id., ¶ 41 (citing *Rutland Renewable Energy, LLC*, 2016 VT 50, ¶¶ 17-18).

Under Section 248(b)(5)'s aesthetic criterion, "a [town plan] provision must be 'intended to preserve the aesthetics or scenic beauty of the area' where the proposed project is located and must apply to specific resources in the proposed project area. ..." *Id.*, ¶¶ 37-38 (citing *In re Woodstock Cmty. Tr. & Hous. Vt. PRD*, 2012 VT 87, ¶¶ 32-33, 192 Vt. 474, 60 A.3d 686).

Randolph's Town Plan steep slopes language clearly intends to address erosion control, as Landowners themselves acknowledge, not aesthetics, and is therefore irrelevant under the Section 248(b)(5) Quechee test. It is also inapplicable because the provision fails to address the Project site.

5. **Randolph's Town Plan Language Prohibiting Solar on Slopes Exceeding 25% is Inconsistent with Act 174**

The Town of Randolph Planning Commission considered and voted not to adopt an enhanced energy plan. See Exhibit RDS MS-17 (Randolph Planning Commission minutes 2019-03-11). In siting cases before the PUC, provisions in a municipal plan may be afforded substantial deference by the PUC, but only those plans that have received an affirmative determination of energy compliance by the regional commission. See 30 V.S.A. § 248(b)(1)(C). Plans that have not received an Act 174 determination of energy compliance are afforded only "due consideration." *Id.*

Act 174 calls for mapping exercises to identified "preferred", "suitable", and "unsuitable" locations, but does not speak to designations as "prohibited." The framework under Act 174

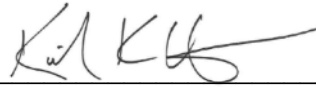
allows municipalities to identify preferred and constrained areas, based on standards developed by the Vermont Department of Public Service ("DPS") pursuant to Act 174. *See* <https://publicservice.vermont.gov/content/act-174-recommendations-and-determination-standards>.

Moreover, steep slopes are not mentioned as a possible constraint under these standards. Nothing in Act 174, the State Energy Plan, the Two Rivers-Ottawaquechee Regional Commission Plan, or the DPS Standards for Energy Compliance suggest a blanket prohibition on steep slopes, but rather encourage and require identification of suitable areas to meet the greenhouse gas reduction targets of Vermont law.

Dated at Burlington, Vermont, this 16th day of March, 2022.

Respectfully submitted,

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