

**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	)	21-2939-NMP
operation of a 500 kW (AC) photovoltaic group	)	
net-metering system in Randolph, Vermont	)	

**APPLICANT’S COMMENTS ON THE HEARING OFFICER’S
PROPOSAL FOR DECISION**

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I. Introduction

NOW COMES Randolph Davis Solar LLC (the “Applicant”) and submits these comments in response to the Hearing Officer’s June 5, 2023 Proposal for Decision rendered in this case (the “PFD”). The PFD recommends that the Vermont Public Utility Commission (the “Commission” or “PUC”) deny Applicant’s request for a 30 V.S.A. § 248 certificate of public good (“CPG”) for the Randolph Davis Solar Project (the “Project”), not because the Project fails to satisfy the applicable criteria of 30 V.S.A. § 248, but rather based upon the Hearing Officer’s improper speculation that the Preferred Site Designation Letter signed by the Town of Randolph Planning Commission, Exhibit RDS MS-5, does not mean what it states. *See* PFD at 15-23. The PFD does not address any of the applicable Section 248 criteria, including whether the Project is otherwise in the public good under Section 248(a).

II. Executive Summary

In June 2021, the Town of Randolph Planning Commission and Selectboard, and the Two Rivers-Ottaquechee Regional Commission (the “TRORC”) executed a joint letter of support designating the Project site as preferred for solar siting under Rule 5.103 (the “Preferred site Designation Letter”). Exh. RDS MS-5. The PFD recommends that the Commission not give weight to the letter for two reasons: (1) The record purportedly does not show that the Town Planning Commission “supports” the Project as required by Commission Rule 5.103; and (2) The Preferred Site Designation Letter purportedly does not show an agreement between the Applicant and the Randolph Planning Commission about the “specific location” for the Project site as required by Rule 5.103. PFD at 15.

Opposing Landowners requested the Planning Commission and the Selectboard to rescind their support for preferred siting on multiple occasions in 2021 and 2022 and, after

multiple lengthy meetings, the Planning Commission and Selectboard maintained their support of the Project and Preferred Site designation. See Section III.D chronology of these Comments. The Applicant respectfully submits that the speculation in the PFD that Applicant “pressured” the Town not to rescind is based upon incorrect facts, incorrect dates, and erroneous speculation. The record is replete with numerous pieces of direct evidence from the Planning Commission, the Selectboard, and the Town’s attorney, not recited nor considered in the PFD, which demonstrate the Randolph Planning Commission drew upon its own information, meetings, and Town legal guidance to retain its preferred siting support for the Project. *Id.*

As to the Project location, the Preferred Site Designation Letter expressly identifies the location with numeric GIS latitude and longitude coordinates – the same coordinates on the Project Site Plan in evidence at the PUC, Exhibit RDS MS-2 (rev. 7/12/22). See Section II.B discussion of these Comments.

The PFD’s recommendation is not accurate or supported by the direct evidence in the record. The Applicant respectfully requests that the Commission reject the Hearing Officer’s PFD in its entirety, issue an order finding that the Project satisfies all applicable Section 248 criteria, and issue a certificate of public good to that effect.

III. Analysis

A. Standard of Review

The Vermont Administrative Procedures Act (“APA”) requires:

- (a) In a contested case, all parties shall be given an opportunity for hearing after reasonable notice.
- (b) The notice shall include ...
 - (3) A reference to the particular sections of the statutes and rules involved.
 - (4) A short and plain statement of the matters at issue. ...
- (c) *Opportunity shall be given all parties to respond and present evidence and argument on all issues involved.*

3 V.S.A. § 809 (emphasis added).

The APA also provides:

A final decision shall include *findings of fact and conclusions of law, separately stated*. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party

submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding.

3 V.S.A. § 812 (emphasis added). Similarly, 30 V.S.A. § 11(c) obligates the Commission to “make its findings of fact.”

“The requirement that the [C]ommission [also] make its findings of fact imposes upon it the **duty to sift the evidence and state the facts.**” *New England Tel. Tel. Co.*, 115 Vt. 494, 495, 66 A.2d 135 (Vt. 1949) (emphasis added). Decisions must be based upon the record evidence, not inferences drawn from mere speculation. *Virginia Fila v. Spruce Mountain Inn*, 2005 VT 77, ¶ 1, 178 Vt. 323, 885 A.2d 723 (“A reasonable inference is one which may be drawn from the evidence without resort to speculation”)(quoting *McGreevy v. Daktronics, Inc.*, 156 F.3d 837, 840-41 (8th Cir. 1998)); *State v. Durenleau*, 163 Vt. 8, 12-13, 652 A.2d 981 (Vt. 1994)(“The evidence and inferences ... must add up to more than mere suspicion; the [factfinder] cannot bridge evidentiary gaps with speculation”). Even where “evidence relied upon by [an] agency is substantial, other ‘evidence which detracts from that relied on by the agency might cause a finding of arbitrary and capricious action.’” *In re Town of Sherburne*, 154 Vt. 596, 605, 581 A.2d 274 (Vt. 1990).

Finally, findings in a hearing officer proposal for decision that only recite the evidence and do not state independent findings drawn from the evidence, are improper. *In re Rumsey*, 2012 VT 74, ¶ 11, 59 A.3d 730 (“[W]e have consistently held that **recitations of evidence are not findings of fact and cannot be considered so.** In the words of *Krupp*, they are ‘immaterial and are not for consideration.’ We have come to call such recitations *Krupp* findings”)(citing *Krupp v. Krupp*, 126 Vt. 511, 514–15, 236 A.2d 653, 655–56 (1967))(emphasis added).

B. The Hearing Officer's “Preferred Site Letter” Findings Are Contradicted by the Direct Evidence and Based Upon Incorrect Speculation

The Preferred Site Designation Letter states in relevant part:

We refer to the application for a Certificate of Public Good (the "Application") to be filed by Randolph Davis Solar LLC, in respect of the 500 kW-AC solar electricity generation project (the "Project") proposed to be sited at the parcel located at 0 Davis Road, Randolph VT 05061, approximate latitude and longitude of Lat: 43.904700° N Lon: - 72.568771° W (the "Location"). Having made our review, we wish to support the Project and declare our desire to have the Location designated as a "Preferred Site" under Section 5.103 of your Rule 5.100.

... This letter is solely for the purpose of *providing support for the Project under Section 5.103*.

Exh. RDS MS-5 (emphasis added). The letter specifically states twice that the Town supports the GIS location specified. The GIS coordinates in the Preferred Site Designation Letter are the same as those in the Site Plan filed with the Commission, Exhibit RDS MS-2 (rev.7-13-22).

The Preferred Site Designation letter is direct and express evidence that the Project satisfies both the specific location and support criteria of Rule 5.103.

C. The Preferred Site Designation Letter is Direct Evidence that the Project is Supported by the Town, Consistent with PUC Rule 5.103

Finding 23 states “*In response to the Notice of Discrepancy*, the Applicant emailed the chair of the Planning Commission on November 11, 2021.” PFD Finding 23 (emphasis added). This is factually inaccurate. The Planning Commission’s Notice of Discrepancy was issued on December 10, 2021, one month *after* Applicant’s November 11, 2021 email. Exh. MB-16 at 3, and Exh. MB-27 at 7-8. The November 11, 2021 email from the Applicant could not have been provided *in response to* the Planning Commission’s Notice of Discrepancy. Findings 24-26, which also assume that the November 11, 2021 Applicant’s email was in response to the December 10, 2021 Notice of Discrepancy, are clearly erroneous for the same reason.

A detailed chronology leading up to the December 7, 2021 Planning Commission meeting and the Planning Commission’s December 14, 2021 vote not to rescind, together with a discussion of the direct evidence from the December 7, 2021 Planning Commission hearing, is provided in Section III.D. of these Comments. Section III.D. also details the subsequent actions by the Selectboard following Opposing Landowners’ repeated requests to rescind the Preferred Site Designation Letter, which included lengthy arguments that the Town failed to do its job if it did not enforce the steep slopes prohibition and rescind the Preferred Site Designation Letter. *See* transcription of the February 10, 2022 Selectboard meeting (a video link is also provided in Exhibit MB-23), discussed in Section III.D.

The factual record of events clearly demonstrates the Town conducted a thorough, deliberative process to make its determination of decision to support and continue to support their earlier decision to designate the location as preferred. The Hearing Officer did not “sift the evidence and state the facts.” *New England Tel. Tel. Co., supra*, 115 Vt.at 495. Instead, the PFD

makes inaccurate and improper inferences based upon speculation alone. *See Virginia Fila v. Spruce Mountain Inn*, 2005 VT 77, ¶ 178 Vt. 323, 885 A.2d 723 (“A reasonable inference is one which may be drawn from the evidence without resort to speculation”)(quoting *McGreevy v. Daktronics, Inc.*, 156 F.3d 837, 840-41 (8th Cir. 1998)); *State v. Durenleau*, 163 Vt. 8, 12-13, 652 A.2d 981 (Vt. 1994)(“The evidence and inferences ... must add up to more than mere suspicion; the [factfinder] cannot bridge evidentiary gaps with speculation”).

The PFD overlooks direct evidence; it overlooks the pivotal December 7, 2021 Planning Commission meeting (Exh. MB-15), the December 20, 2022 Town attorney's legal opinion, the January 13, 2022 (Exh. MB-22) and February 10, 2022 (Exh. MB-23) Selectboard meetings, and the ultimate March 3, 2022 Selectboard decision not to rescind its Preferred Site Designation Letter. This overwhelming body of direct evidence disproves the Hearing Officer's speculation about what motivated the Town to continue its support for preferred siting. This omitted direct evidence proves the Town went through a thorough and deliberative process and continued its support for the Project location as a preferred site throughout, despite multiple requests by Opposing Landowners and hours of Planning Commission and Selectboard meeting deliberations held expressly to consider whether to rescind. *See* Section III.D chronology of these Comments, which draws from this dispositive direct recorded evidence, Exhibits MB-15 (December 7, 2021 Randolph Planning Commission Meeting audio), MB-19 (Randolph Selectboard 2/10/22 Meeting Minutes), MB-22 (January 13, 2021 Randolph Selectboard Meeting video link), MB-23 (February 10, 2022 Randolph Selectboard Meeting video link); RDS MS-B (December 7, 2021 Randolph Planning Commission Meeting Minutes); RDS MS-14 (December 14, 2021 Randolph Planning Commission Letter Accepting Petitioner's Assurances); RDS MS-15 (February 10, 2022 Randolph Selectboard Draft Minutes); RDS MS-16 (March 3, 2022 Randolph Selectboard Meeting Minutes); and MB-27 at 86 (December 20, 2021 Summary of the Town Attorney Town Attorney's Opinion) .

Following multiple opportunities, and with guidance from the Town's legal counsel, neither the Planning Commission nor the Selectboard chose to move forward with rescinding their preferred site support letter. Nor did either Town body chose to notice intervention in the PUC proceeding, notwithstanding the Town could have participated as a “Party of Right.” *See* Rule 5.115(B)(3)(b).

D. The Chronology of Events and Direct Evidence Prove that the Planning Commission Chose Not to Withdraw its Support for the Project as a Preferred Site Because the Applicant Committed to Site the Project Array Out of Slopes Greater than 25% Within the Existing Limit of Disturbance, Not Because it Was "Pressured" by the Applicant

The June 2021 Preferred Siting Designation Letter was required to deem the Project petition filing complete. See Commission Rule 5.104. Following the August 18, 2021 petition filing, on October 21, 2021, Opposing Landowners filed a letter with the Randolph Planning Commission requesting it reconsider and rescind the Preferred Site Designation Letter. Exh. MB-16 at 1.

On November 11, 2021, Applicant's representative offered the Planning Commission Chair and Zoning Administrator that she had "requested review and guidance from legal counsel relating to concerns expressed by Ms. Allen & Mr. Binder, neighbors to the Randolph Davis Solar project" and "explaining further background as to why we arrived at our assessments made to the PUC." MB-27 at 7. The November 11, 2021 email included an email attachment from Applicant's counsel that shared a number of theories to the Applicant as to why the Town Plan steep slopes language "should not be considered to preclude the Town Planning Commission from designating the Project site as preferred." Exh. MB-27 at 8.

The detailed chronology of events and direct evidence set forth in Section III.D of these Comments document the Hearing Officer's inaccurate speculation that Applicant's counsel "made incorrect or misleading representations that inappropriately influenced the Town of Randolph's decisions in this case" by giving the "misimpression that the Town was obligated to issue a preferred-site letter" or "prohibited from considering the Randolph Town Plan in its decision whether to support the Project", and that "[i]t would be inconsistent with the intent of the rule to permit developers to pressure a municipality into designating a location as a preferred site using irrelevant arguments." PFD at 19, 20, 21.¹ In fact, as the chronology of events

¹ Not only are the statements factually incorrect, they unjustly impugn the character of Applicant's legal counsel. See *Williams v. State*, No. 67859 at 3. (Nev. Oct. 14, 2016)(holding that that allegations about legal counsel in a judicial proceeding that suggest counsel's statements were intended to manipulate a witness "was misconduct as it impugned the integrity of ... counsel and was not supported by evidence in the record") (citing *Browning v. State*, 124 Nev. 517, 534, 188 P.3d 60, 72 (2008) ("It is improper for a prosecutor to disparage defense counsel or legitimate defense tactics.")). See also *In re Watkins*, 233 W. VA. 170, 757 S.E.2d 594, 606-07 (W.Va.

demonstrates and per the direct evidence in the record, the Planning Commission did not give weight to the Applicant's email and instead decided to apply its Town Plan steep slopes prohibition to the Project, and informed the Applicant that it would rescind its preferred-site designation unless the Applicant agreed to conduct a ground survey by a Vermont licensed surveyor and "the array will be arranged so that solar panels within the current limit of disturbance are not installed on slopes greater than 25%." Exh MB-16 at 1, Planning Commission Letter to Allen/Binder. The Applicant's December 13, 2021 letter agreed with this request which resulted in the Planning Commission's December 14, 2021 letter (Exh. RDS MS-14) of continued support for the Project.

1. The December 7, 2021 Planning Commission Meeting, Not Mentioned in the PFD, is Direct Evidence that the Planning Commission Chose to Apply its Town Plan Steep Slopes Prohibition to the Project

On December 7, 2021, the Planning Commission held a public hearing lasting over an hour for the express purpose of addressing Opposing Landowners' request that the Planning Commission rescind the Preferred Site Designation Letter. The December 7, 2021 meeting audio transcription was admitted into the record as Exh. MB-15. The PFD does not mention this pivotal meeting or important evidence. At the meeting, Mr. Binder and Attorney Dingledine, speaking as a resident of Randolph, spoke at length requesting the Planning Commission to take steps to warn the Applicant that it would rescind its preferred site letter unless the Applicant moved the array off of slopes greater than 25%. While one Planning Commission member suggested that they rescind the preferred site letter, Planning Commission Member Perry suggested instead that the Applicant be told to conduct a specific land survey:

[Unidentified Planning Commission Member:] It seems to me that we need to rescind that letter.

Planning Commission Member Armstrong Perry: I'm not quite ready to rescind the letter. I think before we rescind the letter, I think its upon them to prove to us, and so they can easily do that by hiring a surveyor and going in there and getting the appropriate information that we can review. It's not that complicated. I've had to do this before. So, you know, if they are really

2013)("When a judge insults, ridicules, or disparages counsel, the parties, jurors, or witnesses, it is clearly misconduct").

dedicated to the process and want the letter, then it's up to them to prove to us that they're not putting this on 25% slopes.

Exh. MB-15 at approximately 00:37:50 (emphasis added).

In response, after further discussion, the Chair stated:

I tend to agree with Perry. We can say that it appears that they are in violation of the 25% requirement and uh unless you can prove otherwise, that we plan to rescind the letter of preferred site that was sent forward.

Exh. MB-15 at 00:43:47 (emphasis added).

Ultimately, the Planning Commission agreed to seek its own legal opinion from the Town's attorney as to whether they could rescind the Preferred Site Designation Letter and, second, to assess their risk of exposure to litigation. See Exh. MB-15 beginning at 0:57:07. As part of this discussion Attorney Dingleline concurred that advice from the Town's attorney was in order:

Planning Commission Member Perry Armstrong: Well, I'm just one member ... It's just my own take on it, ***I think we should have some legal opinion here. Even Brooke agrees with me.***

[Attorney Dingleline:] ***I do.***

Exh. MB-15 at 00:54:07 (emphasis added).

Notably, Attorney Dingleline offered her opinion that the Planning Commission should not be concerned over being sued:

Attorney Dingleline: [G]etting sued – you have sovereign immunity. If they have a quarrel with your opinion they appeal it. ... So I don't, I don't know that there's a huge amount of exposure like you're gonna get sued for money.

Exh. MB-15 at approximately 1:00:35 (emphasis added).

This direct evidence disproves the PFD speculation that the Planning Commission was pressured to not enforce its steep slopes prohibition against the Project. The Planning Commission decided just the opposite.

2. **The Planning Commission's December 10, 2021 Notice of Discrepancy is Direct Evidence that the Planning Commission Chose to Apply its Town Plan Steep Slopes Prohibition to the Project**

On December 10, 2021, the Planning Commission sent a written *Notice of Discrepancy* to the Applicant, stating that the Planning Commission "agreed with Mr. Binder's contention that there are some panels on the eastern side of the array that appear to be on slopes greater than 25%" and that *"[i]f this proves to be the case then the Town of Randolph may have to rescind our support for this site as being a "preferred site.""* Exh. MB-16 at 1.

This is another piece of direct evidence that disproves the PFD speculation that the Planning Commission was "pressured" to not enforce its steep slopes prohibition against the Project.

3. **The Applicant's December 13, 2021 Letter Committing to Avoid Installing the Array on Slopes Greater than 25% Based Upon a Ground Survey Requested by the Planning Commission is Direct Evidence that there Was a Meeting of the Minds**

On December 13, 2021, the Applicant responded in writing to the December 10, 2021 Notice of Discrepancy, stating, among other things:

[P]rior to installation of the panels, Norwich Technologies will confirm the grade slopes in the area of the solar panels by having a Vermont licensed surveyor set grade stakes for the solar array rows location and document the slopes. The parties have noted specific concern to the terrain on the eastern side of the array, and again, confirmation will be secured before any panels are installed in that location. *The array will be arranged so that solar panels within the current limit of disturbance are not installed on slopes greater than 25%. The onsite survey data can be provided to the Town and the Allen/Binders upon request.*"

Exh. MB-16 at 6 (emphasis added).

4. **The Planning Commission's December 14, 2021 Vote Not to Rescind Was Based on the Applicant's Commitment Not to Install the Array on Slopes Exceeding 25%, and is Direct Evidence that there Was a Meeting of the Minds**

On December 14, 2021, members of the Planning Commission voted *via* email, in a 3-1 decision, not to rescind preferred siting. See Exh. MB-27. This decision was based upon the fact the Applicant committed to avoiding placement of panels on slopes greater than 25% grade, a

conclusion reinforced by the Chairman's December 14, 2021 email to Planning Commission members calling a vote:

We have one member of the PC that does not agree with the other 3 members of the PC who agreed to accept Norwich Solar Technologies' response to the issue of violating our Town Plan's prohibition on mounting Solar Arrays on slopes greater than 25%. Norwich's bottom line was:

"While we all are concerned with the potential erosion from installation of solar panels on slopes greater than 25% slopes, all data presented to date is not site specific. Therefore, prior to installation of the panels, Norwich Technologies will confirm the grade slopes in the area of the solar panels by having a Vermont licensed surveyor set grade stakes for the solar array rows location and document the slopes. The parties have noted specific concern to the terrain on the eastern side of the array, and again, confirmation will be secured before any panels are installed in that location. ***The array will be arranged so that solar panels within the current limit of disturbance are not installed on slopes greater than 25%. The onsite survey data can be provided to the Town and the Allen/Binders upon request.***"

I considered this a big win for the town, because if we had agreed to rescinding our letter of support to Norwich which designated Davis Road as a "preferred site." it could have led us into fighting a legal battle with Norwich Solar Technologies and the costs could be steep for the town. I based my assessment on what Bennington went through fighting a large out-of-state solar developer - they were eventually successful in their fight but it reportedly cost their town \$200,000.00 in legal fees.

The one PC dissenter wants to see our Attorney's position on whether or not our town would suffer large legal fees if we chose to fight with Norwich over this issue.

Unfortunately, the position of our Attorney has not yet arrived. I believe we have the following options:

1. Do nothing for now and wait for our Attorney to respond. This will result in us being late with our response back to Biden/Allen (the abutters) to allow them time to respond to the PUC which is due today.
2. Wait for Mike to respond. This may put us beyond our response date to Allen/Biden and may prompt them to request an Evidentiary Hearing from the PC.

3. Go forward with the PC's 3-1 majority agreement and take the actions proposed in my 14 Dec Email. (see attached). This is low risk, because we would be accepting Norwich's bottom line and would not be pulling back our letter of support. We will not have to wait for our Attorney's response.

Exh. MB-27 at 32-33 (emphasis in original).

This is another piece of direct evidence that proves that the reason the Planning Commission decided to continue its preferred siting support for the Project was because it accepted the Applicant's commitment to install the array off of steep slopes, thus mooted any perceived disagreement about the applicability of the Town Plan steep slopes language. Following this exchange, the Chair sent notices to Opposing Landowners and the Applicant informing that the Planning Commission had decided not to rescind the Preferred Site Designation Letter. Exh. MB-16.

5. **The Hearing Officer's December 16, 2021 Order Denying Opposing Landowners' Request for Stay Was Based Upon the Planning Commission's Choice to Continue its Support for Preferred Siting**

On December 16, 2021, the Hearing Officer issued a ruling denying Opposing Landowners' request for stay filed on December 14, 2021, "[b]ecause the status of the preferred designation letter has not changed" Case No. 21-2939-NMP, 12/16/21 Order at 2 (emphasis added).

6. **The Randolph Town Attorney's December 20, 2021 Legal Opinion on Preferred Siting is Direct Evidence Not Included in the PFD that Proves the Town Was Advised that it Could Enforce its Steep Slopes Prohibition**

On December 20, 2021, the Town Manager provided the Planning Commission with a memorandum containing the following summary of the advice of the Town's attorney:

Town Attorney Michael Tarrant provided his advice regarding preferred siting letters last week. The advice was received after the deadline for the Davis Road solar array project appellants to file with the Public Utilities Commission (PUC), and during the active public records request. The advice is described in this memo. ...

There were three main questions for the Town Attorney to consider. A summary of the responses follows each question.

1. Can a preferred siting letter be rescinded?

Likely yes. The State rules defining what a preferred site is, and the nine ways to designate one (including through a letter jointly signed by a Selectboard, Planning Commission, and Regional Planning Commission), do not also appear to detail how the letters work. Without that detail, there is likely the capability to rescind a letter of support.

2. How can a preferred siting letter be rescinded, if it is possible?

As stated in # 1, there isn't a process or formal already outlined. There also isn't much in the way of precedent, to help illuminate a path forward. A simple letter would likely suffice.

3. Would rescinding a preferred siting letter open the Town up to) any liability or other legal exposure?

There isn't an obvious avenue for either to develop. That wouldn't preclude anyone from trying, just that there is no obvious basis. Again there isn't much in the way of precedent to draw upon - including what impact, if any, local action to rescind a preferred siting letter may have with the PUC (which make the ultimate determination).

Exhibit MB-17 at 87 (emphasis added).

7. The PFD Does Not Mention that the Selectboard Held Three Meetings in Early 2022 to Address Opposing Landowners' Request to Rescind the Preferred Site Designation Letter, and on March 3, 2022 Chose to Continue its Support for Preferred Siting

In addition to the December 2021 deliberations at the Planning Commission over preferred siting, Mr. Binder's Exhibits provide evidence that Mr. Binder requested the Selectboard to rescind the preferred site letter at three separate Selectboard meetings in early 2022:

- a January 13, 2022 Selectboard meeting (Exh. MB-18 – minutes of 1/18/22 Selectboard Meeting);
- a February 10, 2022 Selectboard meeting (Exhs. MB-19 and RDS MS-16 - minutes of 2/10/22 Selectboard Meeting); and
- a March 3, 2022 Selectboard meeting (Exh. RDS MS-16 – minutes of 3/3/22 Selectboard meeting).

Mr. Binder and Attorney Dingledine, participating as a resident of Randolph, attended all three meetings, which cumulatively lasted hours.

Mr. Binder introduced 54 exhibits into evidence in this PUC case, including the videos of the January and February 2022 meetings (Exhibits MB-22 and MB-23), but failed to discuss,

disclose, or introduce the minutes or video of the pivotal March 3, 2022 final Selectboard meeting, at which the Selectboard affirmed that it would take no action to rescind and let its Preferred Site Designation Letter stand. See Exh. RDS MS-16 at 1 ("There was agreement that, if the Board was keeping its approval for the letter in place, no action would be necessary").

8. The January 13, 2022 Selectboard Meeting is Direct Evidence Not Mentioned in the PFD, that the Selectboard Chose to Rely Upon its Attorney's Opinion Regarding Preferred Siting

At the January 13, 2022 Selectboard meeting, Mr. Binder incorrectly stated that the Applicant and Applicant's counsel communicated privately by email with members of the Planning Commission after the December 7, 2021 Planning Commission meeting:

Mr. Binder: After the December [7, 2021] meeting, the Planning Commission members communicated privately by email with each other and with Norwich Solar Technologies. The Norwich Solar Technologies attorney told them that the Town had no legal basis to prohibit the development on steep slopes. But, NST promised that if the Planning Commission did not rescind the letter, they would not place solar panels on slopes greater than 25%.

Exh. MB-22 beginning at approximately 48:20.

The only email communication that included an email from Applicant's counsel is in the record and is attached to the November 11, 2021 email from the Applicant's representative. This November 11, 2021 email was offered one month earlier and by the very date, could not have been in response to the December 7, 2021 Planning Commission meeting or the December 10, 2021 Planning Commission Notice of Discrepancy served on the Applicant. The November 11, 2021 email did not use the word "prohibit" anywhere. Mr. Binder's representation to the Selectboard was incorrect, a fact the Planning Commission Chair reported to the Selectboard at the February 10, 2022 Selectboard meeting. See Section III.D.9 of these Comments, below.

9. The February 10, 2022 Selectboard Meeting Re-Affirming the Planning Commission's Decision Not to Rescind is Direct Evidence Not Mentioned in the PFD

During the February 10, 2022 meeting, the Selectboard Chair asked whether the Town had sought its own legal opinion about its options with respect to preferred siting. The Town Manager responded yes, and summarized the legal opinion provided on December 20, 2021.

Exh. MB-22 at approximately 1:14:30 (reciting that the Town attorney stated: "Yes, it's likely that you can [rescind]" and "its unlikely ... to create some set of undue liabilities").

At the February 10, 2022 Selectboard meeting, Attorney Dingledine presented an argument the Selectboard Chair challenged and corrected:

Attorney Dingledine: [I]t is one sentence that is at issue here, and the sentence reads: "Prohibited locations: energy facility development shall have to meet the principle structure setback for the relevant are in the Town zoning and shall [mandatorily] be prohibited in floodways, Class I and II wetlands, lands within 50 feet that are top of bank of perennial streams, lands over 25% slope." ...

If you want to take a position and provide a recommendation and issue a preferred sites letter – this needs to follow your law, and you're not doing that.

The other thing that's really concerning and doesn't seem to be part of the conversation ... there was a meeting of the Planning Commission at which **3 members said, yup, I think we need to rescind this** and Perry said, gee, I'm concerned about getting sued, let's talk to a lawyer.

I don't know why you would be sued [laughter] This is a ministerial act that is covered by sovereign immunity. But, Larry, the fact that you're working with these people or the Planning Commission is working with these people to change the project proposal means that the project as it was proposed doesn't pass muster, and you should rescind that letter. You don't let them fix it now and say, don't worry, we'll ask for a condition. You say, I'm sorry, the reason why you gave us this project and it doesn't comply with the law and that is the job of this Town. That's what they must do in this situation. It is black and white in the Town Plan. ... They have to start over. It can't be fixed.

In fact, the Planning Commission and the Selectboard are not even obligated to take the same position. I've seen one situation where there was a disagreement. But you get to speak as a Selectboard and the Planning Commission gets to speak as the, you know, experts who created the law and gave it to you to enact. And all three of those entities are required to sign on if this is going to be considered a preferred site. Which is a monumental decision by the town because it becomes true and valid unless it can be overcome with evidence, which certainly that will be the case if this goes forward- that in fact the town's recommendation is wrong, because you didn't follow your own laws that you wrote. And ***if you don't enforce the law, that means it's arbitrary and capricious***. You're not treating everyone equally, and you're obligated to treat all of your citizens equally. ***When you create a law, that puts everybody on notice***

that's what the rules of the game are. And now you have a developer saying don't pay any attention to the wording in your actual plan cause don't worry, we'll put the solar rays, I don't know, we'll flatten the site, so there are no steep slopes and then we'll put our solar array panels up. That road is on steep slopes no matter what. It violates the town plan and that's all you have to tell the PUC, that's your decision.

Selectboard Chair Trini Brassard: *First off, the Town Plan is not law. It is the guidance document from the Town that we look to, to give us direction.*

...

Exh. MB-23 beginning at approximately 19:08 (emphasis added).

Also at the February 10, 2022 Selectboard meeting, the Planning Commission Chair, Sonny Holt, verbally provided a detailed report that explained the Planning Commission's process, deliberations, and decision not to rescind, and also disputed Mr. Binder's assertion made earlier that evening that Applicant's legal counsel communicated with the Planning Commission after the December 7, 2021 Planning Commission meeting to influence its decision:

Planning Commission Chair Sonny Holt: *I did an extensive study on this. I looked at the audio and also the video of the last Selectboard meeting. There's a lot of misunderstanding of what went on and a lot of claims that have been made that are really incorrect.* As far as the access road goes, it's 1,100 feet. Of that 1,100 feet there is only one section of 100 feet that has a slope greater than 25%. And that's about 9% of the entire road and probably 2% of the entire limit that's being constructed on. I really don't think the access road is an issue here at all. I did, I can go and give you my findings and recommendations that I came up with in my study and then we can go back and expand on that if you like.

There were two issues basically. One was, will Norwich Technologies install solar panels on slopes greater than 25% in violation of Randolph's Town Plan? And the second issue is, did the Planning Commission use a process to grant a preferred site letter to Norwich Solar Technologies? ***In my findings I found out that number one, Norwich Solar Technologies did not violate the town plan when they requested a preferred siting letter from the Planning Commission on 1 June 2021.*** Then number two, for reasons unknown, Norwich Solar Technologies changed the solar array site plan [difficulty hearing video at 30:58] on 4 August 2021 for review by the Public Utility Commission. ***Finding number three, at an open meeting on 7 December 2021 the Planning Commission confirmed that the [difficulty hearing video at 31:19] site plan violated the 25% steep slope prohibition in the town plan. On 10 December, Norwich Solar Technologies were put on notice that if they planned to put solar panels on steep slopes, then the town of Randolph may have to revoke their***

preferred sites letter. Norwich guaranteed to both the planning commission and the public utilities commission that the array will be arranged so that solar panels within the current limits of disturbance are not installed on slopes greater than 25%.

[T]hrough this entire process, there are a lot of false claims and accusations floating around, and a lot of those made their way into local newspapers. One of the claims was that the 7 December '21 meeting of the Planning Commission they decided to rescind the preferred sites letter but they were going to make sure they weren't going to be in legal hot water first. That's false. There was no decision made to rescind the letter at that meeting.

Another claim: "NST promised that if the Planning Commission did not rescind the preferred sites letter, they would not place solar panels in slopes greater than 25%." That's false. There was no promises asked for nor given by either the Planning Commission or Norwich Technologies.

Another claim: "After the December meeting the Planning Commission members had communicated privately by email with Norwich Solar Technologies. The NST attorney told them the town had no legal basis to prohibit development on steep slopes. That's also false. The assertion that somehow a deal was struck between the Planning Commission and Norwich Technologies is false. There was no communication with the NST attorney. ...

I can go back and give you more details on any of those but that's basically what I found out in my investigation. It was very thorough.

Exh. MB-23 beginning at approximately 29:20 (emphasis added).

This is direct evidence not included in the PFD that proves the PFD speculation that the Town was pressured by the Applicant to continue its support for preferred siting is inaccurate.

10. The March 3, 2022 Selectboard Meeting and Decision to Continue Support for the Project's Location is Direct Evidence Not Mentioned in the PFD

On March 3, 2022, the Selectboard met again, at the request of Mr. Binder, and addressed the topic of support for the Randolph Davis Solar project. It decided that it would take no action to rescind the Preferred Site Designation Letter. Exh. RDS MS-16 at 1, Randolph Selectboard Meeting Minutes 2022-03-03 ("There was agreement that, if the Board was keeping its approval for the letter in place, no action would be necessary").

This is another piece of direct evidence not included in the PFD that proves that the Town wanted to continue its preferred site support for the Project.

E. The PFD is Incorrect That There Was No “Meeting of the Minds” on the Project Location or What Slopes Information the Planning Commission Expected the Applicant to Use to Qualify for Preferred Siting Support

The PFD states: “[T]here was never a mutual understanding between the Applicant and the Planning Commission about whether the slope in a specific location or an average slope of a general area was the benchmark.” PFD at 17. This is not correct.

There was a mutual understanding, as evidenced by the PFD itself, which recites the Planning Commission's December 14, 2021 letter where it clearly outlines the Planning Commission's agreement to and acceptance of the Applicant's siting guarantee:

[T]he Randolph Planning Commission received your response on 13 Dec 2021 and *accepts your guarantee that “prior to installation of the panels, [the Applicant] will confirm the grade slopes in the area of the solar panels by having a Vermont licensed surveyor set grade stakes for the solar array rows location and document the slopes.* The parties have noted specific concern to the terrain on the eastern side of the array, and again, confirmation will be secured before any panels are installed in that location. The array will be arranged so that solar panels within the current limit of disturbance are not installed on slopes greater than 25%. The onsite survey data can be provided to the Town and the Allen/Binders upon request.”

PFD at 17 (citing Exh. MB-16 at 6 (Applicant's December 13, 2021 letter to the Planning Commission in response to the Planning Commission's Notice of Discrepancy))(emphasis added).

The plain language of Applicant's response was that “prior to installation of the panels, Norwich Technologies will confirm the grade slopes *in the area of the solar panels* by having a Vermont licensed surveyor *set grade stakes for the solar array rows location and document the slopes*” and that “*The array will be arranged so that solar panels within the current limit of disturbance are not installed on slopes greater than 25%.*” Exh. RDS MS-13 at 2 (emphasis added). The Planning Commission's December 14, 2021 acceptance of Applicant's assurances also reiterated the expectation that “prior to installation of the panels, *[the Applicant] will confirm the grade slopes in the area of the solar panels by having a Vermont licensed surveyor set grade stakes for the solar array rows location and document the slopes.*” PFD at 17 (quoting the Planning Commission's December 14, 2021 letter accepting Applicant's assurances) (emphasis added). The Planning Commission's expectation was clear and so were the

Applicant's assurances. The slopes data would not be "an average slope of a general area" but was instead explicitly agreed upon to be based on "having a Vermont licensed surveyor set grade stakes for the solar array rows location." The confusion expressed in the PFD is created by the PFD alone, not the facts in evidence, and the conclusions drawn are therefore incorrect.

The PFD "Project Site Slopes" Findings, Findings 8 through 17, are recitations of Mr. Binder's evidence, not the Hearing Officer's deliberative findings of fact. They are *Krupp* findings that are "immaterial and are not for consideration." *In re Rumsey*, 2012 VT 74, ¶ 11. Findings 8 through 17 also rely predominantly on statements in Mr. Binder's surrebuttal testimony and exhibits, which alleged that the LiDAR maps he presented are more accurate than the data the Vermont licensed surveyor provided in the Applicant's revised Site Plan dated February 9, 2022. See Exhs. RDS MS-2, MS-2A, and MS-2B (rev 2/9/22) which demonstrate that the panels will not be located on slopes greater than 25%.

The Applicant introduced into evidence a revised Site Plan prepared by a Vermont professional civil engineer, with a slope layer using the survey data produced by a Vermont licensed surveyor. Exh. RDS SWH-1 (Resume of Scott Homsted); Exh. RDS MS-12 (Letters from Krebs & Lansing and Horizons Engineering); Staskus 2/25/22 supp. pf. at 2-3 ("I hired Horizon Engineering, a Vermont licensed surveyor, to gather on-site field topographic data and requested Krebs & Lansing, a Vermont licensed professional civil engineering firm, to redesign the array, based upon the on-site survey and within the existing Limit of Disturbance, to areas that did not contain slopes greater than 25%")(citing Exh. RDS MS-12, letters from Horizons Engineering and Krebs & Lansing provided to the Selectboard on February 10, 2022"). Mr. Homsted testified under oath that: "***The on the ground data has a higher precision than the LiDAR data.***" Binder surr. pf. at 3. Mr. Homsted also testified:

Exhibit MB-24 [*Mr. Binder's LiDAR Map/ ANR Slopes Map*], is a map compiled from aerial imagery and is meant to provide a gross representation of where steep slopes may exist. For this Project Horizons Engineering has prepared a detailed "on the ground survey" that in conjunction with a computerized digital elevation model gives a more accurate assessment of where steep slopes exist in the area of the array. The solar array has been reconfigured to avoid steep slopes as shown on the current Site Plan. Exhibit MB-7 shows an older version of the Site Plan which does not account for the redesign to avoid steep slopes. Exhibit MB-8 shows steep slopes in the areas of the access road. We do not dispute the existence of steep slopes in this area. However, even with these slopes the Project

still scores "Low Risk" in terms of State of Vermont Construction General Permit 3-9020. The EPSC measures to be employed at the Project site per Sheet C-103 of Exhibit RDS MS-2, which have been approved on many projects by the DEC, will avoid undue erosion and stormwater impacts.

Homsted reb. pf. at 4 (emphasis added).

Importantly, the direct evidence in the case also establishes that Mr. Binder himself admitted that he is not a Vermont licensed surveyor, he is not a Vermont licensed professional engineer, and he is not a Vermont licensed civil engineer:

Q:PET:Binder.1-8: Admit that you are not a Vermont licensed surveyor.

A:PET:Binder.1-8: ***I am not a Vermont licensed surveyor.***

Q:PET:Binder.1-9: Admit that you are not a Vermont licensed professional engineer.

A:PET:Binder.1-9: ***I am not a Vermont licensed professional engineer.***

Q:PET:Binder.1-10: Admit that you are not a Vermont licensed civil engineer.

A:PET:Binder.1-10: ***I am not a Vermont licensed civil engineer.***

Exh. RDS MS-18 through 20 (Discovery Admissions A:PET:Binder.1-8 through -10) (emphasis added). Mr. Binder has not demonstrated the expert qualifications to offer an opinion on the accuracy of surveyed topographical data that Applicant's qualified expert testified is more precise than the LiDAR maps. Even where "evidence relied upon by [an] agency is substantial, other 'evidence which detracts from that relied on by the agency might cause a finding of arbitrary and capricious action.'" *In re Town of Sherburne*, 154 Vt. 596, 605, 581 A.2d 274 (Vt. 1990). It is arbitrary for the PFD to exclude the Applicant's evidence attesting to the more precise accuracy of the topographic measurements developed by Applicant's expert licensed surveyor and civil engineer.

Even more problematic than the omission of all the Applicant's evidence on the Project site slopes, the PFD omits the important fact that ***it was the Planning Commission that requested that a survey be performed and that survey data form the basis of the a revised site plan that would demonstrate that the Project panels would not be installed on slopes greater than 25%.*** See *supra* Exh. MB-15 at 00:37:50 (recommendation of Planning Commission Member Perry Armstrong to request a survey); Exh. RDS MS-14 (The Planning Commission December 14, 2021 letter accepting the Applicant's assurances); Exh. MB-16 at 6 (Applicant's December 13, 2021 letter with assurances). It is also telling that in its December 10, 2021

Notice of Discrepancy, *the Planning Commission noted that Mr. Binder's LiDAR map "had a disclaimer stating that it is 'for general reference only and data layers may or may not be accurate, current, or otherwise reliable.'"* Exh. MB-16 at 3 (emphasis added). The Planning Commission and the Applicant *did* have a "meeting of the minds" that the survey data is what the Planning Commission wanted and expected as proof that the array would not be placed on steep slopes. Reference to Mr. Binder's LiDAR Mapping and calculations is irrelevant because that was not what was agreed upon between the Planning Commission and the Applicant as the slopes benchmark data.

IV. No Additional Evidence is Needed

The PFD Conclusion recommends that if the PUC does not dismiss the case, that the Commission take further evidence, in light of Mr. Binder's LiDAR map, to assure that neither solar panels or primary agricultural soils are on slopes greater than 25%. Applicant respectfully disagrees. As demonstrated by the preceding Section of these Comments, the Applicant's slopes data includes the site specific survey data that the Town had requested. Therefore, to take more evidence in consideration of Mr. Binder's LiDAR map would be irrelevant and unnecessary.

V. Request for Relief

Based upon and in light of these Comments, the Applicant requests that the Commission reject the Hearing Officer's PFD in its entirety and issue a decision finding that the Project satisfies all applicable Section 248 criteria and granting a certificate of public good to that effect.

Dated at Burlington, Vermont this 20th day of June, 2022.

PAUL FRANK + COLLINS P.C.
Attorneys for Randolph Davis Solar LLC



By: _____

Kimberly K. Hayden, Esq.
One Church Street
P.O. Box 1307
Burlington, VT 05402-1307
(802) 860-4134
khayden@pfclaw.com