

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

CASE NO. 21-2939-NMP

PETITION OF RANDOLPH DAVIS SOLAR LLC
FOR A CERTIFICATE OF PUBLIC GOOD, PURSUANT
TO 30 V.S.A. SECTIONS 248 AND 8010,
AUTHORIZING THE INSTALLATION AND OPERATION
OF A 500 KW GROUP NET-METERED SOLAR
ELECTRIC GENERATION SYSTEM IN
RANDOLPH, VERMONT --

August 23, 2023
1 p.m.

Via videoconference

Oral Argument held before the
Vermont Public Utility Commission, via GoToMeeting, on
August 23, 2023, beginning at 1 p.m.

P R E S E N T

COMMISSION MEMBERS: Anthony Z. Roisman, Chairman
Margaret Cheney
J. Riley Allen

STAFF: Jake Marren, Staff Attorney

CAPITOL COURT REPORTERS, INC.
P.O. BOX 329
BURLINGTON, VERMONT 05402-0329
(802) 863-6067
EMAIL: info@capitolcourtreporters.com

A P P E A R A N C E S

ERIC B. GUZMAN, ESQUIRE

Appearing for the Vt. Department of Public Service
112 State Street
Montpelier, VT 05620
eric.guzman@vermont.gov

PAUL, FRANK + COLLINS, P.C.

Appearing for the Applicant
One Church Street, P.O. Box 1307
Burlington, VT 05402-1307

BY: KIMBERLY K. HAYDEN, ESQUIRE

khayden@pfclaw.com

VALSANGIACOMO, DETORA & McQUESTEN

Appearing for Joan Allen and Michael Binder
P.O. Box 625
Barre, VT 05641

BY: L. BROOKE DINGLEDINE, ESQUIRE

lbrooke@vdmlaw.com

AARON KISICKI, ESQUIRE

Appearing for the Vermont Agency of Natural Resources
1 National Life Drive, Davis 2
Montpelier, VT 05620
Aaron.kisicki@vermont.gov

1 CHAIR ROISMAN: Okay. Once again, good
2 afternoon.

3 We are here for an oral argument in
4 case number 21-2939-NMP, the petition of Randolph
5 Davis Solar, LLC for a Certificate of Public Good
6 pursuant to 30 V.S.A. sections 248 and 8010
7 authorizing the installation and operation of a 500-
8 KW group net-metered solar electric generation system
9 in Randolph, Vermont.

10 My name is Anthony Roisman. I'm the
11 Chair of the Vermont Public Utility Commission. With
12 me today are commissioners Margaret Cheney and Riley
13 Allen and Deputy General Counsel Jake Marren.

14 We are conducting today's oral argument
15 by video conference. As you know, there are special
16 rules for such a video conference. Does any party
17 object to the use of a video conference for this oral
18 argument?

19 (No response)

20 CHAIR ROISMAN: Hearing none, we will
21 continue. I'll be recognizing people to speak in
22 order as we progress through today's hearing and will
23 try to provide everyone with appropriate
24 opportunities to both speak and respond. The intent
25 is to minimize the need for people to have to

1 affirmatively ask to be recognized.

2 We will start by taking appearances.
3 When called upon, each party should identify the one
4 person who will be representing that party at today's
5 oral argument. Randolph Davis Solar?

6 MS. HAYDEN: Hello. Kimberly Hayden on
7 behalf of the Applicant.

8 CHAIR ROISMAN: Welcome, Ms. Hayden.
9 Department of Public Service.

10 MR. GUZMAN: Good afternoon. Eric
11 Guzman on behalf of the Department of Public Service.

12 CHAIR ROISMAN: Welcome, Mr. Guzman.
13 Joan Allen and Michael Binder.

14 MS. DINGLELINE: Brooke Dingleline,
15 Your Honor.

16 CHAIR ROISMAN: Welcome, Ms.
17 Dingleline.

18 The Agency of Natural Resources.

19 MR. KISICKI: Good afternoon, Your
20 Honor. This is Aaron Kisicki on behalf of the Agency
21 of Natural Resources.

22 CHAIR ROISMAN: Welcome, Mr. Kisicki.
23 And is anybody representing the Agency of
24 Agriculture, Farm and Manufacturing?

25 (No response)

1 CHAIR ROISMAN: If there are any
2 members of the public in attendance or listening by
3 phone, thank you for your interest. Please remember
4 that only parties will be actively participating
5 today.

6 Before we start the argument we will
7 address the Petitioner's motion filed yesterday
8 afternoon for the commission to take administrative
9 notice of two documents. One, the preferred site
10 letter request submitted to the Town of Randolph
11 planning commission and select board identified in
12 the motion as Exhibit RDS-Judicial Notice-1. And 2,
13 the June 25, 2021, 45-day advance notice submitted in
14 Case No. 21-2211-AN identified in the motion as
15 Exhibit RDS-Judicial Notice-2.

16 Does any party object to this motion?
17 Mr. Guzman?

18 MR. GUZMAN: No objection from the
19 Department.

20 CHAIR ROISMAN: Mr. Kisicki?

21 MR. KISICKI: No objection.

22 CHAIR ROISMAN: Ms. Dingleline?

23 MS. DINGLELINE: Yes, Your Honor. We
24 do have an objection. The evidence has been closed

25 --

1 CHAIR ROISMAN: Wait, Ms. Dingledine.

2 MS. DINGLELINE: I'm sorry.

3 CHAIR ROISMAN: That's all right. We
4 are not going to take argument on this. We are just
5 going to set a schedule. I just needed to know if
6 anybody objected.

7 MS. DINGLELINE: Thank you.

8 CHAIR ROISMAN: So since there is an
9 objection to the motion, the following dates are set:
10 By September 5th of 2023 please file any written
11 objections to the motion. And by September 12th,
12 2023, please file any replies. We will decide the
13 motion at that time.

14 We have allocated an hour for today's
15 argument. Randolph Davis Solar, the Department of
16 Public Service and any other state agency that
17 supports the Applicant will have 30 minutes to divide
18 as they wish, including any time reserved for
19 rebuttal. Ms. Allen and Mr. Binder and any state
20 agency that supports their position will have 30
21 minutes to divide as you wish.

22 Let me turn first to Ms. Hayden. Have
23 you and the Department and any other relevant state
24 agency who is arguing in support of the application
25 discussed how you wish to divide your time?

1 MS. HAYDEN: We have not. And I'm
2 amicable with going with 15 minutes if that would
3 work. I don't know if Mr. Kisicki -- Attorney
4 Kisicki has any comments.

5 I did speak briefly with Attorney
6 Guzman, and I understand that his comments will be
7 relatively brief.

8 CHAIR ROISMAN: Okay. All right. And
9 I assume from that, Ms. Hayden, that you will begin
10 the argument on behalf of the Applicant, and then the
11 Department will follow. Is that your plan?

12 MS. HAYDEN: I defer completely to you,
13 Chairman Roisman.

14 CHAIR ROISMAN: Well --

15 MS. HAYDEN: I'm happy to start.

16 CHAIR ROISMAN: Okay. All right. Mr.
17 Guzman, you're okay with that?

18 MR. GUZMAN: I'm sorry. Attorney
19 Hayden cut out at the last second there.

20 CHAIR ROISMAN: She said that she was
21 planning to start. Is that all right with you?

22 MR. GUZMAN: Yes, Chair Roisman.
23 That's fine with me. And I just wanted to affirm
24 that I do not expect more than 5 minutes.

25 CHAIR ROISMAN: Okay. And Mr. Kisicki,

1 will you wish to present any oral argument today?

2 MR. KISICKI: At this time, Chairman,
3 the Agency doesn't intend to put forth any sort of
4 argument. We may respond to something as it comes
5 up, so I imagine if the Agency does have anything to
6 add it would be very brief.

7 CHAIR ROISMAN: Okay. All right. And
8 Ms. Hayden, do you and Mr. Guzman have -- wish to
9 preserve any of your 30 minutes for rebuttal?

10 MS. HAYDEN: I would like to preserve
11 any of the 30 minutes for rebuttal.

12 CHAIR ROISMAN: Okay. So whatever time
13 happens to be left, if any, you want me to let you
14 know you've got 5 minutes left, or will you keep your
15 own time?

16 MS. HAYDEN: I will try to keep my own
17 time. Sometimes we get engrossed in the arguments
18 that we are advancing, but I also anticipate that the
19 landowner interveners it was their request to have
20 oral argument and not ours so they would be going
21 first in any event.

22 CHAIR ROISMAN: Okay. Yes. Our view
23 was that since the decision was adverse to the
24 position of the Applicant, that normally they would
25 be appealing and would be entitled to go first and

1 then have rebuttal.

2 Are you saying that but for this oral
3 argument the Applicant does not oppose the result? I
4 assume that's not correct.

5 MS. HAYDEN: No. We filed comments,
6 and we clearly -- we filed written comments. We have
7 the right to request oral argument. We felt that our
8 written comments were very thorough and were very
9 clear that we do very much oppose the Proposal for
10 Decision as well as have identified numerous errors
11 and what we see as omissions that create an incorrect
12 record. So if -- so I think we've preserved our
13 position for the record in our written comments.

14 CHAIR ROISMAN: Okay. All right. Well
15 I think we would like to begin with you, Ms. Hayden.
16 But let me turn to Ms. Dingledine.

17 First of all, Ms. Dingledine, do you
18 expect that the -- any state agency will be
19 supporting the position of your clients Ms. Allen and
20 Mr. Binder?

21 MS. DINGLELINE: Not that I know of,
22 Your Honor.

23 CHAIR ROISMAN: Okay. Then you'll have
24 the full 30 minutes to respond after Ms. Hayden and
25 Mr. Guzman have presented. Okay.

1 MS. DINGLELINE: Very good. Thank you.

2 CHAIR ROISMAN: All right. So we will
3 begin the oral argument now. It's -- according to my
4 computer it's 1:09. And Ms. Hayden, you have the
5 floor.

6 MS. HAYDEN: Chairman Roisman, the
7 Applicant filed very detailed comments on the
8 Proposal for Decision. And I don't intend to walk
9 through all of our positions. We include a very
10 specific and clear outline of the areas that we
11 identified as being inaccurate. And so I'm going --

12 (Audio cutting out)

13 CHAIR ROISMAN: Ms. Hayden, you're
14 cutting in and out. The court reporter was trying to
15 indicate to you that she is having a hard time
16 hearing you. Your connection -- the video is now
17 gone completely and the audio is sort of breaking up.

18 Ms. Hayden? We may have to wait a
19 moment for her to get a better connection. Let's
20 see. She may be calling in.

21 While we are waiting, who is Caller 1?
22 Caller 2, is that you, Ms. Hayden?

23 MS. HAYDEN: Can you hear me?

24 CHAIR ROISMAN: We can hear you now.
25 We don't have a video, but we could hear your audio.

1 Are you on the phone or still using the video audio?

2 (Pause)

3 CHAIR ROISMAN: Ms. Sears, please make
4 sure the record reflects the fact that we had this
5 pause due to connection problems.

6 THE COURT REPORTER: Yes. Thank you.

7 CHAIR ROISMAN: Thank you.

8 MS. HAYDEN: You may be able to hear me
9 now?

10 CHAIR ROISMAN: We can hear you just
11 fine. We don't see you.

12 MS. HAYDEN: I apologize. I had to
13 connect to a different platform at my office. And so
14 I'm forgetting where I left off.

15 We wanted to point the commission to
16 several things. The request for oral argument asked
17 the commission to define or determine the meaning of
18 energy facility development as it's set forth in the
19 town plan for purposes of orderly development. And
20 in our view that --

21 (Audio cutting out)

22 MS. HAYDEN: I requested our IT
23 Department to come down to help me. My assistant is
24 on this call, and so I hope that this doesn't
25 continue to happen.

1 CHAIR ROISMAN: Let me -- Ms. Hayden, I
2 know it's not helpful for you to have to keep cutting
3 in and out. Why don't we just take a brief recess,
4 wait for your IT people to come to your office and
5 see if they can solve the problem, and resume again
6 in 10 minutes. Will that work?

7 MS. HAYDEN: That works. I would very
8 much appreciate it, and I apologize very much for
9 this.

10 CHAIR ROISMAN: No. No. We are
11 working to get a hearing room together. So we hope
12 to stop --

13 MS. HAYDEN: It's 1:14. Should I be
14 back at?

15 CHAIR ROISMAN: Come back at 1:25. We
16 will just -- the rest of us will just go into pause
17 mode. And at 1:25 we will try to restart the
18 argument. None of your time has been used yet, and
19 we will start then again hopefully.

20 MS. HAYDEN: Thank you.

21 CHAIR ROISMAN: Okay. Thank you. Good
22 luck with the IT.

23 (Recess was taken.)

24 CHAIR ROISMAN: Ms. Hayden, do you want
25 to just run a test to make sure everything is working

1 okay?

2 MS. HAYDEN: Test. Test. Can you hear
3 me?

4 CHAIR ROISMAN: Very, very clearly.

5 MS. HAYDEN: I very much apologize.
6 I've got my IT person behind me. Hopefully this
7 doesn't continue to happen.

8 CHAIR ROISMAN: No reason to apologize.
9 But we will start over. Just one thing, if anyone
10 on the phone was using it just to listen in, please
11 mute your phone so that there is no background noise
12 coming in. And those of you who are also visible,
13 please, unless you're intending to speak, please also
14 mute so that we don't get any inadvertent noise.

15 Ms. Hayden, you can start again, and
16 you have the full 30 minutes.

17 MS. HAYDEN: Thank you very much,
18 Chairman. Now the Applicants or the interveners have
19 in their comments requested oral argument on the
20 issue of the meaning of energy facility development
21 both for purposes of orderly development according to
22 their comments as well as just with respect to
23 interpretation of the town plan generally.

24 And so the first point with respect to
25 orderly development, the hearing officer did not make

1 any findings on orderly development in this case.
2 And so we think it would be irrelevant and perhaps
3 improper to make findings with respect to -- at the
4 commission level -- orderly development when the
5 hearing officer decided not to address any of the
6 substantive 248 criteria in her findings. That's
7 kind of a procedural issue. But more to the
8 substance, with respect to town plans and the level
9 of deference that a body should provide to towns'
10 interpretation of their own plans, there is a case --

11 CHAIR ROISMAN: Excuse me, Ms. Hayden,
12 we don't intend to reach any merits issues under 248
13 at this stage. From the commission's perspective,
14 the only issue that is on the table is whether the
15 application should be accepted by having met the
16 preferred site prerequisite for a facility larger
17 than 150 KW. So I just didn't want you to spend any
18 part of your time arguing the merits of the
19 underlying application which we would, of course,
20 reach should we determine that the application meets
21 the prerequisite for preferred site.

22 MS. HAYDEN: Thank you, Chairman
23 Roisman. So more to the substance of that, the issue
24 of interpretation of a town plan, and this is central
25 to the hearing officer's Proposal for Decision, the

1 Vermont Supreme Court in in re: Kisiel, K-I-S-I-E-L
2 172 Vermont 124, it's a 2000 decision, spoke directly
3 to the issue. And in that case it was the
4 Environmental Board, but interpretation by the
5 Environmental Board under Act 250. A municipal plan
6 provision where the Environmental Board disagreed
7 with the interpretation construed by the
8 municipality. And the court said in relevant part
9 that where there is an ambiguity in the wording of a
10 plan the board must look to the interpretation of the
11 plan by the municipal bodies responsible for its
12 implementation and enforcement. That's at page 133
13 of that decision. The decision goes on to say, and
14 this is again, we think very analogous to Section
15 248, for purposes of Act 250, the purpose of Act 250
16 is not to supersede local regulation or land
17 development. Although Act 250 gives the board and
18 this court on appeal the power to override a town's
19 implementation of its own plan, this power should be
20 exercised only when the local construction of the
21 town plan is plainly erroneous. No other policy will
22 maintain local control of land use planning and
23 promote fairness and consistency in state and local
24 regulatory review. We must give deference to the
25 determination of the board, but the board in turn

1 must give deference to the determinations of local
2 bodies in applying the plan.

3 So we think that's kind of the
4 governing construct as to how this commission should
5 look at the town, in this case the Town of Randolph's
6 interpretation and implementation of their town plan
7 with respect to preferred siting, and in particular,
8 for projects located on steep slopes, i.e., slopes
9 greater than 25 percent.

10 The town itself consistently set the
11 standard that the concern with respect to preferred
12 siting relates to -- or with respect to the
13 prohibition of steep slopes relates solely with
14 respect to the placement of the solar panels. That
15 was stated in Exhibit 14 which was the town's letter
16 accepting Norwich's commitment to move the solar
17 panels on slopes less than 25 percent. And there
18 were four hearings after that important December 14
19 letter from the planning commission accepting
20 Norwich's commitment that where these issues came up
21 again and again, and the town never backed away from
22 its standard, which is that for its interpretation of
23 its plan, is that if there are solar panels -- if
24 there are other -- if there is other development in
25 the area of disturbance, but not solar panels on

1 slopes greater than 25 percent, that the Applicant
2 had satisfied their concerns. And those were exactly
3 the facts here. We walked through it in quite a bit
4 of detail already in our written findings.
5 Importantly, and this goes to another --

6 CHAIR ROISMAN: Excuse me, Ms. Hayden.

7 MS. HAYDEN: Yes.

8 CHAIR ROISMAN: I'm looking at the town
9 letter of the 14th of December where they say they
10 accept your guarantee. And then they quote your
11 language, that is Norwich Technologies' language from
12 the previous day. I don't see anything in there that
13 directly addresses the question you're now addressing
14 which is whether or not the town plan requires or
15 whether or not the planning commission required that
16 the rest of the site where there is going to be
17 disturbance should also not have a 25 percent slope.

18 Can you point me to where you believe
19 that the town has indicated that it does not think
20 that those other areas are relevant to the 25 percent
21 slope issue?

22 MS. HAYDEN: Well initially the chair
23 of the planning commission when he received the
24 letter from Mr. Binder and Ms. Allen on October 21,
25 2021, raising this issue responded to a staff person.

1 And this is Exhibit MB-6 at approximately page 20.

2 And said my recommendation would be to contact
3 Norwich Technologies to determine how far along they
4 are, to make them aware of this letter, and have them
5 overlay the actual location of the Solar Panels,
6 initial caps, on the property.

7 Norwich then was provided with a
8 December 10 notification that the project did not --
9 that it needed to demonstrate that the project solar
10 panels would not be located on slopes greater than 25
11 percent. Norwich supplied that information and
12 commitment which is Exhibit MS-13. And in MS-14 the
13 commission accepted that guarantee. It did not ask
14 about the larger area of disturbance or the access
15 road.

16 I think it's also significant that the
17 chairman of the commission, and this is Exhibit MB-
18 21, a video of the original June 10th meeting, it was
19 noted that he had walked the site prior to the
20 preferred site review. And so he was aware of the
21 larger limit of disturbance as well as the
22 approximate location of the solar panels at that
23 time.

24 And then on June 21, 2021, the
25 Applicant -- let me step back. Prior to that the

1 original -- and this is what we requested the
2 commission to take official notice of. The original
3 request of May 3, 2021, for a preferred site
4 determination and a letter of joint support for
5 preferred siting attached a site plan that showed
6 both the location of the array as well as the larger
7 area of disturbance. That same site plan accompanied
8 the -- I'm sorry, the June 21, 45-day notice which
9 was dated -- the site plan is dated April 30, 2021.
10 And it very clearly stated those two --

11 (Audio cutting out)

12 CHAIR ROISMAN: Your video is frozen,
13 Ms. Hayden.

14 COMMISSIONER CHENEY: I'm wondering if
15 she should try calling on the phone.

16 CHAIR ROISMAN: Ms. Hayden?

17 MS. HAYDEN: Yes.

18 CHAIR ROISMAN: It's just completely
19 breaking up again.

20 MS. HAYDEN: Well it won't be an
21 effective oral argument if that -- I have been told
22 by IT there is nothing more that they can do here at
23 the office.

24 COMMISSIONER CHENEY: Sometimes just
25 calling in on a regular phone with the same

1 information achieves good sound at least.

2 MS. HAYDEN: Let me try that.

3 CHAIR ROISMAN: Ms. Hayden, if you feel
4 that in order to present an effective argument you
5 need to both be heard and seen, and we are having
6 trouble having both of those today with your system,
7 I think we would have to suspend the oral argument
8 and return on a time when you can fully exercise what
9 you think is the format you need to effectively
10 present for your client. But I'm going to leave that
11 up to you.

12 I think that what Commissioner Cheney
13 suggested has worked frequently. That is, people who
14 are having trouble with both audio and video, were
15 able to get audio just fine. But I think it's up to
16 you to decide how you want to proceed. We will
17 accommodate you.

18 COMMISSIONER CHENEY: And to be clear,
19 what I meant was you don't use a computer at all.
20 You just get on an old fashioned phone, either cell
21 or landline, and then you get the sound at least.

22 MS. HAYDEN: Okay. So that's how it's
23 happened in the past, not people using their landline
24 for audio and leaving the video on?

25 CHAIR ROISMAN: With contested

1 proceedings. But we use GoToMeeting ourselves for
2 staff meeting and commission meeting, and sometimes
3 in those settings where physically being seen isn't
4 as critical, we will have somebody who says: Look, I
5 can't get the video and audio to work. And they call
6 in on a telephone and it works.

7 So the only question to you is if you
8 want to both be seen heard, and it's not working for
9 you today, then we should reschedule so that you can
10 be fully participating. That's all.

11 MS. HAYDEN: I don't think you need to
12 see me necessarily. I'll leave my video on, but I'm
13 going to call in on a landline. And I guess that
14 means I mute myself from this phone, and then I will
15 call in on a landline. It will just take a minute to
16 locate the number and call in unless there is a staff
17 person that has that number readily available. I
18 just need to go to your notice of argument.

19 CHAIR ROISMAN: Why don't you do that.
20 We will pause your time clock.

21 MS. HAYDEN: Okay. I'll join as soon
22 as I can.

23 (Recess was taken.)

24 CHAIR ROISMAN: Kim Sears, make sure
25 you let us know if there is any problem with your

1 hearing Ms. Hayden when she dials in.

2 THE COURT REPORTER: I will. Thank
3 you.

4 COMMISSIONER CHENEY: We are all
5 silent. If that's you, Kim --

6 MS. HAYDEN: I can hear you.

7 COMMISSIONER CHENEY: It sounds like
8 you need to turn off another microphone somewhere.

9 CHAIR ROISMAN: Ms. Hayden, you have
10 two mics open. You need to close off one.

11 MS. HAYDEN: I just closed it out. Is
12 that better?

13 CHAIR ROISMAN: Yes. We can hear you
14 fine.

15 MS. HAYDEN: Okay. I apologize for the
16 second time.

17 CHAIR ROISMAN: That's okay. We will
18 preserve at least 10 more minutes for you to finish
19 your argument or more if you want to take some of the
20 time that you had thought you might want to reserve.

21 MS. HAYDEN: Okay. Well I think I
22 ended with we walked through in re: Kisiel. We
23 walked through the materials that the commission
24 considered and accepted as a guarantee that the solar
25 panels would be sited on slopes not exceeding 25

1 percent.

2 And subsequent to that, in February
3 Norwich Solar had the Horizons Engineering, Mr.
4 Mayer, and then its engineers actually do that work.
5 And a site plan was filed. And both the surveyor and
6 the Krebs & Lancing certified in Exhibit MS-12 that
7 none of the solar panels would be sited on slopes
8 exceeding 25 percent. And that was -- so the
9 cumulation of that evidence we believe establishes
10 that what the town expected and wanted was that the
11 solar array be modified so that it would be moved
12 away from slopes exceeding 25 percent. There were,
13 and we have walked through it in our comments,
14 subsequent hearings where these issues were raised
15 and questioned.

16 I would also point the commission to
17 the December 7th planning commission meeting, and
18 there is a colloquy that we do discuss in our
19 comments, there is a colloquy from planning
20 commission members where they specifically focus only
21 on the solar panels and not on other components of
22 the limit of disturbance.

23 You have the videos of the subsequent
24 select board meeting minutes or select board meetings
25 on this topic. And the issue of the larger area of

1 disturbance and the meaning of energy facility
2 development was raised multiple times by the
3 landowners and Attorney Dingleline, and at no time
4 did the commission or the select board come back and
5 revoke preferred siting because of the road work or
6 the tree clearing that would occur on this site.

7 As we also know, because it's in the
8 record, that a stormwater permit was obtained for the
9 entire limit of disturbance, and it's a low-risk
10 stormwater permit. From our perspective from
11 everything that's in the record, it's clear that the
12 town was satisfied. The speculation that perhaps the
13 town wasn't satisfied is not supported.

14 CHAIR ROISMAN: Ms. Hayden?

15 MS. HAYDEN: Yes.

16 CHAIR ROISMAN: Let me interrupt you.
17 First of all, I want to make sure that our record's
18 clear. There is so many different site plans that
19 have been filed. I want to make sure -- and two of
20 them have the same designation. They are both called
21 RDS-MS-2. Am I to assume that the one that looks
22 like it's the 7th version, which is filed in July of
23 2022, is the site plan that you have submitted --
24 your client has submitted as complying with the
25 condition that the town planning commission insisted

1 on as part of its approval for this as a preferred
2 site? Is that -- does that show the correct
3 information?

4 MS. HAYDEN: That does. And the site
5 plan that was the first site plan where the array was
6 adjusted to avoid steep slopes greater than 25
7 percent was filed on February 9, 2022. That was
8 after -- because what the commission had requested
9 was a guarantee, and go out and get a survey, which
10 is what was done. And then February that information
11 was made available. There is a site plan dated
12 February 9, 2022. And that was superseded several
13 times. There were different requests -- or in
14 response to, you know, statements in the case where
15 the site plan was modified. But the site plan, the
16 location of the array has not changed since that
17 February 9, first modification to move the array
18 panels out of steep slopes, slopes greater than 25
19 percent.

20 CHAIR ROISMAN: All right. Is there
21 anything in the record that you can point us to that
22 shows that after the Norwich Technologies had the
23 survey done and had the solar panel array
24 superimposed on the survey data that shows that the
25 planning commission has agreed that its condition

1 subsequent that was built into its preferred site
2 determination has been met?

3 MS. HAYDEN: The planning commission
4 did not ask to revisit this issue. So there isn't --
5 I'm not -- sitting here today, I'm not aware of that
6 kind of confirmation in the record.

7 CHAIR ROISMAN: Okay. Thank you. Go
8 ahead. I'm sorry to interrupt.

9 MS. HAYDEN: And speaking to another
10 issue in the hearing officer's Proposal for Decision,
11 she -- and it's near the end of her Proposal for
12 Decision. But she felt that there was some confusion
13 by the planning commission as to whether or not the
14 array would be calculated with respect to an average
15 slope calculation, or more specifically, and I think
16 that confusion by the hearing officer is due to she
17 was looking back again at the historic statements
18 from Norwich Technologies in December where it
19 committed to get a survey done but also, you know,
20 referred to average slope. The survey is not done
21 with respect to an average slope. It's a survey of
22 the actual topography, and it was certified to again
23 in Exhibit MS-12 by both the surveyor and the
24 engineer for the project.

25 I don't know how much time I have

1 because it was so broken up, am I running near the 30
2 minutes or --

3 CHAIR ROISMAN: Sorry. Ms. Hayden,
4 you're not running close to the 30, but you're very
5 close to the 15. You've got about 3 minutes left on
6 that 15 minutes.

7 MS. HAYDEN: Okay. Thank you. I think
8 at this point I would like to stop for now and
9 reserve the rest of my time, understanding that
10 Attorney Guzman has some of that remaining time.
11 Reserve my time for rebuttal.

12 CHAIR ROISMAN: Okay.

13 COMMISSIONER CHENEY: Before we move
14 on, I would like to ask a couple questions based on
15 what was just said before it slips into the past.

16 You talked about the adherence to being
17 25 percent slope under that gradient solely with
18 respect to the placement of solar panels, and implied
19 that the town was all right with other development
20 being on a steeper slope such as the road, and I
21 would assume clearing, for example.

22 But -- and you put that in the context
23 of them not asking about larger areas of disturbance.
24 So was that just more or less an inference? In other
25 words, a statement, right, omission, or was there

1 actually an affirmative statement from the town that
2 they understood that other development such as the
3 access road and site preparation, clearing of trees,
4 for example, could and they understood it would occur
5 on steeper slopes?

6 MS. HAYDEN: I would refer you to again
7 Exhibit MB-21 which was the June 10th, 2021, video.
8 At approximately minute 10, Mr. Malley, from Norwich,
9 this was the preferred site meeting, the initial
10 preferred site meeting with the select board. He
11 walked through the draft site plan and described that
12 there was a larger area.

13 Again, this is the exhibit that we have
14 requested the commission to take judicial notice of
15 from May 3, 2021. The actual site plan is April 30,
16 2021. But he described that there is an area where
17 the array would be located and a larger area that
18 would include -- where they would manage for
19 vegetation growth, and a specific path for access
20 that would be determined by operations in
21 engineering. And then Mr. Malley went on to describe
22 the fact that he had walked the site with Sunny from
23 the planning commission and looking at both the
24 larger area and the location of the array.

25 As I said, I wasn't prepared -- we

1 certainly have read through and quoted many sections
2 of the other videos that were provided by the
3 landowners as exhibits, meaning the other select
4 board videos of their meetings in January, February
5 and then March. This issue did come up, and if
6 permitted, I would be happy to brief that and
7 demonstrate that the planning commission -- the
8 select board and certainly the planning commission
9 from the original application was aware that there
10 was a larger area that would be disturbed, and that
11 it was also on steep slopes. Because one of the
12 comments Mr. Malley made in his presentation to the
13 select board is -- on June 10th is that there are a
14 couple of notable features. It's a hillside property
15 where the elevations are fairly steep. And again,
16 that's after approximately minute 10.

17 COMMISSIONER CHENEY: I was just trying
18 to get to an affirmative statement. It sounds like
19 there are some areas of the discussion that were
20 recorded that talk about general awareness that there
21 are steeper slopes that will be subject to
22 disturbance, but not necessarily affirmative
23 statement that they understood that those would be
24 over 25 percent in gradient.

25 MS. HAYDEN: If permitted, I can't

1 point to it on this call for me. There were three
2 subsequent meetings of the select board where the
3 preferred siting was revisited, and also the December
4 7 planning commission meeting.

5 I very specifically recall that the
6 issue of the larger area being -- this was raised by
7 Attorney Dingleline, I think in particular, that the
8 larger area of disturbance met the definition of an
9 energy facility development. And so they were made
10 very much aware of it. But I would need to have the
11 opportunity to point you to that in the record.

12 CHAIR ROISMAN: Ms. Cheney,
13 Commissioner Cheney, you're on mute.

14 COMMISSIONER CHENEY: I've got it. One
15 last question. When you said manage for vegetation
16 growth, did you mean tree clearing?

17 MS. HAYDEN: Yes. Tree clearing. Yes.
18 And to point out again the 45-day notice specifically
19 pointed out, which was June 21, 2021, which the town
20 received, stated that there would be approximately
21 2.4 acres of the solar array with approximately 11
22 acres to be disturbed and cleared for installation
23 and shade management. Again, this well preceded
24 their consideration of the request to rescind.

25 COMMISSIONER CHENEY: Thank you.

1 CHAIR ROISMAN: Ms. Hayden, sort of
2 along the same lines as the questions that
3 Commissioner Cheney was asking you, there seemed to
4 be several places in this record in which the
5 position of Norwich Technologies is that the town was
6 made fully aware of, and then just fill in the blank:
7 There was going to be work done in areas that had 25
8 percent or more slope. That there was going to be a
9 survey done that was going to then show that the
10 panels would not be placed where the 25 percent slope
11 was.

12 But there is not in the record any
13 direct statement from the town or planning commission
14 that says yes, that's okay. It's still a preferred
15 site.

16 So my question to you is, is it Norwich
17 Technology's position that in the absence of a clear
18 statement from the town that we have the jurisdiction
19 to decide, based on the record that's here, that in
20 fact, the conditions that the town laid down for
21 purposes of issuing a preferred site letter have been
22 met? Or is it your position that it's the town's
23 decision to say that those conditions have been met,
24 and that we need to ask the town to give us a
25 statement?

1 MS. HAYDEN: Our position is that the
2 record is very clear that what the town was looking
3 for was the commitment back in December 14, the
4 commitment that Norwich would conduct a survey and
5 then move the array so that the solar panels would be
6 moved outside of slopes greater than 25 percent.

7 That Exhibit MS-14 ends with: We
8 request to see your final solar plan, array plan,
9 prior to construction.

10 Now we have been in litigation before
11 the commission for two years, so the project is not
12 close to construction at this point. You know, if
13 you're asking me should we -- should the Applicant go
14 back to the town at this point and/or should the
15 commission request information from the town to
16 confirm their understanding? I don't think we would
17 be opposed to that.

18 CHAIR ROISMAN: Well the question
19 really is, is it your position that we have the
20 jurisdiction to decide the question of what the town
21 asked for has now been provided? It's true that a
22 survey has been done, and an overlay has been
23 provided. But as you know, Mr. Binder argues that
24 the slope characterization done by the survey is
25 inadequate and that a different slope

1 characterization should exist. So arguably his
2 position is that you don't yet have the kind of
3 survey that goes along with the commitment that the
4 commission -- the planning commission -- was
5 insisting on.

6 We are not at the moment trying to
7 decide that question. I'm trying to just find out
8 from you who do you think should be deciding that
9 question? Do you believe it should be us, this
10 commission, or do you believe it should be the
11 planning commission that's deciding this question?
12 That's all I'm asking.

13 MS. HAYDEN: I believe it should be the
14 planning commission and the select board as the
15 executive body of the town that then affirms a town
16 plan. The planning commission interpreted its plan
17 and requested that that survey be done and that the
18 array be modified and moved. And subsequent to that
19 the select board heard all of these same arguments
20 from Mr. Binder.

21 And in three different meetings in
22 request to rescind preferred siting, and chose not to
23 do that, and they did not ask to see the survey
24 again. But certainly if that's the -- you want that
25 affirmative confirmation, that's something the

1 commission can request. I think the decision very
2 clearly is with the town and not with this Public
3 Utility Commission largely because a lot of what
4 you're doing is speculating as to what may have been
5 in their minds. And to me that seems improper.

6 CHAIR ROISMAN: Okay. Thank you. That
7 answers my question very clearly. Thank you. Okay.

8 So Mr. Guzman, I'm not going to say
9 reserve the full 15 minutes now, but you certainly
10 can have the 5 you asked for.

11 MR. GUZMAN: Thank you, Mr. Chair. I
12 don't anticipate going over 5. I just first wanted
13 to address the requested findings within the
14 interveners' June 20, 2023, comments on the Proposal
15 for Decision. And just state that, you know, our
16 position is that those are premature, not within the
17 scope of the issues considered and the conclusions
18 reached by the hearing officer, in the proposed
19 order.

20 The interveners have requested that the
21 commission make findings on determining the Randolph
22 town plan's definition of energy facility development
23 and its application to be slope prohibition within
24 the town plan. And while the interveners requested
25 findings may be relevant to a conclusion on the -- as

1 to whether the project does or does not meet the
2 Section 248(b)(1) criteria, the hearing officer made
3 no findings on Section 248(b). And those findings
4 are dispositive.

5 (Audio cutting out)

6 CHAIR ROISMAN: Ms. Hayden, I think you
7 need to mute your phone. Ms. Hayden, your phone is
8 still live.

9 MS. HAYDEN: I believe I just muted.
10 I'm muting again now.

11 MR. GUZMAN: And I was -- and those
12 findings that are requested by the interveners in
13 that June 20 comment are not dispositive to the
14 hearing officer's denial of the project.

15 And so our position is that those
16 findings do not need to be adopted within the
17 Proposal for Decision that we have today.

18 In the -- on the second issue that I
19 will not go into significant detail, because I
20 believe they are explained within the Department's
21 comments on the Proposal for Decision, but the
22 Department does not support the proposed order's
23 dismissal of the select board and planning
24 commission's preferred siting letter here.

25 As the Proposal for Decision does

1 explain, the intent of rule 5.103 is to provide an
2 optional way for towns to guide development of net
3 metering and for host municipalities and put a siting
4 of generation facilities. And I would just reiterate
5 that as expressed in our comments that the
6 evidentiary record demonstrates that the select board
7 and the planning commission letters meet the intent
8 of that rule. And that is primarily due to the fact
9 that there was substantial consideration, discussion
10 on the applicability of the town's plan slope
11 prohibition to the project, including the solar array
12 as well as other areas that the interveners have --
13 do consider development as defined within the town
14 plan.

15 Those were, as Attorney Hayden
16 outlined, the select board had significant
17 discussions between January, 2022, and again in
18 February, and again in March. Many of the issues
19 raised by the interveners here regarding the
20 definition of development were raised within those
21 meetings, and those meetings are within the record
22 including video recordings.

23 CHAIR ROISMAN: Mr. Guzman, let me just
24 understand.

25 MR. GUZMAN: Yes.

1 CHAIR ROISMAN: Is it the Department's
2 position that although there is not an affirmative
3 statement from the town or the planning commission
4 that its condition subsequent, which was part of its
5 preferred site letter, this is the letter of December
6 14th of 2021, that those conditions have been met?
7 That there is nothing that we need to be asking for
8 or expect to have filed with us to confirm that those
9 conditions have been met. That the record, by
10 itself, with nothing more is adequate, or that there
11 should be something more?

12 MR. GUZMAN: I think that to -- I think
13 that the suggestion that a, you know, potential
14 condition following issuance of the CPG, if one was
15 issued, requiring an affirmative statement by the
16 town, the Department would certainly not be opposed
17 to that. I think that it is certainly helpful in
18 understanding the town's understanding of the
19 project.

20 My focus here is on the evidentiary
21 record before us in that the town heard the issues
22 raised regarding the application of the definition of
23 energy facility development and considered whether
24 there was a necessary action to affirm their initial
25 preferred siting letter. And within those

1 discussions they opted not to do so. It is not an
2 affirmative declaration by the town, but it is also
3 evident that these issues were considered, and they
4 opted to let the letter stand, so to speak.

5 And while the Department does not
6 dispute the commission's ability to review the
7 validity of a preferred siting letter under its rule,
8 the Proposal for Decision does cite to a couple of
9 Petitioner communications that suggest an undue
10 influence that override the deliberative process by
11 the town.

12 And as we explained in our comments,
13 the Department's position is to defer to the town's
14 decision and designation of the current project as a
15 preferred site in context of rule 5.103 absent a
16 clear demonstration of undue influence. And we would
17 -- we argue within our comments that that undue
18 influence is not present within the record.

19 So -- and that is, I believe, all I
20 have to say for my argument. Thank you.

21 CHAIR ROISMAN: Ms. Hayden, I believe
22 that you now have reserved at least 5 minutes for
23 rebuttal. And after Ms. Dingledine has spoken, I
24 will call on you again. Okay?

25 MS. HAYDEN: Thank you.

1 CHAIR ROISMAN: Ms. Dingledine, you
2 have 30 minutes -- well I'm sorry.

3 Mr. Kisicki, did you have anything?
4 You said you might want to say something. I don't
5 want to deprive you of your opportunity.

6 MR. KISICKI: Thank you, Mr. Chairman.
7 The Agency has nothing to add. Thank you.

8 CHAIR ROISMAN: Okay. All right. Ms.
9 Dingledine, you have 30 minutes.

10 MS. DINGLELINE: Thank you, Your Honor.
11 I might just note that I have been sort of keeping
12 track of the amount of time that the other side has
13 had, and by my calculations they have exceeded 31
14 minutes. But so I don't really think there is any
15 rebuttal time left. But anyway.

16 CHAIR ROISMAN: We are going to give
17 them some leeway given how difficult it is to present
18 an argument interrupted several times due to
19 technological problems that are not the fault of the
20 party.

21 Go ahead, Ms. Dingledine.

22 MS. DINGLELINE: Thank you. I want to
23 start at the beginning. And the beginning is what
24 representation was made originally by Norwich Solar
25 Technologies to the Town of Randolph planning

1 commission. The town plan was represented as being
2 fully complied with by this application. There was
3 actual quotations from the town plan, the energy --
4 renewable energy siting section. But unfortunately,
5 the developer decided to provide only a portion of
6 the town plan. The specific prohibition section was
7 omitted from the presentation to the planning
8 commission.

9 So in the first instance there was a
10 significant misrepresentation of the town plan to the
11 town planning commission. When Mr. Binder brought
12 that up later after the letter was provided and sent
13 and accepted by Norwich Solar Technologies, the
14 planning commission convened a meeting, had this on
15 their agenda, discussed it, and during that meeting
16 they said: Holy cow. We didn't even look at our
17 town plan. There is a prohibition for steep slopes
18 in there in excess of 25 percent grade? Gosh. We
19 didn't even know that.

20 And the result of the discussion was
21 they were going to rescind the letter, but they said:
22 Gee, we better check with our lawyer. So they were
23 going to send out for Mike Tarrant, I believe,
24 Tarrant, Marks & Gillies, whatever their name is now,
25 to tell them whether they could get sued and can they

1 rescind this letter because they didn't want to have
2 a problem. And that's because they were discussing
3 the Apple Hill Solar case where the town of
4 Bennington had been sued by a different developer
5 client of Ms. Hayden's.

6 So anyway, what happened was the very
7 next day by email illegally a vote was taken to not
8 rescind the letter, and we don't know what happened
9 to the attorney's opinion about whether or not they
10 could get sued. Later on -- and it's cited by the --
11 so what happened next was then there is back
12 pedaling. The developer says: Oh gee. We are --
13 the average slope, it's less than 25 percent.

14 Then they say: Oh gee, we are going to
15 put these pylons into the ground. So this actual
16 stake in the ground, the base for the actual solar
17 panel, that in and of itself won't be on 25 percent
18 grade, despite the fact that the limits of
19 disturbance that had been identified as 11 -- more
20 than 11 acres, and include full development of a
21 road, not -- top dressing was also misrepresented and
22 called out by the hearing officer. There is cutting
23 and filling. There is excavation. It is clear that
24 this is construction, development. It is within all
25 of the statutory definitions that Mr. Binder and Ms.

1 Allen have presented to the PUC.

2 The limits of disturbance are defined
3 in the PUC rules, and it's 5.103. There was some
4 error in citing that in the neighbor's brief. But
5 that's where it is actually defined. And it means
6 the boundary within which all construction,
7 materials, storage, grading, landscaping and other
8 activities related to site preparation, construction,
9 et cetera, et cetera. And then it says: Including
10 areas disturbed due to the creation or modification
11 of access roads, utility lines and the clearing
12 and/or management of vegetation. Further, the land
13 --

14 CHAIR ROISMAN: Ms. Dingleline, let me
15 -- I want to make sure I understand your position.
16 You're making two points here it seems. One is that
17 there was some failure, to be completely candid, to
18 put the nicest spin on what you're saying, in the
19 initial application. And the second is that there
20 are provisions of the town's town plan which would
21 say that you shouldn't just limit your view of
22 whether this is a preferred site or acceptable site
23 to where the panels are going to be, but you should
24 look at the entire limit of disturbance.

25 And my question to you is: If the

1 town, in spite of both of those things, submits to us
2 a letter that says: We designate this site as
3 preferred, and our condition, which was that you do a
4 survey, et cetera, et cetera, has been met, is it
5 your position that we should nonetheless challenge
6 the validity of that letter? Or that the town
7 submitting it basically subsumes all the concerns
8 that you raise for our purposes, although it might
9 give Mr. Binder rights with regard to some argument
10 he might want to make against the town in some other
11 court.

12 MS. DINGLELINE: Well it's not up to
13 the town. They are preempted; right? For energy
14 projects. And the local control that has been
15 provided to them is let's look at your town plan
16 language. And you can make a recommendation about
17 what you think that means.

18 The problem is the recommendation is
19 clearly erroneous based on the definitions in their
20 own zoning ordinance in chapter 24 that gives rise to
21 the ability to enact a town plan, and to do such a
22 thing would be an absolute arbitrary and capricious
23 application of the town plan against all of the case
24 law that has been provided to you as well as Kisiel
25 and Molgano, as well as the other one that I printed

1 out and read in quite a bit of detail; petitions of
2 VELCO and GMP, that was -- that the Department of
3 Public Service cited, as well as John Russell which
4 the VELCO decision cited.

5 CHAIR ROISMAN: Let me stop you for a
6 second, Ms. Dingleline. We are not going to decide
7 here today the merits of the provisions of 248(b)
8 that say if you've got a project that seeks a CPG,
9 you've got to meet these conditions. And some of
10 them are the town plan. And what does the town plan
11 mean, et cetera, et cetera. All we are deciding
12 today is whether or not this site qualifies to apply
13 for a CPG given that it's bigger than 150 KW and it
14 needs to have some kind of a preferred site status.
15 And the Applicant's only submitted one basis for
16 that, i.e., that the town produces a letter that says
17 it's a preferred site.

18 COMMISSIONER CHENEY: May I -- I just
19 would like Caller 5 on the phone to mute themselves.
20 We see that lighting up frequently with static. And
21 it's very hard to hear. If someone is on the phone
22 and not muted, could you please mute yourself.

23 CHAIR ROISMAN: Caller 5. Okay. All
24 right. Ms. Dingleline, so the question is the narrow
25 issue that we are trying to answer if the town says

1 this is a preferred site, and any condition that it
2 laid down as a precondition to saying it's a
3 preferred site, the town says has been met, is there
4 a reason why the commission or even a legal basis by
5 which the commission can say in this case; no, this
6 is not a preferred site. Or does the town have the
7 control of that, and they have -- if it could happen,
8 they exercise it.

9 MS. DINGLELINE: I would say they don't
10 have the control. But even if they do, their
11 decision is based on misrepresentations which are
12 very well identified by the Proposal for Decision on
13 page 19. And so it talked about inappropriately
14 influence the town's decision. It talked about the
15 Applicant's attorney arguing that town plans may not
16 prohibit solar generation siting and that the
17 Randolph town plan provisions regarding steep slopes
18 look like de facto zoning. And it goes on for four
19 or five different misrepresentations that
20 inappropriately influence, and was wrong information,
21 and so that the decision that was made was polluted
22 by that as well as threats of litigation which
23 obviously were understood and were part of the
24 decision-making process because Sunny Holt, the
25 Chairman of the planning commission, is quoted as

1 saying: We don't want to get sued. You know, this
2 will subject us to liability. That seems to be a
3 common threat that's going on in these cases. And
4 that is unduly interfering with a town.

5 There is also evidence in this case, a
6 conflict of interest, in violation of the open
7 meeting law, while that's not under the PUC's
8 jurisdiction it certainly should go to credibility of
9 the decision makers that are at issue here. We have
10 --

11 CHAIR ROISMAN: Do you have case law
12 that indicates that we have the jurisdiction? Let's
13 accept the point that you're making, that we have
14 jurisdiction to decide the underlying validity of a
15 preferred site letter from a town or is that the
16 decision that meets -- that certainly can be
17 challenged, but is it not to be challenged with us
18 but to be challenged in a court someplace by, you
19 know, a resident with appropriate standing? Do you
20 have some precedent that you can point to that says,
21 no, that's your business?

22 MS. DINGLELINE: I do not have any case
23 law precedent. But the fact of the matter is that,
24 pardon me, that the preferred site determination can
25 be assailed if there is just and sufficient cause for

1 that. So whether it's deciding that you have no
2 basis, or you're misled, or the basis is not
3 sufficient and you made an erroneous decision that we
4 won't accept, versus, okay, that's your decision, but
5 we reject that decision because it doesn't even
6 comply with your town plan, I mean this is what? An
7 on-the- ground engineering notion? I mean when is
8 any permitting authority -- certainly in my 30 years
9 of Act 250 work and zoning work in Vermont, I've
10 never seen a permit that said: Here you go. Go do
11 what you want and let us know what you did later. Or
12 that you built it in compliance and you engineered it
13 on the ground.

14 The hearing officer's point about we
15 don't have any specific location denoted here, what
16 is the preferred site? It's all going to be figured
17 out later retroactively how you say that -- where you
18 put these things? But, you know, procedurally
19 whether there is no basis for the position of this
20 interpretation.

21 The statute itself ultimately turns on
22 what does the town plan say. And if the town has a
23 different interpretation and they may get sued for
24 arbitrary and capricious application somewhere else,
25 but in this instance and in this moment of the

1 process, I do not think that the commission -- I
2 think they have the authority to say this is
3 information based upon unduly influenced
4 misrepresentations that clearly are evident. And the
5 threat of litigation was the icing on the cake.

6 We do not think that this is a proper
7 decision. It's not credible. Whatever. I think you
8 have the jurisdiction for that. If you don't believe
9 so, then certainly there is the opportunity for you
10 to reject that for just and sufficient cause, that,
11 you know, that this is not what it appears to be. It
12 doesn't comply with the law. So whether that's dealt
13 with up front now to reject the preferred sites
14 letter, because it's not worthy of the position they
15 take, or it's assailed later, I think it's one or the
16 other. But it is the heart of the matter. If the
17 preferred site letter and location does not comply
18 with the town plan, strict prohibition.

19 And one thing I want to change to is
20 land conservation measures, because that is something
21 that DPS talked about in terms of some policy, and a
22 policy document that says you have to explain why
23 there is a policy or what the specific land
24 conservation measure is. And they say it's not a
25 land conservation measure to have a prohibition for

1 slopes with an actual 25 percent grade specification
2 for it.

3 I think that we have -- Mr. Binder has
4 very well provided -- I mean look at Apple Hill.
5 That's from the Supreme Court. They talked about
6 rural residential district versus a specific location
7 saying that a prominent hillside. That's a specific
8 land conservation measure.

9 Now what is a land conservation
10 measure? It is actually defined. And it's to not
11 develop and conserve land. It's to guide
12 development. Here not there. Conservation. When
13 you conserve your land, you sell your development
14 rights for a conservation easement. So, of course,
15 this is -- and we have also argued what the policies
16 are. And it's erosion.

17 And now the one thing I want to point
18 out is that specific policy is clear, clear as a
19 bell, and in fact the Petitioner even admitted that
20 they understand what the policy was designed to do.
21 The Proposal for Decision on page 16 states -- it's
22 the hearing officer talking about a letter after
23 there is email correspondence between Ms. Hayden and
24 the town, and it's going back and forth. She sends
25 an official letter dated December 13, 2021, that says

1 quote: While we all are concerned with the potential
2 erosion from installation of solar panels on slopes
3 greater than 25 percent slopes, all data presented to
4 date is not site specific.

5 So that admission that we are all --
6 while we are all concerned about the potential
7 erosion, obviously steep slopes prohibitions are for
8 that purpose. This is in a section that says you
9 can't build it in wetlands. You can't build it in
10 the flood hazard area. You can't build it on stream
11 banks. You can't build it on slopes in excess of 25
12 percent grade. Those are absolutely specific
13 enforceable land conservation measures or policies
14 that are obvious.

15 The town plan has all sorts of
16 documentation in it about erosion, and obviously
17 everyone knows what that's about. And further --

18 CHAIR ROISMAN: Ms. Dingledine, just a
19 second. Before you leave that. Do you believe that
20 if we were to conclude that the town had properly
21 designated this as a preferred site, they reached
22 that conclusion, that we would in any way constrict
23 the opportunity for your clients to argue in the CPG
24 proceeding that the provisions of 248(b)(1)(C) have
25 not been met, and that we should be giving due

1 consideration to or greater than due consideration to
2 the town's plan, mission, criteria, et cetera, et
3 cetera. Do you think that argument would be in any
4 way compromised if we accept that now the one issue
5 that I think is clearly in front of us, does this
6 site qualify as being a preferred site within the
7 definition of our regulations?

8 MS. DINGLELINE: Yes. I think we are
9 prejudiced because if this doesn't meet the very
10 definitions of your own rules, limits of disturbance,
11 that's where the construction happens. Is this
12 piecemeal -- it's hard -- we live in a time where
13 when people say things over and over it becomes true
14 apparently. This is a target that just keeps getting
15 repeated, but it is against the plain language of the
16 ordinance. It's against the plain language of the
17 rules of the PUC. It's -- where is the site? There
18 is no site defined. We don't know that. Apparently
19 we are not going to know that until after
20 construction. How can you approve something ahead of
21 time when you don't know where it is? That's the
22 bottom line that I take from the hearing officer's
23 Proposal for Decision.

24 This project makes no sense.
25 Seriously, that's where it comes down to. There is

1 no way to control what's going on. How can you say
2 they built it according to the plans when there are
3 no plans?

4 And the other issue is there were
5 repeated requests by Dr. Binder and Ms. Allen about
6 show us the elevations, Lidar, whatever, and the
7 hearing officer asked for those to be provided. And
8 instead they got some kind of partial, oh, we are
9 going to show you just the slopes over here within
10 the limits of disturbance and not within the entire
11 limits of disturbance.

12 So it's very concerning when we see
13 right from the get-go when an Applicant comes in and
14 misrepresents the language in the town plan by
15 omission, actually puts it in in quotations and stops
16 when it starts saying: And the prohibited locations
17 are dot, dot, dot. That is who we are dealing with
18 in this case. And the misrepresentations of fact and
19 of law and of the process continued throughout this
20 entire interaction with the town. It is incumbent, I
21 think, on the PUC, you know, towns have been given an
22 unfunded mandate here. And, in fact, it's even worse
23 than an unfunded mandate. It is a situation where
24 they are not equipped with the tools to even know
25 what they are supposed to be doing in a town plan.

1 Years ago Vermont League of Cities and
2 Towns asked me to come in after the Newark case with
3 the met towers up there, and said what do we need to
4 do for our town plans? We need to teach all of
5 planning commissions and regional planning
6 commissions what to do about an aspirational document
7 that was a planning document that was subsumed into
8 Act 250 and used there as a regulatory document. And
9 what happened in Act 250 was the problem was that all
10 of the town plans said "should" not "shall."
11 Anything that said "should," forget it, criterion 10,
12 you lose.

13 So we taught everybody you've got to
14 put "shall." If you're going to put steep slopes
15 that doesn't mean anything. You've got to have a
16 number. What is a steep slope? Define it. That is
17 the situation for these towns. Randolph is a very
18 small town. I live there. I was asked as a
19 volunteer to come and help write the town plan. You
20 know, and then to have a planning commission of
21 people that are not experts on any of these things
22 except well the realtor that listed the property is
23 on the planning commission, but I don't consider him
24 an expert. They try to write a town plan.

25 Now then what we are looking at here is

1 basically what I would refer to as Boss Hog justice.
2 There is an agenda here. There is a reason why there
3 is arbitrary and capricious interpretation of sure,
4 let's figure out a site that is one little panel
5 here, and a one little panel there. And forget about
6 the road that's on very, very steep slopes. We all
7 tried to climb it. We were all out of breath. We
8 were climbing through all the trees and pucker brush
9 that's grown up, because there is no road anymore.

10 So we expect this town to write clear
11 written community standards for aesthetics in that
12 town plan and land conservation measures, and the
13 notion that a steep slope prohibition of this clear
14 language could be interpreted any other way is
15 ridiculous. And it is -- it smacks of Boss Hog
16 justice is what I would call it. It is not treating
17 everyone fairly. You write a plan, and that's what
18 you're implementing. You don't sit there and figure
19 out how to manipulate and accept something. So even
20 if they accepted, I don't believe they have the
21 authority to. I think it is absolutely against the
22 language of the town plan, and it should not be
23 accepted.

24 CHAIR ROISMAN: You have 5 minutes, Ms.
25 Dingledine.

1 MS. DINGLELINE: Thank you. Yeah. I
2 just want to highlight the Proposal for Decision on
3 page 19 that talks about all the meaningless and
4 misleading representations. And on page 23 it says:
5 However, the record shows that members of the select
6 board and planning commission had concerns about
7 construction occurring on slopes greater than 25
8 percent. And that they based their decision to issue
9 the letter on a belief that the project would require
10 between 4 and 5 acres of clearing and modest
11 improvements to an existing road.

12 Well the hearing officer clearly
13 understood the quote: Substantial earth works of
14 clearing, and that the project's access for the
15 access drive. And she also -- they also point out
16 that the materials presented would require up to 11.9
17 acres of clearing.

18 Now there is a request to put in this
19 judicial notice thing. I know we are dealing with
20 that differently. But that says -- somewhere on a
21 piece of paper it said 11.9 acres. The problem is
22 when Brendan Malley presented the application for the
23 preferred sites letter to the planning commission he
24 said 4 to 5 acres. He didn't say anything about 11
25 acres. So it begs the question again, what is with

1 these representations? If the PUC can't rely on full
2 and fair disclosure from developers to towns who have
3 to make these important decisions for their
4 communities, I mean how many of these cases are
5 contested? How many times are representations made
6 that must be relied on by the PUC that they are
7 honest and forthright? And that is not what we
8 believe has happened here.

9 So we think, given all of the
10 information, that we think has unduly influenced a
11 bad decision by folks who admittedly never even
12 looked at their town plan to begin with and didn't
13 even know they had a prohibited steep slopes
14 prohibition, it's very concerning. If you don't
15 believe you have the jurisdiction to reject this
16 preferred sites letter based on all of this
17 information, and you think it's up to the town, well
18 then we will certainly argue in the next phase that
19 it should not be relied on. It is arbitrary,
20 capricious, and I think that that was, in fact, an
21 issue that was discussed in the Apple Hill case, and
22 at one point the commission agreed that allowing one
23 project in a certain district and not allowing
24 another one might have been a problem. However,
25 there were significant differences that were

1 identified, and the Supreme Court reversed on that.
2 Here I don't see how you could ever allow this kind
3 of interpretation of a town plan because what happens
4 to the next time? How do you then preserve the
5 application or interpretation of how you decide on a
6 preferred site when you are facing a situation where
7 we don't even know where the preferred site is?

8 And frankly, the preferred site should
9 be the entire limits of disturbance, the 11.9 acres.
10 Because -- I'll finish with this. The town plan
11 prohibition itself says quote: Energy facility
12 development. Doesn't say solar panels being put in
13 the ground. It says: The energy facility
14 development. So if the preferred sites letter is for
15 little spots in this 11-acre parcel, and you give
16 them a CPG for that, how do they get to the site if
17 you're not permitting the road as part of the
18 facility? Which we obviously know it is from your
19 own rules. So I don't even understand how this could
20 be a preferred site. It hasn't been identified. But
21 in reality, it has to be the entire thing because
22 that's where all of the construction is happening.
23 And then the decision has to be made. Within those
24 limits of disturbance, is there excavation or
25 construction activity happening on steep slopes? And

1 of course there are. There is no way to get in there
2 without going up -- I don't remember what -- it's
3 like 50-some-odd percent grade. It's very, very
4 steep. I was out of breath.

5 So we are very hopeful that you will
6 listen and refer to the reply in the reply brief of
7 Dr. Binder and Ms. Allen. They have worked very hard
8 on this, and they appreciate all of the time that
9 you've listened to all of their information. Thank
10 you.

11 CHAIR ROISMAN: Thank you, Ms.
12 Dingleline. Ms. Hayden, you have 5 minutes.

13 MS. HAYDEN: First, I want to say there
14 was never a threat of litigation in this case. That
15 absolutely never happened. And I'm offended that
16 that's being suggested here today. I also was not
17 involved with this other solar client in litigation
18 against a town previously. I had no involvement.

19 The facts were that the November email
20 that I wrote I sent to my client who was asked -- who
21 asked me what I thought about the Binders' October
22 letter. I gave my theory as to why the town is not
23 precluded from issuing a preferred sites letter.
24 That's the language in my email from November. And
25 then I gave some theories. And that's completely

1 consistent with rule 3.1 of the Code of Professional
2 Conduct regarding meritorious claims.

3 This Applicant did not threaten to sue
4 the town. This concept of another case with
5 threatened litigation was raised by Attorney
6 Dingledine. The Applicant never raised that.
7 Instead, as soon as the issue was raised by the town
8 and they said that they would rescind this preferred
9 site application or determination, the Applicant
10 acquiesced immediately and agreed to the condition
11 that the town said to move this -- the array, the
12 solar panels off of steep slopes.

13 The town -- the notion that the town
14 doesn't understand what its town plan means, I think
15 there is no evidence in the record that they don't
16 understand what their town plan means. As far as Mr.
17 Malley's original statements about the limit of
18 disturbance being 4 to 5 acres, the site plan, the
19 April 30th site plan did not have the acreage amounts
20 on it. That was -- it turns out that that was a
21 mistake. It was not a misrepresentation.

22 The June 21, 2021, 45-day notice was
23 absolutely clear and which the town received that the
24 total limit of disturbance would be approximately 11
25 acres. So I think these attacks, these personal

1 attacks, rather than arguing the merits of the case
2 is a strategy that is frankly toxic and is not
3 helpful to advance justice.

4 We briefed in detail. And the other
5 thing is that Attorney Dingleline refers to
6 discussion of misrepresentations. We pointed out in
7 our comments that finding 23 of the hearing officer
8 is squarely wrong with the facts. She says that in
9 response to the notice of discrepancy the Applicant
10 emailed the chair of the planning commission on
11 November 11, and by the attorney's -- and included
12 Applicant's attorney arguing that the Randolph town
13 plan does not and should not be considered to
14 preclude the town from designating the project site
15 as preferred. The notice of discrepancy was issued
16 in December, more than a month later. There is no
17 way that my email to my client which was shared with
18 the town with some theories was in response to a
19 notice of discrepancy that was issued in December.

20 The events were that the Applicant
21 acquiesced with whatever request the town was looking
22 for. And did exactly what the town requested which
23 was to survey the site and move the arrays off of the
24 25 percent slope. I have nothing further.

25 CHAIR ROISMAN: Thank you, Ms. Hayden.

1 MS. DINGLELINE: Your Honor.

2 CHAIR ROISMAN: Ms. Dingleline. No.
3 No. You had an oral argument. We are now ready to
4 --

5 MS. DINGLELINE: I understand. But
6 something was just said that needs to be corrected.

7 CHAIR ROISMAN: Ms. -- I'm sorry, Ms.
8 Dingleline, then file something. The oral argument
9 has its own guidelines and they are the order of
10 speaking, and the amount of time that each person
11 has.

12 MS. DINGLELINE: Your Honor, I do
13 believe that they were given extra time. I want to
14 say a very brief thing. I was not the person who ever
15 raised an issue of litigation. And that is a false
16 statement. It was the planning commission themselves
17 that raised that and decided to contact their lawyer.
18 I did not make that representation ever.

19 CHAIR ROISMAN: Okay. Thank you, Ms.
20 Dingleline.

21 MS. DINGLELINE: Thank you.

22 CHAIR ROISMAN: Thank you, Ms. Hayden.
23 Thank you, Ms. Dingleline. Thank you, Mr. Guzman.
24 It's been an interesting oral argument. Ms. Hayden,
25 sorry about the problems with the technology, but we

1 will take this case under advisement. And we will
2 wait to see -- Ms. Dingledine, you have the deadline
3 that we have set for filing your objection to the
4 motion to take official notice of the two documents.
5 So after we get that and get Ms. Hayden's response
6 and Mr. Guzman's position, we will issue a decision
7 shortly thereafter.

8 Thank you all very much. This oral
9 argument is concluded. Thank you, Ms. Sears, for
10 your patience with us today.

11 THE COURT REPORTER: Thank you.

12 (Whereupon, the proceeding was
13 adjourned at 2:41 p.m.)
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C E R T I F I C A T E

I, Kim U. Sears, do hereby certify that I recorded by stenographic means the Oral Argument re: Case No. 21-2939-NMP, via videoconference, on August 23, 2023, beginning at 1 p.m.

I further certify that the foregoing testimony was taken by me stenographically and thereafter reduced to typewriting and the foregoing 62 pages are a transcript of the stenograph notes taken by me of the evidence and the proceedings to the best of my ability.

I further certify that I am not related to any of the parties thereto or their counsel, and I am in no way interested in the outcome of said cause.

Dated at Williston, Vermont, this 25th day of August, 2023.

A rectangular box containing a handwritten signature in cursive script that reads "Kim U. Sears". The signature is written in dark ink on a light-colored background.

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