STATE OF VERMONT PUBLIC UTILITY COMMISSION

Case No. 24-3345-PET

Limited Size and Scope Application
Of Bell Atlantic Mobile Systems, LLC
d/b/a/ Verizon Wireless and Vertex Towers, LLC.
For a Certificate of Public Good,
Pursuant to 30 V.S.A. § 248a, authorizing the
Construction of a telecommunications facility
in Manchester, Vermont

TOWN OF MANCHESTER'S REPLY MEMORANDUM IN SUPPORT OF THE TOWN'S CROSS MOTION FOR SUMMARY JUDGMENT

The contentions in the Petitioner's opposition should be rejected and summary judgment should be granted in favor of the Town. Petitioner has not satisfied and cannot satisfy its burden on multiple points. As such, the petition must be denied because the Project would violate a municipal plan and recommendation that are owed substantial deference, and because the project would have an undue adverse impact on aesthetics.

1. Petitioner has not satisfied its burden and arguments to the contrary rely on a misapprehension of the applicable standard.

Petitioner misapprehends two fundamental, interrelated aspects of the Town's argument. The Town does not argue that substantial deference requires the Commission to apply the Town's interpretation *no matter what*, or that it *mandates* strict compliance with its land use ordinance in every case. Rather, the Town contends that the PUC must follow the two-step analysis required under § 248a and must require Petitioner to meet its burden of proof under each step. The first step is

to determine whether Petitioner has established good cause to avoid substantial deference otherwise due the municipal plan and recommendation. If so, then substantial deference need not be given the municipal plan or recommendation. If not, then the PUC must move to the second step and apply "substantial deference."

Substantial deference has a definition under § 248a. It does not mean the absence of good cause, which is Petitioner's circular argument. Rather, it "means that the plans and recommendations referenced under subdivision (c)(2) of this section are presumed correct, valid, and reasonable." 30 V.S.A. § 248a(b)(5). Thus, when substantial deference is due (because a petitioner has not established good cause to avoid it), the PUC must apply the municipal plan and the municipality's recommendation as to compliance unless the Petitioner overcomes the presumption by establishing the inverse to be true—that they are incorrect, invalid, or unreasonable. In other words, the burden is on the Petitioner to show that the municipal recommendation as to compliance is incorrect. Although the statute is silent as to burden of proof, in the administrative context, overcoming substantial deference requires a showing by clear and convincing evidence. *In re ANR Permits in Lowell Mountain Wind Project*, 2014 VT 50, ¶ 15, 196 Vt. 467, 473; *In re Conservation L. Found.*, 2018 VT 42, ¶ 16, 207 Vt. 309, 316–17.[1]

Petitioner is incorrect in its assertion that the Town's interpretation of § 248a reads out the word "presumed." In each section of its cross motion the Town

[1] Neither the statute nor the legislative history cited by Petitioner contradict this legal principal. Thus, the PUC should rely on the case law on "substantial deference," as argued in the Town's cross motion.

addressed the fact that Petitioner failed to overcome the applicable presumption. *See* Cross Motion, at Sec. A, p. 10; Sec. B, p. 12. It appears that Petitioner has oversimplified the analysis by conflating the definition of "good cause" and the application of due deference when it is due. Despite a lengthy memorandum in opposition, Petitioner does not explain how substantial deference is applied when it is due.

Petitioner effectively repeats its incorrect argument that § 248a preempts the Land Use Ordinance. Pet. Opp. at 5–7. As explained in the Town's cross motion for summary judgment, the statute merely exempts an applicant proceeding through § 248a from having to also obtain a permit through the local zoning process, to be decided by local zoning authorities. Contrary to Petitioner's assertions, this does not require an illogical reading of the statute. The purpose of the statute is to place siting decisions with the Commission, as opposed to with local authorities, to avoid concurrent jurisdiction and duplicative adjudication of the same application. The purpose of the exemption from the local zoning process is not to completely supplant local control over siting. If the purpose was to supplant local control over siting telecommunications facilities altogether, then the substantial deference standard would not exist.

These policy considerations are consistent with the substantial revisions to § 248a made by Act 130, which significantly strengthened the impact of municipal plans and recommendations—including those based upon a land use ordinance adopted pursuant to Title 24, Ch. 117. The effect of this statutory scheme is that the

Commission is required to apply a municipal recommendation as to compliance with either a town plan or land use ordinance where, as here, a petitioner fails to carry its burden with respect to good cause and to otherwise prove that such recommendations are not correct, valid, or reasonable.

A. There is no good cause to avoid substantial deference.

Petitioner fails to establish good cause as defined under § 248a, and therefore the municipal plan and recommendation are entitled to substantial deference. Petitioner's argument that good cause exists to avoid the substantial deference due the municipal plan and recommendation rests on an alleged coverage gap in the center of Manchester, and Petitioner's desire to satisfy its own "coverage objectives." Pet. SUMF ¶¶ 25–27. As in its principal motion, Petitioner's opposition fails to explain how an alleged coverage gap creates a "substantial shortcoming detrimental to the public good or the State's interest in section 202c" as required to establish good cause pursuant to 30 V.S.A. § 248a(b)(3). Petitioner simply assumes that identifying a gap in cellular coverage within a municipality automatically satisfies this standard. The Commission has held otherwise. *Petition of Indus. Tower & Wireless, LLC Requesting a Cert. of Pub. Good, Pursuant to 30 V.S.A. § 248a, Authorizing the Installation of Wireless Telecommunications Equip. of Bordoville Rd. in Enosburgh, Vermont*, No. 22-PET-2120, 2023 WL 5125080, at *7 (Aug. 3, 2023) (while construction of telecommunications facilities is generally consistent with broad interests of § 202c, general consistency with that interest does not establish good cause).

With respect to the Ordinance, Petitioner's principal brief argued that good cause is satisfied on the basis of preemption. With respect to the Town Plan, the Petitioner's principal brief argued that good cause was satisfied because there is "no specific mandatory language as concerns telecommunications towers." As the Town pointed out, under the current § 248a, the provisions of a municipal land use ordinance are not preempted, and neither of Petitioner's arguments actually address or reflect the applicable "good cause" standard.

In its opposition, Petitioner now pivots its good cause argument slightly to focus on a gap in coverage in the vicinity of the proposed facility. However, it still fails to provide evidence sufficient to meet the standard. Petitioner offers the conclusory assertion that the "good cause" standard is satisfied by virtue of an alleged gap in coverage. Petitioner's contention on this point is offered without evidence tending to show that not siting a telecommunications facility to address this particular gap creates a "substantial shortcoming detrimental to the public good." In other words, Petitioner has not shown that either the existence of the purported gap or simply not addressing the gap with a tower at this site is or would be detrimental to the public good.

Petitioner relies on Exhibit ML-2 in support of its good cause argument. That exhibit purports to show a very modest improvement in coverage in a small area. Still, nothing in Petitioner's submissions explains how or why this particular coverage gap, if not addressed, would create a substantial shortcoming detrimental to the public good or the State's interest under section 202c. The existence of a small

gap in coverage, without any evidence about why it must be filled, is insufficient to establish good cause under § 248c. If the existence of a coverage gap were sufficient, it would effectively eliminate the good cause standard, as gaps in coverage can be found throughout the State of Vermont. Petitioner cannot prevail on summary judgment as to good cause when it has failed to demonstrate the existence of a substantial shortcoming detrimental to the public good or the State's interest in section 202c.

The balance of Petitioner's arguments in opposition to the Town's cross motion would require the Commission to improperly reverse the burden of proof in this case. Pet. Opp. at pp. 16–22. Petitioner repeatedly argues that the Town has failed to present sufficient proof. Petitioner argues that the Town failed to present alternatives.[2] Petitioner even argues that the Town failed to argue that there is "no public good met by the Project"—the opposite of both the applicable standard and burden of proof. Opp. at 17. As outlined in the Town's cross motion, the burden is Petitioner's, and Petitioner fails to meet the "good cause" standard.

B. Petitioner has failed to show that the town plan and municipal recommendation are incorrect.

Petitioner fails to otherwise show that the municipal recommendation is incorrect to overcome the substantial deference presumption. The Commission must

[2] Petitioner argues that the *Town* should have presented expert testimony to explain how to meet Petitioner's own coverage objectives and still comply with its zoning regulations. Pet. Opp. at 11. Adopting Petitioner's reasoning would reverse the applicable burden of proof, which requires Petitioner to establish that good cause exists—it does not require the Town to prove that it does not exist.

therefore apply the Town's recommendation and deny the Petition. The Town has presented sufficient evidence to the Commission to support its recommendation as to both the Town Plan and Land Use Ordinance. It is undisputed that the Project is in the MU2 District, where telecommunications facilities are not an allowed use. It is undisputed that the Project would be visible from Bonnet Street and Main Street, and that both are main streets in downtown Manchester. It is undisputed that the Project would be visible from Dana L. Thompson Memorial Park, Hunter Park, and the Riley Rink. In addition to the evidence supporting the above undisputed facts (including citations to the Petitioner's own exhibits), the Town also relies on the language of its Plan and Ordinance, the Petitioner's responses to Requests to Admit, and the affidavit of Town Manager Scott Murphy to establish that the Project would be visible from main streets and parks in downtown Manchester. Based on the evidence, the Town asks the Commission to apply the Town's recommendation with respect to the Project's noncompliance with the Land Use Ordinance—which noncompliance is an undisputed fact. The Town also asks the Commission to apply the Town's recommendation as to the provisions of the Town Plan requiring telecommunications facilities to be (1) located away from public view from main streets *or* adequately screened, and (2) sited in a manner that protects the Town's scenic resources.

Petitioner argues that the *Waterbury* case cited by the Town with respect to aesthetics undermines the Town's ability to base its recommendation on the Land Use Ordinance. (Opp. at 21). *See Petition of Vermont RSA Ltd. P'ship & Cellco*

P'ship, for A Certificate of Pub. Good, Pursuant to 30 V.S.A. S 248a, for the Installation of Telecommunications Equip. in Waterbury, Vermont., No. 8601, 2017 WL 4419262 (Sept. 21, 2017). This is incorrect. The *Waterbury* case was initiated in 2015, prior to the changes in 2016 under Act 130. Thus, while the aesthetics analysis discussed in *Waterbury* and relied on by the Town has not changed, Act 130 drastically changed the analysis with respect to substantial deference due a recommendation based on a municipal land use ordinance. Neither the then-in-effect § 248a, nor the applicable Procedures Order provided for substantial deference to municipal recommendations based on a land use ordinance adopted pursuant to Chapter 117. *Third amended order implementing standards and procedures for issuance of a certificate of public good for communications facilities pursuant to 30 V.S.A. § 248a*, Order issued August 19, 2015. Under the current § 248a, substantial deference is due a municipal recommendation based solely on a municipal land use ordinance. Accordingly, the distinction drawn by the Commission in *Waterbury*—between a municipality relying on its zoning regulations versus a municipality providing an alternative basis for its recommendation—is inapplicable under the existing statutory scheme.

2. The project would have an undue adverse effect on aesthetics in violation of a clear community standard.

Petitioner does not dispute that if the Commission finds that Petitioner failed to establish good cause to avoid substantial deference, or to otherwise demonstrate that the Town's recommendation is incorrect with respect to compliance, then the Commission need not address the other Section 248a criteria, such as aesthetics. *In*

re Application of Derby GLC Solar, LLC, 2019 VT 77, ¶ 19, 211 Vt. 144; *Petition of Indus. Tower & Wireless, LLC*, No. 22-2120-PET, 2023 WL 5125080, at *6. However, even if the Commission did reach them, Petitioner's arguments relating to aesthetics are also unavailing.

Petitioner persists in its reliance on *MGH Solar* to argue that the Commission has already ruled that the Town of Manchester's Town Plan does not contain a clear, written community standard. (Pet. Opp. at 23). Petitioner fails to address the fact that *MGH Solar* considered a completely different provision of the Town Plan, concerning an entirely different location in the Town of Manchester. The Commission's determination that an unrelated provision of Manchester's Town Plan did not create a clear, written community standard has no bearing on the Town Plan provisions at issue in this proceeding.

Petitioner also argues based on the language of the *Waterbury* case, that a municipal land use ordinance cannot provide the basis for a clear, written community standard. (Pet. Opp. at 23–24). While the Commission has stated that land use ordinances are not the "most appropriate" source for a clear, written community standards with regard to aesthetics, that does not mean they can never be considered as such. In *Waterbury*, the Commission was concerned that the ability of towns to grant zoning variances could result in inconsistent application of an ordinance, and about the potential for mandating a particular outcome in § 248 proceedings. However, the MU2 District is one of several zoning districts within the Town of Manchester, and therefore application of the restriction on

telecommunications facilities would not result in complete prohibition on all such facilities throughout the Town. Additionally, the Commission's reasoning that towns "often" grant variances is unwarranted—applicants must meet five strict statutory criteria to obtain a variance, which is a difficult standard to satisfy, and variances are rarely granted. 24 V.S.A. § 4468(a).

Even setting aside the Ordinance, the Town Plan alone contains two applicable clear, written community standards. The Town Plan provisions at issue are "'intended to preserve the aesthetics or scenic beauty of the area' where the proposed project would be located" and "apply to specific resources in the proposed project area." *Petition of Indus. Tower & Wireless, LLC Requesting a Cert. of Pub. Good, Pursuant to 30 V.S.A. § 248a, Authorizing the Installation of Wireless Telecommunications Equip. off of Toppin Rd. in Ira, Vermont*, No. 22-PET-2442, 2023 WL 3151215, at *9 (Apr. 20, 2023). The two Town Plan provisions at are expressly intended to preserve the aesthetics and scenic beauty as they relate to specific, well-traveled streets and scenic and recreational resources within the proposed project area. There could be no other purpose for them. The other provisions of the Town Plan the Town referenced, such as those outlining the purpose of the Design Review Overlay in which the proposed Project Site is located, provide additional support for this conclusion. The Town otherwise relies upon the arguments set forth in its cross motion concerning the clear, written community standards in the Town Plan.

Petitioner continues to argue that a town plan provision cannot constitute a clear, written community standard unless it contains the words "must" and "shall." (Pet. Opp. at 28). That is not the law. As the Town explained in its brief, the case that Petitioner relied on to support that assertion involved a town plan in which "should" was expressly defined to mean not mandated. Manchester's Town Plan contains no similar definition. Petitioner's opposition never addresses the substantive argument and simply reiterates the same conclusion without any further legal support. One such Town Plan provision relating to the siting of telecommunications towers presents a developer with two, binary options: either a project must be relocated away from main streets in the downtown, or it must be screened by dense, coniferous plantings. This binary choice establishes a mandate. The Project does not meet this clear, written community standard because it does neither.

Petitioner also now asserts that the Project tower would not be visible from the "downtown area." (Pet. Opp. at 28). This assertion is contradicted by Petitioner's own admissions that the Project would be visible from Main and Bonnet Streets, coupled with the Affidavit of Manchester's Town Manager stating that the portions of those streets from which it would be visible are in downtown Manchester. Ex. MB-1, Q. 1-13 and 1-14, Aff. Of Scott Murphy, at ¶¶ 3–4. The Petitioner cannot create a genuine issue of material fact by a self-serving contradiction of its own unambiguous sworn responses to requests to admit. *See Johnson v. Harwood*, 2008 VT 4, ¶ 5, 183 Vt. 157, 160.

Because the Project violates the clear, written community standards set forth in the Town Plan, the Commission need not consider the other factors in Quechee step two. A positive finding on any one of the three factors requires a finding that the adverse aesthetic effect of the Project is "undue." Accordingly, the Petition should be denied because the Project would have an undue adverse effect on aesthetics within the Town of Manchester.

CONCLUSION

Wherefore, for the foregoing reasons, the Commission should deny Petitioner's motion for summary judgment and grant the Town's cross motion for summary judgment.

Dated this 27th day of February, 2026.

/s/ Merrill E. Bent
Merrill E. Bent, Esq.
Woolmington, Campbell, Bent & Stasny, P.C.
4900 Main Street
Manchester Center, VT 05255
(802) 362-2560
merrill@greenmtlaw.com