

STATE OF VERMONT
SUPREME COURT

Docket No. 25-AP-427

In re Petition of Industrial Tower and Wireless, LLC]

APPELLANTS' MOTION FOR REARGUMENT

Appellants do hereby Move this honorable Court to grant reargument pursuant to Rule 40 of the Vermont Rules of Appellate Procedure (V.R.A.P.). In support of this Motion, Appellants aver that this Court overlooked or misapprehended key elements of law and fact that would affect the result of the decision, as more specifically set out in the memorandum, below.

MEMORANDUM

A motion to reargue is for the purpose of correcting points of law or fact which the movant believes the Court has erroneously considered. *Moyers v. Poon*, 2018 VT 27 ¶9. This Court overlooked or misapprehended the following key elements of law and fact, as set out in Appellants' Primary and Reply Briefs, which would probably affect the result of the decision:

I. In determining that Appellants had no standing to raise the PUC's exclusion of Town comments and recommendations, this Court overlooked key elements of law and fact

A. The Court overlooked the fact that In re Lake Bomoseen Association, 2025 VT 59, is not applicable to the present case

This Court grounded its holding regarding Appellants' standing on *In re Lake Bomoseen Association*, 2025 VT 59. *Opinion* 2026 VT 40 ¶11 *et seq.* That case is

inapplicable here, as its facts and context are inapposite to the present case.

Appellants' Reply Brief pp.4-6

Lake Bomoseen involved a person attempting to appeal to the Environmental Division from denial of a Vermont Agency of Natural Resources (ANR) permit, when that person had not been a party in the ANR permitting process. This Court's decision in *Lake Bomoseen* clearly stated that the person attempting to appeal was not a "person aggrieved" under 10 V.S.A. §8504(a), the controlling statutory provision regarding appeals from agency decisions to the Environmental Division, and thus lacked standing. *In re Lake Bomoseen Association*, 2025 VT 59 ¶4, ¶21.

Lake Bomoseen is about standing to bring an action in the Superior Court Environmental Division. Although titled an "appeal," it is a trial-court case for which a party must have standing as a "person aggrieved" under the specific land use statute, 10 V.S.A. §8504(a).

Here, Appellants were *parties* to the action at the Public Utility Commission (PUC), explicitly granted intervention status – standing--regarding the project's compliance with the municipal plan under 30 V.S.A. §248a(c)(2). *Procedural Order re Motions to Intervene and Requests for Hearing, September 10, 2024, p.4; SuppPC p.008*. As residents and landowners of Westmore, they are affected by a project's non-compliance with their Town Plan, which is why they were granted standing on this §248a criteria.

The Court misapprehended the decision in *Lake Bomoseen*, which would have affected the decision in regard to Appellants' standing.

B. This Court overlooked Inhinger v. Inhinger, 2003 VT 38 and its holding that a party may appeal if that party has some legal interest which may be, by the judgment appealed from, either enlarged or diminished.

Because of their party status, even third parties or intervenors may appeal any issue decided below which adversely affects their interests. *Inhinger v.*

Inhinger, 2003 VT 38 ¶6, citing *Cooperative Fire Ins. Ass’n. of Vt. v. Bizon*, 166 Vt. 326, 693 A.2d 722 (1997); Appellants’ Reply Brief p.6.

While *Lake Bomoseen* holds that if a person were not a party to an action, they generally cannot appeal the decision in that action, *Inhinger v. Inhinger* stands for the proposition that if a person *were* a party to an action, they can appeal *any issue decided below* which adversely affects their interests.¹ Here, those legal interests explicitly include the project’s compliance with the municipal plan – a point which statute presumes will be addressed by municipal recommendations.

This Court has held that an intervenor can appeal even when the original party has withdrawn from the case, *In re Garen*, 174 Vt. 151, 153-154, 807 A.2d 448, 449-450 (2002); that an intervenor may appeal, by virtue of party status, any issue on which the party is aggrieved, *Cooperative Fire Ins. Ass’n. of Vt. v. Bizon*, 166 Vt. 326, 693 A.2d 722 (1997); and that parties may adopt the arguments of others as their own, and appeal on that basis, *Shahi v. Madden*, 2010 VT 56 ¶12, citing *Inhinger*.

This Court overlooked this line of applicable cases, which would have affected the decision in regard to Appellants’ standing on the issue of the Town’s comments and recommendation.

C. This Court overlooked the Public Utility Commission’s mid-case reversal of position regarding consideration of Town comments and recommendations.

This Court’s *Opinion* overlooked the PUC’s mid-case reversal of position regarding consideration of the municipal comments and recommendation. Appellants’ Primary Brief p.26 et seq. The PUC twice stated that comments and recommendations of the Town of Westmore could be submitted, and that the

¹ Permissive intervention at the PUC comprises Constitutional standing. *In re Apple Hill Solar LLC*, 2019 VT 65 ¶¶19-20.

PUC would receive and consider those Town comments and recommendations pursuant to 30 V.S.A. §248a(n). After closure of non-Petitioner evidence in the case, the PUC abruptly reversed course and excluded the Town's comments and recommendation.

On February 27, 2025, the PUC stated it would consider and provide detailed response to each municipal recommendation under Section 248a(n), *Procedural Order Denying Motion to Intervene*, 02/27/2025, PCv1-100; and on April 11, 2025, the PUC invited the Town to file "any documentation or information" in the public comments, and that these would be considered pursuant to Section 248a(n). *Order Denying Motion for Reconsideration Filed by the Town of Westmore* at 4, PCv1-136.

On April 24, 2025, specifically referencing "public comments" by the WPC and Selectboard, the PUC declared that "the public comments filed after July 9, 2024, are untimely filed and will not be considered in this proceeding." *Order Granting Motion In Limine to Preclude Late-Filed Comments*, 04/14/2025, p.2-3, PCv1-164,165.

This unannounced, unexplained reversal of clearly-expressed agency position is arbitrary and capricious. Appellants' Primary Brief p.27 cited federal case law, but this proposition is also set out in *In re Apple Hill Solar LLC*, 2019 VT 65 ¶25, a case cited in Appellants' Primary Brief Standard of Review.

While preparing and filing their testimony, Appellants had every reason to believe the PUC was going to receive, consider, and give substantial deference to the comments and recommendation of the Town of Westmore. The PUC's about-face directly affected Intervenor-Appellants, shifting the burden of proof after they had already submitted their testimony.

This Court's *Opinion* at ¶¶16 and 17 characterizes the PUC's exclusion of the Westmore comments and recommendations as "a procedural decision

affecting another party's participation in the proceeding.” This characterization relates to the PUC’s decision to deny the Town of Westmore intervention status, rather than its decision, mid-case, to disregard the Town’s comments and recommendations which it had previously invited.

The municipal recommendation to deny the CPG on the grounds that it contravened the town plan established a *prima facie* case that the project is non-compliant with the town plan. Appellants’ Primary Brief p.15 et seq. Yet nowhere in the Final Order does the PUC acknowledge the portion of statute which states the municipal recommendation creates a “rebuttable presumption” with regard to compliance with a Town Plan and telecommunications ordinance. *PCv1-6, throughout*; Appellants’ Primary Brief p.11. Nor did they include a detailed response to each recommendation of the Town. *Id., throughout*.

This Court misapprehends the importance and effect of the exclusion of Westmore’s comments and recommendations. The PUC’s change of position and refusal to consider comments and recommendations of the municipality, after twice stating it would do so, arbitrarily and capriciously altered the evidentiary record of the case which directly affected *all* parties.

II. This Court overlooked the plain language of 30 V.S.A. §248a(c)(2) and the requirement to give substantial deference to municipal plans as a whole; and further misapprehended the nature of the erroneous review standard applied by the PUC

This Court’s *Opinion* at ¶27 through ¶29 overlooks the plain language of 30 V.S.A. §248a(c)(2) requiring the PUC to give substantial deference to municipal plans *as a whole*. This Court has also misconstrued the nature of the erroneous standard applied by the PUC.

As Appellants’ Primary Brief explains, before granting a CPG for a telecommunications tower, the PUC must find under 30 V.S.A. 248a(c)(1) that the

project does not have an undue adverse effect on, among other things, aesthetics. This is the portion of the statute which requires a *Quechee* analysis.

Then, the PUC must, separately and additionally, under 30 V.S.A. §248a(c)(2), afford substantial deference to municipal plans and the recommendations of towns, including those based on telecommunications ordinances. This statutory provision is *not the same as the aesthetics review required by 30 V.S.A. §248a(c)(1)*. A *Quechee* analysis is inappropriate to address §248a(c)(2). It is a unique statutory provision, separately set out and numbered; to interpret §248a(c)(2) as another aesthetic analysis, duplicating the requirement of §248a(c)(1), would render the entire section surplusage.

This Court's *Opinion* recognizes, at ¶28, that:

Neighbors are correct that the hearing officer applied the *Quechee* test and that his discussion of the Town Plan-and conclusion that the tower did not violate the Town Plan existed within the *Quechee* analytical framework. Indeed, the hearing officer explained that "[i]n determining whether a proposed project satisfies the aesthetics criterion contained in 30 V.S.A. § 248(b)(5), the [PUC] applies the so-called 'Quechee test' " and used the "community standards" language from that test to discuss the Town Plan.

That is, this Court recognized that the PUC utilized the wrong review standard, using a *Quechee* aesthetic analysis, which is appropriate under §248a(c)(1), to address the substantial deference to municipal plans and municipal recommendations requirement of §248a(c)(2).

This Court's *Opinion* at ¶29 states:

Specifically, while neighbors opine that the hearing officer "limited [his] review to the 'community standards' contained in the wrong version of *Quechee* aesthetics review," they do not explain how an analysis of those "community standards" would or should differ from the required analysis of the Town Plan pursuant to § 248a(c)(2) when this Court has explained

that "[t]own plans may be sources of clear, written community standards" under Quechee analysis.

The Court, like the PUC, has erroneously conflated one prong of the second step of the *Quechee* aesthetics review required under 30 V.S.A. §248a(c)(1) with the review of the entirety of the town plan which is required by 30 V.S.A. §248a(c)(2). Appellants argued this point at p. 31-32 of their Primary Brief. This Court has misapprehended or overlooked the plain language of 30 V.S.A. §248a(c), which requires *both* an aesthetics review under subpart (1) *and* a detailed review of the municipal plan under subpart (2), affording that plan, as a whole, substantial deference. These are two quite different things – apples and oranges.

An aesthetics review is limited to aesthetics under the *Quechee* test. The second step of the *Quechee* test does include one prong inquiring into whether there are written community aesthetic standards specifically protecting the site of the project.

Substantial deference to the town plan requires substantial deference to the *entire* town plan. However, this phrase must be afforded substantial deference as part of the Town Plan under §248a(c)(2). The substantial deference standard of §248a(c)(2) does not direct the PUC to determine whether contraventions of the Town Plan are “unduly adverse”; rather, far more broadly, if a project contravenes the Town Plan or municipal comments and recommendations, a *prima facie* case is established that the CPG should be denied.

The use of the wrong standard – narrow *Quechee* aesthetic review rather than substantial deference to the Town Plan, comments and recommendations – is not mere harmless error. It was not a typographical error appearing at one place in the decision; it was included in the initial notice to the Town, all of

Petitioner's filings, and then again in the Final Order. Appellants' Primary Brief fn.6.

This Court states that Appellants did not point to any provision of the Plan that the hearing officer omitted from his analysis or how the analysis would have differed by addressing the "entirety" of the Plan. *Opinion* ¶30. But Appellants' Primary Brief does exactly this: It lists numerous parts of the Westmore Town Plan not addressed by the PUC under §248a(c)(2):

...the Town Plan emphasizes the "infinite magnificence" of Lake Willoughby and its visual setting. *PCv2-63*. The Town Plan places high value on ensuring that "natural integrity" of the NNL is not diminished. *PCv2-65*. The Town Plan underscores that Lake Willoughby and the village are at the bottom of a topographical bowl, tied to the "dramatic backdrop of high elevation forested areas" rising all around the lake. *PCv2-66*. The Town Plan deems any development over 100' high that can be seen from the NNL a development with substantial regional impact. *PCv2-66*. Ridgelines surrounding Lake Willoughby are specifically protected by the Town Plan, *PCv2-84*, and the Town Plan directs that development not create a visual intrusion into the viewshed from any vantage point on public roadways, any body of water, or the NNL. *PCv2-84*. See also, *Zebrowski DPT pp.5-7, PCv2-153-155; Kriebel DPT p.9, PCv2-165*.

Appellants' Primary Brief pp.30-31.

Appellants' Primary Brief, referencing the Westmore March 6, 2025 analysis, *PCv1-107*, stated that non-compliance with the telecommunication ordinance, clear near-distance visibility of the tower from National Historic Register Fox Hall, and visibility of the project from State Scenic Route 5A along the lake, serve as further indications that the proposed tower contravenes the Town Plan. These were all ignored by the PUC. The Town Plan and telecommunications ordinance were submitted into the record in their entirety as

Exhibits EX-MP-03 (*PCv2-60*) and EX-MP-10, (*PCv2-128*). Appellants' Primary Brief p.30.

In looking at the Town Plan through the lens of one prong of the second step of *Quechee*, the PUC conducted a tightly restricted review of specific "trees" while missing the "forest" of the Town Plan as a whole – a whole which, in its entirety, treasures and protects views from Lake Willoughby and the community's natural landscape without man-made visual intrusions. This Court overlooked the plain language of the statute which sets out the PUC's obligations to look at aesthetics using the usual mode of review including the *Quechee* analysis, 30 V.S.A. §248a(c)(1), *and* to separately review the municipal plan, in its entirety, and afford that plan as a whole substantial deference, 30 V.S.A. §248a(c)(2). If these didn't require two separate and different analyses, they would not be in two separate statutory sections.

III. This Court overlooked the fact that the Department of Public Service aesthetic witness never said that the tower "would not be visible from adjacent residences."

This Court's *Opinion* at ¶34 states, in part,

...the hearing officer relied on a report compiled by an independent aesthetics expert hired by the Department of Public Service which similarly concluded that the tower "would not be visible from adjacent residences..."

The Court drew this sentence from the PUC's Final Order p.7 ¶21, *PCv1-7*. Appellants' Primary Brief p.33. This Court continued, at *Opinion* ¶37, that "the PUC was within its discretion to credit the Department's expert report..." characterizing this as a weighing of conflicting evidence. However, there was *no* evidence in the record regarding near views other than that submitted by Intervenor.

The Department's witness, Mr. Buscher, never "concluded" that the tower would not be visible from adjoining residences. Appellants' Primary Brief p.34. What Mr. Buscher's report states, verbatim, is:

The Vegetated Viewshed Map, Appendix A. Map 3, indicates the Project would not be visible from adjacent residences, but may have visibility from within the property boundaries. TJBA was not able to access individual private properties to verify potential visibility during field investigation. The property directly north of the Project appears to utilize Frog Hollow Lane to access that property and therefore would pass by the Project Compound. Based on review of aerial imagery, the closest residence appears to be approximately 650 feet south of the Project.

PCv2-188-189, Appellants' Primary Brief p.34.

The Buscher report asserts, at most, that the TJBA visibility modeling indicated lack of visibility from within adjacent homes, indicated visibility from residential properties, but that this information is unconfirmed. The report also correctly notes that the neighbor immediately north of the project, would drive by the Project daily, obviously seeing the project from a close distance.

The *only* evidence regarding near-residence views, therefore, is the extensive testimony and exhibits submitted by the Intervenors, Appellants' Primary Brief pp.33-35. The PUC did not acknowledge this testimony in its Final Order. They disregarded it entirely, instead basing their findings on a distorted and inaccurate interpretation of the DPS witness's report, who had never been to these residences.

Although this Court characterized the PUC's holding regarding near views as a matter of weighing the credibility of competing testimony, the PUC did not go through the motions of claiming that Buscher is a more credible judge of views from inside Megan Patton's home than Megan Patton is, or that of David Anderson, Andrew Zebrowski, or Robert Fitzpatrick. They simply ignored

intervenors' testimony, and in so doing, improperly omitted consideration of near-distance views from their *Quechee* analysis, Appellants' Primary Brief p.35.

This Court also overlooked the fact stated at Appellants' Reply Brief p.15 that the PUC similarly ignored the Westmore Planning Commission's statement that views of the project from adjoining residences "will be adversely affected by this tower from annoying to devastating. **It will destroy their views and destroy the rural and natural setting of their property** which is often why they chose to live where they live. **We see this as negatively affecting their spiritual, physical, financial and mental health.**" *PCv1-91, emphasis added*. This statement is contained in the one communication from the Town to which the PUC claimed to afford substantial deference, the original July 9, 2024 communication. Yet the PUC chose to ignore this portion of that communication rather than afford it substantial deference as required by statute.

Conclusion

This Court has overlooked or misapprehended key elements of law and fact that would affect the result of the decision. Accordingly pursuant to V.R.A.P. 40, reargument should be granted, or such other relief as this Court deems necessary and proper under the law.

Dated at Roata Rossi, Cuneo, Italy this 16th day of September 2026.

/s/Cindy Ellen Hill, Esq.

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Certificate of Word Count Compliance

I hereby certify that this Motion for Reargument and Memorandum of Law complies with the word-count limitations of the Vermont Rules of Appellate Procedure Rule 34(b)(2) and contains no more than **2,996** words exclusive of the heading, the signature block, the certificate of service, and this certification, utilizing Microsoft Word for Mac.

/s/Cindy Ellen Hill, Esq.

Cindy Ellen Hill, Esq.

DATE: 09 16 2026

Certificate of Service

I, Cindy Ellen Hill, Esq., Hill Attorney PLLC, counsel for appellants, do hereby certify that this date I served the foregoing APPELLANTS' MOTION FOR REARGUMENT upon the parties by filing the same in the Court's electronic filing portal. Additionally, a copy has been filed in ePUC in Case No. 24-1755-PET (Appeal Subcase).

/s/Cindy Ellen Hill, Esq.

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