

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

Petition of Randolph Davis Road Solar LLC for a Certificate of public good, pursuant to 30 V.S.A. §§ 248 and 8010, authorizing the Installation and operation of a 500kW group Net-metered solar electric generation system in Randolph, Vermont

Case No. 21-2939-NMP

**NEIGHBOR INTERVENORS' RESPONSE TO PETITIONER'S RESPONSE
TO INTERVENORS' OPPOSITION TO PETITIONER'S REQUEST FOR
JUDICIAL NOTICE**

September 26, 2023

Now come Neighbor Intervenors Joan Allen and Michael Binder, *pro se*, and continue their opposition to the Petitioner's August 22, 2023 Motion Requesting the Commission take Judicial Notice of exhibits RDS Judicial Notice-1 and RDS Judicial Notice-2. Neighbor Intervenors also oppose reopening the evidentiary record to include the Petitioner's September 12, 2023 filing of Mr. Malley's affidavit.

Contents

Introduction	Page 2
Two Comments - June 1, 2021 Planning Commission meeting	Page 3
Three Comments - June 10, 2021 Selectboard meeting	Page 3
One comment - December 7, 2021 Planning Commission meeting	Page 5
Three Comments - Evidentiary Record & Judicial Notice	Page 5
Conclusion	Page 7

Introduction:

The Motion before the Commission is the Petitioner's request for Judicial Notice of the Site Plan document in exhibit RDS Judicial Notice-1. That site plan document is purported to have been attached to the Petitioner's May 3, 2021 email to Sonny Holt, Chair of the Randolph Planning Commission.

The standard for Judicial Notice is:

"A judicially noticed fact must be one not subject to reasonable dispute..." [VRE 201(b)]

The proffered site plan in RDS Judicial Notice-1 is subject to reasonable dispute because the Randolph Town Records [exhibit NI MB-17 at 155] indicate that a different site plan was attached to the May 3, 2021 email.

The Petitioner's September 12, 2023 filing of Mr. Malley's affidavit is an untimely attempt to reopen the evidentiary record in order to authenticate a reasonably disputed site plan, which plan itself is proffered in an untimely attempt to enter evidence in the guise of a judicially noticed fact.

☞ If the disputed site plan met the standard to be recognized as a judicially noticed fact, then there would be no reason or need to authenticate it with Mr. Malley's affidavit.

Intervenors oppose entrance into the evidentiary record of both exhibit RDS Judicial Notice-1 and Mr. Malley's affidavit, and cannot emphasize enough how untimely they are.

Exhibit NI MB-17, including the May 3, 2021 email to Sonny Holt, was submitted into evidence with Mr. Binder's prefiled testimony on May 6, 2022. The Petitioner waited over a year (August 12, 2023) to challenge exhibit NI MB-17 with an unauthenticated and reasonably disputed site plan document, and waited until September 12, 2023 to authenticate their proffered document with Mr. Malley's self-serving affidavit. The Intervenors have had no opportunity to impeach Mr. Malley's affidavit or the disputed site plan in exhibit RDS Judicial Notice-1 with discovery, testimony, exhibits, and/or cross examination.

Two Comments - June 1, 2021 Planning Commission meeting:

1) The Petitioner wrote: [Sept. 12, 2023 Reply pages 5-6]

“As stated in Mr. Binder’s Exhibit MB-14, there was no audio or video recording made of the June 1, 2021 Randolph Planning Commission meeting.”

Exhibit NI MB-14 makes no such statement. However, the absence of a recording is noted in exhibit NI MB-9 which also provides valuable insight into Mr. Malley’s presentation to the Randolph Planning Commission on June 1, 2021. The minutes of that meeting state:

“The array takes up about 3 acres and about 5-6 acres of total associated footprint when you include shade tree cuts, roads and fencing.” [exhibit NI MB-4, Randolph PC Minutes]

2) The Petitioner wrote: [Sept. 12, 2023 Reply page 6]

“The statements made by Attorney Dingledine are not noted in the minutes of the June 1, 2021 Planning Commission meeting, Exhibit NI MB-4.”

It is reasonable and expected that Ms. Dingledine’s statements are not noted in the minutes of that meeting because she neither attended nor participated in that meeting.

Three Comments - June 10, 2021 Selectboard meeting:

1) The Petitioner wrote: [Sept. 12, 2023 Reply page 3]

“The video of the June 10, 2021 Selectboard meeting, Exhibit MB-21, is further evidence that the April 30, 2021 preliminary Site Plan included in Exhibit RDS Judicial Notice-1, was provided to the Town.”

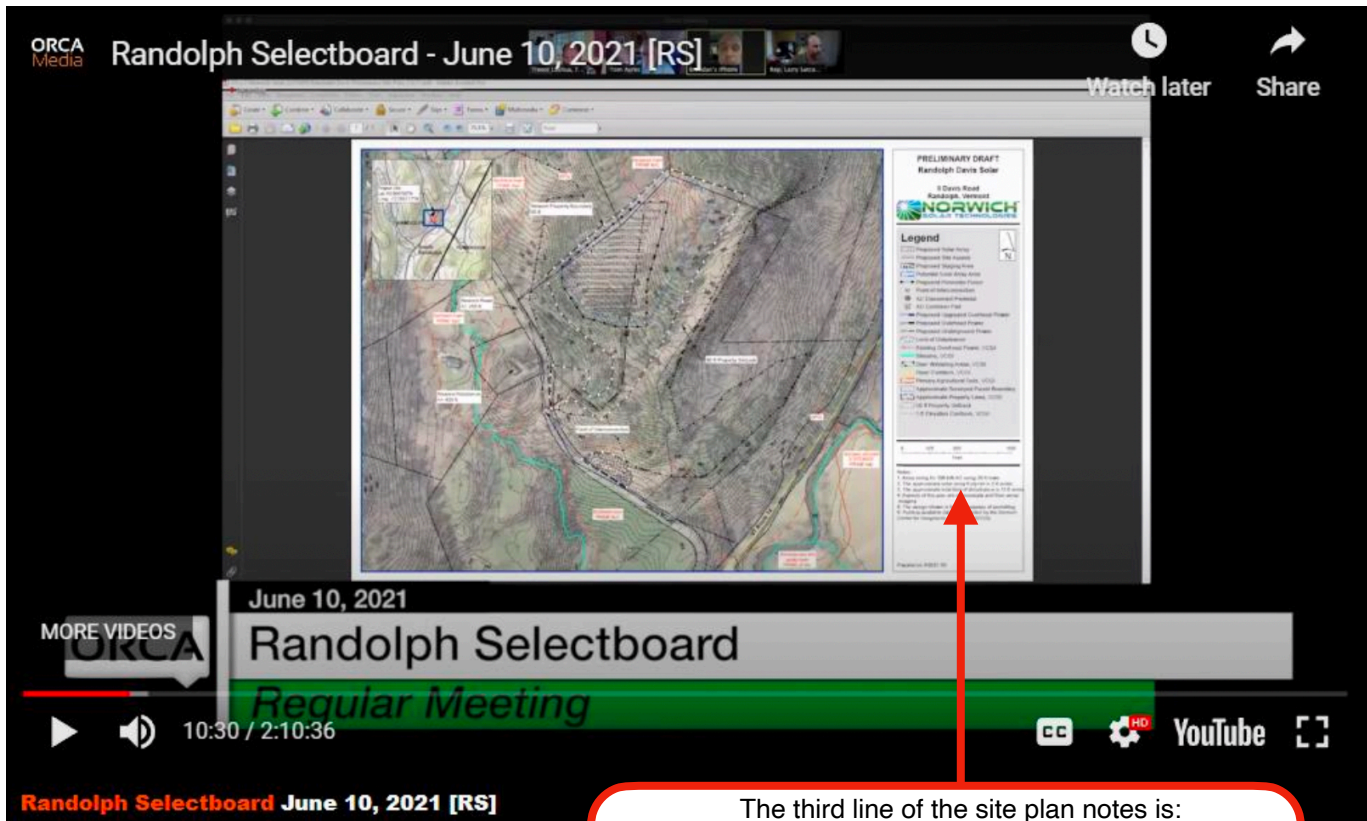
The viewing of the disputed site plan at the **Selectboard** meeting in June of 2021 does not establish that the disputed site plan was attached to the email sent to **Planning Commission** Chair Sonny Holt more than 5 weeks earlier on May 3, 2021. Town records show a different site plan [exhibit NI MB-17 at 155] was sent to Sonny Holt on May 3, 2021.

2) The Petitioner wrote: [Sept. 12, 2023 Reply pages 4-5]

“The Landowners were present by video and actively participated in that meeting, and so knew or should have known that this was the same preliminary April 30, 2021 Site Plan provided for preferred siting by the Applicant.”

The Intervenors agree that the disputed site plan in RDS Judicial Notice-1 was viewed at the June 10, 2021 Selectboard meeting and the Intervenors have never asserted otherwise.

3) The Petitioner submitted this screenshot: [September 12, 2023 Reply page 4]
[annotation and red arrow added by Intervenor]



Mr. Malley's oral presentation to the Selectboard in June 2021 was untruthful, regardless of the very fine print on the computer screen. He told the Selectboard:

"it utilizes between 2.5 and 3 acres of solar array footprint and somewhere between 4 and 5 acres of total area including the area around the array where we manage vegetation growth so the array isn't shaded and to account for things like access and a temporary laydown during construction." [exhibit NI MB-21 audio recording at 0:11:00, Binder PFT at 15]

One comment - December 7, 2021 Planning Commission meeting:

Inasmuch as the Town ultimately did receive the disputed site plan (at least by the time of the June 10, 2021 Selectboard meeting) the Petitioner wrote: [Sept. 12, 2023 Reply page 5]

“This establishes that the Planning Commission had the acreage of the LOD when they met in December 2021 and voted not to rescind preferred siting.”

The Randolph Planning Commission did NOT meet in December 2021 and vote not to rescind preferred siting. The Planning Commission met on December 7, 2021 and agreed to seek an opinion from the Town attorney. The Minutes of the December 7, 2021 Planning Commission [exhibit RDS B, filed December 15, 2021] do not record any votes on the Randolph Davis Solar project. In the Town records there are no Agendas or Minutes of any Planning Commission meeting in December 2021, other than the December 7 meeting.

The preferred sites letters were issued in June 2021, and to this date there has never been either a vote to affirm them, or a vote to not rescind them, recorded in the minutes of any Randolph Planning Commission meeting. What Sonny Holt did after the December 7 meeting, without waiting for the Town Attorney's opinion, and against the advice of the Town Manager, was: deliberate privately by email with other members of the Planning Commission, invent a Notice of Discrepancy, and vote illegally by private email on December 14, 2021 to accept the emailed assurances of the Petitioner that the array would be reconfigured to comply with the Town Plan. [Exh. NI MB-28]

Three Comments - Evidentiary Record & Judicial Notice:

1) The Petitioner wrote: [Sept. 12, 2023 Reply page 6]

“Mr. Malley's sworn affidavit satisfies the authentication requirements of V.R.E. 901, to the extent just authentication is required for a judicially noticed fact.”

If the disputed site plan met the standard to be recognized as a judicially noticed fact, then there would be no reason or need to reopen the evidentiary record in order to authenticate it with Mr. Malley's self-serving affidavit.

2) The Petitioner wrote: [Sept. 12, 2023 Reply page 5]

“Judicial notice of Exhibit RDS Judicial Notice-1 is also necessary to correct inaccurate allegations made at oral argument by Attorney Dingledine, and in Landowners’ September 5, 2023 filing.”

The issue before the Commission is whether it will take Judicial Notice of a proffered email attachment that is reasonably disputed. Nothing (including the allegedly “inaccurate allegations”) in the content of the Intervenors’ September 5, 2023 filing gives the Commission any reason to take Judicial Notice of exhibit RDS Judicial Notice-1. Nothing (including the allegedly “inaccurate allegations”) in the content of attorney Dingledine’s Oral Arguments is even the least bit relevant to whether exhibit RDS Judicial Notice-1 is authentic and readily verifiable, or whether the Commission should take Judicial Notice of it.

3) The Petitioner wrote: [August 22, 2023 Motion to take Judicial Notice, page 1]

“The Site Plan submitted to the Town of Randolph supporting Petitioner’s request for preferred siting (Exhibit RDS Judicial Notice-1) is the same preliminary site plan included in the June 21, 2021 45-Day Notice (Exhibit RDS Judicial Notice-2), and the 45-Day notice expressly stated that the **limit of disturbance would be approximately 11 acres** (included herewith as Exhibit RDS Judicial Notice- 1).” [emphasis added]

After the Intervenors replied to the Motion, the Petitioner wrote: [Sept. 12, 2023 Reply p. 5]

“Landowners’ September 5, 2023 filing also again raises the issue of the Project limit of disturbance (“LOD”). It is unclear how these claims are in any way relevant to the request for judicial notice currently pending.”

The Intervenors concede that their “claims” about the LOD are not relevant to authenticating exhibit RDS Judicial Notice-1. However, the Petitioner brought up the LOD acreage in their Motion Requesting Judicial Notice, and their purpose for requesting judicial notice is to establish that the Town knew the acreage of the project. The Petitioner explains:

“Both of these exhibits are directly relevant to the Commission’s deliberations regarding the Hearing Officer’s Proposal for Decision.” [Sept. 12, 2023 Reply page 5]

The Petitioner’s representations to the Town of Randolph about the acreage of the LOD are indeed relevant to the legal reasoning in the PFD. At some point (certainly by the June 10, 2021 Selectboard meeting) the Town did receive the disputed site plan, but regardless of when

and how the Town received the disputed site plan, and regardless of whether the Commission takes Judicial Notice of that plan, the Petitioner was dishonest in June of 2021 about, *inter alia*, the acreage of the LOD in their oral presentations to both the Town Planning Commission and the Town Selectboard. The Petitioner's dishonesty reinforces the PFD's conclusion that the Preferred Site Letters for this project do not reflect the sort of support that was intended by Commission Rule 5.103.

Conclusion:

For all the reasons stated in this reply document, the Intervenors oppose the Petitioner's Motion requesting the Commission take Judicial Notice of exhibits RDS Judicial Notice-1 and RDS Judicial Notice-2, and the Intervenors also oppose entering Mr. Malley's September 12, 2023 affidavit into the evidentiary record.

Dated at Randolph, Vermont this
26th day of September, 2023

/s/ Joan Allen

Joan Allen, *pro se*

1953 Davis Rd.

Randolph Center, VT 05061

joanbarballen@gmail.com

Dated at Randolph, Vermont this
26th day of September, 2023

/s/ Michael Binder

Michael Binder, *pro se*

1953 Davis Rd.

Randolph Center, VT 05061

michaeljbinder@yahoo.com