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Solar Project Permit is Denied by Public Service Board

Recently, the Public Service Board (PSB) did something it has only done a handful of times in recent history: it denied a petition – a certificate of public good (CPG) – to a company for construction of a solar installation.

In Vermont under 30 V.S.A. Section 248, developers that want to construct a solar or wind power generation facility must petition for, and be granted, a CPG from the PSB. The process to obtain a CPG – managed by a hearing officer assigned to each petition by the PSB – generally consists of a site visit to the proposed construction area, a technical hearing, the hearing officer's written proposal for decision, and finally a PSB determination of whether the project complied with all Section 248 criteria – i.e., whether to grant the CPG. The process and requirements for obtaining a CPG vary depending on the type of project and its size; smaller projects generally undergo a less rigorous review.

Towns where projects are proposed often oppose the issuance of a CPG, contending that a project is inconsistent with the town plan. Despite this opposition, the PSB typically grants all CPG petitions. This is in spite of the statutory language guiding the CPG process which states that the PSB should give "due consideration" to a town's recommendation regarding any given project. 30 V.S.A. § 248(b)(1). The PSB has historically viewed this statutory requirement as being more of a soft guideline. Therefore, many towns find that their efforts to oppose these projects are fruitless. The PSB's recent denial of the petition by Chelsea Solar, LLC (, is surprising not only because it is atypical, but also because the PSB based its denial on the fact that the project would be inconsistent with the town plan and would violate a clear, written community standard. *Petition of Chelsea Solar, LLC*, Docket 8302, Order of 2/16/2016.

The background for this project is that Chelsea Solar, LLC, petitioned the PSB for a CPG in June 2014 to develop a solar project in Bennington. During the petition process, Libby Harris, a Bennington landowner who opposed the project, was granted intervenor status limited to the issues of "orderly development, aesthetics, wind, and noise[.]" Because of various delays the technical hearing on the project was not held until July 2015. Shortly thereafter, Chelsea filed a proposed order that was agreed to by the Department of Public Service (DPS) and the Agency of Natural Resources (ANR). Harris also filed a post-hearing brief opposing the project. Finally, the hearing officer wrote the proposal for decision (PFD) for the PSB's consideration.

The PFD is the document that the PSB adopts as supporting evidence that it is appropriate to issue a CPG for a particular project. The PFD recites the technical aspects of a project, the effects on the environment, and, specifically relevant in this case, whether a project would have an undue adverse impact on the aesthetics and the scenic and natural beauty of an area. To determine the latter criteria the hearing officer and then the Board use the "Quechee Test."

The Quechee Test was adopted by the Vermont Supreme Court in context of an Act 250 case involving the Quechee Lakes Corporation. *In re Quechee Lakes Corporation*, 154 Vt. 543 (1990). The test is a two-part process for determining whether a project would have an undue adverse impact on the aesthetics and the scenic and natural beauty of an area. First, it must be determined if there is an adverse impact on aesthetics and the scenic and natural beauty of an area. In order to make such a finding, the project must be evaluated to determine if it is out of character with its surroundings, taking into account the nature of

the project's surroundings, the suitability of the project's colors and materials with the immediate environment, the visibility of the project, and the impact of the project on the open space. Second, if an adverse impact is found, the PSB must determine whether the adverse effect is "undue." An adverse effect is undue if there is a finding of any one of the following factors:

- the project violates a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area;
- the application fails to take generally available mitigation steps which a reasonable person would take to improve the harmony of the project with its surroundings; or
- the project offends the sensibilities of the average person (is offensive or shocking because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area).

The first part of the Quechee Test was established in regard to the Chelsea Project because all of the parties agreed that the project would have an adverse aesthetic impact. This was because of its large scale, its location close to the welcome center, and that it would require clear-cutting a substantial portion of trees from a parcel that shields nearby residences from a highway interchange. However, the parties disagreed on whether the adverse impact was "undue." The hearing officer concluded that the adverse impact was not undue because it did not violate a clear, written community standard. The hearing officer also concluded that Chelsea's petition for a CPG complied with all applicable Section 248 criteria and, therefore, the hearing officer recommended that the PSB approve the project.

The PSB, rather than merely accepting the hearing officer's conclusions, provided the parties the "opportunity to comment on the issue of whether there is language in the Bennington [t]own [p]lan that constitutes a clear, written community standard for the area in which the Project is proposed[.]" The PSB found that the standards and limitations on development that were articulated in the part of the town plan that addressed the Rural Conservation District (the proposed location for the project) did constitute "clear, written community standards." The PSB stated that the language in the plan is "specific in nature, is specifically applicable to the Project site, and seeks to conserve scenic resources by identifying specific actionable requirements and thus constitutes a clear, written community standard."

The town plan stated that within the Rural Conservation District of Bennington:

> "(1) only limited residential development is permitted, (2) no development may be sited in prominently visible locations on hillsides or ridgelines, (3) any development must utilize earth-tone colors and non-reflective materials on exterior surfaces of all structure, and (4) any development must minimize the clearing of natural vegetation."

The PSB determined that the project would violate three of these four clear, written standards of the town plan because it was not residential development, would remain visible on a hillside above the welcome center, and would necessitate clear-cutting substantial acreage of a dense and "mature" forest. Therefore, because the project violated a clear, written community standard, the adverse impact was "undue" under the Quechee Test analysis.

Chelsea had a different take on the Bennington town plan language. Citing a previous PSB decision involving a solar project in the Town of Rutland ("*Cold River"*), Chelsea argued that the Rural Conservation District's specific development limitations within the town plan were tantamount to *de facto* zoning bylaws and should not be relied on, because to do so would be "contrary to the intent of the Legislature in providing an exemption from zoning by-laws for Projects reviewed under Section 248 [criteria]." *Petition of Rutland Renewable Energy, LLC, re Reconsideration of the Cold River Project*, Docket 8188, Order of 5/6/15. In other words, Chelsea argued that the Rural Conservation District standards were really zoning bylaws dressed in a town plan costume because of how narrow and specific they were, and therefore should be disregarded.

The PSB rejected Chelsea's argument and distinguished the *Cold River* decision. In *Cold River*, the town plan applicable to the project contained standards that were town-wide and failed to identify the project's parcel as a specific scenic resource "worthy of protection." Unlike *Cold River*, the PSB stated that Bennington town plan standards in the Rural Conservation District "were established to conserve the rural character of a particular area of Bennington, not to create town-wide [regulations.]"

Chelsea also argued that the standards within the Rural Conservation District were more advisory than mandatory. Citing language within the town plan's Rural Conservation District section, the PSB found the converse to be true: that the standards were mandatory (e.g., "[s]pecific standards *shall* apply to new development...") (Emphasis added.). After addressing all other issues, the PSB concluded that, because the project failed the second prong of the Quechee Test, it did not meet all the criteria under Section 248. Therefore, Chelsea's CPG was denied.

It is also important to note that the PSB found that the project would unduly interfere with the orderly development of the region. The PSB, citing once more the language of the Rural Conservation District stated, "the [t]own [p]lan articulates specific land conservation measures applicable to the Project site that would be violated if the Project were to be constructed."

VLCT will follow the case to see if Chelsea appeals the PSB decision to the Vermont Supreme Court. If there is an appeal and the PSB decision is upheld, this case – and, notably, the language of Bennington's town plan – may be useful as model language for other Vermont towns wishing to use their town plans to properly site or restrict altogether solar and wind development.

The PSB's decision is archived here. For additional information, see the PSB's "Citizens' Guide to the Vermont Public Service Board's Section 248 Process."

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