STATEMENT OF ISSUES

1. Whether the PSB erred by granting a CPG to a solar project which directly conflicts with the Town of Rutland's Solar Facility Siting Standards?

2. Whether the PSB erred by granting a CPG to a proposed solar project which violates the land conservation measures of the Rutland Town Plan?

3. Whether the PSB erred by concluding that the proposed solar project will not "unduly interfere with the orderly development of the region" in contravention of 30 V.S.A. §248(b)(1)?

4. Whether the PSB erred concluding that the proposed solar project will not have an undue adverse impact upon aesthetics in contravention of 30 V.S.A. §248(b)(5)?

5. Whether the PSB improperly assessed the adverse impacts of the proposed solar project upon the surrounding properties?

6. Whether the PSB erred by granting a CPG to a project featuring the placement ground-mounted solar arrays on primary agricultural soils in the Town?

7 Whether the PSB erred by failing to require additional mitigation measures beyond the preservation of the existing vegetative screening along a portion of Cold River Road?

8. Whether the PSB gave the recommendation of the Town of Rutland against approval of the project due consideration?

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STATEMENT OF THE CASE

In a Decision dated March 11, 2015, the Public Service Board (PSB) issued a Certificate of Public Good (CPG) to Rutland Renewable Energy, LLC (RRE) for the construction and operation of a 2.3 MW solar energy facility on 15 acres of primary agricultural land along Cold River Road in the Town of Rutland ("the Town"). RRE's proposed solar project violates the 2009 Rutland Town Plan and the Town's Solar Facility Siting Standards (SFSS) adopted by the Selectboard of the Town on October 22, 2013. The Town intervened in the proceedings below and has appealed the PSB's CPG Decision to the Vermont Supreme Court because: (1) the PSB failed to accord due consideration to the Town's recommendations that the proposed solar facility will "unduly interfere with the orderly development of the region" in contravention of 30 V.S.A. §248(b) (1); and (2) the proposed solar facility will have an undue adverse impact upon aesthetics, historic sites, and primary agricultural soils in contravention of 30 V.S.A. 248(b)(5). Accordingly, the Supreme Court should reverse the PSB's CPG Decision of March 11, 2015.

Factual Background and Procedural Posture

RRE sought CPG approval for a 2.3 MW solar project to be located on property located along Cold River Road. The subject parcel consists of 24 acres +/- of which contains Class II and Class III wetlands. The proposed project consists of 542 fixed solar racks supporting approximately 10,000 individual panels oriented toward the south. Findings 10-11. PC 9. The solar arrays and associated infrastructure would occupy approximately 15 acres of mostly open meadow that sits atop primary agricultural soils. Findings 230-32. PC 64-65. Cold River Road runs south to north along the eastern boundary of the RRE site, then turns west at a right angle along the northerly boundary of the RRE site and continues westerly until it reached U.S. Route 7. The solar project is designed to be setback 64 feet from Cold River Road. The properties

adjacent to the solar consist of single-family residences. Three of these sit east of the RRE site across Cold River Road. Three properties near the project are registered as historic properties. Findings 194-98. PC 56. Due to the topography of the landscape, the solar site sits lower than surrounding residences. As a result, the solar project cannot be screened effectively from the view of these properties. The lands immediately to the west of the solar site consist of wetlands and woods.

Green Mountain Power (GMP) is headquartered in the City of Rutland and has undertaken to make Rutland the solar capital of New England. Given the considerable efforts of GMP to promote the development of solar sites in Rutland County, it became apparent to the Town in 2013 that many additional solar projects would be proposed for location within its borders. At the time of the adoption of Town Plan in 2009, renewable energy projects were essentially an abstract concept, for which the Town Plan expressed general support. PC 140-42. The 2009 Town Plan also addressed the importance, value, and need to preserve agricultural land and open space. PC143-44. As the proliferation of solar projects became a reality in 2013, the Town desired to have meaningful input before PSB regarding on solar projects proposed for location in the Town, particularly large projects such as the that proposed by RRE. The Town recognized that 2009 Town Plan probably lacked the specificity required to qualify as clear written community standards and to provide written policy upon which the Selectboard and Planning Commissions could rely in testimony before the PSB regarding a proposed solar project's impact upon orderly development. See PSB Rule 5.109 (adopting the so-called "Quechee Analysis") and 30 V.S.A. §248(b)(1). As a result, the Town determined that it would be prudent to develop specific written siting standards in order to guide the orderly development

of solar projects in the Town in a manner consistent with the preservation of the Town's residential neighborhoods and its agricultural, scenic, natural, and historic resources.

Section 4432 of Title 24 authorizes a municipality to "adopt a plan or plans that support the municipal plan." 24 V.S.A. §4432. Such supporting plans may or may not later become incorporated into a municipal town plan. See Id. At its public meeting of October 22, 2013, the Rutland Town Selectboard adopted Solar Facility Siting Standards (SFSS) pursuant to §4432 in support of the implementation of the 2009 Town Plan. The Solar Facility Siting Standards include, without limitation: standards concerning setbacks from wetlands, property lines, public highways, historic buildings, and historic Center Rutland; on-site mitigation of visual impacts through screening, selection of appropriate materials, colors, and textures; the preservation of primary agricultural soils; the protection of significant wildlife habitat and upland areas (elevation of 1,000 feet); and the avoidance of special flood hazard areas. Rod Viens, the applicant's Executive Vice President, attended the meeting at which the Rutland Town Selectboard adopted its SFSS. Tr., 8/20/14, p. 78, lines 20-25.

RRE subsequently held an informational meeting on November 13, 2013 at the Rutland Town Hall prior to its filing of the CPG application in connection with the submission of its proposed plans to the Town Selectboard and Planning Commission at least 45 days prior to the filing of its CPG petition as required by PSB Rule 5.402. See Petitioner Cross Ashcroft Exhibit 4-6, Town of Rutland Response to 1-26, Minutes of October 22, 2013 Meeting of Rutland Town Selectboard. On December 20, 2013, RRE filed its CPG petition with the PSB without revising its solar project to bring it into compliance with the Town's SFSS.

Several adjoining property owners ("the Neighbors") represented by Alan George, Esq. participated in the §248 proceedings and opposed RRE's application for a CPG. On March 5,

2014, the Town filed a Motion to Intervene pursuant to PSB Rule 2.209. RRE opposed the Town's Motion to Intervene and sought to exclude submission and consideration of the Town's SFSS. In a written decision dated March 27, 2014, Hearing Officer Mark Sinclair granted the Town's Motion to Intervene ruling that "the Town has sufficiently articulated a particularized and substantial interest with regard to orderly development of the region, aesthetics, historic sites, the natural environment, the use of natural resources, the health and safety of the public, and agricultural soils. Third Procedural Order: Motion to Intervene and Schedule, p.3. Hearing Officer Sinclair rejected RRE's argument to exclude the SFSS as premature and stated, "I do find that the Standards are relevant, at a minimum, under Section 248(b)(1), as recommendations of the municipal legislative body regarding orderly development." Id.

Hearing Officer John Cotter subsequently replaced Mark Sinclair and conducted a site visit on April 18, 2014. The parties then submitted prefiled testimony and conducted discovery. In August of 2014, the Hearing Officer Cotter conducted technical hearing over the course of four days.

In its Post-Trial Memorandum dated September 29, 2014, the Town opposed the grant of a CPG on the grounds the proposed solar facility would unduly interfere with the orderly development of the region and the proposed solar facility would have an undue adverse impact upon aesthetics, historic sites, and prime agricultural soils. See 30 V.S.A. §248(b)(1) and (5). The Town argued that RRE's proposed solar facility contravened the Town's SFSS in multiple respects. Most importantly, the SFSS prohibits the installation of ground-mounted solar facilities on primary agricultural soils. All of the solar arrays of RRE's proposed project would be located on prime agricultural soils. In addition, the proposed project's setback of 64 feet from Cold River Road violated the SFSS 200–foot setback for a solar project of this size.

The Hearing Officer issued his Proposal For Decision (PFD) on November 20, 2014. The PFD rejected Town's arguments and recommended that the PSB issue a CPG. The Town filed its Objections to Proposal for Decision on December 4, 2014.

The PSB conducted a site visit on January 26, 2015 and issued its written decision granting RRE's application for a CPG on March 11, 2015. The PSB accepted and adopted the Hearing Officer's PFD, with only minor revisions.

The Neighbors then filed a Motion to Reconsider which the PSB denied in a written decision dated May 6, 2015.

The Town and the Neighbors subsequently filed timely notices of appeal to the Vermont Supreme Court.

ARGUMENT

I. THE PSB'S REJECTION OF THE TOWN OF RUTLAND'S SOLAR FACILITY SITING STANDARDS AND THE SUBSTANCE OF ITS CPG DECISION DEMONSTRATES THAT THE PSB IS DEAF TO LEGITIMATE LOCAL CONCERNS AND §248 CPG PROCESS FOR SOLAR PROJECTS IS BROKEN.

The PSB's Decision to grant a CPG for RRE's solar project errs in failing to acknowledge the Town's concerns in a meaningful way and its refusal to give effect to the failure of the RRE project to comply with the Town's SFSS. The Town Selectboard, in conjunction with the Town Planning Commission, developed the SFSS to ensure that the rapid expansion of solar energy projects proposed by GMP for location in the Rutland area will proceed in harmony with existing land uses and without undue adverse impact upon the resources that the Town has determined warrant preservation and protection. The SFSS constitutes the written expression of the will and vision of the two municipal bodies charged by the legislature with the responsibility and authority to plan for land use development and to craft standards and criteria to guide proposed solar projects toward the implementation of the municipality's land use goals.

Before 2013, renewable energy existed only as an abstract concept which towns, and probably most Vermonters, supported on principle. Significant renewable energy development seemed a far off goal. As a result, solar projects simply were salient for town officials. All development projects have impacts. Until now, Vermont towns have not fully appreciated the issues of contextual fit of large solar projects into the landscape and among adjoining properties. Vermonters have not had occasion to experience the effects of solar projects upon the surroundings in which they are place. Simply put, Vermonters have come to realize and appreciate that, while the development of renewable energy is worthwhile goal, contextual fit matters.

The PSB has pursued solar project development aggressively in response to the targets established by the legislature for the development of renewable energy. In the process, the PSB has turned a deaf ear to the concerns raised by towns and neighbor that oppose or seek substantial adjustments to solar projects. While neighbors, and in an ever-growing number of cases, municipalities, have the opposed size, scope, and siting of solar energy projects, the PSB has found it easy to reject opponents' concerns. Usually a town plan's treatment of renewable energy issues features general statements of support. The same is true with respect to town plan policies regarding the preservation of open space, primary agricultural soils, rural character, and scenic vistas. The PSB has found it easy to disregard the concerns of public and private opponents of solar projects by deeming the general statements in town plans insufficient to have bearing upon any particular solar project. As the PSB has approved solar project after solar project without any substantial adjustment, it has now created the widespread perception that the "due consideration" required of it by 30 V.S.A. §248(b) (1) is illusory – an occasion for lip service only. Regardless of the size, scope, location, and context of a solar project, the CPG

process, and the jurisprudence presently administered by the PSB, affords no meaningful or effective input to host towns and adjoining property owners. The reality is that the PSB approves all solar projects, most without the slightest alteration.

In this CPG petition, the PSB had before it for what we believe is the first time, written, specific siting standards concerning solar energy projects. The RRE project directly conflicted with the Town's SFSS standards. Nevertheless, the outcome before the PSB was a foregone conclusion as the PSB performed legal and intellectual gymnastics to sweep away the Town's SFSS under the guise of "due consideration."

As a result of the PSB's wholesale approval of solar projects after "due consideration," towns and neighbors adjoining proposed solar projects have felt ignored, and frankly steamrolled, by the PSB. Legal doctrines, such as the Quechee Analysis, appear on the surface to offer some hope of effective input. As applied by the PSB, however, the prospective check upon the size, scope, and location of a proposed solar project offered by the Quechee Analysis proves to be an illusion.

As one might expect, a backlash began percolating as a result of the Hearing Officer's and the PSB's treatment of the Town's SFSS in this case. As a result of the PSB's rejection of the Town's SFSS, the Town passed a resolution which called attention to the serious failures of the PSB to allow municipalities to have any effective voice in §248 proceedings. The Town sent this resolution to the legislative bodies of every town in Vermont. More and more Vermont towns have now experienced the PSB's administration of the CPG process for solar projects and its adjudication of solar applications. The Town's resolution resonated as many Vermont towns have voiced their concern and displeasure with the PSB's lack of receptivity to the legitimate concerns of town selectboards as the number of PSB proceedings regarding solar projects have

proliferated. While towns' and neighbors' concerns are politely and professionally received, the PSB's ultimate dismissal of the opponents' concerns, and the manner in which the PSB dispatches those concerns, leaves town s and neighbors to conclude that they have no real voice and that the CPG process for solar projects is broken.

Forty one towns adopted Rutland Town's resolution. The towns of Middlebury and Charlotte passed similar resolutions of their own. The Vermont League of Cities and Towns (VLCT) became involved. The signatory towns and their representatives, along with VLCT, petitioned the legislature to address the problem of the lack of effective local input into the solar project CPG process. As a result of these efforts, the legislature recognized to begin strengthen local input into §248 solar project proceedings and culminated in the passage of Public Act No. 56 of 2015. The changes mandated by Public Act No. 56 include: (1) the automatic right of legislative bodies and planning commissions to appear in §248 proceedings[1]; (2) the establishment of a minimum setback of 100 feet from the edge of the public highway traveled way and 50 feet from adjoining property lines for ground-mounted solar projects exceeding 150 kW[2] (3) authority for the PSB to require a larger setbacks on a case-by-case basis;[3] (4) municipal authority to adopt freestanding bylaws or ordinances to establish screening requirements for ground-mounted solar projects;[4] (5) a requirement that the Commissioners of the Public Service and of Housing and Community Development report to the House and Senate Committees on Natural Resources regarding the adoption of municipal screening requirements and to itemize

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[1] See Public Act No. 56 (2015), §26a (enacting 30 V.S.A. §248(a)(4)(F)).

[2] See Public Act No. 56 (2015) §26b (enacting 30 V.S.A. §248(s)(1)(A)(i) and ((B)(i)).

[3] See Public Act No. 56 (2015) §26b (enacting 30 V.S.A. §248(s)(3)(A)).

[4] See Public Act No. 56 (2015) §§26c – 26e(enacting 30 V.S.A. §248(b), 24 V.S.A. §4414(15); 24 V.S.A. §2291(28)).

and summarize the PSB's disposition and status of proceedings involving those requirements;[5] and (6) the creation of a Solar Siting Task Force "to study issues pertaining to the siting, design, and regulatory review of solar electric generation facilities." Public Act No. 56 (2015) §26g.

While the Town has no illusions that Public Act No. 56 controls this case, this PSB's treatment and resolution of this case set the wheels of this legislation in motion. Public Act No. 56 therefore ought to validate the criticisms expressed by the Town in this appeal and should serve as a lens through which the Court views PSB's CPG decision and the Appellants' arguments. While virtually every appellant before this Court likely feels they were wronged or did not receive justice below, Public Act No. 56 demonstrates that a serious problem has existed in the PSB's handling of solar project CPG proceedings and those problems are manifest in this case. The Town is not just another disgruntled litigant; in this case, the Town is the canary in the coal mine. "Due consideration" of municipal concerns actually has to mean something if the rulings of the PSB are to have any legitimacy with local communities and the Vermont public. At present, the PSB is losing that battle.

While the Vermont Supreme Court has stated that its review of PSB decisions will be deferential, that does mean that the Court should refrain from real scrutiny of PSB decisions in order to ensure that participants received due process, fair treatment, and an amply-supported, just decision. Though the Supreme Court presumes the validity of PSB decisions, see In re Halnon, 174 Vt. 514, 518 (2002), the Court may reverse a decision of the PBS when, after a review of the entire record, the Court is left with the "definite and firm conviction that a mistake has been committed." In re VELCO, 131 Vt. 427, 432 (1973). Such is the case here.

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[5] See Public Act No. 56 (2015) §26f (a)(1)-(3).

II. THE PSB ERRED BY FAILING TO RECOGNIZE THAT RRE'S PROPOSED SOLAR PROJECT WILL UNDULY INTERFERE WITH THE ORDERLY DEVELOPMENT OF THE TOWN OF RUTLAND.

The PSB erred in failing to acknowledge in a meaningful way the failure of the proposed solar facility to comply with the Town's SFSS. The Town Selectboard and Planning Commission developed the SFSS to ensure that the rapid expansion of solar energy projects proposed by GMP for the Rutland area will proceed with due consideration of the existing land uses and without undue adverse impact upon the resources that the Town has determined warrant preservation and protection. The SFSS constitutes the written expression of the will and vision of the two municipal bodies charged by the legislature with the responsibility and authority to plan for development and to craft standards and criteria to guide proposed development projects toward the implementation of the municipality's planning goals.

In short, the Town's SFSS sets forth how solar power generation facilities should be designed to foster "orderly development" within the Town in order "to avoid and mitigate potential impacts of solar facility development, while promoting new installations in appropriate locations." SFSS, p.1 (emphasis supplied). PC 165. The PSB's crabbed interpretation of the 2009 Town Plan, the Town's SFSS and the prefiled testimony Selectperson Mary Ashcroft and Howard Burgess, Town Lister and Planning Commissioner, makes clear that the PSB has ignored the letter and spirit of the legislatures' directive in 30 V.S.A. §248(b) (1) to afford the recommendations of the Town's Planning Commission and Selectboard due consideration. The PSB cast aside the SFSS due to: (1) the differences between the SFSS and the preexisting 2009 Rutland Town Plan; (2) the limitations on ground-mounted solar development created by the SFSS's primary agricultural soils and the setback provisions, and (3) the Town's "apparent position that other types of development with greater impacts on primary agricultural soils would not have an undue impact on orderly regional development." PC 79. See generally PC 78-80.

A. The Protection of Primary Agricultural Soils Afforded by Town's SFSS Supports, Rather than Conflicts, With the 2009 Rutland Town Plan.

The great lengths to which the PSB stretches to avoid the opposition of the Town to the RRE project is revealed in the PSB's analysis of the Town's policies concerning the promotion and protection of agriculture through its efforts to preserve primary agricultural soils for agricultural use. The PSB improperly focuses on the impact of the SFSS on the proposed solar site and ignores the fact that RRE has simply chosen a site for its ground-mounted solar arrays that violates the SFSS, when fully 78% of the Town's land is free from the primary agricultural soils restriction.

The 2009 Town Plan notes the historic importance of agriculture in the Town. More importantly, the 2009 Town Plan notes with approval the "recent upswing in smaller-scale agricultural activities, including vegetable production and specialty products . . . [and] a trend towards increased numbers of farms in Rutland Town." 2009 Rutland Town Plan, Agricultural Resources, PC 132. The Town Plan recognizes that prime agricultural lands constitute a limited resource comprising only 22% of the Town's total land. See Id. This means, of course, that fully 78% of the Town's land area consists of soils not primarily suited to farming. The Town Plan notes that the Town's development footprint has managed, in large measure, to avoid compromising the ability of the Town's primary agricultural soils to support agriculture. "[O]nly a small number of structures are currently standing on the highest quality soils in the community." Id. (17 structures or 1% of the total number of buildings in the Town). As a result, the 2009 Town Plan establishes the conservation of agricultural land for agricultural use as an express goal. The 2009 Town Plan states, "[i]n order to retain the potential for future agricultural uses, development should continue to be discouraged on the Town's limited amounts of high quality soils." Id.

The 2009 Town Plan indicates that some development on prime agricultural soils is expected given their scattered dispersal throughout the Town, such as single family homes, for example. The SFSS recognizes that (1) the developers of large-scale ground mounted solar projects will likely be drawn to open space which in turn may feature primary agricultural soils and (2) ground-mounted solar facilities have the potential to occupy substantial amounts of primary agricultural land. For this reason, the SFSS allows encourages the installation of solar collectors on buildings in any location. Indeed, the Rutland Economic Development Corporation (REDC) property located to the west of the proposed site has access to Cold River Road via Quality Lane and the business properties along Route 7 to the west of the proposed site have many large building that could accommodate substantial solar generation facilities on building roof tops. The SFSS also allows ground mounted solar arrays on the majority of land in the Town. The SFSS, therefore, cannot fairly be characterized as in conflict with the 2009 Town Plan. To the contrary, the SFSS "supports" the 2009 Town Plan as required by 24 V.S.A. §4432. See Id. ("A municipality may adopt a plan or plans that support the municipal plan").

In the years since the adoption of the 2009 Town Plan, the development of alternative energy projects, particularly solar projects, began to proliferate. The development of renewable energy projects therefore evolved from an abstract concept to a physical reality on the Town's landscape. As is often the case with a new type of development that becomes manifest, the establishment of the new use has impacts upon the surrounding properties and the local community at large that require dialogue and accommodation. As a result, the siting of solar projects in the Town became a salient issue. The SFSS constitutes the expressions of the Town's Selectboard and Planning Commission to address specifically the new reality of widespread solar development that began to emerge during the twilight of the 2009 Town Plan. When events

cause municipal planning and legislative officials to move from theoretical possibilities to the consideration of practical realities, and from general provisions to the specific, differences between the old and the new expressions of municipal policies and objectives are inevitable, or at a minimum, are to be expected.

Given the unprecedented expansion of solar power initiatives since the adoption of the 2009 Town Plan, the Town quite understandably and reasonably began in 2013 to consider in a specific way how to fit renewable energy projects, and solar projects in particular, within the overall planning and development processes of the Town. The Town Selectboard therefore prepared and considered solar facility siting standards in the autumn of 2013. At the time of the adoption of the SFSS, the 2009 Town Plan had entered the final year of its five-year life span. With this action pursuant to 24 V.S.A. §4432, the Town put in place clear written guidelines to address the new reality of the siting of solar projects on the landscape.

The 2009 Town Plan "discourages" development on the Town's limited amount of prime agricultural soils. 2009 Town Plan, p.32. The SFSS directs that "ground-mounted solar arrays with a generation capacity of greater than 100 kW . . . are to be located on nonagricultural (sic) land or along field edges to avoid fragmentation of, and to minimize and mitigate adverse impacts to agricultural lands and open fields." SFSS, p. 10 (emphasis added). PC 171. The SFSS, therefore, specifies further that "[g]round-mounted solar energy facilities shall not be located on primary agricultural soils as mapped by the USDA Natural Resource Conservation Service in order to preserve such lands for agricultural use." Id. (emphasis added). The SFSS in effect worked to bridge the gap until the Town Planning Commission and Selectboard could complete the lengthy and involved process of preparing and adopting the 2014 Town Plan upon the expiration of the 2009 version.

It should come as no surprise then that the SFSS differed in some ways from the 2009 Town Plan's treatment of renewable energy initiatives. As the PSB noted, the 2009 Town Plan contained the typical professions of support for renewable energy in the abstract. The existence of differences between the 2009 Town Plan and the October 2013 SFSS, however, does not compel the conclusion reached by the Hearing Officer and the PSB that the SFSS conflicts with the 2009 Town Plan or that some "tension" exists "between the prohibition of ground-mounted solar arrays on lands with primary agricultural soils and the lack of prohibition of any other type of development that is more likely permanent and result in greater impacts to the agricultural quality of soils." PC 79. The 2009 Town Plan's expression of support for the installation of solar energy collectors and wind energy production (PC 142) does not mean that any subsequent municipal efforts to draw distinctions between types of renewable energy systems, to channel types of renewable energy projects to particular venues or areas, and/or to adopt guidelines in an effort to achieve a harmonious relationship with surrounding land uses and competing policy objectives place the SFSS in conflict with the 2009 Town Plan. Yet, this is exactly the reasoning adopted by the PSB – difference equals conflict.

With such reasoning, the PSB effectively precludes a town from formulating a policy to address a specific concern that has arisen since the adoption of a town plan years before which addressed the issue in a more general way. Town plans remain in effect for five years. See 24 V.S.A. §4387 (a)("all plans, including all prior amendments, shall expire every five years unless they are readopted according to the procedures in [24 V.S.A. §4385]"). In effect, the PSB used the preexisting Town Plan's more general discouragement of development on primary agricultural soils to neutralize the Town's 2013 effort protect primary agricultural soils from a specific development threat that had arisen since adoption of the 2009 Town Plan. The reality is

that ground-mounted solar arrays gravitate toward open fields. A small percentage of such open land in the Town features primary agricultural soils that Town wishes to preserve for agriculture, use which has experienced a renaissance in the Town and many Vermont communities as a result of the "local food movement." See Ashcroft Testimony, Tr. 8/22/14, p. 46 ("I have a farm and our town plan in several parts has spoken to the need to preserve primary agricultural soil, and we've got a very nice growth of new farmers and new farming activity in Rutland County and in our area, and I would like to see the farm available for that farmland, especially primary ag soils"), 2009 Town Plan ("A recent upswing in smaller-scale agricultural activities including vegetable production and specialty products, appears to have initiated a trend toward increased numbers of farms in Rutland Town. . . . In order to retain the potential for future agricultural uses, development should continue to be discouraged on the Town's limited amount of high quality soils") PC 143. The SFSS does just that by addressing the primary threat to large-scale removal of prime agricultural lands' ability to host farming – ground-mounted solar arrays. The Town's public policy choice is legitimate and the value that it places on the preservation agricultural lands for agricultural use is consistent with the numerous public policy initiatives of the legislature, such initiatives as the current use program.

The hostility of the Hearing Officer and PSB to municipal policies which might infringe upon the solar developer's unfettered right to construct solar projects wherever it wants and as big as the parcel will allow bleeds through between the lines of the CPG Decision. The CPG Decision evidences the opinion of the Hearing Officer and the PSB that any public policy that conflicts with the development of solar energy projects is suspect, inferior, illegitimate, and/or disingenuous. See Decision ([B]ecause the [SFSS] do not prohibit any type of development on primary agricultural soils other than ground-mounted solar arrays, the Town's concerns about

these soils appear to be heavily focused on limiting solar development, as opposed to development generally, without reasoned explanation") PC 16. For this reason, the CPG Decision emphasizes the older and more general Town Plan to delegitimize, and therefore justify the disregard of the SFSS's prohibition of ground-mounted solar arrays on this site. In so doing, the PSB runs afoul of the canons of construction frequently endorsed by the Supreme Court that the more recent legislative expression controls over the older and that the specific controls over the general. See e.g. Town of Killington, 176 Vt. 60, 66 (2003)("courts presume that the legislature passes and amends more topically focused laws with knowledge of existing law), Town of Brattleboro v. Garfield, 180 Vt. 90, 94 (2006)("where two statutes deal with the same subject matter, and one is general and the other specific, the more specific statute controls").

B. The PSB Improperly Disregarded the Primary Agricultural Soil Protections of the SFSS Because Those Standards Did Not Ban All Development on Such Soils.

Both the Hearing Officer and the PSB reasoned that because the Town's SFSS does not prohibit all development on primary agricultural soils, the Town had no basis to oppose the proposed solar project on the ground that its installation would adversely affect the orderly development in the Town. See Decision, p. 79 ("In light of the Town's apparent position that other types of development with greater impacts on primary agricultural soils would not have an undue impact on orderly regional development; we do not find fault with the Hearing Officer's reasoning that installation of the Project also would not result in such undue impact"). PC 79. In effect, the PSB improperly imposed upon the Town a requirement that any planning or land use policy effort must create a seamless and comprehensive web of treatment.

There has never been, and there ought not to be, any requirement in Vermont land use law that a municipality's treatment of a specific land use issue cannot have any effect if the municipal policy does not address all potential impacts that might bear on the subject matter. It

is the nature of government – national, state, and local -- to address issues that arise on the stage of public policy. The scope of governmental response necessarily varies and ought to be allowed to do so. Sometimes the scope of policy is created by targeted application. Other times, the scope is limited by the adoption of specific exceptions. There exists no requirement of comprehensiveness in order for a governmental policy, ordinance, or regulation to be worthy of recognition by an administrative tribunal or court. Is Act 250 illegitimate and subject to disregard because it exempts slate quarries from the land use permit requirement? See 10 V.S.A. §6081(k). The Vermont Supreme Court has rejected any notion that municipal land use authority depends upon an all-inclusive treatment of an issue. Indeed, the Court has made clear that zoning regulations do not fail even if they conflict with a town plan. See Smith v. Winhall Planning Commission, 140 Vt. 178, 183 (1981)("The regulations as adopted may indeed be inconsistent with the Town Plan, but the total consistency upon this argument is predicated is not a legal requirement. . . Partial implementation is not unusual").

Here, the Town adopted the SFSS to respond to the prominent and imminent risk to large swaths of primary agricultural soils that attends ground-mounted solar projects. Solar project developers tend to gravitate to large parcels of predominantly open land, some of which contain primary agricultural soils. The Town recognized and addressed the threat posed to primary agricultural soils by the aggressive push to site solar projects. There is nothing untoward or illegitimate about the Town's adoption of the SFSS. Nevertheless, the Hearing Officer and the PSB, however, used the Town's response to this newly-arisen specific issue as a justification to disregard the Town's policy effort.

In so doing, the PSB ignored the fact that the Town is not without other means to protect primary agricultural soils. The Town does not have zoning and therefore is a so-called "1-acre

town" for purposes of Act 250. The economy in Rutland County and therefore Rutland Town has suffered for several years. Large residential developments have simply not been part of the development picture in the Town. Such developments are only theoretical in the same way that solar projects were until recently. Rutland Town is not Williston, South Burlington, or Shelburne. It therefore made sense for the Town to focus on ground-mounted solar arrays in the SFSS. If and when a proposal for residential development on primary agricultural soils comes along, the Town has Act 250 and its Criterion 9(B) protections available for any development on a parcel larger than 1 acre. See Ashcroft Testimony, Tr. 8/22/14, p. 47-48.

Nevertheless, the Hearing Officer and the PSB faulted the Town for its failure to protect primary agricultural soils from all development. In so doing, the CDG Decision improperly imposed upon the Town a requirement that any policy advanced by the Town in a PSB proceeding must be comprehensive and all inclusive to have any bearing upon a proposed solar project. See Decision, p. 15-16, 78-79. In essence, the PSB disregarded the Town's recommendations simply because the Town addressed the newest and biggest threat to primary agricultural soils that the Town faces.

Even worse, the Hearing Officer and the PSB seized upon the absence of a comprehensive ban of development on primary agricultural soils to delegitimize the SFSS as a deceitful and/or disingenuous effort to protect a limited local resource. Note the Decision's elevation of the possibility of residential development on primary agricultural soils to an "apparent position" of the Town that such development would not have an undue impact on orderly development in the Town. PC 79. Here again, the PSB displays its bias in favor of solar projects and its prejudice against any local opposition to the propagation of them. The PSB's

unmistakable agenda belies the PSB's claims that it has given the recommendations of the Rutland Selectboard and Planning Commission "due consideration."

C. The PSB Cannot Avoid the RRE Project's Conflict With the Primary Agricultural Soils Protection of the SFS By Mischaracterizing the Solar Project as Temporary.

The Hearing Officer and the PSB ignored the reality of that construction of solar projects on primary agricultural soils effectively precludes the agricultural use of those lands. The CPG Decision attempts to avoid this reality by referencing the 25-year life span of the solar panels and converting that life span into a 25-year time limit of the project, in order to characterize any impact on the agricultural use of the prime agricultural soils of the parcel as "temporary." See Decision (describing the effect of the solar project on primary agricultural soils as "modest, temporary and reversible"). PC 16.

This reasoning regarding primary agricultural soils, though apparently common in CPG proceedings, is intellectually dishonest when applied to the Town's SFSS. Pursuant to 30 V.S.A. §248(b)(5), the PSB reviews a proposed project in light of several Act 250 criteria, including 10 V.S.A. §6086(a)(9)(B), primary agricultural soils. Criterion 9(B) requires only that the project not reduce the "agricultural potential of the primary agricultural soils." 10 V.S.A. §6086(a)(9)(B). The Town's SFSS is stricter than Act 250's prime agricultural soils criteria. The Town's SFSS precludes the installation of ground-mounted solar arrays in order to keep prime agricultural lands open for agriculture. The Town's SFSS endeavors to keep the land open for agriculture now in order to foster and support the increase of agricultural development that the Town is experiencing.[6] There is no dispute that the solar project and farming cannot coexist on the property.

[6] See Prefiled Testimony of Mary Ashcroft. PC 163.

The "agricultural potential" of prime agricultural soils can be regarded as secure under Criterion 9(B) if a development can be characterized as "temporary." While a development which does not displace primary agricultural souls may not contravene Criterion 9(B), it does violate the Town's SFSS. Nevertheless, the PSB resorted to its primary agricultural soils playbook because it works with respect to cases that consider only the impact on "agricultural potential" of primary agricultural soils under Criterion 9(B). This playbook, however, could not accommodate the Town's enhanced preservation of prime agricultural soils for agricultural use.

The PSB took advantage of the statutory term "agricultural potential" in 10 V.S.A. §1086(a)(9)(B) to avoid adverse impact upon the use of project land for agriculture by noting that the primary agricultural soils remain in place and could be used for agriculture if and when the solar panel supports are removed from the ground a generation or more in the future. Solar CPG approvals, however, do not carry time limits and allow the substitution of new panels when the original panels wear out. As Rod Viens acknowledged in his testimony, nothing in the CPG petition limits the life of the solar project to 25 years and the useful life of the project can be perpetuated by replacing components as they wear out. See Tr. 8/20/14, p. 73-74. The CPG issued to RRE does not expire after 25 years; nor does it prevent the replacement of the arrays with new panels to extend the life of the project.

Under the guise of giving the primary agricultural soils protections of the Town's SFSS "due consideration," the PSB dismissed the project's impacts on those soils as "temporary." Though the initial panels may have a useful life of 25 years, the PSB converted the expected life span of the panels into the duration of the solar project itself in order to characterize the effects of the solar project as "temporary." For those that must live with a solar project and experience

its effects, the PSB's insistence that a 25-year project is temporary comes off as Orwellian. Only in §248 solar proceedings can effects that will last a generation be packaged as temporary.

It is precisely this sort of intellectual and linguistic gymnastics that the PSB practices in solar project CPG proceedings to approve all applications that come before it that compels the conclusion of those that opposed a solar project that the §248 process is a sham. If the characterization of a solar project as temporary in order to ignore a direct conflicts with clear, written community standards is justified by qualifies as "due consideration," then the statutory directive of §248(b)(1) has no real meaning. With such evident bias in the PSB's CPG Decision, the Vermont Supreme Court should disregard the PSB's assertion that it has given "due consideration" to the Town's position on the RRE project is inconsistent with the orderly development of the region and the Town's land conservation measures as expressed in the SFSS. A CPG Decision which is the product of biased and predetermined decision making ought not to be rendered impregnable simply by the PSB's incantation of "due consideration."

D. The PSB Improperly Disregarded the Solar Project's Failure to Comply With the 200- Setback Requirement of the SFSS.

Contrary to the assumption of the PSB, the Town's SFSS makes clear that the Town supports the development of solar energy facilities when sited appropriately and when the project's impacts upon the surrounding area are taken into consideration. Indeed the Town's standards reflect a nuanced and measured approach to the siting of solar facilities. A three-tiered setback regime ensures that the impact upon surrounding properties by larger solar projects is mitigated by setbacks which increase along with the size of the energy generation capacity. Therefore, the Town's approach to the siting of solar facilities is eminently reasonable. In the judgment of the Town, solar projects carry the potential to have adverse aesthetic impacts upon surrounding properties. The Town reasonably concluded that, the larger the solar project, the

greater the potential for adverse impact. The Town crafted a system of setbacks that channels large solar projects to parcels of sufficient size to provide a progressively larger buffer zone as the complex of solar equipment and arrays increases. The Town's SFSS therefore reflect the judgment of the Town of how best to ensure that solar energy development will be integrated into the orderly development of the Town.

For projects of the size of RRE's proposal, the SFSS require a setback of 200 feet from a public highway and from adjoining property lines. PC 170. RRE's design, however, locates solar panels only 64 feet from Cold River Road on the east and north sides of the RRE property, and thereby violates the SFSS setback requirement. Decision, Finding 27. PC 12. Clearly, given the 15+ acres of the parcel available for the installation of solar arrays, a project of substantial size could have been located on the property while maintaining compliance with the setback requirements of the SFSS 200-foot highway and property line setback requirements.

RRE, however, chose to ignore the Town's SFSS in an effort to install as many solar panels as possible on the property in order to maximize its profit. The PSB, in turn sanctioned RRE's sizing of the project in direct contravention of the reasonable setback regime adopted by the Town. PC 79-82. Here again, the PSB returned to the more general Town Plan which predated the arrival of solar projects in the area and the resulting development of the SFSS. The PSB improperly ignored the project's violation of the Town's setback requirement stating that "the Project is largely consistent with the [Town] Plan," in order to conclude over the objections of the Town that that RRE's solar project will not unduly interfere with the Town's orderly development." PC 82. For the same reasons set forth in Sections II A and B above, this use of the preexisting Town Plan to invalidate the SFSS subsequently adopted by the Town stands as

stark evidence that the PSB failed to give the recommendations of the Selectboard and the Planning Commission due consideration.

III. THE RRE SOLAR PROJECT WILL HAVE AN UNDUE ADVERSE EFFECT ON AESTHETICS, HISTORIC, SITES AND THE NATURAL ENVIRONMENT.

The size, scale, and visibility of RRE's proposed solar project on a parcel that sits lower than the surrounding residential properties will produce undue adverse effects with respect to the aesthetics, historic sites, and natural environment of Cold River Road area. The reasons for these undue adverse effects follow from reasons why the proposed project will unduly interfere with the orderly development of the region. See Prefiled Testimony of Mary Ashcroft, Answer 6, p.4, Lines 7-22 and p. 5, Lines 1-4 ("Two of the Town's designated historic properties are located approximately 110 ft. to the east of the proposed project's solar arrays. The solar project will be visible from those properties. The proposed project's proximity to these historic properties does not comply with the Town's required setback requirement (500 ft.)"). See also Prefiled Testimony of Howard Burgess, Answer 5, p.2, Lines 7-21. The prefiled testimony of Mary Ashcroft and Howard Burgess, as well as the evidence offered by the Neighbors and their expert Jean Vissering constituted substantial evidence of the project's undue adverse impacts on the Cold River Road area which the PSB erred in failing to heed.

RRE conceded that its project will produce adverse effects on these parameters. Mark Kane, RRE's land use planner, acknowledged that the solar project would be out of character with its surroundings in both his prefiled and hearing testimony. See Kane Testimony, Tr. 8/20/14, p. 169, Lines 15-20. Michael Buscher reached the same conclusion. Buscher Testimony. Tr. 8/21/15, p.87, Lines 18-20. There existed no dispute that the project will consume 15 + acres of open space the features primary agricultural soils. Even with vegetative screening, the project will be visible from the public highways and the adjoining properties to the

east and north. PSB erroneously concluded that the project's adverse impacts would not be "undue" primarily because of the effect of vegetative screening proposed along eastern and northern edge of the subject parcel upon those traveling along Cold River Road, and south on Stratton Road. Nevertheless, these plantings would have limited screening effect for the historic residential properties located on the east side of Cold River Road and on the Fucci home which sits above the RRE site. In so concluding, the PSB misapplied the "Quechee Analysis" to consider the impact upon the traveling public, to the exclusion of the directly-affected Neighbors in order to avoid the determination that the project will produce undue adverse effects.

The Quechee Analysis, which the PSB endorses in Rule 5.109, sets forth three standards for consideration once a project is determined to have an adverse impact. Each standard is independent of the other two. An affirmative finding upon any one of the three standards compels the conclusion that the adverse impact is "undue." Under the Quechee Analysis, an adverse impact qualifies as "undue" if:

> (1) It violates a clear, written community standard intended to preserve the aesthetics or scenic and natural beauty of the area;
>
> (2) It offends the sensibilities of the average person; or
>
> (3) The applicant has failed to take generally-available mitigating steps that a reasonable person would take to improve the harmony of the project with its surroundings.

See Halnon, 174 Vt. at 515. While an affirmative finding on any one of the three Quechee standards triggers the determination that the adverse effect is undue, the PSB erred in failing to conclude that RRE's proposed solar project ran afoul of at least one of these three standards.

First, the proposed project violates two clear, written community standards intended to preserve the aesthetics or scenic and natural beauty of the area. The SFSS are intended in part to preserve the rural character and open space that is part and parcel of agriculture land in the Town. The SFSS standards are designed to protect specific -- all properties that feature primary agricultural soils. The SFSS standard therefore specifically applies to the RRE parcel because prime agricultural soils are present there. The PSB improperly refused to consider the Town's SFSS for purposes of its analysis under 30 V.S.A. §248(b)(5) by ruling that the SFSS failed to identify the Cold Rover Road property as a property worthy of protection under the SFSS. The existence of primary agricultural soils on the property sufficiently identifies the RRE site for purposes of the clear, written community standard prong of the Quechee Analysis. The PSB therefore erroneously failed to conclude that the RRE solar project would create an undue adverse impact by virtue of its violation of the clear, written community standard embodied by the Town's SFSS. PC 85.

The PSB erred by failing to conclude that the project does not offend the sensibilities of the average person. While the various experts did testify that the project would not offend the average person that testimony is the result of their perceived need to fit within the PSB's erroneous application this prong of the Quechee Analysis. The PSB wrongfully refuses to pay heed to the impact of the project upon the sensibilities of those who must co-exist with it. The PSB regards neighbors as too interested to be proper subject of the Quechee inquiry. PC 87. The PSB's approach is wrongheaded; the Vermont Supreme Court should take this opportunity to set matter straight.

Nothing in the development of the Quechee Analysis compels the conclusion that adjoining property owners, by definition, cannot harbor average sensibilities. To be sure, an

adjacent owner might possess extreme or heightened sensitivities to a project, but could also articulate concerns the PSB could easily conclude are representative of average sensibilities.

Perhaps a noise example makes the point most easily. A neighbor to a proposed gravel crusher might regard any perceptible new noise as offensive. Other neighbors might regard additional noise as tolerable depending timing and decibel levels. The PSB should consider adjoining neighbors testimony of if and how a proposed project offends their sensibilities, and then determine whether those sentiments are representative of the average person. Therefore, the answer would be "no" for the hyper sensitive. The sensibilities of an adjoining neighbor, however, might comport with those of the average person, and if so, should be worthy of consideration under the Quechee Analysis. The Vermont Supreme Court recognized this concept in the Halnon case. See Halnon 174 Vt. at 515 (affirming PSB denial of CPG for wind turbine that directly obstructed a neighbor's view pursuant to Quechee Analysis where project 'would be offensive and shocking to the [adjoining neighbor] and would be to the average person in a similar situation")(emphasis supplied).

Since Halnon, the PSB has strayed from considering whether a proposed energy project would be shocking or offensive to the average person in the neighbor's situation. See Decision PC 87. Instead, the PSB has ignored the impact of an energy project upon the persons most affected by it precisely because they suffer the greatest effects. The PSB considers adjoining neighbors to be not representative of the general public by definition. Therefore the PSB erroneously deems neighbors' sensibilities irrelevant as a matter of law.

The PSB's reasoning is flawed and is perhaps the greatest contributor to the perception that §248 proceedings regarding solar projects are a sham. Adjoining landowners that will suffer the greatest impact from a solar project are flabbergasted to learn that the PSB will not consider

their concerns when undertaking the Quechee Analysis precisely because they will experience greater impact than the public at large. Reference to the sensibilities of public at large makes sense with respect to state or regional projects, such as power lines. The benefits of such projects flow to many and the aesthetic impacts fall upon many as well. Focusing on the perceptions of the public at large, to the exclusion of the most affected adjoining property owners, makes no sense and undermines the public's confidence in the PSB's handling of CPG applications. The Vermont Supreme Court should make clear that aesthetic impacts of solar projects upon neighbors or other directly affected parties must be assessed under the Quechee Analysis to determine whether the average, similarly-situated persons, would regard the solar project as shocking or offensive. The PSB's refusal to evaluate the aesthetic impact of the RRE project upon the adjoining neighbors constitutes reversible error.

The PSB also erroneously failed to conclude that the project failed the third Quechee inquiry for the failure to taking generally-available steps that a reasonable person would take to improve the harmony of the project with its surroundings. RRE stubbornly refused to reduce the footprint of the project to meet the setbacks required by the SFSS. Nothing in the mitigation inquiry under the Quechee Analysis frees the petitioner, or the PSB, from the obligation to consider changes in the size and scope of the project. But, that is exactly the approach RRE took. RRE limited its response to the adverse impact determination to the supplementation of plantings along the easterly and northerly boundaries of the parcel. Given the lower elevation of the project, the maximum 12-foot height of the plantings, and the use of deciduous trees and

shrubs, the additional plantings do little to increase the harmony of the project with its surroundings.[7]

The PSB rejected the Town's 200-foot setback provision and refused to impose any setback greater than the 64 feet proposed by RRE to avoid any reduction in the number of panels desired by RR. The problem with the RRE solar project is its scale and visibility. Honoring the 200-foot setback requirement of the Town's Solar Facility Siting Standards would have done much to increase the harmony of the project with the surrounding neighborhood. RRE's expert, Mark Kane refused to this mitigation step because he began from the premise that the size and scope of the proposed project was inviolate. Kane Testimony. 8/20/14, p.208-10. If the mitigation obligation encompasses only those changes other than a reduction in the size, scope, or location of the project, the inquiry into the reasonableness of the mitigation steps taken becomes a hollow one indeed. The PSB erred by failing to conclude that the adverse impacts of the proposed solar project are undue because RRE has failed to take the mitigation step of reducing the footprint of the project to honor the 200-foot setback requirement of the SFSS. Notably, even if the Town's 200-foot setback is deemed too restrictive, the minimum 100-foot setback provisions established by Public Act No. 56 would materially reduce the footprint of the RRE project and therefore mitigate its adverse impact.

WHEREFORE, for all of the foregoing reasons, the Town of Rutland respectfully requests that the Vermont Supreme Court reverse the March 11, 2015 Decision of the Public Service Board to grant RRE a certificate of public good for the 2.3 MW solar power generating facility along Cold River Road in the Town of Rutland.

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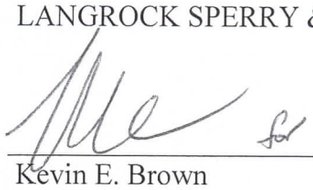
[7] The PSB requirement that RRE maintain an existing hedge row near the Fucci residence lessens the adverse impact for travelers on Cold River Road, but does not render the project a harmonious fit with its surroundings.

DATED at Middlebury, Vermont this 20th day of July, 2015.

LANGROCK SPERRY & WOOL, LLP



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