STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

PETITION NO. 1589 – USS Somers Solar, LLC petition for a declaratory ruling, pursuant to Connecticut General Statutes §4-176 and §16-50k, for the proposed construction, maintenance and operation of a 3.0-megawatt AC solar photovoltaic electric generating facility located at 360 Somers Road, Ellington, Connecticut, and associated electrical interconnection. Council Interrogatories to Petitioner.	**Petition No. 1589**
	January 3, 2024

BRIEF OF PETITIONER USS SOMERS SOLAR, LLC

Petitioner USS Somers Solar, LLC ("Petitioner" or "USS") thanks the Council for its diligent questioning and review of the instant Petition. The focus of the questioning by the Council, both through Interrogatories and through the December 5, 2023 evidentiary hearing ("Hearing"), was primarily on issues such as stormwater drainage, ensuring appropriate public safety measures, interconnection details, and similar issues. Focus on these issues is typical for a Siting Council petition, and USS was able to answer all of the Council's questions on these topics, as is summarized in greater detail below. However, a group of recreational parachutists, in both written comments to the Petition and during the Hearing sought to introduce topics related to their parachuting activities that are beyond the scope of the Council's jurisdiction.

As discussed below, USS addressed these concerns through pre-filed testimony and during its testimony during the Hearing, nonetheless, the parachutists attempted to drag this Petition beyond the scope of the Council's jurisdiction. In doing so, however, they only offered public comment on the topic, not evidence. Although several parties, including the Town of Ellington, requested (and was granted) a public hearing, not one entity proffered a scintilla of evidence to the Council to support their positions, other than USS. As such, the Council should not allow itself to

be dragged beyond its jurisdictional boundaries by individuals who could not be bothered to provide the Council with a single scrap of evidence as to why it should do so.

I. The Parachutists have Asked the Council to Consider Parachutists' Operations and Safety, which is Outside of the Scope of the Council's Statutory Authority.

As the Council is well aware, under the both the Connecticut Uniform Administrative Procedures Act and the Public Utility Environmental Standards Act, the scope of the Council's review of this Petition is limited. Specifically, the scope of the Council's review is limited to the considerations set forth in Conn. Gen. Stat. § 16-50k and the administrative record in this proceeding. Under Connecticut law, nothing else should be considered.

A. The Council's Statutory Considerations Do Not Include Private Access Rights.

Conn. Gen. Stat. § 16-50k provides in relevant part that the Council shall approve by declaratory ruling certain generating facilities so long as the project meets air and water quality standards of the Department of Energy and Environmental Protection, the Council does not find a substantial adverse environmental effect, and for solar projects with a capacity of two or more megawatts, certain prime farmland and core forest considerations have been met. Conn. Gen. Stat. § 16-50k.

Neither section 16-50k nor its associated regulations specifically provide what is considered a substantial adverse environmental effect, however, section 16-50l is instructive in this matter. Section 16-50l provides that Applications for a Certificate must include a number of environmental considerations, including, "available site information, including maps and description and present and proposed development, and geological, scenic, ecological, seismic, biological, water supply, population and load center data." Conn. Gen. Stat. § 16-50l.

Pursuant to the Council's own guidance, petitions for solar facilities brought before the Council provide impact analyses of the following categories as potential environmental effects:

public health and safety; local land use plans; wildlife species and habitats; soil and geology; water resources including wetlands, ground water, and stormwater; air quality; prime farmland; core forest; historical and archeological resources; scenic and recreational areas including visibility; and noise. *See e.g*., *Petition for a Declaratory Ruling for Renewable Energy Facility, dated August 2018*, at p. 3-4; Conn. Gen. Stat. § 16-50k. .

None of the concerns raised in the public comment portion of the Hearing fit within the categories above, even if they had been properly provided as evidence. It is too far a stretch to consider parachutists' safety issues within historical, archeological, scenic, or recreational impact analyses. Although public health and safety impacts are typically provided for the Council's review, this does not include private rights. Private rights, by contrast, are generally considered only in relation to visual impacts to neighbors or the general public and usually visual impacts do not impede the approvals of such projects so long as sufficient vegetative mitigation measures are taken. *Petition for a Declaratory Ruling for Renewable Energy Facility, dated August 2018*, at p. 4. Further, recreational impacts typically pertain to recreational areas enjoyed by the general public. The Council, however, does not, and need not consider how certain private interests exercised on privately-owned land are impacted by a proposed project.

In the Public Hearing, speakers from the Connecticut Parachutists, Incorporated ("CPI") voiced several concerns regarding safety issues and future restrictions on private development. *Public Session Transcript 6:30 p.m*., *12/05/23,* ("Tr.") pp. 95-7. Although it never provided testimony to prove its claim, CPI stated it possesses a lease interest in the airport property with an option to purchase and intends to exercise this option. *Id*. at 94.

Contrary to the evidence supported in the record in this proceeding provided by the airport owner, Larry Durocher, CPI asserted that Mr. Durocher's testimony regarding vertical landing

speeds being at or near zero is not true and that parachutists can travel up to 50 miles per hour across the ground at the time of landing. *Id*. at 95, 101. Commenters also claimed, despite posting no evidence in support of such claims, that there are plans to expand the runway in the future, again, contrary to Mr. Durocher's testimony, and that solar panel construction in a "parachute drop zone" and at the end of a runway is not safe. *Id*.

First and foremost, with respect to this public commentary, Petitioner would like to point out that, at best, the members of CPI retain a private interest in the airport property with private rights of access to certain FAA-approved landing zones for the parachutists – which do not include the Project Area. The Project Area is an alternative landing zone. *See*, Pre-filed Testimony of Larry Durocher. The Council considers *public* safety when approving projects within its jurisdictional authority, but as stated above, is not required to consider *private* rights of access that CPI and its members may or may not possess. Perhaps even more importantly, CPI and its members have failed to provide anything in the record of this Petition to demonstrate that any of them have any clearly defined access rights whatsoever over the proposed Project Area.

Second, the Council might also take into the account that rather ironically, parachutists, who repeatedly jump out of planes at 10,000 feet in the air, are voluntarily undertaking what is arguably a dangerous activity.[1] This appears to be correct from the commenters own statements

[1] Life insurance carriers may refuse to insure those engaged in skydiving or other ultrahazardous activity. *Dullenty v. Rocky Mountain Fire & Cas. Co.*, 111 Idaho 98, 106 (1986). *See also*, *U.S. Specialty Insurance Co. v. Sussex Airport Inc. et al.*, No 14-cv-5494, 2016 WL 2624912, *4 (D.N.J. May 9, 2016) (Holding that an insurance company was entitled to reimbursement for costs of defense due to a policy exclusion for injuries caused by skydiving.). Although not yet specifically addressed by Connecticut courts, at least one federal court has found persuasive the argument that skydiving is an abnormally dangerous/ultrahazardous activity for the purpose of imposing strict liability for injury to others. *See*, *Bullar v. Archway Skydiving Ctr., Inc.*, No. 11-CV-0468-MJR, 2012 WL 1565641, at *3 (S.D. Ill. May 2, 2012) (denying a motion to dismiss Plaintiff's claim because Plaintiff alleged four factors that fall within the guidelines of what constitutes an ultrahazardous activity.) *But see*, *Hulsey v. Elsinore Parachute Ctr.*, 168 Cal. App. 3d 333, 346, 214 Cal. Rptr. 194, 201 (Ct. App. 1985) (Declining to impose strict liability on a skydiving facility for injury to another, however, the court recognized that if parachutists were not in control of their direction of travel and landed in unwanted areas and in doing so caused harm to others, it could be considered as ultrahazardous, and that the critical risks with this activity are borne by those engaging in the sport.)

that they frequently hit the ground at 50 miles per hour, but are nonetheless asserting that there are safety issues with the construction of this solar array. Had the commenters presented evidence regarding these facts, the Council would have been able to evaluate whether there are greater risks associated with landing at those claimed speeds into the existing trees, which surround this landing area and other areas of the property rather than the solar array. Putting aside the question of whether the Council's limited jurisdiction would have allowed for the proffer of such testimony, no such proffer was made, and the Council should not be considering these arguments as it makes its deliberation.

B. The Record is Bereft of Any Evidence Supporting the Commenters' Claims.

As alluded to above, agencies must base final decisions upon findings of fact based "exclusively on the evidence in the record and on matters noticed." Conn. Gen. Stat. § 4-180. *See also*, *O'Connor v. Larocque*, 302 Conn. 562, 574–75 (2011) ("A finding of fact is clearly erroneous when there is no evidence in the record to support it.") Specifically, public comments in proceedings before the Council do not carry any evidentiary weight. The claims CPI and its members make regarding safety risks are not supported by anything in the record, and in fact, directly conflict with evidence provided in the record.

Specifically, at the Hearing, Mr. Durocher's uncontroverted testimony was that "the chances [that any of the parachuters end up in the solar field] are really remote." Tr. at p. 53. *See also*, Pre-filed Testimony of Larry Durocher.[2] Further, in terms of any danger of electrocution if

[2] "CPI's concern is not an accurate depiction of possible scenarios at the Airport. The Federal Aviation Administration ("FAA") has approved a specific "jump zone" area in which the skydivers may land. In an emergency or unforeseen situation, the skydivers have many alternate landing sites. A typical jump is made from at least 10,000 feet above the Airport's elevation. From those altitudes, a jumper has dozens of alternate choices for landing without encountering wires or other electrical hazards. The Project's proposed solar site is merely one of several convenient alternate landing areas to be used in unforeseen situations. Unlike in the past, modern parachutes are designed to give the jumper a high degree of flexibility and maneuverability and thus, the ability to make a calculated decision about the best emergency landing site… even if a skydiver happened to drift into the solar array, both their forward and vertical speeds at touchdown would be at or near zero which would be unlikely to result in injuries."

the panels are accidentally touched, Mitchell Ott of Westwood Professional Services, a professional engineer, stated that the panels "have a grounding system in place [so] if you accidentally touch something you're not electrified. There is some step touch potential, but it is below the threshold that would be required by code." Tr. at p. 54.

Unsupported alleged safety risks to private individuals who voluntarily choose to undertake parachuting activities are not under the purview of the Council in rendering a decision on this Petition. However, should the Council find any reason to consider the unsubstantiated public comments regarding parachutist safety, Petitioner urges the Council to afford greater weight to the testimony provided by the owner of the airport with over fifty (50) years of experience in aircraft safety in combination with the Project's professional design engineer.

II. Petitioner Provided Responses to All Questions Asked During the Hearing.

The Council asked some very detailed questions of the Petitioner during the Hearing, and the Petitioner regrets that it was not able to answer all of the questions immediately when they were asked. However, even though the answers were not immediately provided, Petitioner did answer all of the questions that were asked of it. Petitioner was able to make use of the mid-afternoon break in the Hearing to obtain the answers to the Council's questions. Although it gave the Hearing a somewhat disjointed feel, the Petitioner ultimately provided these responses to all of the Council's questions. So that the answers are in one place for ease of review, the earlier questions, and their answers have been provided below.

(a) Q: How many construction vehicles and what types of vehicles will be expected to enter the site during construction? Tr., p. 16.
A: [W]e do not anticipate more than 20 construction vehicles. *Id*. at 70.

(b) Q: Where will [construction laydown and parking area] be referenced in the observation layout map provided in the photo simulation? *Id*. at 16.

A: [T]he vehicles will be parked along the access road and within the fence line but within the disturbed limits as noted currently. *Id*. at 70.

(c) Q: How frequently would the sheep farmer visit the site while sheep are being hosted at the facility? *Id*. at 17. How would water be brought to the site for the sheep? *Id*. at 19.

A: [This would need to be] a post-approval condition because we simply don't yet have the contract with the sheep farming company yet. *Id*. [Petitioner is] willing to provide that information to the Siting Council once a sheep farmer has been selected for this project[.] *Id*. at 73. [As for the water, Petitioner] can provide the Siting Council with that once a grazer is chosen. *Id*. at 74.

(d) Q: Can you identify [the locations of Solar Panels 5, 6, and 7 on attachment K to the Interrogatory Responses]? *Id*. at 24.

A: [On] Exhibit D in the Appendices A through K… C106… the filing is the first fence corner to the northwest from the end of the runway. So if you go from the runway and travel northwest, the first fence corner that is there, which is also the southeast fence corner, that's filing number 5. If you traverse north from that to the next corner past the fence line – excuse me, past the access road to the north immediately south of the north-south array gap, that's number 6. And then from there if you go east to the farthest eastern fence corner of the project, that is number 7. *Id*. at 75-6.

(e) Q: How much oil [will the transformer contain]? *Id*. at 31. Do you know if the transformer would be equipped with low level alarms? *Id*.

A: [W]e haven't decided on a final inverter make or model. However, [the transformers are] filled with a natural mineral oil, and they will have a low level detection. *Id*. at 72.

(f) Q: Do you know if [the rotary mechanism that turns the trackers requires] greasing of the gears? *Id*. at 35.

A: [W]e will be using oil to put on a natural lubricant for the trackers during operation and maintenance. *Id*. at 72.

(g) Q: [Is the pole lighting] a constant red light or a blinking red light? *Id*. at 38. Do you know the distance of the poles to the nearest residence? *Id*. at 37. [How would the residences be affected by pole lighting?] Is that going to be on 24/7 and what color[?] *Id*. at 59.

A: [The Council, by referencing the record, determined the distances from the poles to the nearest residences.] *See*, *Id*. at 58. [T]he FAA only requires lighting if [the pole] is within 125 feet of the centerline of the runway, which this obviously is not, or if [the

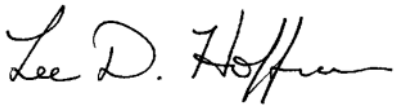
pole will be] greater than 190 feet in altitude in height. Again, these poles are going to be up on Route 83 which is much greater than 125 feet. *Id*. at 71. [Thus, Mr. Durocher did not believe that lighting is required for the points of interconnection given their heights.] *Id*.

III. Conclusion

Based on the written record provided to the Council throughout this Petition, the lack of any evidence presented to the contrary, and the answers provided to the Council's questions, whether provided through interrogatories or at the Hearing, Petitioner believes that it has demonstrated that the proposed project is in the public interest and will have no adverse environmental effects. It will not require tree clearing, nor will it take agricultural land out of production. As such, the Petitioner respectfully requests that the Council approve this Petition.

Respectfully submitted,

USS SOMERS SOLAR, LLC,



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