STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

CANDLEWOOD SOLAR, LLC PETITION FOR DECLARATORY RULING THAT NO CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED IS REQUIRED FOR A 20.0 MEGAWATT AC SOLAR PHOTOVOLTAIC ELECTRIC GENERATING FACILITY IN NEW MILFORD CONNECTICUT	:	PETITION NO. 1312
	:	SEPTEMBER 22, 2017

THE DEPARTMENT OF ENERGY & ENVIRONMENTAL PROTECTION'S RESPONSE TO OBJECTION TO MOTION TO DENY

None of the Petitioner's arguments in opposition to the Department of Energy & Environmental Protection's (DEEP) Motion to Deny the Petition weaken the fact that P.A. 17-218 has a prospective application that turns on the point at which the Siting Council determines whether to grant or deny a petition. As discussed below, the Petitioner's claims regarding C.G.S. § 1-1(u) and violations of its due process rights are red herrings and easily discredited.

I. P.A. 17-218 Operates Prospectively

Siting Council proceedings concern public utility services that seek to balance the state's development goals with environmental protections in a similar fashion as towns do in wetlands and zoning cases. This similarity has produced Siting Council cases that draw heavily from the law and procedures of zoning and wetlands appeals. For example, Siting Council cases have drawn on wetlands and zoning case law in issues of standing (*see Burton v. Conn. Siting Council*, 161 Conn. App. 329, 338 – 340 (2015), *cert. denied*, 320 Conn. 925 (2016) (citing to *Finley v. Inland Wetlands Commission*, 289 Conn. 12, 35 (2008) for the need to

articulate a colorable claim to survive a motion to dismiss, and to *Pond View, LLC v. Planning & Zoning Commission*, 288 Conn. 143, 157 (2008) for the environmental issues being challenged to be within the jurisdiction of the agency being challenged)); aggrievement (*see Burton v. Conn. Siting Council,* 161 Conn. App. at 343 (citing to *Fox v. Zoning Board of Appeals*, 84 Conn. App. 628, 637 (2004); *Olsen v. Inland Wetlands Commission*, 6 Conn. App. 715, 718 (1986), and *Concerned Citizens for the Preservation of Watertown, Inc. v. Planning & Zoning Commission,* 118 Conn. App. 337, 344 (2009), for the holding that party status does not bestow aggrievement); and bias (*see FairwindCT, Inc. v. Connecticut Siting Council*, No. CV116011389S, 2012 WL 5201354, at *19 (Conn. Super. Ct. Oct. 1, 2012), *aff'd*, 313 Conn. 669 (2014) (citing to *Lage v. Zoning Board of Appeals*, 148 Conn. 597, 604 (1961)).

Until 1989, part of the fabric of this shared legal history included the fact that decisions in planning and zoning and wetlands cases were rendered according to the law in effect at the time of decision. This common law practice was changed only when Conn. Gen. Stat. §§ 8-2h and 22a-42e went into effect in 1989. It is undeniable that Conn. Gen. Stat. § 8-2h applies only to zoning cases and Conn. Gen. Stat. § 22a-42e applies only to wetlands cases. There is no analogous statute for Siting Council cases. Furthermore, no court has interpreted Conn. Gen. Stat. §§ 8-2h and 22a-42e to apply to cases at the Siting Council. The rules of statutory interpretation presume that if the legislature intended to include the Siting Council in the 1989 change it would have done so. *See Kudlacz v. Lindberg Heat Treating Co.*, 250 Conn. 581, 587 (1999). As there is no mention of the Siting Council in either Conn. Gen. Stat. §§ 8-2h or 22a-42e, the common law is still in effect and decisions of the Siting Council are governed by the law in effect at the time of decision. Unless the legislature acts again before the Siting Council renders its decision in this petition, P.A. 17-218 is the applicable law.

Given the Siting Council's unique position as the state-wide balancer of sometimes competing development and environmental concerns and our evolving scientific understanding of the interrelatedness of our environment, it is rational to deduce that the legislature specifically chose not to include the Siting Council in 1989 when it enacted Conn. Gen. Stat. §§ 8-2h and 22a-42e. If the legislature changed the common law in Siting Council proceedings to the date of filing, there is the chance that a project could avoid the legislative changes that accompany our evolving understanding of the balancing necessary to ensure public utility services as well as to protect our shared public natural resources. Avoiding the demonstrated legislative concerns for core forest appears to be exactly what Candlewood had in mind when it filed its petition on June 28, 2017. When weighing the investments of a developer versus the protection of our finite and universally shared natural resources, it is both just and right that the most current laws should apply to a Siting Council proceeding until a decision is rendered.

The Petitioner mistakenly cites to Conn. Gen. Stat. § 1-1(u) for the proposition that this new legislative change is a substantive change and therefore, it cannot apply retroactively. Conn. Gen. Stat. § 1-1(u) states: "[t]he passage or repeal of an act shall not affect any action then pending." The Petitioner argues that the passage of P.A. 17-218 affects a pending action, *i.e.*, Petition No. 1312, and therefore the statute cannot apply retroactively. This argument is misguided as, for purposes of this statute, the Connecticut Supreme Court has defined the term "action," under Conn. Gen. Stat. § 1-1(u), as, "the lawful demand of one's right in a court of justice for the purpose of obtaining whatever redress the law provides." *State v. Blasko*, 202 Conn. 541, 555 (1987) (applying a legislative change to a pre-existing grand jury proceeding). In *Blasko*, the Court found that a grand jury proceeding was not a Conn. Gen. Stat. § 1-1(u) "action" because it was not a forum for the assertion of a legal right.

Similarly here, this petition proceeding before the Siting Council is a solicitation by the developer for permission to develop and install a solar array. As such, it is not a forum in which a party is asserting a legal right. Therefore, Conn. Gen. Stat. § 1-1(u) is inapplicable to the interpretation of P.A. 17-218 to this Petition.

The Petitioner also mistakenly relies on *Urbanowicz v. Planning & Zoning Comm'n of Town of Enfield*, 87 Conn. App. 277, 295 (2005) to support its argument that DEEP is seeking the retroactive application of a substantive legislative change. In fact, DEEP's position aligns with the reasoning of *Urbanowicz*. In *Urbanowicz*, the legislation changed the authority of the planning and zoning commission to approve the location of a crematory. *Id.* at 292. The planning and zoning commission in *Urbanowicz* had already rendered its decision granting a special permit for the crematory prior to enactment of the legislation. *Id*. at 282. The Court concluded that the new legislation did not apply retroactively to change the already-rendered decision of the commission. *Id*. at 285. DEEP is not arguing that the Siting Council may go back and apply P.A. 17-218 to petitions that have already been granted. However, in the case of this Petition, and Petition No. 1313, the Siting Council has not yet made its decision, so P.A. 17-218 applies.

II. There are no Due Process Concerns as Core Forest is defined in the P.A. 17-218.

The Petitioner argues that DEEP has failed to promulgate a definition of "core forest" and without a definition, applying P.A. 17-218 to the current petition would be a violation of the Petitioner's due process rights. DEEP responds to this argument by directing the Petitioner to the language of P.A. 17-218 which provides in relevant part: "'Core Forest' means unfragmented forest land that is three hundred feet or greater from the boundary between forest land and nonforest land, as determined by the Commissioner of Energy and Environmental

Protection . . . .” Clearly there is a definition. The statute itself provides the definition and charges DEEP’s Commissioner with identifying which forest lands meet this definition.

Furthermore, pursuant to *Mathews v. Eldridge*, 424 U.S. 319, 332 (1996), in determining whether there is a procedural due process violation, a court applies a three part test that “requires a consideration of the private interest that will be affected by the official action, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards ... and ... the [g]overnment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” (Internal quotation marks and citations omitted.) *Mathews v. Eldridge*, 424 U.S. at 332; *see also Greater New Haven Prop. Owners Ass'n v. City of New Haven*, 288 Conn. 181, 198 (2008). Even assuming, *arguendo*, that the Petitioner’s claim is valid and that the definition of core forest is not just or fair, the Petitioner cannot maintain a claim of procedural due process as it has the right of appeal. *See Id*. at 201 (plaintiff’s procedural due process claim fails as the procedural scheme in question provided an appeal).

For the foregoing reasons and for the reasons set forth in DEEP's Memorandum of Support, DEEP requests the Siting Council to deny the declaratory ruling.

DEPUTY COMMISSIONERS

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I, Kirsten S. P. Rigney, hereby certify that a copy of the foregoing Department of Energy and Environmental Protection's Response to Objection to Motion to Deny was sent on September 22, 2017, by electronic mail to the following parties on the Service List in this matter:

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