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
	:	AUGUST 29, 2017

MEMORANDUM IN SUPPORT OF MOTION TO DENY DECLARATORY RULING

The State of Connecticut Department of Energy & Environmental Protection ("DEEP") hereby submits this memorandum is support of its motion that the above-captioned Petition for Declaratory Ruling ("Petition") be denied on the grounds that DEEP has not represented, and will not be representing, in writing that the project that is the subject of the declaratory ruling ("the Project") will not materially affect the status of the land on which the Project is to be located as core forest. Accordingly, pursuant to the provisions of Conn. Gen. Stat. § 16-50k(a), as amended by Public Act No. 17-218, the Siting Council may not approve the Project by declaratory ruling. Rather, the Project, if it is to be approved at all, must obtain a certificate of environmental compatibility and public need in accordance with the provisions of the Public Utility Standards Act, Conn. Gen. Stat. §§ 16-50g *et seq*. and the Siting Council's Rules of Practice, Regulations of Connecticut State Agencies ("R.C.S.A.") §§ 16-50j-1 through 16-50j-91.

Background

On June 28, 2017, Candlewood Solar LLC filed the Petition with the Siting Council seeking a declaratory ruling that no certificate of environmental compatibility and public need is required for a 20.0 megawatt AC solar photovoltaic electric generating facility that it proposes to construct, operate, and maintain on 163 acres of land in New Milford, Connecticut. Petition, p.

9. According to the Petition, the solar array will be located on approximately 80 acres of this land of which 68 acres is wooded and will be cleared to accommodate the Project. Petition, p. 10. The Project's Environmental Assessment documents that under The University of Connecticut Center for Land Use Education and Research's ("CLEAR") Forest Fragmentation Study, core forest will be diminished. The Assessment concludes that the Project will reduce the total amount of core forest in the area by 95 acres. Environmental Assessment, p. 19.

Pursuant to the provisions of Conn. Gen. Stat. § 16-50k(a), as amended by Public Act 17-218, the Project, being "a solar photovoltaic facility with a capacity of two or more megawatts, to be located on . . . forestland," is one that the Siting Council may approve by declaratory ruling "as long as," among other things, "the Department of Energy & Environmental Protection represents, in writing, to the council that such project will not materially affect the status of such land as core forest." Pursuant to the amended statute, "'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."

Thus, it is clear that the Project is to be located on core forest. Without the written representation from DEEP that the Project will not materially effect the status of core forest, the Siting Council may not approve the Project through a declaratory ruling. Rather, the Project must go through the full process of obtaining a certificate of environmental compatibility and public need pursuant to the provisions of the Public Utility Standards Act and the Siting Council's Rules of Practice.

In this case, DEEP has not, and will not, be making such a representation because the Project *will* materially affect the status of core forest land. The clearing of trees and the

installation of a solar array, for a minimum of twenty years, on land classified as core forest will remove such land from classification as core forest.

Argument

The declaratory ruling petition should be denied: the Candlewood Solar project cannot proceed before the Siting Council *via* a declaratory ruling because the written representation required from DEEP will not be forthcoming. Moreover, the Petition should be denied now – there is no point in conducting further proceedings since the Petition will ultimately fail for lack of the written representation from DEEP.

It has been suggested that Public Act 17-218 does not apply to the Petition because the Public Act is effective July 1, 2017, and the Petition was filed on June 28, 2017.[1] This conclusion is wrong for several reasons.

First, the statute operates prospectively on decisions made by the Siting Council after July 1, 2017. This is evident from the statute's structure and language. Under the statute's structure, the general rule is that no one can build a project like this unless he or she first applies for and obtains a certificate of environmental compatibility and public need from the Siting Council. Conn. Gen. Stat. § 16-50k(a). However, the statue also provides that, notwithstanding this provision, the Siting Council "shall . . . approve by declaratory ruling" certain projects "as long as" certain conditions are met. The declaratory ruling portion of § 16-50k(a) provides an alternative, shortened procedure the Siting Council uses to approve certain projects that the Siting Council would otherwise have to approve by issuing a certificate.

[1] According to a June 22, 2017 article by Gregory B. Hladky in the *Hartford Courant*, "[Staff] for the siting council, said in an email that if Deepwater Wind's petition is submitted before July 1, the new legislation would not apply to the project."

The actual language of the statute is "the council shall . . . approve by declaratory ruling . . . as long as . . . ." In other words, if certain elements are not present, the Siting Council may not approve the project by declaratory ruling. The Siting Council lacks the power to approve by declaratory ruling a project that does not have these elements. For decisions by the Siting Council made prior to July 1, the element that needed to be present was that the project met air and water quality standards of the Department of Energy and Environmental Protection ("DEEP"). For decisions after July 1, there are three elements that must be present: the project must meet DEEP air and water quality standards; the Siting Council must find there is not substantial adverse environmental impact; and for projects on core forest, DEEP must supply the written representation.[2] Because the statute's language applies to what the Siting Council may or may not do, it operates on the Siting Council at the point the Siting Council makes its decision.

The conclusion that the law that applies to this project is the law in effect at the time of the decision – rather than the law in effect at the time of the filing of the petition – is consistent with the case law and statutes that govern what law applies to municipal zoning and wetlands applications. The current rule is that a zoning application or a wetlands application is governed by the zoning or wetlands regulations in effect on the date of the application. But this is so only because statutes had to be enacted to change the common law rule that these applications are governed by the law in effect at the time of the local agency's decision. *See* Conn. Gen. Stat. § 8-2h (zoning applications); *McNally v. Zoning Comm'n*, 225 Conn. 1, 9 (1993) (zoning applications); Conn. Gen. Stat. § 22a-42e (wetlands applications); *Paupack Dev. Corp. v. Conservation Comm'n*, 229 Conn. 247, 249 n.2 (1994) (wetlands applications). There is no statute for Siting Council decisions that changes the common law rule. Accordingly, the law that

[2] For projects to be located on prime farmland, the Department of Agriculture must represent in writing that the project will not materially affect the status of such land as prime farmland.

applies to this project is the law in effect at the time the Siting Council makes its decision, which will be after July 1, 2017.

Second, even if one were to take the view that the date of the application is the date one looks to for the retroactivity analysis, retroactive application of the amended statute is appropriate because the statute is procedural. The prohibition on retroactive application of statutes is found at Conn. Gen. Stat. § 55-3, which says that no statute that "imposes any new obligations" shall be retroactive. The obligations referred to in this statute are "those of substantive law." *Carr v. Planning & Zoning Comm'n*, 273 Conn. 592-93 (2005). Procedural statutes apply retrospectively. *Id*. For the reasons discussed above, the provisions of Conn. Gen. Stat. § 16-50k(a) amended by Public Act 17-218 are procedural: they allow certain projects to proceed under the declaratory ruling procedure, as opposed to going through a full certificate process. Thus the amended statute applies to the Project, even though the application for the Project was filed before July 1, 2017.

Conclusion

For the foregoing reasons, the Petition should be denied because without the written representation from DEEP, there is no need for further proceedings in this matter.

DEPUTY COMMISSIONERS

ROBERT KALISEWSKI,
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I, Kirsten S. P. Rigney, hereby certify that a copy of the foregoing Memorandum in Support of the Motion to Deny Declaratory Ruling was sent on August 29, 2017, by electronic mail to the following parties on the Service List in this matter:

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