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 MEGAWATT AC SOLAR PHOTOVOLTAIC ELECTRIC GENERATING FACILITY IN NEW MILFORD CONNECTICUT	:	PETITION NO. 1312
	:	September 19, 2017

CANDLEWOOD SOLAR, LLC'S MEMORANDUM OF LAW IN SUPPORT OF ITS RESPONSE IN OPPOSITION TO DEEP'S MOTION TO DENY DECLARATORY RULING

Candlewood Solar, LLC ("Candlewood"), hereby submits its Memorandum of Law in Support of its Response in Opposition to the Motion to Deny Declaratory Ruling filed by the Department of Energy and Environmental Protection ("DEEP") with the Connecticut Siting Council (the "Siting Council") in the above captioned matter.

I. Pursuant to Connecticut's Rules of Statutory Construction, The Requirements of Public Act 17-218 Do Not Apply To This Petition.

Pursuant to Connecticut General Statutes section 1-1(u) "[t]he passage or repeal of an act shall not affect any action then pending." C.G.S. § 1-1(u). Candlewood filed its petition in this matter on June 28, 2017, according to the requirements in effect on that date as contained in Connecticut General Statutes section 16-50k (a) which provides in part as follows:

> Notwithstanding the provisions of this Chapter or Title 16a, the council shall, in the exercise of its jurisdiction over the siting of generating facilities, approve by declaratory ruling (A) the construction of a facility solely for the purpose of generating electricity…and (B) the construction or location…of any customer-side distributed resources project or facility or grid-side distributed resources project or facility with a capacity of not more than sixty-five megawatts, as long as such project meets air and water quality

> standards of the Department of Energy and Environmental Protection.

C.G.S. § 16-50k(a) (2013). The Connecticut Legislature adopted Public Act 17-218 which repealed and replaced Connecticut General Statutes section 16-50k. Specifically, section 3 of Public Act 17-218 states: "Subsection (a) of section 16-50(k) of the general statutes is repealed and the following is substituted in lieu thereof **(Effective July 1, 2017)**…" Emphasis added.

Quite simply, pursuant to Connecticut's law on statutory construction, since the petition in this matter was filed before the effective date of the Public Act, and so was "then pending," the Act does not affect it. DEEP has not cited any legal authority in its motion to support its assertion that the new statute should operate prospectively on decisions made by the Siting Council, (Motion p.3) and thus, in effect, retroactively on the petition. In support of Candlewood's position here, however, there is clear and consistent legislative and judicial policy against the retroactive application of statutes particularly for pending cases. "The rule is rooted in the notion that it would be unfair to impose a substantive amendment that changes the grounds upon which an action may be maintained on parties who have already transacted or who are already committed to litigation." *Carr v. Planning & Zoning Comm'n of Town of Bridgewater*, 273 Conn. 573, 592 (2005). *See also, A Gallo and Co. v. McCarthy,* 51 Conn. Supp. 425, rev'd 309 Conn. 810 (2010) (presumption that statutes apply prospectively is only rebutted when legislature clearly and unequivocally expresses its intent that the legislation shall apply retrospectively). In the present case, the Connecticut legislature did not express any intent whatsoever that the Act should apply retrospectively. DEEP's argument fails and its motion should be denied.

In its Motion, DEEP curiously relies on and misapplies the standards for zoning applications in Connecticut General Statutes section 8-2 in an attempt to support retroactive

application of the Act. C.G.S. § 8-2 provides that zoning applications filed prior to a change in zoning regulations are not required to comply with the change. This section instead supports Candlewood's position that the law in effect on the date of the application and not the law that will be in effect on the date of the decision, controls.

II. The Requirements of Public Law 17-218 Are Substantive in Nature and Therefore Retroactive Application of the Statute is Prohibited.

DEEP contends that even if the date of the filing of the petition controls the analysis, it would be proper to apply the requirements of the Act to the petition retroactively because the statute is "procedural" and not "substantive." *See* DEEP's Motion p. 5. As stated previously, the law is clear that a statute is not to be applied retroactively, unless the statute specifically provides for such retroactive application. Furthermore, pursuant to Connecticut General Statutes § 55–3, "[n]o provision of the general statutes, not previously contained in the statutes of the state, which imposes any new obligation on any person or corporation, shall be construed to have a retrospective effect." While this statute does not bar retroactive application of statutes that are merely procedural, it does bar retroactive application of new statutes which impose new obligations or affect substantive rights. C.G.S. § 55-3 codifies certain well-established principles in case law that guide an analysis of whether the effects of new legislation are substantive or procedural. "While there is no precise definition of either [substantive or procedural law], it is generally agreed that a substantive law creates, defines and regulates rights while a procedural law prescribes the methods of enforcing such rights or obtaining redress." *Investment Associates v. Summit Associates, Inc.* 309 Conn. 840, 868 (2013). "We have uniformly interpreted § 55–3 as a rule of presumed legislative intent that statutes affecting substantive rights shall apply prospectively only." *Carr* 273 Conn. at 592.

There can be no doubt that the requirements of the Act and the amended statute impose new obligations on and affect the substantive rights of the Petitioner. Specifically, the Act requires that before even going forward with its petition, that a Petitioner first obtain a written determination by DEEP that its project will not "materially affect the status of such land as core forest" before a project can construct, operate, and maintain a facility on the land. Absent such written determination, the Petitioner must go through the full process of obtaining a certificate of environmental compatibility and public need pursuant to the statutes. This substantial obligation under the petition process was not in effect at the time Candlewood filed its Petition. To impose this obligation on Candlewood now would affect its substantive rights under the petition process.

DEEP has already stated that even if the Petitioner were to start the process anew under the requirements of the amended statute, that it would not issue the required written determination that the project would not materially affect the status of the land as core forest. Any statutory change which extinguishes a party's rights cannot be "procedural." The courts have ruled that "[p]rocedural statutes have been traditionally viewed as affecting remedies, not substantive rights, and therefore leave the preexisting scheme intact." *Id.* In the present case, the Act does not leave the existing scheme for siting solar photovoltaic facilities intact. Indeed, the Act makes significant, substantive changes to where and under what conditions the Project could be sited in Connecticut. For instance, Connecticut courts have found a statutory amendment substantive in nature "because it changed the authority of the commission to approve the location of a crematory within 500 feet of a residence." *Urbanowicz v. Planning & Zoning Comm'n of Town of Enfield*, 87 Conn. App. 277, 295, 865 (2005). The case is clear, limiting the construction, operation, and maintenance of a solar Project on "core forest" would be substantive change. And such a substantive change cannot be applied retroactively under Connecticut law.

The Act cannot be merely procedural then, because it would require Candlewood to meet several new substantive requirements regarding siting facilities on "core forest." Thus, any application of the Act retroactively, as suggested by DEEP, would violate General Statutes § 55–3 because the Act adds significant new obligations that would impair Candlewood's rights and obligations to construct, operate, and maintain its Project.

III. Even If the Effect of the Act Was Deemed Procedural, DEEP Has Yet to Promulgate the Definition Of "Core Forest" In Connecticut. For DEEP to Claim That the Project Affects Core Forest Would Serve to Deny Candlewood its Right of Due Process.

In its motion, DEEP relies on Candlewood's Petition to make its determination that the Project will be located on core forest. The problem with DEEP's argument is that even DEEP has yet to implement the definition of "core forest" under the Act. In the absence of any definition of core forest in Connecticut, Candlewood looked to the University of Connecticut, Center for Land Use Education, and Research ("CLEAR") for guidance. It must be emphasized, however, that any guidance from CLEAR regarding the project is just that – guidance. The fact is DEEP, the state agency responsible for implementing the Act, has yet to promulgate the definition of "core forest" in Connecticut.

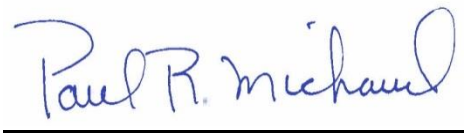
The due process of law appears in the 5th and 14th Amendments to the United States Constitution, and in Article first, section 8 of the Connecticut Constitution. In short, it requires that the procedures and laws used by the federal and state governments must be fair and just. The 14th Amendment to the United States Constitution applies to the states and provides in part "... nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Also, Article First, Section 8 of the Connecticut Constitution provides in part: "No person shall be...deprived of life, liberty or property without due process of law...."

Even if the Siting Council were to rule that the Act is "procedural" in nature, DEEP's Motion must fail because procedural due process requires DEEP to use fair and just procedures when implementing any statute promulgated by the Connecticut Legislature. In the instant case, DEEP has yet to implement the definition of "core forest" in Connecticut. In the absence of any definition, any assertion that the Project would affect core forest violates Candlewood's due process rights.

IV. Conclusion

Pursuant to Connecticut's rules of statutory construction, the requirements of Public Act 17-218 do not apply to this petition because the petition was filed before the effective date of the Act. It is presumed that any new law will apply prospectively only absent any specific language in the law that shows the legislature's intent that it applies retroactively. That is not the case here as there is no such language in the Act. Additionally, the requirements of Public Law 17-218 are substantive in nature, not procedural, and therefore retroactive application of the statute is prohibited. Even if the effect of the Act was deemed to be procedural, DEEP has yet to promulgate the definition of "core forest" in Connecticut. For DEEP to then claim that the Project affects core forest would deny Candlewood its right of due process under the law. For these reasons, DEEP's Motion To Deny Declaratory Ruling should be denied.

CANDLEWOOD SOLAR, LLC

By: 

Paul R. Michaud
Michaud Law Group LLC
515 Centerpoint Drive
Suite 502
Middletown, CT 06457
860-338-3728
pmichaud@mlgcleanenergy.com

CERTIFICATION

I hereby certify that on September 19, 2017, the foregoing was delivered by electronic mail and regular mail, postage prepaid, in accordance with § 16-50j-12 of the Regulations of Connecticut State Agencies, to all parties and intervenors of record, as follows:

John D. Tower, Esq.
New Milford Town Attorney
Cramer & Anderson LLP
51 Main Street New Milford, CT 06776
Phone: (860) 355-2631
Fax: (860) 355-9460
jtower@crameranderson.com

Kirsten S. P. Rigney
Bureau of Energy Technology Policy
Department of Energy and Environmental Protection
10 Franklin Square New Britain, CT 06051
(860) 827-2984 (phone)
(860) 827-2806 (fax)
Kirsten.Rigney@ct.gov

Jason Bowsza
Connecticut Department of Agriculture
450 Columbus Blvd Hartford, CT 06103
(860) 713-2526
Jason.Bowsza@ct.gov

Keith R. Ainsworth, Esq.
Law Offices of Keith R. Ainsworth, Esq., LLC
51 Elm Street, Suite 201
New Haven, CT 06510-2049
(203) 435-2014
(203) 865-1021 – fax
keithrainsworth@live.com

Paul R. Michaud
Commissioner of the Superior Court