STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

DWW SOLAR II, LLC PETITION FOR DECLARATORY RULING THAT NO CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED IS REQUIRED FOR A 26.4 MEGAWATT AC SOLAR PHOTOVOLTAIC ELECTRIC GENERATING FACILITY IN SIMSBURY CONNECTICUT	:	PETITION NO. 1313
	:	SEPTEMBER 21, 2017

DEPARTMENT OF AGRICULTURE'S REPLY TO DWW SOLAR II, LLC'S OBJECTION TO MOTION TO DENY DECLARATORY RULING

The State of Connecticut Department of Agriculture ("DOA"), a party to this proceeding, hereby replies to DWW Solar II, LLC's ("DWW") September 14, 2017 objection to DOA's August 23, 2017 motion to deny the above-captioned petition for declaratory ruling.

P.A. 17-218 Operates Prospectively. DWW's objection is based on a faulty premise, namely, that the critical point in time for the purposes of retroactivity analysis is the date the petition was filed. This is wrong: the correct reference date is the date the Siting Council makes its decision. Because this date will be after July 1, 2017, the provisions of P.A. 17-218 do not operate retroactively in this case – they operate prospectively.

Every court decision that engages in a retroactivity analysis chooses a point in time or an event to use for the analysis, although frequently the choice is simply assumed and not analyzed in any way. The cases DWW cites in support of its objection all have embedded in them a choice of a "touchstone" for the retroactivity analysis. For example, in *D'Eramo v. Smith*, 273 Conn. 610 (2005), the operative date for retroactivity analysis was the date of the plaintiff's injury, not the date the plaintiff filed his claim with the Claims Commissioner. *Id.* at 625. In *Investment Assoc. v. Summit Assoc., Inc.*, 309 Conn. 840 (2013), the critical point in time was the

date of the judgment. In *Anderson v. Schieffer*, 35 Conn. App. 31 (1994), the operative date was the date of the creation of the employer-employee relationship. *Id.* at 39. And, in *Flanagan v. Blumenthal*, 100 Conn. App. 255 (2007), the reference point was the date the plaintiff brought its action against the State. *Id.* at 259. *See also State v. Nathaniel S.*, 323 Conn. 290, 300 (2016) ("date of the offense is the touchstone for both substantive and procedural changes to the [criminal] law").

Where the event that serves as the touchstone occurs *after* a statute has been amended, no retroactivity analysis is necessary because the statute, having been amended *before* the critical event, does not operate retroactively on anything – it operates only prospectively on the event that occurred after it. Thus, for example, in *Peck v. Jacquemin*, 196 Conn. 53 (1985), the plaintiff, passenger in a two-car accident, sued both drivers but settled with one prior to trial for $100,000. During the trial, the court allowed the plaintiff to be examined on the release he had given to the settling driver, even though, while the case was pending, the General Assembly had passed a statute prohibiting such examination. The Supreme Court reversed, ruling that the examination should not have been allowed because the new statute applied. The Court held that there was no retroactive application of the statute because the "trial took place *after* the effective date of the statute. The statute affects only circumstances that may exist at the time of trial rather than those of the date of the accident." *Id.* at 60 (emphasis in original). Similarly, in this case, the Siting Council's decision is going to occur *after* the effective date of P.A. 17-218. There is thus no retroactive application of the amended statute.[1]

[1] The Supreme Court's decision in *FairwindCT, Inc. v. Connecticut Siting Council*, 313 Conn. 669 (2014), is not to the contrary. In that case, one issue was whether the Siting Council was required to consider state noise law in ruling on two petitions for declaratory ruling for wind turbines. After the Siting Council issued its decisions in the two petitions, the legislature amended the statutes to require the Siting Council to consider state noise laws. The issue of retroactivity was not analyzed, as the plaintiffs conceded that the new statute was not retroactive. *Id.* at 701 n.38. This is consistent with the argument DOA makes here: the touchstone for retroactivity analysis is the date of the Siting Council's decision.

DWW chooses as the operative date the date its petition was filed, which was June 29; however, DWW does not discuss the rationale for making this choice, much less cite any cases that would support it. This omission is all the more glaring given that the choice of the Siting Council's decision date as the touchstone is supported by zoning and wetlands cases and statutes, as previously discussed in DOA's Memorandum in Support of Motion to Deny Declaratory Ruling, dated August 23, 2017 ("Memorandum in Support"). Those cases and statutes demonstrate conclusively that, in the absence of a specific statute, the common law rule is that the law that applies to a zoning or wetlands application is the law that is in effect at the time the local commission makes its decision, not the law in effect at the time of the application. In the absence of a statute, the touchstone for retroactivity analysis in this context is the date of the decision, not the date of the application.

DWW argues that the zoning and wetlands cases and statutes actually support its position because, it argues, now the rule is that the law in effect at the time of the application is the law that applies. This argument completely skips over the step that, to change the common law rule, *a specific statute must be enacted.* That a specific statutory change is necessary is evident from the legislative enactments that changed the zoning and wetlands common law rules. The zoning change appeared through the enactment of Conn. Gen. Stat. § 8-2h; the wetlands change appeared through the enactment of Conn. Gen. Stat. § 22a-42e. Both of these enactments were the product of P.A. 89-311, enacted and signed into law in 1989. Thus, the legislature saw the necessity of amending both the zoning and the wetlands statutes to override the common law rule. However, significantly, the legislature did not at this time – or at any time since – amend Conn. Gen. Stat. § 16-50k to make a similar change. The fact that the legislature, which took the trouble to amend *both* the zoning and wetlands statutes, did not *also* amend the Siting Council

statute, indicates that the legislature intended to keep the common law rule in effect as to decisions by that body.

P.A. 17-218 is Procedural. DWW argues that the provisions of P.A. 17-218 that amend Conn. Gen. Stat. § 16k(a) are substantive, not procedural. However, this is plainly wrong, as the portion of § 16k(a) that P.A. 17-218 amends is on its face a procedural statute – it provides for a fast-track procedure, *via* declaratory ruling, to obtain Siting Council permission to construct a "facility." It is the statutory alternative to the longer process whereby an applicant must obtain a certificate of environmental compatibility and public need from the Siting Council prior to constructing a "facility." Even if one were to choose the date of filing the petition as the operative date for retroactivity analysis, the amended statute applies retroactively to petitions filed before July 1, 2017 because it is a procedural statute.

Obviously, procedure can affect, and even control, substance. "[M]any, if not most, rules of legal procedure have the potential to be outcome determinative, and thus to have substantive effects, under certain circumstances." *Nathaniel S.*, 323 Conn. at 298. But, "[i]f we treat as substantive any procedural statute that impacts substantive rights, then the line between substantive and procedural will become hopelessly blurred." *Id.* The fact that there is some effect on substantive rights does not turn a procedural statute into a substantive one.

There are many cases where procedural changes had effects on substantive rights but were still held to operate retroactively. In *Nathaniel S.*, a statute that raised the age from 14 years to 15 years for the automatic transfer from the adult to the juvenile criminal docket was held to apply to a defendant whose case was pending when the statute was passed. Obviously, this procedural change had huge substantive effects – but it was still a procedural change: the defendant moved from the adult to the juvenile criminal docket, with all the consequences that

flowed from that. Similarly, here, DWW will have to move from the declaratory ruling procedure to the certificate procedure, even though that entails some consequences. Another example is the *Investment Associates* case, cited by DWW. In that case, the legislature passed a statute in 2009 that allowed judgment creditors to "revive" their judgments and, effectively, get a new judgment date. This allowed Connecticut judgment creditors to enforce those judgments in foreign jurisdictions that had shorter judgment expiration periods. The Court ruled that the statute was procedural, and could be applied retroactively to a 1994 judgment. *Investment Assoc.*, 309 Conn. at 866 – 870. Clearly, this ruling had a major substantive impact on the judgment debtor whose assets were now subject to execution on the judgment in the foreign jurisdiction for a longer period of time. Still, the statute was procedural and therefore, applied retroactively. *See also, Forrest v. The Golub Corp. dba Price Chopper*, 2016 WL 6120671 (Hartford Jud. Dist., Sept. 8, 2016) (statutes that changed law to allow double damages in employment case and that were enacted during pendency of lawsuit were procedural and applied in that case). The fact that DWW may experience some substantive effects with the move from the declaratory ruling proceeding to the certificate process does not turn this procedural statute into a substantive one.

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

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Certification of Service

I, Steven K. Reviczky hereby certify that a copy of the foregoing Department of Agriculture's Reply to DWW Solar II, LLC's Objection to Motion to Deny Declaratory Ruling was sent on September 21, 2017, by e-mail and by first class mail, postage prepaid to the following parties on the Service List in this matter:

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