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
	:	AUGUST 23, 2017

MEMORANDUM IN SUPPORT OF MOTION TO DENY DECLARATORY RULING

The State of Connecticut Department of Agriculture ("DOA") hereby submits this memorandum is support of its motion that the above-captioned Petition for Declaratory Ruling ("Petition") be denied on the grounds that DOA 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 prime farmland. 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 29, 2017, DWW Solar II, 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 26.4 megawatt AC solar photovoltaic electric generating facility that it proposes to construct, operate, and maintain on 289 acres of land in Simsbury, Connecticut. Petition, p. 1. According to the Petition, the area of the Project proposed on agricultural fields is 126 acres.

Petition, p. 21. Ninety acres of the Project's 289 acres is prime farmland. Petition, p. 43. Per the Petition, "prime farmland is defined as land that has the best combination of physical and chemical characteristics for producing food, feed, forage, fiber, and oilseed crops and is also available for these uses." Petition, p. 43.

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 prime farmland," is one that the Siting Council may approve by declaratory ruling "as long as," among other things, "the Department of Agriculture represents, in writing, to the council that such project will not materially affect the status of such land as prime farmland . . . ." The statute's definition of prime farmland is "land that meets the criteria for prime farmland as described in 7 CFR 657, as amended from time to time." Section 657, in turn, defines prime farmland as "land that has the best combination of physical and chemical characteristics for producing food, feed, forage, fiber, and oilseed crops, and is also available for these uses," which is the same definition used in the Petition.

Thus, it is clear that the Project is to be located on prime farmland. However, if the written representation from DOA of no material effect is not obtained, 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.[1]

In this case, DOA has not, and will not, be making such a representation because the Project *will* materially affect the status of the land on which the Project is to be located as prime farmland. *See* Affidavit of Steven K. Reviczky, ¶ 3.

[1] In the certificate proceeding, the Siting Council, under the amended statute, will be required to consider the Project's impact and significant adverse effect on agriculture generally. *See* Conn. Gen. Stat. § 16.50p(a)(3)(B)(v).

Argument

The declaratory ruling petition should be denied: the DWW Solar II project cannot proceed before the Siting Council *via* a declaratory ruling because the written representation required from DOA 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 DOA.

It has been suggested[2] 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 29, 2017. 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.

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

[2] 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." At the August 3, 2017 pre-hearing conference in this matter, counsel for the petitioner expressed the same view.

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 prime farmland, DOA must supply the written representation.[3] 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 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.

[3] For projects to be located on forestland, DEEP must represent in writing that the project will not materially affect the status of such land as core forest.

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 DOA, there is no need for further proceedings in this matter.

STEVEN K. REVICZKY, COMMISSIONER
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Certification of Service

I, Jason E. Bowsza hereby certify that a copy of the foregoing Memorandum in Support of Motion to Deny Declaratory Ruling was sent on August 23, 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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