

**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

DECEMBER 4, 2017

**DWW SOLAR II, LLC’S OPPOSITION TO FLAMMINI ET AL.’S SUBMITTAL OF  
EVIDENCE AFTER THE EVIDENTIARY RECORD HAS CLOSED**

The petitioner, DWW Solar II, LLC (“DWW”), respectfully submits this Opposition to Flammini et al.’s (hereinafter “the Abutters”) attempt to introduce new administrative notice items and evidence after the Council’s closing of the administrative record. Specifically, DWW objects to the Abutters’ filing of Administrative Notice Items on December 1, 2017 and the Abutters’ inclusion of evidence not previously submitted to the Council prior to the Abutters’ filing of its December 1, 2017 Brief.

At the conclusion of the November 2, 2017 public hearing, the Council made it quite clear that the record in this matter was being closed. Per the Chairman’s closing statement: “No new information, no new evidence, no argument and no reply briefs without our permission, will be considered by the Council.” Transcript, p. 776. Despite this clear cutoff, the Abutters decided to file their Administrative Notice Items almost a month after the close of evidence, and more than five months after DWW filed its Petition.

Turning first to the administrative notice items, these administrative notice items are to be put on the various hearing programs, as was done in this Petition on September 12, October 10,

and November 2, 2017. This affords all parties, including the Council, the opportunity to know what items will need to be considered by the Council throughout the proceeding. The Abutters have proffered no reason for their dilatory filing of these administrative notice items, and as such, they should be stricken from the record of this Petition.

The Abutters also seek to introduce extra-record evidence purportedly alleging the ownership of various parcels and whether the owners of those parcels were appropriately noticed under the Siting Council's rules of Practice<sup>1</sup>. In order to make this argument, the Abutters must first misquote the standards of RCSA §16-50j-40, then must attempt to enter new evidence into the record a month after the record has been closed, and then finally must ignore the law regarding the Council's subject matter jurisdiction. While DWW can do nothing about the first issue, it can shed some light on the other two issues.

The reason why the Council establishes a closing date for record evidence is to avoid the exact situation that the Abutters have now caused. Once a party ignores a deadline, other parties must respond (as is their right under the notions of due process and fundamental fairness) to challenge the evidence and/or explain the errors contained in the submittal of that evidence. The Abutters' inexcusable delay in propounding such evidence brings this issue into clear relief, as DWW is without the means to defend itself from Abutters' contentions on this issue.

The Abutters' delay leaves DWW with a host of issues that must be addressed. With respect to new "evidence" being sought for introduction by the Abutters, DWW notes that not all of the evidence consists of certified copies as alleged by the Abutters. Other issues abound in connection with this late submittal: the Abutters have provided no foundation for the entry of

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<sup>1</sup> DWW notes that despite the representation of the Abutters in their Brief, the referenced deed does not appear to be certified and, more importantly, does not even prove the point that they are trying to make. This deed merely evidences that as of March 1, 2016 Sunlight Construction Inc. owned the referenced real estate. The Abutters have not established that Sunlight Construction Inc. is in fact the *current* owner of record.

such new evidence; no witness has been identified to proffer such evidence; DWW has not had an opportunity to cross examine the Abutters regarding the evidence; nor has DWW had an opportunity to cross examine the Town on this issue.

Against this backdrop, DWW is surprised to see both the Abutters and the Town cite to this new evidence with such enthusiasm. DWW was surprised by the Abutters' citation to the evidence since the excuse proffered by the Abutters for their tardiness makes no sense in light of the facts. As such, they offer no compelling reason for their delay, thus they are without excuse as to why they should be allowed to rely on this alleged evidence. DWW was equally surprised by the Town's inclusion of this issue in its Brief, since it was the Town that provided DWW with the list of abutters in the first place.

The Abutters claim in footnote 2 of their Brief that this information would have been included as "rebuttal evidence," however, the Abutters were surprised that the public hearing session ended abruptly on November 2, 2017." DWW is hard-pressed to ascertain how the Abutters can claim surprise since there was an opportunity to present rebuttal evidence at the hearing on November 2, 2017; the Abutters simply chose not to do so. Moreover, if the Abutters wanted to provide this information to the Council as soon as they possessed it, they could have provided it as soon as they received it. The Abutters, however, conveniently fail to explain to the Council when they first discovered this issue, and when they obtained their alleged evidence. Instead, the Abutters chose to wait until the very last possible day to make this filing and provide no explanation as to why the filing could not be made earlier. The Abutters should not be permitted to take advantage of such delay, particularly in the absence of any cogent explanation.

DWW is even more surprised by the Town's position in its Brief, since the Town provided DWW with the list of abutters to use in this Petition. On April 27, 2017, the Town's assessor provided DWW's representatives with the list of abutters, after considerable back-and-

forth on the issue. A copy of that e-mail exchange is attached as Exhibit A to this Opposition, and the list of abutters that was submitted to DWW by the Town is attached as Exhibit B. Given this backdrop, DWW cannot ascertain how the Town could argue that DWW did not do what was appropriate to provide notice to the abutters of the Project site. The Town should not be allowed to benefit from, at best its own mistake, and should be estopped from relying on the Abutters' new evidence, even if that evidence is somehow found to be properly entered into the record of this Petition (which DWW expressly denies should happen).

Putting all of this aside, the Abutters' "13<sup>th</sup> hour" attempt to enter additional evidence into this record is of little moment since neither the Abutters' nor the Town's legal conclusions on the matter are correct. Even if the evidence is permitted into the record, the law does not require the dismissal of the action as the Town and the Abutters claim. Both argue that the failure of notice to abutters in a Siting Council petition results in the failure of the Siting Council's subject matter jurisdiction over this Petition. With one exception, neither party cites to a case for this proposition, only to cases discussing how Connecticut Courts treat subject matter jurisdiction and notices to parties generally.

That exception would appear to be the controlling case in the matter and comes in the form of the Town's citation to *Mobley v. Metro Mobile CTS of Fairfield County*, 216 Conn. 1, 578 A.2d 1044 (1990). DWW agrees with the Town that this case should be brought to the Council's attention. Of all the cases cited by either party, this case is most directly on point with respect to the issue before the Council. DWW disagrees with the Town's analysis, however. The Town cites to pp. 9 and 10 of *Mobley* in its Brief for the notion that failure of notice of a petition constitutes a jurisdictional defect, but the Town misleads the Council by failing to inform the Council of what is contained further down on page 10 of that decision. The *Mobley* Court reversed the trial court's findings that the Siting Council lacked subject matter jurisdiction

over a purported failure to provide proper notice. As the Court noted on page 10 of its decision, for those cases in which notice defects were found to rob a tribunal of its subject matter jurisdiction, the notice in question “has traditionally been held to apply to notice of the hearing. . . . It does not extend to notice of a prehearing application as well.” *Id.*, p. 10.

The *Mobley* Court went on to note that “all of the cases cited by the plaintiffs for the proposition that the failure to comply with the notice requirement of § 16-50l was a jurisdictional defect involved notice of a hearing. None involved, as here, a statutory notice of the filing of an application.” *Id.* Against this backdrop, the Court held that the fact that even though abutters were involved, that gave those abutters “no significant interest protected by the due process clause.” *Id.* As such, the judgment of the trial court was reversed, and the Siting Council was found to retain its subject matter jurisdiction despite the alleged shortcomings in notice to abutters.

The notice that DWW provided, in the form of actual notice to abutters, as well as the published notice that was made available in various local publications and the signage that was placed at the Project site, was sufficient for any due process or jurisdictional concerns to be met based on the precedent set by *Mobley*. Even if the Town and Abutters could find applicable case law that states to the contrary, DWW would note that neither the Abutters nor the Town have the standing to raise any of these claims. As the court noted in *Town of Middlebury v. Conn. Siting Council*, 2016 Conn. Super. LEXIS 84; 2016 WL 490298 (2016), other parties to a matter “lack standing to assert that a nonparty did not receive notice.” *Id.* at fn 11. *See also Lauer v. Zoning Commission*, 220 Conn. 455, 459, 465, 600 A. 2d 310 (1991). Therefore, neither of the parties here have the standing to make the allegations contained in their Briefs.

In short, the Abutters’ failure, yet again, to follow the applicable rules of practice has resulted in undue burden and delay. For the reasons set forth above, DWW respectfully requests

that the Siting Council deny the Abutters' attempt to enter evidence into the record after the record's close and strike those portions of the Abutters' and Town's Briefs that reference such evidence.

Respectfully Submitted,  
DWW Solar II, LLC

By:

A handwritten signature in black ink, appearing to read "Lee D. Hoffman", is written over a horizontal line.

Lee D. Hoffman  
Pullman & Comley, LLC  
90 State House Square  
Hartford, CT 06103-3702  
Juris No. 409177  
860-424-4300 (p)  
860-424-4370 (f)  
[lhoffman@pullcom.com](mailto:lhoffman@pullcom.com)  
Its Attorney

## CERTIFICATION

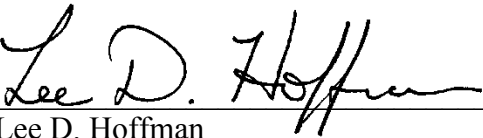
I hereby certify that on December 4, 2017, the foregoing was delivered by electronic mail and regular mail, postage prepaid, in accordance with § 16-50j-12 of the Regulations of Connecticut State Agencies, to all parties and intervenors of record, as follows:

Jesse A. Langer  
Robert M. DeCrescenzo  
Updike, Kelly & Spellacy, P.C.  
One Century Tower  
265 Church Street  
New Haven, CT 06510  
Counsel for the Town of Simsbury

Alan M. Kosloff  
Alter & Pearson, LLC  
701 Hebron Avenue  
P.O. Box 1530  
Glastonbury, CT 06033

Krista Trousdale  
Connecticut Office of the Attorney General  
PO Box 120  
Hartford, CT 06141-0120  
Counsel for the CT Dept. of Agriculture

Jason Bowsza  
Connecticut Department of Agriculture  
450 Columbus Blvd.  
Hartford, CT 06103

  
\_\_\_\_\_  
Lee D. Hoffman  
Commissioner of the Superior Court

## Exhibit A

**Hoffman, Lee D.**

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**Subject:** FW: Request for Abutter List for Multiple (5) Properties  
**Attachments:** SISMBURY\_ABBUTTERS\_04272017.xls

From: Gardner David [<mailto:dgardner@simsbury-ct.gov>]  
Sent: Thursday, April 27, 2017 6:06 PM  
To: Sheathelm, Kurt D.  
Cc: Hoffman, Lee D.  
Subject: FW: Request for Abutter List for Multiple (5) Properties

This time with an attachment.

From: Gardner David  
Sent: Thursday, April 27, 2017 6:05 PM  
To: 'Sheathelm, Kurt D.'  
Cc: Hoffman, Lee D.  
Subject: RE: Request for Abutter List for Multiple (5) Properties

Kurt,

I think this is OK. I added two properties that didn't come up in the search but which would have been the only property on the street not included. These were 100 Casterbridge Crossing and 2 Kilbourn Farms Lane.

There are still owners, chiefly the Town of Simsbury and River Bend that appear multiple times in the list, and the subject parcels are included as well.

Yours, etc.,

David Gardner  
Assessor

From: Sheathelm, Kurt D. [<mailto:KSheathelm@PULLCOM.COM>]  
Sent: Thursday, April 27, 2017 4:58 PM  
To: Gardner David  
Cc: Hoffman, Lee D.  
Subject: RE: Request for Abutter List for Multiple (5) Properties

What you are doing is perfect.  
I really appreciate your time.  
Thank you.  
Kurt

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Kurt D. Sheathelm, Paralegal  
PULLMAN & COMLEY LLC  
p 860 424 4356 • [ksheathelm@pullcom.com](mailto:ksheathelm@pullcom.com)<<mailto:ksheathelm@pullcom.com>>

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TELEPHONING (203) 330-2000; (2) DELETE ALL COPIES OF THE MESSAGE AND ANY ATTACHMENTS; AND (3) DO NOT DISSEMINATE OR MAKE ANY USE OF ANY OF THEIR CONTENTS.

From: Gardner David [<mailto:dgardner@simsbury-ct.gov>]  
Sent: Thursday, April 27, 2017 4:54 PM  
To: Sheathelm, Kurt D.  
Cc: Hoffman, Lee D.  
Subject: RE: Request for Abutter List for Multiple (5) Properties

Kurt,

I ran abutters lists of parcels within 100' of the selected parcels, except that for H05 103 024, I extended it to 300' because of the Town of Simsbury open space that borders it immediately to the south and southeast. I have sorted each spreadsheet in property location order, and plan to combine them into one so that duplicates can be found and eliminated. I also will need to check for ownership changes, because the GIS ownership isn't as up-to-date as we have here or on our online property record cards that are linked from the assessor's web page.

Before I proceed any further, let me know if I am using the right criteria to create the lists – is the 100' or 300' that I used sufficient? Must I use the same distance in all the searches?

Yours, etc.,

David Gardner  
Assessor

From: Sheathelm, Kurt D. [<mailto:KSheathelm@PULLCOM.COM>]  
Sent: Thursday, April 27, 2017 3:05 PM  
To: Gardner David  
Cc: Hoffman, Lee D.  
Subject: Request for Abutter List for Multiple (5) Properties

Hi Dave -

As we discussed, I am looking for abutter property/mailling lists for the following five properties.

This is to support a meeting with the town regarding these properties

I have also included a pdf with the "quick maps" from the Simsbury GIS system for reference.

I appreciate your help with this. Let me know if you need anything else and also, if possible, how long it will take to generate the lists.

Thanks again.  
Kurt

Parcel ID

Address

G03 403 032

County Road

H03 403 012

Hopmeadow Street

H05 403 026-32H

Hoskins Road

H04 403 014

Hopmeadow Street

H05 103 024

Hoskins Road

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Kurt D. Sheathelm  
Paralegal

PULLMAN  
&COMLEY LLC  
ATTORNEYS

90 State House Square  
Hartford, CT 06103-3702  
p 860 424 4356 f 860 424 4370  
[ksheathelm@pullcom.com](mailto:ksheathelm@pullcom.com)<<mailto:ksheathelm@pullcom.com>> • [www.pullcom.com](http://www.pullcom.com)<<https://protect-us.mimecast.com/s/jqkGBgHxndn0hG>>

V-card<<https://protect-us.mimecast.com/s/XBJQBrv2K2aHD>> • Directions<<https://protect-us.mimecast.com/s/7GO3BaHKgagGcG>>

BRIDGEPORT HARTFORD STAMFORD WATERBURY WHITE PLAINS

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