

**STATE OF CONNECTICUT  
CONNECTICUT SITING COUNCIL**

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DWW SOLAR II, LLC PETITION FOR	)	PETITION NO. 1313
DECLARATORY RULING THAT NO	)	
CERTIFICATE OF ENVIRONMENTAL	)	
COMPATIBILITY AND PUBLIC NEED	)	
IS REQUIRED FOR A 26.4 MEGAWATT	)	
AC SOLAR PHOTOVOLTAIC ELECTRIC	)	November 1, 2017
GENERATING FACILITY IN SIMSBURY	)	
CONNECTICUT	)	
.....	)	

**TOWN OF SIMSBURY’S POSTHEARING BRIEF**

In accordance with § 16-50j-31 of the Regulations of Connecticut State Agencies, the Town of Simsbury (“Town”) respectfully submits the following Posthearing Brief in connection with a 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”) filed by DWW Solar II, LLC (“DWW”) with the Connecticut Siting Council (“Council”).

The Town’s primary concern is the safety and well-being of its residents. DWW’s environmental review of the project site, which did not include a sufficient on-site assessment, fails to provide even basic assurances that construction of a large solar facility on a site with a long history of chemical use can be accomplished in a safe manner. In the absence of a demonstration that the solar facility meets the Department of Energy and Environmental Protection’s (“DEEP”) air and water quality standards pursuant to General Statutes § 16-50k(a), DWW’s Petition must be denied. DWW also failed to obtain a written statement from the Department of Agriculture (“DOA”) that the proposal “will not materially affect the status of such land as prime farmland” in accordance with § 16-50k(a), as amended by Public Act 17-218; accordingly, DWW’s Petition should be denied for this reason as well. In addition to these shortcomings, it appears that DWW failed to provide notice to an abutter, which is a subject matter jurisdictional defect.

The Town additionally took the position during the proceedings that, even if safety and environmental concerns were adequately addressed, additional changes to the proposed facility were required to ensure that the facility, if approved, fit within the Town's culture, history and aesthetics and address the concerns of abutters and affected neighborhoods, the Town would not oppose the Petition. These issues include: (1) the full elimination of the infrastructure proposed on the south side of Hoskins Road and the overall reduction of the proposed Facility to lessen impact on the abutters; (2) preserving and protecting historical resources, such as the tobacco barns and historic homes; (3) implementing appropriate screening for abutters and historical resources; (4) utilizing native plantings and pollinators; and (5) ensuring a robust decommissioning plan.

As presented to the Council, the Petition fails to meet statutory requirements designed to ensure that construction of a project of this magnitude is safe for the community, and the Petition should be denied for this reason alone. If safety concerns can be met, the Town asks that the Council require DWW to take reasonable measures to ensure that this project is constructed in a way that does not diminish the appearance, history, culture and value of our community.

## **I. PRELIMINARY STATEMENT**

The Town has spent decades developing land use controls to enhance and preserve the beautiful landscape and character of the Town. The results are immediately obvious to anyone visiting the Town or merely passing through. These land use controls are grounded in respect for the natural environment, celebrating and preserving the Town's history and guiding the built environment so that any large scale commercial or industrial development does not overwhelm and sacrifice the existing look and feel of the community.

The Town is a place where raising a family, providing first class education, and access to the Town's wonderful natural environment are of the highest priority. While commercial development is not discouraged, its placement, scale and context are strictly examined and controlled.

DWW's proposed Facility is a major threat to these principles. Its size alone, 289 acres, would normally cause extensive scrutiny by the Town's local land use boards. No detail would be overlooked, and no possible damage to the residential areas or the historic context of the site would be ignored.

The Council's process precludes the Town's land use boards from engaging in their customary in depth scrutiny of this proposed development. Instead, the Town is a party to a state-mandated proceeding where the Council will supplant the careful, thoughtful review that the Town's own boards and commissions would normally engage in for a commercial project of this scale. We respectfully request that the Council implement the same level of careful review that the Town's land use boards would undertake.

The detailed analysis that follows is intended to assist the Council in achieving the goal of careful scrutiny of DWW's proposed Facility, to protect the Town's inherent right to ensure that the industrial development of a 289 acre parcel of land does not come at the cost of the Town's neighborhoods, health and safety and irreplaceable historic assets. As a result of such scrutiny, the Town believes the Council cannot approve the Petition as submitted. For the reasons set forth below, the Town believes that too many critical issues have been left unaddressed, or not addressed in sufficient detail, to allow for the approval of the Petition at this time.

## **II. THE FACILITY AND PROJECT SITE**

On June 29, 2017, DWW submitted the Petition to the Council. ( *II.B.1.*)<sup>1</sup> The Petition seeks approval of a 26.4 megawatt ("MW") AC electric generating facility in the Town ("Facility"). (*Id.*, pp. 8-9)

The Facility is proposed on five separate parcels of land totaling approximately 289 acres off of Hopmeadow Street, Hoskins Road and County Road in the Town ("Project Site"). The

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<sup>1</sup> All Exhibit references are based on the November 2, 2017 Hearing Program.

Project Site consists of agricultural fields,<sup>2</sup> woodland and wetland areas. (*Id.*, p. 8.)

The Project Site is a classic New England rural landscape, with scattered residential development; intermixed with historic homesteads, woods and agricultural lands and narrow roads. The area has largely retained its rural agricultural feel from 1934. Since 1934, some of the farmland has been converted from pasture, cultivated soils and/or wood lands to residential uses, along with a few municipal functions (i.e., school, athletic fields, playgrounds and firehouse) as the community developed in the years following World War II. (*IV.B.5, A4-1; II.B.1, p. 8.*)

### **III. THE PETITION MUST BE DENIED BECAUSE DWW FAILED TO NOTIFY AN ABUTTER TO THE PROJECT SITE**

General Statutes 4-176(c) provides: “Within thirty days after receipt of a petition for a declaratory ruling, an agency shall give notice of the petition to all persons to whom notice is required by any provision of law and to all persons who have requested notice of declaratory ruling petitions on the subject matter of the petition.” Section 16-50j-40(a) provides in relevant part:

Within 30 days after receipt of a petition for a declaratory ruling, the Council shall give notice of the petition to all persons to whom notice is required by any provision of law and to all persons who have requested notice of declaratory ruling petitions on the subject matter of the petition. The notice provided by the Council shall provide contact information for the Council, a timeline for public involvement and the date, place and time for any scheduled field review of the proposed project.

Notice must be provided to “each person other than the petitioner appearing of record as an owner of property which abuts the proposed primary or alternative sites of the proposed facility . . . .” Regs., Conn. State Agencies § 16-50j-40(a). “These notice requirements are applicable to proposed facilities that, by statute, are required to be approved by a declaratory ruling in lieu of a certificate under Section 16-50k of the Connecticut General Statutes, and to petitions for a declaratory ruling that the subject of the petition does not constitute a facility.” *Id.*

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<sup>2</sup> The Project Site is owned by a developer who is a passive participant in the agricultural use of the parcels making up the Project Site by leasing the land to others. (*Tr.*, p. 573.)

The issue of subject matter jurisdiction is applicable to administrative agencies and must be addressed regardless of the form in which the issue is presented. *Figueroa v. C and S Ball Bearing*, 237 Conn. 1, 4, 675 A.2d 845 (1996). The failure to provide all property owners abutting the Project Site with notice of the hearing on the Petition is a subject matter jurisdictional defect. *Mobley v. Metro Mobile CTS of Fairfield County, Inc.*, 216 Conn. 1, 9-10, 578 A.2d 1044 (1990).

It appears that DWW failed to notify an owner of real property abutting the Project Site. Sunlight Construction, Inc. is the owner of real property commonly referred to as 42 Hoskins Road, with a Tax Assessor identification of 3075511 and Map/Block/Lot H05 403 005. (*II.B.1, Ex. C.*) This abutter is not included on DWW's Abutting Property Owner List and Notice. (*II.B.1, Ex. E.*)

#### **IV. PUBLIC ACT 17-218 APPLIES TO THE FACILITY**

DWW should not be permitted to avoid the clear expression of public policy contained in Public Act 17-218 by filing this Petition two days before the effective date of the Act. Public Act 17-218 amended § 16-50k(a) so that a petitioner seeking the approval of a solar photovoltaic facility with a capacity of two or more megawatts “to be located on prime farmland” must do the following in addition to demonstrating that the proposed facility meets DEEP’s air and water quality standards and obtaining a finding from the Council that the facility does not have a substantial adverse environmental effect: obtain a written representation from the DOA that the proposed facility “will not materially affect the status of such land as prime farmland . . .”<sup>3</sup> The

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<sup>3</sup> General Statutes § 16-50k(a), as amended by Public Act 17-218, provides in relevant part: “. . . no person shall . . . commence the preparation of the site for, commence the construction or supplying of a facility, or commence any modification of a facility, that may, as determined by the council, have a substantial adverse environmental effect in the state without having first obtained a certificate of environmental compatibility and public need, hereinafter referred to as a “certificate”, issued with respect to such facility or modification by the council. . . . 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 . . . (B) the construction or location of any fuel cell, unless the council finds a substantial adverse environmental effect, or 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: (i) Such project meets air and water quality standards of the Department of Energy and Environmental Protection, (ii) the council does not find a substantial adverse environmental effect, and (iii) for a solar photovoltaic facility with a capacity of two or more megawatts, to be located on prime farmland or forestland, excluding any such facility that was



effective date of Public Act 17-208, as it pertained to the amendment to § 16-50k, was July 1, 2017. (*Public Act 17-218, § 3.*)

Public Act 17-218 was passed with the unified and overwhelming support of State legislative, executive and administrative agencies, as well as the State's municipalities. The Act represents the Legislature's clear acknowledgment that supporting sustainable energy and preserving open space, forests and farms are worthy goals that can and should be pursued in a complimentary manner, but not at the expense of one policy over the other.

Approximately 213 acres of the 289 acre Project Site constitute prime or important farmland soils. (*II.B.1, Ex. H; III.B.3, A12-14, 22-31; III.B.4, Nos. 15, 19; Tr., p. 543.*) Approximately thirty-seven to forty-three acres of prime and important farmland soils would be directly disturbed by the proposed Facility. (*III.B.4, No. 19.*) The various parcels are well suited for agriculture and are still cleared agricultural fields with a history of use for tobacco cultivation. (*II.B.1, Ex. N, p. 14.*)

The DOA has not issued a written representation that the proposed Facility will not materially affect prime farmland due to the DOA's opinion that there will be a material impact on the prime farmland subject to the Petition. (*III.B.2.*)

On or about August 23, 2017, the DOA filed a Motion to Deny Declaratory Ruling on the ground that the Petition does not meet the procedural requirements of General Statutes § 16-50(a), as amended by Public Act 17-218. Accordingly, DWW must file and obtain a Certificate of Environmental Compatibility and Public Need pursuant to General Statutes § 16-50g *et seq.* The

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selected by the Department of Energy and Environmental Protection in any solicitation issued prior to July 1, 2017, pursuant to section 16a-3f, 16a-3g or 16a-3j, 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 or the Department of Energy and Environmental Protection represents, in writing, to the council that such project will not materially affect the status of such land as core forest. In conducting an evaluation of a project for purposes of subparagraph (B)(iii) of this subsection, the Departments of Agriculture and Energy and Environmental Protection may consult with the United States Department of Agriculture and soil and water conservation districts."

Town hereby agrees with and adopts the DOA's motion and supporting memorandum and reply.

**V. DWW HAS NOT DEMONSTRATED THAT THE PROPOSED FACILITY MEETS DEEP'S WATER QUALITY STANDARDS**

General Statutes § 16-50k(a)(B)(i) provides that DWW must demonstrate that the proposed Facility meets the air and water quality standards of DEEP. DEEP's water quality standards include § 22a-426-7 of the Regulations of Connecticut State Agencies. DWW must demonstrate that the proposed Facility would not cause contamination of ground waters which exceed regulatory levels and that the Facility would not adversely affect drinking or surface water quality. Regs., Conn. State Agencies § 22a-426-7(a)(2) and (3). DWW has failed to meet its burden of proof demonstrating that the Facility meets DEEP's air and water quality standards.

**A. Pertinent Environmental Characteristics and History of the Project Site and Nearby Areas.**

The groundwater located beneath a majority of the Project Site is classified as GA. A GA classification means existing or potential public or private supply of water which is suitable for drinking without treatment. (*II.B.1, Ex. O, p. 5; Tr., p. 631.*) The precipitation at the Project Site is expected to infiltrate permeable ground surfaces or run off to nearby streams and ponds. (*II.B.1, Ex. O, p. 13; Tr., p. 631.*)

The potable water wells associated with residential properties located down gradient from the Project Site were tested in the past and found to contain the pesticides Vorlex and/or ethylene dibromide ("EDB"). Vorlex and EDB were used for tobacco cultivation in Connecticut and specifically at the parcels making up the Project Site. (*IV.B.7.*)

A nearby property to the north of the Project Site, along both Hoskins and County Roads, commonly referred to as Meadowood, was also used by a prior owner of the Project Site for tobacco cultivation. Past environmental testing revealed the presence of several chemicals, including cyanide, and the presence of EDB in the groundwater on the site, which had

contaminated several residential potable water wells nearby the Meadowood property. (*III.B.2, Ex. C, Attach. B; III.B.7.*)

B. Pertinent Components of the Construction of the Facility.

The proposed Facility<sup>4</sup> would require the excavation of at least 10,000 holes between twelve and fourteen feet deep for the piles or piers necessary to support the solar panels for the Facility. (*II.B.11, No. 3; Tr., pp. 659-60.*) The DOA determined that 10,000 holes is too conservative based on the configuration (array per foot) provided to the DOA by DWW. (*III.B.3, No. 35; Tr., p. 441.*) The proposed Facility would require the disturbance of approximately 58,700 cubic yards (“CY”) of soil, with a net of 37,200 CY to be removed from the Project Site. (*II.B.2, No. 56; Tr., p. 661.*) The excavation and grading contemplated by DWW constitutes a significant soil disturbance. (*Tr., p. 661.*)

C. DWW’s Environmental Assessment of the Project Site.

GZA GeoEnvironmental, Inc. (“GZA”) was retained to perform a Phase I Environmental Site Assessment (“Phase I”) of the Project Site, dated March 29, 2016. (*II.B.1, Ex. O.*) GZA performed the Phase I under the American Society for Testing and Materials Standard Practice E1527-13 (“ASTM E1527-13”). (*II.B.1, Ex. O; Tr., p. 641.*) GZA rendered an opinion as to whether surficial or historical evidence indicates the presence of recognized environmental conditions (“RECs”), which could result in the presence of hazardous material in the environment. (*II.B.1, Ex. O; IV.B.2, Exhibit C, Attach. B; Tr., p. 641.*)

It is the industry standard in Connecticut for a Licensed Environmental Professional (“LEP”) to perform a Phase I under the DEEP’s Site Characterization Guidance Document (“SCGD”). The SCGD requires the LEP to identify Areas of Concern (“AOC”), which include “[l]ocations or areas at a site where hazardous waste and/or hazardous substances (including

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<sup>4</sup> The Facility would be the largest development in the history of the Town. (*Tr., p. 536.*)



petroleum products) have been or may have been used, stored, treated, handled, disposed, spilled, and/or released to the environment.” (*IV.B.2, Ex. C, Attach. B.*) An AOC is distinctly different from a REC, as an AOC includes the potential of a release of hazardous materials, not just evidence of an actual release or material threat of a release. (*IV.B.2, Ex. C, Attach. B.*)

D. The Phase I Revealed Significant Data Gaps and Incomplete Data.

The Phase I acknowledged that the property owner of the parcels making up the Project Site provided little to no information concerning the historical and current operations of the Project Site for tobacco cultivation or otherwise. (*II.B.1, Ex. O, p. 14; Tr., pp. 490, 503.*) The Phase I also acknowledged that the hazardous waste manifests related to the Project Site for 2009-11 were not made available for review. (*II.B.1, Ex. O, p. 24; Tr., p. 649.*)

The Phase I identified a fifty-five gallon metal drum in the eastern portion of Parcel 3 of the Property Site with unknown contents. (*II.B.1, Ex. O, pp. 20, 24; Tr., pp. 631-32.*) The contents of that fifty-five gallon metal drum, whether those contents were released and whether those contents were in the ground would be pertinent to an LEP performing a Phase I. (*II.B.1, Ex. O, pp. 20, 24; Tr., pp. 631-35.*) The Phase I also identified discarded empty drums on Parcels 1 and 3 of the Project Site. (*II.B.1, Ex. O, pp. 20, 24; Tr., pp. 635-37.*) The contents of those discarded drums and whether those contents were released into the ground would be pertinent to determine whether the proposed Facility would meet DEEP’s water quality standards. (*Tr., pp. 635-37.*)

The Phase I also identified eight monitoring wells on Parcel 5 of the Project Site, which suggested previous environmental investigation on Parcel 5. (*II.B.1, Ex. O, pp. 12, 21; Tr., p. 638.*) No information was provided to GZA concerning the environmental investigation concerning the eight monitoring wells on Parcel 5 of the Project Site. (*II.B.1, Ex. O, pp. 12, 21; Tr., p. 639.*) The information concerning the (or any) previous environmental investigation would be pertinent to whether the proposed Facility would meet DEEP’s water quality standards. (*Tr., pp. 639, 669.*)

The Phase I identified the following as RECs on the Project Site: (1) the portions of the Project Site used historically for tobacco cultivation such that pesticide residuals may be present in soil and/or groundwater, as evidenced by the monitoring wells on Parcel 5; (2) the 55 gallon metal drum on Parcel 3; and (3) the discarded metal drums on Parcels 1 and 3. (*II.B.1, Ex. O, p. 23.*)

E. DWW Failed its Obligation of Environmental Due Diligence by Failing to Perform Follow Up Research on Either the Project Site or Adjoining Properties.

The Phase I environmental database search identified two sites, “Culbro” and “Culbro tobacco farm,” referred to as “orphan sites” in LEP vernacular, which are sites or adjoining sites identified in standard environmental record sources in the environmental database that are potentially relevant to a Phase I, but unsupported by sufficient information. (*II.B.1, Ex. O, App. D, p. 10; IV.B.7; Tr., pp. 641-42.*) ASTM E1527-13 requires the environmental professional to perform follow up review of the site or adjoining site identified in one or more environmental record sources. (*Tr., p. 643.*)

GZA did not perform any follow up review on the two “orphan sites” as required by § 8.2.2.1 of ASTM E1527-13. (*Tr., p. 643.*) GZA did not perform any review of the records located at the Connecticut State Library or any of the documents found by Zuvic · Carr and Associates, Inc. (“Zuvic Carr”) at DEEP’s file room and produced by the Town. These documents relate to the two “orphan sites” that were found to be the Project Site and an adjoining site (Hall Farm). (*IV.B.4, Nos. 27-28; IV.B.7; Tr., pp. 639-40, 44-45.*) The two “orphan sites” are also referenced on a list of contaminated or potentially contaminated sites maintained by DEEP on its website, but were not mentioned in the Phase I. This list is readily available on DEEP’s website to the public. (*Tr., pp. 645-46.*)

Incredibly, DWW argued that the documents produced by the Town, which were not included in the Phase I, were not “practically reviewable” because, according to DWW, the

documents would involve “an extraordinary analysis of irrelevant data, so [the documents produced] would be files that are site specific.” (*Tr.*, p. 640.) ASTM E1527-13 defines “practically reviewable” as follows:

information that is practically reviewable means that the information is provided by the source in a manner and in a form that, upon examination, yields information relevant to the property without the need for extraordinary analysis of irrelevant data. The form of the information shall be such that the user can review the records for a limited geographic area. Records that cannot be feasibly retrieved by reference to the location of the property or a geographic area in which the property is located are not generally practically reviewable. Most databases of public records are practically reviewable if they can be obtained from the source agency by the county, city, zip code, or other geographic area of the facilities listed in the record system. Records that are sorted, filed, organized, or maintained by the source agency only chronologically are not generally practically reviewable. Listings in publicly available records which do not have adequate address information to be located geographically are not generally considered practically reviewable. For large databases with numerous records (such as RCRA hazardous waste generators and registered underground storage tanks), the records are not practically reviewable unless they can be obtained from the source agency in the smaller geographic area of zip codes. Even when information is provided by zip code for some large databases, it is common for an unmanageable number of sites to be identified within a given zip code. In these cases, it is not necessary to review the impact of all of the sites that are likely to be listed in any given zip code because that information would not be practically reviewable. In other words, when so much data is generated that it cannot be feasibly reviewed for its impact on the property, it is not practically reviewable.

(*ASTM E1527-13*, § 3.2.69.) ASTM E1527-13 defines reasonably ascertainable to mean “information that is (1) publicly available, (2) obtainable from its source within reasonable time and cost constraints, and (3) practically reviewable.” (*ASTM E1527-13*, § 3.2.77.)

DWW’s argument misses its mark as the documents are pertinent to a Phase I because the historical operations of the Project Site play an important role in the LEP’s assessment of the subject property and the ultimate determination as to whether testing (Phase II) is necessary. (*ASTM E1527-13*, § 8.3.)

The documents produced by the Town were publically available and easily obtainable from DEEP’s file room and the Connecticut State Library. It was not onerous or unduly expensive,

particularly for a developer of DWW's bandwidth. These documents were, therefore, reasonably ascertainable and practically reviewable under ASTM E1527-13. (*ASTM E1527-13*, §§ 3.2.69 and 3.2.77; *IV.B.4*, Nos. 27-28; *IV.B.7*; *Tr.*, pp. 639-40, 44-45.) It appears that DWW is arguing that the documents were not "practically reviewable" simply because DWW neglected to review them. Furthermore, in attempting to minimize the import of the documents produced by the Town, DWW's consultant, GZA, appeared to focus only on the objective of a Phase I;<sup>5</sup> (*Tr.*, pp. 633, 650); and not on whether the proposed Facility would meet DEEP's water quality standards, which is DWW's burden under General Statutes § 16-50k(a).

F. GZA's October 3, 2017 Report Fails to Meet Due Diligence Standards.

On October 3, 2017, GZA prepared a report for DWW concerning the potential impact of the use of the Project Site for tobacco cultivation on the nearby aquifer or residential potable water wells ("GZA Report"). The GZA Report concluded that there was no need to perform any testing of the Project Site or any surrounding wells because any "pesticide residues" on the Project Site "would have long since leached to groundwater and potentially migrated to receptors, if present." (*II.B.8, Ex. D*; *Tr.*, p. 656.)

The GZA Report referred to "pesticide residues" on the Project Site as an indication that GZA believed there were only small amounts of pesticides, if any at all. (*Tr.*, p. 651.) In preparing the GZA Report: (1) GZA did not (and does not) have any sense of the concentrations of "pesticide residues" on or in the Project Site, nor did GZA quantify those amounts; (*id.* pp. 651-52); (2) GZA had no (and does not have any) idea of the subsurface environmental conditions of the Project Site; (*II.B.8, Ex. D*; *Tr.*, p. 652); (3) GZA did not (and does not) know if there are any contaminants in the soil of the Project Site; (*Tr.*, p. 652); (4) GZA did not review any of the documents referenced in the Zuvic Carr report, dated October 5, 2017 ("Zuvic Carr Report");

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<sup>5</sup> During the Hearing, Adam T. Henry, an LEP for GZA, attempted to avoid answering questions as they related to DEEP's water quality standards and just on the "the goal of the Phase I . . ." (*Tr.*, pp. 633, 655.)

(IV.B.7; *Tr.*, pp. 655-56); and (5) GZA did not (and does not) know if any contaminants existing at the Project Site exceed DEEP's water quality standards. (*Tr.*, p. 657.)

The GZA Report stated that "[t]his letter is subject to the attached Limitations and the Terms & Conditions of our contract." The limitations state expressly that "GZA has not performed a site visit as part of the preparation of this report." (II.B.8, *Ex. D.*) Although contrary to the express terms of the GZA Report, Adam T. Henry, an LEP at GZA, indicated that he performed a site visit in preparing the GZA Report, although he could not recall the date. (*Tr.*, p. 653.) The GZA Report also did not address the following important issues: (1) potential buried pesticides or other materials at the Project Site; (*id.*, p. 658); (2) the drums found at the Project Site identified in the Phase I; (*id.*); or (3) the presence of potential pesticide storage and handling areas incident to tobacco cultivation. (*Id.*, pp. 658-59.)

Neither GZA nor anyone else on behalf of DWW has performed any soil or water testing of the Project Site or any adjacent areas, and DWW "does not have any current plans to do so." (II.B.8, *Ex. D.*; II.B.9, *No. 10*; II.B.11, *No. 12*; *Tr.*, p. 656.) The only way to know whether there are any contaminants at the Project Site and whether those contaminants exceed DEEP's water quality standards is to perform soil and water testing as required in a Phase II Environmental Assessment. (*Id.*, pp. 657-58.)

G. The November 2, 2017 Disclosure by DWW

On November 2, 2017, DWW filed a revision to No. 84 of its response to the Council's Second Set of Interrogatories ("November Disclosure"). The revision included approximately 240 pages of documents gathered from the DEEP's file room on October 31 and November 1, 2017 by GZA.<sup>6</sup> (II.B.12.)

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<sup>6</sup> The Town objected to the admission of the November Disclosure as made on the morning of the Hearing. Neither the Council nor the other participants had sufficient time to review the documents and provide a rebuttal, or prepare for cross examination of DWW concerning the November Disclosure. (*Tr.*, pp. 596-600; 623-25.)



Some of the documents in the November Disclosure were documents produced by the Town in October, which further demonstrates that the Town's documents were "practically reviewable." (*IV.B.4, Nos. 27-28; IV.B.7.*) The Phase I and the November Disclosure do not establish that the Project Site was not used for the storage, handling or disposal of pesticides. (*II.B.1, Ex. O, II.B.12.*) The Phase I and the November Disclosure do not demonstrate that the Project Site, was investigated, sampled or remediated. This would include a likely disposal area mapped on Parcel 1. Only a small, off-site area was actually remediated as referenced in the Zuvic Carr Report. (*II.B.1, Ex. O, II.B.12; IV.B.4, Nos. 27-28; IV.B.7.*) . Finally, the Phase I and the November Disclosure do not provide any environmental studies relate to the monitoring wells located on Parcel 5 of the Project Site. (*Id.*)

H. The Phase I Does Not Meet ASTM E1527-13.

ASTM E1527-13 requires the environmental professional to include sufficient information concerning RECs on the subject site or adjoining properties. ASTM 8.2.2.1 provides:

If the property or any of the adjoining properties is identified on one or more of the standard environmental record sources in 8.2.1, pertinent regulatory files and/or records associated with the listing should be reviewed in accordance with 8.1.1 through 8.1.8. The purpose of the regulatory file review is to obtain sufficient information to assist the environmental professional in determining if a recognized environmental condition, historical recognized environmental condition, controlled recognized environmental condition, or a de minimis condition exists at the property in connection with the listing. If, in the environmental professional's opinion, such a review is not warranted, the environmental professional must explain within the report the justification for not conducting the regulatory file review.

The materials submitted by DWW do not satisfy the purpose of ASTM E1527-13 in light of the data gaps and incomplete information, as well as the failure to perform sufficient follow up review of the aforementioned "orphan sites". (*Tr., pp. 583, 660-661.*)

I. DWW Cannot Establish that the Facility Meets DEEP's Water Quality Standards Because of the Unknown Subsurface Environmental Conditions of the Project Site.

The record raises more questions than answers as to the subsurface environmental conditions of the Project Site. The record demonstrates that pesticides were used in substantial quantity on the Project Site. (*II.B.1, Ex. O, II.B.12; IV.B.4, Nos. 27-28; IV.B.7; Tr., p. 584.*) The record further shows that DEEP has voiced concerns over the historical operations of the Project Site for tobacco cultivation and the releases that occurred in relation thereto. (*II.B.1, Ex. O, II.B.12; IV.B.4, Nos. 27-28; IV.B.7; Tr., pp. 583-84.*)

The construction of the Facility, which includes prime farmland, might impact unknown environmental conditions existing on the Project Site. It is undisputed that the Facility constitutes a significant construction project, which could disturb any unknown sources of contamination; such a concern is reasonable based on prior known usage of the Project Site. (*IV.B.7; Tr. p. 585.*) Importantly, the construction work contemplated for the Facility is very different from and a far greater impact than the tilling practices used for past farming operations. Tilling would require the displacement of approximately nine to twelve inches of soil, while the proposed Facility would require the disturbance of approximately 58,700 CY of soil and the excavation of at least 10,000 holes, each approximately twelve to fourteen feet below the surface. (*Tr., pp. 612, 734.*)

A significant issue concerning the auger or pile driving of posts for the proposed Facility is the creation of preferential pathways for potentially existing pockets of contaminants. Another significant issue concerning these activities is the potential release of contaminants typically found in buried "farm dumps" associated with past tobacco cultivation such as what likely was shown on Parcel 1 of the Project Site. Disturbance of a "farm dump" or other areas of buried pesticides via pile driving, augering or extensive earth movement would create a significant release to the environment. (*IV.B.2, Ex. C, Attach. B; IV.B.4, Nos. 27-28; IV.B.7; Tr., p. 609.*)

One cannot know whether the subsurface environmental conditions of the Project Site would yield pesticide residues or significant pockets of contaminants without conducting a proper Phase I or soil and water testing. (*IV.B.7; Tr. p. 608.*) As such, one cannot prepare a soil management plan without knowing the subsurface environmental conditions of the Project Site. Thus, one cannot propose a significant construction project responsibly by going “blind.” (*IV.B.7; Tr. pp.603-04, 610.*)

DWW could have confirmed, and should have based on the Phase I, the subsurface environmental conditions of the Project Site. ASTM E1903-11 is the ASTM standard for conducting Phase II environmental site assessments. ASTM E1903-11 sets forth several objectives including: “Objective 1 –Assess whether there has been a release of hazardous substances . . . . Objective 4 - “Provide information relevant to identifying, defining and evaluation property conditions associated with target analytes [(contaminants)] that may pose risk to human health or the environment, or risk of bodily injury to persons on the property and thereby give rise to potential liability in tort.” (*ASTM E1903-11.*) Ultimately, the Council has insufficient information on which to conclude that the Facility meets DEEP’s water quality standards and, therefore, the Council should deny the Petition.<sup>7</sup>

**VI. THE FACILITY INFRASTRUCTURE PROPOSED ON THE SOUTH SIDE OF HOSKINS ROAD (PARCEL 5) OF THE PROJECT SITE SHOULD BE ELIMINATED AND THE OVERALL FACILITY IN GENERAL SHOULD BE REDUCED TO LESSEN THE IMPACT ON ABUTTERS.**

A significant concern for the Town is the preservation of the Town’s historic and cultural gateway located south of Hoskins Road (Parcel 5). (*IV.B.2, Ex. A.*) The Town has identified Parcel 5 as historically and culturally significant; (*id.*); which has been corroborated by DWW’s consultant, Heritage Consultants, LLC (“Heritage”). (*II.B.1, Ex. M, Phase IA, p. 2; II.B.5, No. 34,*

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<sup>7</sup> DWW has committed to testing the potable water wells of all residential properties abutting the Project Site. (*Tr., p. 730.*) This concession, albeit an important one, does not lessen DWW’s failure to meet its burden under General Statutes § 16-50k(a).

pp. 20, 22; *Tr.*, pp. 566-67.) Furthermore, the record demonstrates that DWW can reduce the footprint of the proposed Facility, without contractual penalty, and there is no evidence that such a reduction would render the proposed Facility financially unfeasible.

A. The Footprint of the Facility Can Be Reduced Without Contractual Penalties.

The DWW PPAs are based on the same template offered to all bidders who participated in the New England Clean Energy Request for Proposals (“Template PPA”). The only difference between the Template PPA and the DWW PPAs is that the latter articulates details specific to the Facility and the Project Site. (*Tr.*, p. 694.)

The DWW PPAs have provisions concerning a “capacity deficiency.” (*Tr.*, pp. 696-697.)

Section 3.3(b) of the Template PPA provides:

To the extent that Seller has constructed the Facility in accordance with Good Utility Practice, and met all other requirements for the Commercial Operation Date under Section 3.4(b) of this Agreement, but a Capacity Deficiency exists on the Commercial Operation Date as permitted by Section 3.4(b), then on the Commercial Operation Date, the Contract Maximum Amount shall be automatically and permanently reduced commensurate with the Capacity Deficiency, which reduced Contract Maximum Amount shall be stated in a notice from Buyer to Seller, which notice shall be binding absent manifest error.

(Emphasis added.) (*New England Clean Energy Request for Proposal, Template PPA § 3.3(b); Tr.*, pp. 697-98.) Section 3.4(b) of the Template PPA provides in relevant part:

The Commercial Operation Date shall occur on the date on which the Facility as described in Exhibit A is completed (subject, if applicable, to a Capacity Deficiency so long as the Actual Facility Size on the Commercial Operation Date is (1) at least ninety percent (90%) of the proposed nameplate capacity of the Facility as set forth in Exhibit A, and (2) not more than ten (10) MW less than the proposed nameplate capacity of the Facility set forth in Exhibit A) and capable of regular commercial operation in accordance with Good Utility Practice, the manufacturer’s guidelines for all material components of the Facility, all requirements of the ISO-NE Rules and ISO-NE Practices for the delivery of the Products to the Buyer have been satisfied, and all performance testing for the Facility has been successfully completed, provided Seller has also satisfied the following conditions precedent as of such date . . . .

(Emphasis added.) (*New England Clean Energy Request for Proposal, Template PPA § 3.4(b); Tr., pp. 699.*)

The nameplate capacity of the Facility is 26.4 MW AC. Ten percent of the nameplate capacity is 2.64 MW. (*II.B.1, p.1; Tr., p. 700.*) Parcel 5 of the Project Site (south of Hoskins Road) would host approximately 2.4 MW AC of the Facility, which is less than 10 percent of the Project's nameplate capacity. (*II.B.8, No. 66; Tr., pp. 701-02.*) If the output associated with Parcel 5 is removed from the proposed Facility, DWW would not be in violation of the DWW PPAs. (*Tr., pp. 702-03.*) There is no evidence on the record that a 10 percent reduction in the nameplate capacity would render the Facility financially unfeasible. (*Tr., p. 705.*)

DWW has proposed relocated approximately 40 percent of the Facility infrastructure to be located on Parcel 5 to other portions of the Project Site (points north of Hoskins Road). (*II.B.8, Nos. 66-67; Tr., pp. 706-07.*) If Parcel 5 of the Project Site (south of Hoskins Road) is removed from the Facility, and DWW relocates approximately 40 percent of the Facility infrastructure to be located on Parcel 5 to other portions of the Project Site, then the Facility would produce approximately 96 percent of the Facility's nameplate capacity. (*II.B.8, Nos. 66-67; Tr., pp. 707-08.*) There is no evidence on the record that an approximate 4 percent reduction in the Facility's nameplate capacity would render the Facility financially unfeasible. (*Tr., pp. 708-09.*)

B. Selection of Solar Panels Can Result in A Smaller Footprint.

Some solar panels are more efficient than others. (*Tr., p. 710.*) Less efficient solar panels generally require more space than efficient solar panels to reach the same nameplate capacity. (*Tr., pp. 710-11.*) DWW has not yet selected the solar panels to be used for the Facility. (*II.B.5, No. 88; Tr., p. 710.*) DWW has committed to investigating alternatives that might result in a reduction of the Facility's footprint. (*Tr., p. 772.*)



## **VII. THE HISTORICAL AND CULTURAL IMPORTANCE OF THE PROJECT SITE REQUIRES ADDITIONAL STUDY**

### **A. Historical Agricultural Use and Dr. Martin Luther King, Jr.**

The Project Site, particularly Parcel 5, which is located south of Hoskins Road, was used historically for tobacco cultivation and other various crops, including rye, corn, potatoes and orchard fruit. (*II.B.5, No. 34, pp. 19-20, 22-23.*) This portion of the Project Site has a direct connection to historical agricultural use of the area. (*II.B.1, Ex. M, Phase IA, p. 2; II.B.5, No. 34, pp. 20, 22; Tr., pp. 566-67.*)

Over the past twenty years, the Town has realized the historical significance of the southern portion of the Project Site, including the five tobacco barns located throughout the Project Site. (*IV.B.2, Ex. B, Attach. B; IV.B.4, No. 10.*) The Project Site, specifically Parcel 5, and the tobacco barns, is also historically significant in that Doctor Martin Luther King, Jr.'s time in the Town as a college student had a significant impact on his calling as a civil rights activist, as well as a larger historical trend of southern minority workers to travel to New England for work. (*IV.B.2, Ex. B, Attach. B; IV.B.4, No. 10; II.B.1, Ex. M, Phase IA, p. 21; II.B.5, No. 34, p. 22; Tr., pp. 570-71.*) Because of the unique and important link between portions of the Project Site and Dr. Martin Luther King, Jr., the Connecticut State Historic Preservation Office ("SHPO") submitted an application to the African American Civil Rights Grant Program administered by the National Park Service, United States Department of the Interior. The application is pending. (*IV.B.8; Tr., p. 576.*)

### **B. Historic Tobacco Barns on the Project Site Should Be Preserved.**

If the Petition is approved, DWW should be required to protect and preserve the five tobacco barns located on the Project Site. The five tobacco barns are structures eligible for the National Register of Historic Places ("Register"). (*IV.B.2, Ex. B, Attach. B; II.B.1, Ex. M, Phase IA, p. 2; II.B.5, No. 34, p. 22; Tr., pp. 570-71.*) Heritage recommended the preservation of the five

tobacco barns located on the Project Site. (*II.B.1, Ex. M, Phase IA, pp. 30-31.*) SHPO also recommended the preservation of the five tobacco barns located on the Project Site. (*II.B.1, Ex. M; IV.B.8.*) The Town would therefore like to preserve the five tobacco barns. (*IV.B.2; Tr., p. 579.*)

DWW could preserve all five tobacco barns. (*Tr., pp. 565-66.*) Additional study is needed to confirm how much of a buffer from the proposed Facility's infrastructure is necessary to preserve the tobacco barn's historical character adequately. (*Tr., p. 581.*)

DWW's interrogatories suggest that the Town is raising concerns about Dr. Martin Luther King, Jr. and the tobacco barns solely because the proposed Facility threatens their existence and DWW seems to question why steps were not taken previously to preserve them in the past, such as adding them to the Register. This is not the appropriate perspective. First, prior to the proposal by DWW, the Town initiated an historic resources inventory in 2013, which include a recommendation for a thematic nomination for agricultural buildings in the Town. (*IV.B.2, Ex. B, Attach. B; IV.B.4, No. 10; Tr., pp. 570-71.*) Second, historic structures are often not listed on the Register until they are threatened. (*Tr., p. 571.*) Third, the crucial issue is not whether a particular structure is already listed on the Register, but whether it is eligible for listing on the Register. (*Id., pp. 569, 612-13.*) Fourth, historic preservation requires resources and cooperation from the property owner. (*Tr., p. 571.*) The ultimate issue is that the historical significance of the Project Site is recognized and certain steps to preserve that heritage are taken.

#### C Historic Residences Near the Project Site.

Two of the four residential structures near the Project site, 85 and 100 Hoskins Road, which were deemed historically significant by Heritage, would be visually impacted by the proposed Facility. (*II.B.1, Ex. M, Phase IA, pp. 2-3; II.B.5, No. 34, p. 20; IV.B.5, No. 9.*) Heritage recommended vegetative screening to buffer the historic residences from the proposed Facility's infrastructure to preserve their historic context. (*II.B.1, Ex. M, Phase IA, pp. 2-3, 32-33.*)

## VIII. SCREENING

As referenced in Part VI, *supra*, the Town's position is that, if the Petition is approved, the Council should eliminate the infrastructure proposed south of Hoskins Road (Parcel 5). Should the Council approve the Petition, then the Town would respectfully request that the following screening mitigation measures be implemented.

A. The Town's Historic Gateway Requires Appropriate Screening.

The southern portion of the Project Site (Parcel 5), consisting of an important cultural and historical component of the Town, would be visually impacted significantly by the proposed Facility. (*II.B.1, Ex. G; IV.B.2, Ex. D; IV.B.5, Nos. 4, 10.*) In response, DWW proposed a ten foot vinyl fence along Hoskins Road, which consists of historically and culturally significant resources, and which contradicted Heritage's recommendations contained in the Phase IA as well as the 2007 POCD and the Town's Guidelines. (*II.B.1, Ex. G; IV.B.2, Ex. D; IV.B.5, Nos. 4, 10.*) DWW's rationale for the ten foot vinyl fence was that "DWW is hard-pressed to ascertain what the 'historical character' of the neighborhood and/or immediate area is." (*II.B.5, No. 6.*)

The Town's proposed alternative screening for Parcel 5 included undulating berms and vegetation. This screening mechanism is common throughout the Town and has been required of many types of developments. Along the northern side of Hoskins Road, there would be a short shoulder to the road, with street trees beyond the shoulder, followed by a split rail fence (open and see through), followed by an undulating vegetative berm with elevations between eight and twelve feet. (*IV.B.2, Ex. D; Tr., p. 369.*) The existing topography along the north side of Hoskins Road would aid in achieving the necessary height of the undulating berms and the two existing tobacco barns would also assist with screening the proposed Project and enhancing the viewshed. (*IV.B.2, Ex. D, Tr., p. 369.*) The earthen berms on the north side of Hoskins Road would not block the existing tobacco barns; rather, the berms would lie between almost connecting the two tobacco

barns, with the split rail fence tying in to the two tobacco barns. (*Tr.*, pp. 369-70.) The south side of Hoskins Road would be similar to the north side; however, the existing topography drops down in elevation and there are no existing barns to obscure the proposed Facility. Additional evergreen trees interspersed sporadically with a split rail fence would achieve sufficient screening. (*Tr.*, p. 370.) The undulating earthen berms would take up approximately fifty feet of the 100 foot buffer articulated by DWW, and was measured from approximately where DWW intended to locate its security fence.<sup>8</sup> (*Tr.*, pp. 371-72.)

Additionally, there is sufficient area for the undulating earthen berms, particularly over areas not historically used for agriculture. (*Tr.*, p. 557.) The Town's alternative screening proposal would not be maintained like a lawn and would likely require sporadic mowing, perhaps annually, to keep invasive plant species from colonizing on the berm. (*Tr.*, p. 375.)

Furthermore, earthen berms have been used successfully within the Town to screen tall buildings and large parking areas. (*IV.B.5, No. 6; Tr.*, pp. 376, 378.) The undulating earthen berms could be smaller on the north side of Hoskins Road because of the existing topography. The berms would have to be somewhat higher on the south side of Hoskins Road because of the downward sloping topography. (*Tr.*, p. 377.) The undulating earthen berms could be smaller than as proposed in the Town's alternative screening proposal and still be effective. The Town would likely find an undulating earthen berm from four feet to eight feet acceptable.<sup>9</sup> (*Tr.*, pp. 554-55.)

The Town's screening proposal would consist of native vegetation species. (*Tr.*, p. 381.) The earthen berms could be engineered to address stormwater runoff appropriately. (*Tr.*, p. 401.)

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<sup>8</sup> The Town's alternative screening proposal would still be necessary south of 85 Hoskins Road even if DWW shifts some of the proposed infrastructure north of Hoskins Road as the Town's alternative is aimed at maintaining the agricultural aesthetic, i.e. to look like grassland. This aim is not achieved by the installation of a ten foot vinyl fence in that area. (*Tr.*, pp. 373-75.)

<sup>9</sup> Dense vegetative screening would be a viable option to the earthen berms if installed in accordance with the Guidelines and Regulations. (*Tr.*, p. 561.)

The cost for the Town's alternative screening proposal would be minor when compared to the cost per linear foot for the ten foot vinyl fence proposed by DWW, particularly if soil excavated in the construction of the Project is used for berms (assuming regulatory approvals). DWW has already accounted for grassland plantings. The street trees are also minor costs when measured against the scope of the proposed project. (*IV.B.2, Ex. D; Tr., pp. 378-79, 383, 407.*)

B. Visual Impact of Proposed Facility on Residential Areas.

A majority of the Project Site is zoned for residential uses and is surrounded by residential neighborhoods. Because the facility is not permitted under the Regulations, and the zoning classifications of most of the Project Site, the residential property owners could not have anticipated a large scale solar project in their backyards. The residential areas adjacent to the Project Site which would have an inadequate buffer from the proposed Project include:

Area 1: Hoskins Road and easterly portions of County Road looking north into the proposed development.

Area 2: Hoskins Road looking south into the proposed development, which includes impact to properties on the north side of Hoskins across from the proposed project (i.e. 100 Hoskins Road)

Area 3: 85 Hoskins Road

Area 4: The homes immediately north of the intersection with County Road and Hoskins Road County Road just west of the proposed project. The homes on the right of Saxton Brook Drive immediately abutting the proposed project.

Area 5: The homes on the west side of Howard Street.

Area 6: The homes on the corner of Centerwood and Gorden Street.

Area 7: The homes on the west side of Knollwood Circle.

Area 8: Litchfield Road (during construction).

Some residences along Berkshire Way will likely have views of the Facility.

(*IV.B.5, No. 6f-2; IV.B6.*)



C. The Council Should Require Effective Screening Mitigation for Residences As A Condition of Approval.

DWW has committed to providing sufficient vegetative screening for each residential property abutting the Project Site with views of the Facility during leaf on or off conditions. (*Tr.*, pp. 674-75.) DWW has committed to providing sufficient vegetative screening from the Facility for the historic residences at 85 and 100 Hoskins Road. (*Tr.*, p. 690.) DWW will confirm views from the residential properties abutting the Project Site during leaf off conditions.<sup>10</sup> (*Tr.*, p. 674.)

**IX. VEGETATIVE COVER AND OPERATIONS AND MAINTENANCE**

If approved, the Facility will occupy prime farmland for approximately twenty-five years. The Council should require that DWW take every measure to preserve the quality of the soils.

*Pollinators.* The Town would want pollinator habitats to be utilized throughout the proposed Project Site, which is a feasible land cover. (*IV.B.2; IV.B.5, No. 4.*) DWW has not offered any justification as to why pollinators cannot be used throughout the Project Site.

*Grubbing.* Heritage initially determined that certain portions of the Project Site were potentially sensitive archaeological areas. Heritage conducted a Phase IB cultural resources reconnaissance survey of moderate and high archaeologically sensitive areas, including shovel tests, and determined that none of the previously designated sites were sensitive archaeologically. (*II.B.5, No. 34, pp. 31-36; Tr.*, p. 692.) There is no reason DWW could not grub the areas previously designated as potential sensitive archaeologically based on the Phase IB results. (*Tr.*, p. 692.) DWW has not confirmed that SHPO has no issues with grubbing the areas previously determined to be potentially sensitive archeologically. (*Tr.*, p. 693.)

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<sup>10</sup> The Project Site has experienced leaf off conditions since DWW initiated development of the proposed Project in 2015. (*Tr.*, pp. 678-79.) DWW did not include a leaf off assessment of the visual impact of the proposed Facility on abutting residential properties because the photosimulations would have been less visually appealing. (*Tr.*, p. 677.) Leaf off conditions would persist throughout the Project Site over approximately six months of the year. (*Tr.*, p. 678.)

*Industry Standards for Vegetative Maintenance and Monitoring.* DWW has not offered any documentary evidence that it is industry standard to mow once annually or otherwise conduct vegetative maintenance on an annual basis. (*IV.B.5, Nos. 68, 72.*)

#### **X. ADEQUATE FINANCIAL SECURITY FOR DECOMMISSIONING SHOULD BE REQUIRED**

DWW's decommissioning plan would fund a financial assurance for decommissioning costs in equal installments over first ten years. (*II.B.1, Ex. S.*) The financial assurance for decommissioning costs may be in form of performance bond, surety bond, letter of credit, parental guaranty or other form. (*Id.*) The financial assurance for decommissioning costs is based on salvage value, although this value is uncertain because of expected technology innovation. (*II.B.1, Ex. S; II.B.5, No. 78.*)

DWW has failed to demonstrate that its Decommissioning Plan is adequate. DWW states that the financial assurance would be funded by the revenue stream flowing from four Power Purchase Agreements executed by and between DWW and several Massachusetts utilities ("DWW PPAs"). (*II.B.5, No. 79; Tr., p. 694.*) There is no evidence that the revenues from the DWW PPAs will provide sufficient financial assurance for decommissioning costs before the tenth year. There is no evidence of how much of the payments from the DWW PPAs will go to DWW as opposed to lenders or project costs. There is no evidence of environmental monitoring or of a more robust decommissioning package to ensure future agricultural use of the Project Site. (*III.B.3, Nos. 45-48; Tr., p. 502.*) Should the Council approve this Petition, the Town would request an order directing DWW to provide a financial assurance for decommissioning costs from the date of commercial operation.<sup>11</sup>

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<sup>11</sup> There are discussions concerning the preservation of the Project Site for agricultural uses after the expiration or termination of the DWW PPAs. The Town is interested in such discussions and would prefer that the Project Site be transferred to the Town so the Town and its citizens could determine the appropriate use of the Project Site. (*Tr., pp. 523-24, 547-50.*)

## **XI. LOCAL REGULATION OF THE PROJECT SITE**

### **A. The Facility Is Not A Permitted Use under the Town's Zoning Regulations.**

The Town's Zoning Regulations ("Regulations") do not allow for the construction of the Facility. The five parcels are designated as either I-1 (industrial use) or R-40 (residential use) Zones under the Regulations. Simsbury Zoning Regs., Art. 2 §§ A and B; Simsbury Zoning Map. (IV.B.3.) The portion of the Project Site south of Hoskins Road (Parcel 5) is zoned for residential use. A portion of approximately seventy acres north of Hoskins Road is zoned for industrial use, such as light industrial and commercial office space. The northern portion of the Project Site is zoned for residential use. (IV.B.3; II.B.1, p. 8; Tr., pp. 527-28.) There is no specific zoning classification for agriculture in the Regulations; rather, the Regulations allow for agricultural land use in zones such as residential and industrial zones. (Tr., p. 543.)

The Facility is not permitted "as of right" under the Regulations. Simsbury Zoning Regs., Art. 7 §§ B and I. As a general matter, the Facility is not permitted by Special Exception in either an I-1 or R-40 Zone. Simsbury Zoning Regs., Art. 7 §§ C and I. (IV.B.3.)

The only avenue under the Regulations in which DWW might be able to obtain approval of the Facility is to seek an amendment of the Zoning Regulations under Article 13 to include solar projects such as the Facility as permitted most likely by Special Exception.

DWW may argue that the Facility is allowable as a special exception use under Article 7, Section A of the Regulations. (*Id.*) That section provides in relevant part:

The following uses are declared to possess such special characteristics that each must be considered as an individual case. They may be permitted as a special exception in any zone after a public hearing, subject to conditions and modifications as determined by the Commission. In evaluating the uses, the Commission shall apply the standards set forth in Section C of this article. The Commission shall require the approval of a Site Plan prepared in accordance with Article Five, Section J. . . . 3. Public Utility installations needed for the public convenience and necessity.

(Emphasis added.) Simsbury Zoning Regs., Art. 7 § A(3).

The Regulations do not define “Public Utility.” (*Id.*) However, the Facility does not constitute a “Public Utility.” DWW and/or the Facility are not a “public service company” that operates for the public convenience and necessity and is extensively regulated by the State. General Statutes § 16-1(3). Rather, DWW and/or the Facility would likely fall under the definition of a “private power producer,” and “private power production facility” which are distinct from a “public service company” and is not regulated anyway near that of a “public service company.” General Statutes § 16-243(b)(1) and (3). As referenced above, “private power production facilities” are not permitted in either an I-1 or R-40 Zone under the Regulations.

Assuming for the sake of argument that DWW is able to amend the Regulations to allow solar facilities by Special Exception, then DWW would have to submit an Application for Special Exception in accordance with Article 7, § C, ¶ 10 of the Regulations. The standards for a Special Exception which the Facility must be weighed against include the following:

- a. The need for the proposed use in the proposed location.
- b. The existing and future character of the neighborhood in which the use is to be located.
- c. The location of main and accessory buildings in relation to one another.
- d. The height and bulk of buildings in relation to other structures in the vicinity.
- e. Traffic circulation within the site, amount, location, and access to parking, traffic load or possible circulation problems on existing streets.
- f. Availability of water to the site and adequate disposal of sewage and storm water.
- g. Location and type of display signs and lighting, loading toner and landscaping.
- h. Safeguards to protect adjacent property and the neighborhood its general from detriment.

Simsbury Zoning Regs., Art. 7, § C, ¶ 10.

B. The Town's Plan of Conservation and Development Requires Preservation of Historical Resources.

The Town's 2007 Plan of Conservation and Development ("2007 POCD") highlights the Town's cultural and historical heritage. The various tobacco fields and barns on Hoskins Road are listed under Character Places —Simsbury Treasures Aesthetic Places #30 on page 46 the 47 of the 2007 POCD, on the map titled "Character Places Simsbury's Treasures." (*II.A.1; IV.B.5, No. A5-2.*) The Town's 2017 Plan of Conservation and Development, effective November 1, 2017, continues the Town's commitment to preserving and enhancing the Town's cultural and historical heritage. (*II.A.2.*)

C. The Town's Local Regulations Require Preservation of the Historical and Cultural Character of the Town and that Visual Impacts of Development Be Minimized.

The Town developed the Design Review Guidelines ("Guidelines") referenced in the Regulations and incorporated them into the Town's regulatory process. The Town's Design Review Board ("DRB") was created in 1988, at the request of the Zoning and Planning Commissions. In 2011, the Town began to develop design guidelines for the Community, which culminated in the "Guidelines for Community Design" October 15, 2012 - Design Review Board - Town of Simsbury. This document is specifically referenced in the Regulations. The DRB reviews all applications associated with non-residential development and multi-family development before the Town's Zoning Commission. (*IV.B.5, Nos. A5-1 and A5-2.*) The Town urges the Council to apply the Guidelines to the Facility, if approved.

The Regulations and Subdivision Regulations,<sup>12</sup> along with the Guidelines, make specific references to minimizing visual impact. The Town's land use regulations specify techniques to

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<sup>12</sup> Subdivision Regulations also allow the Town's Planning Commission to require the developer to set aside up to 20 percent for deed restricted open space. (*Tr., p. 530.*) In this case, under a subdivision application, approximately 57.8 acres would be required as deed restricted open space. Approximately 35 percent of land in the Town is not taxable because it is designated open space. (*Id., p. 548.*)



minimize visual impact. As an example, Article 10 of the Regulations requires screening measures in the form of landscaping in I-1 Zones abutting residential zones. The Regulations also discuss a development's context and character and whether a project has been designed with the appropriate context and character. Page 10 of the Guidelines recommends that projects separate incompatible uses with large open space or natural buffers. Under site and landscape standards (page 12), the Guidelines recommend that parking be screened from street view (i.e. landscaping, berms, fencing, etc.). The Landscaping and Street Tree Plan (pages 16-17) Section under General Standards develops recommendations for varying landscape material with projects scale (height and distances). (*Simsbury Zoning Regs., Art. 10; IV.B.5, No. A5-2; Tr., p. 559.*)

The Town has development standards associated with all types of development along all of its roads that attempt to achieve a balance between growth and legacy. These standards are informed by the 2007 POCD, including page 86, entitled "How We Want To Grow -Special Areas," which emphasizes the importance of the historic development patterns in the Hoskins Road area, and refers to existing residential uses and zoning along Hoskins Road. As an example, the construction of Iron Horse Boulevard in the center of the Town, which is located along the easterly edge of the Town's downtown, was designed and constructed in a manner to preserve the nature/aesthetics of the community's downtown and/or the surrounding Simsbury Meadows' property that was purchased by the Town between downtown and the Farmington River. (*IV.B.5, No. A7.*)

## **XII. CONCLUSION**

The Council must deny the Petition because (1) DWW failed to notify a property owner abutting the Project Site, which resulted in adequate notice of the hearing; (2) DWW did not obtain a written statement from DOA stating that the proposed Facility will not materially affect the status of the prime farm land located at the Project Site; and/or (3) DWW has failed to present evidence sufficient to demonstrate that the proposed Facility meets DEEP's water quality standards. In the alternative, the Town respectfully requests that the Council order the various mitigation measures addressed herein and in connection with the Development and Management Plan.

Respectfully submitted by,

THE TOWN OF SIMSBURY

By: \_\_\_\_\_



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## CERTIFICATION

I hereby certify that on this day that 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:

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