

**STATE OF VERMONT
PUBLIC SERVICE COMMISSION**

CPG #16-0042-NMP

**Application of Orchard Road Solar I, LLC for a
certificate of public good, pursuant to
30 V.S.A. §§ 219a and 248, for a 500 kW
interconnected group net-metered solar electric
Generation system in Middletown Springs, Vermont**)
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NEIGHBORS' PROPOSED SITE VISIT AGENDA

NOW COME Richard Spitalny, Robert & Karen Galloway, Daniel McKeen, and Neil & Thomas Russell, by and through their attorney L. Brooke Dingedine, Esq. of the firm Valsangiacomo, Detora & McQuesten, P.C. and joining in this request are *pro se* Neighbors Ted & Dana Fitzpatrick, Peter & Aileen Stevenson, Elizabeth Cooper, Karen Gutmann & Larry Springsteen, and Douglas Freilich & Julie Sperling (all collectively referred to herein as "the Neighbors") and hereby respectfully submit the Attached Neighbors' Proposed Site Visit Agenda for February 20, 2018 as a result of the Applicant's refusal to agree to anything other than a "drive-by" Site Visit. Moreover, the Applicant is now referring to the February 20, 2018 Site visit as a "Supplemental" Site Visit, when in fact it is the only Site Visit that the Hearing Officer will observe; thus, it is essential that the Hearing Officer be able to

view the Site from the public and private views that have been testified to and admitted into evidence during the technical hearing.

I. INTRODUCTION

The Proposed Project Site is located in the highly scenic area in Middletown Springs¹ known as Burnham Hollow which is located on the original historic Burnham farm established in 1796. The Proposed 500 kW Solar Array Project contains some 2,250 panels that will completely fill a 5 acre area and will be situated on a steep hillside in the dead center of the Coy Mountain viewshed.² The essential question that must be determined by the Commission with regard to aesthetics is: Is the Proposed Project's adverse impact on the aesthetics and the scenic and natural beauty of the area "undue?" There are 4 different expert opinions in evidence this matter and 18 Middletown Springs' residents and landowners who have testified as fact witnesses and who have provided opinions that the proposed project will cause an "undue" adverse impact.

¹ Exhibit NN-41 – (45 day Notice of the Applicant) which contains the Applicants admission that Middletown Springs has exceptional beauty and aesthetic value, stating: "...we realize that this is very important due to the exceptional beauty of Middletown Springs, something invaluable to its residents and visitors."

² Spitalny pf Testimony at p.3.

II. AESTHETICS: UNDUE ADVERSE IMPACT

Because this contested case has conflicting opinions regarding whether the adverse impact on aesthetics and the scenic and natural beauty of the area is undue, the credibility of the witnesses become all the more critical for the hearing officer to determine. Those conflicting opinions include:

1. The Applicant's expert who claims there is no undue adverse impact (Kane);
2. The Department's expert who opines that the project as proposed creates an undue adverse impact because it is shocking and offensive and offends the sensibilities of the average person. The expert believes the same about Applicant's revised landscaping plan. However, the expert created his own landscape mitigation for the project and claims that if the project is altered and changed from the project that is proposed to the different landscaping plan that he created, there would be no undue adverse impact (Owens);
3. The Neighbors' two (2) experts who clearly support the conclusion that the adverse impact is undue (Thomas and Lawrence);
4. All 18 of the Neighbors who testified believe the project will cause an undue adverse impact on public and private views in the area because it violates clear written community standards in the town and regional plan, will be shocking and offensive to the average person, and because the Applicant has failed to take reasonable mitigation measures (Richard Spitalny, Elizabeth Cooper, Roy Cooper, Douglas Freilich, Julie Sperling, Ted Fitzpatrick, Dina Fitzpatrick, Karen Galloway, Robert Galloway, Karen Gutmann, Larry Springsteen, Daniel McKeen, Neil Russell, Thomas Russell, Peter Stevenson, and Aileen Stevenson)³; and,

³ See pf Testimony of Richard Spitalny, Elizabeth Cooper, Roy Cooper, Douglas Freilich, Julie Sperling, Ted Fitzpatrick, Dina Fitzpatrick, Karen Galloway, Robert Galloway, Karen

5. One-hundred-twelve (112) other Middletown Springs townspeople signed a petition opposing the project because they believe that the project will adversely affect the aesthetics and the scenic and natural beauty of the area, will unduly impact orderly development and negatively affect the character of Middletown Springs.⁴

Thus, it is incumbent on the fact finder to evaluate that conflicting testimony and to assess the reliability and credibility of the witnesses to determine how much weight to give their testimony, if any.⁵

Gutmann, Larry Springsteen, Daniel McKeen, Neil Russell, Thomas Russell, Peter Stevenson, and Aileen Stevenson.

⁴ Exhibit NN-7 (Petition).

⁵ The Vermont Bar Association Civil Jury Instructions provides guidance for factfinders (juries) in our state court system which is equally applicable to the PUC Administrative hearing process where Hearing Officers and Commission Members must assess the credibility of witnesses, including so-called battling experts. The Vermont Civil Jury Instructions provide:

F. Credibility of Witnesses

You must consider all of the evidence. This does not mean that you must believe all of the evidence. It is up to you, and only you, to decide whether the testimony of a witness was reliable, as well as how much weight to give the testimony.

The following factors may help you to evaluate the testimony of witnesses:

- did the witness have an interest in the outcome of the case?
- how did the witness behave while testifying?
- did the witness seem candid?
- did the witness seem to have a bias?
- does the other believable evidence in the case fit with the witness's testimony, or is it inconsistent with it?
- how well could the witness see or hear the facts about which he or she testified?
- did the witness seem to have an accurate memory?

You may believe as much or as little of each witness's testimony as you think appropriate. Keep in mind that people sometimes forget things, and sometimes they make honest mistakes. You must decide whether an omission or a mistake is innocent or minor, or whether it is something more serious that affects the rest of their testimony.

G. Expert Witnesses

In addition to the above and forgoing, the issue of Credibility of Witnesses becomes even more important when there is a substitution of hearing officers such as has happened in this case. "If the substitution of administrative law judges is necessary, an agency has the discretion to decide whether the hearing should be recommenced de novo." 2 Am Jur 2d, Administrative Law §312 (citing *New England Coalition on Nuclear Pollution v. United States Nuclear Regulatory Com.*, 582 F2d 87 (1st Cir.), 8 ELR 20707, 51 ALR Fed 451). "Such a decision generally turns on whether credibility determinations must be made, and whether the decision may be made on the record of prior proceedings." *Id.*; see also *Van Teslaar v. Bender*, 365 F. Supp 1007 (Dist. MD). Consequently, the importance of a full and fair opportunity to show the Hearing Officer the views that have been admitted into evidence and to provide an adequate physical and contextual understanding of the evidence that was admitted at hearing is essential to a fundamentally fair process.

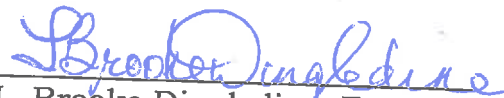
Some witnesses testify as experts. This means that they have special knowledge, training, or experience that qualifies them to give an opinion on a certain matter. You should evaluate the opinion of an expert witness the same way you would consider any other testimony. Then, you should evaluate whether the opinion is based on the facts proved at trial and supported by their knowledge, training, or experience. Vermont Civil Jury Instruction Committee, Plain English Jury Instructions, General Jury Instructions.

CONCLUSION

WHEREFORE, the Neighbors request that the Hearing Officer adopt the Neighbors' Proposed Site Visit Agenda and order that the Neighbors' representatives can have access to the Site at 1pm on February 20th to prepare the Site for viewing by allowing 5 large tarps to be staked on the ground at the 4 corners of the Proposed Project Site and one in the middle of the Site so that the viewing from various locations can be easily accomplished.

DATED at City of Barre, County of Washington and State of Vermont this 16th day of February, 2018.

Richard Spitalny, Robert & Karen Galloway,
Daniel McKeen, and Neil & Thomas Russell



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Orchard Road Solar Project – CPG No. 16-0042-NMP

Neighbors' Proposed Site Visit Agenda

February 20, 2018

1. **LOCATION #1 – PROPOSED PROJECT SITE (“the Site”) –**

1:00 pm, Site preparation/boundary markers: Applicant's and Neighbors' representatives meet at the Site to enter the property and mark the 4 corners/boundaries of the proposed location of the solar array such that markings can be seen from distant views (i.e. Neighbors will bring 4 large tarps to stake onto the ground at each of the four corners of the site).

3:00 pm, Site Visit: Arrive at the Site. From Wescott Road, walk South up the hill to the Mid-point of the Southern boundary line of the Site. Observe views to N, E & W. Walk West along the Southern Boundary to the SW corner of the Site. Observe views to N, E & W.

2. **LOCATION # 2 – FITZPATRICKS' (abutting neighbors) - 59 Wescott Road** – From the SW corner of the project site, walk SW to the Fitzpatrick's House Site which abuts the project property. Observe views to N & E. Walk back down to Wescott Road.

3. **LOCATION # 3 – SPITALNYS' HOME- 67 Wescott Road** – Walk West on Wescott Road to the next property which is owned by Richard Spitalny. Observe views of Proposed Site from deck and bedroom at Spitalny's house.

4. **LOCATION # 4 – ALTERNATE SITE PROPOSED BY NEIGHBORS – Directly across Orchard Road from Proposed Site.** From the Site, drive East on Wescott Road and turn Right onto Orchard Road and park cars. Observe large field on East side of Orchard Road which has been proposed by the Neighbors as an Alternate Site for the Proposed Project.

5. **LOCATION #5 – GALLOWAYS' HOME – 89 Norton Street** - From Location #4, drive North (back down Orchard Road) to Route 140. Turn Left (West) onto Route 140 and drive to Norton Road and turn Right stopping at the Galloways' home located at 89 Norton Road to observe views to the S, E & W from their deck and living room.

6. **LOCATION # 6 – McKEEN'S HOME – 320 West Street** – From Location #5, drive back to Route 140 and turn Left and drive east on Route 140 to Dan McKeen house at 320 West Street and turn Left into his driveway. Observe views to the S, E & W. ****Please note that Rt. 140 and West Street are the same road*****

7. **LOCATION #7 – ROCKS AND TREES LANDOWNERS' FIELD** – From Location #6, walk North into Rocks and Tree's landowners' field. Observe views to the S, E & W. Walk South back down to cars at McKeen's home.
8. **LOCATION #8 – TOM RUSSELL'S HOME – 300 West Street** – From Location #6, drive East (turn Left) on Route 140 and observe Tom Russell's historic home and barn on left as you drive by 300 West Street.
9. **LOCATION #9 – GUTMANN/SPRINGSTEEN'S HOME and FARM - 290 West Street** - After observing and passing Location #8, continue driving East on Route 140 to Karen Gutmann & Larry Springsteen's home at 290 West Street and park. Observe views of the Proposed Site from numerous windows inside their home as well as from their curtilage and farm property.
10. **LOCATION #10 – FREILICH/SPERLING'S HOME – 22 Sundog Lane** – From Location #9, drive East on Route 140 and then turn left onto Sundog Lane and drive to Douglas Freilich & Julie Sperling's home at 22 Sundog Lane to observe views of Proposed Site.
11. **LOCATION #11 – NEIL RUSSELL'S HOME – 240 West Street** – From Location #10, drive East on Route 140 to Neil Russell's home at 240 West Street and park. Observe views of Proposed Site.
12. **LOCATION #12 – ST. ANNE'S CATHOLIC CHURCH** – From Location #11, drive East on Route 140 to St. Anne's Catholic Church and park. Observe views of Proposed Site.
13. **LOCATION #13 - PLEASANT VIEW CEMETARY** – From Location #12, walk to Pleasant View cemetery. Observe views of Proposed Site.
14. **LOCATION #14 – MIDDLETOWN SPRINGS ELEMENTARY SCHOOL** - Drive east on Route 140 and turn right onto South Street and then right again into the Middletown Spring Elementary School and park. Observe views of the Proposed Site.
15. **LOCATION #15 – ROUTE 140 WEST – (one mile from Town Square)** – From Location #14, turn Left and drive North to Middletown Springs town square and then turn Left (West) onto Route 140 and drive West towards the Proposed Site, observing the view the Site (ahead and on the left) from about 1 mile west of the Town's square, still in the 35 MPH speed zone.
16. **LOCATION #16 – ROUTE 140 WEST – (near Tarbell's Farm)** - From Location #15, Continue to drive West on Route 140 towards the Proposed Site, observing the views from Route 140 West taking note of the views around Tarbell's Farm (on right).

