

THROUGH THE SOLAR PANEL GLASS:

REPRESENTING MUNICIPALITIES IN SOLAR ELECTRIC GENERATION FACILITY APPLICATIONS

**PRESENTATION TO VLCT/VBA
MUNICIPAL ATTORNEYS FORUM
DECEMBER 2015**



**HILL
ATTORNEY**
— PLLC —

Towns and Solar

- 1. PSB Practice
- 2. Do Municipal Land Use Regulations Apply?
- 3. Pre-filing Notice and Comments
- 4. Filed Applications
- 5. Hearing Considerations
- 6. Lessons Learned: New Haven VT

PSB Practice: APA and...

- Rules of Civil Procedure apply...
- Sort of.
- Prefiled testimony; limited scope of questioning; rarely depositions, etc.
- Rules of Evidence apply
- Sort of.
- Hearsay seems okay; opinion evidence is sometimes okay, unless you're a project neighbor, etc.

PSB Rules of Practice

- Psb.vermont.gov
- Click on Statutes, Rules and Guidelines; Current PSB Rules; Rule 2.00 is the practice section.
- Also handy: the Citizen's Guide to the Vermont Public Service Board Section 248 Process. Click through 'For Consumers and the Public'.

It's all more like... guidelines...



Finding PSB rulings

- On the PSB website, you can search PSB orders, using an antiquated Google boolean search portal.
- If you are good at programming in basic and fortran, you might be able to find cases in this system.
- If you are under 40, you'll have no idea what I'm talking about, so please find an old codger, or a librarian, or an old codger librarian to help you.

Do municipal land use regs apply to solar projects?

- Generally presumed 'no', but I've argued 'yes'.
- Vermont Pre-emption statute argument
- Will require some test cases.
- Subdivision argument

Preemption Statute Argument

- Subpart 24 VSA §4413(b) states, "A bylaw under this chapter shall not regulate public utility power generating plants and transmission facilities regulated under 30 VSA §248."
- Subpart (g) states, "Notwithstanding any provision of law to the contrary, a bylaw adopted under this chapter shall not: (1) Regulate the installation, operation, and maintenance, on a flat roof of an otherwise complying structure, of a solar energy device that heats water or space or generates electricity. For the purpose of this subdivision, "flat roof" means a roof having a slope less than or equal to five degrees. (2) Prohibit or have the effect of prohibiting the installation of solar collectors not exempted from regulation under subdivision (1) of this subsection, clotheslines, or other every devices based on renewable resources.

Subdivision Argument : Blackacre

- Vermont statute, 24 VSA §4418 defines subdivision as “the division of a lot or parcel of land into two or more lots **or other division of land for sale, development or lease.**”
- The landowner who chooses to subdivide her land for purposes of leasing a portion of it out to someone else to develop an electric generation project should not be able to claim exemption from subdivision regulation. The landowner is neither a ‘public utility’ nor the developer of the ‘power generating plant.... regulated under 30 VSA §248’.

Nice try, counselor...



H. 56, Setbacks for Solar

- New mandatory 'minimum setbacks' for solar siting (Act 56 Section 26b; 30 VSA Section 248(s)). These are indeed pretty minimum: 100 feet from the traveled portion of a roadway for a >150kW facility and 40 feet for a <150kW facility; and 50'/25' from adjoining properties.
- Subsequent sections of statute state, "On review of an application, the Board may require a larger setback than this subsection requires" or may approve a negotiated agreement to a smaller setback. There is no standard upon which the PSB is supposed to base its decision.

H.56, Screening Bylaws

- Act 56 authorizes solar screening requirements to be adopted as a 'municipal bylaw... under 24 VSA Section 4414(15)' **OR** a 'municipal ordinance...under 24 VSA Section 2291 (28)'.
- BUT the ability to do this is significantly constrained by two additional Act 56 restrictions: No matter which of these two paths the Town chooses, the screening requirements "shall not be more restrictive than screening requirements applied to commercial development in the municipality" and shall not require the applicant to get a land use permit.

Screening bylaws, continued...

- One problem is that lots of towns in Vermont do not have specific 'commercial screening standards' – they require commercial development to undergo specific site plan review that is case-specific.
- A few towns are starting to adopt Solar Screening Bylaws (Cornwall, Bennington), but no one will know what will pass muster until test cases start working their way through the system.
- A bylaw should definitely be tied to Town Plan language and goals.
- PSB also says it will defer to specific aesthetic standards in Town Plans... but that's another story.

Pre-filing Notice and Comments



"take care of the sense, and the words will take care of themselves"

Pre-filing Notices to Abutters, Selectboards and Planning Commissions

- There is NO prefiling notice for photovoltaic systems up to 150kW.
- For systems over 150kW, the applicant must send a pre-filing notice of the project to all abutters and other specific interested parties, including town Selectboards and Planning Commissions.
- PSB Rule 5.110(B).

45 day notice for >150kW

- For photovoltaic projects over 150kW, the applicant must send notice to abutters and a list of interested parties, including town Selectboard and Planning Commission, describing the project.
- Send 45 days before filing, but time runs differently in PSB-land. Days count from date of filing with PSB to date comments are rec'd by PSB.
- If major changes are made before filing, they are supposed to send a new 45 day notice.
- If they don't file within 180 days, the prefiling notice is deemed withdrawn and must be re-sent.

Commenting

- Send your comments to the PSB and the Applicant at a minimum. Better to send to whole service list.
- Towns can help by double-checking that all abutters have been served, and touching base to see if abutters or others in line-of-site have any thoughts about the project.
- Can sometimes use this notice period as negotiation period.

Filed Applications



Responding to §248 Applications Filed with the PSB

Under 150kW

- You get 30 days to comment, move to intervene/assert party status, or ask for technical hearing. WATCH THOSE FILING DATES!

Over 150kW

- You get 21 days to comment, move to intervene/assert party status, or ask for technical hearing. WATCH THOSE FILING DATES!

Assert Party Status

- H. 40 Section 26a, states in its entirety:
 - **30 V.S.A. §248(a)(4)(F) is added to read: (F) The legislative body and the planning commission for the municipality in which a facility is located shall have the right to appear as a party in any proceedings held under this subsection.**
- However, there's not strong consensus as to how this must be asserted or if some kind of motion is required – I'd recommend asserting party status in writing and citing this statute.

Requesting a Technical Hearing

- You don't get a trial, you get a 'technical hearing'
- "make a showing that the application raises a significant issue regarding one or more of the applicable criteria listed in section 5.108. Such a showing must go beyond general or speculative claims, and provide specific information regarding potential impacts for the criteria or the criteria conditionally waived in that section." PSB Rule 5.110
- No guidance for what this means. Have obtained hearing on simple briefing; have also submitted prefiled testimony in response to the application; best practice may be affidavits and public records.

Hearing Considerations



Timing and procedure

- Definitely Rabbit-Hole-like. Once you file your comments or request for hearing, you will wait an indefinite period of time.
- The applicant files back, you file back, paper flies back and forth, and eventually the PSB says something.
- You may or may not get a hearing; hearing on small projects will most likely be limited to specific §248 criteria.

Scheduling conference

- If you are granted a hearing, it will start with a scheduling conference.
- If you're used to civil or criminal litigation, you'll be shockingly surprised at how FAST and RIGID the schedules are for PSB proceedings.
- The process is simultaneously unpredictable and random. It's hard to explain. Be prepared to push back hard for appropriate periods of time to respond to things; be prepared to dance.

Trial by experts

- Technical hearing proceeds by prefiled testimony tied to the §248 criteria.
- The §248 criteria beg to be addressed by experts – though Town Officials would be ‘expert’ in town plan, local character and context.
- Poll town officials and volunteers on other areas of expertise – wetlands, aesthetics, electrical engineering, etc.
- Hire judiciously – and expect difficulty finding experts willing to be hired on these projects.

Cross examination

- You get to cross examine witnesses at the technical hearing – but since you don’t get to have your witnesses testify live after you hear the cross examination of the applicant’s witnesses, trial lawyers need to adapt their techniques.
- Rebuttal testimony can be prefiled or live depending on the schedule for the case.
- The board or hearing officer will likely ask questions.

Discovery

- There is a discovery process. It's fast and a jumble. Depositions are rare.
- Interrogos, requests to admit, and document requests, are jumbled together in one single set of information requests.
- Unlike civil court, the PSB gets a copy of the information requests and the responses.

Get to know the §248 Criteria

- Carefully read the statute, 30 VSA §248
- Check the PSB regs and the "Order Implementing 8007" which conditionally waives some of the §248 criteria (meaning you've got a bigger hurdle to overcome)
- http://psb.vermont.gov/sites/psb/files/re_Order_implem_enting_8007_b_.pdf
- Email me if you want me to send you the §248 criteria checklist I wrote up – or make your own as it's a good way to learn them.

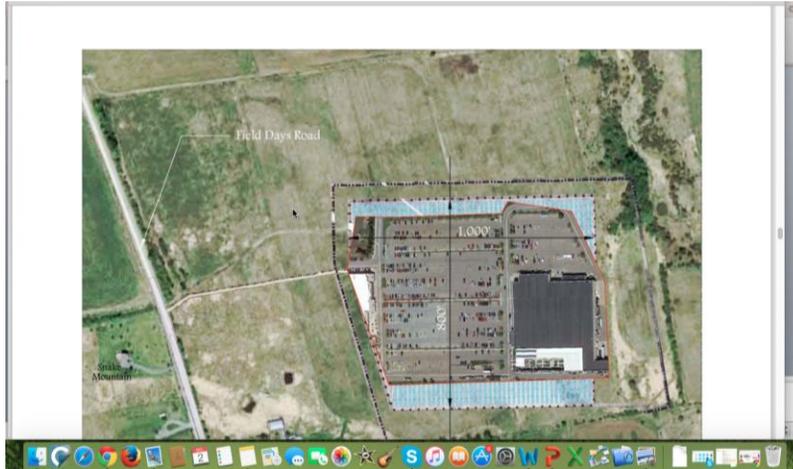
Which criteria matter?

- All of them.
- PSB is probably most accustomed to hearing 'orderly development' and 'aesthetics' issues from towns and neighbors.
- However, these projects are going into wetlands; eating up critical habitat for sensitive species; affecting electrical system stability; impacting historic sites and the context of historic structures.
- There's as of yet no explanation as to how they will be disposed of/decommissioned.
- Don't forget public safety/fire hazard issues.

Politics and Multiparty Litigation

- There is intensive political pressure to approve all solar projects. This colors all aspects of the proceedings.
- Civil litigation attorneys have no doubt had multiparty litigation before, but rarely are the sides and interests so divergent. Expect side-deals and back-room bargains: Alice in Wonderland meets the Game of Thrones.

Lessons Learned: New Haven VT

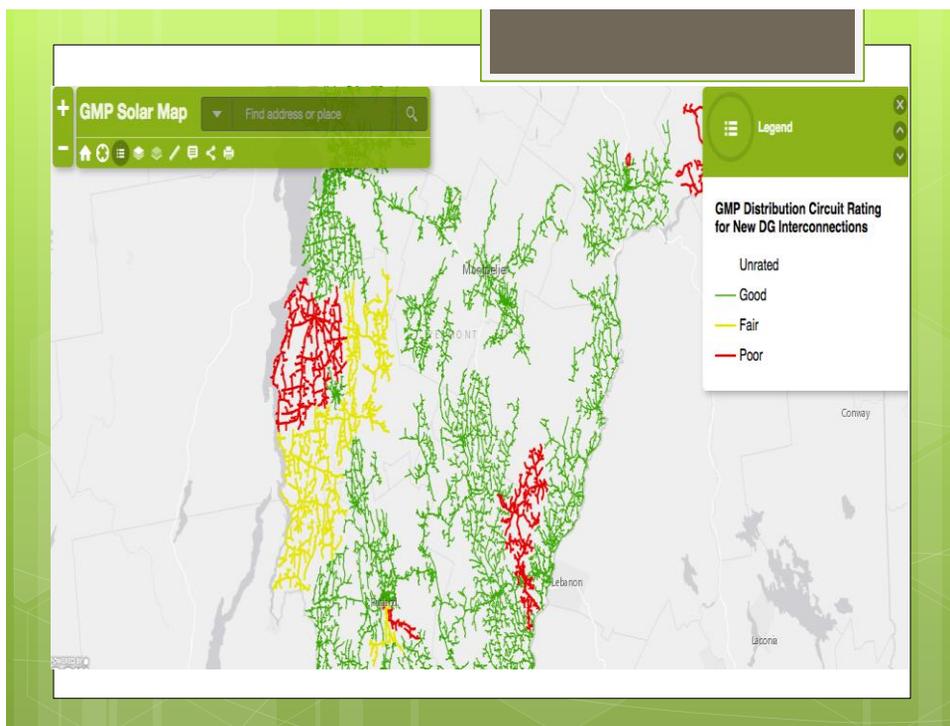


Doing our Fair Share

- New Haven has a half-dozen solar electric generation facilities on the ground, plus many solar panels on roofs and front yards, and a hydroelectric generation facility. The Town produces about 13 times as much power by renewable generation facilities as is used in the Town.
- The Town presently has open files on 12 solar facilities. Three are in the PSB hearing process; five are in the pre-filing notice phase; four are in post-construction enforcement phase (pending or soon-to-be-filed petitions to revoke CPG).
- More applications are coming; several were withdrawn in the face of Town opposition; and developers of several others advised that they elected to locate elsewhere due to the Town's fight against additional commercial solar development.

Life in the GMP Red Zone

- Green Mountain Power has recently put up a 'solar map' showing all of their distribution lines, ranked green-yellow-red based on how close that distribution circuit is to capacity.
- New Haven – and all of western Addison County – is a red zone. Our lines are at capacity for distributed generation.



Some Notable Orders to Date in New Haven PSB solar litigation:

- Docket No. 8523 -- a 2.2MW facility -- in an order pertaining to New Haven's party status, the PSB stated that although it would not entertain arguments pertaining to impact on individual property values of the intervenor/neighbors relative to individualized harm, it WOULD entertain evidence and argument pertaining to impact on property values inasmuch as it impacts town tax revenues, which relates to the §248 Criteria of economic impact.
- Docket NM 6199, a 150kW facility, the Town's request for a hearing was granted based on aesthetics, and particularly the proximity of the project to state-registered historic structures. We believe this was the first hearing granted on a 150kW, though a few have been granted since.

Continued...

Docket NM 5978 -- a 350kW facility proposed to be sited on both sides of an existing 150kW facility, so really it's a 500kW -- the Town's request for hearing regarding orderly development was granted on the basis of the assertion that this project -- and three others by the same developer -- were eating up the Town's extremely limited commercial district, depriving the Town of room for business expansion and tax revenue.

In the same case, Docket NM 5978, the Town's request for hearing on system stability and reliability -- a conditionally waived criteria -- was granted on the grounds of the project's failure of Fast Track criteria #3. By PSB regulation, based on federal regulation, distributed generation projects are limited to 15% of the peak line load of the distribution circuit on which they are located. The circuit bears distributed generation of over 500% of the peak line load. The PSB ordered that GMP be joined as a party in the action. There are at least FIVE other pending solar facility applications on this same distribution circuit at present.

Keys to success, so far...

- --Be attentive to detail, and systematic in your review of an application. File comments on a project even if you generally support it.
- --Put together a team of experts. Utilize the skills and credentials of Town officials, find volunteers in and out of the community, and hire experts on key issues.
- --Think outside the box, try arguments that have not been commonly tried before, and don't listen when people say you can't win.
- --Recognize that there are goals related to certain projects (stopping them, getting them moved, getting enforceable mitigation commitments) and overarching goals of public importance (making sure applications are filled out correctly and properly served on all abutters so the public has accurate due notice of proposed projects; safeguarding the tax base, the Town plan, and electric utility customers interests within the Town in terms of system safety and reliability).

The process may seem surreal... but where ever you go, there you are...



Contact!

- Don't be a stranger.
- Cindy Ellen Hill
- Hill Attorney PLLC
- 144 Mead Lane
Middlebury VT 05753
- hillattorneypllc@gmail.com
- Hillattorneypllc.com
- 802-458-4146

