PSB Decision Provides Planning Insight

Overview

On February 16, 2016, the three-member panel of the Public Service Board issued an order rejecting a petition for a certificate of public good under Section 248 for a 2MW solar electric facility in Bennington, VT. The primary reason for the denial was based on the PSB's determination that the proposed solar facility "violated a clear, written community standard" in the Bennington Town Plan as is defined under the Quechee Test.

This rejection of a certificate of public good for this reason is an unprecedented action in the history of the certificate of public good process. For our communities, the PSB decision provides the best guidance as to how Town Plans can be crafted to have some level of control over where renewable energy generation facilities can be located.

Background

The Chelsea Solar, LLC, facility was proposed in an area designated by the Bennington Town Plan as "Rural Conservation." According to the 2015 Bennington Town Plan, these areas are "located in valley areas outside of Bennington's Urban Growth Area and have retained their rural and open-space character. The purpose of the Rural Conservation areas is to preserve traditional rural and agricultural uses while accommodating low-density residential development." The Plan goes on to indicate that "Agriculture, forestry, very low density single-family residential development, and certain limited uses that are suitable in rural areas are permitted" in the Rural Conservation district.

It is interesting to note that, as of the date of the PSB's order, Bennington is considering draft Solar Siting language for their Town Plan. The draft language was not applied in the PSB's decision.

Clear, Written Standards

One of the most significant challenges in crafting Plan language that addresses such issues as "orderly development of the region" or aesthetics, is understanding what is considered a "clear, written standard" in the eyes of the court under the Quechee Test (see sidebar).

With this order, we are provided with a clear example of what (at least in the contest of the Certificate of Public Good process) a clear, written standard looks like. Bennington's Town Plan indicates the following:

"*Specific design standards shall apply to new development in the Rural Conservation Districts in recognition of the existence of a concentration of agricultural and forest lands and to protect the extraordinary scenic resources such lands and uses provide. Any use in the Rural Conservation District, including single-family dwellings, shall require approval under those regulatory guidelines. Development*

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in this area cannot be sited in prominently visible locations on hillsides or ridgelines, shall utilize earth tone colors and non-reflective materials on exterior surfaces of all structures, and must minimize clearing of natural vegetation."

The PSB, in response of the Hearing Officer's recommendation to the contrary, determined that the proposed development unduly interfered with the orderly development of the region [30 V.S.A. §248(b)(1)], because although the developer took steps to limit the visibility of the project on the hillside where it was proposed, the clearing of 10.6 acres of existing vegetation, violated the standard quoted above (minimize clearing of natural vegetation).

The PSB further clarified why Bennington's Plan language constituted a clear, written community standard, explaining that in order to be considered a clear, written community standard, it must be "intended to preserve the aesthetics or scenic beauty of the area" where the proposed project would be located and must apply to specific resources in the proposed project area.[i] A clear written community standards must be more than simply "general in nature" and do more than seek "to promote good stewardship of scenic resources without identifying specific actionable standards."[ii]

Bennington's Rural Conservation District creates four specific requirements:

1. Only limited residential is permitted,
2. No development may be sited in prominently visible locations on hillsides or ridgelines,
3. Any development must utilize earth-tone colors and non-reflective materials on exterior surfaces of all structures; and
4. Any development must minimize the clearing of natural vegetation

The PSB determined that the proposed facility violated three out of four of these requirements (it was determined that item #3 did not apply, because solar panels by their nature must be reflective. You cannot have a rule that makes renewable generation impossible).

The Quechee Test

In order to reach a determination as to whether the project will have an undue adverse effect on the aesthetics of the area, the Board employs the two-part test first outlined by the Vermont Environmental Board in Quechee, and further defined in numerous other decisions.

Pursuant to this procedure, first a determination must be made as to whether a project will have an adverse impact on aesthetics and the scenic and natural beauty. In order to find that it will have an adverse impact, a project must be out of character with its surroundings. Specific factors used in making this evaluation include the nature of the project's surroundings, the compatibility of the project's design with those surroundings, the suitability of the project's colors and materials with the immediate environment, the visibility of the project, and the impact of the project on open space.

The next step in the two-part test, once a conclusion as to the adverse effect of the project has been reached, is to determine whether the adverse effect of the project is "undue." The adverse effect is considered undue when a positive finding is reached regarding any one of the following factors:

1. Does the project violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area?
2. Have the applicants failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the project with its surroundings?
3. Does the project offend the sensibilities of the average person? Is it offensive or shocking because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area?

Specific Language

The developer eventually utilized the common argument that Town Plan language is "merely a recommendation." The PSB disagreed, pointing out that in this case the Plan language **is** specific and mandatory in nature.

"*Specific design standards **shall** apply to new development in the Rural Conservation Districts in recognition of the existence of a concentration of agricultural and forest lands and to protect the extraordinary scenic resources such lands and uses provide. Any use in the Rural Conservation District, including single-family dwellings, **shall** require approval under those regulatory guidelines. Development in this area cannot be sited in prominently visible locations on hillsides or ridgelines, **shall** utilize earth tone colors and non-reflective materials on exterior surfaces of all structures, and **must** minimize clearing of natural vegetation." [emphasis added]*

Different than Cold River

In the Cold River decision[iii], the PSB ruled that Rutland's solar siting standards were a *de facto* zoning bylaw, and could not be relied upon as a clear written standard under the Quechee test because the bylaws failed to identify the parcel proposed for development as a scenic resource worth of protection. The order specifies that "rather than being established as a site-specific set aside for the purposes of aesthetics and conservation, as is the case here, the Standards in Cold River were a town-wide setback rule for solar projects." The implication here is that by targeting solar specifically, Rutland was bordering on zoning, from which petitions under §248 are exempt.

The PSB states that the "the standards for the Rural Conservation District were established to conserve the rural character of a particular area of Bennington, not to create town-wide setbacks for solar projects. Further the Rural Conservation District language identifies "actionable requirements" which represent clear, written community standards.

What does this Mean?

Fundamentally, this decision provides our communities with a reasonable basis on which to determine that there are some locations where solar development may not be suitable. However, there are several very important limitations which can be derived from this case.

1. **Singling out solar generation facilities specifically will not be a successful tactic with the PSB** – The distinction between Cold River and this case made by the PSB clearly implies that targeting solar specifically crosses into the *de facto* zoning realm.

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2. **Plans need firm language, and clear, written standards** – General plan language that speaks of protection viewsheds or scenic areas will not be effective. Communities must use strict language like "shall" and "must" to make it clear that a provision is mandatory. There must also be clear standards that apply to all development within a specific area. Protected areas must be clearly identified – you cannot say "all roads are scenic," but instead must say something like "The North Road is considered a scenic resource due to its open view of the eastern slope of the Green Mountains." Specificity with regard to what are you are protecting is essential.[iv]

3. **Specificity is key** – in addition to judicious use of "shall" and "must," communities must carefully define land use areas in the Plan. This means having a clear purpose statement (what is this land use area intended to do?), a clearly defined area that is tied into the purpose statement (usually addressed in the map, with related narrative) and standards under which land should be developed to achieve the purpose.

4. **Communities cannot just say No** – In the Cold River case, one of the reasons that Rutland's Siting regulations were rejected is that they compelled "a specified outcome contrary to the intent of the legislature in providing an exemption from zoning by-laws for projects reviewed under Section 248, as well as established Vermont law." All proposals under Section 248 remain exempt from local zoning. While statute has been modified to allow screening requirements (at levels no greater than local commercial development is subject to), the PSB is still only required to give "substantial deference" to local Plans. It is likely that a Plan that attempts to outright prohibit (or has the effect of prohibiting) solar development will be seen as overstepping its authority. Bennington's plan language applied to all development (including single-family residential) within the Rural Conservation District.

5. **Choose the areas where solar isn't appropriate carefully** – In discussions with staff of the Bennington Regional Commission, it appears that there was a significant amount of support for the proposal that was denied in this case. And further, because of the way the PSB interpreted the language, it is likely that no solar facilities will be able to locate within the Resource Conservation District, which is a substantial part of the community. While this may be desirable for those who do not want to see solar developed in their community, most communities recognize that there is a benefit to some amount of local solar development.

   Additionally, as stated in #2, communities must identify specific areas (not general areas) where solar isn't appropriate and clearly outline what *is* appropriate.

6. **Consider identifying where you DO want solar** – While it may not be advisable to single out solar in order to prohibit it, indicating good locations for solar that are clearly supported by the policies of the Plan may be beneficial. Such an approach would clearly be consistent with legislative intent to encourage renewable energy generation. For a developer who could locate in an area identified as "solar appropriate," the benefit of having direct support in the municipal plan might be appealing.

7. **The written word may not be enough** – It is important to note that in the PSB's order, they indicated that the project was inconsistent with the Bennington Town Plan and the recommendations of municipal and legislative bodies. It is essential that a community have active participation from their Selectboard (and other members of municipal government) in order to ensure that the position of the community is understood.

Conclusion

The PSB's decision in this case is surprising. Many professional planners would be skeptical that the standards included in Bennington's plan constituted "clear, written community standards," but the precedence has been established through this case[v]. No doubt, there will be additional rulings that will help us better understand how the PSB is reviewing these cases.

Ultimately, a community will not know how effective new Plan language in a PSB proceeding until it is actually tested. This decision does provide our communities with new information, which is valuable as we all try to tackle this complicated process.

[i] In re Halnon, NM-25, Order of 3/15/01 at 22
[ii] Joint Petition of Green Mountain Power Corporation, et al, Docket 7628, Order of 5/31/11 at 83
[iii] Docket 8188, Order of 3/11/15
[iv] This is supported in the draft PSB rule released on February 19th, 2016.
[v] The draft PSB rule released on 2/19/16 provides communities with specific guidance as to what constitutes a "clear, written community standard."