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Recommendations for legislative Actions pages 2-3 (overview); 6-7 (aesthetics); and 14 (adjoining and non-adjoining landowner intervention)

Introduction and Overview

I could talk for hours on the many conflicts between the way in which Section 248 has been interpreted, amended, and implemented and the Vermont and federal policy goals for an affordable and timely transition away from fossil fuels. But given my limited time, I am going to focus on necessary VT legislative reforms regarding landowner intervention and aesthetics. These are my opinions and I speak for myself rather than any client. But before I dive in, I need to focus the lens through which I view these issues.

Fact: Exxon reported a record profit of $56 billion last year and has a record high stock price. It is using this cash to expand fossil fuel facilities in the US rather than invest in renewable energy.

Fact: The share of fossil fuels in the global energy mix is about 80%

Fact: Estimates are that fossil fuels will decline a bit but will still account for more than **HALF** of global energy production 20 years from now

Fact: The fossil fuels that threaten the viability of human society are not going anywhere without a swift transition to renewable energy; that transition is not

currently happening nearly fast enough to save ourselves from the worst that climate chaos has to offer.

Fact: One reason this is happening is because Fossil fuels don't face the same regulatory hurdles as renewable energy because many fossil fuel facilities are already built

Fact: Fossil companies are also heavily subsidized compared with renewable energy companies. A 2020 report by International Renewable Energy Agency tracked some $634 billion in energy-sector subsidies in 2020, and found that around 70% went to fossil fuels. Only 20% went to renewable power generation.

These figures do not even include the ultimate subsidy fossil fuels receive: artificially low prices that do not account for the devastation fossil fuels cause, leaving taxpayers and the insurance industry to pay to clean up the climate mess that fossil fuel profiteers have made.

Despite the solid proof that global overheating is happening at a frighteningly fast and increasingly lethal pace and the transition to a renewable energy system is happening at a distressingly slow place, the Vermont legislature, executive branch, regional planning commissions and municipalities captured by small factions of NIMBYs have made it more difficult over the years to build renewable energy projects.

It is so bad in Vermont that Vermont's opposition to renewable energy projects has been discussed in the national media. This from a New York Times opinion article by Ezra Klein in 2022: "The Sierra Club published a revealing report on how Vermonters were organizing against renewable power. The Sierra Club reported: 'In 2012, Vermont had at least a dozen wind projects in development. Today, there are none.' The article had to awkwardly note that the Vermont chapter of the Sierra Club had helped kill several of those projects."

If Vermont wants to walk the talk on global warming solutions, our government should be substantially leveling the playing field for renewable energy development/decarbonization infrastructure. Siting reform is badly needed to correct for the tremendous market and regulatory distortions that provide fossil fueled energy with such entrenched and artificial advantages.

The legislature needs to completely overhaul how renewable energy projects are permitted given the existential challenge posed by global overhearing. Such reforms would reconcile the extreme contrast between the overwhelming popular support for renewable energy among strong majorities of Vermonters (cite recent DPS survey) and the self-interested and occasionally irrational opposition they face from NIMBYs, the Agency of Natural Resources, some regional planning commissions and a minority of Town governments captured by NIMBYist minorities. The legislature also needs to send clearer messages to a Public Utility Commission that lacks strong leadership focused on realizing the fossil fuel-free future our survival depends on.

General recommendations

A few quick notes on issues I won't dive into but should be dived into by others:

-consider exemptions from certain environmental regulations such as wetlands where the science shows that solar posts do not affect wetland functions and in fact may improve functions compared to the currently-unregulated use of wetlands for agriculture;

-lessen the power that the legislature has given to towns and regional planning commissions over renewable energy projects as some RPC plans and towns regulate renewable energy much more harshly than they do commercial for profit development;

- exempt renewable energy projects from the greenhouse gas criterion in Section 248 because it is a waste of time and resources to have solar and wind projects address this criterion. ANR places significant burdens on renewable energy developers who seek to harness solar and wind under this criterion (and as a side note, Act 250 does not include greenhouse gas emissions issues in any criteria in a meaningful manner).

Overall, the public benefits from building renewable energy in a rapid and affordable manner. Data from EPA and others have found that "the most severe harms from climate change fall disproportionately upon underserved communities who are least able to prepare for, and recover from, heat waves, poor air quality, flooding, and other impacts." "Racial and ethnic minority

communities are particularly vulnerable to the greatest impacts of climate change."[1]

By not rapidly building renewable energy, our society will continue to harm the most vulnerable and let the fossil fuel companies become richer and more powerful.

I am going to first talk about aesthetics and then landowner intervention. There are two things that Aesthetics and easy landowner intervention have in common- empowering NIMBISm and presenting a false choice. The false choice is Vermont cannot be both beautiful and have a healthy environment on the one hand and have the necessary amount of decarbonization infrastructure on the other hand.

Lets talk about aesthetics; I want to discuss the current law/how the PUC has applied it/the problems with the current approach/and suggested changes.

A. Current law:

a. Section 248 does not identify an aesthetic standard; it just says a project cannot have an "undue adverse effects on aesthetics." Thus, it leaves the PUC with great discretion on such a subjective issue.
b. PUC uses the Quechee test that was developed in the Act 250 context for a for-profit condo development in Quechee Vermont in 1990. I am going to assume most people here are familiar with this test.[2] One modification in the PUC context is the

[1] *Climate Change and Social Vulnerability in the United States: A Focus on Six Impact Sectors is one of the most advanced environmental justice studies to date that looks at how projected climate change impacts may be distributed across the American public*. (one report Poverty and Climate Change prepared by a long list of organizations African development bank, Asian development bank, United Nations development program).

[2] The first step of the test is to determine whether the project would have an adverse impact on aesthetics and the scenic and natural beauty of an area because it would not be in harmony with its surroundings. If the answer is no, then the project satisfies the aesthetics criterion.

Commission's consideration of aesthetics under Section 248 is "significantly informed by overall societal benefits of the project."

i. Part of the current aesthetic test asks would a project be *out of character with its surroundings*. This is a ridiculous question when we are trying to transform our energy system from one based on fossil fuels to renewable energy. Under the fossil fuel based system, Vermont for decades did not need to look at how its energy was developed-yet the people of West Virginia did. Taking responsibility for our energy consumption *should* look different than our current surroundings; it should be of a different character. The PUC uses this test to also question whether a project is visible and if it is visible, the PUC concludes it is adverse. Again, concluding that a renewable energy project is adverse because you can see it is completely in conflict with the goal of taking responsibility for energy production. Under the Quechee test, most renewable energy projects of any meaningful scale are found to be adverse. The continued use of an aesthetic text developed for commercial for-profit development should no longer apply to section 248 projects.

c. There are several additional problems with using this outdated subjective aesthetic test. The Aesthetic criteria uses lots of time and money. Thousands of dollars are spent on aesthetic expert reports; and thousands of dollars are spent litigating a project's aesthetics with landowners and sometimes towns and RPC. Because this is so subjective there is no predictability.

If a project will have an adverse effect on aesthetics, such adverse impact will be found to be undue if any one of the three following questions is answered affirmatively: (a) Would the project violate a clear, written community standard intended to preserve the aesthetics or scenic, natural beauty of the area? (b) Would the project offend the sensibilities of the average person? (c) Have the applicants failed to take generally available mitigating steps that a reasonable person would take to improve the harmony of the proposed project with its surroundings

i. In one case-Bradford solar case discussed on page 8 of REV's No good reason report, where the PUC staff concluded that a solar project that was proposed next to a gas station, Hannaford supermarket, auto parts store and self storage facility would have an undue adverse impact even though aesthetic experts hired by the solar developer and another expert hired by the DPS concluded the project would not have an undue adverse impact. The landowner sought to develop this site because it was immediately adjacent to the landowner's business, which would benefit from the power produced by the project. The solar developer hired an aesthetic expert to prepare a report. The DPS hired another aesthetic expert and billed those costs back to the solar developer. Both experts concluded that given the highly developed character of the project area, the project did not have an undue adverse impact on aesthetics. The Town of Bradford opposed the project on aesthetic grounds even though its testimony acknowledged that it wanted a Tractor Supply store built in that location. The Regional PC concluded that the project would not have an undue adverse aesthetic impact. The PUC staff rejected the conclusions by both aesthetic experts and the RPC, and concluded that the project would have an undue adverse impact on aesthetics and recommended a denial of the CPG.

d. <u>Lets ask our legislators to have a real discussion about Aesthetics:</u> Global overheating is the real undue aesthetic impact. I live in Montpelier. The aesthetics of a flooded downtown create an undue adverse aesthetic impact. Smoke from wildfires across north America due to dry spring conditions and record breaking heat creates an undue adverse aesthetic impact. Flooded farms throughout Vermont where crops and farm equipment were destroyed appeared to me as an undue aesthetic impact.

i. Right now our PUC believes that looking at renewable energy is adverse by default. I want to look at renewable

energy; I have been on trips to fabulous places where you can see wind and solar clearly and it did not diminish my experience like Cadillac Mountain in Acadia National Park in Maine; people still love Lake Champlain even though you can see wind turbines; they still love hiking in Vt with views of wind and solar. *Who here wants to see how their energy is produced?*

e. <u>Legislature needs to lead here.</u> There are many ways to better address aesthetics in Section 248 proceeding and I offer a few for consideration- Does Vermont have the courage to treat global overheating like the emergency is it is?
    i. Real change: the aesthetics criterion does not apply for renewable energy projects.
    ii. Another idea: Exempt all section 248 projects proposed in areas designated in a town or regional planning commission plan as industrial, commercial, education, health care, utility or a mix of any areas with any of these uses.
        1. For all other areas (rural/rural residential) for renewable energy projects, aesthetic criterion applies only if project is located on a parcel that is designated by a town or regional plan, or town ordinance as being conserved/protected for aesthetic qualities (such protections need to apply to all development). This process would be set forth in Title 24, and it would give the landowner an opportunity to challenge. If the parcel is not identified, the aesthetic criterion does not apply. This approach would lessen the areas where aesthetic litigation would occur, and would provide more predictability regarding where Section 248 developers should not build. Town and regional planning commissions already identify areas that need to be preserved for scenic preservation so this Section 248 change can go into effect in 2024 without further studies. Towns and RPC can update plans if they want to conserve more parcels for

aesthetics against all development. If parcel a conserved for aesthetics, Project would have an adverse impact under Part 1 of the Quechee test so we skip that outdated part of the Quechee test, and keep part 2. Although under this approach, it is unlikely that a project could pass part 2.

iii. Less real change, but better-place burden on any party challenging project under aesthetics using clear and convincing evidence. Act 250 places the burden on the party opposing the project on aesthetic grounds. Require PUC to balance any aesthetic impacts against the public benefits of the project, that the impacts of greenhouse gas emissions are global, disproportionately impact rural and marginalized communities, and risk significant economic damage to Vermont. (page 12 of REV report)

Now turning to **landowner intervention** for Section 248 renewable energy project. If you want to understand how much our current renewable energy system empowers NIMBIS, you need to look at the contrast between the intervention standards in Act 250 and those applied in the Section 248 proceedings. Act 250 has a statutory test that establishes the intervention bar and it has teeth; Section 248 has no bar leaving the PUC with great discretion and it has lowered the intervention levels over the years and proposed to eliminate all intervention standards for adjoining landowners.

The legislature needs to lead in this area and focus on the collective good rather than continue to allow NIMBY interests to prevent renewable energy projects from being built in a timely and affordable manner.

Overview: A landowner typically intervenes to protect the value of their home. I have been involved in many negotiations on behalf of Section 248

petitioners with landowners. A landowner's primary concern in a Section 248 proceeding despite what they argue to the PUC, is how the project will affect their home value. A landowner will raise a host of issues to stop a project, such as aesthetics, claims about how wildlife will suffer, concerns about construction traffic, but it really comes down to home value. There is no empirical data that renewable energy projects materially diminishes a home's value that is next to a renewable energy project. [Analysis presented by Ezra Klien based on review of studies].

But lets not forgot that home values in Vermont benefit from Vermont's historic reliance on other state's producing the fossil fuels that we have used for decades. And because VT's energy has been produced elsewhere, we don't look at our energy production and we have gotten used to not having energy produced where load is. This privilege of having energy produced elsewhere has benefitted our home values. At the same time, the aesthetic or land use impacts from a renewable energy project are much less of a threat to home value than the threats of global overheating. Think of the flooding we have seen throughout Vermont; wildfires that reduce air quality; drought where crop fields and water supplies dry up; substantial increase in harmful insects are reported by (UVM study that climate change will increase pest pressure-harm crops; damaged trees(hemlock wooly adelid). [I recommend listing to Ezra Klien from NYT on these issue -he writes and speaks of collective good vs individualism on many formats; one good podcast is -how blue cities became so outrageously expensive.]

1. <u>Current statutory law:</u> Section 248 does not address intervention by landowners. The legislature has not acted in this area. The consequence is that renewable energy projects face the potential for extended litigation every time they propose a project. And that the PUC has great discretion in this area.

2. <u>Compare with Act 250.</u> Compare with Act 250 (the state's land use law that regulates for profit projects, some municipal projects, where there is no public good criteria/no need/economic benefit criteria). In Act 250, the legislature in 10 VSA Section 6058 addresses the landowner intervention

threshold: “any adjoining property owner or other person who has a **particularized interest protected by this chapter** that may be affected by an act or decision by a District Commission.”

3. <u>The Environmental Courts in Act 250 handle landowner intervention very different from the PUC. It is harder to get party status in the for-profit non-public good Act 250 setting than it is in the Section 248 process.</u>
    a. <u>Env court:</u> the court handles party status appeals from Act 250 commissioners.
    b. <u>E Court test:</u> Because Act 250 includes statutory language regarding landowner party status, the Act 250 case law has developed to establish a test that is more strict than Section 248
    c. In Act 250, landowners must meet a two-part test before intervention can be granted. First, “the person asserting party status must first allege an interest protected by Act 250 **that is particular to them, rather than a general policy concern shared with the public.”** The impacts on the would-be party must be “concrete” meaning not speculative. Second, the adjoining landowner must show a “reasonable possibility that the Commission decision may affect **its particularized interest.”** Adjoining landowners must “demonstrate more than a causal connection” and unsupported assertions with vaguely defined interests do not suffice” as “an offer of proof must be specific and concrete.” Under this standard, adjoining landowners have not gotten party status when they were concerned with general aesthetic impacts on their community/surrounding area; general concerns about potential impacts to above ground historic sites; concerns about how a project would impact a recreational path; general concerns about how a project would affect a person’s use of a nearby river; landowner concerns about how a project might affect soils—all issues that either tend to be cover for misplaced concerns about home value and/or that are adequately represented by Section 248 statutory parties.

d. PUC case law and rules: over the recent years, the PUC has decreased the thresholds for landowner intervention-making it easier to participate. And it has allowed landowners to have party status in renewable energy projects on the Need and economic benefit criteria even though state policy makes very clear that the state needs renewable energy.
    i. Rules: Currently, the PUC applies its new rule 2.900 adopted this year by the PUC to determine landowner party status in a section 248 case. In this new rule, the PUC significantly lowered the landowner party status threshold compared with the former rule 2 that has been in existence for decades. Former rule 2 used to require landowners to show a "substantial interest" but the PUC removed the word "substantial" and now landowners just need to show "an interest". Former Rule 2 also required landowners to demonstrate that no alternative means exists to protect their interest but the PUC removed that threshold requirement in new Rule 2.900. Former rule 2 required landowners to identify whether their interests would be adequately protected by other parties (if a person was interested in protection of rivers ANR protected this interest etc). But the PUC removed this requirement in the new rule 2.900 for permissive intervention. Now all a landowner needs to prove for permissive party status is they have a "claimed interest [that] shares a question of law or fact in common with the matters that must be resolved in the proceeding." The PUC must consider whether their intervention will unduly delay proceedings or prejudice interest of exiting parties or the public. This standard is unpredictable and makes it easy for landowners to oppose renewable energy projects. I am going to talk about the new proposed Rule 5.400 where the PUC has proposed to grant automatic party status to any adjoining landowner on any section 248 criteria-they proposed this rule over a year ago and I expect they will try to get it passed at the legislature in a few weeks. But I want to discuss how the PUC is apply this new rule 2.900 but that

rule will continue to apply to non-adjoining landowners (organizations, general residents).

ii. A recent full PUC order on intervention in a proposed 20 MW solar project (Case 23-1447) sums up the PUC's low intervention threshold for landowners. In this order issued August 2023, the PUC applied its new rule 2.900 which establishes the test for landowner intervention. Several entities were participating in the case such as the Town selectboard and planning commission, ANR, DPS, DHP, AAFM. *And yet the PUC granted about 10 landowners party status.* Once you have party status, the person can participate in discovery, file testimony, make motions, participate in the evidentiary hearing, post hearing briefing, and appeal the final order to the Vermont Supreme. Appeals usually take about 1 to 2 years and add tens of thousands of costs to development, more when inflationary pressures are factored in. This creates a hostile environment that developers have departed for other more favorable development environments in other states.

    1. PUC granted non-adjoining landowner party status on aesthetics (not just impacts to their home, but anywhere they thought there was an impact); the natural environmental (including how a project would lessen food supply for animals that were on their property); public health and safety (concerns from landowners that live on a road that the project would be used for construction-none are traffic experts); granted about 4 landowners party status on orderly development; about 3-4 on economic benefit and need criterion-the PUC tried to limit what these landowners could say on need and EB but the limit is vague- "landowner's participation is limited to the local and regional economic and environmental impacts of the Project that could affect the overall economic benefit of the Project to the State and its residents;" and a few were granted party status on GHS impacts of the solar project.

iii. This case shows why the legislature needs to lead here given how these Section 248 party status decisions are moving very far from protecting collective good/advancing public policy goals to focusing on private individually-focused concerns.

iv. Proposed Rule 5.400. PUC rule 5.400 establishes the procedures for Section 248 projects and its been around it mostly its current form since at least the early 2000s. During this time, this rule did not address thresholds for landowner intervention; rather rule 2 did that I discussed earlier provided the standard in the absence of legislation.

1. But now the PUC has proposed a new draft Rule 5.400 *that completely eliminates all intervention thresholds for adjoining owners*. An adjoining landowner would only need to submit a notice that it wants to intervene. It gets party status on all section 248 criteria. Adjoining landowners do not need to identify its concerns with the project; they do not need to explain how those concerns are related to Section 248 criteria; they do not need to explain how their concerns relate to the public good Despite major push back from most stakeholders that participate in Section 248 (Vermont utilities and REV same side); PUC will not budge and I expect it is going to propose this rule to the legislature in the next few months. When they do this, I highly recommend anyone interested in a green transition that is timely and affordable to contact the legislative rules committee and express their opposition to this change (proposed Rule 5.409): Sen. Mark A. MacDonald, Chair, Rep. Trevor Squirrell, Vice Chair Sen. Christopher Bray, Sen. Joe Benning, Sen. Virginia "Ginny" Lyons, Rep. Seth Bongartz, Rep. Mark Higley, Rep. Carol Ode

e. Legislature needs to lead and we need changes. At a minimum, Section 248 should include a landowner intervention threshold

matches those contained in Act 250 as I just discussed (particularizes/specific/concrete interest). But for real change, to truly advance renewable energy policy goals, we need much clearer legislation. I propose that the legislation needs to make clear that:

i. All section 248 renewable energy projects are presumed to be in the public good [collective vs individuals protectionism]

ii. *Option 1:* no landowners have party status: why is this fair-the Department of Public Service, Agency of Natural Resources, Division of Historic Preservation, Agency of Agricultural, Towns and regional planning commissions all have party status (automatic or always granted). Landowners need to make their concerns known to their Town selectboard/planning commissions, regional planning commission, and/or participating state agencies. The section 248 permitting process needs to move away from a litigated permit process that addresses individual needs to a collective good process.

iii. *Option 2:* limit landowner participation to public health and safety criteria and traffic-local issue. Why: they should never have party status on need, economic benefit (Vermont wants these projects); orderly development (they have the right during town and regional planning processes to participate); or any criteria that state agencies are required to participate under such as all natural resources criteria (ANR); and prime Agricultural; the adjoining landowner should be required to provide specific and concrete offer of proof that the project will unduly impact their ability to safely reside or do business on their property (that leaves public health and safety/traffic getting to and from their home).

iv. All Landowners should have the burden of proof and production if they are allowed to have party status.