

100 EAST STATE STREET | P.O. BOX 1309 | MONTPELIER, VT 05601-1309

March 9, 2016

**HAND DELIVERED**

Ms. Judith Whitney, Acting Clerk  
Vermont Public Service Board  
112 State Street  
Montpelier, VT 05620-2701

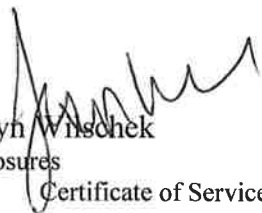
Re: **Application of BDE East Montpelier Lazar Solar, LLC** pursuant to 30 V.S.A. §§ 219a and Board Rule 5.100 authorizing the installation and operation of a 500 kW ground mounted solar array to be located off Route 2 in East Montpelier, Vermont

Dear Ms. Whitney:

Please find enclosed an original and three copies of BDE East Montpelier Lazar Solar, LLC's Response to the Comments Made by the East Montpelier Planning Commission in the above-referenced matter.

Thank you for your attention to this matter. As always, please contact me should you have any questions.

Yours truly,

  
Joslyn Wilschek  
Enclosures  
cc: Certificate of Service

STATE OF VERMONT  
PUBLIC SERVICE BOARD

CPG # NMP-\_\_\_\_\_

Application of BDE East Montpelier Lazar Solar, LLC )  
Pursuant to 30 V.S.A. § 219a and Board Rule 5.100 )  
authorizing the installation and operation of a 500 kW )  
solar group net-metered electric generation facility )  
located off of Route 2 in East Montpelier, Vermont )

**CERTIFICATE OF SERVICE**

On behalf of BDE East Montpelier Lazar Solar, LLC, I hereby certify that I have this day served one copy of the foregoing BDE East Montpelier Lazar Solar, LLC's Response to the Comments Made by the East Montpelier Planning Commission, by first class U.S. mail, on the following persons or entities:

Evan Meenan, Esq.  
Agency of Natural Resources  
1 National Life Drive, Davis 2  
Montpelier, VT 05601

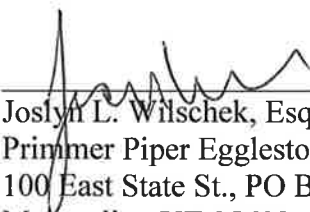
Jeannie Oliver, Esq.  
Department of Public Service  
112 State Street - Third Floor  
Montpelier, VT 05620-2601

Jean Vissering  
East Montpelier Planning Commission Chair  
P.O. Box 157  
East Montpelier, VT 05651

Zachary A. Sances  
P.O. Box 141  
East Montpelier, VT 05651

DATED at Montpelier, Vermont, this 9<sup>th</sup> day of March, 2016.

BDE East Montpelier Lazar Solar, LLC

By:   
\_\_\_\_\_  
Joslyn L. Wilschek, Esq.  
Primmer Piper Eggleston & Cramer PC  
100 East State St., PO Box 1309  
Montpelier, VT 05602  
(802) 223-2102  
[jwilschek@primmer.com](mailto:jwilschek@primmer.com)

STATE OF VERMONT  
PUBLIC SERVICE BOARD

CGP# 16-0001-NMP

Application of BDE East Montpelier Lazar Solar, LLC )  
Pursuant to 30 V.S.A. § 219a and Board Rule 5.100 )  
authorizing the installation and operation of a 500 kW )  
solar group net-metered electric generation facility )  
located off of Route 2 in East Montpelier, Vermont )

BDE EAST MONTPELIER LAZAR SOLAR, LLC'S RESPONSE TO THE COMMENTS  
MADE BY THE EAST MONTPELIER PLANNING COMMISSION

BDE East Montpelier Lazar Solar, LLC (“BDE” or “Applicant”) filed an application to construct a 500 kW ground mounted net-metering solar facility in East Montpelier, Vermont on January 4, 2016. The Town of East Montpelier filed comments on January 25, 2016 and on February 5, 2016. The Applicant hereby responds.

Motion to Intervene

The Town moved to intervene under 30 V.S.A. § 248(b)(1)(orderly development of the region) and 30 V.S.A. § 248(b)(5)(aesthetics). The Applicant has no objection to the Town’s intervention on these two criteria.

1. Section 249(b)(5)(aesthetics).

The Planning Commission’s February 5, 2016 letter (received by the Applicant on February 8, 2016) correctly notes that the Applicant met with the Town on February 4, 2016. The Applicant and the Planning Commission have since discussed the Project and potential resolutions. The Applicant has agreed to the following proposed conditions to be included in the final order and certificate of public good (“CPG”) in order address the Town’s concerns under the aesthetic criterion:

1. Increase sizes of all shrubs shown on Exhibit BDE-AT-7, Sheet L-1 (Landscape Mitigation Plan) so that all shrubs are at least 3-4 feet;
2. Implement a long-term plant maintenance agreement which shall include:
  - a. Certification by a landscape professional that plants have been installed according to the Exhibit BDE-AT-7, Sheet L-1 (Landscape Mitigation Plan) and the agreement identified above to install shrubs at least 3-4 feet in height and comply with the numbers, sizes, species and varieties set forth in Exhibit BDE-AT-7, Sheet L-1 (Landscape Mitigation Plan) with the increased shrub heights;
  - b. Certification by a landscape professional after three years that all plants are in good health and condition; and
  - c. Maintain plants and replace dead or dying plants within 3 months during the Project's life.
3. Maintain the vegetation along the property line between the Project and Route 2;
4. Use dark gray color for all associated equipment (AC combiner panels, electrical cabinets, metering equipment etc.), and locate such equipment either on the back of the racks, or behind the landscape plantings as shown on L-1 (Landscape Mitigation Plan), and the Applicant shall provide a color sample chip for the Planning Commission's approval;
5. At the end of the Project's useful life, the Applicant will decommission the Project. Decommission activities shall include demolition and off-site removal of all Project elements from the property, including solar modules, support

structures, underground electrical lines, conduits, inverters, electrical combiner panels, fencing and fence posts of which the Applicant owns;

6. The Applicant or future Project owner shall issue a written request upon decommissioning that requests Green Mountain Power or the owner of the distribution electric infrastructure constructed for this Project to remove all distribution infrastructure unless the utility believes it is needed for other development.

While the Town's February 5, 2016 letter notes that it "had requested" the undergrounding of electrical lines, the Town notes later in this letter that "[W]e feel the plantings will adequately screen the Project, provided all vegetation along the property line is protected during construction and that a long term maintenance plan is part of the CPG conditions." As outlined above, the Applicant has agreed to install the additional vegetation, maintain vegetation between the Project and Route 2, and to prepare and execute a long-term maintenance plan, and thus the Applicant should not need to underground the electrical lines, which would most likely prevent the Project from being built given the issues identified in the Town's February 5, 2016 letter.

The Applicant submits that even without these conditions, the proposed Project does not raise a significant issue to warrant a hearing or further investigation under this criterion especially given that the Division of Historic Sites has no concerns regarding the aesthetic impact so long as the Petitioner implements the proposed landscape mitigation plan. The Town has not raised a significant issue under the aesthetic criterion to warrant a hearing. Further, the Town has not in fact requested a hearing or a site visit.

Section 248(b)(1)(orderly development of the region)

The Town does not request a hearing under this criterion but “simply ask[s] that the Public Service Board carefully weighs the obvious benefits of adding another 500 kW solar array to the state’s renewable energy portfolio against the less apparent, but very real costs to the village’s development potential before it decides to issue a [CPG] for this Project.” Neither of the Town’s letters identifies any provision in the Town Plan that applies to this Project. In fact the Town of East Montpelier Town plan is incredibly general and it contains no specific land conservation measure applicable to this Project. Prefiled Testimony of Andrew Thomas at pages 7-9; Exhibit-AT-7, pages 6.

*In In re Chaves A250 Permit Reconsider*, 2014 VT 5, ¶¶ 40-41, 195 Vt. 467, 483-84, 93 A.3d 69, 80-81, the Vermont Supreme Court concluded under the orderly development criteria in an Act 250 case that “none of the language highlighted by neighbors creates a specific policy prohibiting a project such as applicants’ in this geographic area [as] [t]he language relied on by neighbors is broad and non-regulatory, espousing general policies about maintaining features, protecting valuable areas, and minimizing impacts, but contains no specific requirements that are legally enforceable.” The Court reiterated that a “project only conflicts with a plan when the plan’s standards are ‘stated in language that is clear and unqualified, and creates no ambiguity.’” *Id.* The Court explained that “[i]n contrast, broad policy statements phrased as nonregulatory abstractions are not equivalent to enforceable restrictions.” The Town has not identified any clear and unqualified binding requirements that apply to the Project site. For these same reasons, the Project has satisfied the orderly development of the regional criteria.

Moreover, contrary to the Town's belief that there is a real development potential for the Project site, as the attached affidavit of Andrew Thomas explains, the Project site has been available for residential home construction for approximately ten years and no one has built any homes because of market conditions and the challenging features of the site.

Given that four of the five surrounding neighbors support the Project, and the Agency of Natural Resources, Division of Historic Sites and the Department of Public Service have no objection to the Project, the Applicant respectfully requests the Board find that the Project satisfies the applicable Section 248 criteria.

Dated at Montpelier, Vermont, this 9<sup>th</sup> day of March, 2016.

BDE EAST MONTPELIER LAZAR SOLAR, LLC

By:

  
\_\_\_\_\_  
Joslyn Wilschek, Esq.

Primmer Piper Eggleston & Cramer PC

PO Box 1309

Montpelier, Vermont 05601-1309

(802)223-2102

[jwilschek@primmer.com](mailto:jwilschek@primmer.com)

**STATE OF VERMONT  
PUBLIC SERVICE BOARD**

CPG # NMP-16-0001

Application of BDE East Montpelier Lazar Solar, LLC     )  
Pursuant to 30 V.S.A. § 219a and Board Rule 5.100     )  
authorizing the installation and operation of a 500 kW     )  
solar group net-metered electric generation facility     )  
located off of Route 2 in East Montpelier, Vermont     )

**AFFIDAVIT**

I, **Andrew Thomas**, being duly sworn, over 18 years of age, and competent to testify on these matters say:

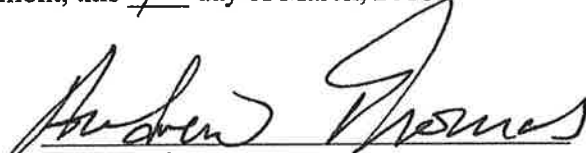
1. I have been involved in commercial development in Vermont for over a decade and thus I am very familiar with market conditions regarding what kind of development can successfully be built. Based on this experience, I am confident the kind of residential development the Town would like to see on the Project parcel is not economically viable today.
2. Market conditions oftentimes determine how land should and could be used, and the current market conditions for the Project area have not brought the demand for residential development.
3. Approximately during 2002 and 2003 the Project parcel underwent subdivision and wastewater permit review and received approval. Those approvals have been in effect for greater than 10 years and to date no development has occurred on the Project parcel. The parcel at issue contains challenging features for the residential home construction. The variety of slopes on the parcel make it a challenging property to construct a residential home and access road/driveway. The parcel has a range of slopes from 10% to more than 20%. A major portion of the parcel has greater than 20% slope. In order to construct a house or site access road/driveway, would involve geotechnical analysis, major excavation equipment, significant regrading, and retaining walls. The depth of bedrock below the slope is unknown, but if encountered would involve the potential for blasting. These challenges and the current market conditions have to date caused the opportunity for residential housing to be avoided on the Project parcel.
4. When I attended a meeting of the East Montpelier Planning Commission, I explained at length these challenges, the Planning Commission acknowledged that there are very steep slopes on portions of the parcel, it would be difficult to construct residential homes, and that all six of the subdivided lots have been available for sale for an extended period of time.
5. Thus, while the Town believes that the Project will result in the loss of approved building sites; the reality is that these lots are not viable residential building sites at




this time due to the market conditions and the land features.

On behalf of BDE East Montpelier Lazar Solar, LLC, I prepared this affidavit to the best of my knowledge and belief, and I have personal knowledge of and will be able to testify as to the validity of the information contained in this affidavit.

Dated at Shelburne, Vermont, this 9<sup>th</sup> day of March, 2016

  
Andrew Thomas

Subscribed and sworn to before me this 9<sup>th</sup> day of March, 2016

  
Notary Public  
Commission expires: 2/10/2019