STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 8188

Petition of Rutland Renewable Energy, LLC for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the construction and operation of the "Cold River Project," consisting of up to a 2.3 MW solar electric generation facility located at the intersection of Cold River Road and Stratton Road in Rutland, Vermont	))))))

Order entered: 5/6/2015

ORDER DENYING RECONSIDERATION

I. INTRODUCTION AND PROCEDURAL HISTORY

On March 11, 2015, the Public Service Board ("Board") issued an Order (the "March 11 Order") and Certificate of Public Good (the "CPG") in this docket approving, subject to certain conditions, the construction and operation of the proposed solar electric generation facility (the "Project").[1]

On March 26, 2015, Joseph Romeo, Charles Flanders, Ted Hubbard, Robert Carrara, Jr. as Trustee of the Robert Carrara, Jr. Trust, and David Fucci (the "Neighbors") filed a Motion for Reconsideration of the Order (the "Reconsideration Motion").

On March 27, 2015, Rutland Renewable Energy, LLC ("RRE") filed its Response to the Neighbors' Motion for Reconsideration ("RRE Objection").

For the reasons discussed below, in this Order we deny the Reconsideration Motion.

II. POSITIONS OF THE PARTIES

The Neighbors' Position

The Neighbors ask that the Board reconsider the March 11 Order, asserting that it is not a faithful application of the relevant legal precedent. The Neighbors contend that the Order should

1. A corrected version of the Order was issued on March 12, 2015.

be altered on three grounds, any one of which, if accepted by the Board, would result in a denial of the CPG for the Project.[2]

First, the Neighbors assert that the Town of Rutland's Solar Facility Siting Standards (the "Standards") are a clear, written community standard for the purpose of aesthetics review in this proceeding. To support this position the Neighbors contend that the setbacks contained in the Standards constitute specific guidance in project design and therefore constitute a clear, written community standard under Board precedent.[3] The Neighbors also argue that even if the Board considers the setbacks contained in the Standards to be a *de facto* zoning bylaw, the setbacks still serve as advisory standards, rather than controlling standards, and further contend that the Board has yet to determine that zoning bylaws can never be a source of clear, written community standards in Section 248 proceedings.[4] Lastly, the Neighbors assert that requiring towns to designate specific resources for aesthetic protection in order to influence the outcome of a Section 248 proceeding creates "new restrictions" that deprive a town of any meaningful voice in this process "short of undertaking an analysis of every particular parcel in the Town to determine if it should be classified as a scenic resource worthy of protection."[5]

Second, the Neighbors are critical of the Board's application of Board precedent holding that adjoining property owners generally are not considered to be "average" persons for purposes of aesthetics analysis when the Board determines whether an average person would be shocked or offended by a proposed project. According to the Neighbors, the Board's "average" person analysis is a departure from the Act 250 case that gave rise to what is known as the *Quechee* test, as well as subsequent Act 250 cases applying that test. According to the Neighbors, the Board's approach restricts the question of whether the average person would be shocked or offended by a proposed project to "the narrow and brief perspective of a passing vehicle," resulting in the issue being "perversely reduced to one of whether persons who only briefly and occasionally see the

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2. Reconsideration Motion at 14-15.

3. Reconsideration Motion at 2.

4. Reconsideration Motion at 3-4.

5. Reconsideration Motion at 4.

Project site from the roadway would find it offensive."[6] The Neighbors assert that the proper approach is for the Board to determine whether the Project, as a whole, is offensive or shocking because it is out of character with its surroundings or significantly reduces the scenic qualities of the area.[7] The Neighbors contend that the Board cannot simply rely on the agreement of the three expert witnesses in this proceeding that the average person would not find the Project shocking or offensive, but must determine for itself if the Project would have such an effect when viewed as a whole.

Third, with respect to mitigation of Project impacts, the Neighbors point out that they put on evidence about the use of setbacks greater than the 64 feet proposed by RRE and less than the 200 feet required by the Standards. According to the Neighbors, this means that RRE was in turn obligated to demonstrate that no increase to the proposed 64-foot setbacks was feasible. The Neighbors contend that RRE did not make such a showing and therefore failed to meet its burden to demonstrate that it has undertaken all generally available mitigating steps to reduce the Project's aesthetic impacts.[8] The Neighbors further assert that they did not ask the Board to consider whether other more appropriate parcels might exist to host a project of the size proposed. They instead argue that the Board has the discretion to deny a CPG for the Project even if no reasonable mitigation is available if the Project's impacts would frustrate the goals of Act 250.[9] Lastly, the Neighbors argue that Board precedent makes clear that a proposed project will have undue aesthetic impacts if it cannot be placed on a project parcel in a manner that will avoid direct interference with a neighbor's primary view of the surrounding area.[10]

RRE's Position

RRE opposes the Reconsideration Motion, contending that the Neighbors have improperly invoked VRCP 59(e) as a vehicle to relitigate issues that were already "repeatedly

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6. Reconsideration Motion at 7, 9.

7. Reconsideration Motion at 8.

8. Reconsideration Motion at 12.

9. Reconsideration Motion at 13.

10. Reconsideration Motion at 14.

raised and addressed" in this proceeding, and that the Reconsideration Motion should therefore be "summarily denied."[11] RRE also asserts that it has met its burden with respect to the setbacks proposed for the Project and that it is not required to prove a negative regarding whether any reduction in Project size that would allow for greater setbacks is feasible.[12] Lastly, RRE emphasizes that the Neighbors are not entitled to any special consideration because Section 248 proceedings are concerned with the public interest and not individual property rights.[13]

III. DISCUSSION

We deny the Reconsideration Motion because the Neighbors have not demonstrated any error in the March 11 Order that is in need of correction.

The disposition of a motion to alter or amend a judgment rests with the discretion of the trial court.[14] Pursuant to Rule 59(e) of the Vermont Rules of Civil Procedure, which are applicable in Board proceedings, courts have "broad power to alter or amend a judgment."[15] In reviewing a Rule 59(e) motion "the court may reconsider issues previously before it, and generally may examine the correctness of the judgment."[16] The purpose of Rule 59(e) is to avoid an unjust result due to inadvertence of the court, as opposed to inadvertence of a party.[17] The rule is not intended to permit parties to relitigate issues or to correct previous tactical decisions.[18] The request for reconsideration must "present facts which could not, with the exercise of due

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11. RRE Objection at 2.

12. RRE Objection at 2-3.

13. RRE Objection at 3.

14. *Alden v. Alden*, 187 Vt. 591, 592 (2010) (citations omitted).

15. V.R.C.P. 59(e) Reporter's Notes.

16. *Drumheller v. Drumheller*, 185 Vt. 417, 432 (2009) (citing *In re Robinson/Keir Partnership*, 154 Vt. 50, 54 (1990) (citations omitted)).

17. *Osborn v. Osborn*, 147 Vt. 432, 433 (1986).

18. *In re Cent. Vt. Pub. Serv. Corp.*, Docket Nos. 6946/6988, Order of 5/25/05 at 3.

diligence by counsel, have been placed before the court before the order complained of was issued."[19]

Clear, Written Community Standard

The March 11 Order provides two grounds for why we concluded that the setbacks established by the Standards do not constitute a clear, written community standard for the purposes of aesthetics review in this proceeding. First, we determined that the setbacks effectively operate as a *de facto* zoning bylaw, and that projects reviewed under Section 248 are exempt from the application of zoning bylaws.[20] Nothing in the Reconsideration Motion has persuaded us to now reach a different conclusion.

The Neighbors' argument that the setbacks contained in the Standards still serve as advisory standards even if the Board determines that they constitute a *de facto* zoning bylaw is not persuasive because application of the setbacks to the Project would compel a specified outcome[21] – a result that is contrary to the intent of the Legislature in providing an exemption from zoning bylaws for projects reviewed under Section 248, as well as to established Vermont law. As we stated in our *Georgia Mountain* decision:

> If zoning regulations were considered clear written community standards for the purpose of aesthetic review under Section 248(b)(5), these could have the effect of mandating a particular outcome to a Section 248 proceeding. Such an outcome is inconsistent with Vermont law; the Vermont Supreme Court has clearly stated that, with respect to Section 248 proceedings, "municipal enactments . . . are advisory rather than controlling."[22]

Additionally, allowing zoning bylaws to dictate the outcome of a Section 248 proceeding would run counter to the statutory requirement that the Board base its decisions in contested

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19. *Cent. Vt. Pub. Serv. Corp.*, Docket Nos. 6946/6988, Order of 5/25/05 at 3 (quoting *Brown v. International Harvester Corp.*, 142 Vt. 140, 142-43 (1982)).

20. March 11 Order at 86.

21. As we discussed in our Order approving the Project, application of the 200-foot setbacks would so significantly reduce the capacity of the Project that it would convert it into a different project entirely and therefore "frustrate the project's purpose." Docket 8188, Order of 3/11/15 at 52, 88.

22. *See Petition of Georgia Mountain Community Wind*, Docket 7508, Order of 6/11/10 at 53 (quoting *City of South Burlington v. Vermont Electric Power Company, Inc.*, 133 Vt. 438, 447 (1975)).

cases on a properly developed evidentiary record with testimony and exhibits subject to cross examination.[23]

Even if we were to relabel the setbacks as "advisory," this would not alter the fact that the application of the setbacks in this proceeding would inappropriately mandate a specific result. The same holds true for the Neighbors' argument that the Board has never found that zoning regulations can never be a source of a clear, written community standard.

Our second ground for rejecting the setbacks in the Standards as a clear, written community standard is that the Standards fail to designate the Project parcel as a scenic resource worthy of protection.[24]

The Neighbors argue that expecting towns to designate specific resources for aesthetic protection creates new restrictions that deprive a town of any meaningful voice in the Section 248 process "short of undertaking an analysis of every particular parcel in the Town to determine if it should be classified as a scenic resource worthy of protection."[25]

We disagree. First, this is not a new expectation. It was first articulated in 1994 in the case of *Re: Town of Barre*[26], an Environmental Board decision that this Board relied upon in part in deciding the *Halnon*[27] case in 2001, and that has been applied in numerous subsequent Board decisions under Section 248.[28] Second, the Neighbors' argument overlooks that the Town of Rutland has already engaged in a process whereby the Project parcel was reviewed and designated for future land use — the evidence shows this parcel was designated for Industrial/Commercial use in the Town's Future Land Use Map. The standard applied by the

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23. 3 V.S.A. § 809.

24. March 11 Order at 85-86.

25. Reconsideration Motion at 4.

26. *Re: Town of Barre* , #5W1167- EB, Findings of Fact, Conclusions of Law, and Order (June 2, 1994) at 21.

27. *In re Halnon*, NM-25, Order of 3/15/01 at 23-24.

28. *See e.g., Application of UPC Vermont Wind*, Docket 7156, Order of 8/8/07 at 66; *Petition of Georgia Mountain Community Wind*, Docket 7508, Order of 6/11/10 at 52; *Petition of Green Mountain Power Corp. et al.*, Docket 7628, Order of 5/31/11 at 86; *Application of Seneca Mountain Wind*, Docket 7867, Order of 8/9/13 at 57. *See also UPC Vermont Wind*, 2009 VT 19, ¶ 26.

Board, both historically and in this proceeding, does not create a significant new burden on towns, given that town plans are required to have a land use map that sets forth "present and prospective land uses, indicating those areas proposed for forests, recreation, agriculture . . . , residence, commerce, industry, public, and semi-public uses and open spaces reserved for flood plain, wetland protection, or other conservation purposes."[29]

The Neighbors also point to language from *In re Halnon* to support their position that the setbacks provide specific guidance in project design and therefore constitute a clear, written community standard. We disagree. The language in question states:

> . . . the provisions in the town plan and zoning ordinances cannot be considered clear, written community standards under the "Quechee analysis," because they do not designate specific scenic resources in the proposed project area or provide specific guidance in project design.[30]

When read in context, it becomes clear that the language from *Halnon* that the Neighbors have cited in fact undermines their position. The *Halnon* language reflects the application of reasoning from a prior Environmental Board decision that explained the Environmental Board's intent behind adopting the clear, written community standard test in its *Quechee* decision. The Environmental Board stated:

> [T]he Board intended to encourage towns to identify scenic resources that the community considered to be of special importance: a wooded shoreline, a high ridge, or a scenic back road, for example. These designations would assist the . . . Board in determining the scenic value of specific resources to a town, and would guide applicants as they design their projects.[31]

According to the Environmental Board's precedent, cited by the Board in *Halnon*, it is the designation of specific resources that communities deem to be of special scenic importance that provides guidance in the development of projects. Thus, when read in context, the language the Neighbors quote from *Halnon* actually leads to the conclusion that the Project parcel is suitable for industrial or commercial development because it has been expressly designated for such use

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29. 24 V.S.A. § 4382(a)(2)(A).

30. *In re Halnon*, NM-25, Order of 3/15/01 at 23-24.

31. *Re: Town of Barre* , #5W1167- EB, Findings of Fact, Conclusions of Law, and Order (June 2, 1994) at 21.

in the Town's Future Land Use Map — a fact that provided guidance to RRE when it selected the parcel for development of the Project.[32]

For the foregoing reasons, we will not alter the March 11 Order with respect to whether the setbacks contained in the Standards constitute a clear, written community standard for the purpose of aesthetics review in this proceeding.

Shocking or Offensive to the Average Person

The Neighbors criticize the March 11 Order for not following Act 250 precedent which holds that adjoining landowners can constitute average persons when reviewing aesthetic impacts under Act 250, and instead applying the Board's own interpretation as to who constitutes an "average" person when reviewing projects under the aesthetics criterion of Section 248.

The Neighbors' argument fails to recognize that the Board is legally obliged to follow the requirements of 30 V.S.A. § 248 when reviewing generation or transmission projects. While Section 248 incorporates numerous Act 250 criteria (specifically, 10 V.S.A. § 1424a(d) and §§ 6086(a)(1)-(8) and (9)(K)), these provisions are statutorily cast as standards to which the Board must give "due consideration." Thus, for instance, in assessing the aesthetic impacts of proposed projects, there is nothing in Section 248 that requires the Board to afford controlling weight to Act 250 cases when the Board gives due consideration to the Title 10 standards that are incorporated into Section 248. Rather, Section 248 directs the Board to determine whether or not a proposed project will result in an undue adverse impact to aesthetics or scenic and natural beauty, and leaves it to the Board's discretion as to how best to make that determination, after giving "due consideration" to the pertinent Title 10 standards.

For many years, the Board's Section 248 decisions have employed the analytical framework created by the Environmental Board in the *Quechee* decision.[33] However, many of the Board's Section 248 decisions reflect how the Board has adapted the *Quechee* test to account

32. Viens pf. reb. at 4.

33. *Re: Quechee Lakes Corp.*, #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law, and Order (Nov. 4, 1985).

for the essential policy difference that distinguishes Section 248 from Act 250.[34] For instance, in 2003 in our *Northern Loop* decision we first determined that the societal benefits of a proposed project would significantly inform our aesthetics analysis of that project.[35] This approach has been consistently applied in Section 248 proceedings since that time.[36]

Similarly, as explained in the March 11 Order, another one of the Board's modifications of the *Quechee* test has been to define the "average" person as the average member of the viewing public who would see a particular project from the vantage point of the public, and not from the vantage point of an adjoining landowner to a project site.[37] We acknowledge that this approach to the *Quechee* test departs from how the test has been applied in Act 250 cases. However, in our judgment, this approach is necessary in order to give effect to the purpose of Section 248, which is to ensure that energy generation and transmission facilities are sited and constructed in Vermont in a manner that promotes the general good of the state. As the Vermont Supreme Court has explained, the Board's analysis in Section 248 proceedings must center on whether a proposed project advances the *public* interest, and not upon its impacts on individual property rights.[38] Additionally, unlike Act 250, which concerns itself only with the impacts of a proposed development, and not the purposes a project is intended to serve,[39] Section 248 and its requirement that a proposed project be found to promote the public good do require the Board to

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34. Unlike in Act 250 cases, in Section 248 proceedings, the Board's fundamental responsibility is to render decisions as to whether a proposed project "will promote the general good of the state . . . ." 30 V.S.A. § 248(a)(2)(A)-(B).

35. *Joint Petition of Vermont Electric Power Company, Inc. et al.*, Docket 6792, Order of 7/17/03 at 28.

36. *See e.g., Petitions of Vermont Electric Power Company, Inc. et al.*, Docket 6860, Order of 1/28/05 at 80; *Amended Petition of UPC Vermont Wind, LLC*, Docket 7156, Order of 8/8/7 at 65; *Joint Petition of Green Mountain Power Corporation et al.*, Docket 7628, Order of 5/31/11 at 83

37. March 11 Order at 86-87.

38. *Vermont Elec. Power Co., Inc. v. Bandel*, 135 Vt. 141, 144 (1977) ("'The sole issue is the determination of whether or not under the criteria set forth in the statute the proposal for which a certificate is sought advances the public interest.' Individual property rights not being at issue, they are not a basis for any special recognition of the property owners, nor do they support any special consideration for their protection in these proceedings.") (quoting *Auclair v. Vermont Elec. Power Co.*, 133 Vt. 22, 28 (1974)).

39. *In re Vermont RSA Ltd. Partnership*, 181 Vt. 589, 591 (2007).

consider the purpose of a project and its benefits to the public. Thus, we conclude that our adaptation of the *Quechee* test to focus on the impacts experienced by the average public viewer is necessary for the lawful administration of Section 248 and the effective implementation of its policy goals.

We recognize that, at times, projects that we find to promote the general good will have impacts on nearby landowners; this Project is one of those cases.[40] It is not our practice to turn a blind eye to such impacts. Instead, we carefully consider ways to mitigate these impacts by imposing conditions that require the implementation of generally available mitigating steps that a reasonable person would undertake given the circumstances of each case. For example, the Board has imposed sound limits to help control noise impacts from certain projects and has required landscaping plans to reduce visual impacts from others.[41] In this particular Docket, we have required RRE to modify its vegetative screening proposal so that RRE must retain and maintain any existing vegetation along the eastern border of the Project parcel that is greater than the 12-foot maximum height proposed by RRE in its vegetative screening plan.

The Neighbors' criticism that the Board's approach improperly restricts analysis of visual impacts from a proposed project to those that would be experienced by individuals riding in a passing car is misplaced. Each case turns on its own particular facts, and in some cases public views will be confined to roadways with views ranging in duration depending on whether one is driving, cycling, or walking past a project, for example. Yet other proposed projects will be viewable from public places such as parks and will result in long-duration views by members of the public. Accordingly, the Board's approach accounts for the quality and duration of views that will be experienced by the average member of the viewing public.

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40. *See Petition of Georgia Mountain Community Wind*, Docket 7508, Order of 5/31/11 at 9-10.

41. *See e.g., Application of UPC Vermont Wind*, Docket 7156, Order of 8/8/07 at 73, 113-14 (imposing maximum sound limits); *Petition of Georgia Mountain Community Wind*, Docket 7508, Order of 6/11/10 at 57, 91(imposing maximum sound limits); *Petition of Green Mountain Power Corp. et al.*, Docket 7628, Order of 5/31/11 at 101-02, 165-66 (imposing maximum sound limits); *Petition of Barton Solar*, Docket 8148, Order of 6/30/14 at 27, 44 (requiring installation of vegetative screening); *Petition of Novus Royalton*, CPG #NMP-5054, Order of 11/21/14 at 15-18, 22 (requiring installation of vegetative screening).

The Neighbors also improperly conflate the initial test for adversity under *Quechee* with the test for undue impacts under the "shock or offend" prong of that analysis. The Neighbors criticize the March 11 Order because its findings concerning how the Project would "fit" within the surrounding context are directed at whether the Project would have an adverse aesthetic effect, and not whether that adverse effect would also be undue.[42]

The findings identified by the Neighbors are directed at whether the Project would have an adverse aesthetic impact because the questions quoted by the Neighbors on pages 7 and 8 of the Reconsideration Motion are directed at adverse impacts under the *Quechee* test, not at whether any adverse effects are also undue.[43] Once a project is found to have an adverse aesthetic impact, it must be determined whether that impact is also undue by, in part, determining whether it would shock or offend the sensibilities of the average person. In *Quechee*, the Environmental Board determined that a project would be shocking or offensive if it is "out of character with its surroundings, or significantly diminishes the scenic qualities of the area."[44] The Neighbors' argument, however, equates the concept of "fit," under the adversity prong of *Quechee*, with whether a project is out of character with its surroundings under the undue prong of that analysis.[45] If the Neighbors were correct, then a finding of adversity under the first step of the *Quechee* test would necessarily compel a finding of undue adversity under the "shock or offend" prong of the second step of that test. Such an approach would render the second step of the *Quechee* test a nullity and we therefore decline to adopt it.

We also disagree with the Neighbors' criticism of the Board's reliance on the evidentiary record in making its findings on whether the Project would be shocking or offensive to the average person. The Board is statutorily required to rely on the evidentiary record in making its

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42. Reconsideration Motion at 7-9.

43. *Re: Quechee Lakes Corp.* at 18-19.

44. *Re: Quechee Lakes Corp.* at 19.

45. Subsequent Environmental Board decisions have described the standard as being whether a proposed project would be "so out of character" with its surroundings or "so significantly diminish" the scenic qualities of the area as to be offensive or shocking to the average person. *See e.g., Re: Pike Industries, Inc. and Inez M. Lemieux*, Land Use Permit #5R1415-EB Findings of Fact, Conclusions of Law, and Order (June 7, 2005).

findings.[46] In finding that the Project would not be shocking or offensive to the average person, the Board reached an independent determination after weighing the evidence of record. That evidence consisted of: (1) the testimony of three expert witnesses, one of whom was retained by the Neighbors and all of whom agreed that the Project would not be shocking or offensive to the average person; and (2) the testimony of a lay witness who stated that he is "not an expert on scenic beauty or aesthetics" and that if the "average person is viewing the project from any of the Neighbors' properties, I can't conceive of how it is not offensive."[47] In the proposed findings, the Hearing Officer found the testimony of the three experts on this point to be more persuasive than that of a lay witness, an evidentiary assessment with which we concur. Further, the fact that the expert witnesses' testimony was consistent with Board precedent on who constitutes an average person for the purpose of aesthetics review in Section 248 proceedings is not a ground for finding error and therefore not a basis for altering the March 11 Order.

For the foregoing reasons, we decline to alter the March 11 Order with respect to whether the Project would be shocking or offensive to the average person.

Generally Available Mitigation

We will not alter the March 11 Order in regard to our conclusions about generally available mitigation because the Neighbors have not demonstrated any error in our finding that RRE has proposed to undertake all generally available mitigating steps to reduce the Project's aesthetic impacts on the surrounding vicinity.

The Neighbors state that they introduced evidence of possible setbacks greater than the 64 feet proposed by RRE, but less than the 200 feet required by the Standards. According to the Neighbors, this required RRE to respond with evidence demonstrating that such lesser setbacks were unfeasible for the Project. The Neighbors contend that RRE failed to do so and has

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46. 3 V.S.A. § 809(g).

47. Fucci pf. at 3. This testimony is not persuasive because it overlooks that the average person viewing the Project would not be viewing it from any of the Neighbors' properties; the average person would be viewing the Project from a public viewpoint.

therefore not demonstrated that it has undertaken all generally available steps to mitigate the aesthetic impacts from the Project.[48]

We disagree with the Neighbors' characterization of the evidence. The testimony the Neighbors rely on to make their argument on this point was offered by the Neighbors' expert aesthetics witness, Jean Vissering. Ms. Vissering stated that "reducing the size of the project should be considered. This may be difficult to do on this limited site, though this is, in my view, a problem of poor site selection."[49] Contrary to the Neighbors' assertion, Ms. Vissering's testimony does not offer any alternative setback, and appears to reference the 200-foot setback contained in the Standards.[50] While Ms. Vissering does state that reducing the Project's size should be considered, she offers no intermediate setback distance that she contends would be reasonable to which RRE could have responded, and instead acknowledges that any reduction in the size of the Project would be difficult due to the characteristics of the Project parcel.

Additionally, Ms. Vissering's testimony about poor site selection, in conjunction with the Neighbors' arguments regarding site selection in their comments on the Proposal for Decision, serve to rebut the Neighbors' current argument that they were not asking the Board to consider whether there were other more appropriate sites to host the Project, but instead were asking the Board to deny the CPG even if no reasonable opportunities for mitigation remained because the Project's impacts are counter to the goals of Act 250.[51]

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48. Reconsideration Motion at 12.

49. Exh. JV-2 at 6.

50. The sentence in Ms. Vissering's testimony that precedes the language quoted by the Neighbors states, "The Select Board siting standard require [sic] a much larger setback of the project than has been proposed here." Exh. JV-2 at 6. Additionally, in their comments on the Proposal for Decision the Neighbors stated, "It is not necessary or appropriate for the Board to determine the reasonableness of a 200 [-] foot setback when applied to a project as small as 1.5 kW. The only question here is whether a 200 [-] foot setback is reasonable as applied to this 2.3 MW facility." Neighbors' Exceptions and Brief re: Proposal for Decision, dated 12/4/14 at 10 ("Neighbors' Comments").

51. *See* Neighbors' Comments at 18 ("If concepts such as orderly development and interests such as avoiding undue adverse aesthetic impacts are to have any meaning, then this Board must make site selection reviewable. Developers should be discouraged from choosing sites that suit only their own selfish economic interests with no regard for a project's impact on surrounding properties and community.")

Even if we accept the Neighbors' current characterization of their argument, we still disagree with their position. The Neighbors assert that the Board should exercise its discretion to deny the CPG, even if the Board determines that RRE has undertaken all reasonable mitigation, because the Project would run counter to the goals of Act 250.[52] Once again the Neighbors' argument fails to address the fact that the Project is being reviewed under Section 248, not Act 250. While several of the criteria found in Act 250 are incorporated by reference into Section 248 for due consideration by the Board, the two statutes are fundamentally different. As discussed above, Section 248 cases are concerned with the public good. The Board must make a specific finding that a proposed project would "promote the general good of the State" before it issues a certificate allowing a project to proceed.[53] No such requirement is found in Act 250.[54] Projects approved under Section 248 receive a "certificate of public good," whereas projects approved under Act 250 receive an Act 250 "permit." Accordingly, the Neighbors' argument that the Project should be denied a certificate of public good because it would be counter to the goals of Act 250 has no application in this proceeding.

The Neighbors' final argument rests on statements made by the Board in its *Halnon* decision. According to the Neighbors, *Halnon* dictates that certain parcels are simply not suitable for the placement of renewable generation facilities, and they suggest that the Project parcel is such a site.[55]

We disagree with the Neighbors' reliance on *Halnon*. In *Halnon*, the Board was faced with a situation where the project developer wished to place an approximately 111-foot-high net-

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52. Reconsideration Motion at 12-13 ("[T]he question before the Board is not simply whether RRE has engaged in all reasonable mitigation with respect to the 'parcel of land under its control,' but whether it is enough to meet Act 250 goals." *Id.* at 13. The Neighbors have not specifically explained how approval of the Project would be counter to the goals of Act 250.

53. 30 V.S.A. § 248(a)(2).

54. This difference is perhaps most illustrated by the fact that projects reviewed under Act 250 are required to be "in conformance with any duly adopted local or regional plan or capital program under 24 V.S.A. chapter 117" (10 V.S.A. § 6086(a)(10)). However, in section 248 proceedings, municipal enactments are deemed advisory, rather than controlling. *See Petition of Georgia Mountain Community Wind*, Docket 7508, Order of 6/11/10 at 53 (quoting *City of South Burlington v. Vermont Electric Power Company, Inc.,* 133 Vt. 438, 447 (1975)).

55. Reconsideration Motion at 13-14.

metered wind turbine directly in the primary viewshed of his neighbors' view of the Green Mountains, even though there were potentially alternate locations on the developer's parcel where the turbine could be sited without the same level of impact on the neighbors' view.[56] Such is not the case here. The evidence of record demonstrates that there are no placement options on the Project parcel that would allow the Project to be configured to eliminate the Neighbors' views of the Project, and subjecting the Project to the setbacks contained in the Standards would fundamentally alter its nature and therefore be unreasonable.[57]

Additionally, while the views from the surrounding elevated properties on the east side of Cold River Road would undoubtedly include the Project infrastructure to varying degrees depending on the specific viewing location, the low profile of the Project's infrastructure would not interfere with views above and beyond the Project to the west, which include the Taconic Range.[58]

Lastly, *Halnon* dealt with the proposed installation of an approximately 111-foot-high wind turbine which would have obstructed the neighbors' primary viewshed. The Board stated that if a project developer could not site a wind turbine in a way that would not have such an impact, then the developer should consider using an alternate technology to meet his or her needs.[59] In this case, the proposed project is not a 111-foot-high wind turbine. It is a photovoltaic project, the majority of whose infrastructure will be no more than 12 feet high and will not interfere with long-range views.

For the foregoing reasons, we decline to alter the March 11 Order with respect to whether RRE has taken all generally available mitigating steps to reduce the aesthetic impacts from the Project.

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56. *In re Halnon*, NM-25, Order of 3/15/01 at 24-27.

57. *See* March 11 Order at 88. The benefit to the Neighbors of requiring 200-foot setbacks is not clear because the elevated nature of several of these properties would still result in views over any landscape screening along the Project's perimeter and into the center of the parcel where Project infrastructure would continue to be located.

58. Exh. Pet. MK-2 at 5; Buscher pf. at 10.

59. *In re Halnon*, NM-25, Order of 3/15/01 at 28-29.

IV. CONCLUSION

It is our charge to review renewable energy facilities such as the one proposed in this proceeding to determine whether they will result in undue impacts, and if they will not, whether they will also promote the general good. This is a charge that we must undertake in light of the statutorily legislated policies and goals established by the Vermont Legislature that support the development of renewable-generation infrastructure within the borders of our state.[60] We do not reach this decision lightly, and acknowledge that the Neighbors' views will be altered by the construction of the Project. However, given the evidentiary record developed in this proceeding, the applicable Section 248 criteria, and Vermont's legislated goals and policies in support of the development of in-state renewable energy facilities, nothing in the Neighbors' Reconsideration Motion warrants alteration of the March 11 Order, and the Motion is therefore denied.

SO ORDERED.

60. *See e.g.,* 30 V.S.A. §§ 202a (state energy policy), 8001 (renewable energy goals), 8004 (renewable portfolio standards, and 8005a (standard offer program).

Dated at Montpelier, Vermont, this 6th day of May, 2015.

s/James Volz)
)
)
s/John D. Burke)
)
)
s/Margaret Cheney)

PUBLIC SERVICE BOARD OF VERMONT

OFFICE OF THE CLERK

FILED: May 6, 2015

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and Order.