

Town of Brookfield Planning Commission

Town Clerk's Office

P.O. Box 463 Brookfield, Vermont 05036

276-3352

August 1, 2014

Mrs. Susan M. Hudson, Clerk
Vermont Public Service Board
112 State Street
Montpelier, VT 05620-2701

Re: Revision to Amended Standards and Procedures Order under 30 V.S.A. § 248a

Dear Mrs. Hudson:

This letter constitutes the comments of the Town of Brookfield Planning Commission ("Commission") in response to your memorandum of July 10, 2014 on revising the Public Service Board's ("PSB" or "Board") Amended Standards and Procedures Order issued under 30 V.S.A. § 248a to define the terms "good cause" and "substantial deference." In summary:

- The General Assembly intends that the terms "good cause" and "substantial deference" under 30 V.S.A. § 248a(c)(2) have the effect of giving greater weight to land conservation measures in municipal plans and to the recommendations of local and regional bodies than does the "due consideration" standard under 30 V.S.A. § 248(b)(1).
- The Board should apply Vermont Supreme Court precedent on "substantial deference" in developing these definitions and follow the land conservation measures in the municipal plans and the recommendations of the local legislative body and the local and regional planning commissions unless there a clear and convincing demonstration to the contrary or a compelling indication of error.

Legislative Intent to Afford Greater Weight

The definitions of "good cause" and "substantial deference" must effect the General Assembly's intent in adopting 30 V.S.A. § 248a(c)(2) to give greater weight than under 30 V.S.A. § 248(b)(1) to the land conservation measures in local plans and the recommendations of the local and regional planning commissions and the local selectboard.

The legislature first passed § 248a(c)(2) in 2007, as part of a statute that gave the PSB authority to approve telecommunications facilities that "will promote the general good of the state" 30 V.S.A. § 248a; 2007 Acts and Resolves No. 79, Sec. 17.

At that time, existing law included § 248(b)(1), which pertains to PSB approval of in-state electric generation and transmission and natural gas facilities. Under § 248(b)(1), the standard for local plans and local and regional recommendations was and is “due consideration.” Specifically, the Board must find that the in-state facility:

[W]ill not unduly interfere with the orderly development of the region, with *due consideration* having been given to the recommendations of the municipal and regional planning commissions, the recommendations of the municipal legislative bodies, and the land conservation measures contained in the plan of any affected municipality.

(Emphasis added.)¹

In contrast, when the General Assembly enacted § 248a(c)(2), it specifically used terms that give greater weight than “due consideration.” The legislature required giving local plans and local and regional recommendations “substantial deference” unless there is “good cause to find otherwise.” The statute states:

Unless there is good cause to find otherwise, substantial deference has been given to the land conservation measures in the plans of the affected municipalities and the recommendations of the municipal legislative bodies and the municipal and regional planning commissions regarding the municipal and regional plans, respectively.

The term “deference” implies that the Board will follow the local plan and local and regional recommendations rather than simply consider them. The term means the “[s]ubmission or courteous yielding to the opinion, wishes, or judgment of another.” American Heritage Dictionary of the English Language at 476 (4th ed., 2000).

The Board’s definitions of “good cause” and “substantial deference” for the purpose of § 248a(c)(2) therefore must have the effect of giving greater weight to local plans and local and regional recommendations than does the phrase “due consideration.” The definitions cannot have the effect of allowing those plans and recommendations to be set aside for any reason that is considered to be good, since the effect would be the same as giving the plans and recommendations whatever consideration is thought to be due. Instead, for the language of § 248a(c)(2) to be meaningful and defined consistently with legislative intent, the definitions must require following the plans and recommendations unless a high bar is crossed.

Vermont Supreme Court Precedent

The Board should apply the precedent of the Vermont Supreme Court on “substantial deference” in defining that term and “good cause” for the purposes of §

¹ With respect to a natural gas facility, § 248(b)(1) requires conformance with the regional plan.

248a(c)(2). The Court applies “substantial deference” in a manner that sets a high threshold.

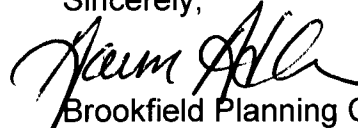
For example, in Travia’s, Inc. v. Dept. of Taxes, 2013 VT 62, the Court stated: “We apply substantial deference to matters within the agency’s area of expertise, and absent a clear and convincing showing to the contrary, a methodology chosen through that expertise is presumed correct, valid and reasonable.” Id., ¶ 18.

Similarly, in applying “substantial deference” to the Commissioner of Labor’s interpretation of workers’ compensation statutes, the Court defers to the Commissioner absent a “compelling indication of error.” Lydy v. Trustaff, 2013 VT 44, ¶ 4.

Using Supreme Court precedent as a model, the Board should adopt the following definitions for purposes of § 248a(c)(2):

1. “Substantial deference” means that the land conservation measures in the local plan and the recommendations of the local legislative body and the local and regional planning commissions are presumed correct, valid, and reasonable and are followed unless good cause is demonstrated otherwise.
2. “Good cause” means:
 - a. a clear and convincing demonstration that a land conservation measure in the local plan or a recommendation of a local legislative body or local or regional planning commission is outweighed by a factor affecting the general good of the state; or
 - b. a compelling indication of error with respect to such a measure or recommendation.

The Commission appreciates the opportunity to provide comments to the Board. E-mail correspondence can be sent to brookfieldplanning@me.com.

Sincerely,

Brookfield Planning Commission
Aaron Adler, Chair
Jeff Girard
Martha Judy
Dan Mason
Clay Purvis, Secretary
William White