

**Carver County Leaders Meeting
July 25, 2017 – 7:30 a.m.
Carver County Justice Center - EOC**



Carver County Board of Commissioners
July 25, 2017

Special Session and Work Session
County Board Room
Carver County Government Center
Human Services Building
Chaska, Minnesota

PAGE

SPECIAL SESSION

- 9:00 a.m. 1. a) **CONVENE**
 b) **Pledge of allegiance**
 c) **Public comments (limited to five minutes)** *Anyone wishing to address the Board of Commissioners on an item not on the agenda may come forward at this time. Please limit your comments to five minutes.*
2. Agenda review and adoption
3. Approve minutes of July 18, 2017, Regular Session..... 1-3
4. Community Announcements
- 9:05 a.m. 5. **GROWTH: Manage the challenges and opportunities resulting from growth and development**
- 5.1 Motion for Stay of Enforcement of the Decision Granting the CUP (PZ20160033) Pending Resolution of the Appeal 4-39
- 10:05 a.m. **ADJOURN SPECIAL SESSION**

WORK SESSION

- 10:05 a.m. A. **CONNECTIONS: Develop strong public partnerships and connect people to services and information**
1. CarverLink Fiber Network Update 40
2. Election Task Force 41

11:15 a.m. **BOARD REPORTS**

David Hemze
County Administrator

UPCOMING MEETINGS

July 26, 2017	7:00 p.m. Carver County Township Association Meeting
August 1, 2017	9:00 a.m. Board Meeting
August 8, 2017	No Meeting
August 15, 2017	4:00 p.m. Board Meeting
August 22, 2017	9:00 a.m. Board Work Session
August 29, 2017	No Meeting

A Regular Session of the Carver County Board of Commissioners was held in the County Government Center, Chaska, on July 18, 2017. Chair Tim Lynch convened the session at 4:03 p.m.

Members present: Tim Lynch, Chair, James Ische, Vice Chair, Gayle Degler, Randy Maluchnik and Tom Workman.

Members absent: None.

Under public comments, Frankie Vassar, questioned when he would receive payment related to his property and the County Road 61 project. The Board requested the County Administrator to follow up on his concern.

Degler moved, Maluchnik seconded, to approve the agenda. Motion carried unanimously.

Ische moved, Workman seconded, to approve the minutes of the July 11, 2017, Regular Session. Motion carried unanimously.

Community announcements were made by the Board.

Maluchnik moved, Degler seconded, to approve the following consent agenda items:

Approved the renewal of the contract for school resource officers in District 110 and 288 for the 2017/2018 school year.

Appointed Commissioner Degler to serve on the Metro Mobility Task Force representing Carver County and the cities of Chaska and Chanhassen.

Approved Sheriff Olson's request to promote a sergeant effective July 10, 2017, and maintain a one sergeant over compliment until September 4, 2017.

Approved the one to four day temporary on sale liquor license for Augusta Ball Club, Inc., for Saturday, October 7, 2017.

Ratified MnCCC IFS software contract with TriMin and Aumentum software contract with Thomson Reuters.

Approved the 2018 retiree health insurance monthly cafeteria contributions, in accordance with County policy, eligible retirees selecting family coverage would receive \$1,450 per month toward their insurance, employee + spouse would receive \$1,175, employee + children would receive \$850 and those selecting single coverage would receive the lesser of the single premium amount or \$690 per month.

Approved the 2018 benefits for non-bargaining employees as outlined including 2018 monthly cafeteria contribution amounts for full-time benefit eligible non-bargaining employees based on the employee's election of health insurance with \$690.00 for single, \$1,175.00 for employee + spouse, \$850.00 for employee + child(ren), \$1,450.00 for family, and \$150.00 for waiver; maintaining the

\$250.00 per month toward the cost of single health insurance for employees budgeted at least half-time but less than 0.8 FTE; and providing HRA/VEBA contributions in the amounts of \$750/\$1,500 and contributions for those electing the HSA High Deductible Health Plan option in the amounts of \$1,100/\$2,000 as described.

Approved Employee Relations to update the Personnel Policy Manual, Section D-2, Vacation & Paid Time Off (PTO) policy language in accordance with the changes outlined, modifying the annual PTO rollback effective date, and changing the PTO cash-out program to require the taking of 40 cumulative, rather than 40 consecutive, hours of PTO during the payroll year prior to cashing out PTO in accordance with their election.

Resolution #51-17, Defining 2017 Non-Bargaining Compensation.

Resolution #52-17, Defining 2018 Non-Bargaining Compensation.

Reviewed July 18, 2017, Community Social Services' actions/Commissioners' warrants in the amount of \$460,851.03.

Motion carried unanimously.

Sonja Wolter, Risk Management, introduced Jane Hennagir with MCIT and stated Ms. Hennagir would be reviewing MCIT's annual report with the Board.

Hennagir explained MCIT was not an insurance company but a joint powers that started when counties found it difficult to get worker's compensation coverage. She stated public entities pool resources to provide property, casualty and worker's compensation coverage and pointed out the benefits of pooling. She noted the development to conclude MCIT's partnership with its principal services provider and bring all services in house.

She highlighted the coverage provided as well as claim frequency and severity. She noted workers compensation is the only piece experience rated and Carver County came in less than expected and with rates going down. She stated reinsurance was an important piece and property and casualty is rebid every year.

Hennagir pointed out dividends are paid when it is actuarially sound and fiscally prudent. She noted a loss control consultant with a law enforcement background was added and he would be working with the Sheriff Departments in preventing claims. She stated they also provide training webinars, offer an employee assistance program and defensive driving training.

She thanked the County for their commitment and continued partnership.

Ische moved, Degler seconded, to recess as the County Board and convene as the Carver County Regional Rail Authority. Motion carried unanimously.

Martin Walsh, Parks, appeared before the Rail Authority to review the proposed Veterans Memorial on railroad property in Mayer. He highlighted a computer rendering of the monument's appearance

and the changes made from the previous plan. Walsh pointed out the groundbreaking held last year and the revised site plan with the increased size of the paver garden area.

He reviewed the current financial status and reviewed the work to be done under three phases. He identified the maintenance to be provided and approvals they have received to date. Walsh stated they are working on the final agreement and will be bringing that back for approval.

Stan Heldt introduced members of the Veterans Memorial Committee in attendance. He reviewed the progress made at the site and their fundraising efforts. He explained who may purchase pavers and pointed out their website address for further information.

The Board expressed consensus for staff to finalize the agreement.

Ische moved, Degler seconded, to adjourn as the Rail Authority and reconvene as the County Board. Motion carried unanimously.

David Frischmon, Property and Financial Services, requested the Board approve reorganization of the Property & Financial Services Department. He reviewed the history and the goal to put in place a structure to handle land transactions. He noted in 2015 the surveyor/recorder were combined and, in 2016, the surveyor was moved to Public Works and he became the interim County Recorder. He pointed out the staff transitions that have taken place recently and increased efficiencies. He reviewed the current and proposed org chart and the goal for one stop land transactions.

He highlighted the benefits to both units and proposed realignment of staff. He suggested this would improve the customer experience, was designed to be more efficient and should speed up the process.

Maluchnik moved, Ische seconded, to create a “one-stop” Land Records Department that processes land and tax records by combining the a) Workload and 3.0 FTEs in Taxpayer Services Land Administration; b) Deed and mortgage processing currently being done by Taxpayer Services Elections and Customer Service staff and c) Workload and 5.0 FTEs in Property Records; to eliminate the Land Administration Supervisor 1.0 FTE and replace with a Land Records Manager 1.0 FTE and related budget amendment. Degler, Ische, Lynch, Maluchnik voted aye. Workman voted nay. Motion carried.

Ische moved, Degler seconded, to adjourn the Regular Session at 5:20 p.m. Motion carried unanimously.

David Hemze
County Administrator

(These proceedings contain summaries of resolutions/claims reviewed. The full text of the resolutions and claims reviewed are available for public inspection in the office of the county administrator.)

Carver County Board of Commissioners Request for Board Action



Agenda Item:

Motion for Stay of Enforcement of the Decision Granting the CUP (PZ20160033) Pending Resolution of the Appeal

Primary Originating Division/Dept: <input type="text" value="Attorney"/>	Meeting Date: <input type="text" value="7/25/2017"/>
Contact: <input type="text" value="Mark Metz"/> Title: <input type="text" value="Carver County Attorney"/>	Item Type: <input type="text" value="Regular Session"/>
Amount of Time Requested: <input type="text" value="60"/> minutes	Attachments: <input checked="" type="radio"/> Yes <input type="radio"/> No
Presenter: <input type="text" value="Matthew Duffy and Mae Beele"/> Title: <input type="text" value="Attorneys for Petitioners, Charles"/>	
Strategic Initiative: <input type="text" value="Growth: Manage the challenges and opportunities resulting from growth and development"/>	

BACKGROUND/JUSTIFICATION:

Charles P. Becklund, Pearl A. Becklund et al. ("Petitioners") filed a Petition for a Writ of Certiorari with the Minnesota Court of Appeals on January 20, 2017, appealing the County's decision to grant a Conditional Use Permit (PZ20160033) to NextEra Energy Resources, LLC and DG Minnesota CSG 2, LLC. The appeal is currently pending with the Minnesota Court of Appeals.

Petitioners learned in May 2017 that DG/NextEra started staking boundary lines and intends to start grading the property in the near future. On June 6, 2017, Petitioners served the County Attorney with a Notice of Motion and Motion for Stay of Enforcement of the Decision Dated November 22, 2016 Granting the Conditional Use Permit pending Resolution of the Appeal in A17-0099. They are requesting that the matter be heard by the Carver County Board of Commissioners in accordance with the Minnesota Rules of Civil Appellate Procedure and asking that the CUP be suspended or "stayed" which would prevent the solar company from beginning construction at the site until the Minnesota Court of Appeals reaches their decision, likely at the end of 2017.

The Petitioners and DG Minnesota are both represented by attorneys in this matter. Attorneys for each party have previously submitted written legal arguments for the Board's consideration and those documents are also attached to this RBA. Because the issues are solely legal and procedural in nature, it is recommended that each attorney be limited to 15 minutes each to present their argument and that no other public comments be taken.

Staff is recommending denial of the motion due to the motion being improper. Even if the motion was proper, staff is recommending that the motion should be denied because:

1. implementation of the project will not permanently alter the character of the area;
2. there are mechanisms in place which would assure that reestablishment of pre-construction conditions would occur in the event the Court of Appeals reverses the issuance of the CUP; and
3. the negative potential impact to DG Minnesota if it were prevented from beginning implementation of the project far outweighs the benefits to the Petitioners and/or the public.

ACTION REQUESTED:

Motion to deny Petitioner's "Motion for Stay of Enforcement of the Decision Dated November 22, 2016 Granting the Conditional Use Permit Pending Resolution of the Appeal in A17-0099" and to adopt and execute the attached proposed findings of fact, conclusions and order.

In the alternative, direct staff to prepare findings of fact, conclusion and order, consistent with the Board's decision.

FISCAL IMPACT: <input type="text" value="None"/> <i>If "Other", specify:</i> <input type="text"/>	FUNDING County Dollars = <input type="text"/> <input type="text"/>
FTE IMPACT: <input type="text" value="None"/>	Total <input type="text" value="\$0.00"/>
<input checked="" type="checkbox"/> Insert additional funding source	

Related Financial/FTE Comments:

Office use only:

RBA 2017- 4875



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June 6, 2017

VIA U.S. MAIL and EMAIL

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Re: Charles P. Becklund, et al. v. DG Minnesota CSG 2, LLC and Carver County, Minnesota
By and through the Carver County Board of Commissioners
Appellate Court File No. A17-0099
Our File No.: 16273-1

Dear Counsel:

Enclosed herein and served upon you please find Petitioners' Notice of Motion and Motion for Stay of Enforcement of the Decision Dated November 22, 2016 Granting the Conditional Use Permit Pending Resolution of the Appeal in A17-0099.

Very truly yours,

MONROE MOXNESS BERG PA

A handwritten signature in black ink that reads "Mae J. Beeler".

Mae J. Beeler
Attorney at Law

/jmw
Enclosures

cc: Clients

**CARVER COUNTY
BOARD OF COMMISSIONERS**

<p>Charles P. Becklund, et al.,</p> <p style="text-align:right">Petitioners,</p> <p>v.</p> <p>DG Minnesota CSG 2, LLC and Carver County, Minnesota by and through the Carver County Board of Commissioners,</p> <p style="text-align:right">Respondents.</p>	<p>PETITIONERS' NOTICE OF MOTION AND MOTION FOR STAY OF ENFORCEMENT OF THE DECISION DATED NOVEMBER 22, 2016 GRANTING THE CONDITIONAL USE PERMIT PENDING RESOLUTION OF THE APPEAL IN A17-0099</p>
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TO: Carver County, Minnesota by and through the Carver County Board of Commissioners and its attorneys Jay T. Squires, Esq. and Michael J. Ervin, Esq., Rupp, Anderson, Squires & Waldspurger, 333 South Seventh Street, Suite 2800, Minneapolis, MN 55402, Mark Metz, Carver County Attorney, 604 East Fourth Street, Chaska, Minnesota 55318 and DG Minnesota CSG 2, LLC, by and through its attorney Todd J. Guerrero, Esq., Kutak Rock, LLP, 60 South Sixth Street, Suite 3400, Minneapolis, MN 55402.

PLEASE TAKE NOTICE THAT Petitioners Charles P. Becklund, Pearl A. Becklund, Jeffrey L. Becklund, Debra Becklund, Lloyd Bratland, David Brockpahler, Philip D. Burandt, Jr., Sarah L. Becklund, Phil Ditsch, Mikal J. Hendrickson, Kerry Hendrickson, Mike A. Hilk, Mitchell Kelzer, Ty P. Lehrke, Kristin M. Lehrke, Delphine E. Luebke, Frank Long, Stephen Wayne Lundstrom, Mark Meyerhoff, Jared Sandeen. Holly Sandeen, Sharon L. Sievers, Daniel P. Sullivan, Jeff Swanson, Todd T. Weinzierl, Johanna J.

Bremer, and Gaylen Thomlinson (“Petitioners”) bring the following motion for a hearing before the Carver County Board of Commissioners, Carver County, Carver County Government Center Human Services Building, 602 East 4th Street Chaska, Minnesota 55318, on June 20, 2017, at 4:00 p.m. or as soon thereafter as counsel can be heard.

MOTION

Under Minnesota Rules of Civil Procedure Rule 62.03 and Minnesota Rules of Civil Appellate Procedure Rule 115.03 Subd. 2(b) and Rule 108.02 Subd. 1(a), Petitioners seek a stay of the enforcement of the decision pending resolution of the appeal through the Minnesota appellate courts in Court File No. A17-0099. In accordance with the rules, Petitioners must first move the Carver County Board of Commissioners (the “Board”) for the stay of enforcement of the November 22, 2016 decision granting the conditional use permit to NextEra Energy Resources, LLC (“Next Era”) and DG Minnesota CSG 2, LLC (“DG”) (the “Decision”) to build a 22-acre solar project (the “Solar Project”). Petitioners filed a writ of certiorari with the Minnesota Court of Appeals, and served it on the parties on January 23, 2017 (the “Appeal”). The County transmitted the Index of Record to the Court in May 2017, which comprises the County’s basis for the Decision. (*See* County’s Index of Record attached hereto as Exhibit A)

In deciding whether to grant a stay, Minnesota courts balance the interests of the Petitioners, the public, and NextEra and DG¹ (collectively “DG/NextEra”) in maintaining the status quo. Petitioners seek to maintain status quo by staying the construction of DG/NextEra’s Solar Project pending the Minnesota appellate courts’ review of the Decision. The substantial interest of the Petitioners and the public in maintaining the status quo during the pendency of the appellate review outweighs any impact DG/NextEra. In contrast, if DG/NextEra is allowed to begin construction and the County’s Decision is overturned, there is significant impacts to Petitioners and exposure to the County and the public in terms of expenses if DG/NextEra fails to restore the site to its current condition (prime farmland and pasture) if Petitioners prevail on their appeal.

FACTS

Project Background

Petitioners own properties adjacent to the Solar Project. (*See* DOC 3:006–08) The Solar Facility is a 4.4 megawatt facility consisting of 17,604 solar array panels mounted on a fixed steel racking system. (ADD3 at ¶ 5) The racking system sits about 8 feet above grade. (*Id.*) Each solar array is about 3 feet wide by 6 feet tall. (*Id.*) It is not clear from the CUP application

¹ DG is a subsidiary of NextEra. (DOC 01:001)

materials whether the solar arrays will exceed the height of the racking system (*See id.*) If so, each solar array will be up to 14 feet tall. (*See id.*) Surrounding the Solar Project are agricultural uses, including animal agricultural operations, farms, farmsteads, pastures, rural residential housing, and Buck Lake. (DOC 20:002)

Applicant submitted the CUP application to the County on May 26, 2016. (DOC 1:010–76) Following review of the CUP Application, the Watertown Board recommended *denial* of the Application. (DOC 3:012–14) The Watertown Board reasoned that the CUP was not allowed under section 152.050 of the County Zoning Ordinance and did not meet the long-term comprehensive planning for the area. (*Id.*)

The County’s Planning Commission reviewed the Application next. (DOC 2:015-020) The County Planning Commission held public meetings on June 21, 2016, July 19, 2016 and August 16, 2016. (DOC 2:001, 015–20; DOC 5:001–010; DOC 8:001, 006–17) Watertown Township continued its strong opposition to the CUP application during the Planning Commission meetings and hearings, stating that the proposed use was not allowed under the Carver County’s Zoning Ordinance and it did not comply with the comprehensive guide plan for the area. (DOC 3:013–14; DOC 4:007 at ¶ 25A.-D)

Several adjacent property owners and other parties also submitted information and testimony demonstrating that the Solar Facility would be detrimental to the use and enjoyment of the adjacent properties, was not compatible with the uses and long-term planning for the area, and would be harmful to the health, safety and general welfare of the immediate area. (DOC 8:001; DOC 9:074–86, 091–93, 094, 095, and 096–97) Fifty-four local residents signed a petition opposing the Solar Project. (DOC 9:068–73) These residents submitted numerous concerns regarding the Solar Project, including the negative impacts on the use and enjoyment of their properties, on Buck Lake Stables’ (“BLS”) business, and on the rural and agricultural aesthetics of the area, the runoff from the site flooding neighboring parcels, and the incompatibility with the current and long-term uses of the area. (*Id.*)

Following the public hearing on August 16, 2016, the Planning Commission voted 3-3 with no recommendation of the CUP to the Board. (DOC 10:001 at ¶ 3) On September 6, 2016, the Board held a public hearing on the CUP. (DOC 11:001–02, 008–12) At the conclusion of this public hearing, the five-member Board voted *unanimously* to authorize County staff to prepare findings for *denial* of the CUP. (DOC 11:012)

On September 20, 2016, the Board voted to close a portion of the meeting to the public. (DOC 13:004) The stated purpose of this closed session was that “the potential for a threat of litigation . . . necessitated the Board to

go into closed session.” (DOC 16:004) The Board then reconvened and voted 4-1 to adopt a motion “to continue final decision” on the CUP Application “to a date not to exceed 60 days.” (DOC 13:006)

This 60-day extension delayed consideration of the CUP until after the November 8, 2016 general election. (See DOC 20:002 at ¶ 3) Three of the five Board members were up for re-election. Each of those members were re-elected.²

Two days after the general election, on November 10, 2016, the Board reconsidered the CUP at a public meeting. (DOC 16:001) The adjacent landowners and Watertown Township Supervisor all opposed the CUP. (DOC 16:003–05) After the public hearing closed, the Board voted 3-2 to adopt findings of fact to *approve* the CUP. (DOC 16:006) On November 22, 2016, the Board adopted Findings of Fact to approve the CUP, stating the “Board has considered all of the factors required by 152.251 of the Carver County Code and finds that all are either true, in this case, or that they can be mitigated by conditions placed on the permit.” (DOC 18:005; DOC 20:006 at ¶ 25)

² See www.co.carver.mn.us/government/county-board-of-commissioners/commissioner-biographies.

Procedural Background

Petitioners filed a Petition for a Writ of Certiorari with the Minnesota Court of Appeals on January 20, 2017, appealing the County's decision to grant a CUP to DG/NextEra. Petitioners filed their opening brief on May 9, 2017. Under the applicable appellate rules, the County had until June 5, 2017, to file a responsive brief. All briefing should be completed by June 15, 2017.

Petitioners learned in May 2017 that DG/NextEra started staking boundary lines and intends to start grading the Property in the near future. This motion for a stay follows.

ARGUMENT

Minnesota allows an agency or governmental body whose decision is subject to certiorari review to “stay enforcement of the decision in accordance with Rule 108,” which governs supersedeas bonds and stays. Minn. R. Civ. App. P. 115.03, subd. 2(b). In determining whether or not to grant a stay pending appeal the

governmental unit must balance the appealing party's interest in preserving the status quo, so that effective relief will be available if the appeal succeeds, against the interests of the public or the prevailing party in enforcing the decision and ensuring that they remain ‘secure in victory’ while the appeal is pending.

DRJ, Inc. v. City of St. Paul, 741 N.W.2d 141, 144 (Minn. Ct. App. 2007).

Therefore, a stay pending an appeal will be granted when the appealing party's

interest in maintaining the status quo during the pendency of the appeal outweighs the interests of the prevailing party in enforcing the decision. The status quo is pristine farm and agricultural land. The motion for the stay must be granted because maintaining the status quo is in the best interests of the Petitioners as well as the general public and greatly outweighs any impacts to DG/NextEra.

I. Maintaining the status quo is in the best interests of Petitioners.

The rural and agricultural setting of the Property and adjacent properties will be permanently altered if the Solar Project is allowed to proceed. Allowing construction of the Solar Project to proceed during the pendency of the Appeal will permanently and dramatically alter this rural landscape and will detrimentally impact the adjacent properties in the process, including the equestrian facility immediately to the east and the adjacent homeowners. Without the stay, this Property and surrounding area will be permanently damaged by construction activities.

Maintaining the status quo is also compatible for the surrounding area. (DOC 1:001 at ¶ 1; DOC 1:005 at ¶14) The properties immediately adjacent to the Property are zoned agricultural and rural residential and comprised of single-family residential homes. (DOC 1:001 at ¶ 1; DOC 1:005 at ¶ 14) The 2030 Comprehensive Guide Plan for the area emphasizes the rural nature of the area, including continuing agricultural and residential uses. (DOC 3:016-

19) Since the early 1900s, the Property has been farmed. Granting a stay would simply perpetuate the use that has existed for more than 100 years.

Additionally, immediately adjacent to the Solar Project is BLS, an equestrian facility, servicing area riders, boarders, and trainers. During the CUP process, BLS clients submitted sixteen letters opposing the Solar Project and detailing its detriment to the use and enjoyment of the BLS property. (DOC 9:091–93, 095, 096–97; DOC 17:001–14) Specifically, the Solar Project raises health concerns for the horses, safety concerns for the riders, and ruins the agricultural and rural aesthetics of the area that brought riders to BLS. (DOC 17:004, 007, and 011) The Solar Project has negatively impacted BLS’s business as boarders have already left and will continue to do so as construction continues. (DOC 8:013; DOC 9:091–93; DOC 11:010; DOC 16:003; DOC 18:002 and 004)

These detrimental impacts to the Petitioners greatly outweigh any impacts to DG/NextEra. Accordingly, the stay must be granted to preserve the status quo pending the appeal.

II. Maintaining the status quo is in the best interests of the public.

The public’s interest will be best served if the status quo of the case is maintained because of the costs associated with decommissioning and the Solar Project’s location in an environmentally sensitive area.

A. *There is no certainty that DG/NextEra will restore the Solar Project site to its current condition if the appeal is successful.*

Should the CUP be reversed on appeal, a party (whether that is DG, NextEra, the Property owner or someone else) will have to decommission and remove all equipment and restore the Property to its current condition.

DG/NextEra estimates the cost of decommissioning the Solar Project is at least \$140,839, including the costs of removing fences, removing equipment, and site restoration. (*See* DOC 1:061–63). DG pledged only \$50,000 to cover these decommissioning and site reclamation costs. (*Id.*). This leaves more than \$90,000 of the decommissioning and restoration costs unsecured and there is no clear indication as to which party would be required to make up the shortfall. (*Id.*) Without that guarantee, the current property owner could be required to pay the shortfall or, worse yet, the Carver County taxpayers. (*Id.*)

For a similar, 5 MW AC solar project in Belle Plaine, Minnesota, NextEra pledged \$153,580 in security for decommission costs.³ Similarly, Scott County required another affiliated entity of DG/NextEra to pledge security in the amount of 125% of the estimated cost of decommissioning as

³ http://www.belleplainemn.com/sites/default/files/images/Attachment_2_Devine-Johnson_IUP_Application_Submittal.pdf at Ex. F.

determined by Scott County.⁴ It is not clear why Carver County did not require more for decommissioning costs, but the \$50,000 will not suffice.

Moreover, if the Solar Project permit is reversed after DG/NextEra begins construction, there is no indication who will be the responsible party⁵ for the remaining unsecured costs (\$90,000) to restore the site. (*Id.*) TruNorth Solar, LLC (“True North”) is the tenant on the Lease. (*See* DOC 1:004; *see also* DOC 1:039–41) As a result, NextEra/DG has no possessory interest in property upon which the Solar Project will be located. (*Id.*) And then only sometime “prior to groundbreaking” DG will become the tenant. (*See id.*) DG is a subsidiary of NextEra, a Florida limited liability company. (DOC 1:001 at ¶ 2) There is no information about TruNorth in the record other than it is “working in partnership” with DG and NextEra. (DOC 01:001 at ¶ 3; *see also* DOC 1:039–42 (a memorandum of lease but not the lease itself)) Bruce Lenzen, the Property owner, signed a “long term lease

⁴ https://www.scottcountymn.gov/AgendaCenter/ViewFile/Minutes/_08082016-417

⁵ The documents submitted in support of the CUP fail to adequately disclose or address who would be responsible party for decommissioning the equipment and restoring the Site. The timing of the assignment and some vague reference to “prior to groundbreaking” make it entirely unclear which party is responsible for restoring the site. (DOC 1:004 at ¶ 8) Adding to that concern, the entities involved are limited liability companies, meaning there is no personal liability or obligation for those company members to ensure that the site is restored. Indeed, the Minnesota Secretary of State website reveals that the name “DG Minnesota CSG” is used for ten different limited liability companies (DG Minnesota CSG 1–10, LLC).

agreement with TruNorth.” (DOC 1:004 at ¶ 8; *see also* DOC 1:039–42). “Prior to groundbreaking,” TruNorth apparently will assign the Lease to DG/NextEra. (DOC 1:004 at ¶ 8) Other than merely referencing this “assignment,” there is nothing in the record about the assignment and only then a vague reference as to the timing of the assignment. (*See id.*) The shroud of mystery regarding the obligations of the parties involved and who would be responsible for restoring the site if the appeal is successful favor maintaining the status quo. (*See id.*)

Moreover, there is no proof of either NextEra’s or DG’s financial wherewithal in the record. There is a real concern that the current property owner, or worse the County or general public, will be responsible for decommissioning and restoring the site if the appeal is successful. (*See* DOC 01:005 at ¶ 16) Further frustrating any efforts to ascertain who might be a responsible party is the fact that only a copy of the Memorandum of Lease is in the record. (DOC 1:039–42) Accordingly, the Property owner or the County could be left chasing an LLC with no assets or an empty shell to recover costs and expenses associated with decommissioning and restoring this site.

The significant and unsecured costs of decommissioning and restoring the site following a successful appeal could result in the Property owner or County taxpayers covering these significant costs. For these reasons, maintaining the status quo is in the best interest of the public.

B. *DG/NextEra failed to address the location within a Shoreland Overlay District, which strictly prohibits industrial uses.*

The public is also protected by maintaining the status quo because the Solar Project is located in an environmentally sensitive area due to its proximity to Buck Lake, a Minnesota Department of Natural Resources (“DNR”) inventoried lake (10-99P). (DOC 1:001 at ¶ 1) Despite several concerns expressed by the public relating to the Solar Project’s location, the CUP and permitting process failed to take into account the Solar Project’s impact on an environmentally sensitive area—the Shoreland Overlay District. (DOC 1:001–76) During the CUP process, DG/NextEra failed to address the impacts to this environmentally sensitive area or the fact that industrial uses are prohibited within Shoreland Overlay Districts. Carver County Zoning Ordinance (“Ord.”) § 152.115 (prohibited uses within Shoreland Overlay Districts). (See DOC 1:001–76) By its own admission, DG/NextEra confirmed that the Solar Project is either a commercial or industrial use. (DOC 12:027)

The DNR regulates shoreland property and defines “industrial use” as “the use of land or buildings for the production, manufacture, warehousing, storage, or transfer of goods, products, *commodities*, or other wholesale items.” Minn. R. 6120.2500 (emphasis added). Minnesota’s appellate courts have consistently described electricity as a commodity. *N. States Power Co. v.*

Minn. Pub. Utils. Comm'n, 344 N.W.2d 374, 382 (Minn. 1984) (“We acknowledge that electricity is a fungible commodity.”); *Minn. Mun. Power Agency v. City of St. Peter*, 433 N.W.2d 463, 467 (Minn. Ct. App. 1988) (“[E]lectricity is an essential commodity[.]”). Accordingly, the Property will be used to produce and/or manufacture a commodity—electricity—and thus constitutes an “industrial use.” Minn. Admin. R. 6120.2500. Because the Solar Project is an “industrial use,” the County Zoning Ordinance prohibits it in Shoreland Overlay Districts. Ord. § 152.115. Inherent in this prohibition is the fact that industrial uses have a greater potential to detrimentally impact the shoreland areas and are therefore strictly prohibited within those areas. *See id.*

The public is also protected by maintaining the status quo because the Property is in a rural area that is predominantly agricultural, with related uses, and is actively farmed. (DOC 1:001 at ¶ 1; DOC 1:005 at ¶ 14) The Property consists of prime farmland, which is land that has “the best combination of physical and chemical characteristics for producing food, feed, forage, fiber, and oilseed crops.” (DOC 1:047–48) The grading and project construction will disturb the soil and displace the farm, risking permanent damage to the delicate eco-system that the farm supports and that of the surrounding area. (*See* DOC 1:001 at ¶ 1)

Because the CUP application and permitting process failed to address the Shoreland Overlay District and the fact that the County Zoning Ordinance prohibits industrial uses within that district, the environment and the health, safety and general welfare of the public is jeopardized by the Solar Project. Accordingly, to protect the public during the pendency of the appeal, staying the construction of the Solar Project and maintaining the status quo greatly outweighs any impact to DG/NextEra.

III. Any impacts to DG/NextEra are outweighed by protecting Petitioners and the public.

The requested stay would have minimal impact on DG/Next Era. During the pendency of the appeal, nothing prevents the Property owner from using the Property for farming and pasture. The current and previous owners have used this property in that manner for more than 100 years. Moreover, DG/NextEra is not accruing any Lease payments because DG is not the tenant until the Lease is assigned to DG “prior to groundbreaking.” (DOC 1:004 at ¶ 8) Further, DG/NextEra have not sought review from the Carver County Planning and Water Management Department or Carver Soil & Water Conservation District or additional permits from the County. (See DOC 1:005–06 at ¶ 21) This review and permitting process will take approximately three months. Finally, DG/NextEra have incurred minimal construction costs related to the Solar Project. As of the date this motion

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

**AFFIDAVIT OF SERVICE
VIA U.S. MAIL and EMAIL**

Re: Charles P. Becklund, et al. v. DG Minnesota CSG 2, LLC and Carver County, Minnesota
By and through the Carver County Board of Commissioners
Appellate Court File No. A17-0099

Jill M. Woitas, of the City of Circle Pines, County of Anoka, in the State of Minnesota, being duly sworn, says that on the 6th day of June, 2017, she served the following:

- Petitioners' Notice of Motion and Motion for Stay of Enforcement of the Decision Dated November 22, 2016 Granting the Conditional Use Permit Pending Resolution of the Appeal in A17-0099.

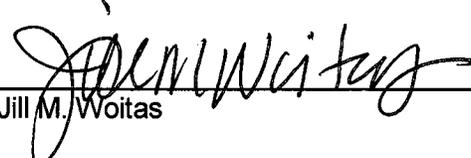
upon the following:

Jay T. Squires, Esq.
Michael J. Ervin, Esq.
Rupp, Anderson, Squires & Waldspurger
333 South Seventh Street, Suite 2800
Minneapolis, MN 55402
Email: jay.squires@raswlaw.com

Todd J. Guerrero
Kutak Rock, LLP
60 South Sixth Street, Suite 3400
Minneapolis, MN 55402
Email: todd.guerrero@KutakRock.com

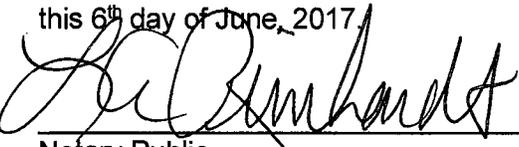
Mark Metz
Carver County Attorney
Government Center – Court Administration
604 East Fourth Street
Chaska, MN 55318
Email: mmetz@co.carver.mn.us

on by email and U.S. Mail by mailing a true and correct copy therein, enclosed in an envelope, postage prepaid, depositing the same in the post office in Minneapolis, Minnesota, to the address shown above.



Jill M. Woitas

Subscribed and sworn to before me
this 6th day of June, 2017.



Notary Public



**CARVER COUNTY
BOARD OF COMMISSIONERS**

<p>Charles P. Becklund, et al.,</p> <p style="text-align:right">Petitioners,</p> <p>v.</p> <p>DG Minnesota CSG 2, LLC and Carver County, Minnesota by and through the Carver County Board of Commissioners,</p> <p style="text-align:right">Respondents.</p>	<p>RESPONDENT DG MINNESOTA CSG 2, LLC'S OPPOSITION TO PETITIONERS' MOTION FOR STAY OF ENFORCEMENT OF THE DECISION DATED NOVEMBER 22, 2016 GRANTING THE CONDITIONAL USE PERMIT PENDING RESOLUTION OF THE APPEAL IN A17-0099</p>
--	---

TO: Charles P. Becklund, et al., and their attorneys Aaron R. Hartman, Matthew S. Duffy, and Mae J. Beeler, Monroe Moxness Berg PA, 7760 France Avenue South, Suite 700, Minneapolis, Minnesota 55435; Carver County, Minnesota by and through the Carver county Board of Commissioners and its attorneys Jay T. Squires and Michael J. Ervin, Rupp, Anderson, Squires & Waldspurger, 333 South Seventh Street, Suite 2800, Minneapolis, Minnesota 55402.

Respondent/Applicant DG Minnesota CSG 2, LLC provides this memorandum in opposition to petitioners' June 6, 2017 Motion for a Stay.

INTRODUCTION

Petitioners/landowners ask this board to stay enforcement of the conditional use permit it issued to Applicant, alleging that Mr. Lenzen's property and "surrounding area" will be "permanently damaged by construction activities" if Applicant is allowed to proceed with construction while petitioners' appeal is pending before the court of appeals. As explained below, this matter is not properly before this tribunal because petitioners have failed to satisfy conditions precedent to bringing their motion. Moreover, because petitioners will not suffer irreparable harm as a result of Applicant's construction activities,

and because a stay would cause great harm to Applicant, the petitioners' request should be denied. To the extent the board is inclined to grant any stay, it may do so only upon petitioners posting a supersedeas bond or other form of security in an amount appropriate to cover the costs and associated economic harm Applicant would suffer as a result of the stay.

DISCUSSION

A. Petitioners' Motion Should Be Dismissed For Lack Of Jurisdiction.

As a threshold matter, because the motion fails to follow the appropriate rules, the board should summarily dismiss it. Rule 108.02, subd. 1 of the Minnesota Rules of Civil Appellate Procedure, governing stays, and the rule on which petitioners' motion is based, states as follows:

A party seeking any of the following relief must move first in the trial court:¹

- (a) a stay of enforcement of the judgment or order of a trial court pending appeal,
- (b) *approval of the form and amount of security*, if any, to be provided in connection with the stay; or
- (c) an order suspending, modifying, restoring or granting an injunction while an appeal is pending.

(Emphasis added). Subdivision 2 goes on to state in pertinent part as follows:

Except as to cases in which a governmental body is the appellant . . . a [board] may grant relief described in subdivision 1 . . . *if the appellant provides security in a form and amount* that the trial court approves.

¹ According to Rule 101.02, "trial court," means the court or agency, including municipal board, whose decision is being reviewed at the appellate courts.

(Emphasis added). Subdivision 3 provides that the security may be a supersedeas bond, letter of credit, cash, or other form as appropriate under the circumstances, but states that the “*appellant bears the burden of demonstrating the adequacy of any security to be given,*” and no stay is effective until the security required is properly filed. And subdivision 4 states: “[i]n all cases, the amount of security must be fixed at such amount as the trial court determines will *preserve the value of the judgment or order* to the respondent during the pendency of appeal.” (Emphasis added).

Here, petitioners chose to ignore their unambiguous obligation to post security in an amount that preserves the value of the board’s CUP order to Applicant. Satisfaction of this condition precedent is foundational – without doing so, petitioners may not avail themselves of this tribunal nor seek the requested relief. Accordingly, the board should decline to even consider petitioners’ motion unless and until such time as petitioners properly address the rule 108 requirements.

B. Applicant’s Interests In Proceeding Under The CUP Far Outweighs Petitioners’ Interest In Preserving the Status Quo.

If the board does not dismiss the motion outright for lack of jurisdiction, it should nonetheless deny the motion.

In deciding whether to grant a stay or not of a conditional use or similar permit, the board should examine whether a stay is necessary to protect petitioners/appellants from irreparable or serious injury in the event of a successful appeal versus whether the appellee (here, Applicant) will sustain irreparable or disproportionate injury in the event the appeal is *unsuccessful*. *Webster v. Hennepin County*, 891 N.W.2d 290, 292 (Minn. 2017). A stay

is improper where adequate relief will be otherwise available to an appellant if its appeal succeeds, especially where such stay would eviscerate the prevailing party's right to remain "secure in victory" if the appeal does not succeed. *DRJ, Inc. v. City of St. Paul*, 741 N.W.2d 141, 144, (Minn. Ct. App. 2007).

Here, there is no reason for a stay because petitioners are not at risk for *any* harm should their appeal succeed. This is because if petitioners are successful in their appeal and Applicant is otherwise unable to operate the solar facility, Applicant will promptly decommission the project and restore Mr. Lenzen's property to its original condition. In stark contrast, a stay will impose significant and permanent harm on Applicant in the event petitioners' appeal fails to succeed.

1. Petitioners Have No Risk As There Is Sufficient Assurance That Applicant Will Restore Mr. Lenzen's Property In The Event Petitioners' Appeal Is Successful.

As support for their motion, petitioners assert that allowing Applicant to proceed with construction of its LSES will "permanently and dramatically" damage Mr. Lenzen's property "and surrounding area," and therefore maintaining the "status quo" during the pendency of the appeal is in the "best interest of petitioners." Not only do petitioners' assertions fundamentally misrepresent the law with respect to stays, they also misstate the facts.

The county has accepted Applicant's decommissioning plan that provides adequate financial assurance that any necessary decommissioning will be accomplished within industry standards. Thus the county has already held, as a matter of law, that restoration of the property to *status quo ante* is both required and possible. Stated differently, the very

same tribunal that petitioners now ask to grant a stay to prevent irreparable harm has already found that irreparable harm cannot occur as a result of the activities that the requested stay seeks to prevent.

In addition, by the terms of the CUP, Applicant is required to post \$50,000 in security to cover any “gap” in the value of the facilities and the cost to decommission. Again, the county has already anticipated and mitigated any potential shortfall associated with removal of the facilities, whenever that decommissioning might occur. Thus, even if the facilities have to be removed in 2018 because petitioners are successful in their appeal, there will be no harm because the money needed to decommission or remove installed facilities is already set aside and Applicant will have willingly borne the financial risk of moving forward with construction during the appeal. Accordingly, there is no risk to Applicant of any unresolved property disturbance whether the appeal is successful or not.

Petitioners’ allegations that (1) there is no assurance of who would be the “responsible party” for decommissioning, (2) Applicant has no “possessory interest” in the property, and (3) there is no proof in the record of Applicant’s “financial wherewithal” have already been soundly rejected during the CUP process and are equally unavailing here. Applicant has provided adequate security in the amount requested by the county and has done so in a form consistent with the county’s rules for projects of this type. Further, Applicant, which will own and operate the project, has been vetted and accepted by the county as being of the quality and character capable of long-term operation and ultimate decommissioning. This vetting process, along with the required posted security, firmly

establishes the absence of any risk that the petitioners may face during the pendency of their appeal.

Finally, petitioners argue that a stay should issue to “protect the public” because the project is located in within the county’s shoreland overlay or agricultural zoning districts. Whether the project is located in a shoreland overlay or any other district is wholly immaterial to the question regarding a stay. As discussed above, there is more than sufficient assurance that the project will be properly decommissioned if not allowed to go forward. The applicability of the shoreland overlay and agriculture districts to the board’s issuance of the CUP is properly before the court of appeals and cannot be decided in a motion for stay.

2. The Harm Associated With A Stay Is Greater To Applicant Than Any Benefit It Would Provide Petitioners.

This project, like other LSEs the county has also recently approved, constitutes a “community solar garden” under rules approved by the Minnesota Public Utilities Commission and specific to Xcel Energy. Those rules specifically require that the Lenzen LSES “shall” achieve mechanical completion within the later of twenty-four (24) months from August 6, 2015 or Xcel Energy’s finding that the solar garden application is “expedited ready.” Eberhardt Aff. at 2, citing to *Order Approving Value of Solar Rate for Xcel’s Solar-Garden Program, Clarifying Program Parameters, and Requiring Further Filings*, MPUC, September 6, 2016, Docket No. E-002/M-13-867, at 24-25. Here, Xcel declared the Lenzen LSES ready on February 17, 2016. Accordingly, the project is required to be mechanically complete no later than February 17, 2018. Eberhardt Aff. at 3.

Failure to meet the mechanical completion deadline means that the project will no longer qualify as a community solar garden under the applicable community solar garden rules, resulting in a possible total loss of investment for Applicant. Because the Court of Appeals is unlikely to issue any decision in the appeal until the end of this calendar year, it is critical that Applicant move forward with construction while the appeal is pending. The project cannot wait for the Court of Appeals' decision because if it fails mobilize now, begin construction, and install critical – but removable – infrastructure before the winter ground freezing, it is likely the project will be unable to reach commercial operation before the required completion date. Eberhardt Aff. at 3. Petitioners' claims of potential damage to land (which they do not even own) and other impairments that would be easily restorable pales in comparison to the very real and permanent financial harm that a stay would cause to Applicant.

C. Petitioners Must Post Security In The Minimum Amount Of \$5.7 Million.

The purpose of a supersedeas bond or other security “is to assure that, pending the outcome of an appeal, the economic risk of the appeal is not borne by the party that prevailed below.” *County of Blue Earth v. Wingen*, 684 N.W.2d 919, 923 (Minn. Ct. App. 2004). An appellant who has been granted a stay during the pendency of an ultimately unsuccessful appeal is liable for “the damages sustained by the respondent in consequence of the appeal” without reference to the theory by which damages are sustained. *Id.* at 922-923, citing to Minn. R. Civ. App. P. 108.01, subd. 2. Lost profits is an appropriate measure

of damages. *Id.* at 923. Here, a stay will cause Applicant construction-related financial losses at a minimum, and potentially a complete loss of its investment to date.

As Ms. Eberhardt explains in her Affidavit, Applicant's spending on the project to date is already significant, with additional significant expenditures required over the next couple of weeks to stay on schedule. To date, Applicant has spent approximately \$1,950,000 in developing the project. Eberhardt Aff. at 3. In addition, Applicant has already incurred \$517,000 in contractor invoices through June 2017, with another approximately \$250,000 to be incurred before July 11. *Id.* Staying on schedule also requires that Applicant order equipment such as modules and racking before July 7 in the amount of \$3,000,000. Thus, the minimum amount of security that petitioners will need to post so as to adequately protect Applicant in the event of an unsuccessful appeal is \$5.7 million. *Id.*

Rule 108 requires *petitioners*, not Applicant, bear the burden of demonstrating the adequacy of the security during the pendency of the appeal. Because petitioners have neglected that responsibility, however, Ms. Eberhardt's affirmation of the damages Applicant sustain in the event of a stay and unsuccessful appeal is the only security amount provided to the board at that this point, and Applicant stands prepared to defend its reasonableness upon any challenge by petitioners. In addition, to the extent that petitioners believe a lesser amount of security is adequate, they are required to explain, with supporting evidence, the factual basis for that amount. And to the extent that petitioners come forward with any lesser amount than presented by Ms. Eberhardt, Applicant is entitled a reasonable amount of time to review and rebut such evidence.

Finally, given the seriousness of this issue to Applicant, it is worth noting that the courts have made clear that the security required by rule 108 is not intended to act as a *limit* on the amount of damages that a respondent may be entitled to when it has been harmed as a result of a stay, but may also seek actual damages from appellants in excess of the security provided. *Id.* at 925 (holding that under rule 108, the court has authority to award damages *in excess* of the amount of the supersedeas bond).

Thus, in order to assure that Applicant “remains secure in victory” in the event of an unsuccessful appeal by petitioners, petitioners must post security in the minimum amount of \$5.7 million before this board may issue any stay. And to the extent that a stay and appellants’ unsuccessful appeal causes applicant more than that amount in damages, Applicant reserves its right to seek its actual damages against petitioners.

CONCLUSION

For the foregoing reasons, DG Minnesota CSG 2, LLC respectfully asks this board to summarily dismiss or deny petitioners’ motion for a stay.

Dated: June 28, 2017

By: /s/ Todd J. Guerrero
Todd J. Guerrero (#0238478)
KUTAK ROCK LLP
60 South 6th Street, Suite 3400
Minneapolis, MN 55402
Tel: (612) 334-5000
todd.guerrero@kutakrock.com

***Attorneys for DG Minnesota
CSG 2, LLC***

4. I understand the Becklund group of petitioners has asked the board to issue a stay of enforcement of the conditional use permit it issued for the Lenzen LSES on November 22, 2016.

5. I am providing this affidavit to provide information about the effect any stay would have on the project and to provide further responsive information.

6. As the owner, DG Minnesota CSG 2, LLC is responsible for decommissioning the project. Our decommissioning plan accepted by the county provides sufficient, independent resources to ensure the project is decommissioned pursuant to industry standards.

7. Applicant has taken assignment of the Lenzen solar lease from TruNorth Community Solar, LLC as of February 10, 2017 and Applicant has filed a memorandum of lease with the Carver County's recorder's office.

8. Granting a stay of the CUP will cause significant economic harm to the Applicant, including potentially the complete loss of the project.

9. The Lenzen project, like other LSESs the county has also recently approved, constitutes a "community solar garden" under rules approved by the Minnesota Public Utilities Commission ("MPUC") and specific to Xcel Energy. Those rules specifically require that the Lenzen LSES "shall" achieve mechanical completion within the later of twenty-four (24) months from August 6, 2015 or Xcel Energy's finding that the solar garden application is "expedited ready." *See, Order Approving Value of Solar Rate for Xcel's Solar-Garden Program, Clarifying Program Parameters, and Requiring Further Filings*, MPUC, September 6, 2016, Docket No. E-002/M-13-867, at 24-25,

attached as Exhibit A. Here, Xcel found the Lenzen LSES expedited ready on February 17, 2016 and thus Applicant is required to complete construction no later than February 17, 2018. Failure to meet the mechanical completion deadline means that the project will no longer qualify as a community solar garden under applicable rules. Failure to meet the deadlines as set forth in orders of the MPUC and the Xcel Energy tariffs could mean a total loss of investment for Applicant.

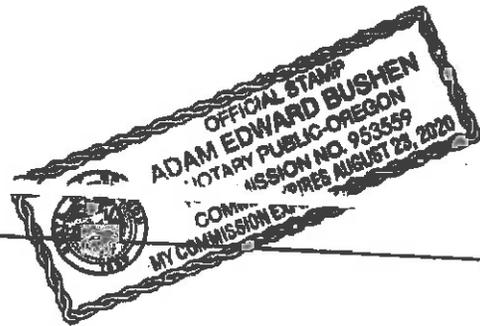
10. The Minnesota Court of Appeals is unlikely to issue its decision in the petitioners' appeal of the conditional use permit appeal until the end of this calendar year. It is therefore critical that Applicant move forward with construction while the appeal is pending because if the project does not begin construction now and, importantly, drive racking piles by the end of September, the project runs the risk of encountering winter ground freezing, and the project will be unable to reach the commercial operation date within the date required by order of the MPUC and Xcel Energy's tariffs.

11. Applicant's spending on the project to date is significant, with additional significant expenditures required over the next couple of weeks to stay on schedule. To date, Applicant has spent approximately \$1,950,000 in developing the project. In addition, Applicant has already incurred \$517,000 in contractor invoices through June 2017, with another approximately \$250,000 to be incurred before July 11. Staying on schedule also requires Applicant to order equipment such as modules and racking before July 7 in the amount of \$3,000,000. Thus, the minimum amount of security that petitioners will need to post so as to adequately protect Applicant in the event of an unsuccessful appeal is \$5,700,000.

I declare that the foregoing is true and correct.

Dated this 28th day of June, 2017

Heather Eberhardt
Heather Eberhardt
DG Minnesota CSG 2, LLC



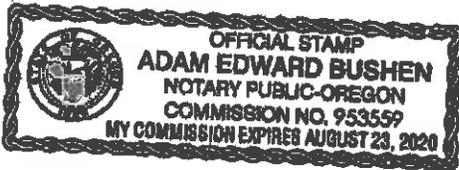
STATE OF OREGON,

County of Multnomah } ss.

On June 28, 2017
DATE

before me personally appeared Heather Beusse Eberhardt

executed the foregoing instrument, acknowledging to me that the same was executed freely and voluntarily, and who made on it are true and correct.



SIGNED AND SWORN TO before me on the date first written above.

Adam E Bushen
Notary Public for Oregon
My commission expires August 23, 2020

NO PART OF ANY STEVENS-NESS FORM MAY BE REPRODUCED IN ANY FORM OR BY ANY ELECTRONIC OR MECHANICAL MEANS.
FORM No. 527 - VERIFICATION UPON OATH, INDIVIDUAL EA

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CARVER COUNTY
BOARD OF COMMISSIONERS

Charles P. Becklund et. al.,
Petitioners,

v.

FINDINGS OF FACT, CONCLUSIONS,
AND ORDER

DG Minnesota CSG 2, LLC and County,
Minnesota by and through the Carver
County Board of Commissioners

This matter came before the County Board on July 25, 2017 on the motion of the Petitioners to “Stay Enforcement” of the Board’s November 22, 2016 decision granting a conditional use permit (“CUP”) to DG Minnesota for the construction of a solar project.

Petitioners’ motion was brought pursuant to Rule 62.03 of the Minnesota Rules of Civil Procedure, and Rules 115.03, subd. 2(b) and 118.02, subd. 1(a) of the Minnesota Rules of Civil Appellate Procedure. By their motion, Petitioners effectively ask the County Board to provisionally revoke the November 22, 2016 CUP pending a Court of Appeals decision in Appellate Court File A17-0099, in which Petitioners challenge the County Board’s November 22, 2016 CUP decision.

Having reviewed the submissions of the parties, and heard arguments of counsel for the parties, the Board hereby makes the following:

FINDINGS

1. In May 2016, DG Minnesota submitted a CUP application to build a large energy solar system (LESS) on an approximately 22 acre parcel of property in the County.
2. The Planning Commission considered the application at three separate meetings on June 21, July 19, and August 16, 2016. All those in support of and those opposed to the project were given the full opportunity to provide information pertinent to the application.
3. The County Board considered the application at four separate meetings on September 6 and 20, and November 10 and 22, 2016.
4. Following the Board’s final meeting on November 22, 2016, the Board issued an eight page decision granting the CUP subject to varied conditions. The conditions included requirements that DG Minnesota comply with the submitted decommissioning plan when the project terminates. The decommissioning plan requires that the project site be restored to pre-construction conditions. It also indicates that DG Minnesota would be

required to post a \$50,000 bond to assure restoration. The Board’s CUP decision addressed all matters that had been raised before the County in the CUP process.

5. On January 20, 2017, Petitioners appealed the Board’s November 22, 2016 decision to the Court of Appeals.
6. On June 6, 2017, Petitioners submitted a “Motion for Stay of Enforcement” of the CUP.
7. On June 28, 2017, DG Minnesota submitted a response to the Motion.
8. Petitioners argue that the County should issue an order “staying enforcement” of the CUP for the following reasons:
 - a. Allowing implementation of the project will permanently alter the rural/agricultural setting of the area;
 - b. There would be no certainty that DG Minnesota would restore the project site to its pre-construction condition if Petitioners’ appeal is successful;
 - c. The project involves an alleged industrial use that is expressly prohibited in the Shoreland Overlay District of Buck Lake; and
 - d. Any impacts to DG Minnesota from a “stay of enforcement” would be minimal.
9. DG Minnesota argues that Petitioners’ motion should be denied for the following reasons:
 - a. The motion fails to comply with the requirements of Rule 108.02, subd. 1 of the Minnesota Rules and Civil Procedure because Petitioners failed to propose security in an amount necessary to protect DG Minnesota from losses if a “stay of enforcement” were granted; and
 - b. Damage to DG Minnesota if a stay was granted far outweighs Petitioners’ interests in preserving the status quo during the appeal.
10. Given the timing of the Court of Appeals case, a decision by the Court of Appeals in Appellate Court File A17-0099 will not likely be rendered until the end of 2017 or later, and a further appeal to the Supreme Court would be possible.

CONCLUSIONS

1. Rule 108.02, subd. 1 of the Rules of Civil Appellate Procedure allows a party, during the pendency of an appeal, to ask the “trial court” for a “stay of enforcement of the judgment or order of the trial court pending appeal”. Rule 101.02 of the Rules of Civil Appellate Procedure indicates “trial court” means, in proper context, the municipal body whose decision is being reviewed by the appellate court.

2. Petitioners argue the above rule permits the County Board to effectively rescind the CUP it issued DG Minnesota on November 22, 2016 during the appeal; Petitioners cite the case of DRJ, Inc. v. City of St. Paul, 741 N.W.2d 141 (Minn. Ct. App. 2007) in support of this proposition.
3. DRJ involved the appeal of a decision to revoke a permit. Thus the motion for a stay in DRJ sought to preserve the previously-issued permit while an appeal of the decision to revoke it ensued.
4. Unlike DRJ, the present case involves a motion to, in essence, temporarily rescind or revoke a granted permit. While the motion in DRJ sought to preserve the permit-holder's property right in the permit proposed for revocation pending appeal, the present motion seeks to take away a property right during an appeal.
5. In DRJ, the municipality could have pursued enforcement of its order to revoke the subject permit, and thus a motion under Rule 108.06, subd. 1, which would have directly sought to stay enforcement of the (City's) order clearly falls within the auspices of the Rule. To the contrary, in the present case, the County Board has already issued a CUP to DG Minnesota, and there is nothing to "enforce". Thus no "stay of enforcement" is arguably possible or appropriate.
6. The Board, for the above reasons, concludes that Petitioners' Motion is improper.
7. But even if the motion was proper, Petitioners acknowledge that in considering such a motion the:
 - ... governmental unit must balance the appealing party's interest in preserving the status quo, so that effective relief will be available if the appeal succeeds, against the interests of the public or the prevailing party in enforcing the decision and ensuring they remain secure in victory, while the appeal is pending.
8. In the present case, the Board concludes, even assuming the propriety of the motion, that the balance of interests favors DG Minnesota, and would compel substantive denial of the Motion for the following reasons:
 - a. Implementation of the LESS project will not permanently alter the character of the area. Given the fact compatibility with surrounding properties is a decisional criteria for conditional use permits under the County Zoning Ordinance, the Board has already concluded that the project is not incompatible with surrounding areas. Moreover, if the CUP were ever overturned by the Court of Appeals, the subject property could and would be required to be restored to pre-construction conditions per DG Minnesota's decommissioning plan.

- b. There are mechanisms in place which would assure that reestablishment of pre-construction conditions would occur as might be required by any reversal of the Board’s November 22, 2016 grant of the CUP. DG Minnesota’s decommissioning plan was made an express condition of the CUP. The plan contains detailed decommissioning requirements. And, it requires DG Minnesota to post \$50,000 in security to assure compliance with the requirements. Notably, if new solar modules are installed at the project site, and needed to be removed in the event of reversal of the CUP, the new modules would in all likelihood still have significant commercial value, and would not likely be abandoned by DG Minnesota. The projected remaining restoration costs would be nearly fully covered by the \$50,000 security, and the salvage value of remaining infrastructure (less than solar modules) would actually exceed the difference in site restoration costs and the \$50,000 security.
- c. The Petitioners never asserted in the CUP proceedings the argument that the proposed use is an “industrial use” under the Shoreland Overlay District and thus prohibited due to the proximity of the project to Buck Lake. This argument has been waived.
- d. The negative potential impact to DG Minnesota, if it were prevented from beginning implementation of its project, far outweighs the benefits to Petitioners and/or the public in this case. Here, DG Minnesota has provided evidence that it must achieve mechanical completion of its project by February 17, 2018 or risk loss of its investment under pertinent Minnesota Public Utilities Commission Rules. The Board concludes that it is unlikely this date could be achieved if any stay would be granted and a decision of the Court of Appeals is not issued until the end of this year. Moreover, the potential economic harm to DG Minnesota would be substantial: \$5.7 million dollars as set forth in the Affidavit of Heather Eberhardt.

ORDER

For all the foregoing reasons, the request of Petitioners for a “Stay of Enforcement of the [County Board’s November 22, 2016] Order” is hereby denied.

Dated: _____

County Board Chair

Carver County Board of Commissioners Request for Board Action



Agenda Item:

CarverLink Fiber Network Update

Primary Originating Division/Dept:

Meeting Date:

Contact: Title:

Item Type:

Amount of Time Requested: minutes

Attachments: Yes No

Presenter: Title:

Strategic Initiative:

BACKGROUND/JUSTIFICATION:

CarverLink is the Carver County Fiber Optic Cable Network that connects all 11 cities and makes available dark and lit fiber services along with high speed internet to the County as well as various cities, townships, schools, governments, libraries, and community support entities.

CarverLink has made several significant advances since the last update to the Board. The staff will provide an update on CarverLink's activities.

ACTION REQUESTED:

No action requested. This is solely an opportunity to keep the Board updated.

FISCAL IMPACT:

If "Other", specify:

FUNDING

County Dollars =

FTE IMPACT:

Total

Insert additional funding source

Related Financial/FTE Comments:

Office use only:

RBA 2017 - 4673

Carver County Board of Commissioners Request for Board Action



Agenda Item:
Election Task Force

Primary Originating Division/Dept: ▼

Meeting Date:

Contact: Title:

Item Type:
 ▼

Amount of Time Requested: minutes

Attachments: Yes No

Presenter: Title:

Strategic Initiative:
 ▼

BACKGROUND/JUSTIFICATION:

Taxpayer Services Department requests board input and direction for establishing an Elections Task Force. The Elections Task Force would consist of Carver County elections key staff as well as a number of city/township election administrators and head election judges. The Elections Task Force would focus on:

1. Researching/Selecting/Implementing New Election Equipment in Carver County
2. Determining the best plan to accurately and efficiently administer absentee voting in Carver County while maintaining strict compliance with election laws as well as providing outstanding customer service for absentee voters
3. Researching and implementing an "Election Administration Portal" that would facilitate more effective and efficient two-way communication between the Carver County election administrators and city/township/school election staff.

ACTION REQUESTED:

Taxpayer Services Department requests County Board input/direction regarding the establishment of an Election Task Force to include recommendations relative to scope/focus and members/participants.

FISCAL IMPACT: ▼

If "Other", specify:

FUNDING

County Dollars =

FTE IMPACT: ▼

Total

Insert additional funding source

Related Financial/FTE Comments:

Office use only:

RBA 2017 - 4824