Agenda Date: 2/27/19
Agenda Item: 8C

STATE OF NEW JERSEY

Board of Public Utilities
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Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

CLEAN ENERGY

ORDER DENYING MOTION FOR RECONSIDERATION

IN THE MATTER OF THE IMPLEMENTATION OF L. 2012, C. 24, THE SOLAR ACT OF 2012	)	DOCKET NO. EO12090832V
IN THE MATTER OF THE IMPLEMENTATION OF L. 2012, C. 24, N.J.S.A. 48:3-87(T) – A PROCEEDING TO ESTABLISH A PROGRAM TO PROVIDE SRECS TO CERTIFIED BROWNFIELD, HISTORIC FILL AND LANDFILL FACILITIES	)	DOCKET NO. EO12090862V
KDC SOLAR BLACK ROCK, LLC SCHALKS CROSSING ROAD	)	DOCKET NO. QO17080893

Party of Record:

Amanda G. Dumville, Esq., McCarter & English, LLP, on behalf of KDC Solar Black Rock, LLC

BY THE BOARD:

KDC Solar Black Rock, LLC ("KDC" or "Applicant") has moved for reconsideration of the New Jersey Board of Public Utilities' ("BPU" or "Board") Order dated March 26, 2018 in the above-captioned matter denying its application for certification of a solar electric power generation facility project, pursuant to L. 2012, c. 24 ("Solar Act"), codified at N.J.S.A. 48:3-87 (t) ("Subsection (t)").

BACKGROUND

On July 23, 2012, the Solar Act was signed into law. The Solar Act amends certain aspects of the statute governing generation, interconnection, and financing of renewable energy. Among other actions, the Solar Act requires the Board to conduct proceedings to establish new standards and develop new programs to implement the statute's directives. By Order dated

October 10, 2012, the Board directed Board staff ("Staff") to initiate proceedings and convene a public stakeholder process to fulfill the directives of the Solar Act.[1]

The Solar Act – specifically, Subsection (t) – provides that:

> No more than 180 days after [July 23, 2012], the board shall, in consultation with the Department of Environmental Protection and the New Jersey Economic Development Authority, and, after notice and opportunity for public comment and public hearing, complete a proceeding to establish a program to provide SRECs to owners of solar electric power generation facility projects certified by the board, in consultation with the Department of Environmental Protection, as being located on a brownfield, on an area of historic fill or on a properly closed sanitary landfill facility. . . . Projects certified under this subsection shall be considered "connected to the distribution system" [and] shall not require such designation by the board[.]
>
> [N.J.S.A. 48:3-87(t).]

The Solar Act defines the terms "brownfield," "area of historic fill," and "properly closed sanitary landfill facility." A "brownfield" is "any former or current commercial or industrial site that is currently vacant or underutilized and on which there has been, or there is suspected to have been, a discharge of a contaminant." N.J.S.A. 48:3-51. "Historic fill" is "generally large volumes of non-indigenous material, no matter what date they were placed on the site, used to raise the topographic elevation of a site . . . ." Ibid. A "properly closed sanitary landfill facility" means "a sanitary landfill facility, or a portion of a sanitary landfill facility, for which performance is complete with respect to all activities associated with the design, installation, purchase, or construction of all measures, structures, or equipment required by the Department of Environmental Protection. . . ." Ibid.

Toward implementing the October 10, 2012 Order, Staff met with staff of the New Jersey Economic Development Authority and the New Jersey Department of Environmental Protection ("NJDEP"). On November 9, 2012, consistent with the requirements of the Solar Act, the Board held a public hearing presided over by Commissioner Joseph L. Fiordaliso. In addition, the public was invited to submit written comments through November 23, 2012.

[1] I/M/O the Implementation of L. 2012, C. 24, The Solar Act of 2012; I/M/O the Implementation of L.2012, C.24, N.J.S.A 48:3-87(d)(3)(b) – A Proceeding to Investigate Approaches to Mitigate Solar Development Volatility; I/M/O the Implementation of L.2012, C.24, N.J.S.A 48:3-87(e)(4) – Net Metering Aggregation Standards; I/M/O the Implementation of L.2012, C.24, N.J.S.A 48:3-87(Q), (R) and (S) – Proceedings to Establish the Processes for Designating Certain Grid-Supply Projects as Connected to the Distribution System; I/M/O the Implementation of L.2012, C.24, N.J.S.A 48:3-87(T) – A Proceeding to Establish a Program to Provide Solar Renewable Energy Certificates to Certified Brownfield, Historic Fill and Landfill Facilities; and I/M/O the Implementation of L.2012, C.24, N.J.S.A 48:3-87(W) – A Proceeding to Consider the Need for a Program to Provide a Financial Incentive to Supplement Solar Renewable Energy Certificates for Net Metered Projects Greater than Three Megawatts; 2012 N.J. PUC LEXIS 286 (Oct. 10, 2012).

In an Order dated January 24, 2013, the Board approved Staff's proposed process for certifying solar generation projects as being located on brownfields, areas of historic fill, and properly closed sanitary landfill facilities.[2] The certification process for projects seeking approval pursuant to Subsection (t) provides three potential recommendations from Staff to the Board: full certification, conditional certification, or denial of certification. Conditional certification may be granted for projects located on sites which NJDEP has determined require further remedial action or, in the case of properly closed sanitary landfill facilities, additional protective measures, and full certification may be granted for projects located on sites for which NJDEP has determined no further remedial or protective action is necessary. The process incorporates the expertise of NJDEP to confirm a potential project's land use classification for eligibility and to account for the state of remediation of the project site. 2013 N.J. PUC LEXIS 27 at 31–33.

The January 24, 2013 Order states that certification would be limited to those areas delineated by NJDEP. In compliance with this directive, applicants are required to delineate the precise section(s) of the location where the solar facility is proposed to be sited, and NJDEP reviews this material in making its recommendation.

The Board found that an application for solar projects located on brownfields, areas of historic fill, or properly closed sanitary landfill facilities was necessary to initiate the certification process and directed Staff to work with NJDEP to develop an application. Id. at 33. On or about April 10, 2013, Staff distributed, via the public renewable energy stakeholder email distribution list and posted to the New Jersey Clean Energy Program ("NJCEP") and BPU websites, a Subsection (t) application form.

Projects certified under Subsection (t) of the Solar Act are subject to all of the Board's rules; the statutory language exempts such projects from the need for further Board designation as "connected to the distribution system" but does not remove any of the Board's oversight authority. For example, projects must comply with the rules at N.J.A.C. 14:8-2.4 and applicable Board orders concerning registration with the SREC Registration Program ("SRP"). The size and location of the subject project will then be reflected in the public reporting of solar development pipeline data.

KDC Black Rock, LLC – Schalks Crossing Road – Docket No. QO17080893

KDC Black Rock Application

On August 17, 2017, KDC submitted an application to the Board to have its project certified as being located on a brownfield pursuant to Subsection (t) of the Solar Act. Applicant's 4.5 MWdc project is proposed to be constructed on a 15 acre parcel that includes one acre on which the Black Rock Gun Club was constructed. The entire subject property, Block 1402, Lot 55, at 33 Schalks Crossing Road, Plainsboro Township, Middlesex County, New Jersey, is 69.91 acres[3] and owned by Turkey Island Corporation ("Turkey Island"). The one acre is taxed and assessed

[2] I/M/O the Implementation of L. 2012, C. 24, The Solar Act of 2012; I/M/O the Implementation of L.2012, C.24, N.J.S.A 48:3-87(T) – A Proceeding to Establish a Program to Provide SRECS to Certified Brownfield, Historic Fill and Landfill Facilities; and I/M/O the Implementation of L.2012, C.24, N.J.S.A 48:3-87(U) – A Proceeding to Establish a Registration Program for Solar Power Generation Facilities, 2013 N.J. PUC LEXIS 27 (Jan. 24, 2013).

[3] For the sake of simplicity, we will use the phrase "69-acre property" to describe the land that is valued, assessed and taxed under the Farmland Assessment Act, N.J.S.A. 54:4-23.1 et seq.

as commercial property (4A).[4] The remaining land on the 69-acre property is valued, taxed, and assessed as Qualified Farmland (3B). Ibid.

Staff forwarded the application to NJDEP for review and a recommendation as described above. On December 19, 2017, NJDEP issued a Recommendation Memorandum to the Board in which NJDEP advised that the 15-acre area proposed for certification is not a brownfield as set forth in the Solar Act. NJDEP advised that a review of the subject tax records revealed that the 69-acre property is identified as qualified farmland.[5] NJDEP said that the project does not qualify for certification under Subsection (t) because the proposed area for certification, approximately 15 acres, is on land devoted to horticultural or agricultural use that is valued, assessed, and taxed pursuant to the Farmland Assessment Act of 1964, N.J.S.A. 54:4-23.1 to 23.24, at any time within the 10-year period prior to July 23, 2012, the effective date of the Solar Act. In support of its finding, NJDEP also cited I/M/O Implementation of L. 2012, c. 24, N.J.S.A. 48:3-87(t) – a Proceeding to Establish a Program to Provide SRECs to Certified Brownfields, Area of Historical Fill, and Landfill Facilities – Millenium Land Development, LLC (Love Lane), 443 N.J. Super. 73 (App. Div. 2015) ("Millenium").[6] In sum, NJDEP concluded that the 15-acre portion of the 69-acre property for which KDC seeks certification is not a brownfield.

KDC Black Rock Order

Based on the information provided in the application and the NJDEP's determination that the 15 acres requested for Subsection (t) certification on Block 1402, Lot 55 is not located on land meeting the Solar Act's definition of a brownfield because the record shows that the 69-acre property is farmland, the Board issued an order on March 26, 2018 ("KDC Black Rock Order") denying KDC's request for certification of the project.[7] In the KDC Black Rock Order, the Board found that KDC's application cannot be considered under Subsection (t) because the solar project would be sited on land that has been valued, assessed, and taxed as farmland and that such applications are governed by Subsection (s). Subsection (s) states in relevant part:

> [A] solar electric power generation facility that is not net metered or an on-site generation facility and which is located on land that has been actively devoted to agricultural or horticultural use that is valued, assessed, and taxed pursuant to the "Farmland Assessment Act of 1964," P.L.1964, c.48 (C.54:4-23.1 et seq.) at any time within the 10-year period prior to . . . [July 23, 2012], shall only be considered "connected to the distribution system" if (1) the board approves the facility's designation pursuant to subsection q. of this section; or (2)(a) PJM issued a System

[4] See searchable property tax database https://www.stateinfoservices.com/property/1218/1402/55/QFARM.

[5] Ibid. In the New Jersey Property Tax System, QFARM (3B) is a class of real property, which stands for Qualified Farmland. Pursuant to the Farmland Assessment Act, landowners who receive qualified farmland tax status for their property must meet specific prerequisites and conditions to obtain and maintain that status. See N.J.S.A. 54:4-23.2 through -23.5.

[6] In this opinion, the Appellate Division of the Superior Court of New Jersey affirmed the Board's decision that Millenium's application could not be considered under Subsection (t) because it concerned a solar project proposed to be sited on property that had been valued, assessed, and taxed as farmland and that such applications are governed by N.J.S.A. 48:3-87(s) ("Subsection (s)").

[7] I/M/O the Implementation of L. 2012, C. 24, The Solar Act of 2012; I/M/O the Implementation of L.2012, C.24, N.J.S.A 48:3-87(T) – A Proceeding to Establish a Program to Provide SRECS to Certified Brownfield, Historic Fill and Landfill Facilities; and KDC Solar Black Rock, LLC; Schalks Crossing Road, 2018 N.J. PUC LEXIS 49 (Mar. 26, 2018).

> Impact Study for the facility on or before June 30, 2011, (b) the facility files a notice with the board within 60 days of . . . [July 23, 2012], indicating its intent to qualify under this subsection, and (c) the facility has been approved as "connected to the distribution system" by the board. . . .
>
> [N.J.S.A. 48:3-87(s).]

The Board stated that the plain text of Subsection (s) is indicative of a legislative intent to discourage development of grid-supply solar facilities on farmland and to limit eligibility of projects located on farmland to Subsections (q) and (s). KDC Black Rock, 2018 N.J. PUC LEXIS 49 *13-14.

The Board also cited an earlier order involving a developer who filed an application seeking certification under Subsection (t) for a proposed solar facility on a former apple orchard. In that case, the Board denied Millenium's application, finding that the project did not qualify for certification under Subsection (t) because the site was farmland.[8] On November 12, 2015, the Appellate Division agreed and affirmed the Board's denial of Millenium's application under Subsection (t). Millenium, 443 N.J. Super. at 78. The court found that "projects sited on agricultural property valued, assessed and taxed as farmland do not qualify as brownfields for purposes of subsection (t)." Ibid. The court also held that Subsection (s) unambiguously precludes a Subsection (t) application for a solar project on land that was valued, assessed, and taxed as farmland within the 10-year period prior to the effective date of the Solar Act. Id. at 80.

Consistent with Millenium, the Board rejected KDC's application, finding that it is not eligible for SRECs under Subsection (t) on the basis that the 69-acre property, with the exception of the one acre on which a building and trap and skeet shooting range are located, is classified and taxed as a farm. The Board referred to KDC's application, which included a June 22, 2017 lease option agreement describing the proposed location of the solar facility as: "Schalks Crossing Road (Block 1402, Lot 55 Q Farm [f/k/a Block 6, Lot 22.05 Q Farm] on the Township of Plainsboro Tax Map)" (emphasis added). The Board also noted that the 2003–2010 Site Tax Map notes the classification as "QFarm" for Block 1402, Lot 55 (emphasis added). Moreover, the Board cited to the searchable tax and property databases, which disclosed that the 69-acre property, excluding the one acre on which the building and trap and skeet shooting range are located, is classified and taxed as a farm.[9] KDC Black Rock, 2018 N.J. PUC LEXIS 49 *15–16.

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[8] I/M/O the Implementation of L. 2012, C. 24, The Solar Act of 2012; I/M/O the Implementation of L.2012, C.24, N.J.S.A 48:3-87(T) – A Proceeding to Establish a Program to Provide SRECS to Certified Brownfield, Historic Fill and Landfill Facilities; and Millenium Land Development, LLC, Love Lane – Motion for Reconsideration, 2014 N.J. PUC LEXIS 155 (May 21, 2014) ("Millenium Order"). In its Order denying Millenium's motion for reconsideration of the Board's July 19, 2013 Order rejecting Millenium's application filed pursuant to Subsection (t), the Board clarified that solar projects on agricultural land "that is valued, assessed, and taxed pursuant to the Farmland Assessment Act of 1964 . . . within the ten (10) year period prior to July 24, 2012 will not be eligible for designation as being located on a brownfield . . . for purposes of qualifying for SRECs under Subsection t." Id. at *14.

[9] https://www.stateinfoservices.com/property/1218/1402/55/QFARM and http://www.state.nj.us/treasury/taxation/lpt/TaxListSearchPublicWebpage.shtml.

KDC Motion for Reconsideration

On April 18, 2018, KDC filed a motion for reconsideration and, in the alternative, reopening of the record. KDC asked for expedited treatment of the motion, requesting that the Board issue an order by May 22, 2018, due to uncertain construction costs after August 13, 2018. KDC also filed a motion for the admission pro hac vice of Kimberly Frank, Esq.

First, KDC argues that the Board should reconsider its finding that the 69-acre property does not meet the Solar Act's definition of a brownfield. N.J.S.A. 48:3-51 and N.J.A.C. 14:8-1.2. In support, KDC provided new material in its attempts to show that the 69-acre property is a former and current commercial site, was formerly zoned as an industrial site, is listed on NJDEP's Known Contaminated Sites List, and, other than its use by the Black Rock Gun Club, is underutilized due to lead shot contamination from the gun club's activities. KDC notes that, in 2002, Plainsboro Township declined to purchase the 69-acre property to become part of the Plainsboro Reserve due to the presence of lead contamination and the resulting environmental remediation liability and costs. KDC also claims that the only environmentally and economically beneficial alternative use for this land is to use it as the location of KDC's solar project.

KDC also maintains that the Board erred in concluding that the 69-acre property is farmland as defined by the Solar Act and must determine whether the project is located on land (1) that has been actively devoted to agricultural or horticultural use and (2) that was valued, assessed, and taxed pursuant to the Farmland Assessment Act of 1964 during the relevant period. KDC asserts that the Board engaged in a separate and standalone inquiry of each factor in the Millenium Order. In summary, KDC argues that the 69-acre property does not meet the Solar Act's definition of farmland because, while it is valued, assessed, and taxed as farmland, it is not and has not been actively devoted to agricultural or horticultural use for 46 years.

Second, KDC urges the Board to reconsider its finding that KDC's application cannot be considered under Subsection (t) because, as KDC notes, Subsection (t) created a program to provide SRECs to owners of solar electric generation facility projects certified as being located on a brownfield, area of historic fill, or properly closed sanitary landfill facility. KDC maintains that the first question for consideration under Subsection (t) is whether the property in question is a brownfield. KDC asserts that the 69-acre property meets this definition. Further, KDC argues that Subsection (s) applies to sites actively devoted to agricultural or horticultural use and valued, assessed, and taxed as farmland between 2002 and 2012, and KDC's 69-acre property, while valued, assessed, and taxed as farmland in that period, has only been used actively used as a trap and skeet shooting range since 1972.

KDC also asserts that the 69-acre property is distinguishable from the site at issue in the Millenium Order because Millenium's property was on an apple orchard that contained contaminants in the soil as the result of the agricultural use of the land, while KDC's 69-acre property has never been used as farmland as defined by the Solar Act, and its contamination is the result of discharge of lead shot in connection with the gun club's activities. KDC also distinguishes the Millenium project from the 69-acre property because, while the Appellate Division in Millenium noted the absence of evidence that the land was contaminated within the Solar Act's definition of a brownfield, KDC asserts that it has provided substantial evidence that the 69-acre property is contaminated and meets the Solar Act's definition of a brownfield.

Third, KDC argues that public policy considerations – namely, the State's interest in promoting installation of solar projects on contaminated industrial and commercial sites that would otherwise remain unproductive while discouraging large-scale solar projects on farmland and open space -- support reconsideration of the Board's determination that the 69-acre property site does not quality under Subsection (t). KDC also asserts that the 69-acre property is not valuable or useable as farmland and thus is not properly reviewed under Subsection (s), the purpose of which is to protect farmland.

Secretary's Letter

Pursuant to N.J.A.C. 14:1-8.7(c), if the Board does not grant or otherwise act upon a motion for reconsideration within 60 days of its filing, it will be deemed denied. On May 22, 2018, the Board authorized the issuance of a letter from the Board Secretary to KDC, informing the Applicant that the Board was continuing its review, that the Board would act on the motion beyond the 60-day time period, and that the matter shall remain open pending the Board's issuance of a final decision.

NJDEP's November 2018 Memorandum of Recommendation

In its Memorandum of Recommendation dated November 5, 2018, NJDEP reaffirms its original recommendation that the 69-acre property does not meet the definition of "brownfield" as set forth in the Solar Act, based on NJDEP's review of KDC's motion for reconsideration with supporting certification and attachments, the property tax records and Farmland Assessment applications, and KDC's July 16, 2018 response to discovery questions propounded by both NJDEP and BPU. NJDEP notes KDC's argument that the Board's determination was erroneous in finding that the 69-acre property does not meet the definition of "brownfield." NJDEP also notes that, although KDC does not dispute that the property owners have historically identified – and currently identify – the 69-acre property as qualified farmland in their tax filings, KDC submitted the certification of the property owner, in which he states that the subject land has not been actively devoted to agricultural or historical use since 1972, or for 46 years. NJDEP further notes KDC's claim that the subject land has been used exclusively for commercial purposes as a trap and skeet shooting range since 1972, which has resulted in excessive contamination of lead shot for more than three decades.

First, NJDEP states that publicly available tax records, such as the Middlesex County Board of Taxation Tax Lists, provide confirmation that the 69-acre property has been taxed as qualified farmland since 2011.[10] Second, NJDEP reports that the Plainsboro Township Tax Assessor's Office confirmed that the owner of the 69-acre has submitted an annual Farmland Assessment application for at least the past four years.[11] NJDEP reports that, in each Farmland Assessment application, the owner included the requisite annual certification, which declares under penalty of perjury that the land is actively devoted to agricultural or horticultural uses and will remain devoted until the end of the tax year.[12] On June 29, 2018, the Plainsboro Tax Assessor's Office

[10] See Middlesex County Board of Taxation Website; 2011 is as far back in time that the Tax Lists will go. http://taxlookup.njtown.net/pmod4search.aspx?cc=12. See also https://www.stateinfoservices.com/property/1218/1402/55/QFARM.

[11] See Applications for Farmland Assessment provided by the Plainsboro Tax Assessor's Office, which were submitted to that Office by the owner of the 69-acre property for years 2014, 2015, 2016, and 2017. The Plainsboro Tax Assessor's Office advised that the office is limited in the prior years that they can confirm property tax status, as they are permitted to retain tax records at their office for a limited amount of time, or about three years.

[12] This annual certification is also required pursuant to the Farmland Assessment Act. See Page 1 of a

confirmed to NJDEP that the owner of the 69-acre property again certified under penalty of perjury that the property was actively devoted to agricultural or horticultural use and would remain so through the end of 2018. Third, NJDEP advises that, for the years prior to the effective date of the Solar Act, KDC certified in its July 16, 2018 response to Discovery Question #1 that they do not dispute that the 69-acre property has historically been taxed and assessed as farmland during at least the 10-year period prior to the Solar Act. Fourth, NJDEP quotes from page 11 of KDC's motion, which reads, "The Board cited to the NJDEP's review of the tax records which indicated that the 69-acre property is identified as Qualified Farmland . . . . KDC does not dispute the tax records."

Citing Millenium, NJDEP concludes that the project does not qualify for certification under Subsection (t) of the Solar Act because the proposed area for certification (approximately 15 acres) is on land that was and is developed to "horticultural or agricultural use that is valued, assessed and taxed pursuant to the Farmland Assessment Act of 1964, N.J.S.A. 54:4-23.1 to 23.24, within the ten-year period" prior to the Solar Act's effective date. NJDEP notes that when a property owner certifies under penalty of perjury that the subject property is actively devoted to agricultural or horticultural use and on that basis the property is valued, assessed, and taxed as farmland, such applications are not governed by Subsection (t). NJDEP maintains that the additional information provided by KDC does not change that conclusion, and NJDEP recommends that the motion for reconsideration be denied.

DISCUSSION AND FINDINGS

Reconsideration is a matter within the sound discretion of the tribunal, to be exercised in the interest of justice. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990); Palombi v. Palombi, 414 N.J. Super. 274, 288 (App. Div. 2010). Reconsideration is not appropriate merely because a party is dissatisfied with a ruling or wishes to reargue its position. Rather, it is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. See, e.g., Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996); I/M/O Michael Manis and Manis Lighting, LLC – New Jersey Clean Energy Program Renewable Energy Incentive Program, 2015 N.J PUC LEXIS 99 (Apr. 15, 2015). The "magnitude of the error cited must be a game-changer for reconsideration to be appropriate." Palombi, supra, 414 N.J. Super. at 288. "Said another way, a litigant must initially demonstrate that the Court acted in an arbitrary, capricious, or unreasonable manner, before the Court should engage in the actual reconsideration process." D'Atria, supra, 242 N.J. Super. at 401.

A motion for reconsideration requires the moving party to allege "errors of law or fact" that were relied upon by the Board in rendering its decision. N.J.A.C. 14:1-8.6(a)(1). If the moving party seeks to introduce additional evidence as part of its motion for reconsideration, the rule requires that the evidence be stated briefly in the motion along with "reasons for failure to previously adduce said evidence." N.J.A.C. 14:1-8.6(a)(2).

N.J.S.A. 48:2-40 provides that the Board may order a rehearing, and/or extend, revoke, or modify any order made by it. An administrative agency may invoke its inherent power to rehear a matter "to serve the ends of essential justice and the policy of the law." Handlon v. Town of Belleville, 4 N.J. 99, 107 (1950); In re Trantino Parole Application, 89 N.J. 347, 364 (1982).

Farmland Assessment Overview at
https://www.state.nj.us/agriculture/divisions/anr/pdf/farmlandassessmentoverview.pdf.

The Board has reviewed the motion for reconsideration, the supporting documentation, and the entire record in this case as a whole. The Board reopens its prior decision to consider the evidence surrounding the property's assessment as a farmland and the property's eligibility for certification under Subsection (t) of the Solar Act. For the reasons noted herein, the Board denies KDC's motion for reconsideration.

As the Board noted in the KDC Black Rock Order, KDC's application disclosed that the 15-acre parcel of land chosen for the construction of the proposed solar facility qualifies as farmland. The June 22, 2017 lease attached to the application described the proposed location of the solar facility as: "Schalks Crossing Road (Block 1402, Lot 55 Q Farm [f/k/a Block 6, Lot 22.05 Q Farm] on the Township of Plainsboro Tax Map)". The 2003-2010 Site Tax Map also notes the property's classification as "QFarm" for Block 1402, Lot 55. Moreover, two separate databases, https://www.stateinfoservices.com/property/1218/1402/55/QFARM and http://www.state.nj.us/treasury/taxation/lpt/TaxListSearchPublicWebpage.shtml, show the property class as "Farm (qualified)." NJDEP relied on this record to conclude that the project did not qualify for certification under Subsection (t) because the property was land actively devoted to horticultural or agricultural use that is valued, assessed, and taxed pursuant to the Farmland Assessment Act of 1964, N.J.S.A. 54:4-23.1 to 23.24, at any time within the 10-year period prior to July 23, 2012, the effective date of the Solar Act. After reviewing the evidence, relevant precedent,[13] Subsection (s), and the definitions of "farmland" in the Solar Act and in N.J.A.C. 14:8-1.2, the Board agreed with NJDEP and denied the application, finding that the project was located on farmland and therefore ineligible for certification under Subsection (t). KDC Black Rock Order, 2018 N.J. PUC LEXIS 49 *15-16.

Now, after the Board denied KDC's application based in part on the lease and the site tax map that KDC submitted with its application, KDC and Turkey Island allege that the 69-acre property – despite its classification as qualified farmland – has been used exclusively for commercial purposes as a trap and skeet shooting range. Moreover, in an attempt to meet the requirements of N.J.A.C. 14:14:8.6(a), which mandates that the movant specify the reasons why the evidence was not previously adduced, KDC recognizes that its application could have been clearer and that it could have appended additional material to clarify the commercial use of the site. In support, KDC submitted the affidavit of James Jeffers, president of Turkey Island Corporation, the property owner. Mr. Jeffers states that his family has owned the 69-acre property for more than 70 years and specifically through the corporation since 1968. Mr. Jeffers indicated that the site had been larger, that most of the site and surrounding acreage had been used as cow pasture as part of a dairy farm, and that part of it was wooded acreage. He stated that, prior to Turkey Island's acquisition of the site, the land had been let fallow. He further stated that, in 1972 the Township of Plainsboro approved an application that permitted the construction of a clubhouse and that, pursuant to leases between Turkey Island and Black Rock Gun Club, the trap and skeet shooting range began operating at the site in 1972. Mr. Jeffers stated that the Black Rock Gun Club cleared former cow pastures of brush and saplings and that the Black Rock Gun Club and another gun club have continuously leased and used the entire site for the exclusive purpose of a trap and skeet shooting range and clubhouse. Curiously, Mr. Jeffers does not address the tax classification of the site as qualified farmland.

While the Board notes that KDC has provided supplemental information wherein it attempts to establish that part of the 69-acre property is a brownfield, the Board **DID NOT ERR** in its factual finding that the site is farmland. The Board agrees with NJDEP's conclusion that the 69-acre property's historical status as qualified farmland – which was corroborated by KDC's application, its motion for reconsideration, publicly available tax databases, and KDC's responses to

[13] Millenium Order, 2014 N.J. PUC LEXIS 155; Millenium, 443 N.J. Super. 73.

discovery, including the certified tax records produced by Turkey Island through KDC – precludes its status as a brownfield under Solar Act. Indeed, the publicly available tax records show the current classification of the entire 69.91 acres as qualified farmland. On this record, the Board **DOES NOT FIND** that its decision was palpably incorrect or irrational nor that the Board acted in an arbitrary, capricious, or unreasonable manner.

The Board **ALSO DID NOT ERR** in its legal finding that the 69-acre property is governed by Subsection (s), which provides limited opportunities for the development of solar facilities on farmland, rather than Subsection (t), which provides opportunities for the development of solar facilities on properly closed sanitary landfill facilities, brownfields, and areas of historic fill. Notwithstanding KDC and Turkey Island's statements that the 69-acre property has not in reality been actively devoted to agricultural horticultural use, neither KDC nor Turkey Island dispute that the site has historically been and is currently valued, assessed, and taxed as farmland. KDC's argument is twofold. KDC argues that the tax status is not the sole factor to be considered because the Board must first find that the 69-acre property had been actively devoted to agricultural or horticultural use, which KDC and Turkey Island dispute. KDC also claims that the tax status of the 69-acre property is not a factor relevant to whether the site is a brownfield. Contrary to KDC's assertions, the 69-acre property's favored tax assessment is relevant because, to receive that assessment, the property owner is required to file a Farmland Assessment application annually, certifying that information provided on the application is true and correct and wherein the property owner represents the acreage that is actively devoted to agricultural or horticultural use. The 69-acre property's special farmland assessment is also relevant because, consistent with precedent, solar projects sited on agricultural property valued, assessed, and taxed as farmland do not qualify as brownfields for purposes of Subsection (t) but are governed by Subsection (s). Millenium, 443 N.J. Super. at 78.

Turning to the statutory definitions, N.J.S.A. 48:3-51 defines "farmland" as "land actively devoted to agricultural or horticultural use that is value, assessed, and taxed pursuant to the 'Farmland Assessment Act of 1964,' P.L. 1964, c. 48 (C. 54:4-23.1 et seq.)." Under N.J.A.C. 14:8-1.2, "farmland" means "land actively devoted to agricultural or horticultural use that is valued, assessed, and taxed pursuant to the 'Farmland Assessment Act of 1964,' at any time within the 10-year period prior to the effective date of the Solar Act." Because both definitions refer to the Farmland Assessment Act of 1964, it is necessary to review some of those statutory provisions.

N.J.S.A. 54:4-23.2 reads:

> For general property tax purposes, the value of land, not less than 5 acres in area, which is actively devoted to agricultural or horticultural use and which has been so devoted for at least 2 successive years immediately preceding the tax year in issue, shall, on application of the owner, and approval thereof as hereinafter provided, be that value which such land has for agricultural or horticultural use.
>
> [N.J.S.A. 54:4-23.2 (emphasis added).]

N.J.S.A. 54:4-23.5, titled "Land deemed actively devoted to agricultural, horticultural, woodland use," provides:

> Except as otherwise provided in subsection d. of this section, land, five acres in area, shall be deemed to be actively devoted to agricultural or horticultural use when the amount of the gross sales of agricultural or horticultural products produced thereon . . . have averaged at least $500[14] per year during the two-year period immediately preceding the tax year in issue. . . .

N.J.S.A. 54:4-23.6 sets forth the qualifications for valuation, assessment, and taxation as:

> Land which is actively devoted to agricultural or horticultural use shall be eligible for valuation, assessment and taxation . . . when it meets the following qualifications:
>
> (a) It has been so devoted for at least two successive years immediately preceding the tax year for which valuation under this act is requested;
>
> (b) The area of such land is not less than five acres when measured in accordance with the provisions of section 11 hereof; and
>
> (c) Application by the owner of such land for valuation hereunder is submitted on or before August 1 of the year immediately preceding the tax year to the assessor of the taxing district in which such land is situated on the form prescribed by the Director of the Division of Taxation. . . .
>
> [N.J.S.A. 54:4-23.6 (emphasis added).]

N.J.S.A. 54:4-23.13 provides that eligibility of land for valuation, assessment, and taxation under the Farmland Assessment Act of 1964 shall be determined for each tax year separately, and N.J.S.A. 54:4-23.14(a) describes the application form and its contents. N.J.S.A. 54:4-23.14(b) further states:

> A certification by the landowner that the facts set forth in the application are true may be prescribed by the director to be in lieu of a sworn statement to that effect. Statements so certified shall be considered as if made under oath and subject to the same penalties as provided by law for perjury.

Thus, under the Farmland Assessment Act of 1964, the owner must file the application yearly and must provide information supporting the statutory income and acreage requirements. Notably, the owner certifies these facts in the application.

[14] Among other changes, the 2013 amendment to the Farmland Assessment Act of 1964 increased the income requirement from $500 to $1,000. L. 2013, c. 43.

In response to discovery requests, KDC provided copies of the Farmland Assessment Form that it obtained from Turkey Island. On July 20, 2010, Turkey Island certified for tax year 2011 that the 69-acre property is rented to a farmer and is farmed by the owner, Turkey Island, and a tenant. In Section 2 under "Actively Devoted Land," Turkey Island certified that 22.8 acres is cropland harvested, 47.11 acres is appurtenant woodland or wetland, and 69.91 is the total devoted to agricultural or horticultural use. In Section 3, under "Field Crops (Harvested Acres)," Turkey Island certified the current year's farming activity as "Rye (grain) straw 22.8 acres." Above the signature of Turkey Island's corporate officer was the verification, which reads in pertinent part:

> The undersigned declares under the penalties provided by law, that this application . . . has been examined by him (her) and to the best of his (her) knowledge and belief is true and correct. Filing of this application is also a representation that the land will continue to be devoted to an agricultural or horticultural use during the year for which farmland assessment is requested.

On June 7, 2011, Turkey Island certified the same information in its Farmland Assessment Form for tax year 2012.

These Farmland Assessment applications show that Turkey Island represented that the 69-acre property was actively devoted to agricultural or horticultural use for at least two successive years immediately preceding the tax year for which farmland assessment was requested, or 2009–2012. Moreover, as noted above, the searchable tax records show that Turkey Island's 69-acre property was classified and assessed as qualified farmland from at least 2011 through 2018. The State cannot ignore these tax records nor can it ignore the favored tax assessment which Turkey Island received – and continues to receive – based on its own certified Farmland Assessment applications.

In enacting the Solar Act of 2012, the Legislature specified the review process for the Board to designate grid supply projects as connected to the distribution system, when the property has been valued, assessed, and taxed pursuant to the Farmland Assessment Act of 1964 between July 25, 2002 and July 23, 2012. Subsection (s) – not Subsection (t) – applies to land that has benefited from tax treatment under the Farmland Assessment Act of 1964 within the 10 years prior to July 23, 2012. Millenium, 443 N.J. Super. 73. Therefore, the Board **FINDS** that it did not err in rejecting KDC's application under Subsection (t).

For the reasons indicated above, the Board **HEREBY DENIES** KDC's motion for reconsideration. Accordingly, the Board need not address Ms. Frank's request for pro hac vice admission.

This Order shall be effective on March 9, 2019.

DATED: 2/27/19

BOARD OF PUBLIC UTILITIES
BY:

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PRESIDENT

MARY-ANNA HOLDEN
COMMISSIONER

DIANNE SOLOMON
COMMISSIONER

UPENDRA J. CHIVUKULA
COMMISSIONER

ROBERT M. GORDON
COMMISSIONER

ATTEST:

AIDA CAMACHO-WELCH
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities

In the Matter of the Implementation of L. 2012, c. 24, the Solar Act of 2012;
In the Matter of the Implementation of L. 2012, c. 24, N.J.S.A. 48:3-87(t) – A Proceeding to Establish a Program to Provide SRECs to Certified Brownfields, Historic Fill and Landfill Facilities, KDC Black Rock, LLC – Schalks Crossing Road

Docket Nos. EO12090832V, EO12090862V, and QO17080893

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