STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Petition of Chelsea Solar LLC, pursuant to 30 V.S.A. § 248, for a certificate of public good authorizing the installation and operation of the "Chelsea Solar Project," a 2.0 MW solar electric generation facility located off Willow Road in Bennington, Vermont	]]]]]]]	Docket No. 17-5024-PET

TOWN OF BENNINGTON MOTION FOR PROTECTIVE ORDER

The Town of Bennington ("Town") hereby moves pursuant to V.R.C.P. 26(c) for a protective order precluding Chelsea Solar LLC from taking the deposition of every individual member of the Town of Bennington Selectboard, and requiring Chelsea Solar to conform to V.R.C.P. 30(b)(6) in seeking testimony on behalf of a municipal entity as to the matters on which the Town has offered evidence.

SUMMARY

The Town of Bennington has offered to submit to a 30(b)(6) deposition as to the matters on which the Town has offered evidence, and to respond to other written discovery pursuant to V.R.C.P. 33, 34, and 36. Petitioner is instead requesting an extraordinary unduly burdensome series of depositions of individual members of the Selectboard who have not offered testimony or evidence in this proceeding. A protective order is appropriate to protect the Town from unnecessary and disproportionate burdens while still allowing reasonable discovery to the Petitioner regarding the matters at issue to Petitioner's request for a Certificate of Public Good pursuant to 30 V.S.A § 248.

MEMORANDUM

I. Factual Background

In connection with the above-captioned matter, the petitioner Chelsea Solar has requested that the Town make available "Stuart Hurd [the Town Manager], Dan Monks [the Planning Director] and each of the Select Board members" for the Town of Bennington to provide deposition testimony in connection with this proceeding pursuant to 30 V.S.A. § 248. (Ex. A, Email of Michael Melone to Merrill Bent dated June 26, 2018).

As supported in detail, *infra*, the request is atypical, legally unwarranted, and disproportionate to the needs of the case, and that it imposes undue burden, expense, and prejudice to the Town.

The Town requests that a protective order be imposed limiting Chelsea to discovery initiatives aimed at the Town as an institution including deposition(s) pursuant to V.R.C.P. 30(b)(6), and written discovery pursuant to V.R.C.P. 33, 34, and 36.

II. Legal Argument

Rule 26 limits the scope of discovery to matters that are both relevant to a party's claim or defense *and proportional to the needs of the case*, taking into account (among other things) "the importance of the issues at stake in the action . . . and whether the burden or expense of the proposed discovery outweighs its likely benefit." V.R.C.P. 26(b)(1).

As relevant here, Rule 26(c) of the Vermont Rules of Civil Procedure provides that:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, [a court] may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place or the allocation of expenses; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of discovery be limited to certain matters. . . .

V.R.C.P. 26(c).

The provisions of V.R.C.P. 26 apply in the context of this proceeding pursuant to PUC Rule 2.214(A).

A. Rule 30(b)(6) Governs the Request

Vermont Rule of Civil Procedure 30(b)(6) plainly provides the mechanism available for obtaining testimony on behalf of an entity—including a municipal entity. 30(b)(6) provides that:

> A party may in [a deposition notice] name as a deponent a public or private corporation . . . or governmental agency and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. The persons so designated shall testify as to matters known or reasonably available to the organization.

While the rule *does not* preclude taking depositions by other authorized procedures, in Chelsea's own words, it seeks to depose members of the Selectboard on

the basis that "the Select Board speaks for the Town" (Ex. A). The only mechanism for obtaining testimony that "speaks for" an organization, including a municipal corporation, is clearly controlled by V.R.C.P. 30(b)(6). The Town is perfectly amenable to offering 30(b)(6) testimony with respect to the matters on which the Town has offered evidence.

B. The Request Is Disproportionate to the Needs of the Proceeding

The testimony of individual legislators is of extremely limited value, thus the burden and potential prejudice of such testimony substantially outweighs its likely benefit.

"[W]hatever interpretative force one attaches to legislative history, the Court normally gives little weight to statements, such as those of the individual legislators, made *after* the bill in question has become law." *Barber v. Thomas*, 560 U.S. 474 (2010); *Trudell v. State*, 2013 VT 18, ¶ 27, 193 Vt. 515, 528 (2013) ("Courts generally give little weight to an individual legislator's interpretation of the law once enacted because it cannot reflect the thought processes of the entire Legislature."); *State v. Madison*, 163 Vt. 360, 373–74, 658 A.2d 536, 545 (1995) (explaining that the comments of individual legislators regarding their understanding of meaning of statute "are of little weight in determining legislative intent, unless they also exist in a written report that was available for review by the full legislature before passing the bill."). Given the extremely minimal value of an individual lawmaker's testimony concerning legislative history, legislative intent, or legislative interpretation, Petitioner's request is disproportionate to the burden that it would impose both on these individuals and on

public resources. It is also uniquely prejudicial to the Town under the circumstances discussed in greater detail in Point II-C, *infra*.

It is equally the case that Chelsea may not depose individual Select Board members in their capacity as quasi-judicial or judicial decision-makers. The United States Supreme Court has also spoken to this issue, articulating a policy against exploratory inquiries into the mental processes of governmental decision-makers absent a showing of extraordinary circumstances. *United States v. Morgan*, 313 U.S. 409, 422 (1941). Where no extraordinary circumstances exist, individual decision-making authorities are generally not required to submit to an oral deposition where the authority is "willing to respond institutionally to discovery initiatives by producing the administrative record or other documents, answering interrogatories, or by designating a single representative to speak for the agency on deposition in accordance" with Rule 30(b)(6). *Community Federal Sav. And Loan Ass'n. v. Federal Home Loan Bank Bd.*, 96 F.R.D. 619, 621 (1983) (citing *United States v. Morgan*, 313 U.S. at 422.

As the Court in *Community Federal* stated, "The reasons for the *Morgan* policy are obvious. Not only must the integrity of the administrative process be protected, but public policy requires that the time and energies of public officials be conserved for the public's business to as great an extent as may be consistent with the ends of justice in particular cases . . . a failure to place reasonable limits upon private litigants' access to responsible governmental officials as a source of routine pre-trial discovery would result in a severe disruption of the government's primary function." *Id.*

This policy has been expressly adopted by the Vermont Supreme Court in *Monti v. State* (151 Vt. 609, 563 A.2d 629 (1989)), and it has been extended to apply in the

context of Vermont Open Meetings Law. *Rueger v. Natural Resources Bd.*, 2012 VT 33, ¶ 10, 191 Vt. 429, 436, 49 A.3d 112, 116 (2012).

Members of the Selectboard are ordinary citizens and volunteers. None of them have offered evidence or given testimony in this proceeding. Taking the deposition of each individual member of the Board is not an appropriate use of their time or of public resources, and is contrary to public policy. Because its likely benefit is outweighed by burden of depositions and by the prejudice to the Town, depositions should be limited to institutional depositions pursuant to V.R.C.P. 30(b)(6).

C. The Request is Particularly Prejudicial to the Town in Light of Pending Litigation Commenced by a Chelsea Affiliate in Another Forum.

Requiring the Town to accede to Chelsea's request is potentially prejudicial in another, unique manner. Chelsea Solar affiliate (and the owner of the Property upon which Chelsea Solar is located), PLH LLC, has commenced a lawsuit against the Town of Bennington in the Environmental Court seeking declaratory and injunctive relief, as well as monetary damages, attorneys' fees and costs. (Environmental Court Complaint, Exhibit B). The allegations set forth in this Complaint are directly related to some of the issues raised in the present proceeding. The Chelsea Project is mentioned 13 times in the Complaint, and the Complaint takes issue directly with various actions of the Selectboard. (Ex. B, at ¶¶ 12–13). Given the extremely limited value of the Selectboard's testimony in connection with the instant proceeding, the potential prejudice in the pendency of a civil case in which the Town is defending against claims for monetary and equitable relief weighs heavily in favor of a protective order.

CONCLUSION

The notion that Chelsea is entitled to depose every member of the Selectboard because it "voluntarily injected itself" into the case, as it posits in correspondence on this issue, would mean that every Vermont municipality that makes a recommendation as to a certificate of public good Project pursuant to 30 V.S.A. § 248(b) opens itself up to an examination of every individual Selectboard member in every case. That is unreasonable and creates the potential for abuse by developers who disagree with a municipal position on a given project. In turn, such a holding would create a significant disincentive for municipalities to take a position on applications for a certificate of public good for fear of becoming embroiled in discovery processes which far exceed the needs of a given case and result in an unnecessary waste of public resources. It would set a very dangerous precedent with respect to developers who may be inclined to abuse of the legal system.

The Town respectfully requests that discovery initiatives be limited to those aimed at the Town as an institution. Such discovery may include deposition(s) pursuant to 30(b)(6) based on matters designated in advance with "reasonable particularity" so that the municipality can respond appropriately and designate the appropriate responsive person pursuant to that rule. All such depositions should be required to take place in Bennington County, where the Town and the property in question are located. The Town will also respond institutionally to written discovery requests pursuant to Rules 33, 34, and 36, subject to ordinary discovery limitations with respect to those procedures.

At Manchester, Vermont this 27th day of June, 2018.

/s/Merrill E. Bent, Esq.
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CERTIFICATION PURSUANT TO V.R.C.P. 26(h)

The undersigned counsel has conferred with Chelsea Solar Project LLC's counsel in a good-faith effort to resolve or minimize disputes raised in this motion as required by V.R.C.P. 26(h), but counsel was unable to resolve the dispute. Such correspondence occurred via email on June 20th, 22nd and 26th.

/s/Merrill E. Bent, Esq.

TOWN OF BENNINGTON EX A TO MOTION FOR PROTECTIVE ORDER

6/27/2018

EXHIBIT A

Merrill Bent

From: Michael Melone <mjmelone@allcous.com>
Sent: Tuesday, June 26, 2018 1:15 PM
To: Merrill Bent
Subject: RE: Word Versions

Hi Merrill, we will be issuing deposition notices to Stuart Hurd, Dan Monks and each of the Select Board members. Please advise as to their availability in August and September (prior to September 10), which will allow for sufficient time to resolve any motions to quash or for a protective order that you file. We are agreeable to noticing the location for your office if that is more convenient for you and your clients. Thanks

Michael Melone
Allco Renewable Energy Limited
1740 Broadway, 15th Floor
New York, NY 10019
(T) 212-681-6974
(F) 801-858-8818
mjmelone@allcous.com

From: Merrill Bent [mailto:Merrill@greenmtlaw.com]
Sent: Friday, June 22, 2018 10:15 AM
To: Michael Melone <mjmelone@allcous.com>
Cc: Rob Woolmington <Rob@greenmtlaw.com>
Subject: RE: Word Versions

Hi Michael:

Thanks. I will see you at 2:30 p.m.

Depositions of an entire Selectboard are not "standard procedure" in Vermont, nor does your description suggest that those depositions would be in proportion with the needs of the case. The Town is willing to designate a single official pursuant to V.R.C.P. 30(b)(6) to appear at a deposition.

As I am sure you know, the United States Supreme Court has articulated a policy against exploratory inquiries into the mental processes of government decision-makers absent a showing of extraordinary circumstances. Where no extraordinary circumstance exists, individual decision-making authorities are generally not required to submit to an oral deposition where the authority "is willing to respond institutionally to discovery initiatives by producing the administrative record or other documents, answering interrogatories, or by designating a single representative to speak for the agency on deposition in accordance" with Rule 30(b)(6). (*See, e.g. Community Federal Sav. And Loan Ass'n v. Federal Home Loan Bank Bd.*, 96 F.R.D. 619, 621 (1983) (*citing United States v. Morgan*, 313 U.S. 409, 422 (1941)).

There is significant caselaw concerning the prohibition of court-ordered questioning as to the mental processes of lawmakers. Cases extend to state legislators, state senators, governors, city council members, boards of supervisors, boards of trustees, voters who petition for and approve a charter amendment, mayors, county officials, public power authority and department of water and power, board of water commissioners, sheriffs, city commissions, a local action formation committee, and former planning director and commissioners.

As the *Community Federal* Court stated, "The reasons for the *Morgan* policy are obvious. Not only must the integrity of the administrative process be protected, but public policy requires that the time and energies of public officials be

conserved for the public's business to as great an extent as may be consistent with the ends of justice in particular cases. . . a failure to place reasonable limits upon private litigants' access to responsible governmental officials as a source of routine pre-trial discovery would result in a severe disruption of the government's primary function." *Id.*

This policy has been expressly adopted by the Vermont Supreme Court in *Monti v. State*, 151 Vt. 609, 563 A.2d 629 (1989). It has also been extended to apply in the context of Vermont Open Meetings Law. *Rueger v. Natural Resources Bd.*, 2012 VT 33, ¶ 10, 191 Vt. 429, 436, 49 A.3d 112, 116 (2012).

These are ordinary citizens and volunteers, and taking each of their deposition is not an appropriate use of their time or of public resources, and is contrary to public policy. In addition, it fails the proportionality test.

Notices of deposition for the entire Selectboard will be met with a motion for a protective order and/or motion to quash.

Please do send along the 30(b)(6) topics you would like to address so that we can designate the correct person to testify on behalf of the Town.

I note that while the cases you cite contain a reference to deposition of municipal Board members, it was not discussed or analyzed as an issue, so it is unclear whether there was any dispute about their availability or what the surrounding circumstances were.

Many thanks,

Merrill

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From: Michael Melone [mailto:mjmelone@allcous.com]
Sent: Friday, June 22, 2018 9:40 AM
To: Merrill Bent <Merrill@greenmtlaw.com>
Subject: RE: Word Versions

Hi Merrill, yes let's meet at the end of Apple Hill road at 2:30pm and walk the perimeter of the property. I don't think we should delve too far into the brush there because the tick situation is horrific!

Regarding the depositions, parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Here the main focus of contested issues is orderly development and aesthetics. That in turn includes a focus on the Town Plan, screening and municipal decisions and policies regarding commercial scale solar. As you have argued, the Select Board speaks for the Town. The Select Board members have unique and relevant knowledge of the issues that are being contested, which includes municipal decision, policies and measures regarding commercial scale solar.

Moreover, if the Town is successful in its appeal of the vested rights issue, then an additional issue is the balancing test in 248(b) that the PUC would then be required to decide and receive evidence on. That balancing test requires the PUC to weigh the Town's a land conservation measure or specific policy against other factors affecting the general good of the State. Such a balancing requires, among other things, an evaluation of the value that should be attributed to the Town policy. The Select Board members have unique and relevant knowledge on that as well.

Each member of the select board is intimately familiar with the ins and outs of our project, the Town Plan, screening ordinance, other renewable energy developments built in the RCON, the town's land conservation measure and policies. Each Select Board Member has unique knowledge that is not obtainable from another source. Dan Monks essentially affirmed that in his deposition last year when he repeatedly stated that he could not speak for the Select Board. The issues that necessitate taking the deposition of each member are as you have stated at the heart of the case thus elevating the issues to paramount importance under VCRP 26.

In order to minimize the burden on each member we are prepared to be flexible as to the time and place for the deposition.

Depositions of members of a board including municipal boards is clearly relevant, necessary and proportional as cases show. *See, e.g., Miner v. City of Glens Falls*, 999 F.2d 655 658 (2d. Cir. 1993) (discussing the depositions of each member of the Glen Falls municipal board including the mayor); *Pico v. Board of Education*, 638 F.2d 404 (2d Cir. 1980); *Reg'l Econ. Cmty. Action Program v. City of Middletown*, 294 F.3d 35, 52 (2d. Cir. 2002) ("The Planning Board members' deposition testimony provides additional evidence of pretext. When questioned about the reason for the Board's disparate treatment of the two properties, one member testified: 'I cannot recall what I thought at the time, what other people thought at the time and in what detail the economic development argument began to figure in. So I can't really recall specifically what the distinction was.'"); *White v. Regester*, 412 U.S. 755, 774 (1973) (discussing the "lengthy depositions" of the members of the board and of the staff members exposing the lack of any meaningful indications of the standards used.)

I would say it is standard procedure to permit depositions of each member of a board that is a party to a case. That should be even more so here because the Select Board voluntarily injected itself into the case, with full knowledge of the rights of the parties to discovery and depositions under the VRCP.

While depositions of high level corporate executives may be duplicative, cumulative and burdensome where the person sought to be deposed has no personal knowledge of the events in dispute. *See Baine v. General Motors Corp*., 141 F.R.D. 332, 333-35 (M.D. Ala. 1991) (denying the plaintiff's request to depose a corporate vice president who lacked unique personal knowledge of the issues); *see also Thomas v. International Business Machines*, 48 F.3d 478, 483 (10th Cir. 1995) (barring deposition of corporate executive who lacked personal knowledge of the events when the plaintiff served the notice of deposition at the "eleventh hour"), that is not the case here. Each Select Board member has been personally involved and has unique knowledge.

Michael Melone
Allco Renewable Energy Limited
1740 Broadway, 15th Floor

TOWN OF BENNINGTON EX B TO MOTION FOR PROTECTIVE ORDER

6/27/2018

EXHIBIT B

STATE OF VERMONT

SUPERIOR COURT

ENVIRONMENTAL DIVISION
DOCKET NO._____

PLH LLC
Plaintiff

v.

THE TOWN OF BENNINGTON, and
THE BENNINGTON COUNTY
REGIONAL COMMISSION
Defendants

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DAMAGES FOR VIOLATIONS OF 24 V.S.A. CH. 117, AND THE VERMONT CONSTITUTION

NOW COMES PLH LLC ("PLH" or "Plaintiff"), by and through their attorneys, by way of complaint against the Town of Bennington (the "Town") and the Bennington County Regional Commission (the "BCRC"), respectfully petition this Court for (i) injunctive relief, (ii) declaratory relief under 12 V.S.A. §4711 and V.R.C.P. 57, (iii) a review of governmental action under V.R.C.P. 75, (iv) an appeal to the Environmental Division under V.E.C.P. 5 pursuant to 24 V.S.A. §§4471, 4472 for violations of 24 V.S.A. ch. 117, and (v) damages in an amount to be proved at trial.

NATURE OF THE ACTION

1. Fossil fuel generation not only is destroying the planet, but is responsible for the pre-mature death of countless Americans.[1]

2. Recently, the U.S. Administration released a dire report on the prospects for the climate. *See* https://science2017.globalchange.gov/chapter/executive-summary/. USGCRP, 2017: *Climate Science Special Report: Fourth National Climate Assessment, Volume I*

[1] See, https://www.epa.gov/sites/production/files/2017-10/documents/ria_proposed-cpp-repeal_2017-10.pdf; https://www.washingtonpost.com/news/energy-environment/wp/2017/11/01/trumps-epa-says-obamas-climate-rule-could-prevent-up-to-4500-deaths-annually-moves-to-scrap-it/?utm_term=.f0597f004dfa

[Wuebbles, D.J., D.W. Fahey, K.A. Hibbard, D.J. Dokken, B.C. Stewart, and T.K. Maycock (eds.)]. U.S. Global Change Research Program, Washington, DC, USA, 470 pp, doi: 10.7930/J0J964J6. The report concludes that "[s]ea level rise will be higher than the global

average on the East and Gulf Coasts of the United States." *Id*. Stronger storms will be more frequent raising the costs to recover from such storms. The east coast, including the Northeast, in particular will see more frequent and stronger storms and hurricanes. *Id*. at Chapter 9. https://science2017.globalchange.gov/chapter/9/. *See also*, *id.* at Fig. 9.2.

3. Ignoring the dangers of fossil fuels and those warnings, on January 22, 2018, Bennington became the anti-solar capital of Vermont, passing changes to its Town Plan designed to stifle solar development—perpetuating our Thelma and Louise-like drive off the climate cliff.

4. Since 2015 a small band of NIMBY (not-in-my-backyard) Bennington residents from the private Apple Hill homeowners association neighborhood have co-opted the governmental power of the Town of Bennington to harm Plaintiff's ability to lawfully develop solar projects on property in Bennington. The result has been the use of governmental power to target Plaintiff in an unlawful, discriminatory and unconstitutional manner—culminating in Bennington's most recent anti-solar amendments to its Town Plan.

5. The Town of Bennington now hopes to get Bennington County on board with its anti-solar and anti-climate Town Plan.

6. Plaintiff ask this Court to declare invalid the Bennington solar screening ordinance (the "Screening Ordinance") and the provisions of the Bennington Town Plan that restrict the development and siting of solar energy farms, and to issue a permanent injunction enjoining the same.

7. This suit also seeks to enjoin the BCRC from taking any action to certify the Bennington Town Plan or Screening Ordinance under 24 V.S.A. §4352(b).

PARTIES

8. Plaintiff PLH is an Indiana limited liability company with its office located at 145 Pine Haven Shores, Suite 1000A, Shelburne, VT 05482. PLH owns the following real property in the Town: Property #23-50-16-00, 27.18 acres (the "Eastern Industrial RR Property"), (ii) Property #23-50-20-00, 40.6 acres (the "Western Industrial RR Property"), and

(iii) Property #29-50-31-00, 27.04 acres (the "Chelsea/Apple Hill Property").

9. Defendant Town is a town in Vermont chartered in 1749.

10. Defendant the Bennington County Regional Commission was created, pursuant to 24 V.S.A. §4341, by the seventeen towns and villages it serves. It has the authority to certify the Bennington Town Plan as compliant under 24 V.S.A. §4352(b).

FACTS APPLICABLE TO ALL COUNTS

11. In 2014 two solar farms were proposed on Plaintiff's Chelsea/Apple Hill Property in Bennington—the Chelsea Solar Farm and the Apple Hill Solar Farm. All surrounding neighbors were notified of the plans for the solar farms. The Town received and reviewed the plans for the solar farms and made no objection or comment.

12. But then in August 2015, the NIMBY residents convinced the Select Board to hold a meeting (of which the Plaintiff received no notice) at which false visual information was provided to the Select Board, resulting in the Select Board voting to oppose the Chelsea Solar and Apple Hill Solar Farms.

13. Even when the Plaintiff later informed the Select Board that it was relying on false information, the Select Board refused to change its position, and actively opposed

those two solar farms before the PUC, which is the Vermont state agency responsible for approving the siting of solar projects. *See*, 30 V.S.A. §248.

14. Making matters worse, the Town's actions were blatantly discriminatory as compared to the Town's actions with respect to other similarly situated solar projects located in the Town.

15. Not satisfied with co-opting the Town to use its governmental power to target Plaintiff's Chelsea/Apple Hill Properties without any justifiable regulatory concerns with respect to the projects, the NIMBY band proceeded to take control of the Town's Siting Committee, which proceeded to develop anti-solar changes to the Town Plan.

16. Based upon the work of the Siting Committee the Town passed the Screening Ordinance in late 2015, and made anti-solar changes to its Town Plan in early 2016 in order to target Plaintiff's properties, adding a provision that banned any solar farms or group of solar farms on more than 10 acres.

17. Then in 2016 the Vermont legislature enacted 24 V.S.A. §4352 and 30 V.S.A.

§248(b)(1)(C).

18. Act 174 of 2016 established a new set of municipal and regional energy planning standards, *see* 24 V.S.A. §4352, which if met would allow those plans to carry greater weight— substantial deference vs. due consideration—in the 30 V.S.A. §248 siting process before the PUC. Meeting the standards is entirely voluntary; if regions and municipalities do not wish to update their plans, they will continue to receive due consideration in the section 248 process.

19. On June 21, 2017, the Bennington County Regional Energy Plan (the "Regional Plan") was the first regional energy plan to be approved by the Vermont Department of Public Service ("DPS") under 24 V.S.A. §4352(a).

20. Pursuant to 24 V.S.A. §4352(b), now that the Regional Plan has been certified by the DPS, the Select Board may submit the Energy Amendment and its Town Plan to the BCRC for issuance of a determination of energy compliance. Under 24 V.S.A. §4352(b), the BCRC can only issue such an affirmative determination if it makes a "finding that the municipal plan meets the requirements of [24 V.S.A. §4352(c)] and is consistent with the regional plan."

21. 24 V.S.A. §4352(c) requires that a municipal plan include an energy element that has the same components as described in 24 V.S.A. §4348a(a)(3) for a regional plan and be confirmed under 24 V.S.A. §4350.

22. 24 V.S.A. §4352(c) also requires that a municipal plan must be consistent with the following, with consistency determined in the manner described under 24 V.S.A. §4302(f)(1) (the "Consistency Standards"):

A. Vermont's greenhouse gas reduction goals under 10 V.S.A. § 578(a);

B. Vermont's 25 by 25 goal for renewable energy under 10 V.S.A. § 580;

C. Vermont's building efficiency goals under 10 V.S.A. § 581;

D. State energy policy under 30 V.S.A. §202a and the recommendations for regional and municipal energy planning pertaining to the efficient use of energy and the siting and development of renewable energy resources contained in the State energy plans adopted pursuant to 30 V.S.A. §§ 202 and 202b (State energy plans); and

E. the distributed renewable generation and energy transformation categories of resources to meet the requirements of the Renewable Energy Standard under 30

V.S.A. §§ 8004 and 8005.

23. 24 V.S.A. §4352(c) also requires that a municipal plan must meet the standards for issuing a determination of energy compliance included in the State energy plans. The requirements of 24 V.S.A. §4352(c) are hereinafter referred to as the "Municipal Standards."

24. The DPS has published "ACT 174 RECOMMENDATIONS AND DETERMINATION STANDARDS," which are the standards for issuing a determination of energy compliance included in the State energy plans, *see*, http://publicservice.vermont.gov/content/act-174-recommendations-and-determination-standards, (the "DPS Standards.")

25. After the passage of Act 174, the Bennington Siting Committee continued to target Plaintiff as it recommended further anti-solar changes to the Town Plan, which changes were adopted on January 22, 2018.

26. Currently solar energy farms greater than 150 kilowatts ("KWs") are permitted Town-wide. The anti-solar amendments to the Town Plan approved by the Planning Commission, *see* **Exhibit 1** (the "Energy Amendment"), and adopted by the Select Board on

January 22, 2018, stifle solar development by designating only a limited number of parcels within the Town as "preferred sites." If a parcel is not designated as a preferred area then the Town Plan bans the placement of solar facilities greater than 150 KWs in size on the parcel, labeling such sites as "unsuitable."

27. Designation as a preferred area also has a positive economic consequence for those landowners. As a municipally designated preferred area, the State of Vermont makes it easier to obtain long-term electricity off-take agreements, an essential element in the development of any solar farm.

28. Public records requests to the Town and BCRC produced documents that show clearly that the laser-like focus of the Siting Committee's work under Act 174 was to target Plaintiff's properties and the projects on those properties. *See., e.g.,* **Exhibit 2,** which is an email from the Executive Director of Bennington County Regional Commission to the Bennington Planning Director on February 9, 2017, stating that the "*narrowly targeted Chelsea/Apple Hill project parcels and the Rice Lane RR areas*" [which are Plaintiff's Eastern Industrial RR and Western Industrial RR properties], raised "a red flag" and that more window-dressing was needed to attempt to justify why "those lots should be treated differently."

29. The Town has refused to disclose any documents related to the 2016 Town Plan anti-solar amendment or the Chelsea and Apple Hill Solar Farms. The Town has also failed to produce any documents from members of the Siting Committee.

30. The Energy Amendment fails to designate the Chelsea/Apple Hill Property, the Eastern Industrial RR Property, and the rural residential portion of the Western Industrial RR Property (collectively, the "Plaintiff's Targeted Properties") as specifically preferred sites for no legitimate reason.

31. In comparison, the Energy Amendment designates certain sites as preferred sites (*see* the Solar Siting Map included in the Energy Amendment) even though they are simply not developable for solar greater than 150 kilowatts because of ecological constraints. For example, preferred parcels 35-50-45-02 and 35-50-58-00 are unbuildable for solar because they are almost entirely a Highest Priority Surface Water and Riparian Areas and a Riparian Wildlife Connectivity area. The same thing applies with parcel 36-50-05-00 which is covered entirely by Priority Surface Waters and Riparian Areas and Highest Priority Surface Water and Riparian Areas and a Riparian Wildlife Connectivity area.

Similarly, parcel 31-50-08-02 is mostly in a Highest Priority Surface Water and Riparian Areas and a Riparian Wildlife Connectivity area.

32. Other preferred sites have similar and obvious insurmountable problems. For example, parcel 06-01-54-01 is part of a habitat block that has a threat level of 10—the highest score assigned by the Vermont Agency of Natural Resources. Parcel 18-50-07-00 is listed as

wetland project 2012-162 and the site for rare, threatened and endangered species ("RTE"). Parcel 18-50-08-00 also has a significant presence of RTE according to ANR. Parcel 25-50-08- 01 is bisected by a wide class 2 wetland according to ANR. Parcel 35-50-25-00 is almost entirely either a class 2 wetland or a flood zone. Parcel 38-50-14-02 is in a river corridor and has a significant class 2 wetland leaving little space for solar once setbacks are accounted for. Parcel 38-50-15-00 has a river corridor, class 2 wetland (project 2015-620) and RTE. Parcels 43-51-30- 00 and 49-51-43-00 are adjacent to a river corridor, and are the site of wetlands projects 2017- 258 and 2016-254.

33. Parcel 44-50-42-00 (the Vermont Veterans Home) is part a river corridor, and mostly otherwise covered by buildings, so unless the Town is advocating for the removal of the Veterans home, there is no meaningful potential for larger scale ground mounted solar. Parcel 58-50-79-00 is the site of wetland project 2006-208.

34. These undevelopable sites, while selected a preferred, illustrate the lack of compliance with 24 V.S.A. §4352(c), but also show that the Energy Amendment does not select preferred and unsuitable sites through any objective analysis, but rather based upon the whims and prejudices of the Siting Committee.

35. The selection of the preferred sites clearly demonstrates that there is no rational basis on which to exclude all the parcels that were excluded, and that there was no

objective criteria used. Rather, the selection process indicates an off-the-cuff discriminatory selection.

36. Still worse, there is no objective basis for not designating the site of the Chelsea and Apple Hill Solar Farms as specifically preferred sites. Statements from a recent email from Select Board Vice Chair Don Campbell highlights why the Chelsea and Apple Hill sites are perfect for solar:

> the lot is small, there is no river or lake to protect, the forest is in terrible condition (basal area is so low it barely qualifies as forest in many places and it is rife with invasives), it does not connect to other conserved lands, it is not part of an animal corridor, it does not provide significant public access, it is not high quality farm land nor is it suitable for low-income housing, and is not tribal or cultural heritage land.

37. All objective and non-discriminatory criteria would have led to the designation of the Chelsea/Apple Hill Property as a specifically designated preferred site. The fact that it was not further illustrates the unlawful discrimination that infected the entire process.

38. Similarly, any objective criteria would have led to the designation of the Eastern Industrial RR Parcel as specifically preferred. The Plaintiff's Eastern Industrial RR Parcel has no ecological constraints other than a *de minimus* area of class II wetlands. Yet that parcel, even though most of it is ***industrially zoned***, is not designated as preferred. There is simply no rational basis as to why the Energy Amendment would deem that property "unsuitable" for solar energy.

39. Still worse, the Energy Amendment designates 214 municipally owned acres in the Bennington rural conservation zone ("RCON") as preferred sites for solar, while designating all other properties in the RCON zone as unsuitable, including Plaintiff's Chelsea/Apple Hill Property, simply because such land is *privately owned*, creating an unconstitutional discriminatory preference for itself as against all other landowners.

40. The total acres designated as preferred and owned by the Town is approximately 221 acres making the Town the largest provider of solar energy sites in the Town. The Energy Amendment also designates another approximately 354 acres of preferred sites, but when a review of the suitability of those sites is actually conducted as noted above, the number of acres available for solar drops to a fraction.

41. The Town is simply using its governmental power to unconstitutionally take away the property development rights currently enjoyed by Plaintiff and others for no legitimate reason.

42. The defendants' actions have caused and continue to cause injury to Plaintiff.

43. The Energy Amendment and the Town's anti-solar Town Plan and Screening Ordinance has caused and continues to cause injury to Plaintiff and threatens further injury to Plaintiff. Classifying and threatening to classify Plaintiff's properties as unsuitable for solar development has an immediate adverse impact on the fair market value for the properties, and impairs the Plaintiff's ability to develop solar on the properties.

CAUSES OF ACTION

COUNT I

I. THE PLANNING COMMISSION'S PASSAGE OF THE ENERGY AMENDMENT IS VOID *AB INITIO* FOR FAILURE TO ADHERE TO THE REQUIREMENTS OF 24 V.S.A. §4384.

44. Plaintiff repeat s and re-alleges the allegations contained in each and every preceding paragraph of this Complaint.

45. The Planning Commission's passage of the Energy Amendment fails 24 V.S.A. §4384 in at least three respects. *First*, the Planning Commission did not meet the notice requirements of 24 V.S.A. §4384(e). *Second*, the Planning Commission's written report did

not sufficiently address the issues listed in 24 V.S.A. §4384(c)(1)-(5). *Third*, the Planning Commission made changes to the proposed amendment between the warning date and the first hearing on the amendment.

The Plaintiff's Multiple Requests For Notice

46. On April 27, 2017, Brad Wilson, a representative of the Plaintiff, sent an e-mail to the Town's Planning Director requesting information as to when the Planning Commission would meet to review the Solar Siting Guidelines and map (*see* **Exhibit 3** hereto). Mr. Wilson also expressed the Plaintiff's desire to participate in all stages of the process of the development and ratification of the Energy Amendment.

47. On April 28, 2017, Mr. Wilson again sent an e-mail to the Town's Planning Director requesting notice of the public hearings on the Energy Amendment (see **Exhibit 4** hereto).

48. On May 26, 2017, Mr. Wilson again sent an e-mail to the Town's Planning Director requesting information regarding the dates of the public hearings for the Energy Amendment (see **Exhibit 5** hereto).

49. On August 2, 2017, Mr. Wilson again sent an e-mail to the Town's Planning Director requesting information regarding the dates of the public hearings for the Energy Amendment (see **Exhibit 6** hereto). Mr. Wilson again expressed the Plaintiff's desire to participate in the process.

50. On August 28, 2017, the Planning Commission distributed a copy of the

proposed energy amendment (the "Originally Warned Energy Amendment") and a copy of the corresponding written report to various statutory parties pursuant to 24 V.S.A. §4384(e) (the "August 28 Warning"). *See*, **Exhibit 7**. The August 28 Warning set a date of October 16, 2017

for the public hearing to consider the Originally Warned Energy Amendment before the Planning Commission.

51. Plaintiff was provided notice of the October 16, 2017, public hearing through an e-mail sent from the Planning Director to Mr. Wilson on October 11, 2017 (*see* **Exhibit 8**

hereto).

52. There were not a sufficient number of members of the Planning Commission in attendance on October 16, 2017 for a quorum and, consequently, no meeting occurred.

53. Despite the lack of a quorum, the two planning commissioners in attendance received comments from the public. *See*, **Exhibit 9**.

54. The Planning Commission's public hearing on the energy amendment to the Town Plan was re-scheduled for November 6, 2016, with such notice being sent to certain persons on October 30, 2017, through an email send by the Planning Director. *See*, **Exhibit 10**.

55. As described in that October 30, 2017, email, the text of the Originally Warned Energy Amendment was changed to create a November 6, 2017 version to address community solar facilities and agricultural soils. Thus, the text of the energy changes to the Town Plan that was presented and considered at the November 6, 2017 public hearing was different than the text of those changes that accompanied the August 28 Warning (see **Exhibit 10** hereto).

56. Making those changes prior to the November 6, 2017, hearing and not providing a new 30-day notice violated 24 V.S.A. §4384 and long-standing guidance on the process requirements for planning commissions. *See*, Vermont Secretary of State's web site, *Plan and Bylaw Adoption Tools*, [1] page 3 ("*No changes may be made between the time the public notice is posted/published and the public hearing."*)

57. Further, violating 24 V.S.A. §4384(c), the Planning Commission did not revise the written report to account for the new revisions related to community solar facilities.

58. Mr. Wilson raised various specific issues on the energy amendment in an email dated October 18, 2017, to the Executive Director of the BCRC and the Planning Director. *See*, **Exhibit 11**. Those comments were put into a letter and submitted at the November 6, 2017 meeting. *See*, **Exhibit 12.**

59. In an email to the Planning Director, the Executive Director of the BCRC stated: "Brad raises some interesting points for discussion. Let's review them once we get his formal statement and consider whether we need to get a legal opinion." *See*, **Exhibit 11**. But it was clear that the Planning Commission had no interest in reviewing any of Mr. Wilson's issues as the Planning Director made clear when he stated: "Brad is very self-serving and I don't want to waste any effort on trying to please him or his billionaire client."

60. On November 6, 2017, the Planning Commission voted unanimously to pass the Energy Amendment, as revised from the Originally Warned Energy Amendment.

61. At the November 6, 2017 hearing, Mr. Wilson made a specific request to receive listings of the criteria that were used to exclude Plaintiff's properties from the preferred list and also asked for reconsideration for adding them as preferred sites. Both

requests have been ignored.

62. The Energy Amendment was adopted by the Select Board on January 22, 2018.

The Notice Requirements of 24 V.S.A. §4384(e).

63. 24 V.S.A. §4384(e) requires that strict but simple notice requirements be met before the Planning Commission has the legal authority to consider an amendment to the Town Plan.

64. 24 V.S.A. §4384(d) requires that the Planning Commission hold at least one public hearing within the municipality after public notice on any proposed plan or amendment. 24 V.S.A. §4384(e) requires that a written notice be given at least thirty (30) days prior to the first hearing to designated persons. That notice must include a copy of the proposed plan or amendment and the written report and it must either be delivered with proof of receipt, or mailed by certified mail, return receipt requested. 24 V.S.A. §4384(e)(4) includes among the persons entitled to notice any "business, conservation, low income advocacy and other community or interest groups or organizations that have requested notice in writing prior to the date the hearing is warned."

65. The Plaintiff's representative requested to be notified of the public hearings four times over a four-month period prior to the Planning Commission's issuance of the August 28 Warning. *See* **Exhibits 3 through 6.** Brad Wilson's request for notice of changes to the Town

Plan was clear in his April 27, 2017 email to the Planning Director:

> Given that we do own property in the Town and we are solar developers, I hope it is no surprise that we would like to participate in the process as that map is generated, reviewed, and ultimately approved. Would you be able to notify me of the next opportunity to do so?

See, **Exhibit 3** hereto.

66. Despite the repeated requests by the Plaintiff's representative for notice, the

Planning Commission omitted the Plaintiff from the August 28 Warning, only providing a notice on October 18, 2017.

67. Despite having written to the Town's Planning Director on four separate occasions requesting notice of any public hearings on the Energy Amendment, the Planning Commission failed to act and failed to provide the required notice to the Plaintiff under 24 V.S.A. §4384(e) within the mandatory time requirements.

68. The Planning Commission also failed the notice requirements because it did not provide 30 days advance notice of the November 6, 2017, first hearing to any of the parties entitled to notice under 24 V.S.A. §4384(e).

69. Under Vermont law, the failure to adhere to the procedural requirements of 24 V.S.A. §4384(e) causes the Planning Commission's affirmative vote on the Energy Amendment on November 6, 2017 to be void *ab initio*.

70. Because zoning ordinances are in derogation of common law property rights, the Vermont Supreme Court insists upon strict compliance with the established procedures.

71. Having failed to adhere to the procedural requirements of 24 V.S.A. §4384(e), the Planning Commission's vote on November 6, 2017 approving the Energy Amendment was void.

72. The notice provided to the Plaintiff did not allow the Plaintiff sufficient time to adequately respond to the Energy Amendment or the ad hoc discriminatory methodology behind its drafting. Although Mr. Wilson did participate during the public hearing on November 6, 2017, the shortened notice period for such hearings was unreasonable and prejudicial to the Plaintiff.

73. As such, the Plaintiff hereby respectfully requests that this Court issue a

declaratory judgment that the Planning Commission's November 6, 2017 approval of the Energy Amendment was void *ab initio* due to the failure of the Town to satisfy the procedural requirements sets forth in 24 V.S.A. §4384(e), and as a result the Select Board's adoption of the Energy Amendment was void.

COUNT II

II. DECLARATORY JUDGMENT THAT THE ENERGY AMENDMENT AND THE TOWN PLAN'S ANTI-SOLAR PROVISIONS VIOLATE PLAINTIFF'S DUE PROCESS AND EQUAL PROTECTION RIGHTS.

74. Plaintiff repeats and re-alleges the allegations contained in each and every preceding paragraph of this Complaint.

75. The Common Benefits Clause of the Vermont Constitution, which guarantees equal protection of the laws, in pertinent part, reads,

> That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community. . .

Vt. Const., ch. I, art 7.,

76. "The concept of government exercising its authority inequitably and without a rational basis or for the emolument of a particular group [or against a particular person] was anathema to that end." *In re Town Highway No. 20*, 2012 VT 17, P34 (2012). Government action is judged under a "more stringent test" under the Common Benefits Clause than the United States Constitution's Equal Protection Clause's rational basis test. *Baker v. State*, 170 Vt. 194, 205 (2000). Here the Plaintiff's rights to equal protection and due process have been violated under the Vermont Constitution for several reasons.

77. *First*, the Energy Amendment and the Town's other restrictions on solar

discriminate based upon the size of a solar generating facility. Discrimination against commercial development based upon its size is unconstitutional. *See, State v. Ludlow Supermarkets, Inc*., 141 Vt. 261, 448 A.2d 791 (1982) (invalidating a Sunday closing law that discriminated among classes of commercial establishments on the basis of their size.) The Vermont Supreme Court has declared that Article 7 "only allows the statutory classifications . . . if a case of necessity can be established overriding the prohibition of Article 7 by reference to the "'common benefit, protection, and security of the people.'" *Id.* at 268, 448 A.2d at 795. Applying this test, the Town's disparate treatment of large and small businesses fails to withstand constitutional scrutiny.

78. *Second*, the Energy Amendment and the Town's other restrictions on solar single out solar facilities but allows every other type of electrical generation or other uses without any legitimate justification for the necessity of the disparate treatment.

79. *Third,* the primary purpose of the Energy Amendment is to target Plaintiff's properties and the projects on those properties, and the rest of the plan is mere window dressing. The Town's actions have not been motivated by legitimate regulatory concerns but by political pressure from neighbors.

80. *Fourth,* the Town has intentionally treated Plaintiff's properties differently from similarly situated properties without any necessity, and indeed without any legitimate rational basis for the difference.

81. The Town's treatment of the Plaintiff's Targeted Properties as local "constraints" unfit for preferred status is not based upon any legitimate regulatory concerns or supporting data but on political pressure from NIMBY neighbors and political allies that took over the siting process. Based on a well know bias against the Plaintiff, the Solar Siting Committee began their mapping process by specifically identifying the Plaintiff's

Targeted Properties, by treating the properties as local "constraints" against the development of renewable energy facilities and designating them as unsuitable for solar development despite the fact that current zoning laws allow for the development of solar facilities on the properties.

82. A July 11, 2017 email exchange between the Planning Director to the BCRC Director best summarizes the mindset of the Town and the Siting Committee during the formulation of the Energy Amendment, *see* **Exhibit 13** hereto:

> **From:** Jim Sullivan [mailto:jsullivan@bcrcvt.org]
> **Sent:** Tuesday, July 11, 2017 9:50 AM
> **To:** Dan Monks <dmonks@BenningtonVT.org>
> **Subject:** RE: Renewable Energy Siting Committee
>
> I will do my best. I suggest you drill it into peoples' heads that the Act 174 plan amendment is complex and includes much more than the solar map. I really don't think most people understand that at all – and that is why they get upset with the time it is taking to put together the plan amendment. I expect we can meet your deadlines, but I would prefer it if people at the town actually paid attention to the full amendment – as I said last night, this is a comprehensive energy plan and focusing on one map, while making some people happy, obscures the more important parts of the plan. Do you think anyone (other than yourself) has read
>
> the draft or even given a passing thought to energy conservation, transportation alternatives, or any of the other required elements of the plan?
>
> James Sullivan
>
> **From:** Dan Monks <dmonks@BenningtonVT.org>
> **Sent:** Tuesday, July 11, 2017 10:35 AM
> **To:** Jim Sullivan [mailto:jsullivan@bcrcvt.org]
> **Subject:** RE: Renewable Energy Siting Committee
>
> Hi Jim,
> My intent is to drive your points home at the upcoming meetings. I have not distributed the draft amendment, as I wanted to make sure it was complete before it was widely disseminated to the public. I suspect the Planning Commission will understand the importance of a comprehensive approach. Others may never understand.

> As we move through the adoption process, you and I can work to inform the Planning Commission and the Select Board of the importance of a comprehensive approach.
>
> Thanks for all of your hard work on the amendment. Unfortunately, as long as Chelsea/Apple Hill is on people's minds, we will have difficulty focusing attention on the real issues at public meetings.
> Dan

83. *Fifth*, the Energy Amendment amounts to reverse spot zoning with respect to the Plaintiff's Targeted Properties.

84. *Sixth*, the Energy Amendment constitutes spot zoning with the respect to the properties that have been designated as "preferred sites".

85. "Spot zoning" is when a municipality singles out a small parcel or perhaps even a single lot for a use classification different from the surrounding area and inconsistent with any comprehensive plan, for the benefit of the owner of the property. *Galanes v. Brattleboro,* 136 Vt. 235, 239 (Vt. 1978) ("*Galanes*"). This practice is usually condemned by the judiciary. *Id.* A similar condemnation falls upon "reverse spot zoning" or attempts by surrounding land owners to get such a parcel reclassified to avoid a use permitted by existing law. *Id*. *See also* 1 R. Anderson, American Law of Zoning, § 5.05, at 244 (1968). That is exactly what occurred here as the Siting Committee intentionally targeted Plaintiff's Targeted Properties as "unsuitable for solar" out of animus and without necessity, and indeed without any legitimate regulatory basis at all.

86. The work product and emails of the Siting Committee and the BCRC clearly show the intent of the Town (with the complicity of the BCRC) to unfairly single out the Plaintiff's Targeted Properties for adverse treatment under the Energy Amendment without necessity to do so, and indeed without legitimate regulatory justification. *See., e.g.,* **Exhibit 12.**

which is an email from the Executive Director of Bennington County Regional Commission to the Bennington Planning Director on February 9, 2017, stating that the "*narrowly targeted Chelsea/Apple Hill project parcels and the Rice Lane RR areas*" (which are Plaintiff's properties), raised "a red flag" and that more window-dressing was needed to attempt to justify why "those lots should be treated differently."

87. The Energy Amendment and the Town's other restrictions on solar violate Plaintiff's due process rights because the language is standard-less, and was based upon no necessity, and indeed no legitimate regulatory criteria. There are three overlapping theories under which a delegation of standard-less municipal approval power is unconstitutional: (1) a delegation of legislative power without adequate standards violates the separation of powers required by the Vermont constitution; (2) the power to grant or refuse support for permits without standards denies applicants equal protection of the laws; and (3) administration of local land use laws without standards denies landowners due process of law because it does not give them notice of what land uses are acceptable. *In re Handy*, 171 Vt. 336, 348-349 (2000).

88. As Supreme Court aptly observed in *Handy*:

> Without definite standards an ordinance becomes an open door to favoritism and discrimination, a ready tool for the suppression of competition through the grant of authority to one and the withholding from another. . . . A zoning ordinance cannot permit administrative officers or boards to pick and chose the recipients of their favors.

(internal quotations and citations omitted).

89. Vermont courts will not uphold municipal ordinances or plans that "fail to provide adequate guidance," thus leading to "unbridled discrimination" by the reviewing court and the municipal bodies charged with its interpretation. *In re Appeal of JAM Golf*,

LLC, 2008 VT 110, ¶ 13. Such standard-less discretion violates property owners' due process rights. *Id*. ¶14.

90. "[A]ll ordinances are subject to the limits of our Constitution, and [Vermont

courts] will not enforce laws that are vague or those that delegate standardless discretion to town [] boards." *Id*., ¶ 17 (citing *Handy*, 171 Vt. at 348-49, 764 A.2d at 1237-38). "[C]ity authorities may not deny permission for a project when there is not a specific policy set forth in the plan . . . stated in language that is clear and unqualified, and creates no ambiguity. A city plan must contain "specific standards" to guide enforcement to be given regulatory force." (internal citations and quotations omitted).

91. "[T]he absence of standards results in the exercise of discretion in a discriminatory fashion." *Handy*, 171 Vt. at 348-49. In this case, as in *Handy*, the absence of standards has resulted in the exercise of discretion in a discriminatory fashion.

92. Similarly, because there are no specific standards in the Energy Amendment to guide enforcement, "[s]uch standardless discretion violates property owners' due process rights. *Id*., ¶ 14, and it violates Plaintiff's due process rights. *JAM Golf, LLC*, 2008 VT 110, ¶ 13.

93. "We also recognize that the Legislature intended to give Municipalities flexibility

in dealing with development proposals at variance with new proposed zoning rules. But a grant of flexibility to the municipality is constitutional only if it is accompanied by some ability of landowners to predict how discretion will be exercised and to develop proposed land uses accordingly. Flexibility cannot be a synonym for ad-hoc decision making that is essentially arbitrary. We cannot ignore that in a small town environment, the

people involved, and affected by, the decisionmaking process have frequently had extensive interaction with each other, and the use of flexibility may reflect that interaction rather than neutral, predictable, and universal administrative standards. Nor can we resolve the deficiency in the statute by announcing that the selectboard does not have unfettered discretion and creating a "reasonable basis" review standard. Post, at 7-8. This course of action would offend all three of the reasons why a standardless delegation is unconstitutional."

94. For the reasons stated herein, Plaintiff asks for a declaratory judgment that the Energy Amendment and the Town Plan's provisions restricting solar development on Plaintiff's properties violate Plaintiff's due process and equal protection rights.

COUNT III

III. DECLARATORY JUDGMENT THAT THE ENERGY AMENDMENT FAILS TO COMPLY WITH 24 V.S.A §4352.

95. Plaintiff repeats and re-alleges the allegations contained in each and every preceding paragraph of this Complaint.

96. Under 24 V.S.A §4352(d), part of the Municipal Standards includes the DPS Standards, which are "the standards for issuing a determination of energy compliance described in [§4352(c)(3)]," and the Consistency Standards. The Energy Amendment fails to meet the DPS Standards and the Consistency Standards.

97. If a municipality seeks to identify potential areas for the development and siting of renewable energy resources, as the Energy Amendment does, the DPS Standards set forth a process by which that is to be done. Specifically, pursuant to section 12A of the DPS Standards, the first step is for the municipality to collect raw data on energy potential using best available data layers (including LiDAR as appropriate). The end result of this step is a map showing the areas of raw energy potential within the municipality. The second step is set forth in section 12B and requires the municipality to identify known constraints

which would likely cause certain areas to be unsuitable for development (e.g. vernal pools, FEMA Floodways). Once these known constraints are identified they are then taken out of the raw energy map to form a "Secondary Resource Map". The last step is for the municipality to identify possible constraints, which are conditions that would likely require mitigation, and which may prove a site unsuitable after site-specific study (e.g. agricultural soils, deer wintering activities, certain Vermont Agency of Natural Resources criteria). Once these potential constraints are identified they are taken out of the Secondary Resource Map to form the "Prime Resource Map."

98. As a starting point, the Siting Committee used the "Bennington Solar Resource Map" (the "BCRC Solar Resource Map") which designated land in the region as (i) "Prime Solar (Areas with high solar potential and no identified Constraints (Known or Possible)", (ii) "Secondary Solar (Areas with high solar potential and no Known Constraints but where at least one Possible Constraint Exits)" and (iii) Municipal Districts (Scenic, Historic, or other Design Control Districts, which may limit solar development)". In other words, most of the work had already been done by the BCRC and the only remaining step for the Siting Committee under the Municipal Standards was to identify local known and possible constraints and back them out of the BCRC Solar Resource Map. Rather than follow the Municipal Standards, however, the Siting Committee was determined to engage in reverse spot zoning with respect to the Plaintiff's Targeted Properties.

99. The Siting Committee on February 15, 2017, created a map which identified five local "constraints" which they overlaid on the BCRC Solar Resource Map. *See,* **Exhibit 14** hereto. These "constraints" were (1) Chelsea and Apple Hill Solar Farm Sites, (2) Zoning District Behind Home Depot, (3) Forest Zoning District, (4) Agriculture Zoning

District and (5) VT Prime and State Important Agricultural Soils in the RCON District. The first two "constraints" are the Plaintiff's Targeted Properties and, of course, they are not "constraints" at all but simply blatant discriminatory targeting of Plaintiff.

100. Further local constraints were identified over the course of the next month and on March 15, 2017, another map was created by the Siting Committee which included an additional three constraints, (6) Forest Land Cover, (7) Covered Bridges ¼ Mile Buffer and (8) Scenic Viewsheds (1 Mile). This March 15, 2017 map continued to separately identify the Targeted Properties as "constraints". *See*, **Exhibit 15** hereto.

101. Over the course of the next month the Siting Committee completely abandoned the DPS Standards. Rather than continuing to back out local constraints from the BCRC Solar Resource Map, the Siting Committee chose to work backwards and simply identify what they considered to be "Preferred Solar Sites". Instead of backing out local constraints to create a prime solar resource map as required by the Municipal Standards, the Siting Committee did the exact opposite by arbitrarily choosing "Preferred Solar Sites". Even more troublesome than the Siting Committee completely ignoring the Municipal Standards, was their decision to label any land not designated as preferred as "unsuitable for solar development in excess of 150 KW of capacity".

102. Specifically, the Preferred Solar Map legend states that "solar energy facilities in

excess of 150 KW of capacity shall be restricted to these sites and to building rooftops and other locations specifically identified as preferred areas for solar energy development; other sites are considered unsuitable for solar energy development in excess of 150 KW of capacity." The "preferred areas" referenced in the Energy Amendment are: (1) roof-mounted systems, (2) systems located in proximity to existing large scale, commercial or industrial

buildings, (3) proximity to existing hedgerows or other topographical features that naturally screen the entire proposed array, (4) reuse of former brownfields, (5) facilities that are sited in disturbed areas, such as gravel pits, closed landfills, or former quarries and (6) areas specifically identified as suitable for solar facilities on the Solar Energy Resource Map (collectively, the "Preferred Areas"). Thus, any land that is not a Preferred Area is automatically and categorically classified as "unsuitable for solar".

103. Not surprisingly, the backwards methodology employed by the Siting Committee resulted in an irrational, exclusionary and discriminatory Solar Siting Map. Although the Energy Amendment lists which constraints exclude a site from consideration as a Preferred Site,[2] the Energy Amendment gives no explanation as to what characteristics actually make a Preferred Site "preferred". Worse still, there are a number of sites in the Town that do not include any of the Exclusionary Constraints but are inexplicably not designated as Preferred Sites, just as there a number of Preferred Sites that include one or more of the Exclusionary Constraints. All the while, the Plaintiff's Targeted Properties continued to be intentionally excluded from the preferred site map.

104. In summary, the Siting Committee mapping process commenced with reverse spot zoning which intentionally discriminated against the Plaintiff's Targeted Properties and thenended with the exclusionary zoning tactic of arbitrarily designating sites as Preferred Sites and in the process completely abandoned any attempt to comply with the Municipal Standards.

105. The Energy Amendment also fails to meet the Consistency Standards.

106. The Energy Amendment is inconsistent with Vermont's greenhouse gas

[2] The sixteen land constraints which disqualify a site from consideration as a preferred site are listed on page 23 of the Energy Amendment (collectively, the "Exclusionary Constraints").

reduction goals under 10 V.S.A. § 578(a), which require the regional reduction of emissions of greenhouse gases from the 1990 baseline by 50 percent by January 1, 2028; and 75 percent by January 1, 2050. The Town's anti-solar designation of but a handful of sites as unsuitable by the Town in conjunction with the projected limited opportunities for economically feasible development of solar facilities, makes the Energy Amendment inconsistent with the goals under 10 V.S.A. § 578(a), because the Town will not be able to meet those goals.

107. The Energy Amendment is inconsistent with Vermont's 25 by 25 goal for renewable energy under 10 V.S.A. § 580. The Town's anti-solar designation of but a handful of sites as unsuitable by the Town in conjunction with the projected limited opportunities for economically feasible development of solar facilities, makes the Energy Amendment inconsistent with the goals under 10 V.S.A. § 580, because the Town's designations impair the achievement of those goals.

108. The Energy Amendment is inconsistent with Vermont's building efficiency goals under 10 V.S.A. § 581, which among other things require (1) the substantial improvement of the energy fitness of at least 25 percent of the State's housing stock by 2020 (approximately 80,000 housing units), (2) the reduction of annual fuel needs and fuel bills by an average of 25 percent in the housing units served, and (3) the reduction of total fossil fuel consumption across all buildings by an additional one-half percent each year, leading to a total reduction of six percent annually by 2017 and 10 percent annually by 2025. The Town's anti-solar designation of but a handful of sites as unsuitable by the Town in conjunction with the projected limited opportunities for economically feasible development of solar facilities, makes the Energy Amendment inconsistent with the goals under 10 V.S.A. §581, because the Town's designations impair the achievement of those

goals by preventing larger scale net-metering and distributed generation.

109. The Energy Amendment is inconsistent with Vermont's energy policy under 30 V.S.A. §202a and the recommendations for regional and municipal energy planning pertaining to the efficient use of energy and the siting and development of renewable energy resources contained in the State energy plans adopted pursuant to 30 V.S.A. §§202 and 202b (State energy plans).

110. In December 2015, the DPS released the latest edition of the state's Comprehensive Energy Plan ("CEP"). The CEP establishes the following goals:

a. reduce total energy consumption per capita by 15% by 2025, and by more than one third by 2050;

b. meet 25% of the remaining energy need from renewable sources by 2025, 40% by 2035, and 90% by 2050; and

c. meet three end-use sector goals for 2025: 10% renewable transportation, 30% renewable buildings, and 67% renewable electric power.

111. The Town's anti-solar designation of but a handful of sites as unsuitable by the Town in conjunction with the projected limited opportunities for economically feasible development of solar facilities, makes the Energy Amendment inconsistent with Vermont's energy policy and the CEP because it significantly impairs the achievement of those goals.

112. The Energy Amendment is inconsistent with Vermont's distributed renewable generation and energy transformation categories of resources to meet the requirements of the Renewable Energy Standard under 30 V.S.A. §§ 8004 and 8005. In

30 V.S.A. § 8004 the Legislature has made it clear that the policy of the State of Vermont is to encourage distributed generation projects up to 5MWs in size. The Town's anti-solar designation of but a handful of sites as unsuitable by the Town in conjunction with the projected limited opportunities for economically feasible development of solar facilities, makes the Energy Amendment inconsistent with the goals under 30 V.S.A. §§ 8004 and 8005, because the Town's designations impair, and almost completely ban distributed renewable generation and energy transformation categories of resources, and do in fact ban projects at and close to the Legislature's 5MW size. A municipal plan cannot be consistent with the Legislature's encouragement of projects of 5MWs in size when the municipal plan effectively bans all such projects.

113. As stated above, the Energy Amendment also fails the DPS Standards. The Siting Committee inexplicably decided to abandon the DPS Standards halfway through their formulation of the Solar Siting Map. The DPS Standards, however, are not optional step in the process and the Siting Committee cannot simply ignore them as they did if the Town's goal is to have the BCRC certify the Energy Amendment. Not only did the Siting Committee ignore the DPS Standards, they turned the standards upside down and inside out.

114. For example, the DPS Standards state: "The Mapping standards lay out a sequence of steps for planners to examine existing renewable resources and to identify potential (and preferred) areas for renewable energy development, and to identify likely unsuitable areas for development, by layering constraint map layers on to raw energy resource potential map layers." *See* DPS Standards, page 10. The Siting Committee did not identify potential, preferred and unsuitable areas for solar energy development by "layering constraint map layers" on the BCRC Solar Resource Map. The Siting Committee did the exact opposite, they arbitrarily chose the Preferred Sites and then determined that

anything not within a Preferred Area is unsuitable for solar.

115. Further, Steps 12 and 13 of the DPS Standards make it clear that when identifying known or possible constraints on renewable development, then the land use policies applicable to other forms of development in these areas must be similarly constrictive. Said differently, the Town cannot discriminate against the development of renewable energy as compared to other types of development. For example, if the Town wants to limit or preclude renewable energy development on property in the RCON Zone, it has to limit or preclude all development on property in the RCON Zone in the same manner. The Energy Amendment fails this Municipal Standard because it treats renewable energy development differently than other forms of development.

116. Continuing with the example of property within the RCON Zone, the Energy Amendment precludes the development of any solar facility in excess of 150kW in the RCON zone if such land is privately owned. Thus, the Energy Amendment is discriminating against development of solar facilities in the RCON zone based on size and based on ownership. However, the Town allows for the development of golf courses, kennels, sawmills, colleges, cemeteries, amongst other things in the RCON zone *without regard to the size* of such developments and *without regard to whether the developments are on private or public land*.

See, Table 3.12 of the Town's Land Use & Development Regulations (the "Land Use Regulations"). As such, the Town is treating solar development differently than other developments allowed within the RCON zone and is, therefore, violating the Municipal Standards.

117. Another example is the "Mass and Scale" provision in the Energy Amendment which states that "[e]xcept for projects located on preferred sites, solar

facilities larger than 10 acres, individually or cumulatively, cannot be adequately screened or mitigated to blend into the municipality's landscape and are, therefore, explicitly prohibited." *See*, page 26 of the Energy Amendment. First, the assertion that facilities larger than 10 acres cannot be adequately screened is baseless. Second, there is no other provision in the Town Plan or the Land Use Regulations that limits any other type of development to 10 acres or less. Once again, on its face, the Energy Amendment is discriminating against the development of solar development in contravention of the Municipal Standards.

118. For the reasons stated herein, Plaintiff asks for a declaratory judgment that the Energy Amendment fails to comply with 24 V.S.A §4352**.**

COUNT IV

IV. DECLARATORY JUDGMENT THAT THE ENERGY AMENDMENT VIOLATES 24 V.S.A. CH. 117.

119. Plaintiff repeats and re-alleges the allegations contained in each and every preceding paragraph of this Complaint.

120. The reverse spot zoning of the Energy Amendment, which equates to the regulation of property based on the identity of the owner and not the use of the land, not only is unconstitutional, but exceeds the Legislature's grant of authority to municipalities.

121. A distinction based upon the identity of the owner rather than the public health, safety, morals, or general welfare is invalid. See *Galanes,* 136 Vt. at 240 (the power to zone requires reference to public health, safety, morals, or general welfare).

122. Here, the Town exceeded its authorization in three respects. First, the Town had a laser-like focus on Plaintiff's Targeted Properties, and classified those properties as unsuitable based upon the identity of the owner and for no legitimate regulatory reason.

Second, the Energy Amendment disqualifies all privately-owned land in the RCON zone solely based on the identity of the owner. Third, the Town designated preferred parcels based upon the identity of the owner and for no legitimate regulatory reason

123. Plaintiff has been unlawfully discriminated against as compared to the Town's treatment of other landowners.

124. For the reasons stated herein, Plaintiff asks for a declaratory judgment that the Energy Amendment exceeds the Legislature's grant of authority to municipalities.

COUNT V

V. DESIGNATING SIMILARLY SITUATED PROPERTIES AS "PREFERRED SITES" AND NOT OTHERS VIOLATES PLAINTIFF'S DUE PROCESS AND EQUAL PROTECTION RIGHTS.

125. Plaintiff repeats and re-alleges the allegations contained in each and every preceding paragraph of this Complaint.

126. With respect to the designation of "Preferred Sites" for solar, Plaintiff challenges the constitutionality of such designation in the Energy Amendment. The Town has not used any justifiable and permissible constraints in developing its list of "Preferred Sites." Moreover it has not treated similarly situated properties equally.

127. The conscious, intentional discrimination by the Town against the Plaintiff is readily apparent throughout the process by which the Siting Committee created the Solar Siting Map. As compared to other similarly situated landowners in the Town, the Plaintiff was discriminated against.

128. Moreover, in order to pass constitutional muster the municipal plan in question must be reasonably related "to public health, safety, morals or general welfare." *Galanes,* 136 Vt. at 240; *see also State v. Sanguinetti*, 141 Vt. 349, 351, 449 A.2d 922, 924 (1982) (same). The regulatory approach taken by the Siting Committee is unreasonable,

irrational, arbitrary and discriminatory and not related to public health, safety, morals or general welfare. Arbitrarily designating certain parcels within the Town as Preferred Sites for solar to the benefit of certain landowners and to the detriment of similarly situated landowners is a violation of due process and equal protection rights.

129. As convoluted and as backwards as the Siting Committee's mapping process was, the one thing that remained consistent was their inherent bias against the Petitioners and their unyielding desire to make sure the Plaintiff's Targeted Properties would never be developed for solar. This practice of reverse spot zoning with respect to the Targeted Properties continued throughout the entire process, even when the Siting Committee decided to ditch the Municipal Standards and focus instead on identifying individual parcels as Preferred Sites. The Siting Committee started and ended the map-making process by violating the Plaintiff's rights under the Common Benefits Clause of the Vermont Constitution.

130. For the reasons stated herein, Plaintiff asks for a declaratory judgment that the defendants designating similarly situated properties as "preferred sites" and not Plaintiff's properties violates Plaintiff's due process and equal protection rights.

COUNT VI

VI. DECLARATORY JUDGMENT THAT THE BCRC IS REQUIRED TO ADHERE TO THE VERMONT ADMINISTRATIVE PROCEDURE ACT IN MAKING AN AFFIRMATIVE DETERMINATION OF ENERGY COMPLIANCE UNDER 24 V.S.A. §4352.

131. Plaintiff repeats and re-alleges the allegations contained in each and every preceding paragraph of this Complaint.

132. In any determination of affirmative energy compliance conducted by the BCRC, the Plaintiff's legal rights, duties, or privileges to develop solar farms on its property in

the Town will be determined by the BCRC.

133. Under 24 V.S.A. §4352(e) the BCRC is required to hold a hearing.

134. Under 3 V.S.A. §801(b)(2) the BCRC proceeding qualifies as a contested case entitling Plaintiff to the procedural due process rights afforded by the Vermont Administrative Procedure Act.

135. Even if the BCRC hearing and proceedings related to an affirmative determination of the Energy Amendment were not subject to the Vermont Administrative Procedure Act, due process requires that the Plaintiff be afforded similar protections before the BCRC can take away the Plaintiff's valuable property rights.

136. For the reasons stated herein, Plaintiff asks for a declaratory judgment that the BCRC is required to adhere to the Vermont Administrative Procedure Act in making an affirmative determination of energy compliance under 24 V.S.A. §4352.

COUNT VII

VII. INJUNCTIVE RELIEF ENJOINING THE BCRC FROM TAKING ANY ACTION TOWARDS CERTIFYING THE ENERGY AMENDMENT OR THE SCREENING ORDINANCE UNDER 24 V.S.A. §4352.

137. Plaintiff repeats and re-alleges the allegations contained in each and every preceding paragraph of this Complaint.

138. The Energy Amendment does not satisfy the requirements of 24 V.S.A. §4352 and is unconstitutional.

139. The unconstitutional and unlawful Energy Amendment imminently threatens Plaintiff's constitutional and statutory rights.

140. Certification by the BCRC would itself be an unconstitutional action as it would further violate Plaintiff's rights.

141. Because the certification of an unconstitutional action would itself be unconstitutional, and certification would violate Plaintiff's constitutional and statutory rights, Plaintiff is entitled to an injunction prohibiting such action.

142. Courts consider four factors in determining whether to issue a preliminary injunction: (1) the threat of irreparable harm to the plaintiff; (2) the potential harm to the other parties; (3) the likelihood that plaintiff will succeed on the merits; and (4) the public interest.

143. With respect to the first factor, the threat of irreparable harm to the Plaintiff is substantial as the Energy Amendment violates the due process and equal protection rights of the Plaintiff.

144. The Energy Amendment treats similarly situated properties in the Town differently by arbitrarily selecting some parcels as "Preferred Sites" for solar development and others owned by the Plaintiff as "unsuitable" without justification and despite the fact that current zoning laws allow for the development of renewable energy facilities on such sites. In addition, the Energy Amendment memorializes and sanctions the Siting Committee's exercise in reverse spot zoning whereby they targeted certain of the Plaintiff's properties for discriminatory treatment in violation of the Common Benefits Clause of the Vermont Constitution.

145. With respect to the second factor, there is no harm in having the Planning Commission reformulate the Energy Amendment in accordance with the Municipal Standards, and in a constitutional manner. In fact, it would be to the Town's benefit as it is the Town's intent to have the Energy Amendment certified by the BCRC in order to have the Energy Amendment carry greater weight - substantial deference - in the Section 248 siting process before the PUC. As explained herein, the BCRC would be

precluded from certifying the Energy Amendment under 24 V.S.A. §4352(c)(4) because the Energy Amendment violates the Municipal Standards in a number of ways**.**

146. With respect to the third factor, there is a substantial likelihood that the Plaintiff will succeed on the merits given how the Energy Amendment clearly violates the Common Benefits Clause of the Vermont Constitution, and Vermont law. On its face, the Solar Siting Map created by the Siting Committee treats similarly situated properties differently by arbitrarily selecting some parcels as "Preferred Sites" for solar development and others as "unsuitable" without justification and despite the fact that current zoning laws allow for the development of renewable facilities on such sites. Moreover, there is ample evidence that the Siting Committee engaged in reverse spot zoning and targeted certain of the Plaintiff's properties for discriminatory treatment.

147. The last factor that this Court is to consider with respect to the granting of the requested injunction is the public interest. This factor weighs heavily in favor of the Plaintiff as the public has a strong interest in (i) seeing the Energy Amendment conform to the Municipal Standards, (ii) seeing the Municipal Standards enforced as written, (iii) having similarly situated properties treated similarly with respect to the potential development of renewable energy systems, (iv) encouraging renewable energy development rather than inhibiting it through exclusionary zoning laws and (v) enforcing the procedures set forth in §4384(e)(4).

148. For the reasons stated herein, Plaintiff asks this Court to enjoin the BCRC from taking any action towards certifying the Energy Amendment or the screening ordinance under 24 V.S.A. §4352.

COUNT VIII

VIII. DECLARATORY JUDGMENT THAT THE TOWN'S SCREENING ORDINANCE VIOLATES 24 V.S.A. § 4414(15).

149. Plaintiff repeats and re-alleges the allegations contained in each and every preceding paragraph of this Complaint.

150. 24 V.S.A. § 4414(15) allows a municipality to enact a "freestanding bylaw to establish screening requirements that shall apply to a ground-mounted plant that generates electricity from solar energy." It also allows the municipality to "make recommendations to the Public Utility Commission applying the bylaw."

151. 24 V.S.A. § 4414(15)(B) defines "screening" as "reasonable aesthetic mitigation measures to harmonize a facility with its surroundings and includes landscaping, vegetation, fencing, and topographic features."

152. However, a municipal screening bylaw or ordinance is only valid if it is not "more restrictive than screening requirements applied to commercial development in the municipality." *See*, 24 V.S.A. § 4414(15)(A).

153. Under 30 V.S.A. § 248(b)(1)(B) the ground-mounted solar electric generation facility must comply with both the screening bylaw and "the recommendation of a municipality applying such a bylaw."

154. The Town's Screening Ordinance does not comply with 24 V.S.A. § 4414(15) because it is more restrictive than screening requirements applied to commercial development in the municipality.

155. The Town's by-laws do not contain a similar screening requirement for commercial development.

156. For the reasons stated herein, Plaintiff asks for a declaratory judgment that the Town's Screening Ordinance violates 24 V.S.A. § 4414(15).

COUNT IX

IX. THE TOWN'S SCREENING ORDINANCE AND 24 V.S.A. §4414(15) VIOLATE PLAINTIFF'S DUE PROCESS, EQUAL PROTECTION AND FREE SPEECH RIGHTS.

157. Plaintiff repeats and re-alleges the allegations contained in each and every preceding paragraph of this Complaint.

158. The Town's screening ordinance violates Plaintiff's due process, equal protection and free speech rights.

159. *First*, 24 V.S.A. § 4414(15) violates Plaintiff's equal protection and free speech rights because the authorization for a screening ordinance does not apply to all solar facilities, such as those on a roof, any other electric facility, such as a wind facility, a biomass facility or a natural gas plant, or any other commercial development or other development. The law singles out only one type of use for restrictive treatment.

160. A solar facility is by its very nature an expression of speech. It is a statement against the political deniers of climate change and the destruction that comes from fossil fuel use. The requirement that an owner essentially hide or screen its speech violates its free speech rights.

161. *Second*, the Town's screening ordinance is unconstitutionally vague and standard- less. In a rule 30(b)(6) deposition in PUC docket 8454, the Town admitted that the level of screening needed to meet the Town's screening ordinance is whatever the Select Board says it is.

162. *Third,* both the Paper Mill solar project and the Town's Route 7 net-metered project met the Town's screening ordinance. *See* **Exhibits 16-17** for photos of those projects. Moreover the Town's Route 7 solar project is in what the Town designates as

a scenic gateway. When it comes to solar farms on Plaintiff's properties , however, the Town insists on a level of screening far in excess of what it has for other solar projects which are clearly visible from public vantage points.

163. For the reasons stated herein, Plaintiff asks for a declaratory judgment that the Town's Screening Ordinance and 24 V.S.A. §4414(15) violate Plaintiff's due process, equal protection and free speech rights.

COUNT X

X. THE REQUIREMENT THAT A SOLAR FACILITY ADHERE TO THE RECOMMENDATION OF A MUNICIPALITY VIOLATES PLAINTIFF'S DUE PROCESS, EQUAL PROTECTION AND FREE SPEECH RIGHTS AND VIOLATES THE CONSTITUTIONAL SEPARATION OF POWERS.

164. Plaintiff repeats and re-alleges the allegations contained in each and every preceding paragraph of this Complaint.

165. Section 30 V.S.A. § 248(b)(1)(B) requires that a ground-mounted solar electric generation facility must comply with both the screening ordinance and "the recommendation of a municipality applying such a bylaw or ordinance."

166. The Plaintiff's due process rights are violated because a municipality is not required to afford the proponent of a solar facility any due process prior to making recommendations that involve Plaintiff's property rights, but the PUC is required to follow the municipality's recommendation. The Plaintiff's due process rights are also violated because there is no standard governing a municipality's recommendation, turning the entire section 248 permitting process into relying on the standard-less criteria imposed on an ad hoc basis by the municipality's select board.

167. The Plaintiff's equal protection rights are violated in two ways. *First*, the restrictions do not apply to all solar facilities, such as on a roof, any other electric facility, such as a wind facility, a biomass facility or a natural gas plant, or any other commercial

development or other development. The law singles out only one type of use for restrictive treatment. *Second*, the law prefers municipal speech over the speech of owners of plants by providing preference for the recommendations of a municipality in a proceeding that adjudicates substantial property rights of the Plaintiff.

168. The Plaintiff's free speech rights are violated in three ways. *First*, a solar facility is by its very nature an expression of speech. It is a statement against the political deniers of climate change and the destruction that comes from fossil fuel use. The requirement that an owner essentially conform to a municipality's standard-less instructions violates its free speech rights. *Second*, the law discriminates on where the solar modules are placed. The law does not permit any restriction on solar modules on the roof of a house, whereas it regulates the same modules if placed on the ground. *Third*, the recommendation of a municipality applying such a bylaw or ordinance is speech. The law violates the Plaintiff's rights by giving preference to the Town's speech in deciding whether land development rights of the Plaintiff should be taken away or restricted.

169. 30 V.S.A. § 248(b)(1)(B) violates the separation of powers clause because it transfers to the municipality the power to say what the law is by requiring the PUC to follow the municipality's interpretation of its ordinance. The judiciary's constitutional role is to exercise its independent judgment "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). A rule of deference that prevents judges from exercising that independent judgment unconstitutionally transfers judicial power to the Executive Branch. *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring in the judgment). What is more, such a rule erodes the judiciary's critical role in checking the excesses of the Executive Branch. *Id.* at 1220-21; *see also* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*,

96 Colum. L. Rev. 612, 655-85 (1996). Making matters still worse from the standpoint of separation-of-powers, such deference effectively combines in a single agency (here, the Select board) both the power to prescribe and the power to interpret—yet "a fundamental principle of separation of powers . . . [is] that the power to write a law and the power to interpret it cannot rest in the same hands." *Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326, 1341 (2013) (Scalia, J., concurring in part and dissenting in part).

170. For the reasons stated herein, Plaintiff asks for a declaratory judgment that the requirement that a solar facility adhere to the recommendation of a municipality violates Plaintiff's due process, equal protection and free speech rights and violates the constitutional separation of powers.

COUNT XI

XI. DECLARATION THAT 24 V.S.A. §4352(b) IS AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER AND VIOLATES THE CONSTITUTIONAL LIMITS ON SEPARATION OF POWERS.

171. Plaintiff repeats and re-alleges the allegations contained in each and every preceding paragraph of this Complaint.

172. The Vermont Constitution ch. II, § 2, provides that the "Supreme Legislative power shall be exercised by a Senate and a House of Representatives."

173. The Vermont Constitution ch. II, § 3, provides that the "Supreme Executive power shall be exercised by a Governor, or in the Governor's absence, a Lieutenant-Governor."

174. Within certain parameters the Legislature may constitutionally delegate legislative authority to the executive branch.

175. 24 V.S.A. §4352(b), however, constitutes a delegation to the executive

branch, i.e., the DPS, which then has the power to re-delegate legislative power to a county commission, here the BCRC, if the DPS approves the BCRC as competent enough to be given the re-delegation of legislative authority.

176. The Legislature cannot delegate to the executive the power to then delegate legislative power back to a county commission. While the Legislature has the power to delegate authority to the executive subject to standards and an opportunity for judicial review, it cannot delegate the power to delegate legislative authority to the executive branch, which is what 24

V.S.A. §4352(b) does.

177. For the reasons stated herein, Plaintiff asks for a declaratory judgment that 24 V.S.A. §4352(b) is an unconstitutional delegation of legislative power and violates the constitutional limits on separation of powers.

COUNT XII

XII. DECLARATION THAT THE BENNINGTON TOWN PLAN'S RESTRICTIONS ON SOLAR FARMS ARE UNCONSTITUTIONAL AND VIOLATE 24 V.S.A. §4413(g)(2).

178. Plaintiff repeats and re-alleges the allegations contained in each and every preceding paragraph of this Complaint.

179. The Town Plan contains restrictions on solar farm development that are unconstitutionally vague, irrational and serve no government purpose.

180. The Town Plan provides that "[e]xcept for projects located on preferred sites, solar facilities larger than 10 acres, individually or cumulatively, cannot be adequately screened or mitigated to blend into the municipality's landscape and are, therefore, explicitly prohibited."

181. There are no standards to determine whether a solar farm is larger than 10 acres, making the determination unconstitutionally vague, ambiguous and standard-less.

182. The 10-acre rule applies to solar only and no other kind of development in Bennington. It is unconstitutionally discriminatory on its face. It also violates 24 V.S.A. §4413(g)(2) which provides a municipal bylaw may not "[p]rohibit or have the effect of prohibiting the installation of solar collectors … or other energy devices based on renewable resources." As applied, the Town Plan and By-laws would prohibit and have the effect of prohibiting the installation of a solar farm if it exceeded the 10-acre provision.

183. Further, the Town Plan restricts development in the RCON zone "in prominently visible locations on hillsides", but the Town Plan gives no standards as to what constitutes a hillside or what constitutes "prominently visible", making the restriction unconstitutionally vague, ambiguous and standard-less.

184. The Town Plan further restricts development in the RCON zone by stating that development "must minimize clearing of natural vegetation." But there is no clear guidance as to what the requirements are rendering the application vague, standard-less and subject to the political whims of the Town's administration.

185. For the reasons stated herein, Plaintiff asks for a declaratory judgment that the Bennington Town Plan's restrictions on solar farms are unconstitutional and violate 24 V.S.A. §4413(g)(2).

RELIEF REQUESTED

186. For the reasons stated, Plaintiff respectfully requests the following relief:

a. Grant judgment in favor of Plaintiff and against defendants;

b. Issue the declarations requested herein by Plaintiff;

c. Grant all appropriate injunctive relief;

d. Award Plaintiff an appropriate amount in monetary damages as determined at trial, including pre- and post-judgment interest;

e. Award Plaintiff attorneys' fees and the costs of bringing this action; and

f. Grant Plaintiff such other relief as is just and appropriate.

Dated: February 21, 2018

PLH LLC

BY: PAUL FRANK + COLLINS P.C.

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