STATE OF VERMONT
PUBLIC UTILITY COMMISSION

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

PETITIONER'S OPPOSITION TO THE TOWN OF BENNINGTON'S MOTION FOR A PROTECTIVE ORDER

Chelsea Solar LLC (the "Petitioner" or "Chelsea") files this opposition to the motion for a protective order filed by the Town of Bennington (the "Town") seeking to prevent the depositions of six members of the Bennington selectboard. The Town cannot even remotely reach the very substantial Constitutional and other criteria they face in a motion of this sort.

The instant motion presents important issues related to access to discovery, trial preparation, due process, and equal protection. The protective order sought by the Town is unsupportable as a matter of law and fact, and if granted would seriously and unfairly impair Chelsea's prosecution of this case. The Vermont Supreme Court has cautioned that "during the pretrial period 'restrictions which may impede the development, presentation and determination of facts should be avoided.'" *Schmitt v. Lalancette*, 2003 VT 24 (2003) at P13 ("*Schmitt*") quoting *Int'l Bus. Mach. Corp. v. Edelstein*, 526 F.2d 37, 41 (2d Cir. 1975). *See also*, *Farnsworth v. Procter & Gamble Co.,* 758 F.2d 1545, 1547 (11th Cir. 1985) ("trial preparation and defense . . . are important interests, and great care must be taken to avoid their unnecessary infringement"). As applied to the facts here, the case law establishes that Chelsea is entitled to take the oral deposition of all members of the Bennington selectboard. The Town's motion should be denied, and an order issued providing for the deposition of each selectboard member.

SUMMARY OF THE ARGUMENT

The Town seeks an unprecedented and unjustifiable protective order blocking Chelsea from deposing 6 members of the Bennington selectboard, who have voluntarily injected themselves into this case by making recommendations to the Public Utility Commission ("PUC" or the "Commission") pursuant to the statutory authorization under 30 V.S.A. §248(b)(1) on an issue at the very heart of this case. In seeking to quash the depositions, the Town would remove any transparent review of the Town actions from this process. As a party in this case, the Town has placed its interests in issue and cannot and should not be allowed to avoid its obligations as a party to fully respond to discovery and allow a transparent process intended to reach a full and fair decision. There is simply no credible basis proffered by the Town for the extraordinary relief requested. On the other hand, granting such relief would deprive Chelsea basic due process rights and seriously harm its trial preparation and prosecution of its case.

The position on protective orders of the Vermont Supreme Court and all federal and state courts is the same—protective orders are disfavored and should only be granted under extraordinary circumstances. *Schmitt* at P12 fn. 3 ("[p]rotective orders might prove necessary where there is a risk that one party will abuse the discovery process, [] but these are exceptional situations.")

Trying to stop a deposition, as the Town requests, is even more disfavored and protective orders prohibiting depositions are rarely granted. The Town's motion wholly ignores well-established precedent that an order barring a litigant from taking a deposition is a most extraordinary measure. *Schmitt,* P12, fn. 3; *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979) ("It is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error.") The moving party bears a

heavy burden of showing "extraordinary circumstances" that would justify such an order, and the showing must be sufficient to overcome plaintiff's "legitimate and important interests in trial preparation." *Alexander v. FBI*, 186 F.R.D. 71, 75 (D.D.C. 1998); *see also Prozina Shipping Co., Ltd. v. Thirty-Four Automobiles*, 179 F.R.D. 41, 48 (D. Mass. 1998); *Cipollone v. Liggett Group, Inc*., 785 F.2d 1108, 1121 (3d Cir. 1986) (burden of persuasion is on the party seeking protective order; the harm alleged "must be significant, not a mere trifle"); *see also, Static Control Components, Inc. v. Darkprint Imaging*, 201 F.R.D. 431, 434 (M.D.N.C. 2001) (party "assumes a heavy burden because protective orders which totally prohibit a deposition should be rarely granted absent extraordinary circumstances."); *Office of the DA of Phila. v. Bagwell*, 155 A.3d 1119, 1136 (Pa. Cmwlth. 2017) ("In both Pennsylvania and in the federal courts, protective orders are rare, disfavored, and require the party seeking a protective order to shoulder a heavy burden."); *Elliott v. AMS, Inc.,* 2016 U.S. Dist. LEXIS 109970, (S.D. W.Va. 2016) *10-11 (same) (collecting cases); *Frideres v. Schiltz*, 150 F.R.D. 153, 156 (S. D. Iowa 1993) ("Protective orders prohibiting depositions are rarely granted.")[1] Examples of "extraordinary circumstances" are rare, such as if there is "compelling evidence that a deposition will constitute a substantial threat to a witness' life." *United States v. Mariani,* 178 F.R.D. 447, 448 (M.D. Pa. 1998) (protective order preventing the deposition of 83-year-old terminally ill witness warranted); *see also, Frideres v. Schlitz*, 150 F.R.D. 153, 156 (S.D. Iowa 1993) (protective order issued where witness' physician opined that the stress from deposition could be "life threatening" to the witness). Extraordinary circumstances do not exist here.

[1] *See also, Investment Properties Intl., Ltd. v. IOS, Ltd*., 459 F.2d 705, 708 (2d Cir. 1972) (granting writ of mandamus to vacate district court order quashing notice of depositions in antitrust action); *United States v. Mariani,* 178 F.R.D. 447, 448 (M.D. Pa 1998); *Naftchi v. New York Univ. Med. Ctr.,* 172 F.R.D. 130, 132 (S.D.N.Y. 1997); *Motsinger v. Flynt,* 119 F.R.D. 373, 378 (M.D.N.C. 1988).

The Town has not met its heavy burden to show that the depositions of the selectboard members will cause harm or prejudice to the Town or the members themselves. The Town claims, however, that the selectboard members are "high-ranking" government officials entitled to avoid deposition, and inquiry into their decision-making based upon the doctrine adopted by the Vermont Supreme Court in *Monti v. State*, 151 Vt. 609, 612 (Vt. 1989) ("*Monti*"). But *Monti* explains why the selectboard members *are subject to deposition* here.

The Town selectboard members are part-time officials meeting regularly only twice per month for a handful of hours, with the meetings commencing after the general close of the work-day. The doctrine imposing additional restrictions on deposing high-ranking officials does not apply to such part-time government officials. In *Monti*, the Vermont Supreme Court explained that the theory of adding an additional showing before requiring high-ranking officials, such as the Governor of Vermont, to sit for a deposition is "a doctrine founded on notions of the public's interest in limiting unnecessary demands on the time of highly-placed public officials. '[P]ublic 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.'" *Monti v. State*, 151 Vt. 609, 612 (Vt. 1989) ("*Monti*") (internal citations omitted.). *See also*, *Alexander*, 186 F.R.D. at 1 (citing *Farnsworth v. Procter & Gamble Co*., 758 F.2d 1545, 1547 (11th Cir. 1985) (Unless the movant can show that the need for the protective order is "sufficient to overcome plaintiffs' legitimate and important interests in trial preparation," high-ranking officials are subject to deposition.)

Here the selectboard members are part-time officials the deposition of which *would not take away any time* from government duties. Part-time or retired officials (including members of supervisory boards) are not entitled to the additional conditions imposed on depositions of high-

ranking officials. *See, e.g., S.L. v. St. Louis Metro. Police Dep't Bd. of Comm'rs*, 2011 U.S. Dist. LEXIS 53956 (E.D. Mo. 2011) ("Board members are not full-time government officials, so they do not have greater duties and time constraints than other witnesses."); *Byrd v. District of Columbia,* 259 F.R.D. 1, 8 (D.D.C. 2009) ("[G]iven that the concerns associated with deposing high-ranking officials have to do with the potential interruption of current duties, it is the current position, and not any former position, that is evaluated."); *Sanstrom v. Rosa*, 1996 U.S. Dist. LEXIS 11923, 1996 WL 469589 at *5 (S.D.N.Y. 1996) ("because Mr. Cuomo is no longer governor, he cannot claim this privilege.").

Even if the selectboard members were "high-ranking" officials, Chelsea is entitled to depose them because the criteria set forth by the Vermont Supreme Court in *Monti* is met. The members themselves are the only source of the information needed. In deciding whether to grant a certificate of public good ("CPG"), the Commission is statutorily required to give "due consideration" to the recommendations of the Town. The selectboard has made recommendations in its pre-filed testimony. The level of consideration "due" to the Town's recommendations depends, under other things, on the motivations of the selectboard members, how they distinguish the Chelsea Project from similarly situated projects that the Town has supported, and a host of other issues related to whether the Town's recommendations are in accord with decisions for other solar projects, and based upon legitimate regulatory criteria. Chelsea asserts that the evidence already in the record supports its claim that the Town's opposition is not based upon any legitimate regulatory purpose, but rather motivated by the vocal opposition from a few neighbors and generalized animus. The Vermont Supreme Court has unequivocally condemned such conduct. *See, e.g., In re Town Highway No. 20*, 2012 VT 17, P22 (2012) (holding town liable in tort for due process and equal protection violations where just as here "the Town's decisions with regard to

[the project] have all been guided by one motive: to favor the property rights of [] neighbors.")

The Town has simply not "shown any special circumstances requiring that the [PUC] order a form of examination different from that requested by [Chelsea]." *Gallagher v. Pelletier*, 1997 U.S. Dist. LEXIS 19738, *4 (E.D. Pa. 1997) citing *Interlego v. Leslie-Henry Co.,* 32 F.R.D. 9, 10 (M.D. Pa. 1963) ("In the absence of special circumstances, the court should ordinarily allow the examining party to choose his own mode of examination.") In any case, courts recognize that questioning a representative, such as what the Town has offered as a rule 30(b)(6) deposition is insufficient. *See, e.g., Payne v. District of Columbia*, 279 F.R.D. 1 (D.D.C. 2011) ("Nor can Defendant District of Columbia fairly suggest that the information Plaintiff seeks can be obtained from some other source. In theory, Plaintiff could ask other participants in the conversations among members of the Council and members of the executive branch what Council Chair Gray said; however, in reality, it is only Gray who can testify about his recollection of the conversations, and offer a non-hearsay account of what he said.") So too here. A rule 30(b)(6) representative, such as Daniel Monks, can only offer second-hand knowledge. He is not the source of the information.

Direct questioning of each selectboard member is not only appropriate, and proportional, but absolutely necessary for trial preparation. *See, Smith v. Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982) ("Municipal officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate."); *Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042, 1070-1071 (D. Az. 2014) ("Motive is often most easily discovered by examining the unguarded acts and statements [in a deposition] of those who would otherwise attempt to conceal evidence of discriminatory intent.") (internal citations and quotations omitted.); *Am. Broad. Companies, Inc. v. U.S. Info. Agency*, 599

F. Supp. 765, 769 (D.D.C. 1984) ("Depositions are also more reliable, as they are taken under oath, and the deponents' responses are relatively spontaneous.")

Moreover, the selectboard members are not entitled to any quasi-judicial or other privilege regarding each member's mental processes and decision-making. *First,* the selectboard was not acting in a judicial or quasi-judicial capacity. *Rueger v. Natural Res. Bd.*, 2012 VT 33, P8 (2012). A proceeding is quasi-judicial if "the legal rights of one or more persons who are granted party status are adjudicated, which is conducted in such a way that all parties have opportunity to present evidence and to cross-examine witnesses presented by other parties, which results in a written decision, and the result of which is appealable by a party to a higher authority." *Id.* at P8. *Second*, and crucially here, as the United States Supreme Court has explained, the *Morgan* case (relied on by the Town) does not shield a probe of the selectboard members.

In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), the United States Supreme Court stated that while the Secretary of Transportation's decision was entitled to a presumption of regularity, "that presumption is not to shield his actions from a thorough, probing, in-depth review." The United States Supreme Court held that a trial court may require the administrative officials who took part in the decision to testify and explain the reasons for their actions:

> Of course, such inquiry into the mental processes of administrative decisionmakers is usually to be avoided. *United States v. Morgan*, 313 U.S. 409, 422, 85 L. Ed. 1429, 61 S. Ct. 999 (1941). And where there are administrative findings that were made at the same time as the decision, as was the case in *Morgan*, there must be a strong showing of bad faith or improper behavior before such inquiry may be made. But here there are no such formal findings and it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves.

Overton Park, 401 U.S. at 420. That is the case here. The only way that Chelsea can prepare its case is by *examining the decisionmakers themselves*. Anything less in this case would violate

Chelsea's rights to due process and equal protection and seriously impair its trial preparation.

Moreover, the Town has impliedly waived any ability to object to the depositions of the selectboard members by filing testimony and recommendations. A governmental entity that voluntarily chooses to file "recommendations" pursuant to its statutory right under 30 V.S.A. §248 has impliedly waived any basis that it might otherwise have had to refuse to be subjected to scrutiny of those recommendations, the persons responsible for making them, and the deliberative process. Implied waiver arises "when the party attempts to use [a] privilege both as a shield and a sword by partially disclosing [in this case the recommendations and] affirmatively relying on them to support its claim or defense and then shielding the underlying communications from scrutiny." *Pall Corp. v. Cuno Inc.*, 268 F.R.D. 167, 168 (E.D.N.Y. 2010) (internal citations and quotations omitted). That is exactly what the Town is attempting to do here—use it statutory right under section 248(b) to make recommendations as a sword and then try to shield the basis and motivations for its recommendations through claims of undue burden or some type of purported right to hide them. Selectively shielding facts that are potentially less favorable from disclosure is a sword and shield practice that the Vermont Supreme Court finds impermissible. Mental impressions are crucial to any claim of inequitable conduct and cannot be selectively offered. *See, e.g., State v. Valley*, 153 Vt. 380, 395 (1989) ("We are not willing to allow the defendant to use [] privilege as both a sword and a shield to ensure that the court has only an incomplete and onesided version."); *Arista Records*, 2011 U.S. Dist. LEXIS 42881, 2011 WL 1642434, at *3 ("In sum, . . . 'it would be unfair for a party asserting contentions [of good faith] to then rely on its privileges to deprive its adversary of access to material that might disprove or undermine the party's contentions.'") (alterations in original) (quoting *Newmarkets Partners, LLC v. Sal. Oppenheim Jr. & Cie. S.C.A.*., 258 F.R.D. 95, 106 (S.D.N.Y. 2009)); *Sandvik Intellectual Prop. AB v. Kennametal,*

Inc., No. 2:10-CV-00654, 2012 U.S. Dist. LEXIS 84028, 2012 WL 2288554, at *2 (W.D. Pa. June 18, 2012) (same); *In re Town Highway No. 20*, 2012 VT 17, P58 (2012) ("Here, the Town selectboard was performing a governmental function, but doing so in a manner that invidiously discriminated against [plaintiff] in violation of due process and Article 7, and there can be no immunity for such conduct.")

The Town's alternate request—that Chelsea pay for the cost of the Town's attorney for the deposition—is wholly unsupported. The Town has not met the "good cause" standard for the extraordinary measure of a protective order under VRCP 26(c). As a result, there is no legal basis on which the taking of the depositions could be conditioned on the payment of attorney's fees. Nor is it even arguable that the Town paying its own attorney to attend at deposition at a location of the Town's choosing—its attorney's office—is an "undue" expense under VRCP 26(c). Depositions are a normal part of discovery, and what is more, the Town has voluntarily injected itself into the case as a party and has voluntarily chosen to make "recommendations" against the Project. *See, Schmitt* at P18 (rejecting party's claim for a protective order because the discovery sought was "discovery to which he is otherwise entitled… [and no] facts [] supported the notion that Schmitt's request was so abusive or burdensome that a protective order was appropriate.")

ARGUMENT

I. Introduction.

Restrictions on development of real property "are in derogation of the common law." *In re Willey*, 120 Vt. 359, 365 (1958). Such restrictions must be strictly construed. *Id.* "[E]xemptions should be construed in favor of the owner." *Id.* Here giving the power to regulate land use through standard-less criteria in a Town Plan allows for unbridled discrimination based upon the whim of the municipality. We have seen it in action when the Town supported a commercial scale ground-

mount solar project in the Rural Conservation ("RCON") zone after the first Chelsea CPG Order in February 2016. We have seen it on video when in August 2015, the selectboard voted to oppose the Project based upon false information. Such standard-less provisions violate property owners' due process and equal protection rights. *In re Appeal of JAM Golf, LLC*, 2008 VT 110, ¶ 14. *See also, Town of Westford v. Kilburn*, 131 Vt. 120, 124, 300 A.2d 523, 526 (1973) ("without the guidance of any standards, equal protection is denied the citizens.") (internal citations and quotations omitted.)

Similarly, in *In re Miserocchi*, 170 Vt. 320, 749 A.2d 607 (2000), the Vermont Supreme Court held that "a decision arrived at without reference to any standards or principles is arbitrary and capricious; such ad hoc decision-making denies the applicant due process of law." *Id*. at 325, 749 A.2d at 611 (citation omitted). *See also*, *State v. Auclair*, 110 Vt. at 163, 4 A.2d 107, 114 (1939) (It is essential to the validity of the statute that it shall "establish a certain basic standard--a definite and certain policy and rule of action for the guidance of the agency created to administer the law.") (internal citations omitted)); *Village of Waterbury v. Melendy*, 109 Vt. 441, 451, 199 A. 236, 241 ("It cannot be a mere arbitrary choice, for it has been said that in the American system of government no room is left for the play and action of purely arbitrary power").

The standard-less criteria in the Town Plan could not directly restrict development because to do so would violate Chelsea's due process and equal protection rights. Using it to indirectly accomplish the same objective through the *Quechee* test or through vague, undefined purported orderly development goals is equally offensive.

Any recommendations of the Town must be based upon any legitimate regulatory concerns and not on political pressure from neighbors. *In re Town Highway No. 20*, 2012 VT 17 (2012). But the latter is exactly what the Town's opposition is based upon. The Town's exercise of its

right to make recommendations "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." *See, In Re Handy*, 171 Vt. 336, 349 (2000). As the Vermont Supreme Court has cautioned, "[f]lexibility cannot be a synonym for ad-hoc decision making that is essentially arbitrary." *Id*. "We cannot ignore that in a small town environment, the people involved, and affected by, the decision-making 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." *Id. See also, Del Monte Dunes at Monterey, Ltd v. City of Monterey*, 920 F.2d 1496, 1508 (9th Cir. 1990) (recognizing constitutional claim for denial of a permit "motivated, not by legitimate regulatory concerns, but by political pressure from neighbors and other residents.") ; *See also, In re Town Highway No. 20*, 2012 VT 17, P45 (2012) (recognizing constitutional violation from "the selectboard's repeated failure to provide fair and impartial decisionmaking, the result of a relentless bias against [plaintiff] and favoritism toward neighbors.")

The Town's opposition is also manifestly discriminatory in comparison to its treatment of other commercial scale solar and electric projects in the RCON zone, which the Town supported, which shows *prima facie* that its actions here arbitrary and illegitimate, and that a deposition of each selectboard member is appropriate, proportional and constitutionally necessary. *See, In Re Handy*, 171 Vt. 336, 349 (2000); *In re Town Highway No. 20*, 2012 VT 17 (2012); *see also*, *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam) (recognizing a constitutional claim as a "class of one" by showing that plaintiff had "been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.").

Discrimination against Chelsea is visually shown in Exhibits 6 and 7 to the Town's 30(b)(6) deposition conducted in docket 8454. *See*, Exh. CS-BW-25. Those exhibits depict the

Paper Mill solar project and show what type of ground-mounted solar project passes muster under the Town's aesthetic and orderly development goals under the Town Plan in the RCON zone. When those are compared to the Chelsea plan simulations, it is clear that there was no basis on which to conclude Chelsea violated any goal or criteria of the Town. The Paper Mill project is plainly visible from public roads and neighboring properties. Whereas the Chelsea project is proposed to be screened in all directions.

Additionally, the Town's recently approved commercial ground-mounted net-meter solar project sited and visible in what the Town considers a scenic gateway,[2] shows quite clearly that the Town Plan's aesthetic "standards" are not standards at all but merely optional *ad-hoc* criteria that can be applied at will by the political elite of the Town.

As this case illustrates, "most towns, when given the opportunity, will listen to the vocal and passionate opposition that exists for almost every proposed project - and will not support the implementation of such projects." *Letter to Governor Shumlin and DPS Commissioner Miller*, October 24, 2012, from David Raphael of Landworks.

II. The Town Has Not Shown "Good Cause" For The Issuance Of A Protective Order.

The Town's motion wholly ignores well-established precedent that an order barring a litigant from taking a deposition is a most extraordinary measure. *Schmitt,* P12, fn. 3; *Salter v. Upjohn Co*., 593 F.2d 649, 651 (5th Cir. 1979) ("It is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error."). The moving party bears a heavy burden of showing "extraordinary circumstances" that would justify such an order, and the showing must be sufficient to overcome plaintiff's "legitimate and important interests in trial preparation." *Alexander v. FBI*, 186 F.R.D. 71, 75 (D.D.C. 1998);

[2] *See*, *ER Bennington Solar I, LLC*, 2016 Vt. PUC LEXIS 570 (October 19, 2016).

see also Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3d Cir. 1986) (burden of persuasion is on the party seeking protective order; the harm alleged "must be significant, not a mere trifle"); *Schmitt* at P13 ("during the pretrial period 'restrictions which may impede the development, presentation and determination of facts should be avoided.'")

"Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." V.R.C.P. 26(b)(1). This relatively broad rule may be constricted when a party from whom discovery is sought shows "good cause" for protection "from annoyance, embarrassment, oppression, or undue burden or expense." V.R.C.P. 26(c).

The Vermont Supreme Court has stated that "[p]rotective orders might prove necessary where there is a risk that one party will abuse the discovery process, [] *but these are exceptional situations*." *Schmitt* at P12 fn. 3. (emphasis added.) Like all other courts, the Vermont Supreme Court considers protective orders "extraordinary measures," that only should be issued if the movant has shown "good cause" and shows that the protective order is necessary to prevent an abuse of the discovery process. *Id.*

"Good cause" requires the party resisting discovery to meet a heavy burden. *Minter v. Wells Fargo Bank, N.A.*, 258 F.R.D. 118, 125 (D. Md. 2009) ("the standard for issuance of a protective order is high. A motion seeking to prevent the taking of a deposition is regarded unfavorably by the courts, and it is difficult to persuade a court to do so."); *Static Control Components, Inc. v. Darkprint Imaging*, 201 F.R.D. 431, 434 (M.D.N.C. 2001) ("By requesting the Court to prohibit plaintiff from deposing a witness, defendant [] assumes a heavy burden because protective orders which totally prohibit a deposition should be rarely granted absent extraordinary circumstances.") (internal citations omitted); *see also SEC v. SBM Investment Certificates, Inc*., 2007 U.S. Dist. LEXIS 12685, 2007 WL 609888 (D. Md. 2007) (recognizing

courts' general disfavor completely prohibiting depositions). Similarly, the Vermont Supreme Court has cautioned that "during the pretrial period 'restrictions which may impede the development, presentation and determination of facts should be avoided wherever possible.'" *Schmitt,* at P13 quoting *Int'l Bus. Mach. Corp. v. Edelstein*, 526 F.2d 37, 41 (2d Cir. 1975).[3]

The Town's motion trips at the starting gate as it utterly fails the specificity and evidentiary requirements that must be presented to even hope to obtain a protective order. General allegations of annoyance, embarrassment, oppression, or undue burden or expense are simply insufficient. *See, Schmitt* at P16 ("Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test," quoting *Cipollone v. Liggett Group, Inc*., 785 F.2d 1108, 1121 (3d Cir. 1986).) On that basis alone, the Town's motion must be denied.

In *Schmitt*, for example, the Vermont Supreme Court reversed the issuance of a protective order, rejecting generalized allegations of "embarrassment to defendants, the potential significant and unjustified negative impact on defendants' business, and the potential for extending discovery 'into expensive and unnecessary areas far in excess of that justified by the possible value of this lawsuit,'" as sufficient to issue a protective order. *See, Schmitt* at P15 ("None of these reasons, in the context of this lawsuit, are sufficient to support an order denying otherwise relevant discovery to Schmitt under Rule 26(c).") The Vermont Supreme Court then proceeded to adopt the federal rules approach to the heavy burden required to meet "good cause" for a protective order:

> Although we have not had occasion to discuss the meaning of "good cause," this is well-traveled ground under the federal rules. A party seeking a protective order to prevent injury to a business must present allegations of

[3] . "To obtain a protective order, the party resisting discovery or seeking limitations must show "good cause" for its issuance *by demonstrating harm or prejudice that will result from the discovery*. Fed. R. Civ. P. 26(c)(1); *see also Phillips ex rel. Estates of Byrd v. Gen. Motors Corp*., 307 F.3d 1206, 1210-1211 (9th Cir. 2002). Generally, a party seeking a protective order must meet a "heavy burden" to show why discovery should be denied. *Blankenship v. Hearst Corp*., 519 F.2d 418, 429 (9th Cir. 1975)." *Cedano v. Thrifty Payless, Inc*., 2011 U.S. Dist. LEXIS 123950 (D. Ore. 2011), *8. (emphasis added.)

> injury with some specificity. *Cipollone v. Liggett Group, Inc*., 785 F.2d 1108, 1114 (3d Cir. 1986). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." *Id*. at 1121; *see also Joy v. North*, 692 F.2d 880, 894 (2d Cir. 1982) (refusing to make protective order where proponent's only argument in its favor was the conclusory statement that disclosure of certain information would "injure the bank in the industry and local community").

See also, Elliott v. AMS, Inc. (In re Am. Med. Sys.), 2016 U.S. Dist. LEXIS 109970, (S.D. W.Va. 2016) *10-11:

> protective orders "should be sparingly used and cautiously granted." *Baron Fin. Corp. v. Natanzon*, 240 F.R.D. 200, 202 (D. Md. 2006) (quoting *Medlin v. Andrew*, 113 F.R.D. 650, 653 (M.D.N.C. 1987)). Moreover, a court's customary reluctance to constrain discovery is heightened in the case of a motion seeking to prevent the taking of a deposition.

The reason for rarely prohibiting a deposition is *"fundamental." Elliott v. AMS, Inc.,* 2016 U.S. Dist. LEXIS 109970, (S.D. W.Va. 2016) at *10-11:

> Usually, the subject matter of a deposition is not well-defined in advance; thus, the need for prospective relief is more difficult to establish than in other methods of discovery. In addition, "a motion can be made if any need for protection emerges during the course of the examination;" therefore, a ruling prior to commencement of the deposition is not necessary to achieve a fair resolution. 8 Wright & Miller, Federal Practice and Procedure, § 2037 (3d Ed.). As a result, the burden to show good cause for an order prohibiting the taking of a deposition is especially heavy. *Medlin,* 113 F.R.D. at 653; *Motsinger v. Flynt*, 119 F.R.D. 373, 378 (M.D.N.C. 1988) ("Absent a strong showing of good cause ***and*** extraordinary circumstances, a court should not prohibit altogether the taking of a deposition.")
>
> (emphasis added.)

"[P]rotective orders are rare, disfavored, and require the party seeking a protective order to shoulder a heavy burden, which includes a particularized, fact-intensive showing of the necessity of the order." *See*, *Office of the DA of Phila. v. Bagwell*, 155 A.3d 1119, 1136 (Pa. Cmwlth. 2017) (collecting cases) and citing *e.g., Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006); *Baxter International, Inc. v. Abbott Laboratories*, 297 F.3d 544, 545 (7th Cir.

2002); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3rd Cir. 1994).

The Town has simply not established "good cause." Nor has it proven with the requisite level of specificity exactly how a deposition of each selectboard member would cause any annoyance, embarrassment, oppression, or *undue* burden or expense under VRCP 26(c) sufficient to justify a protective order. Even a cursory review of the Town's motion shows it is manifestly deficient.

The Town's motion does exactly what the Vermont Supreme Court and other courts reject—relying on "[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning." For example, in the Motion's "Factual Background" the Town alleges in conclusory form that the deposition "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." Mot. at 2. The remainder of the motion is dedicated to more conclusory legal arguments.

The motion's first legal argument is based upon the notion that the existence of rule 30(b)(6) institutional deposition provides the "good cause" for prohibiting the select board members' depositions. The Town cites no authority for this fantastical proposition. The rule itself expressly provides to the contrary. A rule 30(b)(6) deposition is no substitute for oral testimony of select board members. Indeed, the various discovery methods provided under the Vermont Rules of Civil Procedure are intended to be complementary and not mutually exclusive. 7 James Wm. Moore et al., Moore's Federal Practice ¶ 33.04[1] (3rd ed. 1999). As distinct from an institutional deposition which can be second-hand hearsay, "[t]he underlying purpose of a deposition is to find out what a witness saw, heard, or did -- what the witness thinks." *Hall v. Clifton Precision,* 150 F.R.D. 525, 528 (E.D. Pa. 1993); *see also Applied Telematics, Inc. v. Sprint Corp.,* 1995 WL 79237 at *1 (E.D. Pa. Feb. 22, 1995). In a case involving a common

understanding and concerted action such as this one, the need to depose the selectboard members involved is even more obvious because each members' actions and knowledge -- not merely what may be in a hearsay recount of a second-hand witness -- are potentially important proof of the illegitimate actions and bias that taint the recommendations from the Town, and the conclusions on orderly development and aesthetics. In addition, pretrial depositions are necessary to ascertain how and from whom evidence to be used at trial may be procured and admitted, and to commit adverse witnesses to their testimony. *See* Manual for Complex Litigation § 21.45 (3rd ed. 1995). Thus, the fact that the Town offers a rule 30(b)(6) deposition does not render the taking of each selectboard members' pretrial depositions burdensome.

The motion's second legal argument is based upon the conclusory allegations that "[t]he testimony of individual legislators is of extremely limited value, thus the burden and potential prejudice of such testimony substantially outweighs its likely benefit." Mot. at 4. That conclusory allegation falls flat for a few reasons. *First,* the Town fails to come forward with any evidence that supports its factual conclusion that the testimony of each member of the selectboard would be of "extremely limited value." *Second*, even if a prospective deponent disclaimed any knowledge, *i.e*., alleges the deposition would provide no value, it is hornbook law that such a claim provides *no basis* for issuing a protective order. *See*, 8 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, §2037 (2d. 2009):

> A witness cannot escape examination by claiming that he has no knowledge of any relevant facts, since the party seeking to take the deposition is entitled to test his lack of knowledge, but a different result is sometimes reached when the proposed deponent is a busy government official, or a very high corporate officer unlikely to have personal familiarity with the facts of the case.

See also Naftchi, 172 F.R.D. at 132; *Rolscreen Co. v. Pella Products of St. Louis, Inc.,* 145 F.R.D. 92, 97 (S.D. Iowa 1992*); Travelers Rental Co. v. Ford Motor Co.,* 116 F.R.D. 140, 143 (D. Mass.

1987).

Third, the motion does not provide any evidentiary basis to support its claim that depositions would be an undue burden or cause prejudice. The Town's claim of undue burden boils down to hyperbole about the burdens imposed on its selectboard members. None of these claims is rooted in fact. *Fourth*, the motion fails to provide any evidentiary support for its factual conclusion with respect to the "likely benefit" of the deposition, or how that benefit is outweighed by other considerations.

The Town's motion then diverges into a list of inapposite case law citations involving legislators testifying about legislative history when courts engage in statutory interpretation. Those cases have nothing to do with the legal or factual issues here. The motion then repeats its conclusory unsubstantiated allegation: "[g]iven 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."

The Town's next legal argument relying on *United States v. Morgan*, 313 U.S. 409, 422 (1941), is that Chelsea "may not may depose individual selectboard members in their capacity as quasi-judicial or judicial decision-makers." Mot. at 5. *Morgan* does not apply here for the very obviously reason that the selectboard is not acting in a quasi-judicial or judicial capacity. *Rueger v. Natural Res. Bd.*, 2012 VT 33, P8 (2012). A proceeding is quasi-judicial if "the legal rights of one or more persons who are granted party status are adjudicated, which is conducted in such a way that all parties have opportunity to present evidence and to cross-examine witnesses presented by other parties, which results in a written decision, and the result of which is appealable by a party to a higher authority." *Id.* at P8. But crucially here, as the United States Supreme Court has

explained, the *Morgan* case (relied on by the Town) does not shield a probe of the selectboard members. In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), the United States Supreme Court stated that while the Secretary of Transportation's decision was entitled to a presumption of regularity, "that presumption is not to shield his actions from a thorough, probing, in-depth review." The United States Supreme Court held that a trial court may require the administrative officials who took part in the decision to testify and explain the reasons for their actions. *Overton Park*, 401 U.S. at 420. That is the case here. The only way that Chelsea can prepare its case is by *examining the decisionmakers themselves*.

The Town's next argument continues its unsubstantiated conclusory arguments—"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)."

The Town's final argument is that "[r]equiring the Town to accede to Chelsea's request is potentially prejudicial in another, unique manner." Mot. at 6. The Town then proceeds to briefly describe the litigation in Vermont Superior Court between PLH LLC and the Town, to which Chelsea *is not* a party. The Town's argument is insufficient for a few reasons. *First* the Town alleges in conclusory fashion "potential" prejudice, which is insufficient. As the Vermont Supreme Court and other courts made clear, the movant seeking to prevent a deposition must come with proof, and proof in detail, as to exactly how there is good cause and how the deposition *is* prejudicial and how it *will cause* annoyance, embarrassment, oppression, or undue burden or expense. Even when such a showing is made, courts will not prohibit the deposition but will constrain the protective order in a targeted manner to address the specific ways in which the

depositions would cause annoyance, embarrassment, oppression, or undue burden or expense. *Second*, the Town has not presented evidence to prove how the depositions of the selectboard members would in fact be prejudicial. *Third*, as the Vermont Supreme Court stated in *Schmitt,* courts reject the notion that a separate proceeding can provide a basis to restrain discovery in the proceeding before it unless it can be clearly shown that the party seeking the depositions is acting in bad faith. *See, Schmitt* at P16, fn. 4 (stating "argument that the discovery was sought mostly to gain an advantage in other litigation 'in some circumstances might raise an inference of bad faith sufficient to support a protective order'" citing *Dove v. Atl. Capital Corp*., 963 F.2d 15, 19 (2d Cir. 1992)). That is certainly not the case here. Chelsea's laser focus is on this proceeding and obtaining the long-delayed CPG for its Project.

In short, the Town has not shown that the short depositions that Chelsea has proposed would cause annoyance, embarrassment, oppression, or undue burden or expense.

III. The Availability Of A Rule 30(b)(6) Deposition Does Not Obviate The Need To Depose Each Selectboard Member.

A rule 30(b)(6) is not a substitute for live testimony of witnesses with first-hand knowledge. VCRP 30(b)(6) and the corresponding Federal rule permit Chelsea to notice a deposition of an institution, such as the Town. VCRP 30(b)(6) expressly provides that such a deposition does not limit Chelsea's ability to take other depositions or make use of the other available means of discovery.[4]

While a deposition of Town representative under rule 30(b)(6) is something Chelsea has the right to use as filed here, only the selectboard members themselves can testify to their actions and intentions. In a similar situation the district court observed in *Payne v. District of Columbia*,

[4] *See,* VCRP 30(b)(6) ("This paragraph (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.")

279 F.R.D. 1 (D.D.C. 2011):

> Nor can Defendant District of Columbia fairly suggest that the information Plaintiff seeks can be obtained from some other source. In theory, Plaintiff could ask other participants in the conversations among members of the Council and members of the executive branch what Council Chair Gray said; however, in reality, it is only Gray who can testify about his recollection of the conversations, and offer a non-hearsay account of what he said. See Byrd, 259 F.R.D. at 5 (depositions of government officials allowed where plaintiffs "sufficiently show[ed] that none of the contested depositions are cumulative or duplicative or imposes a burden that outweighs their likely benefit[.]").

So too here. A rule 30(b)(6) representative, such as Daniel Monks, can only offer second-hand knowledge. He is not the source of the information. In essence the Town misconstrues the place of a rule 30(b)(6) deposition. Chelsea is entitled to depose the officials with first-hand knowledge, and cannot be relegated to a deposition based primarily on a rule 30(b)(6) deponent's second-hand knowledge.

IV. The Doctrine Adopted In *Monti* For High-Ranking Officials Does Not Apply Here.

In *Monti*, a former Vermont government employee sought to depose the Governor of Vermont in connection with her suit for wrongful discharge. The Vermont Supreme Court adopted a four-factor test to apply in determining whether a busy, highly-placed government official should be taken away from their busy schedule for a deposition that would justify the extraordinary measure of issuing a protective order.

The *Monti* court observed that:

> This is … a doctrine founded on notions of the public's interest in limiting unnecessary demands on the time of highly-placed public officials. "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." Community Fed. Sav. & Loan Ass'n v. Federal Home Loan Bank Bd., 96 F.R.D. 619, 621 (D.D.C. 1983). The trial court must balance the prejudice or injustice to the litigant seeking the deposition with the public interest that high public officials not be

> "hampered or distracted in the important duties cast upon [them] by law." California State Bd. of Pharmacy v. Superior Court, 78 Cal. App. 3d 641, 644, 144 Cal. Rptr. 320, 322 (1978).

Id. 612-13, 563 A.2d at 631.

Here the Town selectboard members are not highly-ranked governmental officials entitled to be judged under the *Monti* test, but even if they were, the *Monti* factors are satisfied here entitling Chelsea to depose each selectboard member.

A. The Selectboard Members Are Not High-Ranking Government Officials.

Generally, "a party is entitled to depose a witness on all relevant issues to which the witness has knowledge." *Alliance for Global Justice v. District of Columbia*, 2005 U.S. Dist. LEXIS 15190, 2005 WL 1799553, at *1 (D.D.C. 2005) (citation omitted). "However, '[c]ourts have consistently recognized the undue burden that falls on public officials as a consequence of compulsion to attend depositions.'" *Id*. (citations omitted).

Wright & Miller has described the considerations underlying the "apex" executive principle:

> A witness cannot escape examination by claiming that he has no knowledge of any relevant facts, since the party seeking to take the deposition is entitled to test his lack of knowledge, but a different result is sometimes reached when the proposed deponent is a busy government official, or a very high corporate officer unlikely to have personal familiarity with the facts of the case.

8 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, §2037 (2d. 2009) (internal citations omitted).

"[T]he apex deposition rule is bottomed on the apex executive lacking any knowledge of relevant facts. The rule is aimed to prevent the high level official deposition that is sought simply because he is the CEO or agency head - the top official, not because of any special knowledge of, or involvement in, the matter in dispute." *Minter v. Wells Fargo Bank, N.A.*, 258 F.R.D. 118, 126

(D. Md. 2009) (collecting cases). ("[T]he apex deposition rule is intended to protect busy, high-level executives who lack unique or personal knowledge [, the deponent] is no longer a busy corporate executive, but works a limited schedule. [] A deposition would seemingly not interfere with any of his corporate responsibilities.") *Id. Accord, Monti* at 612-13.

So too here. The selectboard members are engaged in municipal affairs part-time, meeting generally only twice per month for a handful of hours. The Town has offered no facts to support a conclusion that the selectboard members are busy individuals whose depositions would even remotely affect their attention to municipal affairs. *See also, Byrd v. District of Columbia*, 259 F.R.D. 1 (D.D.C. 2009) (denying protective where "[t]here is no indication that failure [of deponents] to perform their particular duties for the length of a deposition would create any hardship or unreasonable burden.")

B. Even If the Selectboard Members Qualify As High-Ranking Officials, Chelsea Is Entitled To Depose The selectboard Members Under *Monti*.

Assuming arguendo that the members of the selectboard are in the same category as the President of the United States or the Governor of Vermont,[5] Chelsea is entitled to depose each of the six[6] members of the selectboard under the Vermont Supreme Court's decision in *Monti v. Vermont*, 563 A.2d 629 (1989). *Monti* established the standard to determine when a high ranking public official should be deposed. The standard established by the Vermont Supreme Court is "that the party requesting the deposition make a particularized showing of need for the deposition,

[5] *But see, Killington, Ltd. v. Lash*, 153 Vt. 628, 636 (Vt. 1990) quoting the words of Chief Justice Marshall in *United States v. Burr*, 25 F. Cas. 30, 191-192 (C.C.D. Va. 1807) (No. 14,692d) acknowledging that in despite the "the weight of presidential office and the necessary exercise of a reasonable privilege in the pursuit of that office: 'That the president of the United States may be subpoenaed, and examined as a witness, and required to produce any paper in his possession, is not controverted.'"

[6] Selectboard chair, Tom Jacobs, has recused himself from all matters regarding the Chelsea Solar project so his deposition is not necessary.

i.e., that it is necessary to prevent prejudice or injustice to the party requesting it." *Monti*, at 632. The court went on to state:

> In applying this standard, trial courts should weigh the necessity to depose or examine an executive official against, among other factors, the substantiality of the case in which the deposition is requested; the degree to which the witness has first-hand knowledge or direct involvement; the probable length of the deposition and the effect on government business if the official must attend the deposition; and whether less onerous discovery procedures provide the information sought.

Here a deposition of each selectboard member is necessary to prevent prejudice and injustice to Chelsea. The members of the selectboard have voluntarily injected themselves into this case by making recommendations to the Commission on issues at the very heart of this case. In seeking to quash the depositions, the Town would remove any transparent review of the Town actions from this process. As a party in this case, the Town has placed its interests in issue and cannot and should not be allowed to avoid its obligations as a party to fully respond to discovery and allow a transparent process intended to reach a full and fair decision. On the other hand, granting such relief would deprive Chelsea basic due process rights and seriously harm its trial preparation and prosecution of its case.

Moreover, each of the factors set forth in the *Monti* test strongly weigh in favor of Chelsea.

1. *The substantiality of the case in which the deposition is requested.*

The substantiality of this case is self-evident. It has been continuing for more than four years already, with one trip to the Vermont Supreme Court. Chelsea has invested hundreds of thousands of dollars in development of the Project. Moreover, important environmental goals of the State of Vermont are at stake, as well as the due process, equal protection and property rights of Chelsea. In addition, the level of consideration "due" to the Town's recommendations depends, under other things, on the motivations of the selectboard members, how they distinguish the

Chelsea Project from similarly situated projects that the Town has supported, and a host of other issues related to whether the Town's recommendations are in accord with decisions for other solar projects, and based upon legitimate regulatory criteria. Those are issues that Chelsea is entitled to address through depositions of each selectboard member. Chelsea asserts that the evidence already in the record supports its claim that the Town's opposition is not based upon any legitimate regulatory purpose, but rather motivated by the vocal opposition from a few neighbors and generalized animus. The Vermont Supreme Court has unequivocally condemned such conduct. *See, e.g., In re Town Highway No. 20*, 2012 VT 17, P22 (2012) (holding town liable in tort for due process and equal protection violations where just as here "the Town's decisions with regard to [the project] have all been guided by one motive: to favor the property rights of [] neighbors.") These due process, equal protection, property and trial preparation interests are substantial interests.

2. The degree to which the witness has first-hand knowledge or direct involvement.

Here each selectboard member clearly has both first-hand knowledge and direct involvement. The selectboard members are the ones calling the plays on behalf of the Town with respect to the Project.

3. *The probable length of the deposition and the effect on government business if the official must attend the deposition.*

Chelsea has noticed each deposition and expects that each would not last longer than three hours, excluding time to address objections or claims of privilege by counsel. The depositions are scheduled for days where the selectboard would not have a regularly scheduled meeting. Thus there would be no effect on government business if the member attends the deposition. In any case, Chelsea is open to scheduling each deposition at a time and place in or near Bennington that is convenient for each member.

4. *Whether less onerous discovery procedures provide the information sought.*

There are no other discovery procedures that can provide the first-hand testimony of each selectboard member to which Chelsea is entitled and which is crucial to its trial preparation, as explained above. *See, e.g., Payne v. District of Columbia*, 279 F.R.D. 1 (D.D.C. 2011) discussed *supra.* Moreover, direct questioning of each selectboard member is not only appropriate, and proportional, but absolutely necessary for trial preparation. *See, Smith v. Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982) ("Municipal officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate."); *Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042, 1070-1071 (D. Az. 2014) ("Motive is often most easily discovered by examining the unguarded acts and statements [in a deposition] of those who would otherwise attempt to conceal evidence of discriminatory intent.") (internal citations and quotations omitted.); *Am. Broad. Companies, Inc. v. U.S. Info. Agency*, 599 F. Supp. 765, 769 (D.D.C. 1984) ("Depositions are also more reliable, as they are taken under oath, and the deponents' responses are relatively spontaneous.")

In short, all the *Monti* factors weigh heavily in Chelsea's favor establishing that the Town is not entitled to a protective order.

C. The Ohio Supreme Court Has Adopted And Applied *Monti*, Which Confirms Chelsea's Satisfaction Of The *Monti* Factors.

Although there have not been any subsequent Vermont Supreme Court opinions applying the *Monti* factors to the facts of a particular case, another court—the Ohio Supreme Court—has applied the *Monti* factors. In adopting *Monti* in *State ex rel. Summit County Republican Party Exec. Comm. v. Brunner*, 117 Ohio St. 3d 1210, 1211 (Ohio 2008), the Ohio Supreme Court denied a motion for a protective order with remarkable parallels to this case. There the Ohio Secretary of State sought a protective to prevent her deposition in a case involving her decision and her mental

processes related to her decision to appoint person to a county board of elections against the wishes of the local county Republican Party Executive Committee. As to the first factor, the court stated:

> First, this is a matter of great public interest involving the secretary's decision to reject a person recommended by the committee to the elections board and her appointment of a different person. The claim is premised upon R.C. 3501.07, which recognizes mandamus actions in this court under certain circumstances when the secretary rejects a recommended appointee.

Here, the case is substantial, having been litigated for over four years. It involves a matter that by definition affects the good of the State of Vermont. Combatting climate change with reducing and displacing fossil fuel use is a high priority for the public and the State of Vermont. In addition, the standard-offer program is an important program for the public and the State of Vermont.

As to the second *Monti* factor, the Ohio Supreme Court stated:

> Second, notwithstanding the secretary's claim to the contrary, the committee's claims challenge a decision of the secretary herself and not some lower-level employee in her office. R.C. 3501.07 focuses on the secretary's "reason to believe" whether the recommended appointee is competent. *The secretary's personal knowledge and thought process in arriving at her decision lies at the heart of this case. No one else can answer the questions the committee has a right to ask.*

(emphasis added.)

So too here. The members of the selectboard made the decision to make the recommendations here. The members of the selectboard made the decision to oppose the Project. What led the members, individually and collectively, to oppose the Project and make the recommendations strikes at the heart of this case. The members of the selectboard cannot hide behind an appointed representative. The selectboard members motivations in opposing the Project infect not only the recommendations themselves, but what "due consideration" the Commission should give to them. Recommendations that are pre-textual, and motived by local opposition are

illegitimate and entitled to no weight. *See, e.g., In re Town Highway No. 20*, 2012 VT 17, P22 (2012) (holding town liable in tort for due process and equal protection violations where just as here "the Town's decisions with regard to [Chelsea's project] have all been guided by one motive: to favor the property rights of his neighbors."); *Del Monte Dunes at Monterey, Ltd v. City of Monterey*, 920 F.2d 1496, 1508 (9th Cir. 1990) (recognizing constitutional claim for denial of a permit "motivated, not by legitimate regulatory concerns, but by political pressure from neighbors and other residents.") *See, Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam) (recognizing a constitutional claim as a "class of one" by showing that plaintiff had "been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.")

As to the third *Monti* factor, the Ohio Supreme Court stated:

> Third, there is no reason to believe that a deposition need take an inordinate amount of time. The issues are limited, involving the secretary's decisions to reject Daley's appointment and to appoint Varian.

That is equally true here as explained above.

As to the fourth *Monti* factor, the Ohio Supreme Court stated:

> a deposition may indeed be the least onerous way to generate the necessary responses. The secretary can relate her own thought process in her own words.

So too here. There are no other discovery procedures that can provide the first-hand testimony of each selectboard member to which Chelsea is entitled and which is crucial to its trial preparation. *See, e.g., Payne v. District of Columbia*, 279 F.R.D. 1 (D.D.C. 2011) discussed *supra*.

The Ohio Supreme Court also rejected the claim that the Secretary was "entitled to a protective order to prevent her deposition testimony based on the deliberative-process privilege." *Id*. at 1211. The Ohio Supreme Court also rejected the attempt to limit the scope of the deposition. "We deny the motion because the parties should be able to introduce all potentially relevant

evidence at this early stage of the case. We will ultimately determine which evidence is pertinent to the committee's claims in resolving those claims on the merits." *Id*. at 1212.

V. The Selectboard Members Are Not Entitled To Any Quasi-Judicial or Judicial Immunity.

The selectboard members are not entitled to any quasi-judicial or other privilege regarding each member's mental processes and decision-making. *First,* the selectboard was not acting in a judicial or quasi-judicial capacity. *Rueger v. Natural Res. Bd.*, 2012 VT 33, P8 (2012). A proceeding is quasi-judicial if "the legal rights of one or more persons who are granted party status are adjudicated, which is conducted in such a way that all parties have opportunity to present evidence and to cross-examine witnesses presented by other parties, which results in a written decision, and the result of which is appealable by a party to a higher authority." *Id.* at P8. *Second*, and crucially here, as the United States Supreme Court has explained, the *Morgan* case (relied on by the Town) does not shield a probe of the selectboard members.

In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), the United States Supreme Court stated that while the Secretary of Transportation's decision was entitled to a presumption of regularity, "that presumption *is not to shield his actions from a thorough, probing, in-depth review*." (emphasis added.) The United States Supreme Court held that a trial court may require the administrative officials who took part in the decision to testify and explain the reasons for their actions:

> Of course, such inquiry into the mental processes of administrative decisionmakers is usually to be avoided. *United States v. Morgan*, 313 U.S. 409, 422, 85 L. Ed. 1429, 61 S. Ct. 999 (1941). And where there are administrative findings that were made at the same time as the decision, as was the case in *Morgan*, there must be a strong showing of bad faith or improper behavior before such inquiry may be made. But here there are no such formal findings and it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves.

Overton Park, 401 U.S. at 420. That is the case here. The only way that Chelsea can prepare its

case is by *examining the decisionmakers themselves*. Anything less in this case would violate Chelsea's rights to due process and equal protection. The other cases discussed above also confirm that in deposition Chelsea is entitled to probe the mental and deliberative processes of each selectboard member. *See, e.g., Payne v. District of Columbia*, 279 F.R.D. 1 (D.D.C. 2011); *In re Town Highway No. 20*, 2012 VT 17 (2012); *State ex rel. Summit County Republican Party Exec. Comm. v. Brunner*, 117 Ohio St. 3d 1210, 1211 (Ohio 2008); *State v. Valley*, 153 Vt. 380, 395 (1989); *Smith v. Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982); *Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042, 1070-1071 (D. Az. 2014); *Am. Broad. Companies, Inc. v. U.S. Info. Agency*, 599 F. Supp. 765, 769 (D.D.C. 1984).

VI. The Depositions Are Proportional to The Needs Of The Case.

Section 248(b)(1) requires that the Project not result in an undue adverse effect on orderly development of the region with due consideration for the recommendations of, among others, the Town. The mental processes, deliberative process, including how the selectboard has acted with respect to similarly situated projects directly relate to what "consideration" the Commission should afford a recommendation of the Town. Orderly development goes to the heart of the issues in this case.

How the selectboard differentiates its position with respect to the Chelsea Project as compared to other similarly situated projects is also relevant to what "due consideration" the selectboard recommendations are entitled. That in turn requires a direct query into the deliberative and mental processes of the selectboard members in reaching a decision. In an analogous situation involving an agency taking a selective position, the Vermont Supreme Court recognized that the mental and deliberative process of the decision-makers is fair game to determine if the decision was based upon an "unjustifiable standard." *State v. Wesco, Inc*., 2006 VT 93 (2006) at P12. In

Wesco, the Vermont Supreme Court adopted a threshold standard that a party seeking discovery must show "some evidence" of the unjustified standard. *Id.* at P18. "To show 'some evidence' of discriminatory effect, a [party] must show 'some evidence that similarly situated defendants . . . could have been [treated the same], but were not'". *Id.* at P14, fn. 3. Here that standard is easily met by (1) selectboard member Jim Carroll's public position that the neighbors should not have to deal with a project they do not want, (2) the selectboard's supporting or not opposing similarly situated commercial scale solar arrays in the RCON zone, and (3) the selectboard's supporting a commercial scale solar project with virtually no screening adjacent to Route 7 in an area specifically identified as a scenic resource in the Bennington scenic resource inventory.

Inquiry of the selectboard is also necessary and relevant for Chelsea to make a case that little to no consideration is due to the policies related to orderly development that the selectboard is complaining the Project runs up against. The goals and aims of those policies in the specific context of this Project are crucial in determining what consideration should be given those policies as part of the determination of undue adverse effect on orderly development. How the selectboard members have differentiated this Project in also relevant, and a line of inquiry the Chelsea is entitled to pursue by direct questioning of selectboard members.

Oral depositions are the only method in which Chelsea can adequately make the inquiries necessary to then present a comprehensive case as to the level of due consideration that should be afforded to the selectboard's recommendations, and to prosecute its case that all section 248 criteria are satisfied.[7]

[7] *See also*, *Stagman v. Ryan*, 176 F.3d 986, 994-95 (7th Cir. 1999) (High-Ranking officials should be required to sit for depositions in cases arising out of the performance of their official duties if there is some reason to believe that the deposition will produce or lead to admissible evidence.) Courts do not issue protective orders when there are allegations that the official acted with improper motive or acted outside the scope of his official capacity. *See, e.g., Bagley v. Blagojevich*, 486 F. Supp. 2d 786, 789 (C.D. Ill. 2007)

VII. The Suit By PLH LLC In Superior Court Is Irrelevant To The Town's Motion.

The Town, in unsubstantiated conclusory fashion, claims it would be prejudiced in a separate proceeding to which Chelsea is not even a party by allowing depositions here. But the Town does not say how it would be prejudiced. The Town's lack of evidentiary support for its conclusory allegations requires rejection of the Town's assertion. *See, Schmitt* at P16. As the Vermont Supreme Court stated in *Schmitt,* courts reject the notion that a separate proceeding can provide a basis to restrain discovery in the proceeding before it unless it can be clearly shown that the party seeking the depositions is acting in bad faith. *See, Schmitt* at P16, fn. 4 (stating "argument that the discovery was sought mostly to gain an advantage in other litigation 'in some circumstances might raise an inference of bad faith sufficient to support a protective order'" citing *Dove v. Atl. Capital Corp*., 963 F.2d 15, 19 (2d Cir. 1992)). That is certainly not the case here. Chelsea's laser focus in on this proceeding and obtaining the long-delayed CPG for its Project.

VIII. The Selectboard Members Have Waived Any Basis To Refuse or To Limit Their Depositions.

The Town's motion for protective order must be rejected for another reason as well. By voluntarily injecting themselves into this case, and filing testimony that states the positions taken by the selectboard members, they have waived any right to claim any sort of privilege. They

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(permitting deposition where plaintiffs alleged that the Governor ordered their jobs eliminated in retaliation for their attempt to organize on behalf of a union that was a rival to a group that had contributed heavily to his election campaign); *Detoy v. City and County of San Francisco*, 196 F.R.D. 362, 370 (N.D. Cal. 2000) (permitting deposition where the chief of police took the "unusual" step of intervening personally in disciplinary proceedings against a police officer to ensure lighter discipline for the officer); *Virgo Corp. v. Paiewonsky*, 39 F.R.D. 9, 10 (D.V.I. 1966) (permitting deposition of a Governor accused of taking arbitrary actions as a result of Congressional pressures and personal friendships); *Atlanta Journal & Constitution v. City of Atlanta Dep't of Aviation*, 175 F.R.D. 347, 348 (N.D. Ga. 1997) (permitting regarding the official acts of a mayor when the court was satisfied that he had "pertinent, admissible, discoverable information which [could] be obtained only from him."). Unless the movant can show that the need for the protective order is "sufficient to overcome plaintiffs' legitimate and important interests in trial preparation," high-ranking officials are subject to deposition. *Alexander*, 186 F.R.D. at 1 (citing *Farnsworth v. Procter & Gamble Co*., 758 F.2d 1545, 1547 (11th Cir. 1985)).

cannot use their position as members of the selectboard as both a sword and a shield.

The Town asserts that requiring the selectboard members to be deposed "would set a very dangerous precedent with respect to developers who may be inclined to abuse of the legal system." Mot. at 7. Developers are not required to leave their due process rights at the door of the Commission when they file a petition, but that is exactly what the Town seeks. If a Town is going to take a position against a project, it should be no surprise that the project proponent would seek to challenge the basis for that opposition.

A governmental entity that voluntarily chooses to file "recommendations" pursuant to its statutory right under 30 V.S.A. §248 has impliedly waived any basis that it might otherwise have had to refuse to be subjected to scrutiny of those recommendations, the persons responsible for making them, and the deliberative process. Implied waiver arises "when the party attempts to use [a] privilege both as a shield and a sword by partially disclosing [in this case the recommendations and] affirmatively relying on them to support its claim or defense and then shielding the underlying communications from scrutiny." *Pall Corp. v. Cuno Inc*., 268 F.R.D. 167, 168 (E.D.N.Y. 2010) (internal citations and quotations omitted). That is exactly what the Town is attempting to do here—use its statutory right under section 248(b)(1) to make recommendations as a sword and then try to shield the basis and motivations for its recommendations through claims of undue burden or some type of purported right to hide them. Selectively shielding facts that are potentially less favorable from disclosure is a sword and shield practice that the Vermont Supreme Court finds impermissible. Mental impressions are crucial to any claim of inequitable conduct and cannot be selectively offered. *See, e.g., State v. Valley*, 153 Vt. 380, 395 (1989) ("We are not willing to allow the defendant to use [] privilege as both a sword and a shield to ensure that the court has only an incomplete and onesided version."); *Arista Records*, 2011 U.S. Dist. LEXIS 42881, 2011 WL

1642434, at *3 (“In sum, . . . 'it would be unfair for a party asserting contentions [of good faith] to then rely on its privileges to deprive its adversary of access to material that might disprove or undermine the party's contentions.’”) (alterations in original) (quoting *Newmarkets Partners, LLC v. Sal. Oppenheim Jr. & Cie. S.C.A.*., 258 F.R.D. 95, 106 (S.D.N.Y. 2009)); *Sandvik Intellectual Prop. AB v. Kennametal, Inc*., No. 2:10-CV-00654, 2012 U.S. Dist. LEXIS 84028, 2012 WL 2288554, at *2 (W.D. Pa. June 18, 2012) (same); *In re Town Highway No. 20*, 2012 VT 17, P58 (2012) (“Here, the Town selectboard was performing a governmental function, but doing so in a manner that invidiously discriminated against [plaintiff] in violation of due process and Article 7, and there can be no immunity for such conduct.”)

At bottom, the Town simply seeks to remove any transparent review of the Town actions from this process. As a party in this case, the Town has placed its interests in issue and cannot and should not be allowed to avoid its obligations as a party to fully respond to discovery and allow a transparent process intended to reach a full and fair decision. There is simply no credible basis proffered by the Town for the extraordinary relief requested. On the other hand, granting such relief would deprive Chelsea basic due process rights and seriously harm its trial preparation and prosecution of its case.

IX. There Is No Basis On Which To Condition The Depositions On The Payment Of Attorney’s Fees.

The Town’s amended motion suggests that if the selectboard members are required to sit for a deposition that Chelsea should pay for their legal fees. The Town’s request should be rejected out-of-hand, just as the Vermont Supreme Court rejected in *Schmitt* the complaint about costs imposed by rightful discovery. *See Schmitt*, at *18 (“there was no unnecessary expense to Lalancette [even if it would] be expensive.”). *See also, Gallagher v. Pelletier*, 1997 U.S. Dist. LEXIS 19738, *3-4 (E.D. Pa. 1997) (denying costs of depositions because “Defendants have made

no showing of unreasonable hardship or circumstances that would overcome the general obligation of parties to bear their own expenses.") *Id*. at *4. ("'This Court has generally been reluctant to impose charges of this kind upon the party taking the depositions and will usually rule that the parties should bear their own expenses, unless the circumstances are such as to indicate strongly that discretion should be exercised to the opposite effect.' *Continental Casualty Company v. Houdry Process Corp*., 18 F.R.D. 75, 76 (E.D. Pa. 1955)." *Alfred Bell & Co. v. Catalda Fine Arts, Inc*., 5 FRD 327 (D.N.Y. 1946) (Denying request by plaintiff that defendants be required to pay all expenses necessarily entailed in connection with taking of depositions of plaintiff's officials and employees and others residing in England.); *SEC v. Aqua-Sonic Products Corp*., 93 FRD 326 (S.D.N.Y. 1981) (where Securities and Exchange Commission in action alleging violations of securities laws took depositions of investors who, albeit located across country, had been sought out originally by defendants, defendants have not demonstrated good cause, annoyance, oppression, or undue burden and expenses cannot be awarded under Rule 26(c)).

The Town has not met the "good cause" standard for the extraordinary measure of a protective order under VRCP 26(c). As a result, there is no legal basis on which the taking of the depositions could be conditioned on the payment of attorney's fees. Nor is it even arguable that the Town paying its own attorney to attend at deposition at a location of the Town's choosing—its attorney's office—is an "undue" expense under VRCP 26(c). Depositions are a normal part of discovery, and what is more, the Town has voluntarily injected itself into the case as a party and has voluntarily chosen to make "recommendations" against the Project. *See, Schmitt* at P18 (rejecting party's claim for a protective order because the discovery sought was "discovery to which he is otherwise entitled… [and no] facts [] supported the notion that Schmitt's request was so abusive or burdensome that a protective order was appropriate.")

X. Conclusion.

For the reasons stated above, the Town's motion should be denied, and an order issued providing for the deposition of each selectboard member.

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Respectfully submitted,

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