

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]	Docket No. 17-5024-PET
Project,” a 2.0 MW solar electric]	
generation facility located off Willow]	
Road in Bennington, Vermont]	

TOWN OF BENNINGTON OPPOSITION TO MOTION UNDER RULE 60(b)
and MOTION TO CONSOLIDATE

The Town of Bennington (“Town”) hereby submits the following memorandum in opposition to Chelsea Solar LLC’s Motion under Rule 60(b) and Motion to Consolidate.

MEMORANDUM

I. FACTUAL BACKGROUND

The Petitioner once again asks the Public Utility Commission (“PUC” or “Commission”) to set aside its prior decision denying a Certificate of Public Good (“CPG”) in Docket 8302, concerning a proposed solar project in Bennington, Vermont.¹ This is Petitioner’s second motion pursuant to V.R.C.P. 60(b) seeking to vacate the Public Utility Commission’s (“PUC”) February 16, 2016 final order denying a CPG for

¹ Although the Motion purports to also be for consolidation of Dockets 8302 and 17-5024- PET, the brief contains no specific arguments and cites to no authority in support of the right to that relief. Vacating the Final Order pursuant to V.R.C.P. 60(b) should not have the effect of consolidating the proceedings cases, as it would be highly prejudicial to other parties who have relied on the finality of that prior decision in participating in this proceeding. Given that no appeals were sustained with respect to the various Orders Chelsea seeks to vacate, the parties should be able to rely on their finality. Thus, even if a motion to vacate were warranted, the entire matter would have to be relitigated to avoid prejudice with respect to decisions made in reliance on the Final Order.

the project (“Final Order”). This is Petitioner’s tenth post-Final Order motion seeking relief from, or modification to, the Final Order.

Following the Final Order, Chelsea filed the following motions:

- On March 10, 2016, a request take judicial notice of certain documents;
- On March 11, 2016, a motion to vacate the PUC’s order for failure to comply with 3 V.S.A. § 811;
- On March 20, 2016, a motion to strike certain comments made by intervenor Libby Harris;
- On March 21, 2016, a motion to alter and amend the Final Order, motion to reopen the record, motion for a supplementary hearing, and motion for new findings;
- On March 21, 2016, a motion to amend its petition for a CPG;
- On May 12, 2016, a motion to strike comments filed by the Vermont Department of Public Service and the Agency of Natural Resources;
- On January 24, 2017, a motion for mediation pursuant to V.R.C.P. 16.3;
- On September 7, 2017, a Motion under Rule 60(b) and Amendment to Petition; and
- On September 9, 2017, a motion made before the Vermont Supreme Court for Remand of the Case to the PUC.

All of the arguments presented in the instant motion repeat arguments set forth in prior motions, which have all been heard, considered, and ruled on.² As referenced above, Chelsea also appealed the Final Order to the Vermont Supreme Court, but later abandoned its appeal in favor of submitting a new petition for consideration by the PUC. For the following reasons, Chelsea’s motion should be swiftly denied, and reasonable restrictions should be imposed to prevent further repetition of arguments.

II. LEGAL ARGUMENT

² Although Petitioner’s Motion also asks the PUC to set aside its April 14, 2017 and April 17, 2017 orders denying Chelsea’s previous motions, none of the arguments set forth in the Motion are specific to those Orders.

A. PETITIONER’S MOTION SHOULD BE DENIED AS UNTIMELY AND DUPLICATIVE OF MOTIONS PREVIOUSLY RULED ON.

V.R.C.P. 60(b) permits a party to seek relief from a final order based on six enumerated bases. As relevant here: “(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); . . . (6) any other reason justifying relief from the operation of the judgment.” V.R.C.P. 60(b).

The Rule requires that a motion made pursuant to V.R.C.P. 60(b) be made “within a reasonable time, and for reasons (1), (2), and (3), not more than one year after the judgment, order, or proceeding was entered or taken.” Petitioner’s motion should be denied as untimely and as duplicative insofar as the issues have already been ruled on.

i. Arguments Concerning the Basis for the PUC’s Final Order

The Petitioner’s first argument in support of its motion is that “The Commission’s Interpretation in the Chelsea Orders is Not Supportable.” (Motion, at 7–13). Chelsea argues that the Commission was incorrect as to (1) the type of development permissible in the RCON district; (2) the finding that the project violated the Town Plan criterion prohibiting development in prominently visible locations on hillsides and ridgelines; and (3) the finding that the project violated the Town Plan criterion requiring development to minimize the clearing of natural vegetation. (Motion, at 7–8).

These arguments assert a mistake by the PUC and thus fall under V.R.C.P. 60(b)(1), which carries a one year limitation. These arguments could have been—and in fact were—raised long before now. The Final Order was issued on February 16, 2016—nearly two-and-a-half years ago. The orders disposing of these arguments, from which Chelsea also seeks

relief, issued on April 14, 2017 and April 17, 2017—nearly 15 months ago. This most recent motion was not made within one year of entry of any of the above orders, or otherwise within a reasonable time following those decisions, and should be denied on that basis.

Moreover, Petitioner has presented each of these arguments in prior motion practice, including the March 21, 2016 Motion to Alter and Amend and in Chelsea's Motion for Remand before the Vermont Supreme Court (Chelsea's 3/21/2016 Motion to Alter and Amend in Docket 8302, at 6, 23–28, 38–40 (attached as Exhibit A); Chelsea's 9/8/2017 Motion for Remand, at 5, 15–16 (attached hereto as Exhibit B)). The motions were denied.

The Town, as well as other parties, have already expended time and resources responding to these arguments. The Town hereby incorporates its previous opposition to those arguments, and appends its responsive briefs as Exhibit C.

In support of its renewed efforts, Chelsea cites to statements made by Town counsel in August 2017, and by a Town official in September 2017, which Chelsea argues were “repudiations” of the basis of the Final Order. This argument is based on an incorrect interpretation of the Final Order. The PUC did not conclude that commercial scale solar projects were altogether prohibited in Bennington's RCON district. The PUC's decision actually stated that “[w]hile limited residential development is permitted, commercial development is prohibited with certain rural exceptions.” (Final Order, at 51–52). Thus, the PUC acknowledged that “certain rural exceptions” exist, and did not rule out commercial solar development as one of those exceptions. The PUC concluded this *particular* project was not permitted because it did not satisfy the design standards applicable to new development in the Rural Conservation District. (Final Order, at 51–52, 55–57).

Chelsea asserts that the August and September 2017 statements provide the basis for this request, which places this argument under V.R.C.P. 60(b)(2) (“new evidence”), which provision is subject to a one year limitation from the date of entry of the underlying order. Even in the absence of the one year limitation, they are not raised within a reasonable amount of time. It has been nearly a year since that public meeting and deposition took place, and Chelsea has proceeded on its new petition, requesting swift review which necessitated action by the parties in furtherance of the scheduling Order. Chelsea should not be permitted to now change courses on the basis of statements made several months before Chelsea filed the new petition. This argument was also raised in Chelsea’s prior 60(b) motion and in its Motion for Remand, both of which specifically reference the August and September 2017 statements. (Ex. B, at 15–16; Chelsea’s 9/7/2017 60(b) Motion, at 9, 20, 24, motion attached hereto as Exhibit D).

Chelsea’s arguments concerning the *Chaves* case (Motion, at 11), the supposed ambiguity of the design standards in the Town Plan (Motion at 12), and as to the other stated goals of promoting solar resources in the Town and Regional Plans (Motion at 12–13) have all been made in prior motions denied by the PUC and/or the Vermont Supreme Court. (Ex. A, at 44–49, 51–56; Ex. B, at 18; see Orders of April 14, 2017, April 17, 2017, October 12, 2017, and September 22, 2017, all of which are attached hereto as Exhibit E).

ii. Arguments concerning Due Process and Equal Protection/Common Benefits

Chelsea’s next argument is that the prior orders should be vacated because they were based upon a denial of due process. (Motion, at 13–23). Chelsea’s objections with respect to this claim are based primarily on (1) Ms. Harris’s post-proposed decision objections; and (2) the PUC’s request for comments. (Motion, at 13–16). Ms. Harris’s comments were made

in October 13, 2015. The PUC's request for comments was made January 6, 2016—more than two-and-a-half years ago. Once again, this argument must be denied as untimely.

Additionally, the arguments were raised in prior filings, which were opposed by other parties, and denied by the PUC. (Ex. A, at 20–21, 24–25, 32, 50, 65, 68–70; *see* Exhibit E Orders). In its arguments, Chelsea characterized these comments as constituting “unfair surprise”—which falls under V.R.C.P. 60(b)(1), and carries a limitation of one year. Chelsea also filed a motion to strike certain comments made by Ms. Harris on March 20, 2017, so it is clear that it has already raised its objections to her comments as well.

Chelsea next asserts that it was denied due process under 3 V.S.A. § 811 and for “additional reasons,” including a violation of Vermont’s Common Benefits Clause, an “ambush” in violation of Due Process, and because the PUC request for comments was a violation of Due Process (Motion, at 16–24). The § 811 argument was made by motion dated March 11, 2016, and in Chelsea’s Remand Motion, both of which have been ruled on. (Ex. B, at 20–23; Chelsea’s 3/11/2018 Motion to Vacate, *passim*, attached hereto as Exhibit F; *see* Ex. E Orders). The “additional reasons” were also raised in previous motions, and ruled on. (Ex. A, at 24–32, 50; 68–70, raising Due Process, Common Benefits, Equal Protection, and unlawful discrimination arguments; Ex. B, at 8–9, 20; *see* Ex. E Orders).

iii. Arguments that it would be Unjust to Not Vacate the Chelsea Orders

Chelsea’s next argument is a catchall, and largely repetitive of the arguments discussed in the preceding sections. (Motion, at 24–26). Chelsea reiterates the assertions that the PUC’s conclusions are “not supportable” and that Chelsea’s due process and equal protection rights have been violated, which arguments are addressed in II-A (i) and (ii), above. Chelsea argues an additional point of error that the PUC failed to properly consider

undue interference with orderly *regional* development, and that it misinterpreted the consideration requirement set forth in § 248(b)(1). (Motion, at 24–26). Once again, the motion is untimely, and these exact arguments have already been raised, briefed, and decided. (Ex. B, at 31–39; *see* Ex. E Orders).

B. THE FINAL ORDER AND THE MOTIONS ORDERS ARE FINAL, BINDING ORDERS, AND RELITIGATION OF THE LEGAL ISSUES IS BARRED BY COLLATERAL ESTOPPEL AND IN THE ALTERNATIVE, THE LAW OF THE CASE DOCTRINE.

The Final Order and Motions Orders are final. The time to appeal has long since expired. Once the right to appeal was not exercised within the time permitted, the orders became final. *Cent. Vt. Pub. Serv. Corp.*, 172 Vt. 14, 20, 769 A.2d 668, 673 (2001). The PUC has also already rejected the Petitioner’s post-decision motions seeking relief from the Orders. (*See* Ex. E Orders).

Petitioner is also barred from relitigating the issues by the doctrine of collateral estoppel. Collateral estoppel applies if there is a final order in former litigation in which the parties and subject matter are identical or substantially identical to those before the court in this case. *Berlin Convalescent Center v. Stoneman*, 159 Vt. 53, 56, 615 A.2d 141, 142 (1992).³ It bars a party from raising issues that were litigated and those which should have been raised in the prior litigation. *Id.* Insofar as all of the legal issues raised in the present motion have been previously litigated and decided (or otherwise should or could have been), they cannot be raised again.

³ Collateral estoppel bars relitigation of an issue when the following criteria are met: “(1) preclusion is asserted against one who was a party or in privity with a party in the earlier action; (2) the issues was resolved by a final judgment on the merits; (3) the issue is the same as the one raised in the later action; (4) there was a full and fair opportunity to litigate the issue in the earlier action; and (5) applying preclusion in the later action is fair.” *Trepanier v. Getting Organized, Inc.*, 155 Vt. 259, 265, 583 A.2d 583, 587 (1990). All of these criteria are satisfied with respect to issues raised in the instant motion.

The purpose of collateral estoppel is “(1) to conserve the resources of the courts and litigants by protecting them against piecemeal or repetitive litigation; (2) to prevent vexatious litigation; (3) to promote the finality of judgments and encourage reliance on judicial decisions; and (4) to decrease the chances of inconsistent adjudication.” *Cent. Vt. Pub. Serv. Corp.*, 172 Vt. at 20, 769 A.2d at 673. All of these purposes are implicated in considering Chelsea’s present motion, and all of them militate against consideration of the arguments therein.

In *Iannarone v. Limoggio*, the Vermont Supreme Court rejected the argument that collateral estoppel does not bar relitigation through post-judgment motions in the same proceeding. *Iannarone v. Limoggio*, 2011 VT 91, ¶ 17, 190 Vt. 272, 279. The Court rejected this assertion the basis that, “[u]nder this argument, a party could raise the same post-judgment claim over and over again hoping some judge would finally accept it.” *Id.* at 280. This is precisely what is at issue with respect to this motion.

It is not fair to require the parties to respond to repetitive motions addressing issues identical to those previously raised and addressed. Petitioner is no stranger to this concept. The Supreme Court has held with respect to Petitioner’s affiliate (represented by the same legal counsel/principal), that once a motion is denied, “the proper procedure is to pursue an immediate appeal, and not to file repetitive motions pestering the [trial] court. This is true regardless of how the motions are labeled where the substance of the motions and the purported justification [for the motion] remain unchanged.” *In re Petition of GMP Solar-Richmond, LLC*, 2017 VT 108, ¶ 18, 179 A.3d 1232, 1238–39 (2017) (citations omitted). If this practice is not stopped, it will only persist as a drag on State resources.

Even if the matter were to be consolidated or treated as a “continuation” of the prior proceeding in Docket 8302 (a proposition with which the Town strenuously disagrees), the law-of-the case doctrine would nonetheless apply to preclude relitigation of the issues that have already been decided by the Commission. “The law of the case doctrine is a rule of practice that provides that once a court decides a particular rule of law, that decision governs the same issue in subsequent stages of the same case.” *Felis v. Felis*, 2014 WL 3714663, at *2 (VT May 9, 2014) (citing *Gardner v. Jeffereys*, 2005 VT 56, ¶14, 178 Vt. 594 (2005)). Based on these legal doctrines, Petitioner should not be given another opportunity for review of the legal determinations already made.

The Town requests that the PUC in its order on this motion exercise its inherent authority to control its docket by imposing reasonable restrictions to deter Chelsea’s practice of submitting repetitive filings. To that end, Chelsea should be required to certify that all future filings do not contain arguments that it has previously raised before the Commission or the Vermont Supreme Court.

CONCLUSION

For the above reasons, the Petitioner’s Motion pursuant to V.R.C.P. 60(b) should be denied, and reasonable restrictions should be imposed to limit future repetitive litigation.

At Manchester, Vermont this 12th day of July, 2018.

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EXHIBIT A

STATE OF VERMONT
BEFORE THE
PUBLIC SERVICE BOARD

Petition of Chelsea Solar LLC for a	)	
certificate of public good, pursuant to 30	)	Docket No. 8302
V.S.A. § 248, authorizing the installation and	)	
operation of a 2.0 MW solar electric	)	
generation facility at 500 Apple Hill Road,	)	
Bennington, Vermont	)	

MOTION OF CHELSEA SOLAR LLC

TO ALTER AND AMEND UNDER RULE 59(E), TO REOPEN THE RECORD AND
FOR A SUPPLEMENTARY HEARING UNDER RULE 59(A) AND FOR NEW
FINDINGS UNDER RULE 52

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MOTION OF CHELSEA SOLAR LLC TO ALTER AND AMEND UNDER RULE 59(E), TO REOPEN THE RECORD AND FOR A SUPPLEMENTARY HEARING UNDER RULE 59(A) AND FOR NEW FINDINGS UNDER RULE 52

Chelsea Solar LLC (“Chelsea Solar”) pursuant to Board Rules 2.103 and 2.221, and Vermont Rules of Civil Procedure 52 and 59 hereby files this motion for reconsideration of the Board’s order of February 16, 2016 (the “Order”), and for new findings, and asks the Board to vacate the Order and issue a certificate of public good (“CPG”) for the Chelsea Solar project (the “Project”). Chelsea Solar also moves to reopen the record, for a supplementary hearing and for new findings.

PROCEDURAL MATTERS

On March 11, 2016, Chelsea Solar filed a Motion to Vacate under 3 V.S.A. §811 (“Motion to Vacate”), a Motion to Reopen Discovery and a Request for Judicial Notice (“RJN”). In this document Chelsea Solar files: (1) a motion for reconsideration of the Order (i.e., a motion to alter and amend) under VRCP 59(e), (2) a motion under VRCP 59(a) to reopen the record to admit (which also covers the evidence that was requested that the Board notice in the RJN, in the event that the Board does not notice some or all of that evidence requested to be noticed in the RJN), (3) a motion under VCRP 59(a) for a supplementary hearing on the issue of the Town Plan and its application to the Project and the criteria under Section 248(b)(1) and Section 248(b)(5), and (4) a motion under VRCP 52 for new and additional findings.

If the Board grants the Motion to Vacate and issues a CPG to Chelsea Solar, there is no reason to address the Motion to Reopen Discovery or this Motion to Alter and Amend, but there would still remain the need to confirm that the Board has noticed the evidence requested in the RJN, or admitted that evidence under this Motion to Reopen the Record. If the Board were to only vacate its Order but not concurrently issue a CPG to Chelsea Solar, then the Motion to Reopen Discovery, the RJN, the Motion to Reopen the Record and the Motion for a Supplementary Hearing and for New Findings must be decided, but the Motion to Alter and Amend herein would not to be decided as the Order would have been vacated.

SUMMARY

The Board's decision cannot be squared with its decisions in other cases, its issuance of CPGs for other facilities in the Bennington rural conservation ("RCON") district, the applicable statutory language, or decisions of the Vermont Supreme Court.¹

In addition, the Order based its entire legal analysis on an approach that has been rejected by the Vermont Supreme Court. The Board's focus solely on excerpts from the Town Plan of Town of Bennington (the "Town"), and refusal to consider (i) the language of the Town's zoning regulations that implement the Town Plan, (ii) the Town's actions in implementing of the Town Plan and zoning regulations or (iii)

¹ Even communities that seem desperate for a way to curtail solar development expressed skepticism at the legal justification for the Board's February 16 Order: "The PSB's decision in this case is surprising. Many professional planners would be skeptical that the standards included in Bennington's plan constituted 'clear, written community standards.'" *See*, http://www.trorc.org/wp/wp-content/uploads/2016/02/benningtonPSB_final-1.pdf.

the other expressed goals of the town and regional plans (all of which strongly favor the Project) was plain error. *In Re Kiesel*, 172 VT 124, 128 (2000), (“[I]mplementation of town plan is done through zoning ordinances so that the ordinances control the plan.”); *In re John A. Russell*, 2003 VT 93 (2003) (“As succinctly stated in *Smith [v. Winhall Planning Comm’n]*, 140 Vt. [178,] 183 [] [1981], ‘the regulations control the plan.’”) As a member of the Bennington Select Board stated recently: "The way it is now, we've written a town plan that pretty aggressively supports alternative energy."²

Moreover, the Board ignored, and acted contrary to, its own recent precedent in the RCON District, which precedent has unanimously held that there is no clear, unambiguous community standard violated by electric and other facilities in the RCON District.

Additionally, contrary to the plain language of Section 248(b)(1), the Board equated the failure to strictly adhere to the Town Plan as fatal. That is the requirement under Act 250 in section 6086(a)(10) of 10 V.S.A. Chapter 151, it is not the language or the standard of the statute in section 248(b)(1). The Board’s holding effectively adds language to the statute which the Legislature did not put there, makes superfluous the Legislature’s newly enacted Section 248(b)(1)(B), and is in direct conflict with the doctrine of *expressio unius est exclusio alterius*.

² http://www.benningtonbanner.com/localnews/ci_29323287/bennington-select-board-votes-support-maple-leaf-solar.

But the most visible mistake in the Order is the Board's confusion with what project *it was actually reviewing*. The Board's Order confused the Apple Hill Solar project (Docket 8454) and the Chelsea Solar Project. For that reason alone, the Order must be vacated and reconsidered. It is the Apple Hill solar project that is partially visible (at least under the currently proposed plan in that docket) from the Vermont Welcome Center, *not the Chelsea Solar Project*. *See*, Prefiled Testimony of Mark Kane in Docket 8454 at page 4. Chelsea on the other hand must be evaluated separately as if the Apple Hill Solar project is not built. The cumulative effect of both projects is appropriate to review only in the Apple Hill docket, not in the Chelsea Solar docket.

Visibility from the Welcome Center is an appropriate issue for discussion in the Apple Hill Solar docket 8454. It is not in this docket, for the simple reason that the *Chelsea Solar Project is not visible at all from the Welcome Center*. *See*, Exhibit CS-MK-7, Figure 6 (attached again to this motion); Declaration of Mark Kane dated March 11, 2016 ("Kane Decl. 1"); Declaration of Mark Kane dated March 21, 2016 ("Kane Decl. 2").

The Chelsea Solar Project is completely shielded from view by the existing trees on the Apple Hill site. *See*, First Supplemental Prefiled Testimony of Mark Kane dated September 26, 2014, page 5. ("As suggested in my earlier testimony, and as supported by this visual simulation, the retention of vegetation along the southern portion of the property effectively *screens* views of the Project from the Welcome Center.") (emphasis added). The utter lack of visibility of the Chelsea

Solar Project standing alone is visually demonstrated by Exhibit CS-MK-7, Figure 6, which was also attached to Chelsea's Motion to Vacate, and is attached again to this motion. The complete lack of visibility is also re-confirmed by Mark Kane in his declarations attached hereto as Exhibits A and B. *See also*, Hearing Transcript at pp. 23-24.

Thus the Board's central factual conclusion that the "Project would remain visible on a hillside above the Vermont Welcome Center", Order at 57, is factually incorrect, and reinforces the Board's confusion with the evidence in this docket with the evidence in docket 8454.

The Board's central legal conclusion that three goals in the Bennington Town Plan constituted standards is also incorrect. The Board held that the Project did not satisfy the Section 248 criteria set forth in 30 V.S.A §§248(b)(1) and (b)(5) because the Project purportedly did not satisfy three of the four goals in the Town Plan's description of the RCON district, to wit: (1) development is not "limited residential development"; (2) development "in prominently visible locations on hillsides and ridgelines" is prohibited; and (3) "any development must minimize the clearing of natural vegetation". *See*, Order at 57.

The Board's contrary orders in four separate dockets granting CPGs for facilities in the RCON zone are, on their own, sufficient to debunk the Board's conclusions and show that Chelsea Solar has been discriminated against as compared to the Board's treatment of prior applicants for CPGs in the RCON District, violating, *inter alia*, the Vermont Constitution's Common Benefits Clause.

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.") *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.")

But there is more. The Town's recent announcement of its own 500kw net meter project in one of the Town's purported scenic gateways in the rural residential district (which like the RCON is purportedly only for "limited residential development")³, shows quite clearly that the Town's "scenic standards" are not standards at all but merely *ad-hoc* criteria that can be applied or not applied by the political elite of the Town at their unlimited discretion.

The lack of any standard is further evident from the vague and ambiguous terms used. None of "hillside", "prominently visible" or "minimize clearing" is defined, and the Vermont Supreme Court has refused to recognize such vague and ambiguous terms as standards.

The Board's decision also completely re-writes the law as to aesthetics. Now the *aesthetic* value of the loss of trees does not overcome, in the Board's view, the positive impact on greenhouse gases ("GHG") of the Project. *See*, Order at 60 ("we cannot conclude that the societal benefits cited [] are so significant as to render

³ http://www.berkshireeagle.com/local/ci_29641498/bennington-vt-select-board-approves-solar-project-projected.

acceptable the otherwise *undue adverse aesthetics* impact caused by the clear-cutting of 10.6 acres of existing mature forest to accommodate the Project.”) (emphasis added.) Under that standard-less rule, no trees at all can be removed for a solar project.

Finally, although Chelsea Solar believes that the CPG should be issued based upon the current plan for the Project, in order to further respond to the newly raised concerns, Chelsea has amended its plan to compress the footprint of the Project in order to reduce its overall profile and the clearing for the Project by close to 20%.

STATEMENT OF THE CASE

In the Order, the Board adopted all the findings recommended by the Hearing Officer except for Findings 30 and 32 related to the orderly development of the region criteria under 30 V.S.A. 248(b)(1). The Board also held that construction of the Project would violate a clear, written community standard, applicable to the Project site under the first prong of the second part of the *Quechee* test, and thus held that there would be an undue adverse effect on aesthetics. The Board did not state which Finding(s) regarding aesthetics in particular the Board did not adopt, but it is clear that it would be at least the second sentence of Finding 112 and the first part of Finding 104.

I. Background

A. The SPEED Program and the Vermont Energy Act of 2012.

The Vermont Legislature established the SPEED Program to encourage the development of renewable energy resources in Vermont as well as the purchase of renewable power by the state's electric distribution utilities. 30 V.S.A. §§ 8001, 8005, 8005a. The statute promotes this goal in two ways: by requiring electric utilities to purchase a certain amount of power from renewable energy sources, and by creating a standard-offer program. Under the standard-offer program, the Board authorizes certain long-term power purchase contracts with electrical generators in Vermont for renewable energy projects that have a nameplate capacity of 2.2 megawatts ("MW") or less and meet certain other criteria. *Id.* § 8005a(b). Once a plant owner executes a standard-offer contract, the Board guarantees a set price for that plant's energy for the duration of the contract regardless of whether the market price changes. *Id.* § 8005a(f)(4).

In the Vermont Energy Act of 2012 (Act 170) the Legislature set higher goals for adoption of renewable energy, and expanded and revised the standard offer program up to 127.5 MW in order to further encourage distributed local generation, such as the Project. The Project was the first project selected under the amended SPEED program.

B. The Bennington Regional Plans

1. Policies and Goals in the Regional Plan Encouraging the Project.

The goals of the 2007 Regional Plan [Exhibit CS-MK-4] (in effect at the time of the CPG petition filing):

- ✓ “Energy planning should emphasize the use of diverse and reliable supplies of energy resources in an efficient and environmentally sound manner.” P.6. [Exhibit AH5-MK-5].
- ✓ “Particular attention should be given to the development of renewable energy resources in the area.” P.6. [Exhibit CS-MK-4].
- ✓ “Land use, transportation, economic development, and housing policies and strategies should support the efficient use of energy resources.” P.6. [Exhibit CS-MK-4].
- ✓ “Reduce the flow of energy dollars leaving the Bennington region by decreasing our reliance on non-local energy sources.” P.65. [Exhibit CS-MK-4].
- ✓ “Encourage the development of renewable energy resources.” P.65. [Exhibit CS-MK-4].

The goals of the 2015 Regional Plan (See, RJN, Exhibit E):

- ✓ “Utilization of local natural resources should support regional economic and renewable energy development while ensuring that such development, including any resource extraction, is accomplished in an environmentally sensitive manner.” p.7.
- ✓ “Solar []energy resources should be accessed to meet a significant share of the region’s energy needs.” P.7.
- ✓ “Production of energy from local renewable sources [can] have profound impacts on the regional economy.” P.48.
- ✓ “Development of the region’s available renewable energy resources (specifically biomass for space heating and solar, wind, and small hydro for electricity) will help reduce reliance on unstable and expensive imported energy. Of course, greater utilization of those resources also

will benefit the regional economy by directing money that would otherwise be exported from the region to employ people locally to develop and operate the energy systems. P.48.

- ✓ “Alternative energy in the form of “renewable” sources such as solar [], can provide significant amounts of clean energy well into the future. Developing those resources is extremely important.” P. 174.
- ✓ “[M]uch of the region’s future renewable energy will need to be derived from local sources.” P.181
- ✓ “Energy from the sun can be used to [] generate electricity (using photovoltaic panels) at either a small or large commercial scale. Solar energy technologies are proven and continually being refined. They also have a relatively minor environmental impact and yield significant net energy (environmental costs and energy expenditures are primarily associated with production of solar panels and other equipment).” p.182.
- ✓ “Local sources of energy, including biomass for space heating and a distributed electricity network benefiting from local renewable resource based generation, will provide lasting economic benefits.” P. 41.
- ✓ “Production of energy from local renewable sources [can] have profound impacts on the regional economy.” P.48.
- ✓ “Development of the region’s available renewable energy resources (specifically biomass for space heating and solar, wind, and small hydro for electricity) will help reduce reliance on unstable and expensive imported energy. Of course, greater utilization of those resources also will benefit the regional economy by directing money that would otherwise be exported from the region to employ people locally to develop and operate the energy systems.” P.48.
- ✓ “Bennington County has abundant biomass (primarily wood) renewable energy resources as well. Recent assessments have found that forests located just within Bennington County could provide over 150,000 cords of wood per year for fuel (in addition to timber harvested for other purposes). This wood can be used as cordwood in wood burning furnaces and stoves, or can be processed into wood pellets (there are several nearby manufacturers that use mostly locally sourced wood) for use in efficient and clean burning pellet stoves and furnaces, or chipped for

use in institutional or community direct burn or wood gasification facilities.” P.178.⁴

All of those goals support the Chelsea Solar Project and contravene the Board’s conclusion that the three RCON goals relied on by the Board constitute a clear, unambiguous written community standard, a recommendation or a land conservation measure against the Project.

2. Policies and Goals in the Regional Energy Plan Encouraging the Project.

The goals of the Bennington Regional Energy plan (RJN Exhibit F):

- ✓ “Alternative energy in the form of ‘renewable’ sources such as solar [] can provide significant amounts of clean energy well into the future. Developing those resources is extremely important.” P. i.
- ✓ “To maintain a good quality of life, vibrant communities, and prospering economies, we will have to [use] energy obtained from clean renewable sources.” P. i.
- ✓ “Decrease our reliance on non-local energy sources through [] development and use of local renewable energy sources.” P.i.
- ✓ “Renewable energy will become increasingly important in the coming decades, and the most efficient and valuable energy sources will be the ones that are closest to the end users.” P.ii.
- ✓ “it will be important to supplement any out-of-region generating capacity (nuclear, hydro, and other sources) with locally generated electricity.” P. ii.
- ✓ “A ‘smart grid’ that relies on many smaller scale distributed sources of electricity will need to be developed.” P.ii.
- ✓ “By taking a lead in efforts to [] develop local renewable energy sources [] Bennington County can become a uniquely vibrant and successful region.” P.ii.

⁴ The land in the Bennington County Regional Commission region is about 370,000 acres. See, RJN, Exhibits D and E. The amount of clearing for the Chelsea Solar Project is about 14.85 acres or 0.0040% of the region under the recent plan, but only 12.36 acres, or 0.0033% under the revised plan.

- ✓ “The impacts on climate, the so-called ‘global warming’ that has resulted from the rapid release of billions of tons of carbon dioxide that had been locked in solid and liquid fossil fuels, has been well-documented. The disruption of natural ecosystems, human settlements, and economic activity, together with the other adverse environmental impacts of fossil fuel combustion (e.g., smog, acid rain) further compel us to seek and use alternative sources of energy.” P.6.
- ✓ “Transportation is an energy-intensive and complex process, whether the commodity being transported is food in a truck or electricity over a transmission line. Because we need to conserve energy in every way possible, local production of energy for use in our region will become increasingly important. We must find ways to [] use the renewable energy resources available locally for [] electricity generation.” P. 6.
- ✓ “[N]ew large-scale generating sources will need to be found and supplemented with locally generated electricity from renewable resources.” P. 7.
- ✓ “Decrease our reliance on non-local energy sources through [] development and use of local renewable energy sources.” P.8.
- ✓ “Give full consideration to use of locally available renewable energy resources for [] and electricity.” P.24.
- ✓ “Seek additional electric generating capacity from local renewable resources to provide energy for electric vehicles.” P.30.
- ✓ “Such present day objectives as viewshed protection, [] will need to be partially retracted to make way for the compelling future demand for energy.” P.32. (emphasis added.)
- ✓ “Support development of local and regional industries that produce energy through conservation and renewable sources of energy.” P.32.
- ✓ “We must transition from nonrenewable to renewable energy sources, and because of net energy constraints resulting from acquisition, processing, and transportation of energy, much of that renewable energy will need to be derived from local sources.” P.34.
- ✓ “Energy from renewable sources can help address space and water heating needs, provide fuel for transportation, and generate electricity (that can, in turn, be used for heating, transportation, and many other functions). Space and water heating can be accomplished using solar energy, wood (cordwood, pellets, or chips).” P.34.

- ✓ “[C]ommercial generation of electricity using [] large scale arrays of pv panels, [] can offset coal, natural gas, and nuclear fuel use, adding valuable years to the generating capacity of those energy sources.” p.36.
- ✓ “Any discussion of renewable energy in Bennington County must include wood, which together with direct solar energy, is the most obvious and ubiquitous source of locally available energy. The 1982 Regional Energy Plan estimated that forests, just within Bennington County, could provide over 150,000 cords of wood per year for fuel (in addition to timber harvested for sawlogs, veneer wood, and pulpwood). That quantity of wood could easily satisfy all of the residential space heating needs for the region, with a significant volume of biomass remaining for use in commercial/industrial applications and for electricity generation.” P.36.
- ✓ “Despite the hurdles that must be overcome to make wood a significant, and perhaps primary, local energy source, its abundance, reliability, and the fact that reliance on this fuel provides jobs and recycles money in the regional economy suggest that planning for greater utilization of the resource should be pursued.” P.38.
- ✓ “Obtaining energy from wood is a relatively simple process using simple and time-tested technologies. Many homes can be heated with a single wood or pellet burning stove or furnace. Cord wood used in stoves or furnaces is readily available from many local suppliers and requires little preparation beyond splitting and drying.” P.38.
- ✓ “In addition to a concerted effort at conservation in all energy sectors, the most feasible future sources of electricity for the region come from smaller renewable resource based generating facilities distributed throughout the area.” P.47.
- ✓ “The value of energy conservation and development of renewable energy resources should be given significant weight when evaluating new projects and programs.” p.51.
- ✓ “Recognize and support economically and environmentally sound development of the region’s renewable energy resources.” P. 52.

All of those goals support the Chelsea Solar Project and contravene the Board’s conclusion that the three RCON goals relied on by the Board constitute a clear, unambiguous written community standard, a recommendation or a land conservation measure against the Project.

3. Regional Designation of the Chelsea Solar Site as a Prime Location for Solar.

The Bennington County Regional Commission's Renewable Energy Potential: Solar Map designates the Chelsea Solar site as a "prime" location for a solar electricity generating facility. *See*, RJN, Exhibit H.

C. The Bennington Town Plan

1. The Town Plan Goals for the RCON District.

The Town Plan [Exhibit CS-MK-3 at pp. 25-26] provides as follows:

Rural Conservation Districts are located in valley areas outside the Urban Growth Area which have retained their rural and open space character. Considerable acreages of agricultural land exist in these areas, along with extensive woodlands and low density residential development. The purpose of the Rural Conservation Districts is to preserve this distinctive rural character while accommodating low density residential development in a manner that avoids the need for public water supply and public sewer systems.

Agriculture, forestry, very low density single-family residential development, and certain limited uses that are suitable in rural areas are permitted in the district. Additional standards apply to college buildings, cultural institutions, and the adaptive reuse of historic structures as bed and breakfasts. Subdivisions must protect important agricultural land, natural, and scenic resources; major subdivisions must meet the standards for residential Planned Unit Development.

Specific design standards shall apply to new development in the Rural Conservation Districts in recognition of the existence of a concentration of agricultural and forest lands and to protect the extraordinary scenic resources such lands and uses provide. Any use in the Rural Conservation District, including single-family dwellings, shall require approval under those regulatory guidelines. Development in this area cannot be sited in prominently visible locations on hillsides or ridgelines, shall utilize earth tone colors and non-reflective materials on exterior

surfaces of all structures, and must minimize clearing of natural vegetation.

2. The Zoning By-laws Implementation of the RCON Goals.

The Town Plan does not purport to contain enforceable standards in the RCON district. Rather as the Town Plan specifically states development in the RCON district would need to comply with the “regulatory guidelines” to be established. Those guidelines are contained in Bennington’s Land Use regulations (See, RJN Exhibit B (the “By-laws”)). The need to rely on those zoning regulations, as opposed to the Town Plan is in accord with Vermont law (discussed *infra* in ARGUMENT III B. below). *See, In Re Kiesel*, 172 VT 124, 128 (2000), (“[I]mplementation of town plan is done through zoning ordinances so that the ordinances control the plan.”); *In re John A. Russell*, 2003 VT 93 (2003) (“As succinctly stated in *Smith*, 140 Vt. at 183, 436 A.2d at 762, ‘the regulations control the plan.’”)

Table 3.13(F) of the Bylaws (RJN, Exhibit B) re-iterates that the Town Plan only establishes goals when it states that Table 3.13(F) “is intended to further the goal of preserving the scenic quality of Bennington’s rural landscape.” Table 3.13(F)3.b. lists eight standards for development on “hillsides or ridgelines”, all of which are designed to “minimize [but not eliminate a development’s] visual impact from public roads and lands.” Notably the By-laws, and hence the Town Plan’s goals, only apply to visual impacts from public lands, not private lands.

3. Policies and Goals in the Town Plan Encouraging the Project.

There are a multitude of statements in Bennington Town Plan expressing the Town's policy and goals of encouraging projects such as the Chelsea Solar Project.⁵

The Town Plan expresses the following goals and policies:

- ✓ "Support efforts to develop renewable energy facilities." P.3.
- ✓ "[E]fforts must be made to establish reliable local energy from renewable sources." P. 7.
- ✓ "The economic sectors and needs identified earlier in this chapter will remain important to the community, but will need to be adapted over time to take advantage of opportunities offered by things such as local renewable energy resources." P. 12.
- ✓ "Produce as much of the community's energy demand as possible using local resources." P.12.
- ✓ "support [] local foods and renewable energy." P.14.
- ✓ "Incentives for investment in conservation and renewable energy systems should be supported." P.55.
- ✓ "Future electricity supply constraints are a concern because of expiring contracts with Vermont Yankee and Hydro Quebec as well as possible fuel shortages at regional fossil-fuel based generating plants. Resolving these problems will require implementation of a "smart grid" where supply can be more closely matched with demand as well as through development of a large number of small renewable-energy-based generating facilities distributed throughout the region." P. 83.
- ✓ "[T]he great majority of fuel used for transportation and heating and cooling homes and businesses is derived from nonrenewable fossil fuels. In addition to the negative environmental impacts associated with burning oil, gas, and similar fuels, the available supply of those fuels is strictly limited and within a relatively short period of time, production will not be able to keep pace with demand (for further details, see Bennington Regional Energy Plan, 2009). The result will be escalating

⁵ RJN, Exhibit A.

prices and physical shortages of energy products that will begin to cause severe problems if we have not reduced our reliance on those fuels.” P.92.

- ✓ “The town [] should support [] development of renewable energy resources.” P.94.
- ✓ “Generation of energy from renewable energy resources supports conservation of non-renewable energy resources while helping to maintain a clean environment.” P. 94.
- ✓ “Potential renewable energy resources in Bennington include: *** Solar energy to heat buildings, water, and to power photovoltaic cells. Pp. 94-95.
- ✓ “It is likely that the smart grid will rely on many distributed small generators located closer to the points where the electricity is used; consequently, the town should support economically and environmentally sound development of local electricity generating capacity.” P. 95. [Exh. CS-MK-3]
- ✓ “Actively promote the energy-related benefits of town policies that:*** Support development of renewable energy resources.” Pp. 95-96. [Exh. CS-MK-3].
- ✓ “Create and support programs and facilities that provide stable, affordable, and clean renewable sources of energy, including wood (and other biomass), wind, water (hydroelectric), solar, and geothermal. Give strong consideration to the energy needs of the community when evaluating the environmental and economic affects of such programs and facilities.” P. 96. [Exh. CS-MK-3].
- ✓ “The town should continue to pursue [] renewable energy projects.” P.96. [Exh. CS-MK-3].

All of those goals support the Chelsea Solar Project and contravene the Board’s conclusion that the three RCON goals in the Town Plan relied on by the Board constitute a clear, unambiguous written community standard, a recommendation or a land conservation measure against the Project.

4. Policies and Goals in the Town Energy Plan Encouraging the Project.

The policies and goals expressed in Bennington energy plan encourage projects such as the Chelsea Solar Project, and also encourage the use of trees for biomass⁶:

- ✓ “Alternative energy sources such as solar, [] and biomass-based fuels can provide significant amounts of clean energy well into the future. Developing these resources is extremely important.” P.2.
- ✓ “Commercial Renewable Energy Opportunities in Bennington *** The amount of money spent on energy in Bennington—as pointed out in previous sections—suggests that real economic benefits can be realized if some significant portion of that energy is generated from local sources.” P.38.
- ✓ “renewable energy must focus on local resources.” P.38.
- ✓ “Available resources that potentially can provide for some of the area’s energy needs include: biomass (wood and field crops), [] and direct solar radiation. [] Developing those resources now also will help provide energy security for the community, assuring availability of the energy needed to sustain economic prosperity well into the future.” P. 38.
- ✓ “Biomass Energy Potential *** Any discussion of renewable energy in Bennington County must include wood, which together with direct solar energy, is the most obvious and ubiquitous source of locally available energy. The Bennington Regional Energy Plan estimates that forests, just within Bennington County, could sustainably provide over 150,000 cords of wood per year for fuel (in addition to timber harvested for sawlogs, veneer wood, and pulpwood). That quantity of wood could easily satisfy all of the residential space heating needs for the region, with a significant volume of biomass remaining for use in commercial/industrial applications and for electricity generation. Forest resources in nearby areas of new York and Massachusetts provide additional resources that could be available for local energy utilization (Biomass Energy Resource Center data).” P.38.
- ✓ “Although widely available, a significant increase in the utilization of local wood products for commercial energy production poses some serious challenges. Much of the forested land in Bennington County is

⁶ See, RJN Exhibit G.

not currently available for harvesting because it is located in federally designated wilderness or other protected areas.” P.38.

- ✓ “Despite the hurdles that must be overcome to make wood a significant, and perhaps primary, local source of heat energy, its abundance, reliability, and the fact that reliance on this fuel provides jobs and recycles money in the local economy suggest that planning for greater utilization of the resource should be pursued. The reduced net carbon and sulfur dioxide emissions realized through combustion of biomass rather than coal, oil, or gas provides an additional reason to pursue greater use of this renewable resource.” P.38.
- ✓ Space heating in homes and small businesses can be accomplished with wood or wood-pellet burning stoves or furnaces. Cord wood is readily available from local suppliers and requires little preparation beyond splitting and drying.” P.38.
- ✓ “Solar energy technologies are proven and [] have a relatively minor environmental impact.” P.43
- ✓ “there are compelling reasons to attempt to implement solar technologies wherever possible.” P.43.
- ✓ The town energy committee should “advocate for [] renewable energy projects. P. 45
- ✓ “All developments should be planned to take maximum advantage of opportunities for utilization of solar energy.” P.45.
- ✓ “The town should support efforts to develop appropriate cost-effective biomass energy resources.” P.47.

All of those goals support the Chelsea Solar Project and contravene the Board’s conclusion that the three RCON goals in the Town Plan relied on by the Board constitute a clear, unambiguous written community standard, a recommendation or a land conservation measure against the Project.

II. Selection of Chelsea Solar as the First Project under the New SPEED Program.

The selection of the Chelsea Solar Project as the first project under the revised SPEED program was not without controversy. Because it and the Apple Hill Solar project (Docket 8454) were located adjacent to each other, the Board disqualified the Apple Hill project. One Board member wanted to disqualify both the Chelsea and Apple Hill projects.

The Board's disqualification was appealed to the Vermont Supreme Court, and on March 28, 2014, the Vermont Supreme Court reversed the Board's decision resulting in both the Chelsea and Apple Hill projects receiving power purchase agreements.⁷

III. The Board's Order.

Chelsea's petition for a CPG was filed on June 19, 2014. The technical hearing for the Project was held on July 16, 2015. No issue concerning the Project's conformance with the Town Plan was raised by any party to this Docket in the year prior to or up to and including the technical hearing. On October 2, 2015, the Hearing Officer issued a proposed decision ("PFD") which was adverse to intervenor Libby Harris, but was not adverse to Chelsea Solar. On October 13, 2015, the issue of the Project's conformance with the Town Plan was first raised by Ms. Harris in her comments on the Hearing Officer's PFD, which essentially were taken entirely from the Town of Bennington's post-hearing brief in the Apple Hill docket.

⁷ See, *In re Programmatic Changes to the Standard-Offer Program and Investigation into the Establishment of Standard-Offer Prices under the Sustainably Priced Energy Enterprise Development (SPEED) Program*, 2014 VT 29 (2014).

On January 6, 2016, the Board requested comments on the issue but provided no opportunity to engage in discovery or present further evidence on the newly raised defense.

About one month later, the Board issued the Order holding that the Project did not satisfy the Section 248 criteria set forth in 30 V.S.A §§248(b)(1) and (b)(5) because the Project purportedly did not satisfy three of the four RCON goals in the Town Plan: (1) only development is “limited residential development”; (2) development “in prominently visible locations on hillsides and ridgelines” is prohibited; and (3) “any development must minimize the clearing of natural vegetation”. *See*, Order at 57.

ARGUMENT

I. Standard

A. Motion for Reconsideration (i.e., to Alter and Amend) Under Rule 59(e).

Rule 59(e) gives the Board broad power to alter or amend a judgment and the rule may be used to reconsider matters encompassed in a decision on the merits. *In re Joint Petition of Green Mt. Power Corp.*, 2012 VT 89, P51 (2012)

B. Motion to Reopen and for a Supplementary Hearing under Rule 59(a).

On a motion for a new trial in an action tried without a jury, the court before which the action has been tried may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment. Under the

Vermont Rules of Civil Procedure, a motion to reopen is considered a motion for a partial new trial. *See* V.R.C.P. 59(a) (on motion, court may grant new trial "on all or part of the issues"). Such a motion is routinely decided on affidavits so that the court can determine whether new evidence is available that might lead to a different outcome on the issue involved. *In re Petition of Twenty-Four Vermont Utilities*, 159 Vt. 339, 357 (1992). Here the affidavits and the RJN establish that reopening the record to admit the evidence requested would lead to a different outcome. Moreover, because the decisive issue was raised after the record closed and the hearings were held, Chelsea has not been fully heard on the findings decided by the Board adverse to Chelsea, and as such a new or continued hearing on those issues should be granted for the same reasons as discussed in Chelsea's Motion to Reopen Discovery.

C. Motion for New and Additional Findings.

Under VRCP 52(b), upon motion of a party the Board may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59.

II. The Board Erred in its Interpretation and Application of Section 248(b)(1).

30 V.S.A. §§248(b)(1) states that the Board must find the construction of the project:

will not unduly interfere with the orderly development of the region with due consideration having been given to the recommendations of the municipal and regional planning commissions, the recommendations of the municipal legislative bodies, and the land

conservation measures contained in the plan of any affected municipality.

The Board disagreed with the Hearing Officer's proposed Findings 30 and 32 (which provided that the Project satisfied the criteria of section 248(b)(1)), and held that the Project would interfere with the orderly development of the region because "the Project is inconsistent with the Bennington Town Plan and with the recommendations of the municipal representatives contained in that plan." Order at 50.

The Board elaborated that the Board was rejecting finding 30 based on the "language of the Bennington Town Plan", and finding 32 because the Board concluded "it does not accurately reflect the Bennington Town Plan's provisions regarding development in Bennington's Rural Conservation Districts." Order at 50-51. The purported violations of the Town Plan's RCON goals were: (1) development is "limited residential development"; (2) development is prohibited "in prominently visible locations on hillsides and ridgelines"; and (3) "any development must minimize the clearing of natural vegetation," all in order to purportedly protect scenic resources, which are separately addressed by Section 248(b)(5).

The Board rejected the evidence in the record that development was not precluded at the Project site, which conclusion was never disputed by any party to the proceeding. But the Board, *sua sponte* read the excerpts from the Town Plan as prohibiting anything but "limited residential development" with "certain rural exceptions." Order at 52.

A. The Board's *Sua Sponte* Action Constitutes Unfair Surprise and Violates Chelsea Solar's Rights Under 3 V.S.A. § 809(c).

The Board acknowledged the issue of the Town Plan affecting the orderly development of the region was not raised by any party at any time in this proceeding until the Board's Order. The Board *sua sponte* based its decision with respect to Section 248(b)(1) on that issue, without providing any opportunity for Chelsea Solar to engage in discovery or provide any new testimony at all. How can a party go through the entire section 248 process, execute memorandum of understandings with both Vermont state agencies covering Section 248 criteria, present evidence on an issue, have no contrary evidence be presented, have the issue never challenged and then wake up one day and find the Board makes a decision against the evidence and, even more surprisingly, contrary to four recent decisions of the Board issuing CPGs in the Bennington RCON district.

In addition, the Board's Order is also a reversal of its prior orders and its Section 248 guide as to exactly what constitutes a recommendation of a municipality.⁸ If any case represents unfair surprise and a violation of due process, this is it. The Board's *sua sponte* action also violates Chelsea Solar's right under 3 V.S.A. § 809(c) ("Opportunity shall be given all parties to respond and present evidence and argument on all issues involved." (emphasis added)). Chelsea Solar has had no opportunity to fully litigate the issue. Moreover, in order to adequately

⁸ See, *Petitions of Vermont Electric Power Company, Inc. (VELCO) and Green Mountain Power Corporation (GMP)*, Docket 6860, Order of 1/28/05, at 200-201, and "Guide to Filing a Petition Under Section 248", discussed *infra*.

present evidence on this issue, discovery needs to be reopened and a supplemental hearing scheduled.

B. The Board Ignored Its Own Orders Recently Issuing Four CPGs in the Bennington RCON District, Violating Chelsea Solar's Rights to Equal Protection; The Board is Collaterally and Equitably Estopped From Raising the Issue as the Result of Its Prior Decisions.

The Board rejected the evidence in the record that development of the Project was not precluded at the Project site, and based only upon its limited reading of excerpts from the Town Plan, rejected the evidence presented, and concluded that the Town allowed only "limited residential development" with "certain rural exceptions" in the RCON district. Order at 52.

The Board is equitably and collaterally estopped from raising the issue because the Board has recently on at least four occasions issued CPGs for development of facilities in the RCON district that were not limited residential development. The Board's Order also violates Chelsea Solar's right to equal protection because there is no basis on which to differentiate between Chelsea Solar and the applicants that were granted CPGs by the Board in the RCON district.

The Board has recently issued four CPGs for projects in the Bennington RCON District, at least three of which were explicitly supported by the Town, and none of which were residential developments.

In Docket 8355 the Board recently approved a wireless communications tower under Section 248a in the RCON District, which was supported by the Town. (*See*, RJN Exhibit J.) Section 248a provides for a more stringent standard with respect to aesthetics, requiring "substantial deference" as opposed to just "due

consideration” “to the land conservation measures in the plans of the affected municipalities and the recommendations of the municipal legislative bodies and the municipal and regional planning commissions regarding the municipal and regional plans.” That facility was located entirely in the RCON District. The project was not a limited residential development. Moreover, soaring 90 feet tall, the project was visible on a hillside. If the Town Plan were a clear, unambiguous community standard, a recommendation or a land conservation measure, the Town should have not supported the project and the Board should not have issued the CPG. But it did, with the Board holding that the project did not violate any standard in the Town Plan. *See*, RJN, Exhibit J. (“The Project does not violate any written community standards contained in the applicable town or regional plans.”)

In Docket 8393, the Board approved a 140-foot high wireless communication tower in the RCON District, again supported by the Town. The project was not a limited residential development. Soaring 140 feet tall, the project was visible on a hillside. If the Town Plan were a clear unambiguous community standard, a recommendation or a land conservation measure, the Town should have not supported the project and the Board should not have issued the CPG. But it did, with the Board holding that the project did not violate any standard in the Town Plan. *See*, RJN, Exhibit K (“The Project is consistent with the land conservation measures in the Bennington Town Plan and the Bennington County Regional Plan.”)

In Docket 7763, the Board approved a major expansion of an electrical facility, a substation, in the RCON District. (*See*, RJN Exhibit I). The work was within an area specifically designated by the Town of Bennington as a scenic resource, which is in stark comparison to the Chelsea Solar site, which has not been so designated. That approved project required the same clearing as the Chelsea Solar Project—15 acres. In addition, it was located on a prominently visible side of Bald Mountain.⁹ The project was also far taller than the Chelsea Solar Project.¹⁰ The project was visible from several vantage points, and was within an area designated in Bennington’s scenic resource inventory. *See*, RJN Exhibit I. (“The new VELCO Bennington and CVPS Pickett Hill substations will be visible from several viewpoints to the west and will have an adverse impact on the scenic character of the area surrounding the New Facility, which is within an area identified as being visually sensitive by the Town of Bennington. In particular, the aesthetic impact of the New Facility will be adverse from the Bennington Bypass, the Bennington Downtown and Urban Growth Area, the Old Bennington and Bennington Battle Monument area, and the Southern Vermont College.”) Yet despite the fact that the project violated all three of the purported standards

⁹ *See*, RJN Exhibit I. (“The new VELCO Bennington and CVPS Pickett Hill site is located on the eastern edge of the southern portion of the Valley of Vermont physiographic region, on the western lower slopes of Bald Mountain. The area surrounding the property is primarily forested with steep slopes and portions of the eastern boundary of the parcel abut the Green Mountain National Forest. The site is located east of the Bennington Bypass within the Town of Bennington's designated Rural Conservation and Forest zoning districts.”)

¹⁰ *See*, RJN, Exhibit I (“While a majority of the New Facility's components will be thirty feet high or less, some components will extend to fifty-four feet in height.”)

discussed by the Board in the Order, and additionally was located in the scenic inventory area (which Chelsea Solar is not), the Board had no difficulty concluding that no clear written community standard, recommendation, or land conservation measure was violated. *See*, RJN Exhibit I (“The Project does not violate a clear written community standard intended to preserve the aesthetics or scenic beauty of the area.”)

Similarly, the Board recently issued a CPG (#NMP-6523) to the Kobelia Bennington GLC Solar LLC 500kw solar project in the RCON District in Bennington. That facility was located entirely in the RCON District. The project was not a limited residential development, and it was visible from the road. The slope of the land was greater than that of the Chelsea Solar site. Thus, the Board should have denied the CPG. It did not. Rather the Board held that the project did not violate any standard in the Town Plan. *See*, RJN Exhibit L. (“There are no land conservation measures contained in the applicable regional or town plans that would prohibit development in the area where the Project is proposed.”)

The Board’s Order on section 248(b)(1) must be set aside and the Board should make findings 30 and 32 as proposed by the Hearing Officer as that is what the weight of the evidence requires.

C. The Board Erred by Focusing only on the Town and Not the Region and By Ignoring the Other Goals Expressed in Town and Regional Plans, and the Town’s Land Use Regulations.

The Board findings must be set aside because it is clear that the Board only focused on the Town and not the region, ignored the other goals expressed in the

Town and Regional plans, ignored the Town's Bylaws and ignored the Town's actions in implementing such plans and Bylaws. Where there is "an incomplete and incorrect statement of the issues material to a rightful decision," reversal is required. *Dodge v. McArthur*, 126 Vt. 81, 85 (1966) (quoting *Kinsley v. Willis*, 120 Vt. 103, 112, (1957)). Here the Board relied solely on its interpretation (which was contrary to the experts of Chelsea Solar and the Department) in order to arrive at its holding. The Board made the decision on an incomplete and incorrect basis by ignoring the other portions of the Town Plan, the regional plan and the Bylaws.

In addition, the issue under Section 248(b)(1) is whether the Project would unduly interfere with the orderly development of the *region*, not one town within a region. The region is Bennington County not the Town of Bennington. The Bennington region consists of approximately 370,000 acres. The region includes the town and villages of Arlington, Bennington, Dorset, Glastenbury, Landgrove, Manchester, Manchester Village, North Bennington Village, Old Bennington Village, Peru, Pownal, Rupert, Sandgate, Shaftsbury, Stamford, Sunderland, Woodford. The site itself and the clearing required at the site for the Project is a mere 0.004% of the region.

1. The Board Ignored the Plain Language of the Statute.

The Board ignored the plain language of Section 248(b)(1) and instead changed the language to Act 250's requirement in Section 6086(a)(10) of 10 V.S.A. Chapter 151 that a project must conform to the Town Plan. The Order reflects the Board's erroneous position that the Project must strictly adhere to the RCON Goals

in the Town Plan for purposes of Section 248(b)(1). Under the plain terms of the statute, however, the Board need only give “due consideration” to the recommendations of the municipal and regional planning commissions in deciding if the Project will not unduly interfere with the orderly development of the region. Assuming *arguendo* that the RCON Goals in the Town Plan can be considered to be a “recommendation” under Section 248(b)(1), which, as explained *infra*, they cannot, the Vermont Supreme Court has construed the phrase “due consideration in Section 248(b)(1) to ‘at least impliedly postulate[] that municipal enactments, in the specific area, are advisory rather than controlling’. *In re Vt. Elect. Power Co.*, 179 Vt. 370 (quoting *City of S. Burlington v. Vt. Elec. Power Co.*, 133 Vt. 438, 447 (1975)). In a complete break from Board precedent, for purposes of its analysis under Section 248(b)(1), the Board is inexplicably insisting on strict adherence to the purported goals in an excerpt from the Town Plan remarkably without considering the entire town and regional plans or the Town’s actions in implementing such plans.

The error in the Board’s analysis is further clearly demonstrated by the recent enactment of Section 248(b)(1)(B) in which the Legislature has set forth the *only type* of municipal standard that must be adhered to.¹¹ The doctrine of *expressio unius est exclusio alterius* means that the expression of one thing is the

¹¹ Section 248(b)(1) provides:

(B) with respect to a ground-mounted solar electric generation facility, shall comply with the screening requirements of a municipal bylaw adopted under 24 V.S.A. § 4414(15) or a municipal ordinance adopted under 24 V.S.A. § 2291(28), and the recommendation of a municipality applying such a bylaw or ordinance, unless the Board finds that requiring such compliance would prohibit or have the effect of prohibiting the installation of such a facility or have the effect of interfering with the facility's intended functional use.

exclusion of another. *Expressio unius* generally reflects an inference that any omissions in a statute are intentional. *Clymer v. Webster*, 156 Vt. 614, 625 (1991). To conclude additional municipal standards would need to be adhered to renders Section 248(b)(1)(B) superfluous, and contradicts the maxim of statutory interpretation of *expressio unius*.

2. The Project's Impacts Are Localized in Nature and There is no Credible Evidence in the Record that Demonstrates that the Localized Impacts Interfere with the Orderly Regional Development.

The test under Section 248(b)(1) is whether the proposed project will unduly interfere with the orderly development of the *region*, not the town. There are seventeen towns within the Bennington Region and this Project is located in only one of them. While localized impacts may in some instances be found to interfere with orderly regional development due to their character or severity, there is no credible evidence in the record that demonstrates that the localized impacts from this Project would rise to such a level. *See, Petition of Rutland Renewable Energy, LLC*, Docket 8188, Order of March 11, 2015. In fact, there is no evidence in the record that the Project has any adverse regional impact whatsoever, let alone an undue adverse impact.

The proper analysis under Section 248(b)(1) would have been for the Board to look at the overall *regional* effects of the Project, just as it did in the *Petition of UPC Vermont Wind, LLC* in Docket No. 7156. In that Docket, the Board determined that even though the project in question was (i) inconsistent with the regional plan's description of traditional land use in a "rural area" and (ii) visible to neighboring

towns, the Board found no undue interference with the orderly development of the region and issued the CPG. The Board's determination was then upheld by the Vermont Supreme Court. *See, In re UPC Vermont Wind, LLC*, 185 Vt. 296 (2009). With respect to the Project in this Docket, there is no evidence in the record of non-conformance with the regional plan and the Project is not visible to neighboring towns. Thus, the Board misinterpreted and misapplied Section 248(b)(1) in the Order as its arguments with respect to the purported violation of Section 248(b)(1) are premised solely on the impacts of the Project within the immediate vicinity and not the overall region.

The Board's decision in *UPC Vermont Wind* also shows that Chelsea Solar is being denied equal protection of the laws, due process and is suffering an unjust taking, because there is no rational basis on which to take the approach the Board did in *UPC Vermont Wind*, and then take the opposite approach here.

3. The Weight of the Evidence Shows That the Project Would Not Unduly Interfere With the Orderly Development of the Region.

The evidence in this Docket presented on the orderly development of the region was presented by Chelsea's expert, Mark Kane, through his pre-filed testimony dated June 18, 2014 ("Kane pf."), which provides that the Project will not unduly interfere with the orderly development of the region and will not cause any direct impacts on the capacity of the region to develop.

The Bennington Regional Plan (2007) was developed by the Bennington County Regional Commission and provides broad objectives relative to growth and development in the region. The Regional Plan does not identify with any specificity

the Project site or the landscape within which it is proposed. *See*, Exhibit CS-MK-2 at 23. As described more fully in Mark Kane’s report, the Project site is at the edge of developed highway infrastructure and the Project supports regional objectives. *See*, Kane pf. at 6. While the Regional Plan identifies issues and the importance of addressing impacts to the scenic resource in the development of land, the plan does not provide specific clear written community standards that are designed to preserve the aesthetics or scenic beauty of the area in which the Project will be built. Thus, on its face the only evidence in the record supports the conclusion that the Project would not unduly interfere with orderly development of the region.

Section 248(b)(1) also provides that the Board will give “due consideration” to different categories of input from regional and municipal officials as the Board considers whether the project would unduly interfere with the orderly development of the region. Such categories of input are, first, recommendations of the municipal and regional planning commissions. Second, the recommendations of the municipal legislative bodies. Third, the land conservation measures contained in the plan of any affected municipality. Again, those recommendations and measures must relate to orderly development of the region, as opposed to one single town within the region. If one town through its town plan or otherwise could dictate whether a renewable energy project unduly interferes with the orderly development of the region, that would be a classic case of the tail wagging the dog.

D. The Town Plan's RCON Goals are Neither Recommendations Nor Land Conservation Measures.

The Board misinterpreted Section 248(b)(1) by holding that the RCON Goals constituted both (i) “recommendations” and (ii) “land conservation measures”.

1. The Town Plan's RCON Goals are not Recommendations under Section 248(b)(1).

In the Order, the Board has misinterpreted and misapplied Section 248(b)(1) by suggesting that the “recommendations of the municipal and regional planning commissions and the municipal legislative bodies” include the RCON goals. In the *Petitions of Vermont Electric Power Company, Inc. (VELCO) and Green Mountain Power Corporation (GMP)*¹², the Board specifically interpreted the meaning of the word “recommendations” in Section 248(b)(1) and determined that such recommendations include only (i) those recommendations presented pursuant to Section 248(f) (i.e. comments received by municipal and regional planning commissions during the 45 day advance notice period) and (ii) evidence and argument relating to Section 248(b)(1) presented by a municipal legislative body, municipal planning commission, or regional planning commission that elect to intervene as a party. *See, Petitions of Vermont Electric Power Company, Inc. (VELCO) and Green Mountain Power Corporation (GMP)*, Docket 6860, Order of January 28, 2005, at 200-201.

¹² *See, Petitions of Vermont Electric Power Company, Inc. (VELCO) and Green Mountain Power Corporation (GMP)*, Docket 6860, Order of 1/28/05, at 200-201.

The Board's Order in Docket No. 6860 is further supported by the Board's own "Guide to Filing a Petition Under Section 248" (the "Guide"), which states that information submitted under §§248(b)(1) must address the following two points:

- ***Any comments on the proposed project submitted by municipal and regional planning commissions and municipal legislative bodies.*** This should include a statement of when the 45-day advance notice was submitted to the relevant bodies, along with a description of the filing, or, if a waiver was received, copies of the letters waiving this requirement. (emphasis added)
- Any relevant land conservation measures contained in the municipal plans. (Land conservation measures must evince a specific policy directed towards land conservation; general policy statements in plans that apply indiscriminately throughout the municipality do not rise to the level of a "land conservation measure").¹³

In direct conflict with Docket No. 6860 and the Board's own Guide, the Board has erroneously conflated this two part test by suggesting that the municipal or regional planning commissions or legislative body "recommendations" under Section 248(b)(1) include the RCON goals. This is simply an incorrect interpretation of this provision and the Board's consistent application of that provision.

No comments on the proposed Project were submitted by the municipal or regional planning commissions or the municipal legislative bodies and none of the aforementioned parties elected to intervene in this docket prior to the Board's Order, or present any evidence. Under the Board's consistent practice evidenced in its Order in Docket No. 6860 and its own Guide, there are no "recommendations" to

¹³ <http://psb.vermont.gov/statutesrulesandguidelines/guidelines/GuidetoFiling248Petition>

address or to provide “due consideration” to with respect to the first half of Section 248(b)(1).

Recently enacted Section 248(b)(1)(B) provides further confirmation that neither a town plan nor a bylaw can be considered a recommendation. Section 248(b)(1)(B) provides that a solar electric generation facility shall comply with the screening requirements of a municipal bylaw or ordinance and “the recommendation of a municipality applying such a bylaw or ordinance”. If the bylaw or ordinance itself was a recommendation, then the requirement of compliance with a recommendation would be superfluous.

2. The Town Plan’s RCON Goals are not Land Conservation Measures under Section 248(b)(1).

The Board in Docket No. 6860 also considered what provisions in a municipal plan constitute a “measure” that is cognizable under Section 248(b)(1).¹⁴ The Board relied, in this regard, on the Vermont Supreme Court’s precedent in applying the Act 250 requirement of conformance with local plans. *See, In re Vt. Elect. Power Co.*, 179 Vt. 370, 386 (2006). Specifically, the Act 250 requirement of "conformance with any duly adopted local or regional plan," 10 V.S.A. §6086(a)(10), requires a "specific" municipal policy rather than "broad goals lacking in specific policies or standards." *Id.* (internal citations omitted). Moreover, consistent with the Vermont Supreme Court's precedent in applying the Act 250 requirement of conformance with local plans, the Board concluded that for a provision in a municipal plan to

¹⁴ *Petitions of Vermont Electric Power Company, Inc. (VELCO) and Green Mountain Power Corporation (GMP)*, Docket 6860, Order of 1/28/05, at 202.

constitute a "measure" that is cognizable under Section 248(b)(1), that provision must "evince a sufficiently 'specific policy'" promoting land conservation.¹⁵ Non-specific provisions of municipal plans should not carry more weight in applying Section 248(b)(1) than in applying Criterion 10 of Act 250 (10 V.S.A. § 6086(a)(10)), given that Section 248(b)(1) requires "due consideration" of the land conservation measures of the municipal plans, rather than a finding of conformance as required by criterion 10.¹⁶

When applying the Board's definition of "land conservation measure" in Docket No. 6860, it is abundantly clear that the RCON goals do not constitute "land conservation measures". The Town Plan reads:

Specific design standards shall apply to new development in the Rural Conservation Districts in recognition of the existence of a concentration of agricultural and forest lands and to protect the extraordinary scenic resources such lands and uses provide.¹⁷

Protecting "extraordinary scenic resources" provided by "agricultural and forest lands" which comprise *nearly half* of all of the land in the Town of Bennington is not a "specific" municipal policy but rather a perfect example of a "broad goal" that does not rise to the level of a "land conservation measure" under existing Vermont law. Following the command of Docket No. 6860 and *In re Vt. Elect. Power Co.*, the RCON goals are clearly not "land conservation measures". But even if they were, as demonstrated *infra*, the Project would satisfy them.

¹⁵ *Id.*, relying on *In re John A. Russell Corp.*, 2003 VT 93, ¶19 (2003).

¹⁶ *Id.*

¹⁷ *See*, Exh. CS-MK-3 at 31.

E. It was Plain Error to Base the Board’s Holding on the Town Plan.

It is plain error to make a decision regarding orderly development without considering the zoning regulations because as the Vermont Supreme Court has made clear—“The primary purpose of *zoning* is to facilitate the orderly development of communities by confining particular uses to defined areas.” *In re Sardi*, 170 Vt. 623, 625 (2000) (emphasis added.)

Here the Board refused to consider the zoning regulations, and instead turned the Town Plan’s RCON Goals into enforceable standards when the Town of Bennington has not even done that. The Board has acted contrary to the direction of the Vermont Supreme Court (discussed *infra* in III B. below), and has refused to consider the zoning regulations which categorically allow development such as the Chelsea Solar Project, as is also amply evidenced by the fact that the Board has issued CPGs in the RCON district as discussed above.

F. Even if the Board Appropriately Relied on the Town Plan in Issuing its Decision, The Board Erred When Determining that the Project Does Not Conform with the RCON Goals at Issue.

The purported violations of the RCON Goals are: (1) development is “limited residential development”; (2) development is prohibited “in prominently visible locations on hillsides and ridgelines”; and (3) “any development must minimize the clearing of natural vegetation,” all in order to purportedly protect scenic resources.

1. Commercial Development in the RCON District.

As discussed in Section II B. above, the Board has erroneously concluded that only limited residential development with certain rural exceptions is permitted in the

RCON District. The Board reached this conclusion by looking at a separate section of the Town Plan, namely Section 3.1 (Existing Land Use). The language in such section states:

Although development will occur outside of this [Urban Growth] area, it will be much less concentrated *and shall not include new commercial uses* because such uses are incompatible with the rural character of the area.

(emphasis added)

If that language is to be strictly construed (as the Board has done), that sentence would preclude any commercial development outside of the Urban Growth Area. However, the Town Plan specifically allows for commercial development outside of the Urban Growth Area (*e.g.*, the Rural Residential District which lies outside the Urban Growth Area allows for commercial development (*e.g.*, grocery stores) and solar electric facilities—even in a scenic gateway)¹⁸ and (ii) the RCON District which lies outside of the Urban Growth Area allows for commercial development (*e.g.*, bed and breakfasts and cultural institutions) as well as the multitude of other uses specified in Table 3.13 of the Bylaws, including electric facilities. Further, as discussed above, the Board has recently issued four CPGs for projects in the RCON District, at least three of which were explicitly supported by the Town, and none of which were residential developments.

¹⁸ http://www.berkshireeagle.com/local/ci_29641498/bennington-vt-select-board-approves-solar-project-projected.

2. The RCON Goals Regarding Development on “Prominently Visible” locations on “Hillsides”.

As discussed in detail below in Sections III D. 4. (i) and (ii) below, the Town’s reference to “hillside” and “prominently visible locations” are vague and ambiguous and there is no way the use of such terms could create a meaningful development standard. Even so, when one considers the Town’s example of a “prominently visible location” on a “hillside” that is contained in the Amendment to the Bennington Land Use and Development Regulations (*see*, RJN Exhibit 3), it is clear that the Project site is not on a “prominently visible” location on a hillside nor on a “hillside” at all.

3. The RCON Goal to “Minimize” Clearing.

As discussed in detail below in Section III D. 5. below, the Town Plan language regarding “minimizing” clearing on its face is vague as there is no clear guidance as to what the requirements are. *See, In Re Kisiel*, 172 VT at 130. Minimizing clearing is not a standard that restricts development, but rather a best practice implemented in connection with the development itself. Thus, the result of that best practice varies with the type of project being developed and this Project has minimized clearing. *See*, Exhibit CS-MK-2 to the Kane Pft. at 19; Kane Decl. 1. For example, in Docket 7763 in which the Board issued a CPG for an electric facility in the RCON District, 15 acres of clearing was required for the project. The goal of minimizing clearing was met because nothing in addition to what was reasonably required for the project was cleared. “Minimize clearing” is more aptly characterized as a best practice in designing an otherwise permitted use, not a standard that can prevent a project in the first place.

G. Aesthetic Concerns Are Addressed Under Section 248(b)(5), Not Section 248(b)(1).

The Legislature intended aesthetics to be addressed by the standards in Section 248(b)(5), not in Section 248(b)(1). To conclude otherwise would render Section 248(b)(5) redundant or superfluous as the *Quechee* test already includes a component that addresses clear, unambiguous community standards. If the Town had made recommendations regarding aesthetics during the 45-day notice period or if it had intervened in this Docket and made recommendations regarding aesthetics *and* Chelsea Solar had ignored such recommendations, then the issue of aesthetics might be properly before the Board under Section 248(b)(1). But as previously discussed, the Town made no recommendations during the 45-day notice period nor did they intervene in this Docket until well after the technical hearing date.

III. The Board Erred in its Conclusion As to Aesthetics under Section 248(b)(5).

A. The Board Thought It Was Reviewing the Apple Hill Solar project from Docket 8454.

The Board's Order confused the Apple Hill Solar project (Docket 8454) and the Chelsea Solar Project. For example, on p. 53 and p. 60 of the Order, the Board stated that the amount of clearing required for Chelsea Solar would be 10.6 acres. That acreage relates to the Apple Hill project, not the Chelsea Solar Project. *See*, Docket 8454, Prefiled Testimony of Brad Wilson, Page 3, Line 14 ("The [Apple Hill] project will incorporate 10.6 acres of clearing area.") Clearing for the Chelsea Project is 14.85 acres. *See*, Docket 8302, Prefiled Testimony of Brad Wilson, Page 3, Line 14.

Worse, it is evident that the Board did not even read the entire Order. At multiple locations in the PFD (which is pages 1-49 of the Order), the Hearing Officer clearly stated that the clearing was 15 acres. *See*, p. 24 (“cutting down approximately 15 acres of forest”); *see*, p. 24 (“the Project means that 15 acres of forest would cease to exist”); *see*, p. 24 (“clearing of 15 acres of trees”); *see*, p. 8 (“the Project would occupy 14.85 acres.”); *see*, p. 31 (“The Project is located on 14.85 acres.”).

The Board’s confusion at which project it was reviewing is also evident from its discussion of the visibility of the Chelsea Solar Project. It is the Apple Hill solar project that is partially visible (at least under the currently proposed plan in that docket) from the Vermont Welcome Center, not the Chelsea Solar Project. *See*, the Prefiled Testimony of Mark Kane in Docket 8454 at page 4; Kane Decl. 1; Kane Decl. 2. Chelsea on the other hand must be evaluated separately as if the Apple Hill Solar project is not built. The cumulative effect of both projects is appropriate to review only in the Apple Hill docket, not in the Chelsea Solar docket.

Visibility from the Welcome Center is an appropriate issue for discussion in the Apple Hill Solar docket 8454. It is not in this docket, for the simple reason that the Chelsea Solar Project is not visible at all from the Welcome Center. *See*, Exhibit CS-MK-7, Figure 6; Kane Decl. 1; Kane Decl. 2. It is completely shielded from view by the existing trees on the Apple Hill site. *See*, First Supplemental Prefiled Testimony of Mark Kane dated September 26, 2014, page 5. (“As suggested in my earlier testimony, and as supported by this visual simulation, the retention of

vegetation along the southern portion of the property effectively *screens* views of the Project from the Welcome Center.”) (emphasis added). Kane Decl. 1; Kane Decl. 2. The utter lack of visibility of the Chelsea Solar Project standing alone is visually demonstrated by Exhibit CS-MK-7, Figure 6, which was also attached to Chelsea’s Motion to Vacate, and is attached again to this motion as Exhibit D. The complete lack of visibility is also re-confirmed by Mark Kane in his declaration attached as Exhibit A and his declaration attached as Exhibit B. *See also*, Hearing Transcript at pp. 23-24.

Thus the Board’s conclusion that the “Project would remain visible on a hillside above the Vermont Welcome Center”, Order at 57, is factually incorrect, and reinforces the Board’s confusion with the evidence in this docket with the evidence in docket 8454. The Board did not hear the case; it did not read the entire record; it did not even read the entire Order and the parts of the record that it did read show the Board’s confusion between the Chelsea Solar and Apple Hill solar projects. The Board’s confusion is, on its own, sufficient justification to reconsider the Board’s Order.

B. The Board’s Legal Analysis Looking Only at the Town Plan Has Been Rejected by the Vermont Supreme Court.

The Board focused solely on excerpts from the Town Plan alone, and refused to consider the Bennington zoning regulations that implement the Town Plan, the goals of the town and regional plans and the Town’s actions in implementing such plans. The Board’s refusal to consider the Bennington zoning regulations, the Bennington Regional plans, the other parts of the Town Plan and the actions of the

Town in implementing and interpreting such plans was clear error, as the Vermont Supreme Court has stated on multiple occasions.

The Vermont Supreme Court recently reviewed the treatment of town plans and again held that town plans cannot be viewed in isolation if there is a claim that the town plan constitutes a clear, unambiguous community standard. *See, In Re Chaves A250 Permit*, 2014 VT 5 (2014) (“*Chaves*”). As *Chaves* instructs, the land use regulations, other goals in the town plan, other goals in the regional plan and other goals in regional and town energy plans must also, at a minimum, be reviewed and considered. *See also, In Re Kiesel*, 172 VT 124, 134 (2000) (the Town’s actions in interpreting the town plan must be considered); *Id.* 172 VT at 128 (when a town has zoning regulations in place it is error to not consider those— “[I]mplementation of town plan is done through zoning ordinances so that the ordinances control the plan.”); *See also, In re John A. Russell*, 2003 VT 93 (2003) (“As succinctly stated in *Smith*, 140 Vt. at 183, 436 A.2d at 762, ‘the regulations control the plan.’”)

The situation in *Chaves* is similar to that presented here. In *Chaves*, as here, the project’s conformance to regional and town plans was challenged. In fact, the issues advanced by the project’s challengers in *Chaves* were remarkably similar as those advanced here. The challengers cited “the purpose of the rural residential-3 district, where the project [was] located, [was] to ‘provide for agriculture, forestry, *low-density residential development* and other compatible land uses in a manner that maintains the Town's rural character, scenic landscape and natural resources.”

Chaves, 2014 VT at 40. (emphasis added.) That is exactly the same argument used here with respect to the RCON District.

The challengers in *Chaves* also cited the town plan’s “stated policy in the scenic areas section [] to ‘[m]aintain natural and man-made features that are of local scenic, cultural and historic significance and protect them from activities that impair their integrity, character and/or quality.’” *Id.* The challengers further cited “the town’s policy [] to ‘[p]rotect places of outstanding cultural, aesthetic, archeological, natural and/or historical value from development that impairs their character and quality.’” *Id.* Finally, the challengers relied on language in the regional plan which specified that the type of project at issue, mineral extraction, should “*minimize*” adverse effects on aesthetics ... and special community resources.” *Id.* (emphasis added.)

The Court held that a town plan cannot be viewed in isolation. The actual land use regulations and other goals in town and regional plans *must be* considered. The Court also rejected the challengers attempt to equate the town plan with the status of an unambiguous, clear and unqualified community standard because it “contain[ed] no specific requirements that [were] legally enforceable.” *Id.* at P41. The Court also cited *In re JAM Golf, LLC*, 2008 VT 110, ¶¶ 13-14, 185 Vt. 201, 969 A.2d 47, which held that ordinances that required design to “‘protect’ natural resources was unconstitutionally vague because it created no real standard.” *Id.*

The Court’s holding in *Chaves* is particularly applicable here, as the Bennington Town Plan does not contain any specific requirements that are *legally enforceable*. The Bylaws which implement the Town Plan are legally enforceable, but

the Town Plan on its own is not. *See also, Regan v. Pomerleau*, 2014 VT 99, P16 (2014) (rejecting claims based upon the town plan because they were not “*mandatory and set[] forth no specific enforceable standards.*”) As the Supreme Court emphasized in *Regan*, to constitute a clear, ambiguous community standard, a town plan must require mandatory compliance and set forth specific enforceable standards.

The Vermont Supreme Court has rejected the approach of the Board reflected in footnote 34 of the Order. The Board asserted that it was more appropriate to rely on town plans as the primary source of clear written community standards, even when zoning regulations implementing the town plan are in place. The Vermont Supreme Court has characterized that approach as clear error. *See, In Re Kiesel*, 172 VT 124, 128 (2000), (“[I]mplementation of town plan is done through zoning ordinances so that the ordinances control the plan.”); *In re John A. Russell*, 2003 VT 93 (2003) (“As succinctly stated in *Smith*, 140 Vt. at 183, 436 A.2d at 762, ‘the regulations control the plan.’”)

C. The Board Erred by Focusing on Only the Town.

Of significant importance, the *Chaves* Court recognized the “community” for purposes of a “community” standard includes the region—not just the town. The Board, in classic tail wagging the dog fashion concluded, however, that because the Town’s purported clear written community standard was purportedly violated, then *ipso facto* the orderly development of the region was unduly and adversely affected, and the Project had an undue adverse effect on aesthetics.

D. The Board Erred by Holding the Three Goals in the Town Plan Constituted a Clear, Unambiguous Written Community Standard.

1. The Board Erred by Not Recognizing the Other Express Goals in the Town and Regional Plans Which Support the Project.

The Court in *Chaves* faulted the challengers for not recognizing that the town and regional plans expressed other goals, thus ambiguity was by definition created. The Court held that the town plan's language did "not express unambiguous standards in that *both the town and regional plans* also express other goals." *Id.* at P42. (emphasis added.) Specifically, the Court noted that the town plan recognized the importance of the project's proposed operations. *Id.* at P42. That is also the case here, as detailed herein.

Also of particular relevance here is the Court's recognition of the importance of other goals expressed in the Town Plan. The Bennington Town Plan includes a *multitude* of statements and goals promoting local distributed solar resources, such as the Chelsea Solar Project. Moreover, the Bennington Town energy plan describes various goals encouraging solar resources, such as the Chelsea Solar Project and the use of trees for biomass.¹⁹ Of particular note is the Town's statement that "[s]uch present day objectives as *viewshed protection*, [] *will need to be partially retracted to make way* for the compelling future demand for energy." *See*, RJN, Exhibit F at p.32.

¹⁹ *See also*, RJN, Exhibit G. A municipal plan *must* include an "energy plan, including an analysis of energy resources, needs, scarcities, costs and problems within the municipality, a statement of policy on the conservation of energy, [], a statement of policy on the development of renewable energy resources." 24 VSA 4382(a)(9).

Similarly, the Bennington regional plan describes various goals which recognizes the importance of solar energy resources, such as the Chelsea Solar Project.²⁰ Indeed, the current version of the Bennington County Regional Commission's regional energy planning project designates the Chelsea Solar site as a "prime" location for solar. (*See*, RJN, Exhibit F and H.)²¹

As the Supreme Court stated in *Chaves* these other specific priorities must be considered and are enough to debunk the argument that the Town Plan creates an unambiguous, clear and unqualified community standard.

i. THE BENNINGTON TOWN PLAN INCLUDES A MULTITUDE OF GOALS AND OBJECTIVES ENCOURAGING PROJECTS SUCH AS THE CHELSEA SOLAR PROJECT.

There are a multitude of statements in Bennington Town Plan expressing the Town's policy and goals of encouraging projects such as the Chelsea Solar Project, as discussed above. All of those goals support the Chelsea Solar Project and contravene the Board's conclusion that the three factors relied on by the Board constitute a clear, unambiguous written community standard, a recommendation or a land conservation measure against the Project.

²⁰ *See*, RJN Exhibit D, E and F. The purposes of municipal plans are set forth in 24 VSA 4302(a) and include "to encourage the development of renewable resources". 24 VSA 4302(c) further provides municipal planning shall "further the following specific goals: [] (5) To identify, protect, and preserve important natural and historic features of the Vermont landscape, including: [] (C) significant scenic roads, waterways, and views."

²¹ As designated in Chelsea Solar's Motion to Reopen Discovery, many of the other goals in the Town and regional plans were already in the record, even in the absence of the Board's unwillingness to consider the entire town and regional plans or the zoning regulations.

ii. THE BENNINGTON MUNICIPAL ENERGY PLAN EXPRESSES POLICIES AND GOALS ENCOURAGING PROJECTS SUCH AS THE CHELSEA SOLAR PROJECT AND THE CLEARING OF TREES.

The policies and goals expressed in Bennington energy plan and discussed above encourage projects such as the Chelsea Solar Project, and also encourage the use of trees for biomass. All of those goals support the Chelsea Solar Project and contravene the Board's conclusion that the three factors relied on by the Board constitutes a clear, unambiguous written community standard, a recommendation or a land conservation measure against the Project.

iii. THE BENNINGTON REGIONAL PLAN SETS FORTH GOALS ENCOURAGING PROJECTS SUCH AS THE CHELSEA SOLAR PROJECT, AND USE OF TREES FOR BIOMASS.

The policies and goals expressed in Bennington Regional Plan, both the 2007 and 2015 versions, discussed above encourage projects such as the Chelsea Solar Project, and also encourage the use of trees for biomass. All of those goals support the Chelsea Solar Project and contravene the Board's conclusion that the three factors relied on by the Board constitute a clear, unambiguous written community standard, a recommendation or a land conservation measure against the Project.

iv. THE BENNINGTON REGIONAL SOLAR MAP DESIGNATES THE CHELSEA SOLAR SITE AS A PRIME LOCATION FOR A SOLAR PROJECT.

The Bennington County Regional Commission's Renewable Energy Potential: Solar Map designates the Chelsea Solar site as a "prime" location for a solar electricity generating facility. *See*, RJN, Exhibit H. That designation supports the Chelsea Solar Project and contravenes the Board's conclusion that the three factors

relied on by the Board constitute a clear, unambiguous written community standard, a recommendation or a land conservation measure against the Project.

2. The Board Ignored Its Own Orders Recently Issuing Four CPGs in the Bennington RCON District.

As discussed above, the Board recently issued at least four CPGs for projects in the RCON district, none of which would have been allowed if the Board's holdings were correct. Those orders contravene the Board's conclusion that the three factors relied on by the Board constitute a clear, unambiguous written community standard, a recommendation or a land conservation measure against the Project.

Those orders also equitably and collaterally estop the Board from its contrary holding here. The Board's holdings in those four dockets also shows that Chelsea Solar is being denied equal protection of the laws, due process and is suffering an unjust taking, because there is no rational basis on which to justify the difference in the holding here.

3. The Board Ignored the Other Uses Allowed By the Town Plan and the By-laws in the RCON District.

The Board's conclusion that anything other than limited residential development is prohibited in the RCON District is flatly contradicted by the Town Plan (*see* Exhibit CS-MK-3, page 25 (colleges, cultural institutions and bed & breakfasts allowed in RCON District) and RJN, Exhibit A). In addition, the Board's conclusion regarding residential development is flatly contradicted by the Town's zoning regulations. *See*, RJN, Exhibits B and C.

The Vermont Supreme Court has clearly held on multiple occasions that the failure to consider the actual zoning regulations (which the Board refused to do) is clear error. *In Re Kiesel*, 172 VT 124, 128 (2000), when a town has zoning regulations in place it is error to not consider those. (“[I]mplementation of town plan is done through zoning ordinances so that the ordinances control the plan.”) *See also, In re John A. Russell*, 2003 VT 93 (2003) (“As succinctly stated in *Smith*, 140 Vt. at 183, 436 A.2d at 762, ‘the regulations control the plan.’”) *See also, Regan v. Pomerleau*, 2014 VT 99, P16 (2014) (rejecting claims based upon the town plan because they were not “mandatory and set[] forth no specific enforceable standards.”).

The By-laws specifically permit electric facilities such as the Project. The Town Plan also makes it clear that an urgent goal of the Town is to have local electric generation, such as the Project. And the entire premise for the SPEED standard offer program is the Legislature’s goal of having diverse distributed renewable energy generation throughout the State, such as the Project.

4. What Constitutes a Hillside or Prominently Visible in the Town Plan is Vague and Ambiguous.

The Vermont Supreme Court addressed the issue of development on hillsides in *In Re Kiesel*, 172 VT 124 (2000). There the town plan prohibited development on “steep slopes and hillsides”. *Id.* at 129. There, as here, the town plan “provide[d] no specific standards to enforce the policy.” *Id.* at 130. Because the town plan provided no specific standards, the Court reversed holding “[a]bsent some objective measure to guide enforcement of the steep-slope prohibition, there was no basis for the Board

to conclude that the project was not in compliance with this policy.” *Id.* In addition to the ambiguities created by the other portions of the Bennington Town Plan, which recognize the importance of solar projects, and the Bylaws which permit such electric facility uses, the Bennington Town Plan has other ambiguities. The Town Plan’s purported clear, written unambiguous community standard for the RCON District speaks of development “in prominently visible locations on hillsides and ridgelines”, none of which are defined or listed.

The Court’s holding in *In Re Kiesel* is directly on point. Here because the Bennington Town Plan has no “specific standard to enforce the policy,” there was “no basis for the Board to conclude that the project was not in compliance with this policy.” Therefore, the Board must vacate its holding and find that the Project does not violate any standard in the Town Plan.

i. THE TOWN PLAN’S REFERENCE TO A HILLSIDE IS VAGUE AND AMBIGUOUS.

The Town Plan refers to the term “hillside” but does not contain the definition of a “hillside”. Without a definition, the term is vague and ambiguous as there is no meaningful way to have the term create a development standard. *See, In Re Kiesel*, 172 VT at 130.

The Merriam-Webster dictionary defines “hillside” as “the side of a hill”.²² The Merriam-Webster dictionary defines “hill” as “a usually rounded area of land that is higher than the land around it but that is not as high as a mountain: an area of

²²*See*, <http://www.merriam-webster.com/dictionary/hillside>.

sloping ground on a road, path, etc.: a pile of something.”²³ The American Heritage dictionary defines “hillside” as “The side or slope of a hill, situated between the foot and the summit.”²⁴ The American Heritage dictionary defines “hill” as “1. A well-defined natural elevation smaller than a mountain. 2. A small heap, pile, or mound. 3. a. A mound of earth piled around and over a plant. b. A plant thus covered. 4. An incline, especially of a road; a slope.”²⁵

As the ordinary dictionary definitions make clear, the definition of hill and hillside can cover virtually any piece of land that has any change in slope, which would cover most parcels of land in Bennington. Here, the test is whether there is a clear, unambiguous written community standard. When development on hillsides is to be restricted, clear standards must be set. *See, In Re Kiesel*, 172 VT at 130. Those standards must begin with clearly defining when they apply, which in turn requires a definition of “hillside”. In order to have a standard, a standard must be established. *Id.* Without such a definition, one could conclude that land with any slope should be considered a hillside.

As Mark Kane explains in his declaration attached hereto as Exhibit A, because the Town has no clear standard as to what constitutes a “hillside”, he used the term hillside in his testimony in as broadly a context as possible—any land with even minimal slope—so as to address the issue of the prominence or visibility of the Project. His references to hillside were in no way intended to testify as to whether in

²³*See*, <http://www.merriam-webster.com/dictionary/hill>.

²⁴*See*, <https://www.ahdictionary.com/word/search.html?q=hillside&submit.x=55&submit.y=20>.

²⁵*See*, <https://www.ahdictionary.com/word/search.html?q=hill&submit.x=20&submit.y=25>.

fact the Project site was a hillside within the meaning of the Town Plan as that term is not defined.

ii. THE TOWN PLAN'S REFERENCE TO PROMINENTLY VISIBLE LOCATIONS IS VAGUE AND AMBIGUOUS.

The Town Plan does not contain a definition of “prominently visible locations”. Without a definition, the term is ambiguous and there is no meaningful way to have the term create a development standard. *See, In Re Kiesel*, 172 VT at 130.

The American Heritage dictionary defines “prominent” as: “1. Projecting outward or upward from a line or surface; protuberant; prominent eyebrows. 2. Immediately noticeable; conspicuous; a product with a prominent place in the store.”²⁶ Similarly, the Merriam-Webster dictionary defines “prominent” as “easily noticed or seen; sticking out in a way that is easily seen or noticed.”²⁷

The Project will not be prominently visible. *See*, Exhibit CS-MK-2 at 19. Nor will the Project be located in a prominently visible location on the site. Nor is the Project site a prominently visible hillside or ridgeline. Indeed, the Project will not be visible at all from the Vermont Welcome Center. *See*, Exhibit CS-MK-7, Figure 6. It is completely shielded from view by the existing trees on the Apple Hill site. *See*, First Supplemental Prefiled Testimony of Mark Kane page 5. (“As suggested in my earlier testimony, and as supported by this visual simulation, the retention of vegetation along the southern portion of the property effectively *screens* views of the

²⁶

<https://www.ahdictionary.com/word/search.html?q=prominently&submit.x=0&submit.y=0>.

²⁷ <http://www.merriam-webster.com/dictionary/prominently>.

Project from the Welcome Center.”) The utter lack of visibility of the Chelsea Solar Project standing alone is visually demonstrated by Exhibit CS-MK-7. *See also*, Hearing Transcript at pp. 23-24. The complete lack of visibility is also re-confirmed by Mark Kane in his declaration attached as Exhibit A.²⁸

5. What Constitutes Minimizing Clearing in the Town Plan is Vague and Ambiguous.

One of the purported clear, unambiguous community standards in the Town Plan is that development in the RCON “must minimize clearing of natural vegetation.” That purported standard on its face is vague as there is no clear guidance as to what the requirements are. *See, In Re Kiesel*, 172 VT at 130.

Minimizing clearing is not a standard that restricts development, but rather a best practice implemented in connection with the development itself. Thus, the result of that best practice varies with the type of project being developed and this Project has minimized clearing. *See*, Exhibit CS-MK-2 to the Kane Pft. at 19. For example, in Docket 7763 in which the Board issued a CPG for an electric facility in the RCON District, 15 acres of clearing was required for the project. The goal of minimizing clearing was met because nothing in addition to what was reasonably required for the project was cleared. Minimize clearing is more aptly characterized as a best practice in designing an otherwise permitted use, not a standard that can prevent a project in the first place.

²⁸ Moreover, the Town has designated certain areas as scenic resources and the Chelsea Solar site is *not* one of them. *See*, Kane Pft. at 5-6.

The situation in *Chaves* is again similar to that presented here. In *Chaves*, on appeal, the neighbors argued that the regional and town plans used mandatory language regarding “minimizing impacts” on historical sites. The Vermont Supreme Court held that the language relied was broad and nonregulatory, espousing general policies about maintaining features, protecting valuable areas, and minimizing impacts, but contained no specific requirements that are legally enforceable. *See, Chaves*, 2014 VT at 12.

The Board’s decision illustrates the lack of any standard. The Board held that “the clearing of 10.6 acres of existing vegetation runs afoul of [the minimize clearing] provision in the Town Plan and its vision for orderly development.” Order at 53. How is there a standard? At what point does clearing run “afoul” of the purported standard? Is it at any clearing? 1 acre? 2 acres? Where exactly between zero and 10.6 is the standard? And once that number is determined on what substantial evidence or basis did the Board divine that number?

The Board also determined that whatever number is the crossover point is mandated for the Town’s “vision” for orderly development. Are “visions” now standards? If so, how are they supposed to be applied on a non-discriminatory basis because as noted above that same vision did not seem to matter when the Board approved a CPG in the RCON district for a Vermont utility that needed to clear 15 acres of forest on the side of Bald Mountain.

The “minimize clearing” language in question cannot be considered a development standard when a variety of permitted uses result in full or virtually full clearing of sites within the RCON District.

**E. Even if the Goals in the Town Plan or the By-laws are Clear,
Unambiguous Written Community Standards, the Project Satisfies Them.**

The Vermont Supreme Court has clearly stated that when a town has a zoning regulation, the zoning regulation must be reviewed. *In Re Kisiel*, 172 VT 124, 128 (2000), (“[I]mplementation of town plan is done through zoning ordinances so that the ordinances control the plan.”); *In re John A. Russell*, 2003 VT 93 (2003) (“As succinctly stated in *Smith*, 140 Vt. at 183, 436 A.2d at 762, ‘the regulations control the plan.’”)

Here, the Bylaws specifically characterized the Town Plan’s RCON District’s purported standards as “goals.” *See*, RJN Exhibit B, Bylaws Table 3.13(F). In order to implement those goals, the Town established certain guidelines to guide development in the RCON District. *See*, RJN Exhibit B. Even if those guidelines were considered clear, unambiguous written community standards, the Project meets such goals, as it meets the eight criteria list in Table 3.13(F).

Table 3.13(F) of the Bylaws states that it “is intended to further the goal of preserving the scenic quality of Bennington’s rural landscape.” Table 3.13(F)3.b. of the Bylaws lists eight standards for development on “hillsides or ridgelines”.

(1) “*Development shall be blended into the existing natural landscape to minimize its visual impact from public roads and lands. This effect shall be accomplished through one or more of the following: siting of structures within forest*

or forest edge areas.” That is precisely what has been done with the Chelsea Solar Project. It is located within the forest area. It is not visible from the Vermont Welcome Center or other public lands or roads. Of critical importance, the By-law makes it clear that development is not prohibited, but only that the visual impact must be “minimized”. That is what Chelsea Solar has done. Even the Board’s Order concedes that fact (although mistakenly confusing the Project with the Apple Hill project). Order at 53 (“Chelsea has taken steps to limit the visibility of the Project on the hillside where it is proposed to be located”). But Chelsea has gone well beyond minimizing the visual impact, it has eliminated it.

(2) *“Development shall not cause undue alteration of natural topography.”*

The Project does not alter the natural topography. Only minimal grading is required.

(3) *“[T]ree removal shall not cause undue alteration of the natural vegetation patterns of the hillside or ridgeline.”* This criteria provides two photo examples which emphasize that the tree removal guideline is focused solely on the visual impact. Here the cleared area and the Project would not be visible at all from the Vermont Welcome Center or other public roads or lands.

(4) *“Development shall be sited so that no structure shall exceed the height of land serving as the visual and physical backdrop to the site as viewed from a public road or other public land.”* The solar facility does not exceed the height of the trees serving as the visual and physical backdrop and cannot be seen from the Vermont Welcome Center or other public roads or lands.

(5) *“Outdoor lighting should not illuminate off-site locations.”* The Project does not include outdoor lighting that would illuminate off-site locations.

(6) *“Utility lines should be constructed and routed to minimize the effects on the visual setting. Above ground lines should follow tree lines and avoid straight runs across open fields.”* The utility lines associated with the Project satisfy this requirement.

(7) *“Towers and similar structures should not be prominently visible in a manner that would detract from the scenic character of the area.”* The Project does not include towers or similar structures.

(8) *“Windows that generate excessive glare shall not be used. Uninterrupted expanses of glass shall be avoided.”* The Project does not include windows or uninterrupted expanses of glass.

Moreover, when one considers the Town’s example of a “prominently visible location” on a “hillside” that is contained in Amendment to the Bennington Land Use and Development Regulations (*see*, RJN Exhibit 3), it is clear that the Project site is not on a “prominently visible” location on a hillside nor on a “hillside” at all.

F. There is No Adverse Effect on Aesthetics from the Project.

As the Bylaws clearly state, the Town Plan and Bylaws are only concerned with views from public lands, not from private lands. Currently the edges of the Chelsea Solar Project site are visible from the Vermont Welcome Center and from cars traveling on Route 7 and along Route 279. That will not change regardless of what is ultimately built on the project site. The vegetation on the edges of the site

will still be what is seen, the Project itself will not be able to be seen. Because of all the retained vegetation, its additional plantings at the southwest corner of the Project and its construction within or at the edge of a forest as the By-laws allow and recommend, the Chelsea Solar Project is not visible from the south, from the Vermont Welcome Center, or from anywhere around the Project. As a result, any conclusion that there is an adverse effect on aesthetics is without support.²⁹

IV. Even if the Town Plan as implemented by the By-laws Creates a Clear, Unambiguous Community Standard, a Land Conservation Measure or a Recommendation, Its Application by the Board to the Project Violates 24 V.S.A. §4413(g)(2).

24 V.S.A. §4413(g)(2) provides:

(g) Notwithstanding any provision of law to the contrary, a bylaw adopted under this chapter shall not:

(2) Prohibit or have the effect of prohibiting the installation of solar collectors not exempted from regulation under subdivision (1) of this subsection, clotheslines, or other energy devices based on renewable resources.

The Legislature enacted 24 V.S.A. §4413(g)(2) in the Energy Act of 2012, the same Act in which the Legislature enacted the new SPEED program of which the Chelsea Solar Project is the first power purchase agreement awarded. As applied by the Board, the Town Plan and By-laws would prohibit and have the effect of prohibiting the installation of the Chelsea Solar Project, which fits squarely within

²⁹ The *Quechee* test only makes sense if the legal test of adversity is applied taking into account the retained and added vegetation. Otherwise, the third prong that a person did not undertake steps a reasonable person would to minimize the impact makes no sense.

the term “solar collectors”.³⁰ Thus the Town Plan or Bylaws could not be applied, either directly or indirectly, to prohibit the Project.

Newly enacted Section 248(b)(1)(B) and 24 VSA 4414(15)³¹ further confirms that conclusion. Both of those sections relate to screening, which is solely an aesthetics concern. The Legislature has therefore clearly addressed the relationship between aesthetics and municipality’s plan or bylaws, both prior to and after the amendments. The Legislature has clearly stated that both before and after the amendment, it is improper to do what the Board did here—use a municipal plan or bylaw to prohibit a solar project. Section 248(b)(1)(B) and 24 VSA 4414(15) provide for adherence to a validly adopted and non-discriminatory screening bylaw or ordinance on a prospective basis *unless* it prohibits or “ha[s] the effect of prohibiting the installation of such a plant”. Thus both before and after the amendment, the Legislature has made clear that no municipal plan, bylaw or ordinance can be used for aesthetic reasons to prohibit or have the effect of prohibiting a solar plant. The

³⁰ In 2015, the Legislature enacted 24 V.S.A. 4414(15) which permits a municipality to enact a free-standing screening regulation applicable to solar plants. That provision does not apply to the Chelsea Solar Project. The Town has not enacted a screening by-law applicable to solar plants.

³¹ 24 VSA 4414(15)

Solar plants; screening. Notwithstanding any contrary provision of sections 2291a and 4413 of this title or 30 V.S.A. chapter 5 or 89, a municipality may adopt a freestanding bylaw to establish screening requirements that shall apply to a ground-mounted plant that generates electricity from solar energy. In a proceeding under 30 V.S.A. § 248, the municipality may make recommendations to the Public Service Board applying the bylaw to such a plant. The bylaw may designate the municipal body to make this recommendation. Screening requirements and recommendations adopted under this subdivision shall be a condition of a certificate of public good issued for the plant under 30 V.S.A. § 248, provided that they do not prohibit or have the effect of prohibiting the installation of such a plant and do not have the effect of interfering with its intended functional use.

Board basing its decision solely on what it viewed was a criteria regarding aesthetics in a Town plan is invalid under 24 V.S.A. §4413(g)(2).

24 V.S.A. §4413(g)(2) also clearly overrides the first prong of the second part of the *Quechee* test, because if it did not, then a clear community standard could do indirectly what the Legislature has prohibited directly. Thus the Board's reliance on that prong of the *Quechee* test is erroneous, and prohibited by 24 V.S.A. §4413(g)(2).

V. The Board's Order is Arbitrary and Capricious and Not Supported by Substantial Evidence.

Under the substantial evidence standard, an agency “must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

It is arbitrary and capricious if an agency fails to exercise its discretion or does not provide an explanation for its decision. *Miami Nation of Indians of Indiana, Inc. v. U.S. Dept. of Interior*, 255 F.3d 342, 350 (7th Cir. 2001); *Lemons v. Skidmore*, 985 F.2d 354, 358 (7th Cir. 1993); *Miller v. Hambrick*, 905 F.2d 259, 262 (9th Cir. 1990); *Vinci v. Consolidated Rail Corp.*, 927 F.2d 287, 288 (6th Cir. 1991) (per curiam). If an agency is required to balance factors in reaching its decision and it fails to do so, such failure is also an abuse of discretion. *See, e.g., SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A.*, 382 F.3d 1097, 1103 (11th Cir. 2004) (failure to balance stated factors “is a clear abuse of discretion”); *Miller v. Department of Treasury*, 934 F.2d 1161 (10th Cir. 1991) (“failure to balance [stated] considerations . . . constituted an abuse of discretion”); *Huang v. INS*, 436 F.3d 89,

99 (2d Cir. 2006) (“the failure to balance, by itself, justifies a vacatur”).

Even when an agency exercises its discretion or provides an explanation for its decision, the arbitrary and capricious test is not satisfied merely when an agency decision is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute. *Motor Vehicle Mfrs.*, 463 U.S. at 42. An agency “must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Id.* citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

A reviewing court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Motor Vehicle Mfrs.*, 463 U.S. at 43. An agency decision is arbitrary and capricious if (i) the agency has relied on factors which the legislature has not intended it to consider, (ii) “entirely failed to consider an important aspect of the problem”, (iii) “offered an explanation for its decision that runs counter to the evidence before the agency”, or (iv) “is so implausible that it could not be ascribed to a difference in view or the product of agency expertise”. *Motor Vehicle Mfrs.*, 463 U.S. at 43. “The reviewing court should not attempt itself to make up for such deficiencies; [it] may not supply a reasoned basis for the agency's action that the agency itself has not given.” *Motor Vehicle Mfrs.*, 463 U.S. at 43.

An agency must take a “hard look” at the salient issues and the evidence. *Motor Vehicle Mfrs.*, 463 U.S. at 42-43.

A. The Board's Decision Re-writes the Law as to Aesthetics.

Now the *aesthetic* value of the loss of trees does not even overcome, in the Board's view, the positive impact (which the Board did not quantify) on GHG of the Project. *See*, Order at 60 ("we cannot conclude that the societal benefits cited [] are so significant as to render acceptable the otherwise *undue adverse aesthetics* impact caused by the clear-cutting of 10.6 acres of existing mature forest to accommodate the Project.") (emphasis added.)

There are a few remarkable aspects of that statement. First, the Board has focused solely on the *undue adverse aesthetics* impact from the cutting of 10.6 acres of trees. But the Board can cite to no evidence to support an *actual* adverse aesthetic impact from the cutting of trees let alone an undue adverse effect. Rather the Board is engaging in mere speculation based on its legal conclusion that the Town Plan requires clearing be minimized, to arrive at a factual finding that the clearing itself (regardless of what is then built in the cleared area) would have an actual adverse effect. There is no evidence in the record to support the Board's conclusion, much less substantial evidence.

Moreover, the Board's decision is arbitrary and capricious because it has failed to explain how there is an actual adverse effect from just the clearing, and how such a conclusion can be squared with every other project the Board has approved that required any removal of trees. The Board's rationale taken to its logical conclusion is that any clearing has an adverse effect on aesthetics and that as a matter of law the adverse aesthetic impact is undue even after taking into account GHGs.

Under the Board's new rule, which has now been announced without going through the notice and comment period required for rules, no trees at all can be removed for a solar project. The Board's new approach is arbitrary and capricious, not supported by substantial evidence, violates Chelsea Solar's rights to equal protection and due process, and constitutes an unjust taking.

B. The Board Failed to Give Significant Consideration to the GHG benefits of the Project.

The Board stated that it gave "significant consideration to the Project's potential greenhouse gas benefits," *see* Order at 60, but that is all it said on that topic. It did not offer any explanation of how it could make that conclusion, or how it weighed the GHG benefits against its aesthetic conclusion. Section 248(b)(5) established the standard that "an in-state facility, will not have an undue adverse effect on esthetics ... with due consideration having been given to the criteria specified in 10 V.S.A. § [6086(a)(8)] and greenhouse gas impacts."³²

The Board seems to have elevated the maintenance of existing trees to some holier status with regard to aesthetics, but one cannot wonder whether the Board was also implicitly making a judgment about the benefits of trees beyond aesthetics by using such terms as "clear-cutting".

There is no evidence in the record that the existing trees provide any benefit, and any presumption that there is one would be pure speculation that is subject to readily available contrary evidence. For instance, a study by the National Center for

³² The cross-reference to 10 V.S.A. § 6086(a)(8) brings with it the burden of proof standard associated with that criteria. As to aesthetics the burden of proof is on the challengers.

Atmospheric Research published more than 20 years ago showed that expanding forests in colder areas, such as Vermont, could actually increase the temperature of snow-covered regions.³³ Other research shows that trees emit almost the same mass as the human population in the form of the VOC isoprene, the main natural volatile organic compound related to atmospheric pollution.³⁴ A recent comprehensive European study has shown that afforestation in Europe has actually contributed to global warming.³⁵

The words “and greenhouse gas impacts” were added by Act 170, the Vermont Energy Act of 2012, the same Act in which the Legislature expanded the SPEED program to encourage projects such as Chelsea Solar. The addition of those words in the same Act as the Legislature’s enactment of the revised SPEED program provides a clear indication of Legislative intent that the factors to be addressed under Section 248(b)(5) must consider the GHG benefits. Indeed Act 170 is fulfilled with provisions focusing on the importance of reducing GHGs.

Despite the plain language of Section 248(b)(5), the Board only provided lip-service to the GHG factor. In doing so it “entirely failed to consider an important aspect”. Moreover, its minimal explanation “runs counter to the evidence before the agency”. The only evidence is that the clearing could not be viewed from any public lands, except for a potentially trivial impact from the windows of the Bennington Monument. But if a potential trivial impact from the Monument is going to be the

³³ <http://www.nature.com/nature/journal/v359/n6397/abs/359716a0.html>.

³⁴ <http://earthzine.org/2016/02/15/the-trouble-with-trees-volatile-organic-compounds-exacerbate-climate-change-and-air-pollution/>.

³⁵ <http://science.sciencemag.org/content/351/6273/597>.

standard, then all development in view or potential view of those windows should cease.

The standard in Section 248(b)(5) is that the Project will not have an undue adverse effect on aesthetics with due consideration having been given to greenhouse gas impacts. The American Heritage Dictionary defines “undue” as “[e]xceeding what is appropriate or normal; excessive.”³⁶ The Merriam-Webster Dictionary defines “undue” as “more than is reasonable or necessary.”³⁷ The Board has approved many solar facilities, and wind facilities in plain view of public lands and roadways universally determining that the presence of those facilities did not have an undue effect on aesthetics. Here, however, the Board finds not only an adverse effect, but an undue adverse effect, on aesthetics solely because of the clearing, which except for a potential trivial view from the Bennington Monument windows cannot be seen. The Board’s conclusion is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

C. The Board has Created a New Standard-less Criteria.

The Board’s decision regarding clearing of trees has established a criteria without any standard. The Board held that “the clearing of 10.6 acres of existing vegetation runs afoul of [the minimize clearing] provision in the Town Plan and its vision for orderly development.” Order at 53. How is there a standard there? At what point does clearing run “afoul” of the purported standard? Is it at any clearing? 1 acre? 2 acres? Where exactly between zero and 10.6 is the standard? And once that

³⁶ <https://www.ahdictionary.com/word/search.html?q=undue&submit.x=42&submit.y=15>.

³⁷ <http://www.merriam-webster.com/dictionary/undue>.

number is determined on what substantial evidence or basis did the Board divine that number? None of these answers appear in the Board's Order and as a result the Board's Order on that issue lacks substantial evidence and is arbitrary and capricious.

VI. The Board's Order Violates Chelsea Solar's Rights to Equal Protection, Due Process and Property under the United States and Vermont Constitutions.

The Common Benefits Clause of the Vermont Constitution guarantees equal protection of the laws.³⁸ "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 Chelsea Solar's rights to equal protection, due process and property have been violated under both standards.

First, Chelsea Solar has been discriminated against as compared to the Board's treatment of prior applicants for CPGs in the RCON District. *See, Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam) (recognizing a

³⁸ VT. CONST. ch. I, art. 7. This article is entitled "Government for the people; they may change it," and reads in full,

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; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.

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.") *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.")

Second, the minimizing clearing criteria is being used to discriminate against Chelsea Solar's proposed use as compared to the other uses specifically called out as permitted in the Town Plan, such as agriculture (which would allow total clearing), harvesting of timber (which would allow total clearing), major subdivisions and planned unit developments (which would allow predominant clearing), college buildings and cultural buildings (which would allow predominant clearing).

Third, the minimizing clearing criteria is being used to discriminate against Chelsea Solar's proposed use as compared to the other uses specifically called out in the By-laws for the RCON zone, such as the uses called out in the Town Plan (and discussed above) as well as extraction (which would allow total or almost clearing), sawmill (which would allow total or almost total clearing), electric facilities (such the substation in docket 7763, which allowed all the clearing required), golf courses (which would allow total or almost clearing), and a cemetery (which would allow total or almost clearing).

Fourth, there is no prohibition in the State of Vermont on clearing trees (except in wetlands or wetlands buffers) if the acreage cleared is less than 40 acres. The

Board's denial of a permit based upon the exercise of a right that the owner of the land possesses and can exercise freely, most certainly fails any rational basis examination, and certainly a more stringent test under the Vermont Constitution.

Fifth, the Town's recently announced 500kw net-meter solar project to be placed in the Rural Residential district and directly in what the Town considers a scenic gateway, shows quite clearly that the Town's "scenic standards" are not standards at all but merely ad-hoc criteria that can be applied or not applied by the political elite of the Town.

REQUEST TO REOPEN THE RECORD AND FOR A SUPPLEMENTARY HEARING

The evidence discussed herein might lead to a different outcome on the issues of the Project's compliance with Sections 248(b)(1) and (b)(5). As a result the Board should reopen the record to admit the evidence referenced in the attached declarations (to the extent not already judicially noticed), and schedule a supplementary hearing. *In re Petition of Twenty-Four Vermont Utilities*, 159 Vt. 339, 357 (1992). Here the declarations and the RJN establish that reopening the record to admit the evidence requested would lead to a different outcome. Moreover, because the decisive issue was raised after the record closed and the hearings were held, Chelsea has not been fully heard on the findings decided by the Board adverse to Chelsea, and as such a new or continued hearing on those issues should be granted for the same reasons as discussed in Chelsea's Motion to Reopen Discovery.

REQUESTED NEW FINDINGS

Chelsea Solar requests the Board make the following additional findings:

30. The Project will not unduly interfere with the orderly development of the region, with due consideration having been given to the recommendations of the municipal and regional planning commissions, the recommendations of the municipal legislative bodies, and the land conservation measures contained in the plan of any affected municipality. This finding is supported by findings 31 through 34 below.

32. The Project site is zoned and identified in the 2010 Bennington Town Plan as part of the Rural Conservation District. The language describing this district states that while sensitivity to environmental and visual impacts for land use development is important, development is not precluded. Kane pf. at 5; exh CS-MK-3.

104. The Project will not have an adverse effect on aesthetics or on the scenic or natural beauty of the area, nor will the Project have an adverse effect on historic sites or rare and irreplaceable natural areas. This finding is supported by findings 105 through 123, below.

112. The Bennington Town Plan, Bennington Scenic Resource Inventory, and Bennington Regional Plan identify many areas of the community as scenic, but the Project site is not part of those areas. Review of the current town and regional plans reveals no written standards intended to preserve the scenic beauty of the Project site or area. The Project site is not specifically identified as a scenic area or designated for land conservation, and no standards exist which prohibit development of the parcel. Kane pf. at 5.

117. The Project site has the potential to be the most visible from the south at the highway interchange and the Vermont Welcome Center. The SE Group prepared a visual simulation of the currently proposed design as seen from the south. The retention of vegetation along the southern portion of the property effectively screens views of the Project from the Vermont Welcome Center. Kane pf. supp. at 5-6; exh. CS-MK-7. In other words, neither the Project itself nor the clearing related to the Project can be viewed at all from either the south or the Vermont Welcome Center.

117A. The Bennington zoning By-laws have created some criteria applicable to the Project site, and to the extent those criteria would be applicable, the Project satisfies them.

CONCLUSION

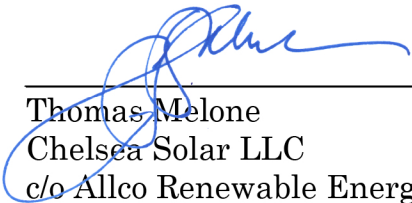
It is the responsibility of the Legislature to make changes to the Section 248 process, not the Board. The Board should resist joining the Town, whose actions have been “arbitrary and irrational action that w[ere] motivated, not by legitimate regulatory concerns, but by political pressure from neighbors and other residents.” *See, Del Monte Dunes at Monterey, Ltd v. City of Monterey*, 920 F.2d 1496, 1508 (9th Cir. 1990). *See also, Southview Assoc., Ltd. v. Bongartz*, 980 F.2d 84 (2d. Cir. 1992). The lack of legitimate regulatory concerns of the Town, and its arbitrary and irrational action motivated by political pressure from neighbors and other residents is forcefully shown in the video of the Town Select Board’s meeting of August 14, 2015.³⁹ That video shows the Town’s ready willingness to rely on false information without even minimal inquiry, just to appease neighbors and other residents. Those actions should not be allowed to infect these proceedings.

For the foregoing reasons, the Board should reconsider and vacate its Order of February 16, 2016, issue a CPG for the Chelsea Solar Project, make new and additional findings as requested and reopen the record to admit whatever documents subject to the RJN that the Board has not noticed for the alternative evidentiary reasons specified in the RJN. If the Board does not issue a CPG for the Project, the Board should still vacate the Order, and schedule a supplementary hearing so that

³⁹ Available at: https://www.youtube.com/watch?v=VBJzl_7XrBc

Chelsea Solar can introduce further evidence described herein and in the declarations, and make new and additional findings as requested.

Respectfully submitted this 21th day of March 2016.



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EXHIBIT B

**IN THE SUPREME COURT
OF THE
STATE OF VERMONT**

Docket No. 2017-195

In Re: Petition of Chelsea Solar LLC, pursuant to 30 V.S.A. § 248, for a Certificate of Public Good authorizing the installation and operation of a 2.0 MW solar electric generation facility to be located at 500 Apple Hill Road in Bennington, Vermont

Appeal From:

Public Service Board
DOCKET NO. 8302

MOTION OF APPELLANT
ALLCO RENEWABLE ENERGY LIMITED
FOR REMAND OF THE CASE
TO THE VERMONT PUBLIC UTILITY COMMISSION

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MOTION FOR REMAND TO THE VERMONT PUC

Appellant Chelsea Solar LLC (“Chelsea”) moves this Court to remand this case to the Public Utility Commission (the “PUC”) for the taking of additional evidence pursuant to 3 V.S.A. §815(b) and pursuant to this Court’s common sense approach to remand in the interests of justice.

This is not the first time this Court has been called on to resolve a dispute involving these two solar projects on land in the Town of Bennington—the Chelsea Solar project (the “Project”) and the Apple Hill Solar project—which were submitted in 2013 in response to Vermont’s standard offer solicitation. Originally the PUC refused to issue an agreement for the Apple Hill project based upon the PUC’s claim that the Chelsea and Apple Hill projects were not separate projects. This Court reversed the PUC’s decision. *See, In re: Programmatic Changes to the Standard-Offer Program*, 2014 VT 29 (2014).

This Court has stated that it would not allow parties to bide their “time for months during complex, lengthy, and expensive proceedings, and then attempt an ambush when those proceedings draw to a close.” *In Re Lakatos*, 2007 VT 114 (2007) at P9 quoting *In Re Burlington Elec. Dep’t*, 141 Vt. 540, 547 (1982). Chelsea was doubly ambushed. First by intervenor Libby Harris and then by the PUC. But now that the Town of Bennington (the “Town”) has agreed that similar revised plans for the Apple Hill solar project (which the PUC has agreed to consider) are consistent with the standards of the Bennington Town Plan (the “Town Plan”), and Chelsea has submitted a rule 60(b) motion to the PUC, the common sense approach is to remand this case to the PUC for the taking of additional evidence.¹ Remand under

¹ The rule 60(b) motion is included in the appendix to this motion. The appendix will be referenced by page numbers beginning with “A.” On September 7, 2017, the undersigned

these circumstances is even more warranted in light of the fact that every day scientists urge immediate action to avoid devastating consequences to the planet from climate change, and Vermont's Climate Change Commission was told last month that Vermont is nowhere near on a path to meet its climate goals.

BACKGROUND

After more than two years, hundreds of thousands of dollars of Project costs, and a lengthy section 248 process, a technical hearing was held by a hearing officer on Chelsea's section 248 application. No party at the hearing (or at any time prior to the hearing) raised the issue of whether putting a commercial ground-mounted utility-scale solar project in the Bennington rural conservation ("RCON") district was contrary to the Town Plan. And there was no reason why they would have raised it. The PUC had already approved commercial utility-scale solar projects in the Bennington RCON district (and indeed has approved such a project *even after* it denied Chelsea a certificate of public good ("CPG")). Moreover, the Town had received and reviewed the plans for the Chelsea Project more than 1 year before the hearing, and made no objection or comment. Further, the Bennington by-laws permit solar as well as various other commercial uses in the RCON zone. In addition, all outstanding issues concerning the Chelsea Project's compliance with the section 248 criteria among Chelsea, the Vermont Agency of Natural Resources ("ANR") and the Vermont Department of Public Service (the "Department") were resolved pursuant to the memorandums of understandings. Chelsea also entered into a memorandum of understanding with the local Apple Hill Homeowner's Association to address many of their concerns. The hearing was held and the hearing officer issued a proposed decision approving the issuance of a CPG for the Chelsea Project.

emailed all Appellees asking for their position on this motion. As of the time this motion was packaged for fedex pickup, no Appellee had responded with its position.

Then, on August 13, 2015, in a hastily called public Select Board meeting (of which the Chelsea received no notice) the Town Select Board voted to oppose the Chelsea and Apple Hill solar projects based upon false visual information provided by the neighbors.² The Select Board followed up that meeting with a letter to the PUC expressing its opposition to the projects. By the time the false information could be corrected, the train had left the station in the fervor of the times of municipal revolt against what was perceived as the PUC's insensitivity to local concerns.

In her October 13, 2015, comments on the Chelsea proposed decision, Libby Harris, a neighbor and intervenor in these proceedings ("Harris") claimed for the first time (copying comments the Town made with respect to the Apple Hill project) that the project violated a clear, written community standard allegedly set forth in the Town Plan—thus allegedly not satisfying the requirements of 30 V.S.A. §248(b)(5). Harris' objections, however, were different than the basis used by the PUC to deny the CPG. Harris claimed that the Project was subject to specific design standards applicable in the RCON zone, which is true, but she never argued that commercial solar facilities were prohibited in the RCON zone. A316-320. Rather, Harris based her aesthetics complaint on her incorrect allegations that the "record [was] devoid of actual [color] photographic simulations, arguing that it was 'impossible to understand the visual impact of the final project based upon the evidence in the record.'" See, A318, Harris October 13, 2015,

² The Select Board was shown a color large-scale visual simulation of the combined Chelsea and Apple Hill solar projects from the vantage point of the Vermont Welcome Center. The shown simulation was devoid of any vegetation, thus the projects were clearly in view. That simulation was prepared during discovery at the request of the Department because the Department had requested a simulation without vegetation to verify the location of the solar panels in the computerized model. The actual color visual simulations of the Chelsea project from the Vermont Welcome Center, which were not shown during the meeting, show that the Chelsea Project could not be seen, a conclusion with which the PUC agreed in the Motions Order. See, A227, Motions Order at 15.

comments at 5. Of course, that was simply not true as color visual simulations were in the record showing the Project was hardly visible, and the testimony of Chelsea's aesthetics expert was also in the record explaining that minimal impact on the view.

On January 6, 2016, the PUC issued an order requesting comments on the Town Plan issue raised by Harris. Chelsea filed comments including an excerpt from the Bennington by-laws governing development in the RCON zone, which by-laws permit solar, but the PUC refused to consider the by-laws and any other evidence sought to be presented by Chelsea in those comments. *See*, A263, Denial Order at 51, fns. 25, 27.

At the time the PUC was considering the hearing officer's recommended decision to issue the CPG, there was a backlash against the PUC for what was perceived in various corners as trampling on municipalities with respect to siting solar projects. This Court has stated that the atmosphere at the time created a "backlash that persuaded the Legislature to amend § 248 to give towns greater control over solar generation facilities." *In re Petition of Rutland Renewable Energy, LLC*, at P10. *See also, id.* at P42 (Robinson, J. concurring) (referring to the situation as a "political maelstrom" noting "frustrated municipalities all around the state that feel 'ignored' and 'steamrolled' by the PUC.")

The Denial Order

On February 16, 2016, the PUC issued the Denial Order rejecting certain of the hearing officer's proposed findings regarding aesthetics and orderly development.³ The basis for the

³ In the Denial Order (A261-274), the PUC adopted all the findings recommended by the hearing officer except for Findings 30 and 32 related to the orderly development of the region criteria under 30 V.S.A. §248(b)(1). The PUC also held that construction of the Chelsea Project would violate a clear, written community standard, applicable to the Project site under the first prong of the second part of the *Quechee* test, and thus held that there would be an undue adverse effect on aesthetics. The PUC did not state which Finding(s) regarding aesthetics in particular the PUC

denial was the issue raised by Harris in her post-proposed decision comments—i.e., that project violated a clear, written community standard and as such would have an undue, adverse impact on aesthetics. But as argued above, the PUC’s basis was much different than Harris’ claims. Harris never made an argument based upon the facts in the record but rather on her incorrect assertion of the absence of testimony, analysis and color visual simulations. The PUC nevertheless rejected the uncontested testimony of Chelsea’s expert that it did consider, ignored the supplemental testimony of Chelsea’s expert (and the actual screening plan), ignored its own prior precedent approving solar and other utility scale projects in the RCON zone, and relied on factors not raised by Harris.

The PUC’s rationale was that the Project violated the following three criteria in the Bennington Town Plan related to development in the Bennington RCON zone, which is where the Project site sits. *First*, the PUC found *sua sponte* that development in the RCON zone was limited to “limited residential development” and thus a commercial ground-mount solar project was prohibited in the RCON zone. *Second*, the PUC found *sua sponte* that the Project violated the Town Plan criterion that prohibits development “in prominently visible locations on hillsides and ridgelines” in the RCON zone. *Third*, the PUC found that the Project violated the Town Plan criteria that “any development must minimize the clearing of natural vegetation.” The PUC, however, did not explain what “minimize clearing” meant, or how the Project violated it. The PUC also *sua sponte* rejected proposed findings 30 and 32 concluding that the Project would unduly interfere with the orderly development of the region and thus not satisfy 30 V.S.A. §248(b)(1) (even though no party ever raised that issue) again based upon the PUC’s legal conclusion of the Town Plan’s provisions relating to development in the RCON zone.

did not adopt, but presumably that it would be at least the second sentence of Finding 112 and the first part of Finding 104.

Contemporaneously with the issuance of the Denial Order the PUC took the highly unusual step of issuing a press release touting its denial of the CPG. The PUC also posted the press release on its web site's home page. The PUC did not issue a revised proposed decision adverse to Chelsea prior to issuing the Denial Order. Nor did the PUC ever claim that a majority of the PUC commissioners read the record of the case prior to issuing the Denial Order.⁴

The neighboring Apple Hill solar project was on a parallel but slightly delayed track in the section 248 process. As of February 2016, the technical hearing had been held and post-hearing submissions made. No proposed decision, however, had yet been issued for the Apple Hill project.

In March 2016, both Chelsea and Apple Hill solar filed several motions with the PUC, and each also filed an amendment to its CPG application. The amendments for each project revised the plans so as to comply with the criticisms (justified or not) of the earlier plans. The net result was a substantially smaller footprint for each project, substantially less clearing (and less clearing than other RCON zone permitted uses), and projects that would be completely screened from the public and the neighbors. The revised projects were specifically designed to have no adverse effect on aesthetics, thus eliminating the reasons (justified or not) for the PUC's denial of the CPG for the Chelsea project.

The Motions Order

On April 14, 2017, the PUC denied Chelsea's motions (the "Motions Order") to re-open the record or reconsider the Denial Order. The PUC also refused to accept the amendment to the Chelsea site plans. The Commission also provided further commentary regarding two criteria in the Town Plan which it believed the Project violated.

⁴ It is undisputed that a majority of the PUC commissioners did not hear the case.

With respect to the primary basis for denial of the CPG—that commercial ground-mounted solar facilities are not permitted in the RCON zone (*a position the Town acknowledged on August 14, 2017, is not credible*), see A157 and discussion *infra*—the PUC discounted the fact that the Town of Bennington had previously supported, and the PUC had approved, commercial ground-mounted solar facilities and other electric facilities in the RCON zone. The PUC also failed to acknowledge the issuance of a CPG to another commercial ground-mounted solar facility in the RCON zone since the issuance of the Denial Order.

With respect to the second Town Plan criteria allegedly violated by the Project—*i.e.*, being sited in a prominently visible location on a hillside or ridgeline—the PUC acknowledged that the Project was not visible from the Vermont Welcome Center. Nevertheless the PUC stated that because the Project would be visible *from somewhere*, it still failed the Town Plan’s criteria prohibiting the siting of structures “in prominently visible locations on hillsides and ridgelines.” To support that conclusion, the PUC quoted Finding 110 of the Denial Order, which referenced Chelsea’s expert, Mark Kane’s initial pre-filed testimony at 4: “‘while the extent of the visibility is not large’ the Project would ‘create an adverse impact with respect to the visual resources of the area. That is, the Project would be visible.’”⁵ The PUC’s reliance on that slim reed is manifestly erroneous for two reasons. *First*, it ignores Kane’s supplemental testimony (as was made clear in Kane’s affirmation dated March 21, 2016, submitted with Chelsea’s motions and amendment). A28, ¶11, A212, ¶12. The language cited by the PUC was from Kane’s original pre-filed testimony (Kane pf.) where he stated that there would be some transient low visibility as cars drove around the Project site in the highway interchange. The PUC, however, simply failed to account for the supplemental testimony and supplemental mitigation plan, the purpose

⁵ See, A289-290, Motions Order at 14-15.

of which was to screen the Project from direct and unfiltered views from the vantage point referenced by Kane in his original pre-filed testimony—i.e., motorists travelling at high speed through the highway interchange. A212, ¶12, A28, ¶11. With the successful implementation of that mitigation Kane stated that the Project would have little impact on the surrounding visual resource. *Id.* He also stated that the Project would not likely be noticeable to motorists travelling around the western edge of the Project site unless one was intentionally looking for the Project. *Id.* The PUC’s use of superseded testimony is clear error and simply reinforces Chelsea’s claim that a majority of the PUC commissioners did not record the record.

Second, the PUC’s reliance on mere “visibility” ignores the language of the Town Plan allegedly violated, which refers to *prominently visible* locations on hillsides or ridgelines, not merely visible locations. As Mark Kane explains, A212, ¶12, A28, ¶11, Finding 110 in which the PUC relied does not account for his supplemental testimony. Had the PUC accounted for that supplemental testimony, as Kane explains, there is “no reasonable basis to conclude that the Project even as originally proposed was sited in a prominently visible location on a hillside or ridgeline as it would be barely visible.” *See*, A28, ¶13.

Although the PUC refused to re-visit its conclusions in the Denial Order or accept the amendment with respect to the Chelsea Project, the Commission took the opposite approach with respect to the Apple Hill project and re-opened the Apple Hill proceeding and agreed to accept the amendment and review the revised site plans. *See*, A201.

The PUC’s based its different treatment of Chelsea (vs Apple Hill) on the notion that the PUC’s January 2016 request for comments on the Town Plan issue was sufficient due process for Chelsea because Chelsea had the opportunity to introduce evidence through its response to that request. But there are two manifest errors with that theory. *First*, Chelsea *did* provide further

evidence in its response such as additional references to the Town Plan, regional plan and the Town's specific land use measures governing the RCON district and how the Project satisfied them. The PUC, however, refused to consider those because they were not previously offered into evidence. *See*, A263, Denial Order, at 51, fn. 25 ("in the Chelsea PFD Comments, Chelsea cites to section 9.2 of the Town Plan at page 100. This part of the Town Plan was not included in the excerpts and therefore as not admitted into evidence.") *See*, A263, *id.*, fn. 27 ("Citing table 3.13 of the Bennington zoning rules attached as 'Exhibit A' to the Chelsea PFD Response, Chelsea argues that certain allowable uses in the Rural Conservation Districts include 'electrical facilities.' Exhibit A is not in evidence because Chelsea failed to offer it into the record; therefore we cannot rely on Exhibit A in making our determination.")

Second, Harris never raised the primary issue relied on by the PUC—*i.e.*, that commercial ground-mounted solar projects were prohibited in the RCON zone. As a result Chelsea had no reason to specifically address such a claim. Further, Harris never argued that the Project was sited in a prominently visible location on a hillside or ridgeline. To be sure Harris talked about aesthetics and viewpoint, but she based her aesthetics argument on her incorrect allegation that the record was devoid of color visual simulations, analysis of aesthetics and a screening plan. *See*, A318, Harris Comments at 5 ("It is impossible to understand the visual impact of the final project based on the evidence in the record.") Harris made those incorrect factual assertions even though she questioned Chelsea's expert at the technical hearing about the exact evidence she claimed in her comments was absent from the record. As a result Chelsea had no reason to address the second basis on which the PUC concluded the Town Plan was violated because it was not raised. An opportunity to submit evidence that is excluded is not an opportunity at all. Nor is it fair or consistent with due process for Chelsea to be presumed to need to address

arguments of which it has no notice.

The Corrections Order

On April 17, 2017, the PUC issued a further order (A311) because it realized that the primary basis in the Motions Order on which it denied much of Chelsea's relief—alleged untimeliness of Chelsea's filings—was simply wrong.

Efforts With the Town Regarding the Revised Plans

For the better part of the past year, Chelsea and Apple Hill Solar have engaged both intervenor Harris and the Town in settlement discussions to address their concerns and produce projects that all would agree would not be visible to the public or the neighbors. Adjustments to the amended plans of both projects were made based upon input from the Town.⁶ The revised final plans and visual simulations were prepared and distributed to the Town, the neighbors and made available to the public. The Town's Select Board held several public meetings on the revised plans, culminating last month in the Select Board voting to withdraw its opposition to the Apple Hill project because in the words of the Town Attorney, the revised plans are "consistent with what I see is the text of the Town Plan." *See*, A174. The Town, however, voted to continue its opposition of the Chelsea Project in this Court because that appeal currently involves the original (not the revised) plans. *See*, A149.

LEGAL STANDARD

Under 3 V.S.A. §815(b), remand to the PUC to take additional evidence is appropriate if (1) "the additional evidence is material" and (2) "there were good reasons for failure to present it

⁶ Harris never seriously engaged in settlement discussions claiming, among other things, that solar was not permitted in the RCON zone even though she was, at the same time, urging that solar be restricted to the sites designated as preferred in the plan approved by the Town's solar siting committee, which designated hundreds of acres in the RCON zone as preferred sites for solar, but none of which were near her property.

in the proceeding before the [PUC].”

Under this Court’s inherent authority to act in the interests of justice, remand is appropriate, among other reasons, if “the [PUC] may have acted on incomplete or inadequate information; or may have failed to give adequate consideration to an alternate route.” *In re Maple Tree Place*, 156 Vt. 494, 499 (1991) (quoting the “common sense approach to remand” contained in *State ex rel. Gunstone v. Washington State Highway Comm’n*, 72 Wash. 2d 673, 674-75, 434 P.2d 734, 735 (1967)).

ARGUMENT

I. The Common Sense Approach Is To Remand This Case For the Taking Of Additional Evidence.

This Court takes a “common sense approach to remand.” *In re Maple Tree Place*, 156 Vt. 494, 499 (1991). Remand is appropriate if “the [agency] may have acted on incomplete or inadequate information; or may have failed to give adequate consideration to an alternate route.” *Id.* (internal citations and quotations omitted). Remand to the agency for further consideration is “not a determination that the [agency] is wrong,” but rather “an indication that the disinterested court, which has reviewed the record, is not satisfied on the basis of that record that the [agency] is right.” *Id.* (internal citations and quotations omitted). Remand is appropriate even if “no grounds for reversal [are] found.” *Id.*

An early remand is particularly appropriate here for several reasons.

A. Economy Of Judicial And Agency Resources Favor Remand.

It would be inefficient use of judicial and agency resources to fight over a site plan that Chelsea has already agreed it would revise so as to comply with the criticisms (justified or not) of the earlier plan. Chelsea has filed a rule 60(b) motion with the PUC submitting the revised plans and asking the PUC to provide relief from its Denial Order. *See*, A1 *et seq.* Both the

Chelsea and Apple Hill projects have been significantly reduced in size through a combination of using higher wattage black-faced solar modules (which were not available when the original section 248 petition was filed), reducing row-to-row spacing, and decreasing the tilt angle of the modules. With additional adjustments to the plan at the Town's suggestion, the net result is that both projects would be completely screened from view from the public and the neighbors. Expert testimony on the revised site plans states that there is no adverse effect on aesthetics because the projects cannot be seen. *See*, A46-47, ¶¶58-59.

The PUC has already agreed to re-open the Apple Hill section 248 proceedings, *see* A201, and review the revised site plans for that project. After months of public comments, on August 14, 2017, the Bennington Select Board voted 5-1 to discontinue its opposition to the Apple Hill Solar project in PUC docket 8454 because the revised plans meet the requirements of the Bennington Town Plan. At the Select Board's public hearing, the Town of Bennington's counsel, Rob Woolmington, stated: "I never read the Town Plan as prohibiting all alternative energy everywhere in the [rural conservation] district. I think what they've done is consistent with what I see is the text of the Town Plan." *See*, A174.

The Select Board, however, voted to continue its opposition to Chelsea in this proceeding because the original plans are at issue, not the revised plans. A149. But there is no reason for the parties to continue litigating the original plans in this Court when Chelsea is willing to move forward with the revised plans submitted to the PUC in the rule 60(b) motion. Moreover, when the PUC issued the Denial Order in February 2016, it did not have the benefit of any input from the Town in the Chelsea proceeding. Now it does. That input is directly contrary to the PUC's blanket legal conclusion that the Town Plan bars commercial solar projects. On that particular

issue the following statement from the Town’s attorney at the August 14 public hearing is especially relevant:

the Town Plan I do not think can credibly be construed to bar alternative energy projects in the rural [conservation] district because of the preceden[ts], because of the language of the plan, because of the way the zoning by-laws allow specific uses in that area and because of the planning that’s been underway for the future that includes a number of properties in that area for solar energy.

See, A157.⁷

Thus a common sense approach to the current dispute is to remand the case to the PUC for further consideration of the revised plans. Remand makes even more sense in the current environment. The Governor’s Climate Action Commission was told last month that “Vermont is ‘nowhere near’ meeting goals set in law and policy to stem the state’s contribution to global climate change.”⁸ Further, everyday scientists urge immediate action to combat climate change.

B. The PUC Failed To Give Adequate Consideration To An Alternate Plan.

In *In re Jolley Assocs. (Town of Shelburne)*, 2006 VT 132, P13, this Court stated that “[r]emand is appropriate to return the matter [] for further consideration if the proposed use or site plan, or both, were [] subject to a different approach,” citing *Maple Tree Place*. (emphasis added.) That is precisely the case here as the revised site plans fully eliminate the bases for the

⁷ The PUC’s conclusion was also contradicted by the PUC’s approval of commercial solar projects in the Bennington RCON district both before and after the Denial Order. *See, e.g.*, CPG (#NMP-6523), October 15, 2015, Kobelia Bennington GLC Solar LLC, approving a solar project before the Denial Order; *see*, Exhibit B to Chelsea’s Motion for Mediation filed January 20, 2017, for the order approving one afterwards—Order approving CPG for ER Paper Mill Village Solar, LLC, November 17, 2016 .

⁸ *Vermont ‘nowhere near’ climate change goals, panel hears*, VT Digger, August 16, 2017, available at <https://vtdigger.org/2017/08/16/vermont-nowhere-near-climate-change-goals-panel-hears/>. (“‘We’re nowhere near achieving the type of (greenhouse gas) reductions we need to reach our goals,’ said Jeff Merrell, the Department of Environmental Conservation’s air quality planning section chief and a speaker at the task force meeting.”)

denial of the CPG. The PUC refused to give any consideration to the alternate plan proposed by Chelsea. The PUC's rationale was that because Chelsea proposed the alternate plan after the evidentiary record closed, it would not consider it.⁹ However, it is unclear when the PUC officially closed the record, if at all.

In the Motions Order, the PUC also suggested that Chelsea had an opportunity to completely revise the Project once the PUC issued its request for comments on Harris' claim that the project would violate the Town Plan. But it was not reasonable for Chelsea to have anticipated from the PUC's request for comments that the PUC (i) would ignore the two years of effort designing a project that was reviewed by experts including those of the Department, (ii) would ignore expert testimony and visual analysis in the record, (iii) would act contrary to its actions approving other projects approved in the RCON zone, (iv) would ignore the supplemental testimony of Chelsea's aesthetics expert, and (iv) would not adopt the hearing officer's conclusions on bases never raised by any party, and would do so all without proposing another decision or scheduling further evidentiary hearings.

⁹ The PUC's rationale, however, is less than clear. At one point the PUC states that "Chelsea's Motion to Amend the Petition is untimely under Rule 59(e) because it was offered after the [Denial] Order." A297, Motions Order at 22. Then the PUC stated: "Because the amendment was proposed after the evidentiary record closed, it is not appropriate to address the substance of this Motion to Amend the Petition as part of our reconsideration of the [Denial] Order. The Motion to Amend the Petition is therefore untimely." *Id.* Although it is not clear when, if at all, the record closed, the PUC's refusal to accept the amendment directly contradicts the plain language of PUC Rule 2.204(G). The PUC treated the amendment as a motion to amend, but unlike VRCP 15, Rule 2.204(G) does not require consent or a motion for an amendment. Rather Rule 2.204(G) is self-executing and expressly permits amendments "at any time," and the only basis on which the Rule disallows an amendment is if the PUC affirmatively finds that the amendment has "the effect of unreasonably delaying any proceeding" or that it would "unreasonably adversely affect[] the rights of any party." No such findings were made by the PUC. No party objected to the amendment within the ten-day period stated in rule 2.204(G).

C. The PUC Acted On Incomplete Information.

Prior to the issuance of the Denial Order, the PUC realized that it was going to issue the Denial Order based upon incomplete information. The PUC realized from Chelsea's submission in January 2016 on the Town Plan issue that the PUC did not have the complete Town Plan or complete regional plan. The PUC also realized from the Bennington by-laws submitted at that time that it did not have the full picture of the intention of the Town Plan because the by-laws provided the guidelines as to the Town Plan's development criteria in the RCON zone. In addition, as the PUC conceded in the Motions Order, it did not have a real grasp on the facts and fudged calculations in order to reconcile certain facts in the proposed decision with its own analysis. A287, fn. 26.

Crucially, in the Motions Order the PUC admitted that it was basing its decision on superseded testimony. The PUC's rationale for disagreeing with the hearing officer's proposed findings regarding aesthetics and orderly development rested on the Project allegedly violating three criteria in the Bennington Town Plan related to development in the Bennington RCON zone, which is where the Project site sits. *First*, the PUC found that development in the RCON zone was limited to "limited residential development" and thus a commercial ground-mount solar project such as the Project was prohibited in the RCON zone. *Second*, the PUC found that the Project violated the Town Plan criterion that prohibits development "in prominently visible locations on hillsides and ridgelines" in the RCON zone. *Third*, the PUC found that the Project violated the Town Plan criteria that "any development must minimize the clearing of natural vegetation."

The first basis has been discredited by the Town. As stated above, the Town Attorney has publicly stated that the PUC's finding that commercial grounded-mounted solar is not

permitted in the RCON zone under the Town Plan *is simply not credible*. See, A157. As to the second basis, as argued above, the PUC (i) ignored the supplemental testimony of Mark Kane, which superseded what was relied on by the PUC, (ii) ignored the plain language of the Town Plan by equating mere alleged “visibility” with being in a “prominently visible location[] on [a] hillside[],” A290, and (iii) ignored the evidence that Chelsea did submit in connection with its January 2016 comments. Had the Commission accounted for the supplemental testimony and actual evidence, as Kane explains, there is “no reasonable basis to conclude that the Project even as originally proposed was sited in a prominently visible location on a hillside or ridgeline as it would be barely visible.” See, A28, ¶13. The PUC’s second basis is simply not credible either.

The end result is that the PUC’s disagreement with the hearing officer’s proposed findings relies solely on the vagaries of a statement that development in the RCON zone must “minimize clearing”. Even the PUC has failed to explain what type of standard that really is, how it could possibly be a clear and unambiguous standard, how it applies to the Project, and how the Project allegedly fails it.¹⁰

Whether any of that information would be decisive is for the PUC to determine in the first instance. Accordingly, remand is appropriate on that basis as well.

¹⁰ The Chelsea site’s usefulness for solar was emphasized in a recent email by Bennington Select Board Vice Chair, Don Campbell, to Libby Harris, a copy of which was provided by Harris:

“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.”

See A186.

D. Remand Is Required To Avoid Unconstitutional Selective Enforcement.

To make matters worse, in the Motions Order the PUC admitted to selective enforcement of its view of the allegedly violated provisions of the Bennington Town Plan. The PUC's explanation for its different treatment of Chelsea as compared to other solar projects it approved in the Bennington RCON zone before its denial of the CPG for Chelsea, was that no one complained.¹¹ As this Court acknowledged in *In re G.T.*, 170 Vt. 507 (2000), such an explanation is the paradigm of unconstitutional discrimination and selective enforcement. See, *id.* at 514 citing *People v. Acme Markets, Inc.*, 37 N.Y.2d 326, 334 N.E.2d 555, 558, 372 N.Y.S.2d 590 (N.Y. 1975) (discriminatory enforcement found where Sunday sales law was unenforced, save upon complaint). The parallel between the *Acme Markets* case and this case is striking. In *Acme Markets* the Sunday sales law was enforced only upon complaint, which turned it into a tool for private purposes. Here, both before and after it denied Chelsea a CPG, the PUC issued CPGs for solar projects in the RCON zone, a result directly at odds with the basis for its denial here that putting solar facilities in the RCON zone violates the Town Plan.

II. Remand Is Appropriate Under 3 V.S.A. §815(b).

Remand to the PUC to take additional evidence is appropriate if (1) “the additional evidence is material” and (2) “there were good reasons for failure to present it in the proceeding before the [PUC].”

¹¹ In the Motions Order, the PUC only mentioned its decisions rendered prior to the Denial Order. See A294, Motion Order at 19, fn. 48. The PUC did not address the fact that even after it issued its well-publicized Denial Order, and Chelsea filed its various post-order motions, the PUC continued to issue CPGs to commercial utility scale solar projects in the RCON zone. This was pointed out to the PUC in Chelsea's motion for mediation filed on January 20, 2017. In that motion Chelsea attached the PUC's order dated November 17, 2016, issuing a CPG for a commercial utility-scale solar facility in the RCON district.

A. The Additional Evidence Is Material.

Chelsea meets the two-prong test for remand under 3 V.S.A. §815(b). The evidence Chelsea wishes the PUC to consider is certainly material, as it eliminates the bases for the PUC's denial. The evidence Chelsea wishes to present and have the PUC consider is contained in its rule 60(b) motion (A1 *et seq.*) and includes:

1. The revised plan for the Project (and the affirmations related thereto) which eliminates all potentially adverse effects to aesthetics, thus eliminating the bases under 248(b)(1) and 248(b)(5) (whether correct or not) for the denial of the CPG;
2. The Town's position with respect to compliance with the Town Plan of the revised Apple Hill plans, which in all material respects are the same as the Chelsea proposed plan;
3. The publicly stated legal position of the Town discrediting the primary basis for the PUC's denial of the CPG, all of which are equally applicable to the Chelsea project;
4. The PUC's approval (subsequent to the Denial Order) of a utility scale solar project in the RCON zone;
5. The full Town Plan and Regional Plan which set forth a multitude of goals that support the project; and
6. Chelsea's expert's supplemental testimony, which the PUC has admitted it failed to consider, and the affirmations explaining to the PUC the consequences of its failure.

B. There Were Good Reasons For Failure To Present The Additional Evidence.

This Court has stated that it is good policy for applicants to resolve differences by amending projects to respond to issues raised by interested participants. *See, In Re Chaves A250 Permit*, 2014 VT 5 (2014) at P16. ("Applicants are encouraged to resolve differences with

interested parties by amending a project to respond to issue.”) This Court has also stated that it would not allow parties to bide their “time for months during complex, lengthy, and expensive proceedings, and then attempt an ambush when those proceedings draw to a close.” *In Re Lakatos*, 2007 VT 114 (2007) at P9 quoting *In Re Burlington Elec. Dep’t*, 141 Vt. 540, 547 (1982).

This case involved a lengthy section 248 process, including a technical hearing, and the issuance of a proposed favorable decision by the hearing officer during which no party at the hearing (or at any time prior to the hearing) raised the issue of whether putting a commercial ground-mounted utility-scale solar project in the Bennington RCON zone was contrary to the Town Plan. It would not be reasonable to conclude that Chelsea should have been aware that the PUC was considering ruling against it, particularly on issues never raised by any party, and that Chelsea’s last chance to amend its CPG application to address the perceived shortcomings (especially those raised *sua sponte* by the PUC) would slip away within a few weeks. That is particularly so given the PUC’s prior approvals for CPGs in the RCON zone, and as argued above, the fact that the Harris comments did not raise the primary two bases ultimately relied on by the PUC. There is certainly good reasons for not presenting evidence to rebut a claim when the claim was never made.

Had the PUC issued a revised proposed decision adverse to Chelsea, or at the very least provided some clear notice to Chelsea as to its intentions, then an amendment with the revised plans would have been filed earlier, and the additional evidence that it wishes to present would have been presented earlier.

III. Remand Is Appropriate Because The PUC Failed To Afford Chelsea Its Procedural Rights Under 3 V.S.A. §811.

A remand is required because the record does not show a majority of the PUC commissioners heard the case or read the record. Under the plain language of 3 VSA §811, a majority of the PUC commissioners must have either heard the case or read the record, if it issues a final decision without first issuing an adverse proposed decision. No commissioner heard the case, as the case was heard by a hearing officer. And despite multiple requests, the PUC has refused to state whether a majority of the commissioners “read the record.” Instead the PUC has taken the position that the due process rights guaranteed under 3 VSA §811 simply do not apply to the PUC. A285. Such a position is plainly contradicted by the language of the statute. It is also contrary to this Court’s holding that the Public Utility Commission is only freed from the due process requirements of 3 VSA §811 if a majority of the commissioners either hear the case or read the record. *See, Vermont Elec. Power Co., Inc. v. Bandell*, 135 Vt. 141, 147 (1977) (section 3 VSA §811 does not apply if “the Board does read the record or hear the case, or both.”)

To make matters worse, the PUC’s failure to observe the procedural safeguards of 3 VSA §811, led directly to the PUC concluding that it had the ability to dismiss the amendment Chelsea filed in which Chelsea proposed revised site plans, as compared to the Apple Hill case where it has realized the amended plans should be reviewed. Thus the PUC refused to give Chelsea the opportunity to present an alternate configuration to address the two issues raised by the PUC in the Denial Order—compliance with orderly development of the region (§248(b)(1)) and aesthetics (§248(b)(5)), both of which were never raised as an issue by any party prior to the issuance of the hearing officer’s proposed decision approving the CPG for the project, and in the

case of §248(b)(1) was an issue never raised by any party (including the PUC) prior to the PUC's decision.

Under 30 V.S.A. § 8, the chairman of the PUC may appoint a hearing officer to inquire into and examine any matter within the jurisdiction of the PUC. That was done in this proceeding. 3 V.S.A. § 811 states that, "[w]hen in a contested case a majority of the officials of the agency who are to render the final decision have not heard the case or read the record, the decision, if adverse to a party to the proceeding [] shall not be made until a proposal for decision is served upon the parties, and an opportunity is afforded to *each party adversely affected* to file exceptions and present briefs and oral argument to the officials who are to render the decision." (emphasis added.)

The PUC held that only the hearing officer was bound by 3 VSA §811 and that the PUC is not. A285. There is no question that the hearing officer issued a proposed decision, but that decision was not adverse to Chelsea. It is also true that under 3 VSA §811, the PUC is permitted to adopt all, part or none of the hearing officer's decision and issue its own decision. But the PUC's ability to issue its own decision that is adverse to Chelsea is constrained by 3 VSA §811, constraints which the PUC ignored.

There is no dispute that this case is a contested case, and that a majority of the officials of the PUC who rendered the final decision did not hear the case. In such a circumstance, under 3 VSA §811, the PUC can only be freed of the requirement to issue its own proposed decision adverse to Chelsea if a majority of the PUC commissioners "read the record." The "record," i.e., what must be read, is clearly defined in 3 VSA §809(e), which defines the "record" as including "(1) all pleadings, motions, intermediate rulings; (2) all evidence received or considered; (3) a

statement of matters officially noticed; (4) questions and offers of proof, objections, and rulings thereon; (5) proposed findings and exceptions; and (6) any decision, opinion, or report.”

In its motion to vacate the Denial Order for failure to comply with the requirements of 3 VSA §811, Chelsea pointed out that the PUC had not stated that a majority of the PUC commissioners “read the record.” In response the Department pointed out that there is no requirement in section 811 that the PUC state whether, or which, commissioners “read the record.” While true, that misses the point. This Court cannot adequately review whether section 811 has been complied with without such a statement. In its reply to the Department, Chelsea asked that the PUC simply state which PUC commissioners “read the record.” As stated in that reply, there was no reason to debate the issue of whether a majority of the PUC commissioners read the record because the PUC commissioners can simply clarify the issue by declaration or a statement.

Tellingly, in its Motions Order, the PUC refused to answer the question of whether a majority of the PUC commissioners read the record. Instead the PUC ignored the plain language of section 811 stating: “nothing in Section 811 requires the PUC to circulate a draft of its final decision.” A285, Motions Order at 10. The PUC’s avoidance of the question creates the inference that it cannot give the response required by section 811. The PUC’s conclusion also ignores the plain language of section 811. The PUC has denied Chelsea, as a party adversely affected by the decision, the right to “file exceptions and present briefs and oral argument to the officials who are to render the decision.” Making matters worse, the PUC dismissed the amendment to the site plan only because it had issued an order denying the CPG.

The procedural protections in section 811 are substantial rights which must be “scrupulously observed and impartially administered.” *See, In re State Aid Highway No. 1*, 133

VT 4, 11 (1974) (discussing 3 V.S.A. § 811: “Environmental laws affect very substantial rights, and it is vital that the procedures under which they are enforced be scrupulously observed and impartially administered. Any failure in this respect can quickly rise to constitutional dimensions.”)

The PUC has essentially conceded it did not follow the requirements of section 811 because it held that “section only requires that a hearing officer’s proposal for decision be circulated. Nowhere in that section does it require that the PUC, as the decision maker, circulate a draft of its determination.” A284, Motions Order at 9. This Court should remand the case to the PUC ordering the PUC to clarify whether a majority of the PUC commissioners “read the record.” If the PUC cannot affirmatively state that a majority of the PUC commissioners read the record, as such term is comprehensively defined by 3 VSA §809(e), then the PUC should be required to vacate the Denial Order and issue a revised proposed decision or consider the revised plans. Anything less would require this Court to engage in speculation as to whether a majority of the PUC commissioners “read the record.”

CONCLUSION

For the above reasons, this Court should vacate the Denial Order and remand this case to the PUC.

Dated: September 9, 2017



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EXHIBIT C

STATE OF VERMONT
BEFORE
THE PUBLIC SERVICE BOARD

Petition of Chelsea Solar LLC for a	]	
certificate of public good, pursuant to	]	
30 V.S.A. § 248, authorizing the	]	
installation and operation of the	]	Docket No. 8302
Chelsea Solar Project” consisting of a	]	
2.0 MW solar electric generation facility	]	
to be located at 500 Apple Hill Road in	]	
Bennington, VT	]	

TOWN OF BENNINGTON’S OPPOSITION TO PETITIONER’S MOTION TO ALTER AND AMEND
UNDER RULE 59(E), TO REOPEN THE RECORD AND FOR A SUPPLEMENTARY HEARING
UNDER RULE 59(A) AND FOR NEW FINDINGS UNDER RULE 52.

The Town of Bennington (Town), by and through its attorneys, Witten,
Woolmington, Campbell & Bernal, P.C., files this memorandum in Opposition to Petitioner
Chelsea Solar, LLC’s (Chelsea) Motion to Reconsider the Board’s Order of February 16,
2016 (Order).

SUMMARY

In its Motion, Chelsea seeks (1) reconsideration of the Board’s February 16, 2016
Order pursuant to V.R.C.P. 59(e); (2) to reopen the record to admit certain materials for the
Board’s consideration; (3) a supplementary hearing on the issue of the application of the
Bennington Town Plan to the Chelsea Solar Project in the context of § 248 review pursuant
to V.R.C.P. 59(a); and (4) new findings pursuant to V.R.C.P. 52.

Chelsea’s repetitive and confused filing (a) misconstrues the provisions of the
Bennington Town Plan and the evidence in the record; (b) ignores statutory pre-emption of
zoning regulation of energy projects; (c) wrongly describes the legal and factual applicability
of prior Board proceedings; (d) seeks to re-litigate matters on which it failed to carry its

burden of proof; and (e) misstates the procedural history in an attempt to re-litigate issues on which it previously had full opportunity to present argument and evidence.

The Motion should be denied.

I. Prior Proceedings.

On June 19, 2014, Chelsea filed its petition for a certificate of public good (CPG) under 30 V.S.A. § 248 (Section 248) to install and operate a 2.0 MW solar electrical generation facility at 500 Apple Hill Road in Bennington, Vermont (the Project).¹ A technical hearing was held on July 16, 2015, after which the parties filed post-hearing briefs.

On October 2, 2015, the Hearing Officer's Proposal for Decision (PFD) was issued, and on October 13, 2015, the Town of Bennington filed public comments requesting the Board to find that the project was not in the public good based on environmental, safety, visual, and aesthetic detriment to the natural and historical surroundings. On the same date, Libby Harris² requested the Board to conduct a site visit, which the Board did on November 13, 2015.

Both Ms. Harris and Chelsea filed responses to the PFD. Because Ms. Harris's response raised for the first time the application of specific language in the Bennington Town Plan to the Project, the Board issued an order permitting the parties the opportunity to comment on that issue. Chelsea filed comments in response to that order on January 15, 2016, to which the Vermont Agency of Natural Resources responded on January 22, 2016

¹ The Town was granted the right to intervene in this matter pursuant to Board Rule 2.209(A), by order dated March 23, 2016.

² Libby Harris had been granted permissive intervenor status by order of April 16, 2015.

in order to criticize Chelsea's description of how the Board reviews impacts under § 248(b)(5).

On February 16, 2016, the Board issued an order denying Chelsea's Petition.

II. Legal Standard

A. Motion for Reconsideration and to Alter and Amend Pursuant to V.R.C.P. 59(e)

V.R.C.P. 59(e) "codifies the trial court's inherent power to 'open and correct, modify or vacate its judgments,'" so as to "avoid an unjust result arising from 'the mistake or inadvertence of the court and not the fault of the parties.'" *Application of Emerson Falls Hydro, Inc.*, 2016 WL 1048972, CPG #NMP-6757, *2 (Mar. 4, 2016) (quoting *Osborne v. Osborne*, 147 Vt. 432, 433 (1986)). The decision to modify an order or judgment is entirely within the discretion of the Board and "should be used with great caution." *Haven v. Ward's Estate*, 118 Vt. 499, 502 (1955). V.R.C.P. 59(e) "is *not* intended to permit parties to simply relitigate issues or revise their tactical approach or to allow parties to advance arguments that could and should have been presented prior to the decision." *Application of Emerson Falls Hydro, Inc.*, 2016 WL 1048972, at *2 (emphasis added); *see also In re SP Land Co., LLC*, 190 Vt. 418, 435 (2011) ("[Rule 59(e)] does not provide a vehicle for a party to undo its own procedural failures, and it certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the court prior to the judgment.")(internal citations omitted).

B. Motion to Reopen the Record and Take Additional Testimony Pursuant to V.R.C.P. 59(a)

As with a Motion to Amend or Alter pursuant to V.R.C.P. 59(e), a motion to reopen pursuant to V.R.C.P. 59(a) is left to the Board's discretion to determine whether new evidence is available that might lead to a different outcome on the issue involved. *Petition of Twenty-Four Vermont Utilities*, 159 Vt. 339, 357–58 (1992). It is also within the Board's discretion whether to take additional testimony pursuant to V.R.C.P. 59(a).

C. Motion to Amend or Make Additional Findings Pursuant to V.R.C.P. 52(b)

Pursuant to V.R.C.P. 52, the Board may, upon motion of a party, amend its findings or make additional findings, and amend its Order.

III. The Board's findings and conclusions are supported by the record, and properly apply applicable law.

In its 73-page motion, Chelsea asserts the same arguments over and over, with different legal labels pasted to the same claim in different sections of the filing.

Chelsea's arguments are essentially these:

1. The Board erred in its interpretation of and reliance on the Bennington Town Plan.
2. The Board should have considered Bennington's zoning bylaws.
3. The Board was bound by its prior actions in other cases.
4. The Board's findings are not supported by the record.
5. The Board's procedure was unfair to Chelsea, and the Board should either revise its findings consistently with the hearing officer's recommendations, or

allow Chelsea to recommence discovery and re-litigate all issues decided against Chelsea.

This memorandum addresses Chelsea's arguments in that order.

The Board appropriately interpreted and applied the Bennington Town Plan.

The Board found that the Project violated three of four specific provisions of the Town Plan governing development in the Rural Conservation District:

(1) only limited residential development is permitted, (2) no development may be sited in prominently visible locations on hillsides or ridgelines, (3) any development must utilize earth-tone colors and non-reflective materials on exterior surfaces of all structures, and (4) any development must minimize the clearing of natural vegetation. Order at 56.

In reaching its conclusion, the Board found that "that the Town Plan language is specific in nature, is specifically applicable to the Project site, and seeks to conserve scenic resources by identifying specific actionable requirements and thus constitutes a clear, written community standard." Order at 58.

Chelsea's principally argues that Bennington Town Plan does not meet the standards of specificity required by *In re Kiesel*, 172 VT 124 (2000), *In re Chaves Act 250 Permit Reconsider*, 2014 VT 5, 195 Vt. 467 and *In re John A. Russell Corp.*, 2003 VT 93, ¶ 16, 176 Vt. 520 (mem.).

None of these cases addressed the role of municipal plans under the statutes applicable in this proceeding. 30 V.S.A. § 248(b)(1) requires "due consideration" of "land conservation measures contained in the plan of any affected municipality," and 30 V.S.A. § 248(b)(5) requires "due consideration" of aesthetics. The cases cited by Chelsea involved the application of municipal plans in Act 250, principally under Criterion 10,

which requires that developments must “conform” to the requirements of municipal plans. 10 V.S.A. § 6086(a)(10).

Proceedings before this Board under Section 248 and before a District Commission under Act 250 are substantially different.

When the Board evaluates a petition for a CPG under 30 V.S.A. § 248, it is engaging in a legislative, policy-making process. In so doing, it must exercise its discretion to weigh alternatives presented to it, utilizing its particular expertise and informed judgment. Thus, [the Supreme Court] give[s] great deference to the Board's expertise and judgment, and accord a strong presumption of validity to the Board's orders. *In re UPC Vermont Wind, LLC*, 2009 VT 19, ¶ 2, 185 Vt. 296.

Act 250 permit proceeds are *not* legislative, policy-making processes. They are adjudicatory proceedings in which findings of conformance must be made. This is quite distinct from consideration of a municipal plan when making the more discretionary, policy-making determination as to whether a particular project would be good for the public.

Chelsea's argues, in effect, that unless the Town Plan has the specificity of a zoning ordinance or regulatory code, it may not be considered by the Board. In *In Petition of Rutland Renewable Energy, LLC*, 2015 WL 1227471 (Vt.P.S.B. 2015), this Board implicitly rejected that argument by finding that sections of the Rutland Town Plan were unenforceable in Section 248 proceedings precisely because they were *too specific*. The Board held that certain Town Plan provisions were so specific that they “would effectively act as a zoning bylaw, and their application in this proceeding would circumvent the statutory exemption from zoning found in 24 V.S.A. § 4413(b).” *Id* at 50.

The Act 250 cases certainly provide cautionary guidance about the need for clarity and consistency, but they do not set absolute standards as to how the Public Service Board must *consider* municipal plans in evaluating whether permitting of a particular project would be good for the public.

Nonetheless, the Bennington Town Plan is sufficiently specific to meet the standards for application in Act 250. As the Board found in its Order, the Town Plan prescribed very specific standards for any new development in Rural Conservation Districts:

Specific design standards **shall** apply to new development in the Rural Conservation Districts in recognition of the existence of a concentration of agricultural and forest lands and to protect the extraordinary scenic resources such lands and uses provide. Any use in the Rural Conservation District, including single family dwellings, **shall** require approval under those regulatory guidelines. Development in this area **cannot** be sited in prominently visible locations on hillsides or ridgelines, shall utilize earth tone colors and non-reflective materials on exterior surfaces of all structures, and **must** minimize clearing of natural vegetation (emphasis supplied). Town Plan at 26.

Chelsea asserts that these provisions are too vague to be considered by the Board. Even if there were ambiguity about whether these standards would apply to some projects or some sites, this project and this site plainly fall within the scope of the language. Almost the entire site would be clear cut, the materials are not all earth tones, and the location is plainly visible from Route 7, the Battle Monument and Route 279. See further discussion *infra* at 12–13.

The Town Plan also states that “agriculture, forestry, very low density single-family residential development, and certain limited uses that are suitable in rural areas are permitted.” Town Plan at 28. Again, even if there were ambiguity about whether

these standards would apply to some projects or some sites, this project plainly does not satisfy the standard because virtually the entire site is devoted to the proposed use.³ There is nothing limited about it. A forest would be largely destroyed by a production plant for electricity.

Chelsea offered little evidence or argument in connection with 30 V.S.A. § 248(b)(1) (orderly development) even though it bore the burden of proof. *See, e.g., Petition of Green Mountain Power Corporation for a Certificate of Public Good*, 2010 WL 2810933, *8 (May 13, 2010). In pre-filed testimony Mr. Kane simply stated that he believed “development is not precluded” in Rural Conservation Districts identified in Bennington’s Town Plan, and that “this location and form of development seem to support the regional objectives.” Pre-filed Testimony dated 6/17/2014 at 5-6. In its response to the hearing officer’s proposed findings, at page 3, Chelsea merely argued that no other party submitted other evidence to contradict the opinion of Mr. Kane.

The Board in its order, however, chose not to accept Mr. Kane’s opinion, but rather to rely on the language in the Town Plan. So the Board did not simply “reject the evidence in the record that development was not precluded at the Project site” as Chelsea asserts (Petitioner’s Brief, at 23); rather, the Board relied on *other* evidence in the record—namely, excerpts of the Town Plan submitted by Chelsea—to reach the conclusion that only limited residential development is permitted in the Rural Conservation Districts, with limited exceptions. Order, at 50–54. The heart of Chelsea’s gripe is that the Board reached a conclusion contrary to the testimony filed by Chelsea’s

³ Supplemental Aesthetic Assessment Report, Exh. CS-MK-7, at 3 (“the project requires clearing most of the site.”)

own expert. The Board is under no obligation to exercise its discretion pursuant to Rules 52 or 59 to revisit its findings and determination with respect to proposed findings 30 and 32.

Chelsea also argues that the Board erred by giving weight to the land conservation considerations of the Town Plan over statements in the regional and municipal plans that generally endorsed solar energy production. (Petitioner's Brief, at 47–49, 56). This argument simply ignores the language of 30 V.S.A. § 248(b)(1), which directs consideration of the “*land conservation measures* contained in the plan of any affected municipality.” That is precisely what the Board did.

With respect to Chelsea's arguments that the project does, in fact, conform to the Town Plan (Petitioner's Brief, at 38–41), and the balance of Chelsea's arguments relating to § 248(b)(1), Chelsea clearly seeks to litigate issues that have already been considered in this proceeding, and were specifically addressed in the Chelsea response to the PFD. Permitting Chelsea to revisit these arguments would not be an appropriate application of Rule 59 or 52.

The Bennington zoning bylaws are irrelevant to this proceeding.

Chelsea argues that the Board erred by failing to consider the Bennington zoning bylaws in assessing whether the project would unduly interfere with the orderly development of the region. (Petitioner's Brief at 38, 43–46).

Projects subject to the Board's jurisdiction under Section 248 are exempt from regulation by municipal zoning bylaws. 24 V.S.A. § 4413(b). Accordingly, zoning bylaws do not reference or address the siting of energy generation facilities.

The Board has repeatedly held that zoning bylaws are not community standards that can be considered in Section 248 proceedings. *See, e.g., Petition of North Springfield Sustainable Energy Project*, Docket No. 7833 (Feb. 12., 2014)(“zoning bylaws are not an appropriate source of clear written community standards”)(denying CPG based on consideration of the town plan’s provisions relating to truck traffic).

The Board is not bound by prior actions in other cases.

Chelsea’s argument that its Equal Protection Rights were violated and that the Board should be “collaterally and equitably estopped” from addressing the Rural Conservation District are based on Chelsea’s claim that the Board previously issued other CPGs for non-residential projects in Bennington’s Rural Conservation District. (Petitioner’s Brief, at 25–28).

In making this argument, Chelsea fails to conjure up even one legal precedent. The judicial principle of collateral estoppel may be applicable in administrative proceedings in the limited circumstances when there is identity of parties and issues have been fully litigated. *See, e.g., In re Stormwater NPDES Petition*, 2006 VT 91, ¶ 5 (2006) (“The doctrine of collateral estoppel, or issue preclusion, bars relitigation of an issue actually litigated by the parties in a prior case.”); *Berlin Convalescent Center, Inc. v. Stoneman*, 159 Vt. 53, 60(1992) (party may be precluded from re-litigating an issue in a prior case when the party fully and fairly litigated the issue). Equitable estoppel works to prevent a party “from asserting rights which may have existed against another party who in good faith has changed his or her position in reliance upon earlier representations.” *Fisher v. Poole*, 142 Vt. 162, 168 (1982). These circumstances do not apply here.

Chelsea's argument is actually one of *stare decisis*. The claim is that once this Board has touched an issue, it becomes binding precedent that cannot be revisited in a subsequent proceeding. Administrative agencies, of course, should respect precedent to the extent it may be applicable based on the facts, context and law, and on the depth to which an issue was actually examined in prior decisions. However, even if a precedent were directly on point, an agency can depart from prior precedent provided that the new decision contains a reasoned explanation. *New York & Atlantic Railway Company v. Surface Transportation Board*, 635 F.3d 66 (2d Cir. 2011) (construing federal Administrative Procedures Act); *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 389 (D. Conn. 2008) (upholding administrative decision on the ground that it was well reasoned).

Chelsea argues that Board decisions with respect to two telecommunications towers under 30 V.S.A. § 248a, a net metering project under the expedited procedures of 30 V.S.A. § 219a, and a substation approved four years ago in a different section of town are binding precedents that preclude a finding that this project would unduly affect the orderly development of the region.

The only one of these decided solely under Section 248 was the substation approved in Docket No. 7763 by Order dated August 17, 2012 (the Substation Order), in which the Board expressly relied on a conservation easement that was incorporated into the Project as part of its findings under 30 VSA Sec. 248(b)(1). Substation Order at page 20 at ¶44. There was discussion of the Town Plan, but this focused on the desirability of imposing conservation easements to protect views. Substation Order at page 19 at ¶ 39. There was no discussion in the Substation Order about whether the location of that facility in that

particular portion of town, within the Rural Conservation District, unduly interfered with the orderly development of the region. So Chelsea's argument essentially is that by issuing a CPG for the substation, the Board necessarily ruled by implication that any electrical facility could henceforth be located anywhere in any portion of Bennington's Rural Conservation District even though that issue was not expressly considered in that proceeding.

In this proceeding, Ms. Harris expressly raised the issue of whether this extensive solar array filling this particular parcel of land within the Rural Conservation District would interfere with the orderly development of the region, under specifically identified policies of the Town Plan. This issue had never before been directly considered by the Board, and no prior proceeding bars a fresh look at the issue. In any event, because the Board explained its reasons at length, this decision would be proper even if there were clearly contrary precedents.

The Board's findings are supported by the record.

Chelsea argues that the Board erred by making findings that were not supported by the record, and which improperly assumed that the Apple Hill project would be developed for purposes of assessing cumulative visual impacts. (Petitioner's Brief at 41-43).

There is one factual error in the Order that should be corrected. The Board understated the extent of proposed clearing by referring to a 10.6-acre clearing area rather than to 14.85 acres. Order at 53 and 60; *see* pre-filed testimony of Brad Wilson at 3. This acreage reference should be corrected in the Board's order in response to the motion.

Chelsea's principal argument about allegedly unsupported findings is directed at one sentence in the Board's order: "the Project would remain visible on a hillside *above* the Vermont Welcome Center." Order at 27. Chelsea construes this finding to mean that the Board has concluded the project will be visible *from* the Welcome Center. (Petitioner's Brief at 43.).

The Board's finding as actually written is supported by the record. Chelsea's own witness, Mark Kane, admitted that "the offsite visibility of the Project is largely directed to the south and would impact the existing Vermont Welcome Center." Kane sup. pf. dated 9/26/15 at 5–6; exh. CS-MK-7. The Hearing Officer relied on and cited this testimony, and the Board was entitled to rely on it as well. *In re Petition of Chelsea Solar, LLC*, Docket No. 8302, at *34.

Mr. Kane also acknowledged that the cutting would create an adverse visual impact under the *Quechee* test,⁴ but he chose to consider that this was not an undue impact because it would be visible only fleetingly to people traveling in cars. Kane pf. dated 6/18/15 at 4. The Board, however, did not consider these impacts as part of the *Quechee* test. The Board reviewed them when considering the land conservation provisions of the town plan in connection with the orderly development of the region. Order at 53-54. That is, the factual conclusions and evidence from Mr. Kane provide ample support in the record for the Board's consideration of the conservation provisions

⁴ See, e.g., *Petition of Nrg Renew Spark, LLC for A Certificate of Pub. Good, Pursuant to 30 V.S.A. Ss 219a & 248, to Construct A 500 Kw Grp. Net-Metered Solar Elec. Generation Facility in Waterbury, Vermont*, NMP-6311, 2015 WL 5005998, at 11 (Aug. 12, 2015).

of the Town Plan in deciding that the project would unduly interfere with the orderly development of the region.

This property located on a prominent hill at the gateway to Bennington from the north, above the Welcome Center, would be effectively clear cut, and the visual impact would be adverse. Because this would occur in an area specifically identified in the Town Plan for conservation protection, this project would unduly interfere with the orderly development of the region.

Accordingly, Chelsea is not entitled to relief under Rule 52 or 59 based on findings that are alleged to be unsupported.

The balance of Chelsea's contentions with respect to the Board's findings and decisions under 30 V.S.A. § 248(b)(1) and (b)(5) attempt to re-litigate issues that either should have been or were raised prior to the Board's Order. These claims do not point to any factual mistake or inadvertence by the Board or suggest the existence of new evidence that might necessitate a contrary conclusion. (Petitioner's Brief, at 41–61). Accordingly, these issues are not appropriately addressed by granting a motion pursuant to V.R.C.P. 59 or 52.

The Board's procedures were fair and Chelsea is not entitled to further relief.

Chelsea argues that the Board's review of the Town Plan with respect to its application of § 248(b)(1) criterion "represents unfair surprise and a violation of due process." (Petitioner's Brief, at 24). However, Chelsea itself submitted the excerpts of the Town Plan at issue in support of its petition, and Ms. Harris raised the issue of adherence to the Town Plan in her responsive comments to the PFD. Chelsea's

contention that the issue “was not raised by any party at any time in this proceeding until the Board’s Order” is false.

Chelsea also asserts that it was “denied any opportunity to respond” pursuant to 3 V.S.A. § 809(c); however, recognizing that the issue was raised for the first time after issuance of the PFD, the Board provided the parties with an opportunity to respond. Chelsea took the opportunity to file legal and factual arguments on January 15, 2016 (Chelsea Response). In its response, Chelsea specifically addressed application of the Town Plan to the § 248(b)(1) criterion, arguing that the project was consistent with the Town Plan under the orderly development criteria, and relying on excerpts from the Town Plan and testimony from Mark Kane. (Chelsea Response, at 2–4). Chelsea did not raise any objection concerning the insufficiency of the evidentiary record—in fact, it aggressively argued that Ms. Harris, representing herself, was stuck with the evidence in the record. (Chelsea Response at 1).

In light of this procedural background, Chelsea’s claim that it was denied due process is disingenuous, and Chelsea should not be granted the opportunity to relitigate the issues or undo its own tactical or procedural failures through Rules 59 or 52.

Chelsea asks the Board to reevaluate the evidence, crediting its own submissions over all else, in order to reach its desired conclusion. (Petitioner’s Brief, at 28–33, 38). The arguments now presented should and could have been, and in fact largely were already made and considered in this proceeding. Accordingly, V.R.C.P. 59 and 52 are appropriate mechanisms for the review sought by the Petitioner.

The Board Should Consider Imposing Word Limits on Further Filings in this Matter

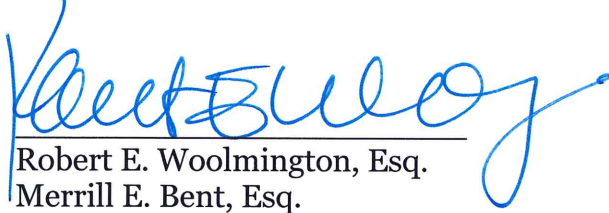
The Town also requests that the Board consider exercising its inherent authority to control its docket to impose word limits on any further filings in this matter.

Chelsea's meandering, 73-page Brief largely raised issues that were not appropriate for review under the Rules it invoked. Administrative agencies have the inherent power to control their own docket, and the Board should do so in this instance, to prevent continued excessive briefing and filing going forward. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543 (1978) ("[A]dministrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." (internal quotation marks and citation omitted)); *see also GTE Service Corp. v. F.C.C.*, 782 F.2d 263, 274 n. 12 (Court of Appeals, Dist. D.C. 1986) (recognizing the inherent authority to control dockets).

CONCLUSION

For the foregoing reasons, the Board's should modify its findings to reflect the correct acreage of the Project as 14.85, rather than 10.6, and deny the Petitioner's Motion. In addition, the Board should consider exercising its inherent authority to control its docket to impose word limits on any further filings in this matter.

Dated at Manchester this 28~~th~~ day of April, 2016.



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STATE OF VERMONT
BEFORE
THE PUBLIC SERVICE BOARD

Petition of Chelsea Solar LLC for a	]	
certificate of public good, pursuant to	]	
30 V.S.A. § 248, authorizing the	]	
installation and operation of the	]	Docket No. 8302
Chelsea Solar Project” consisting of a	]	
2.0 MW solar electric generation facility	]	
to be located at 500 Apple Hill Road in	]	
Bennington, VT	]	

TOWN OF BENNINGTON’S OPPOSITION TO PETITIONER’S MOTION TO VACATE THE
BOARD’S ORDER OF FEBRUARY 16, 2016

NOW COMES Town of Bennington (“Town”), by and through its attorneys,
Witten, Woolmington, Campbell & Bernal, P.C., and files this Opposition to
Petitioner Chelsea Solar, LLC’s (“Petitioner” or “Chelsea”) Motion to Vacate the
Board’s Order of February 16, 2016 as follows:

INTRODUCTION

In its Motion, the Petitioner requests that the Board to vacate its order of
February 16, 2016 on the basis that of an alleged failure to comply with the
requirements of 3 V.S.A. § 811. In the arguments made in support of its motion, the
Petitioner misinterprets the language and requirements of § 811 and ignores
controlling case law. For these reasons, as set forth in more detail below, the
Petitioner’s Motion should be denied.

PROCEDURAL BACKGROUND

On June 19, 2014, the Petitioner filed its petition for a certificate of public
good pursuant to 30 V.S.A. § 248 to install and operate of a 2.0 MW solar electrical

generation facility at 500 Apple Hill Road in Bennington, Vermont (“Project”).¹ A technical hearing was held on July 16, 2015, after which the parties filed post-hearing briefs.

On October 2, 2015, the Hearing Officer’s Proposal for Decision was issued, and on October 13, 2015, the Town of Bennington filed public comments requesting that the Board halt the project based on environmental, safety, visual, and aesthetic detriment to the natural and historical surroundings. On the same date, Libby Harris² requested that the Board conduct a site visit, which the Board did on November 13, 2015.

Both Ms. Harris and the Petitioner filed responses to the Hearing Officer’s October 2, 2015 proposal for Decision, on October 13, 2015 and October 14, 2015 respectively. Because Ms. Harris’s PFD response raised for the first time the issue of application of language in the Bennington Town Plan to the Project site, the Board issued an Order permitting the parties the opportunity to comment on that issue. The Petitioner filed its comments in response to that order on January 15, 2016, to which the Vermont Agency of Natural Resources responded on January 22, 2016 in order to criticize the Petitioner’s description of how the Board reviews impacts under § 248(b)(5).

On February 16, 2016, the Board issued an order denying the Petitioner’s Petition.

¹ The Town was granted the right to intervene in this matter pursuant to Board Rule 2.209(A), by order dated March 23, 2016.

² Libby Harris was granted permissive intervenor status by order of April 16, 2015.

ARGUMENT

I. THE BOARD'S DETERMINATION DOES NOT VIOLATE 3 V.S.A. § 811

The Petitioner contends that the Board's Order of February 16, 2016 should be vacated because the Board failed to comply with 3 V.S.A. § 811 of the Administrative Procedure Act ("APA"). Specifically, the Petitioner contends that the Board's Order violated § 811 in that it did not specifically state that all three Board members read "the entire record." This argument misapplies the APA and ignores existing law addressing the precise issue.

3 V.S.A. § 811 provides that:

When in a contested case a majority of the officials of the agency who are to render the final decision have not heard the case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served upon the parties, and an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision."

While the Petitioner asserts that the Board's Order is faulty for its failure to specifically affirm that each member of the Board read the entire record, such affirmation is not a requirement under the § 811, and the Board's review in this case satisfied the mandates of the APA.

The application of 3 V.S.A. § 811 to proceedings before the Board has already been addressed by the Vermont Supreme Court. While the Board "may appoint a hearing officer to inquire into and examine any matter within the jurisdiction of the Board," "it is for the Board to make any judgment based on his [or her] findings." *Vermont Elec. Power Co., Inc. v. Bandel*, 135 Vt. 141, 147 (1977); see 30 V.S.A. § 8.

The Court went on:

[30 V.S.A. § 8] refers to 3 V.S.A. § 811 in connection with such a judgment. That section states, “When in a contested case a majority of the officials of the agency who are to render the final decision have not heard the case or read the record . . .” a notice of decision must be served on the parties, with an opportunity to file exceptions and present briefs and oral arguments to the Board.”

There is no such requirement where the Board does read the record or hear the case, or both. In such situations, the Board is *not* accepting the determination of the hearing officer without itself evaluating the facts. It is itself performing the duty imposed by 30 V.S.A. § 11(b).

Vermont Elec. Power Co., Inc., 135 Vt. at 147 (emphasis supplied).

The Board appointed a hearing officer and then reviewed the findings of that officer as well as the evidentiary record. *Petition of Chelsea Solar, LLC*, Docket No. 8302, order of 2/16/2016, at 49–62. Rather than accept the determination of the hearing officer, the Board rendered a determination based on its own evaluation of the facts. *Id.* The notice of decision requirement of § 811 is not applicable to the Board’s determination in this proceeding, pursuant to the Supreme Court’s holding in *Vermont Elec. Power Co. Inc.* (*supra*).³

³ *In re Lakatos*, in which the Vermont Supreme Court analyzed requirements under 3 V.S.A. § 811, does not require a different conclusion. (2007 VT 114 (2007)). In *Lakatos*, the administrative agency convened a subcommittee to “proceed under 30 V.S.A. § 811.” *Id.* at ¶ 3. Counsel for that agency then circulated among the parties a memorandum outlining the procedure and specifically promising the parties an “opportunity to file exceptions and present briefs and argument concerning the proposed decision *with the Board*,” to consist of both the hearing committee members and additional members necessary to reach a quorum. Thus, in *Lakatos*, the requirements of 3 V.S.A. § 811 applied to the Board itself (not the subcommittee), and was only modified to the extent of the parties’ waiver allowing a two-tiered process.

Contrast that scenario to proceedings pursuant to § 248, in which the Board is specifically authorized to appoint a hearing officer to “inquire into and examine any matter within the jurisdiction of the [B]oard.” 30 V.S.A. § 8. The Board is then authorized to make any judgment based on the findings of such duly appointed hearing officer, whereby “it is itself performing the duty imposed by 30 V.S.A. § 11(b),” and the requirements of 3 V.S.A. § 811 do not apply. *Bandel*, 135 Vt. at 147.

II. A MOTION TO VACATE IS NOT THE APPROPRIATE PROCEDURAL REMEDY FOR
THE MISTAKES OF FACT ALLEGED TO HAVE BEEN MADE BY THE BOARD

The Petitioner asserts that the Board's findings contained several mistakes of fact, and conflated the Chelsea Solar Project with the Apple Hill Solar Project in its Order (Docket No. 8454). (Petitioner's Brief, at 3–5, 9–10). The Petitioner further contends that the Board's actions were inconsistent with its own prior rulings, and reached incorrect legal conclusions. (Petitioner's Brief, at 5–10) Such assertions are properly addressed in a motion to alter or amend the Order pursuant to V.R.C.P. 59 or 52, or on appeal, as the case may be. V.R.C.P. 59 or 52 would enable the Board to review the alleged defects and, if substantiated, issue an amended Order correcting the mistakes. In fact, the Petitioner has made such a motion, the merits of which the Town addresses in its opposition filed in response thereto.

CONCLUSION

For the foregoing reasons, the Petitioner's Motion to Vacate the Board's Order of February 16, 2016 should be denied.

Dated at Manchester this 28 day of April, 2016.



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STATE OF VERMONT
BEFORE
THE PUBLIC SERVICE BOARD

Petition of Chelsea Solar LLC for a]
certificate of public good, pursuant to]
30 V.S.A. § 248, authorizing the]
installation and operation of the]
Chelsea Solar Project” consisting of a]
2.0 MW solar electric generation facility]
to be located at 500 Apple Hill Road in]
Bennington, VT]

Docket No. 8302

TOWN OF BENNINGTON’S OPPOSITION TO PETITIONER’S MOTION TO REOPEN DISCOVERY

The Town of Bennington (Town), by and through its attorneys, Witten, Woolmington, Campbell & Bernal, P.C., files this memorandum in Opposition to Petitioner Chelsea Solar, LLC’s (Chelsea) Motion to Reopen Discovery.

INTRODUCTION

Petitioner asserts that it is entitled to discovery on account of “new defenses” raised by intervenor Libby Harris in her post-hearing brief filed on October 13, 2015.¹ The position misstates the procedural posture of this proceeding and misapplies the law with respect to the relevance of the additional categories of materials sought through renewed discovery.

For these reasons, as explained in more detail below, the Petitioner’s Motion to Reopen Discovery should be denied.

Procedural Background

On June 19, 2014, Chelsea filed its petition for a certificate of public good (CPG) under 30 V.S.A. § 248 (Section 248) to install and operate a 2.0 MW solar electrical generation facility at 500 Apple Hill Road in Bennington, Vermont, at the northern

¹ Libby Harris had been granted permissive intervenor status by order of April 16, 2015.

“gateway” of the Town of Bennington (the Project).² Following the petition, discovery was opened, during which pre-filed testimony and exhibits were submitted. After discovery concluded, a technical hearing was convened on July 16, 2015, after which the parties filed post-hearing briefs.

On October 2, 2015, the Hearing Officer’s Proposal for Decision (PFD) was issued, and on October 13, 2015, the Town of Bennington filed public comments requesting the Board to find that the project was not in the public good based on environmental, safety, visual, and aesthetic detriment to the natural and historical surroundings. On the same date, Libby Harris requested the Board to conduct a site visit, which the Board did on November 13, 2015.

Both Ms. Harris and Chelsea filed responses to the PFD. Because Ms. Harris’s response raised for the first time the application of specific language in the Bennington Town Plan to the Project, the Board issued an order permitting the parties the opportunity to comment on that issue. Chelsea filed comments in response to that order on January 14, 2016, to which the Vermont Agency of Natural Resources responded on January 22, 2016 in order to criticize Chelsea’s description of how the Board reviews impacts under § 248(b)(5). While Chelsea did respond to the issues raised by Ms. Harris in her post-hearing brief, it did not raise any concerns regarding the evidentiary record, or any purported inadequacy of time allowed for discovery.

² The Town was granted the right to intervene in this matter pursuant to Board Rule 2.209(A), by order dated March 23, 2016.

I. The Petitioner's Motion to Reopen Discovery is Untimely and Should be Denied

The Petitioner filed this motion to reopen discovery on *March 11, 2016*, just shy of six months after Ms. Harris filed her post-hearing brief on October 13, 2016, in which she raised questions about Bennington's Town Plan, and then only after an adverse determination by the Board denying Chelsea's petition. *Petition of Chelsea Solar, LLC*, Docket No. 8302 Order of 2/16/16 (the Order). If the information now sought by the Petitioner were as essential as it now claims, surely the Petitioner would have raised the alleged inadequate discovery before now.

Even if the Petitioner were entitled to discovery of the type it now seeks (which it is not, as explained in further detail, *infra*), this request comes far too late. The Board has no obligation to reopen discovery—particularly where it's reasoned determination has already been entered in the matter in question. To accede to this request would only encourage endless litigation by disappointed parties.

II. Ms. Harris did not Raise "New Defenses" in her Post-Hearing Brief

The Petitioner mischaracterizes the arguments set forth in Ms. Harris's post-hearing brief, as "new defenses." However, Ms. Harris simply raised the question of the impact on the proposed Project on aesthetics, orderly development of the region, and public health and safety pursuant to 30 V.S.A. § 248(b). The burden of proof under these criteria of Section 248 has always rested on the Petitioner. *See, e.g., Petition of Green Mountain Power Corporation for a Certificate of Public Good*, 2010 WL 2810933, *8 (May 13, 2010). Ms. Harris merely raised the question of whether Petitioner had carried its burden of proof with respect to several statutory criteria.

Not only is it an appropriate topic for review in a proceeding pursuant to § 248, the Board is required to give due consideration to “the recommendations of the municipal legislative bodies, and the land conservation measures contained in the plan of the affected municipality.” 30 V.S.A. § 248(b)(1), (5); the Order; *see, e.g., Petition of Rutland Renewable Energy, LLC*, 2015 WL 1227471, *56 (Mar. 11, 2015); *see also In re UPC Vermont Wind, LLC*, 2009 VT 19, ¶¶ 18, 19 (2009); *In re Vermont Elec. Power Col, Inc.*, 2006 VT 370 ¶ 25 (2006). The Petitioner itself entered excerpts of the Town Plan in to the evidentiary record not only in support of its Petition, but presumably in recognition of the due consideration requirement applicable in proceedings under § 248.

The Board is the arbiter of the meaning and application of the Town Plan in the context of a § 248 proceeding, including the question of whether a proposed project poses undue adverse impacts in the context of that plan. *Petition of Rutland Renewable Energy, LLC*, 2015 WL 1227471, at *51–63 and n. 94. Where, as here, the provisions of a town plan are unambiguous and establish clear, written community standards (*see* Section III, *infra*, the Board need not look further to ascertain the meaning of the plan or the applicability of its provisions to the record before it. Accordingly, the type of information sought by the Petitioner, largely pertaining to the *Town’s* interpretation of its plan, properly remains outside of the record.

III. Further Discovery is Unnecessary because the Town Plan sets forth Clear Written Community Standards

The Petitioner further argues that it is entitled to discovery on the Town Plan, zoning bylaws, and actions taken by the Town related to the Town Plan. (Petitioner’s Brief, at 3).

According to the Petitioner's reasoning, such discovery is necessary whenever "there is a claim that the Town Plan constitutes a clear, unambiguous community standard." (Petitioner's Brief, at 4). This argument is directly contrary to the applicable law.

When a town plan sets forth a standard "stated in language that is clear and unqualified, and creates no ambiguity," extrinsic evidence as to the meaning of the standard need not be considered. *See, e.g., In re John A. Russell Corp.* 2003 VT 93, ¶ 16 (2003) (discussing the distinction between clear, unambiguous language and ambiguous language in town plans).

The holding in *In re Chaves* (2014 VT 5) is inapposite to this proceeding because it involved the interpretation of *ambiguous* provisions. The Court in *Chaves* did not hold, or even imply, that consideration of a town plan *requires*, in every case, discovery related to the town plan or the admission of additional information into the evidentiary record, as the Petitioner argues. (Petitioner's Brief, at 4–5, 19–22). Nor did the Court in *Chaves* hold that an ambiguity is created by definition where the town and regional plans express "other goals" as Petitioner contends. (Petitioner's Brief, at 6–18). Rather, the Court in *Chaves* held that the town and regional plans in question were ambiguous because they *only* expressed general policies regarding certain resources, as opposed to the clear and unambiguous standards set forth in the Bennington Town Plan. *Chaves*, 2014 VT 5, ¶¶ 38–39.³

³ Likewise, *In re Kiesel* concerned application of ambiguous provisions and is inapposite (172 Vt. 124 (2000)). The Petitioner's citation to *Smith v. Winhall Planning Commission* (140 Vt. 178 (1981)) is also taken jarringly out of context. *Smith* involved an appeal from a determination of a town Planning Commission regarding compliance with the Zoning Regulations, *not* review of a Town Plan in connection with Criterion 10 review under § 248 (or Act 250, for that matter).

Furthermore, the language at issue in the Bennington Town Plan is a significant departure from the provisions at issue in *Chaves*, and unquestionably sets forth a clear, unambiguous community standard.

Chaves and *In re Kiesel* do not address the role of municipal plans under the statutes applicable in this proceeding. 30 V.S.A. § 248(b)(1) requires “due consideration” of “land conservation measures contained in the plan of any affected municipality,” and 30 V.S.A. § 248(b)(5) requires “due consideration” of aesthetics. These cases involved the application of a municipal plan in Act 250, principally under Criterion 10, which requires that developments must “conform” to the requirements of municipal plans. 10 V.S.A. § 6086(a)(10).

Proceedings before this Board under Section 248 and before a District Commission under Act 250 are substantially different.

When the Board evaluates a petition for a CPG under 30 V.S.A. § 248, it is engaging in a legislative, policy-making process. In so doing, it must exercise its discretion to weigh alternatives presented to it, utilizing its particular expertise and informed judgment. Thus, [the Supreme Court] give[s] great deference to the Board's expertise and judgment, and accord a strong presumption of validity to the Board's orders. *In re UPC Vermont Wind, LLC*, 2009 VT 19, ¶ 2, 185 Vt. 296.

Act 250 permit proceeds are *not* legislative, policy-making processes. They are adjudicatory proceedings in which findings of conformance must be made. This is quite distinct from consideration of a municipal plan when making the more discretionary, policy-making determination as to whether a particular project would be good for the public.

In any event, Bennington's Town Plan is not ambiguous, and meets the standards established by this Board. As the Board held in *Petition of Rutland Renewable Energy, LLC* (2015 WL 1227471), "[i]n order for a provision to be considered a clear, written community standard, it must be 'intended to preserve the aesthetics or scenic beauty of the area' where the proposed project is located and must apply to specific resources in the proposed project area." *Id.* at *59 (quoting *Petition of Georgia Mountain Community Wind, LLC*, Docket No. 7508, Order of 6/11/10 at 52). "Act 250 precedent directs that towns should draft language 'to identify scenic resources that the community considered to be of special importance: a wooded shoreline, a high ridge, or a scenic back road, for example.'" *Id.* (quoting *Re: Town of Barre*, #5W1167-EB, Findings of Fact, Conclusions of Law, and Order, at 21 (June 2, 1994)).

That is precisely what Bennington has done in its Town Plan. The Board's Order sets forth its sound analysis of the provisions of the Town Plan that are in question. Following its analysis, the Board concluded that "[Bennington's] Town Plan language is specific in nature, is specifically applicable to the Project site, and seeks to conserve scenic resources by identifying specific actionable requirements and thus constitutes a clear, written community standard." *Id.* at 51.

Because the Board has found that the Town Plan constitutes a clear, written community standard, it is unnecessary to gather or consider extrinsic evidence in order to determine the meaning or intent of that plan insofar as it relates to the proposed Project.

IV. The Town Plan is the Primary Source for Clear, Written Community Standards

The Petitioner's contention that the Town Plan must be reviewed against other land use regulations, or that discovery is required with respect to so-called "contradictory positions" taken by the Town in unrelated circumstances, is contrary to settled law and plainly incorrect. (Petitioner's Brief, at 3–19, 19–21, 21–26).

As stated in the Board's Final Order in Docket No. 7628:

[Z]oning regulations are not the most appropriate source for a clear, written community standard under the *Quechee* test, as applied by the Board in Section 248 proceedings. Because towns often grant exceptions and variance to these ordinances on a case-by-case basis, it is difficult to rely on a zoning ordinance as a clear and consistent statement of a community's policies or standards. The ability of a town to grant zoning variances will, in many cases, result in different zoning standards being applied depending upon the individual circumstances of the permit application. *Therefore, it is more appropriate to rely on the town plan as the primary source of clear written community standards.*

Joint Petition of Green Mountain Power Corporation, Vermont Electric Cooperative, Inc., Vermont Electric Power Company, Inc., and Vermont Transco LLC, Docket No. 7628, Order of 5/31/2011, at 86–87 (emphasis added); *see also*, *Petition of Rutland Renewable Energy, LLC*, 2015 WL 1227471, *60 (Mar. 11, 2015) ("Board precedent has been clear that zoning bylaws are not an appropriate source for clear, written community standards in § 248 proceedings.").

Projects subject to the Board's jurisdiction under Section 248 are exempt from regulation by municipal zoning bylaws. 24 V.S.A. § 4413(b). Accordingly, zoning bylaws do not reference or address the siting of energy generation facilities.

The Board has repeatedly held that zoning bylaws are not community standards that can be considered in Section 248 proceedings. *See, e.g., Petition of North*

Springfield Sustainable Energy Project, Docket No. 7833 (Feb. 12,, 2014) (“zoning bylaws are not an appropriate source of clear written community standards”) (denying CPG based on consideration of the town plan’s provisions relating to truck traffic).

Thus, contrary to the Petitioner’s arguments, and the inapposite cases cited in support thereof, the Town Plan is the appropriate source for clear written community standards.

In addition to being irrelevant to the issues before the Board, the Petitioner’s discussion of “contradictory positions” taken by the Town in other instances is also misleading. (Petitioner’s Brief, at 21–26). Namely:

- The towers at issue in Docket Nos. 8355 and 8393 both qualified as a project of limited size and scope pursuant to § 248a, involving approximately 325 and 9,100 square feet of earth disturbance, respectively. *Petition of VTel Wireless*, Docket No. 8355, Order of 1/7/2015, at ¶ 3–4; *Petition of New Cingular Wireless*, Docket No. 8393, Order of 12/18/2014, at 2–3.
- The project at issue in Docket No. 7763 was approved alongside, and made contingent upon compliance with a Decommissioning Plan and an MOU with the Town providing for decommissioning activities, landscape mitigation, and conservation easements in favor of the Town, all of which were all designed to minimize the aesthetic impact posed by the Project. *Joint Petition of Vermont Electric Power Co., Inc. and Vermont Transco LLC and Central Vermont Public Service Corporation*, Docket No. 7763, Order of 8/17/2012, at 61–62. Accordingly, the findings reflected the conclusion that the adverse impact identified by the Petitioner was sufficiently mitigated by the measures proactively put in place to do so, and therefore not unduly adverse. These additional findings directly follow the finding selectively quoted by the Petitioner. *Id.* 58–59.
- The project approved under CPG #NMP-6523 is a net-metering system pursuant to § 219a. One again, the Petitioner ignored key findings with respect to its discussion of that project, which lead to the conclusion of no undue adverse impact. CPG #NMP-6523, Order of 10/14/2015, at 11–12.

In sum, three of these four proceedings involved different statutory frameworks, and all four involved different facilities. There was no discussion in any of these matters whether the location of each facility in that particular portion of Bennington, within the Rural Conservation District, unduly interfered with the orderly development of the region. So Petitioner essentially contends that by issuing a CPG for these particular projects, the Board necessarily ruled by implication that any electrical facility could henceforth be located anywhere in any portion of Bennington's Rural Conservation District even though that issue was not expressly considered in any of these proceeding.

Even if a precedent were directly on point, which none of these is, an agency can depart from prior precedent provided that the new decision contains a reasoned explanation. *New York & Atlantic Railway Company v. Surface Transportation Board*, 635 F.3d 66 (2d Cir. 2011) (construing federal Administrative Procedures Act); *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 389 (D. Conn. 2008) (upholding administrative decision on the ground that it was well reasoned).

Given that relevant portions of the Town Plan are already part of the record, allowing further discovery regarding the other, irrelevant categories of information identified by Petitioner would promote abusive discovery on municipalities, and serve only to confuse the accepted standard for review of petitions pursuant to Section 248.

IV. "Hillside," "Prominently Visible," and "Minimizing Clearing" are not Ambiguous Terms.

In support of its late motion to reopen discovery, the Petitioner submits a "declaration" of its own expert contradicting his own pre-filed testimony in an attempt to create an ambiguity with respect to the terms of "hillside," prominently visible," and

“minimizing clearing” in the Town Plan. (Petitioner’s Brief, at 26–30). Neither the Petitioner nor its expert previously asserted that these terms were ambiguous and, in fact, comfortably employed the terms in pre-filed testimony and briefing before the Board. The Board need not give any credit—nor even consider—the self-serving, contradictory “new evidence” submitted by the Petitioner in support of this Motion.

Even if there were ambiguity about whether these standards would apply to some projects or some sites, this Project plainly does not satisfy the standard. Nearly the entire site is devoted to the proposed use. There is nothing limited about it. A forest would be largely destroyed by a production plant for electricity.

Under V.R.C.P. 26, applicable to Board proceedings pursuant to Board Rule 2.214, the Board has broad discretion in ruling on discovery matters. *Record v. Kempe*, 2007 VT 39, ¶ 9, 182 Vt. 17 (discovery rulings are discretionary, and not subject to review if there is a reasonable basis for the court’s action).

The Board should exercise its sound discretion here and deny the motion to reopen discovery.

Conclusion

The parties to this proceeding have had adequate time for discovery, and no complaint to the contrary has been heard in the nearly six months since the date of the technical hearing, and at no point prior to the Board’s Order.

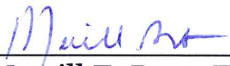
Even if the request to reopen discovery were timely, no additional evidentiary inquiry is needed insofar as the Town Plan established “a site-specific set-aside for purposes of aesthetics and conservation,” thereby providing a clear written community

standard with respect to the proposed site, upon which the Board has already rendered its determination. Order, at 58.

Allowing additional discovery at this late stage would be inappropriate, serving only to rehash well-trod ground in order to delay resolution of the case, and to create an unnecessary burden on the Town.

For the foregoing reasons, the Petitioner's Motion to Reopen Discovery should be denied.

Dated at Manchester this 28 day of April, 2016.



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STATE OF VERMONT
BEFORE
THE PUBLIC SERVICE BOARD

Petition of Chelsea Solar LLC for a	]	
certificate of public good, pursuant to	]	
30 V.S.A. § 248, authorizing the	]	
installation and operation of the	]	Docket No. 8302
Chelsea Solar Project” consisting of a	]	
2.0 MW solar electric generation facility	]	
to be located at 500 Apple Hill Road in	]	
Bennington, VT	]	

TOWN OF BENNINGTON’S RESPONSE TO PETITIONER’S REQUEST FOR JUDICIAL NOTICE

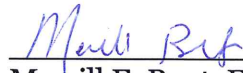
NOW COMES Town of Bennington (“Town”), by and through its attorneys, Witten, Woolmington, Campbell & Bernal, P.C., and responds to Applicant Chelsea Solar, LLC’s (Petitioner or Chelsea) Request for Judicial Notice as follows:

The Petitioner requests judicial notice of municipal and regional regulations of various types, as well as multiple certificates of public good granted by the Board.

The Town does not object to the Petitioner’s request that the Board take judicial notice of Exhibits A through H, however it disputes the Petitioner’s characterization thereof, and the relevance of those materials to this proceeding, as set forth in detail in the Town of Bennington’s Opposition to Petitioner’s Motion to Reopen Discovery, filed herewith. With respect to Exhibits I through L, all of which are prior determinations of the Board, judicial notice is not required. However as none of these determinations were based on the same facts as the case at hand, these determinations are also of limited relevance.

[Signature on Following Page]

Dated at Manchester this 28 day of April, 2016.



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STATE OF VERMONT
BEFORE
THE PUBLIC SERVICE BOARD

Petition of Chelsea Solar LLC for a	]	
certificate of public good, pursuant to	]	
30 V.S.A. § 248, authorizing the	]	
installation and operation of the	]	Docket No. 8302
Chelsea Solar Project” consisting of a	]	
2.0 MW solar electric generation facility	]	
to be located at 500 Apple Hill Road in	]	
Bennington, VT	]	

TOWN OF BENNINGTON’S OBJECTION TO
CHELSEA’S PROPOSAL TO AMEND ITS PETITION

The Town of Bennington (Town), by and through its attorneys, Witten, Woolmington, Campbell & Bernal, P.C., files this memorandum to object to Chelsea Solar, LLC’s (Chelsea) Proposal to Amend its Petition.

In its Order dated February 16, 2016, the Board held that “that the Project will unduly interfere with the orderly development of the region because the Town Plan articulates specific land conservation measures applicable to the Project site that would be violated if the Project were to be constructed.” Order at 54.

The proposed amendment does not materially mitigate any of the Town of Bennington’s land conservation measures identified by the Board in its Order. The slight adjustments proposed to the extent of clearing¹ do not affect the board’s correct conclusion that the extensive clearing of “existing vegetation runs directly afoul of this provision in the Town Plan and its vision for orderly future development.” Order at 53.

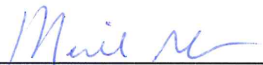
¹ The proposed clearing would supposedly be reduced from 14.85 acres to 12.0 acres. Pre-filed testimony of Brad Williams at 3; declaration of Brad Williams dated March 21, 2016, at 2.

Nor does the proposed amendment address the fundamental problem with the project identified in the Board's Order: Bennington Rural Conservation District is not an appropriate location for the proposed use. Order at 53-54.

Re-opening the proceeding to consider this amendment would unreasonably delay completion of the matter, and would adversely affect the Town of Bennington and Libby Harris by requiring these parties to engage in useless re-briefing of factual and legal issues that have already been addressed by the Board. Under Rule 2.204(G) the Board may at any time reject a proposed amendment when it will unreasonably delay proceedings or adversely affect the rights of a party.

WHEREFORE, the Board should dismiss the proposed amendment to the petition.

Dated at Manchester this 28 day of April, 2016.



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IN THE SUPREME COURT FOR THE STATE OF VERMONT

No. 2017-195

In re: Petition of Chelsea Solar LLC for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the installation and operation of the Chelsea Solar Project” consisting of a 2.0 MW solar electric generation facility to be located at 500 Apple Hill Road in Bennington, VT

On Appeal from:
Public Utilities Commission
Docket No. 8302

**TOWN OF BENNINGTON’S MEMORANDUM IN OPPOSITION TO
APPELLANT’S MOTION FOR REMAND**

The Town of Bennington submits the following memorandum in opposition to the motion by Allco Renewable Energy Limited (Allco) to remand this matter to the Public Utility Commission (PUC).

Prior Proceedings. Allco petitioned the PUC to issue a Certificate of Public Good (CPG), pursuant to 30 V.S.A. § 248, for a solar-generating facility in the Town of Bennington. In a 63-page order entered on February 2, 2016 (the Order), the PUC denied the CPG and held that Allco’s project would (a) create undue, adverse aesthetic impacts based on clear, written community standards found in the Bennington Town Plan; and (b) would unduly interfere with the orderly development of region. Order at 50-62; appendix submitted by Allco with motion (App.), vol. 2, 262-274.

Allco then filed motions to vacate, to alter, to reconsider, to strike evidence, to strike addition evidence, to amend its petition to revise the project,

to re-open evidence, to re-open discovery, to take judicial notice and to compel mediation. These filings exceeded 300 pages. Allco proposed major changes to the project that, Allco asserted, would overcome the factual findings and legal conclusions made by the PUC in denying the CPG. The requested relief was virtually identical to what Allco now asks this Court to require the PUC to do on remand.¹

The proposed alterations to the project include a change in the facility's "footprint" by about two acres, a new access road, different support structures, different solar panels, a new landscaping plan, and new buffers for setback areas. While the proposed revisions involve electrical generation of the same capacity on the same parcel, virtually every other project detail has changed. It is fundamentally a new project.

The PUC rejected Allco's demands in an order date April 14, 2017 (the Supplemental Order).² App. vol. 2, 276-310. In denying Allco's request to re-open the proceedings to review a comprehensively revised project (the New Project), the PUC found that Allco had made a "tactical decision" not to propose revisions to the project earlier in the review process. The PUC found that the proposal to amend the project after full hearings and closure of the evidentiary record was simply an effort to "revise [Allco's] tactical approach" after it failed to achieve success in a completed proceeding. The PUC rejected this untimely effort

¹ App. Vol 2 contains more detail about the proposed project changes than submitted by Allco to the PUC, but the scope and nature of the proposed changes are fundamentally the same.

² The PUC made some minor amendments to the Order to correct the statement of procedural history and some factual details.

to “relitigate issues” on a new record. Supplementary Order at 22; App. Vol. 2 at 297.

Allco filed its appeal and now asks this Court to order, prior to briefing on the merits and argument by the parties, the same review of the New Project previously denied by the PUC.

The motion to remand should be denied.

A. The PUC did not abuse its discretion in rejecting Allco’s request, reiterated in this motion for remand, to amend its petition for review of the New Project.

By this motion, Allco asks the Court to summarily reverse the PUC’s decision (a) to deny Allco the right to amend its petition after the denial of the CPG; and (b) to start over in the same docket with the New Project.

This Court “defers to the [PUC]’s expertise and informed judgment” and will accept its conclusions and findings unless the appealing party demonstrates that they are clearly erroneous. *In re Verizon New England Inc.*, 173 Vt. 327, 334, 795 A.2d 1196 (2002); *In re Green Mountain Power Corp.*, 162 Vt. 378, 380, 648 A.2d 374 (1994).

Findings are clearly erroneous only when this Court has “*reviewed the entire record*” and is “left with the definite and firm conviction that a mistake has been committed” (*emphasis supplied*). *Grice v. Vermont Elec. Power Co.*, 2008 VT 64, ¶ 26, 184 Vt. 132, 956 A.2d 561.

The Rules of Appellate Procedure establish clear procedures for consideration of claims by appellants. There must be a Printed Case in a specified form that references the record below. Allco submitted with this motion

an appendix that contains several orders and motions from the proceeding below, but no parts of the evidentiary record on which the PUC based its extensive findings. App. vol. 2. Instead, Allco has appended 212 pages of new documents that it hopes to submit to the PUC on remand.

This appeal presents an important legal issue for review of alternative energy projects by the PUC, and for the planning work of Vermont towns: What degree of specificity is required in a town plan to support denial, on aesthetic grounds, of a CPG for an energy project? This Court partially addressed this issue in *In re Petition of Rutland Renewable Energy, LLC*, 2016 VT 50, ____ Vt. ____, 147 A.3d 621 (holding that the PUC did not err in finding that a particular plan would *not* support a CPG denial). This appeal presents for the first time a case in which the PUC found that the terms of a municipal plan justify denial of a CPG on the grounds that the project would (a) create an undue, adverse impact; and (b) unduly interfere with the orderly development of the region.

In an appeal pursuant to the Rules, issues are adjudicated according to briefs that follow prescribed structures, and appellees are given adequate time to respond to the arguments. Allco's motion in effect asks this Court to reverse the PUC without a determination on the merits, to do so without briefing on the evidentiary record and on an expedited time schedule, and then to compel the PUC to review the New Project that it has already declined to review.

Because this Court has not had the benefit of briefing on the merits based on review of the hearing record, there is no basis to conclude that the PUC abused its discretion in denying the relief sought by this motion.

B. Allco's motion does not satisfy the requirements for remand under 3 V.S.A. § 815(b).

Allco argues that it is entitled to remand under 3 V.S.A. § 815(b) because there were “good reasons for failure to present [the revised project] in the proceedings before the PUC.” Motion at 10-11.

Allco alleges that the PUC's decision to deny an amendment to the petition, after completion of the proceedings, was not “reasonable” because Allco was surprised that the deficiencies in its project would be given credence by the PUC. Motion at 13-14. A losing party's surprise that the requirements of a town plan would be relied upon by the PUC is not a recognized statutory basis for summary remand to review a materially revised project.

A matter is appropriately remanded to an administrative agency under 3 V.S.A. § 815(b) if this Court finds that it must speculate about the basis of the decision reached, or if claims were not addressed. *Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corporation*, 167 Vt. 228, 242, 705 A.2d 1001, 1010 (1997) (remanding after decision on the merits of the appeal).

In the case at bar, the PUC's Order clearly stated the legal and factual bases for denying the CPG, and the Supplemental Order addressed at considerable length the cascade of claims raised by Allco's filings after denial of the CPG. There is no basis for summarily remanding under the Administrative Procedure Act.

C. Discretionary remand at this stage is not appropriate.

In further support of its request to remand, Allco argues that the Town of Bennington “has discredi[ed] the primary basis for the PUC’s denial of the CPG.” Motion at 18; *see also* 12-13, 15-16.

This is not true. The Town will argue in this appeal that the PUC’s Order was well-grounded in fact and law, and must be affirmed. The Town will take the position in its Appellee’s Brief that the Town Plan does not bar *all* renewable energy developments in its Rural Conservation District. This does not change the factual and legal bases for the PUC’s conclusion that *the Chelsea project* would create undue, adverse aesthetic impacts, and would unduly interfere with the orderly development of region. A snapshot of one portion of the Town of Bennington’s anticipated argument in its Appellee Brief does not provide grounds for remanding this case. The conclusion that the Town will reach is different than argued by Allco, and other parties to the appeal may present varying positions.

Allco argues that its New Project will cure the deficiencies identified by the PUC in the rejected project, and therefore judicial economy favors a remand at the discretion of this Court so that the New Project can be considered.

The Town of Bennington strongly opposes a remand that might be construed as authorizing review of the New Project under a claim of vested rights extending back to the original application date. The New Project might mitigate many of the original project’s deficiencies precisely because it is a quite different development than the one rejected by the PUC. *See infra* at 2. If Allco wishes to

secure review of the New Project, it should file a new petition subject to the new notice, procedural and party status requirements for renewable energy projects established by Act 174 (2016).³ In addition, the New Project should be reviewed for conformance with the Town of Bennington solar siting ordinance enacted in 2016 pursuant to Act No. 56 (2015).

By this motion, Allco is trying to undo its unwise tactical decision to pursue a project that failed to comply with the requirements of the Bennington Town Plan. Allco now hopes to substitute the New Project for review under grandfathered legal rules. Review of the New Project under old rules would (a) deprive the Town and other interested parties of the participation rights granted by Act 174; and (b) allow the New Project to skirt review for conformance with planning decisions by the Town made during the three years since Allco filed its petition for the rejected project.

In arguing for a discretionary remand, Allco also relies on *In re Jolley Associates (Town of Shelburne)*, 2006 VT 132, 181 Vt. 190, 915 A.2d 282. In *Jolley*, a zoning case, the Environmental Court remanded an application to the municipality to address one specific issue identified by the trial court – removal of a gas station canopy. This Court held that the remand did not disturb the vested rights of the applicant to review of the project under the legal rules in effect at the time of original application because (a) removal of the canopy was not a “substantial revision;” and (b) the trial court’s order of remand was expressly made “without prejudice.” *Id.* at ¶ 16.

³ Act 174, *inter alia*, expanded party standing rights in CPG proceedings, and requires the PUC to give greater weight to land conservation measures contained in certain town plans.

This Court found that because of the limited scope of the *Jolley* project revision, it was an exception to the established legal principle that “denial of a zoning application requires that the applicant *file a new application* that substantially revises its proposal to address all concerns that prevented approval of the prior application” (emphasis supplied). *Id.*

Here, Allco argues that a major alteration of its project – new structures, new site plan, new access road, new landscaping plan, new buffer locations – should be considered by remand rather than by a new application. *Allco seeks to transform the exception into a new rule.*

If Allco wishes to challenge the PUC’s decision to deny its petition after a full hearing and extensive proceedings, it should file its brief and do so. If Allco wishes to abandon its original project and seek approval of its new one, it should dismiss this appeal and file a new petition.

Allco should not be allowed to lose its tactical bet, and still claim vested rights in legal rules that the Town and the General Assembly have amended in the years since the original petition was filed. If this Court were to remand under these circumstances, it would create a damaging precedent that would encourage developers to submit non-compliant projects in the hope that deficiencies would not be spotlighted by opponents or recognized by the PUC. If such a project were rejected, as in this case, a developer could simply ask to start over under the old rules.

Finally, Allco argues that because a PUC hearing officer is allowing discovery on proposed revisions to another solar project, this Court should remand to allow review of the New Project. Motion at 1, 18.

The other project, known as Apple Hill, has been treated as a wholly independent project by Allco since the filing of the two applications. Indeed, Allco successfully appealed to this Court to obtain a judicial determination that the projects must be reviewed separately. *In re: Programmatic Changes to the Standard Offer Program*, 2014 VT 29, 196 Vt. 175, 95 A.3d 999.

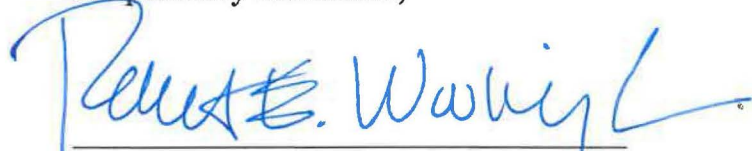
Unlike the Chelsea project, the merits of the Apple Hill application have never been ruled upon by the PUC. Unlike the Chelsea project, the Apple Hill application has not been the subject of an order by the PUC denying consideration of major changes after issuance of a final order. The administrative status of a separate application does not provide grounds for remanding this case.

Libby Harris, a party to this proceeding, reviewed this memorandum and asked the Town of Bennington to advise the Court that she agrees with the Town's position and reasoning in opposing Allco's motion for remand.

WHEREFORE, this Court should find that the PUC did not abuse its discretion in declining to allow a comprehensive alternation of the project after completion of the proceeding, and Allco's motion to remand should be denied.

Dated at Manchester Center, VT this 19th day of September 2017.

Respectfully submitted,



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EXHIBIT D

**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 a	)	
2.0 MW solar electric generation facility to be	)	
located at 500 Apple Hill Road in Bennington,	)	Docket No. 8302
Vermont	)	

**MOTION UNDER RULE 60(b) AND AMENDMENT TO PETITION
OF CHELSEA SOLAR LLC**

In accordance with V.R.C.P. 60(b)(6), Chelsea Solar LLC (“Chelsea” or “Petitioner”) hereby files this motion for relief from the Board’s Orders of February 16, 2016, April 14, 2017 and April 17, 2017 (the “Orders”). On February 16, 2016, the Public Utility Commission (“PUC” or the “Commission”) issued an order (the “Denial Order”) denying Chelsea Solar a certificate of public good (“CPG”) for its proposed solar electric generation facility in Bennington (the “Project”). The Denial Order became final on April 17, 2017, when the PUC issued its correction to its April 14, 2017, order regarding various motions filed by Chelsea Solar (the “Motions Order”). An appeal with the Vermont Supreme Court is pending as docket 2017-195.¹

After months of public comments on the revised plans for the Chelsea Project and the neighboring Apple Hill solar project (docket 8454), on August 14, 2017, the Bennington Select Board voted 5-1 to not oppose the revised plans for the Apple Hill solar project because the revised plans meet the requirements of the Bennington Town Plan (the “Town Plan”). At the

¹ The prudential considerations that an appellate court may exercise over a lower court’s jurisdiction, such as a “lower court [being] divested of jurisdiction as to all matters within the scope of the appeal,” *see, Kotz v. Kotz*, 134 Vt. 36, 38 (1975), are not the same as what can be exercised over an independent agency. The jurisdiction of an agency is determined by statute. *See*, 30 VSA §209 in the case of the PUC. There is nothing in Vermont statutes that deprives the Commission of jurisdiction over any issues when an appeal is filed with the Supreme Court. *See, e.g.,* 30 VSA §12, §14 §209.

Select Board's public hearing, the Town of Bennington's counsel, Rob Woolmington, stated: "I never read the Town Plan as prohibiting all alternative energy everywhere in the [rural conservation] district. I think what they've done is consistent with what I see is the text of the Town Plan." See, Attachment ("Att.") II, Exhibit BWS-1, Transcript of August 14, 2017, Select Board meeting, at 38.

Now that the Town of Bennington has agreed that similar revised plans for the Apple Hill solar project (which the PUC has agreed to consider)² are consistent with the Town Plan, the common sense approach is for the PUC to grant this rule 60(b) motion and consider the revised plans and additional evidence for the Chelsea Project. Granting this motion is even more warranted in light of the fact that every day scientists urge immediate action to avoid devastating consequences to the planet, and Vermont's Climate Change Commission was told last month that Vermont is nowhere near on a path to meet its climate goals.

BACKGROUND

After more than two years, hundreds of thousands of dollars, and a lengthy section 248 process, a technical hearing was held by a Hearing Officer on Chelsea's section 248 application. No party at the hearing (or at any time prior to the hearing) raised the issue of whether putting a commercial ground-mounted utility-scale solar project in the Bennington rural conservation ("RCON") district was contrary to the Town Plan. And why would they have? The PUC had already approved commercial utility-scale solar projects in the Bennington RCON zone (and indeed has approved such a project even after it denied Chelsea a CPG). Moreover, the Town had received and reviewed the plans for the Chelsea Project more than 1 year before the hearing, and made no objection or comment. Further, the Bennington by-laws permit solar as well as

² See, Att. V, Docket 8454, *Procedural Order Re: Additional Due Process*, May 24, 2017.

various other commercial uses in the RCON zone. Further, all outstanding issues concerning the Project's compliance with the section 248 criteria among Chelsea, the Vermont Agency of Natural Resources ("ANR") and the Vermont Department of Public Service (the "Department") were resolved pursuant to the memorandums of understandings. Chelsea also entered into a memorandum of understanding with the local Apple Hill Homeowner's Association to address many of their concerns. The hearing was held and the Hearing Officer issued a proposed decision approving the issuance of a CPG for the Chelsea project.

On August 13, 2015, in a hastily called public Select Board meeting (of which the Petitioner received no notice) the Town Select Board voted to oppose the Chelsea and Apple Hill solar projects based upon false visual information provided by the neighbors.³ The Select Board followed up that meeting with a letter to the PUC expressing its opposition to the projects. By the time the developer could correct the false information, the train had left the station in the fervor of the times of municipal revolt against what was perceived as the PUC's insensitivity to local concerns.

In her October 13, 2015, comments on the Chelsea proposed decision, Libby Harris, a neighbor and intervenor in these proceedings ("Harris") claimed for the first time (copying comments the Town made with respect to the Apple Hill project) that the project violated a clear, written community standard—the Town Plan—thus allegedly not satisfying the requirements of 30 V.S.A. §248(b)(5).

³ The Select Board was shown a visual simulation of the combined Chelsea and Apple Hill solar projects from the vantage point of the Vermont Welcome Center. The shown simulation was devoid of any vegetation, thus the projects were clearly in view. That simulation was prepared during discovery at the request of the Department because the Department had requested a simulation without vegetation to verify the location of the solar panels in the computerized model. The actual visual simulations of the Chelsea project from the Vermont Welcome Center, which were not shown during the meeting, show that the project could not be seen, a conclusion with which the PUC agreed in the Motions Order. *See*, Motions Order at 15.

On January 6, 2016, the PUC issued an order requesting comments on the Town Plan issue raised by Harris. Chelsea filed comments including an excerpt from the Bennington by-laws governing development in the RCON zone, which by-laws permit solar, but the PUC refused to consider the by-laws and any other evidence sought to be presented by Chelsea in those comments. *See*, Denial Order at fns. 25, 27.

At the time the PUC was considering the Hearing Officer's recommended decision to issue the CPG, there was a backlash against the PUC for what was perceived in various corners as trampling on municipalities with respect to siting solar projects. The Vermont Supreme Court has stated that the atmosphere at the time created a "backlash that persuaded the Legislature to amend § 248 to give towns greater control over solar generation facilities." *In re Petition of Rutland Renewable Energy, LLC*, at P10. *See also, id.* at P42 (Robinson, J. concurring) (referring to the situation as a "political maelstrom" noting "frustrated municipalities all around the state that feel 'ignored' and 'steamrolled' by the PUC.")

The Denial Order

On February 16, 2016, the PUC rejected the Hearing Officer's proposed findings regarding aesthetics and issued the Denial Order.⁴ The basis for the denial was the issue raised by Harris—i.e., that project violated a clear, written community standard and as such would have an undue, adverse impact on aesthetics. The clear, written community standard allegedly violated was the Town Plan as it relates to the RCON zone. The PUC rejected the testimony of Chelsea's expert, and ignored its own prior precedent approving solar and other utility scale

⁴ In the Denial Order, the Commission adopted all the findings recommended by the Hearing Officer except for Findings 30 and 32 related to the orderly development of the region criteria under 30 V.S.A. §248(b)(1). The Commission also held that construction of the Project would violate a clear, written community standard, applicable to the Project site under the first prong of the second part of the *Quechee* test, and thus held that there would be an undue adverse effect on aesthetics. The Commission did not state which Finding(s) regarding aesthetics in particular the Commission did not adopt, but it is clear that it would be at least the second sentence of Finding 112 and the first part of Finding 104.

projects in the RCON.

The PUC's rationale was that the Project violated the following three criteria in the Bennington Town Plan related to development in the Bennington RCON zone, which is where the Project site sits. *First*, the Commission found that development in the RCON zone was limited to "limited residential development" and thus a commercial ground-mount solar project was prohibited in the RCON zone. *Second*, the Commission found that the Project violated the Town Plan criterion that prohibits development "in prominently visible locations on hillsides and ridgelines" in the RCON zone. *Third*, the Commission found that the Project violated the Town Plan criteria that "any development must minimize the clearing of natural vegetation." The PUC also *sua sponte* rejected proposed findings 30 and 32 concluding that the Project would unduly interfere with the orderly development of the region and thus not satisfy 30 V.S.A. §248(b)(1), again based upon the PUC's legal conclusion of the Town Plan's provisions relating to the RCON zone.

The issue of the Project not satisfying 30 V.S.A. §248(b)(1) was never raised by any party or the PUC prior to the PUC's Denial Order. Contemporaneously with the issuance of the Denial Order the PUC took the highly unusual step of issuing a press release touting its denial of the CPG. The PUC also posted the press release on its web site's home page. The PUC did not issue a revised proposed decision adverse to Chelsea prior to issuing the Denial Order. Nor did the PUC ever claim that a majority of the PUC members read the record of the case prior to issuing the Denial Order.⁵

The neighboring Apple Hill solar project was on a parallel but slightly delayed track in the section 248 process. As of February 2016, the technical hearing had been held and post-hearing submissions made. No proposed decision, however, had yet been issued for the Apple

⁵ It is undisputed that a majority of the PUC members did not hear the case.

Hill project.

In March 2016, both Chelsea and Apple Hill solar filed several motions with the PUC, and each also filed an amendment to its CPG application. The amendments for each project revised the plans so as to comply with the criticisms (justified or not) of the earlier plans. The net result was a substantially smaller footprint for each project, substantially less clearing (and less clearing than other permitted uses), and projects that would be completely screened from the public and the neighbors. The revised projects were specifically designed to have no adverse effect on aesthetics, thus eliminating the reasons (justified or not) for the PUC's denial of the CPG for the Chelsea project.

The Motions Order

On April 14, 2017, the PUC denied Chelsea's motions (the "Motions Order") to re-open the record or reconsider the Denial Order. The PUC also refused to accept the amendment to the Chelsea site plans. The Commission also provided further commentary regarding two criteria in the Town Plan which it believed the Project violated.

With respect to the primary basis for denial of the CPG—that commercial ground-mounted solar facilities are not permitted in the RCON zone (*a position the Town acknowledged on August 14, 2017, is not credible*)—the Commission discounted the fact that the Town of Bennington had previously supported, and the Commission had approved, commercial ground-mounted solar facilities and other electric facilities in the RCON zone. The Commission also failed to acknowledge the issuance of a CPG to another commercial ground-mounted solar facility in the RCON zone since the issuance of the Denial Order.

The Commission also claimed that its request for comments on the Town Plan issue was sufficient due process for Chelsea because Chelsea had the opportunity to introduce evidence

through its response to that request. Chelsea *did* provide further evidence in its response such as additional references to the Town Plan, and the Town's specific land use measures governing the RCON district and how the Project satisfied them. The PUC, however, refused to consider those because they were not previously offered into evidence. *See*, Denial Order, fn. 25 (“in the Chelsea PFD Comments, Chelsea cites to section 9.2 of the Town Plan at page 100. This part of the Town Plan was not included in the excerpts and therefore as not admitted into evidence.”) *See, id.*, fn. 27 (“Citing table 3.13 of the Bennington zoning rules attached as ‘Exhibit A’ to the Chelsea PFD Response, Chelsea argues that certain allowable uses in the Rural Conservation Districts include ‘electrical facilities.’ Exhibit A is not in evidence because Chelsea failed to offer it into the record; therefore we cannot rely on Exhibit A in making our determination.”)

With respect to the second Town Plan criteria allegedly violated by the Project—being sited in a prominently visible location on a hillside or ridgeline—the Commission acknowledged that the Project was not visible from the Vermont Welcome Center. Nevertheless the Commission stated that because the Project would be visible *from somewhere*, it still failed the Town Plan's criteria prohibiting the siting of structures “in prominently visible locations on hillsides and ridgelines.” To support that conclusion, the Commission quoted Finding 110 of the Denial Order, which referenced Chelsea expert, Mark Kane's initial pre-filed testimony at 4: “‘while the extent of the visibility is not large’ the Project would ‘create an adverse impact with respect to the visual resources of the area. That is, the Project would be visible.’”⁶ The difficulty with the Commission's reliance on that slim reed is two-fold. *First*, it ignores Kane's supplemental testimony (as was made clear in Kane's affirmation dated March 21, 2016, submitted with Chelsea's motions and amendment). The language cited by the Commission was from Kane's original pre-filed testimony (Kane pf.) where he stated that there would be some

⁶ *See*, Motions Order at 14-15.

transient low visibility as cars drove around the Project site. The Commission, however, simply failed to account for the supplemental testimony and supplemental mitigation plan, the purpose of which was to screen the Project from direct and unfiltered views from the vantage point referenced by Kane in his original pre-filed testimony—i.e., motorists travelling at high speed through the highway interchange. With the successful implementation of that mitigation Kane stated that the Project would have little impact on the surrounding visual resource. He also stated that the Project would not likely be noticeable to motorists travelling around the western edge of the Project site unless one was intentionally looking for the Project. See, Att. I, ¶11; Att. VI, ¶. The Commission’s use of superseded testimony is clear error and simply reinforces Chelsea’s claim that a majority of the Commissioners did not record the record.

Second, the Commission’s reliance on mere “visibility” ignores the language of the Town Plan allegedly violated, which refers to *prominently visible* locations on hillsides or ridgelines, not merely visible locations. As Mark Kane explains in Att. I, ¶12, Finding 110 in which the Commission relied does not account for his supplemental testimony. Had the Commission accounted for that supplemental testimony, as Kane explains, there is “no reasonable basis to conclude that the Project even as originally proposed was sited in a prominently visible location on a hillside or ridgeline as it would be barely visible.” See, Att. I, ¶13.

Although the Commission refused to re-visit its conclusions in the Denial Order or accept the amendment with respect to the Chelsea Project, the Commission took the opposite approach with respect to the Apple Hill project and re-opened the Apple Hill proceeding and agreed to accept the amendment and review the revised site plans. See, Att. V.

Efforts With the Town Regarding the Revised Plans

For the better part of the past year, the developer has engaged both intervenor Harris and

the Town in settlement discussions to address their concerns and to insure projects that would not be visible to the public or the neighbors. Further adjustments to the amended plans of both projects were made based upon input from the Town.⁷ The revised final plans and visual simulations were prepared and distributed to the Town, the neighbors and made available to the public.⁸ The Town's Select Board held several public meetings on the revised plans, culminating last month in the Select Board voting to withdraw its opposition to the Apple Hill project because in the words of the Town Attorney, the revised plans are "consistent with what I see is the text of the Town Plan." See, Att. II, Exh. BWS-1, Transcript of August 14, 2017, Select Board meeting, at 38. The Town, however, voted to continue its opposition of the Chelsea Project in the Vermont Supreme Court because that appeal currently involves the original (not the revised) plans. See, Transcript at 44-45.

LEGAL STANDARD

Rule 60(b)(6) "is an omnibus clause providing that 'the court may relieve a party ... from a final judgment, order, or proceeding for ... any other reason justifying relief from the operation of the judgment.'" *Pierce v. Vaughan*, 2012 VT 5 (2012) at P9. "[R]elief from judgment under V.R.C.P. 60(b)(6) is, by its very nature, invoked to prevent hardship or injustice and thus is to be liberally construed and applied." *Id.* citing *Cliche v. Cliche*, 143 Vt. 301, 306 (1983). V.R.C.P. is made applicable to PUC proceedings under PUC rule 2.105.

The appropriate standard in this case is the flexible standard used by the United States

⁷ Harris never seriously engaged in settlement discussions claiming, among other things, that solar was not permitted in the RCON zone even though she was, at the same time, urging that solar be restricted to the sites designated as preferred in the plan approved by the Town's solar siting committee, which designated hundreds of acres in the RCON zone as preferred sites for solar, but none of which were near her property.

⁸ The developer engaged a canvassing firm to survey citizens of Bennington outside of the local neighborhood. The results of the survey indicated overwhelming support for the Chelsea and Apple Hill solar projects. In addition, after just a few days 59 people signed a petition to the Select Board asking that they approve the projects.

Supreme Court in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), under which a party is entitled to relief if there is a significant public interest involved and there is a significant change in facts or law. Here that standard is easily met. The public interest in deploying renewable energy to combat climate change is extraordinarily high. The Governor's Climate Action Commission was told last month that "Vermont is 'nowhere near' meeting goals set in law and policy to stem the state's contribution to global climate change."⁹ Further, everyday scientists urge immediate action to combat climate change. There has also been a significant change in the facts. The basis on which the PUC denied a CPG for the Chelsea Solar project no longer exists with respect to the revised plans, which were timely filed in this Docket¹⁰. In addition, subsequent to the denial of the Chelsea Project, the PUC has approved a commercial solar facility in the RCON zone.

Chelsea also meets the high threshold *normally* required by Rule 60(b)(6), which "reflects the need to balance finality of judgments with the need to examine possible flaws in the judgments." *See, Bouret-Echevarria v. Caribbean Aviation Maint. Corp.*, 784 F.3d 37, 42 (1st Cir. 2015) ("There must be an end to litigation someday and therefore district courts must weigh the reasons advanced for reopening the judgment against the desire to achieve finality in litigation.") (internal citations and quotations omitted). Normally courts would examine four factors as they balance the competing interests of finality and adjudication on the merits:

- (1) the motion's timeliness, (2) whether exceptional circumstances justify extraordinary relief, (3) whether the movant can show a potentially

⁹ *Vermont 'nowhere near' climate change goals, panel hears*, VT Digger, August 16, 2017, available at <https://vtdigger.org/2017/08/16/vermont-nowhere-near-climate-change-goals-panel-hears/>. ("'We're nowhere near achieving the type of (greenhouse gas) reductions we need to reach our goals,' said Jeff Merrell, the Department of Environmental Conservation's air quality planning section chief and a speaker at the task force meeting.")

¹⁰ PUC Rule 2.204(G) allows proposed amendments to be filed at any time (See Section II of this Motion).

meritorious claim or defense, which, if proven, could bring her success at trial, and (4) the likelihood of unfair prejudice to the opposing party. However, this compendium is neither exclusive nor rigidly applied. Rather, the listed factors are incorporated into a holistic appraisal of the circumstances. There is no ironclad rule requiring an in-depth, multi-factored analysis in every case. Sometimes one factor predominates to such an extent that it inexorably dictates the result.

Id. at 43 (internal citations and quotations omitted).

Chelsea meets all four factors. *First*, Chelsea's motion is timely. It is being submitted within a reasonable time after the Board's Motions Order. It is also being submitted promptly after the Select Board's August 14 hearing. *Second*, there are many exceptional and extraordinary factors surrounding this proceeding as described in this motion and Chelsea's other filings, such as, (i) the false information that triggered the cascading events leading to the Denial Order, (ii) the Commission ignoring Kane's supplemental testimony, and testimony at the technical hearing, (iii) the Commission's approval of other commercial ground-mounted solar projects in the RCON zone both before and after the Denial Order, and (iv) the Town discrediting the primary basis for the Commission's conclusions. *Third*, the revised plans and testimony together with the position of the Town of Bennington, easily clear the hurdle of a meritorious position that could be successful in a re-opened proceedings. *Fourth*, there is no unfair prejudice to any party. No party's rights are being lost or prejudiced. To the contrary, reviewing the revised plans in this proceeding will be beneficial to all parties as compared to the extra time and effort of doing so in a newly-filed separate proceeding, which would also then result in an inefficient use of resources with all the parties concurrently continuing litigation at the Vermont Supreme Court.

Moreover, the policy of finality, which is the policy that raises the burden for a movant, is minimal because even if the Vermont Supreme Court upheld the PUC's Orders, Chelsea Solar

would procedurally be entitled to file a new CPG application using the revised plans. It would be an inefficient use of judicial and agency resources to fight over a site plan that Chelsea has already agreed with the Town of Bennington it would revise so as to comply with the criticisms (justified or not) of the earlier plan. Thus when evaluating this rule 60(b) motion, the standard favors litigation on merits, and a decision on the revised plans.

THE REVISED PLANS AND AFFIRMATIONS

The table below provides an index to the documentation, affirmations and amended plans filed herewith.

Att. I	Affirmation of Mark Kane	Mr. Kane provides revised visual simulations and his expert opinion on the criteria in 30 V.S.A. §248(b)(1), Orderly Development of the Region, 30 V.S.A. §248(b)(5), aesthetics
Att. II	Affirmation of Brad Wilson	Mr. Wilson details the revisions to the project and the effect on 30 V.S.A. §248(b)(1), (2), (3), (4), (5), (6), (7), (10)
Att. III	Affirmation of Dori Barton	Ms. Barton provides confirmation that the project changes do not adversely affect her prior conclusions regarding compliance with the criteria in 30 V.S.A. §248(b)(5), (8)
Att. IV	Affirmation of Greg Dixon	Mr. Dixon addresses specific criteria in Section 248 related to the ecological and biological impacts of the proposed Project.
Att. V	Docket 8454, <i>Procedural Order Re: Additional Due Process</i> , May 24, 2017	The PUC order concerning the process with respect to revised Apple Hill solar project site plans.
Att. VI	Supplemental Declaration of Mark Kane dated March 21, 2016	Mr. Kane addresses the supplemental mitigation plan.

Summary of the Revised Plans

Both the Chelsea and Apple Hill projects have been significantly reduced in size through a combination of using higher wattage black-faced solar modules (which were not available when the original section 248 petition was filed), reducing row-to-row spacing, and decreasing the tilt angle of the modules. With additional adjustments to the screening plan at the Town's

suggestion, the net result is that both projects would be completely screened from view from the public and the neighbors. Expert testimony on the revised site plans (see Att. I) state that there is no adverse effect on aesthetics because the projects cannot be seen.

The computer generated visual simulations of the revised plans (see Att. I) show clearly that the project is completely screened from all public and neighboring vantage points. The revised plan for the Project (which is achievable in part due to technological advances in the capacity of solar modules since the technical hearing) eliminates all potentially adverse effects to aesthetics, thus eliminating the bases under 248(b)(1) and 248(b)(5) (whether correct or not) for the denial of the CPG. See, Att. I. As to the other section 248 criteria, the affirmations submitted herewith establish that the Project continues to satisfy other section 248 criteria.

ARGUMENT

I. The Common Sense Approach Is For the PUC To Grant The Motion And Review The Revised Plans.

The PUC should take the flexible and “common sense approach” and review the alternate plans. *In re Maple Tree Place*, 156 Vt. 494, 499 (1991). There are several factors that favor such an approach.

A. There Is A Significant Change Of Facts And Economy Of Judicial And Agency Resources Favor Addressing Those Now.

It would be inefficient use of judicial and agency resources to fight over a site plan that Chelsea has already agreed with the Town of Bennington it would revise so as to comply with the criticisms (justified or not) of the earlier plan. The PUC has already agreed to re-open the Apple Hill section 248 proceedings and receive and review the revised site plans that were presented to the Town. After months of public comments, on August 14, 2017, the Bennington Select Board voted 5-1 to not oppose the revised plans for the Apple Hill Solar project in docket

8454 because the revised plans meet the requirements of the Town Plan. At the Select Board's public hearing, the Town of Bennington's counsel, Rob Woolmington, stated: "I never read the Town Plan as prohibiting all alternative energy everywhere in the [rural conservation] district. I think what they've done is consistent with what I see is the text of the Town Plan." See, Att. II, Exh. BWS-1, Transcript of August 14, 2017, Select Board meeting, at 38.

The Select Board, however, voted to continue its opposition to Chelsea in the Vermont Supreme Court because the original plans are at issue there, not the revised plans. But there is no reason for the parties to continue litigating the original plans in the Vermont Supreme Court when the developer is willing to move forward with the revised plans submitted herewith. Moreover, when the PUC issued the Denial Order in February 2016, it did not have the benefit of any input from the Town in the Chelsea proceeding. Now it does. That input is directly contrary to the PUC's blanket legal conclusion that the Town Plan barred commercial solar projects.¹¹ On that particular issue the following statement from the Town's attorney at the August 14, 2017, public hearing is especially relevant:

the Town Plan I do not think can credibly be construed to bar alternative energy projects in the rural [conservation] district because of the preceden[ts], because of the language of the plan, because of the way the zoning by-laws allow specific uses in that area and because of the planning that's been underway for the future that includes a number of properties in that area for solar energy.

See, Att. II, Exh. BWS-1, Transcript of August 14, 2017, Select Board meeting, at 21.

B. Significant Public Policies Favor Reviewing The Amended Plans.

The Governor's Climate Action Commission was told last month that "Vermont is 'nowhere near' meeting goals set in law and policy to stem the state's contribution to global

¹¹ The PUC's conclusion was also contradicted by the PUC's approval of commercial solar projects in the Bennington RCON district both before and after the Denial Order. See, e.g., CPG (#NMP-6523), Kobelia Bennington GLC Solar LLC, approving a solar project before the Denial Order; see, Exhibit B to Chelsea's Motion for Mediation filed January 20, 2017, for the order approving one afterwards.

climate change.”¹² Further, everyday scientists urge immediate action to combat climate change.

The landmark Paris Agreement to combat climate change officially took effect last November. "We remain in a race against time," UN Secretary General Ban Ki-moon said. When signed, the Paris Agreement was expected to hopefully limit the rise in average world temperatures to "well below" 2.0 C above pre-industrial times. But the day before the Paris Agreement took effect, the United Nations Environment Programme published its annual emissions report concluding that without an additional 25% reduction by 2030 on top of the Paris Agreement, the world is on a path of 2.9-3.4 C of warming. With that new urgent call to action, and the aggressive anti-climate change stance of the current US Administration, the need for immediate deployment of renewable energy is more acute.

The policies espoused in the Bennington Regional Plan (*see*, Att. II, Exh. BWS-4) and the Bennington Town Plan (the 2010 and 2015 versions) (*see*, Att. II, Exh. BWS-2 and Exh. BWS-3) also favor immediate action to address climate change, and the development of local renewable energy resources. Further, the Chelsea site is ideal for solar, for among other reasons, those stated in a recent email by Bennington Select Board Vice Chair, Don Campbell, to Libby Harris.¹³

¹² Vermont 'nowhere near' climate change goals, panel hears, VT Digger, August 16, 2017, available at <https://vtdigger.org/2017/08/16/vermont-nowhere-near-climate-change-goals-panel-hears/>. (“‘We’re nowhere near achieving the type of (greenhouse gas) reductions we need to reach our goals,’ said Jeff Merrell, the Department of Environmental Conservation’s air quality planning section chief and a speaker at the task force meeting.”)

¹³ The Chelsea site’s usefulness for solar was emphasized in a recent email by Bennington Select Board Vice Chair, Don Campbell, to Libby Harris, a copy of which was provided by Harris: “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.” *See* Att. II, Exh. BWS-5.

C. Vermont Supreme Court Precedent Favors The PUC Considering The Alternate Plan.

The Vermont Supreme Court has stated that it is good policy for applicants to resolve differences by amending projects to respond to issues raised by interested participants. *See, In re Chaves A250 Permit*, 2014 VT 5 (2014) at P16. (“Applicants are encouraged to resolve differences with interested parties by amending a project to respond to issues.”) The Vermont Supreme Court has also stated that “[r]emand is appropriate to return the matter [] for further consideration if the proposed use or site plan, or both, were [] subject to a different approach,” *In re Jolley Assocs. (Town of Shelburne)*, 2006 VT 132, at P13 (emphasis added.) That is precisely the case here as the revised site plans fully eliminate the bases for the denial of the CPG.

The PUC’s rationale for not giving any consideration to the alternate plan, or indeed any alternate plan or conditions, was that because Chelsea proposed the alternate plan after the evidentiary record closed, it would not consider it.¹⁴ However, it is unclear when the PUC officially closed the record, if at all. The PUC’s Motions Order also suggested that Chelsea had an opportunity to completely revise the Project once the PUC issued its request for comments on Harris’ claim that the project would violate the Town Plan. But it is not reasonable for Chelsea to have anticipated from the PUC’s request for comments that the PUC (i) would ignore the two

¹⁴ The PUC’s specific rationale is less than clear. At one point the PUC states that “Chelsea’s Motion to Amend the Petition is untimely under Rule 59(e) because it was offered after the [Denial] Order.” *See*, Motions Order at 22. Then the PUC stated: “Because the amendment was proposed after the evidentiary record closed, it is not appropriate to address the substance of this Motion to Amend the Petition as part of our reconsideration of the [Denial] Order. The Motion to Amend the Petition is therefore untimely.” *Id.* at 22. That conclusion directly contradicts the plain language of PUC Rule 2.204(G). The PUC treated the amendment as a motion to amend, but unlike VRCP 15, Rule 2.204(G) does not require consent or a motion for an amendment. Rather Rule 2.204(G) is self-executing and expressly permits amendments “at any time,” and the only basis on which the Rule disallows an amendment is if the PUC affirmatively finds that the amendment has “the effect of unreasonably delaying any proceeding” or that it would “unreasonably adversely affect[] the rights of any party.” No such findings were made by the PUC. No party objected to the amendment within the ten-day period stated in Rule 2.204(G).

years of effort designing a project that was reviewed by experts including those of the Department, (ii) would ignore expert testimony in the record, (iii) would reverse its conclusions from other projects approved in the RCON zone, (iv) would ignore the supplemental testimony of Chelsea's aesthetics expert, and (v) would not adopt the Hearing Officer's conclusions, all without proposing another decision or scheduling further evidentiary hearings.

D. Consideration of The Revised Plans Would Avoid Selective Enforcement.

In the Motions Order the PUC admitted to selective enforcement of its view of the allegedly violated provisions of the Town Plan. The PUC's explanation for its different treatment of Chelsea as compared to other solar projects it approved in the Bennington RCON zone both before and after its denial of the CPG for Chelsea, was that no one complained.¹⁵ As the Vermont Supreme Court acknowledged in *In re G.T.*, 170 Vt. 507 (2000), such an explanation is the paradigm of unconstitutional discrimination and selective enforcement. See, *id.* at 514 citing *People v. Acme Markets, Inc.*, 37 N.Y.2d 326, 334 N.E.2d 555, 558, 372 N.Y.S.2d 590 (N.Y. 1975) (discriminatory enforcement found where Sunday sales law was unenforced, save upon complaint). The parallel between the *Acme Markets* case and this case is striking. In *Acme Markets* the Sunday sales law was enforced only upon complaint, which turned it into a tool for private purposes. Here, both before and after it denied Chelsea a CPG, the PUC issued CPGs for solar projects in the RCON zone, a result directly at odds with the basis for its denial here that putting solar facilities in the RCON zone violates the Town Plan.

¹⁵ In the Motions Order, the PUC only mentioned its decisions rendered prior to the Denial Order. See Motions Order at 19, fn.48. The PUC did not address the fact that even after it issued its well-publicized Denial Order, and Chelsea filed its motions, the PUC continued to issue CPGs to commercial utility scale solar projects in the RCON zone. This was pointed out to the PUC in Chelsea's motion for mediation filed on January 20, 2017. In that motion Chelsea attached as Exhibit B the PUC's order dated November 17, 2016, an order issuing a CPG for a commercial utility-scale solar facility in the RCON district, one which is visible from public roadways. Thus the PUC continues to approve CPGs in the RCON zone—a position 180 degrees opposite of its holding in the Denial Order.

The PUC's actions and its admission that it only would enforce its conclusion upon complaint is unconstitutional discrimination, which re-opening the proceeding and reviewing the revised plans would alleviate.

II. PUC Rule 2.204 Favors Reviewing The Amended Plans.

After the PUC's Denial Order, Chelsea Solar filed an amendment to its petition for a CPG. *See*, Motions Order at 21 ("Chelsea made the Motion to Amend the Petition after the Petition was denied and while the finality of the February 16 Order awaited a determination pursuant to V.C.R.P. 59(e).") In the Motions Order, the PUC dismissed the amendment on the basis that it was insufficient and untimely. The PUC stated that it was insufficient because the amendment did "not include information as to the potentially significant impacts of the proposed changes on all of the Section 248 criteria." *Id.* at 23. While Chelsea does not agree that the amendment could be completely dismissed on that basis, today's motion and amendment corrects that perceived deficiency. Further, based upon the Town's conclusions as to the compliance with the Town Plan for the amended Apple Hill project, the amended Chelsea plans would similarly result in full compliance with the Town Plan thus eliminating the bases on which the PUC issued the Denial Order.

In the Motions Order, the PUC also concluded that the amendment was untimely because it was filed "after the evidentiary record closed," *id.* at 22, stating that any change that could have been made before the Denial Order was permanently banned. While it is unclear when if at all the evidentiary record was closed, that conclusion directly contradicts the plain language of Rule 2.204(G). It was also contrary to standard PUC practice to impose conditions, i.e., alternate plans, if it has an issue with a certain feature of a project. The PUC treated the amendment as a motion to amend, but unlike VRCP 15, Rule 2.204(G) does not require consent or a motion for

an amendment. Rather Rule 2.204(G) is self-executing and the only basis on which the Rule disallows an amendment is if the PUC affirmatively finds that the amendment has “the effect of unreasonably delaying any proceeding” or that it would “unreasonably adversely affect[] the rights of any party.” No such findings were made by the PUC. Thus the PUC should provide relief from its decision as to untimeliness.

Even if the amendment were governed by VRCP 15, the PUC should have not dismissed the amendment. Under the Vermont and Federal Rules of Civil Procedure, a judgment is separate document that must be entered pursuant to Rule 58. No such separate document is generally issued by the PUC, and none was issued in this docket. It is clear, however, from the PUC’s Motions Order that the PUC did not consider its Denial Order final because it acknowledged that the finality of that order “awaited a determination” of Chelsea’s motions. *See*, Motions Order at 21 (“Chelsea made the Motion to Amend the Petition after the Petition was denied and while the finality of the February 16 Order awaited a determination pursuant to V.C.R.P 59(e).”) Thus when the amendment was filed, the PUC’s order was not final. The Vermont Supreme Court has “repeatedly held that trial courts are to be liberal in permitting amendments to the pleadings.” *Northern Security Insurance Co. v. Mitec Electronics, Ltd.*, 2008 VT 96, ¶ 38, 184 Vt. 303, 965 A.2d 447. “This policy of liberality rests on three principal goals: (1) to ensure maximum opportunities for claims to be decided on their merits rather than on procedural niceties; (2) to provide notice of claims and defenses; and (3) to enable parties to raise claims that were overlooked or unknown earlier in the proceedings.” *Id.*

PUC Rule 2.204(G) provides a far more liberal amendment policy than VRCP 15 because it allows amendments “at any time.” The policy of Rule 2.204(G) is consistent with the Vermont Supreme Court’s policies that differences among participants should be resolved by amending

projects, *see, In Re Chaves A250 Permit*, 2014 VT 5 (2014) at P16, and remanding to agencies for “further consideration if the proposed use or site plan, or both, were [] subject to a different approach.” *In re Jolley Assocs. (Town of Shelburne)*, 2006 VT 132, at P13 (emphasis added.) Those factors also favor granting this motion and reviewing the revised plans.

III. The PUC’s Findings Are No Longer Supportable.

The Commission’s rationale for disagreeing with the Hearing Officer’s proposed findings regarding aesthetics and orderly development rested on the Project allegedly violating three criteria in the Bennington Town Plan related to development in the Bennington RCON zone, which is where the Project site sits. *First*, the Commission found that development in the RCON zone was limited to “limited residential development” and thus a commercial ground-mount solar project such as the Project was prohibited in the RCON zone. *Second*, the Commission found that the Project violated the Town Plan criterion that prohibits development “in prominently visible locations on hillsides and ridgelines” in the RCON zone. *Third*, the Commission found that the Project violated the Town Plan criteria that “any development must minimize the clearing of natural vegetation.”

The first basis has been discredited by the Town. As stated above, the Town Attorney has publicly stated that the Commission’s finding that commercial grounded-mounted solar is not permitted in the RCON zone under the Town Plan is simply not credible. *See*, Att. II, Exh. BWS-1, Transcript of August 14, 2017, Select Board meeting, at 21. As to the second basis, the Commission (i) ignored the supplemental testimony of Mark Kane as discussed above, which superseded what was relied on by the Commission, (ii) ignored the plain language of the Town Plan by equating mere alleged “visibility” with being in a “prominently visible location[] on [a] hillside[],” and (iii) ignored the evidence that Chelsea did submit in connection with its January

2016 comments. Had the Commission accounted for that supplemental testimony, as Kane explains, there is “no reasonable basis to conclude that the Project even as originally proposed was sited in a prominently visible location on a hillside or ridgeline as it would be barely visible.” *See*, Att. I, ¶13. The Commission’s second basis is simply not credible either.

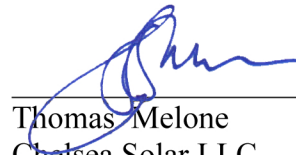
The end result is that the Commission’s disagreement with the Hearing Officer’s proposed findings relies solely on the vagaries of a statement that development in the RCON must “minimize clearing”. Even the Commission has failed to explain what type of standard that really is, how it could possibly be a clear and unambiguous standard, how it applies to the Project, and how the Project allegedly failed it.

CONCLUSION

For the reasons stated above, Chelsea moves the Commission to grant this motion, vacate the Denial Order and set a further procedural schedule to review the revised plans.

Dated: September 7, 2017

CHELSEA SOLAR LLC



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EXHIBIT E

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 8302

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 at)
500 Apple Hill Road, Bennington, Vermont)

Order entered: 4/14/2017

ORDER DENYING CHELSEA MOTIONS

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I. INTRODUCTION

In today's Order, the Vermont Public Service Board ("Board") denies motions by Chelsea Solar LLC ("Chelsea" or the "Petitioner"): (1) to vacate the Board's Order of February 16, 2016 (the "February 16 Order"); (2) to reopen discovery in this Docket; (3) to take judicial notice of certain documents; (4) to amend Chelsea's June 19, 2014, petition (the "Petition"); (5) for a supplementary hearing pursuant to V.R.C.P. 59(a) to make new findings pursuant to V.R.C.P. 52(b); (6) to alter and amend the February 16 Order pursuant to V.R.C.P. 59(e); (7) to strike the responses of the Department of Public Service ("DPS" or the "Department") and the Agency of Natural Resources ("ANR") to Chelsea's post-judgment motions; (8) to hold an evidentiary hearing on the motions pursuant to V.R.C.P. § 78(b)(2); and (9) for mediation pursuant to V.R.C.P. § 16.3.

II. PROCEDURAL HISTORY

On June 19, 2014, Chelsea filed the Petition with the Board including supporting testimony and exhibits, requesting a certificate of public good under 30 V.S.A. § 248 to install and operate a 2.0 MW AC solar electric generating facility at 500 Apple Hill Road, Bennington, Vermont (the proposed "Project").

On October 2, 2015, the Hearing Officer issued a proposal for decision ("PFD") consistent with 3 V.S.A. § 811. In the PFD, the Hearing Officer recommended that the Board approve the Project subject to certain conditions.

On October 13, 2015, Libby Harris filed comments on the PFD (the "Harris PFD Comments"). In those comments, Ms. Harris argued that the Project would violate a clear, written community standard in the Town Plan and therefore "the CPG should not be issued."¹ Ms. Harris also requested that the Board visit the site before issuing a final order.

On October 14, 2015, Chelsea filed comments requesting that the Board delete the Hearing Officer's finding 12, which addresses technical features of the Project's interconnection equipment, and replace it with corrected language.

No other comments on the PFD were filed.

¹ Harris PFD Comments at 5.

On November 13, 2015, Board Chairman Volz and Board Member Cheney conducted a site visit to the Project parcel and the adjacent site of the Apple Hill Solar project being reviewed in Docket 8454 (“Apple Hill”). The Board also visited several surrounding properties with views of the Project site.

On January 6, 2016, the Board issued an Order providing the parties with an opportunity to comment on the issue of whether there is language in the Town Plan that constitutes a clear, written community standard for the area in which the Project is proposed to be sited (the “January 6 Order”). The Board observed that Ms. Harris had raised this issue for the first time in her comments on the PFD.

On January 15, 2016, Chelsea responded to the January 6 Order (the “Chelsea PFD Response”).

On February 16, 2016, the Board issued the February 16 Order finding that the Project would unduly interfere with the orderly development of the region and would have an undue, adverse impact on aesthetics.

On March 14, 2016, Chelsea filed three motions requesting that the Board: (1) vacate the February 16 Order (“Motion to Vacate”), (2) reopen discovery (“Motion to Reopen Discovery”), and (3) take judicial notice of certain documents (“Request for Judicial Notice”).

On March 21, 2016, Chelsea filed three motions requesting that the Board: (1) alter or amend its February 16 Order pursuant to V.R.C.P. 59(e) (“Motion for Reconsideration”); (2) order a supplementary hearing pursuant to V.R.C.P. 59(a) to make new findings pursuant to V.R.C.P. 52(b) (“Motion for a Supplementary Hearing”); and (3) permit an amendment to its June 19, 2014, petition (“Motion to Amend the Petition”).

On April 29, 2016, Ms. Harris and the Department filed comments opposing the Chelsea motions of March 14 and March 21 (the “Harris April 29 Comments” and the “DPS April 29 Comments,” respectively).

On May 2, 2016, the Town of Bennington (“Bennington” or the “Town”) filed comments opposing the Chelsea motions of March 14 and March 21 (the “Bennington May 2 Comments”).

On May 3, 2016, Bennington filed a notice of supplemental authority, citing to the April 29, 2016, decision of the Vermont Supreme Court in *In re Rutland Renewable Energy, LLC* (“*Cold River*”), 2016 VT 50.

On May 5, 2016, ANR filed comments supporting the DPS April 29 Comments (the “ANR May 5 Comments”).

On May 13, 2016, Chelsea filed a motion requesting that the Board strike the DPS April 29 Comments and the ANR May 5 Comments (the “Motion to Strike”). Also on May 13, 2016, Chelsea filed a reply to the DPS April 29 Comments and the Harris April 29 Comments, the Bennington May 2 Comments, and the ANR May 5 Comments (the “Chelsea May 13 Reply”). Chelsea also filed a request for an evidentiary hearing pursuant to V.R.C.P. § 78(b)(2) (the “Motion for an Evidentiary Hearing”).

On May 25, 2016, ANR filed comments opposing the Motion to Strike (the “ANR May 25 Comments”).

On June 3, 2016, the Department and Ms. Harris each filed comments opposing both the Motion to Strike and the Motion for an Evidentiary Hearing (the “DPS June 3 Comments” and the “Harris June 3 Comments,” respectively).

On June 6, 2016, Chelsea filed a reply to the ANR comments of May 25 and the Department comments of June 3 (the “Chelsea June 6 Reply”).

On January 24, 2017, Chelsea filed a motion for mediation pursuant to V.R.C.P. § 16.3 (the “Motion for Mediation”).

On January 27, 2017, Bennington filed comments opposing the Motion for Mediation.

On January 31, 2017, the Department filed comments opposing the Motion for Mediation.

On February 1, 2017, the Board issued an order directing the parties to comment on the Motion for Mediation by February 17, 2017.

On February 21, 2017, Chelsea filed comments in support of its Motion for Mediation (“Chelsea February 21 Comments”).

On February 24, 2017, Ms. Harris filed comments in opposition to the Motion for Mediation (“Harris February 24 Comments”).

On March 20, 2017, Chelsea filed a motion by email to strike certain comments by Ms. Harris in the Harris February 24 Comments (the “Second Motion to Strike”). The email was followed up by a paper filing on March 30, 2017.

On March 22, 2017, Ms. Harris responded to the Second Motion to Strike.

No other comments were filed.

III. POSITIONS OF THE PARTIES OTHER THAN THE PETITIONER

The Department

The Department maintains that “the Board exercised sound discretion in interpreting the application of the Bennington Town Plan to the Project”² and should reject all of the Chelsea motions.

Ms. Harris

Ms. Harris opposes the Chelsea motions of March 14 and March 21. Ms. Harris supports Bennington’s opposition to the Chelsea motions of March 14 and March 21. Ms. Harris also supports the ANR May 25 Comments and the DPS June 3 Comments that oppose the Motion to Strike and the Motion for an Evidentiary Hearing. Ms. Harris also opposes the Motion for Mediation because it was “not timely or appropriate.”³ Ms. Harris further requests that the Board “sanction the Petitioner for excessive and frivolous filings.”⁴

Bennington

Bennington opposes the Chelsea motions of March 14 and March 21. Bennington contends that the Board proceedings “were fair and Chelsea is not entitled to further relief.”⁵

2. DPS April 29 Comments at 18.

3. Harris February 24 Comments at 4.

4. Harris June 3 Comments at 2.

5. Bennington May 2 Comments, Memorandum in Opposition to Petitioner’s Motion to Alter and Amend Under Rule 59(e) at 14.

Bennington also requests that “the Board consider exercising its inherent authority to control its docket to impose word limits on any further filing in this matter.”⁶

Bennington also opposes the Motion for Mediation because the current version of V.R.C.P. § 16.3 does not apply to this matter.

ANR

ANR supports the DPS April 29 Comments opposing the Chelsea motions of March 14 and March 21. ANR recommends that the Board dismiss the Motion to Strike with prejudice because “[f]iling baseless motions, such as the Motion to Strike, serves no productive purpose, requires the expenditures of additional Agency resources, and should not be condoned.”⁷

IV. DISCUSSION

A. Motion to Vacate

Chelsea requests that the Board vacate the February 16 Order because it was issued in violation of the Administrative Procedures Act (“APA”), which states in relevant part:

When in a contested case a majority of the officials of the agency who are to render the final decision have not heard the case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served upon the parties, and an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision. The proposal for decision shall contain a statement of the reasons therefor and of each issue of fact or law necessary to the proposed decision, prepared by the person who conducted the hearing or one who has read the record. The parties by written stipulation may waive compliance with this section.⁸

Chelsea argues that: (1) it was denied due process in that it received no opportunity “as a party adversely affected by the decision” to comment on the February 16 Order; and (2) the Board violated the APA by not reading the entire record before issuing its decision. As to the due process argument, Chelsea asserts that the Hearing Officer’s PFD was not adverse to its interests

6. *Id.* at 16.

7. ANR May 5 Comments at 2.

8. 3 V.S.A. § 811.

but that the February 16 Order was and thus required the Board to publish its own revised PFD and allow comment on it.⁹ Regarding the APA violation argument, Chelsea asserts that the quoted language in Section 811 requires that the three Board members read the entire record, which Chelsea alleges evidently did not occur because the February 16 Order contains numerous factual errors.

As discussed below, these arguments are not supported by the facts or the relevant case law. We therefore deny the Motion to Vacate the February 16 Order.

1. Motion to Vacate: Due Process

On October 2, 2015, the Hearing Officer issued a PFD recommending that the Board approve the Project subject to certain conditions.

On October 13, 2015, Ms. Harris filed comments on the PFD. In those comments, Ms. Harris argued that the Project would violate a clear, written community standard in the Town Plan. Ms. Harris requested that the Board not accept the Hearing Officer's recommendation to approve the Project because "the Petitioner has not met his burden of proof, and the Project would create an unduly adverse aesthetic impact and the CPG should not be issued."¹⁰ Ms. Harris also requested that the Board conduct a site visit.

In the January 6 Order, the Board provided the parties with an opportunity to comment on the issue of whether there is language in the Town Plan that constitutes a clear, written community standard for the area in which the Project is proposed to be sited, this issue having been raised by Ms. Harris for the first time in her PFD comments.

On January 15, 2016, Chelsea responded to the January 6 Order by filing the "Chelsea PFD Response," in which Chelsea asserted that the Town Plan standards identified by Ms. Harris in fact are "zoning bylaws" and that "it is well settled in Vermont that zoning regulations are not

9. Chelsea argues, without citing to any authority, that the Board is required to issue its own PFD. There is no such legal requirement in Title 30 or the Vermont APA. Cf. 30 V.S.A. § 226b, which explicitly requires the issuance of a proposed Board order in certain specified circumstances.

10. Harris PFD Comments at 4-6.

the most appropriate source for a clear, written community standard under the Quechee test and projects under Section 248 are exempt from zoning bylaws.”¹¹ Chelsea further argued that:

With respect to the amorphous design suggestions in the Town Plan, . . . the Project property is not in violation of any “clear standards” in the Town Plan. . . . [S]uch an interpretation of the Town Plan would have the effect of mandating a particular outcome in this Section 248 proceeding and such an outcome is inconsistent with Vermont law.¹²

Chelsea supported its argument by stating that “the only evidence in the record in this Docket on topic” is that provided by Mark Kane, Chelsea’s aesthetics witness who testified to the Project’s conformance with the Town Plan. Chelsea argued that it had met its burden of proof regarding the issue of whether the Town Plan created a clear, written community standard through “the unchallenged testimony of Mark Kane on the Town Plan” and because “[n]o evidence has been presented by any party in this Docket that contradicts the evidence provided by the Petitioner with respect to the Project’s conformance with the Town Plan.”¹³ Chelsea added that the Department, using “its own aesthetics consultant,” agreed “that subject to certain conditions specified in the Memorandum of Agreement, the Project satisfies the criteria of Sections 248(b)(1) and 248(b)(5).”¹⁴ After consideration of these arguments made in the Chelsea PFD Response, we issued the February 16 Order denying a CPG for the Project for the reasons set forth in that Order.

In the Motion to Vacate, Chelsea now argues that the Board is required by 3 V.S.A. § 811 to provide Chelsea with an opportunity to file exceptions and present briefs and oral argument on the issues raised by Ms. Harris in her filing of October 13, 2015.

11. Chelsea PFD Response at 6 citing *Petition of Georgia Mountain Community Wind*, Docket 7508, Order of 6/1/10 at 52 (quoting *City of South Burlington v. Electric Power Company, Inc.*, 133 VT 438, 447 (1975)(holding municipal zoning regulation of transmission line preempted by state regulatory authority)).

12. *Id.* at 8-9 citing *Petition of Georgia Mountain Community Wind*, Docket 7508, Order of 6/1/10.

13. Chelsea PFD Response at 3.

14. *Id.* at 1-2.

The Department argues that the February 16 Order should not be vacated because Chelsea's due process rights were satisfied when the Board's January 6 Order requested comments on the issue of clear, written community standard.¹⁵

Petitioner availed itself of this opportunity and on 1/15/16 filed a 13-page response containing legal arguments contrary to those presented by Harris. Notably, Petitioner makes no mention of this additional process and the role of the Board therein, in its Motion to Vacate. Had the Board proceeded directly to a Final Order without conducting any additional process, due process may have required a subsequent proposal for decision but on this record, no further process was due.¹⁶

The Department supports its argument by citing *Bandel*,¹⁷ in which the Vermont Supreme Court upheld the Board's decision *sua sponte* to reject the recommendation of a hearing officer in favor of conducting further proceedings. After an additional evidentiary hearing, the Board in *Bandel* issued an order rendering additional findings and reaching legal conclusions contrary to those of the hearing officer.

Chelsea responds by asserting that in *Bandel* the Board rejected the hearing officer's findings only after further hearings were held by the Board. Chelsea therefore argues that *Bandel* requires that additional hearings be conducted in this case. The Department responds that the additional process reflected in the Board's request for comments and the Chelsea PFD Response are sufficient to meet the requirements of *Bandel* and the due process requirements of 3 V.S.A. § 811.

We find no merit to Chelsea's argument. As to the requirements of § 811, that section only requires that a hearing officer's proposal for decision be circulated. Nowhere in that section does it require that the Board, as the decision maker, circulate a draft of its determination. Moreover, the possibility that the final decision may be different from the PFD is implicitly

15. Bennington also argues that the Motion to Vacate should be denied because there was no violation of 3 V.S.A. § 811 and "the Board's review in this case satisfies the mandates of the APA." Bennington May 2 Comments, Opposition to the Motion to Vacate, at 3.

16. DPS April 29 Comments at 5, citing *In re Peter A. Lakatos, D.M.D.*, 182 VT 487 (2007) (Petitioner before Board of Dental Examiners permitted exceptions to Board decision where Board did not hear the evidence, the Board rejected fact-finder's recommendation, and credibility of petitioner's testimony was essential issue).

17. DPS April 29 Comments at 3, citing *Vermont Electric Power Co., Inc. v. Bandel* ("*Bandel*"), 135 VT 141 (1977).

contemplated by § 811, otherwise the opportunity for comments would be meaningless. Here, not only did Chelsea have an opportunity to comment on the PFD, but the Board went beyond what was legally mandated by providing a further opportunity to respond to comments, as evidenced by the filing of the Chelsea PFD Response. The fact that Chelsea's filing was unpersuasive does not justify vacating the February 16 Order.

Chelsea further argues that the APA requires that the Board issue its own PFD because its decision differed from the Hearing Officer's recommendation. This novel argument is not supported by statute, case law, or Board practice. Again, nothing in Section 811 requires the Board to circulate a draft of its final decision.

Turning to the *Bandel* argument, we are similarly unpersuaded. After receiving Ms. Harris's comments on the PFD arguing that the Project would violate a clear, written community standard, the Board issued the January 6 Order that provided Chelsea with additional process in the form of written comments. After consideration of these comments, the February 16 Order denying a CPG for the Project relies on the Hearing Officer's findings that were made based on evidence sponsored by the Petitioner and already admitted into the record. Unlike in *Bandel*, the Board did not require a supplementary hearing to develop new evidence in order to support its determination. Rather, the Board reviewed and relied upon the evidentiary record developed by the Hearing Officer to reach a conclusion that differs from the outcome recommended by the Hearing Officer in the PFD. Chelsea has not shown how proceeding in this manner in any way violated § 811 of the APA.

Finally, we observe that no party requested the hearing that Chelsea now finds necessary. After Ms. Harris's filing, Chelsea availed itself of the additional process by filing a legal brief that sought to rebut Ms. Harris's argument. In that legal brief Chelsea made a decision to rely upon the existing evidentiary record in presenting its rebuttal arguments. Neither Chelsea nor any of the other parties sought an additional evidentiary hearing at that time.

2. Motion to Vacate: Alleged Factual Errors

Chelsea further argues that the February 16 Order should be vacated because it contains several factual errors that reflect the Board's failure to review the record and hold a hearing before making an adverse determination. We disagree.

First, Chelsea argues that it was error for the Board to reject finding 32, which states:

The Project site is zoned and identified in the 2010 Bennington Town Plan as part of the Rural Conservation District. The language describing this district states that while sensitivity to environmental and visual impacts for land use development is important, development is not precluded. Kane pf. at 5; exh CS-MK-3.

Chelsea contends that the rejection of finding 32 is tantamount to denying "the credibility of Mr. Kane's testimony," which, in turn, is an evidentiary judgment that can only be made following a hearing before the Board members, as opposed to the Hearing Officer.¹⁸ We disagree. As contemplated in *Bandel*, the Board as the ultimate trier of fact applied its own "special competence"¹⁹ to the evidence in the record. Based upon its review, the Board rejected finding 32 "because it does not accurately reflect the Bennington Town Plan's provisions regarding development in Bennington's Rural Conservation Districts."²⁰ The Board reviewed exhibit CS-MK-3, which includes various excerpts of the Town Plan, and reached a conclusion in interpreting these excerpts from the Town Plan that simply differed from Mr. Kane's conclusion. Therefore Chelsea's first allegation of error is without basis.

Second, Chelsea alleges that the Board erred in the February 16 Order by concluding that the Town Plan does not permit the Project because it does not allow non-residential commercial development in the Rural Conservation District. Chelsea points out that the Town Plan allows the development of "colleges, cultural institutions, and bed and breakfasts"²¹ in the Rural Conservation District. We acknowledge that the Town Plan does permit such enterprises in the Rural Conservation District.²² The Town Plan does not, however, permit commercial energy

18. Motion to Vacate at 7.

19. See *Bandel*, 135 VT at 147.

20. February 16 Order at 50-51.

21. Motion to Vacate at 8.

22. Exh. CS-MK-3 at 26.

generation facilities in the Rural Conservation District, because it has been set aside for limited residential development and certain rural commercial activities.²³

Chelsea also emphasizes that the Board has approved other projects seeking review under Section 248 in the Rural Conservation District.²⁴ Chelsea contends that while these projects did not meet the development standards in the Town Plan, the Board nonetheless found them to be in the public good. We disagree with Chelsea's position. Most significantly, these cases differ because no party in those cases produced evidence that these projects did not conform with the Town Plan. The issue was not decided in these cases, and these cases are thus readily distinguishable. Chelsea's second allegation of factual error is without basis.

The third factual error Chelsea alleges is the Board's statement that the Project would result in "the clearing of 10.6 acres of existing vegetation." Chelsea contends that all 14.85 acres of the Chelsea site would be treeless upon completion of the Project.²⁵ Chelsea argues that the Board's "error" is a reflection of the Board's failure to review the record. We disagree. The 10.6-acre figure reflects our determination, after a thorough review of the record, that 10.6 acres, rather than 14.85 acres, would be treeless upon completion of the Project.²⁶

The Board made this factual determination after assessing three inconsistent elements of the record and concluding that the 10.6-acre figure is an accurate reflection of the final treeless area at the Project site upon its completion.

23. Exh. CS-MK-3 at 16 and 26.

24. Motion to Vacate at 5-9, citing *Petition of VELCO and CVPS for a certificate of public good pursuant to 30 V.S.A. § 248 authorizing the construction of the Bennington Substation Project*, Docket 7763, Order of 8/17/12; *Petition of VTel Wireless, Inc., for a certificate of public good, pursuant to 30 V.S.A. § 248a, for the installation of telecommunications equipment in Bennington, Vermont*, Docket 8355, Order of 1/7/15; *Petition of New Cingular Wireless PCS, LLC, d/b/a AT&T Mobility, and American Towers LLC, for a certificate of public good, pursuant to 30 V.S.A. § 248a, for the installation of telecommunications equipment in Bennington, Vermont*, Docket 8393, Order of 12/18/14; and *Petition of Kobelia Bennington GLC Solar, LLC for a certificate of public good, pursuant to 30 V.S.A. §§ 219a and 248, to install and operate a 500 kW group net-metered solar electric generation facility in Bennington, Vermont*, CPG #NMP-6523, Order of 10/14/15.

25. Motion to Vacate at 3.

26. The 10.6-acre figure was developed as follows: (1) a deduction of 1.15 acres (the difference between the sum of acreage of Chelsea (14.85) and Apple Hill (13.6) and the joint tract acreage (27.3), i.e. $14.85 + 13.6 = 28.45 - 27.3 = 1.15$ acres); (2) a deduction of 3 acres for the rare, threatened, and endangered species conservation areas; (3) a deduction of an estimated 0.1 acres of vegetative mitigation; and (4) the application of the sum of all the deductions, $14.85 - (1.15 + 3 + 0.1) = 10.6$ acres.

The first inconsistency isolated by the Board in its review of the record derives from finding 3 and the site plan upon which finding 3 is based. The site plan includes the areas of both the Chelsea and the neighboring proposed Apple Hill project as part of a 27.3-acre tract. Finding 3 states that the Chelsea site is 14.85 acres of those 27.3 acres. The proposed Apple Hill project is described as being 13.6 acres.²⁷ The total acreage of the two projects is thus 28.45 acres, not 27.3 acres. This is a 1.15-acre inconsistency.²⁸

The second and third inconsistencies in the record relate to accounting for the amount of the Project area that would be covered in trees once all construction and vegetative mitigation efforts are complete.

In order to avoid adverse impacts to both rare, threatened, and endangered ("RTE") plant species and aesthetics, Chelsea developed plant conservation areas in consultation with ANR²⁹ with a combined area of approximately three acres.³⁰ These three acres of the Project site would not be clear-cut. This is a 3.0-acre inconsistency.

Finally, in consultation with the Department, Chelsea proposed a vegetative mitigation scheme to include re-planting along the northern, southern, and eastern edges of the Project.³¹ There is no estimated total acreage of this re-planting, the third inconsistency, in evidence. The Board estimated approximately 0.1 acres would be replanted. This is a 0.1-acre inconsistency.

The record is unclear as to the precise area of the Project that would be treeless upon completion of both the RTE and aesthetics mitigation schemes. The 14.85-acre figure does not appear to reflect all the activities to be conducted in the 27.3-acre parcel proposed for both Chelsea and Apple Hill (and in evidence in this Docket in the Chelsea site plan). Therefore, in an attempt to resolve the inconsistencies and in order to "credit" Chelsea for the retention of three acres of trees as well as the extensive replanting plan proposed as part of the Project, the

27. See exh. CS-MK-2 and CS-ECOS-4, and see also *Petition of Apple Hill Solar LLC*, Docket 8454, prefiled testimony of Brad Wilson at 2-3 and Mark Kane at 3-4 and exhs. AHS-ECOS-4 and AHS-MK-2.

28. The Board generally does not look outside the filing in a docket, but did so here to the extent that it was aware of a factual inconsistency. Further, the basic layout of Apple Hill is referenced in the Chelsea filings, see exh. CS-MK-2, figures 1 and 2.

29. Findings 124-128; exhs. CS-MOU-1 and CS-DIS-ANR-1.

30. See exh. CS-DB-3.

31. Findings 114-117; exhs. CS-MOU-4 and CS-MK-7.

Board determined that the final treeless footprint of the Project would be 10.6 acres, which, as the parties have stated, happens also to be the estimated clearing required for the proposed Apple Hill project.³²

The Board did not reject finding 3, which states that the Project “would occupy 14.85 acres” of an approximately 27-acre tract. While the Project would occupy 14.85 acres, not all of those acres would be treeless upon completion of the Project. Chelsea misreads finding 3 to state that all 14.85 acres would be treeless upon completion of the Project. Rather than being a mistaken conflation of the Apple Hill proposal with this Docket caused by a failure to review the record, as Chelsea argues, the allegedly erroneous 10.6-acre figure used in the February 16 Order was the product of our review of the record in order to accurately state the final treeless area of the Project.

The fourth factual error alleged by Chelsea reflects another misreading of the February 16 Order. Chelsea argues that our determination that “the Project would remain visible on a hillside above the Vermont Welcome Center”³³ is incorrect because “[t]he Chelsea Solar project is not visible at all from the Vermont Welcome Center.”³⁴ Careful review of these two statements, however, shows that there is no inconsistency because the language used in these two quoted statements is different and this difference affects the meaning of the two statements.

Finding 117 of the February 16 Order states that “retention of vegetation along the southern portion of the property effectively screens views of the Project from the Vermont Welcome Center.” By adopting this finding, the Board agrees with Chelsea that the Project would not be visible from the Vermont Welcome Center.

The Board’s statement that “the Project would remain visible on a hillside *above* the Vermont Welcome Center” reflects the evidence in the record admitted by Chelsea and adopted by the Board. Specifically, Chelsea acknowledged that “while the extent of the visibility is not large” the Project would “create an adverse impact with respect to the visual resources of the

32. Docket 8454, Wilson pf. at 3.

33. February 16 Order at 57.

34. Chelsea Motion to Vacate at 9.

area.”³⁵ That is, the Project would be visible. And, as a topographic reference point, the Project site is at an elevation “above”³⁶ the Vermont Welcome Center on a hillside that “gently slopes at 8% grade from the northeast corner to the southwest, falling approximately 94 feet over the distance.”³⁷

The Board agrees with Chelsea that the Project would not be visible “from” the Vermont Welcome Center. However, it would be visible in its location “above” the Vermont Welcome Center from other surrounding areas. Chelsea’s fourth allegation of factual error reflects a misreading of the Board’s February 16 Order.

We disagree with Chelsea’s argument for vacating the February 16 Order because the Board did not review the record, as required in a case heard by a Hearing Officer and as evidenced by alleged factual errors in the February 16th Order. To the contrary, the Board’s Order shows that it examined the relevant evidence on each of the issues raised by Chelsea. The alleged factual errors are the result of Chelsea’s misreading and misinterpreting the language of the February 16 Order. Therefore the Motion to Vacate is denied.

B. Motion to Reopen Discovery

Chelsea argues that Ms. Harris’s post-PFD argument that the Town Plan contains language that amounts to a clear, written community standard amounts to a “new defense” and asserts that Chelsea therefore is entitled to discovery on that new defense. Additionally, Chelsea requests that discovery be reopened to resolve ambiguity in other goals articulated in the Town Plan.

The Department asserts that the Board should deny Chelsea’s Motion to Reopen Discovery for three reasons. First, the Department argues that Chelsea’s motion is incorrectly premised on the notion that Ms. Harris’s argument that the Project would violate a clear, written community standard is the functional equivalent of a new defense. The Department argues that Ms. Harris’s argument did not shift the burden of proof from Ms. Harris back to Chelsea,

35. Finding 110, citing Kane pf. at 4.

36. Exh. CS-ECOS-4.

37. Finding 106, citing Kane pf. at 4.

entitling it to additional discovery. Second, the Department contends that Chelsea retained the burden of proof and that Chelsea did not take the opportunity to ask to reopen discovery to respond to Ms. Harris when Chelsea commented on the Hearing Officer's proposal for decision or in its response to the January 6 Order. Finally, the Department opposes the Chelsea Motion to Reopen Discovery because Chelsea "proffers no description of what type of discovery it would conduct, or the nature of the information that such discovery might reveal, or how it might be relevant to the matters under review."³⁸

Bennington recommends that the Board deny the Chelsea Motion to Reopen Discovery because the motion "misstates the procedural posture of this proceeding and misapplies the law with respect to relevance of the additional categories of materials sought through renewed discovery."³⁹ Specifically, Bennington argues that: (1) Chelsea's request is untimely and should have been raised when the Board sought comments on Ms. Harris's argument that the Town Plan contains language that amounts to a clear, written community standard; (2) Ms. Harris did not raise a "new defense," and "instead merely raised the question of whether Petitioner had carried its burden of proof," which remains with the Petitioner; (3) further discovery is unnecessary because the Town Plan sets forth clear, written community standards; and (4) the Town Plan, and not the zoning bylaws Chelsea seeks to enter into evidence, is the primary source for clear, written community standards.

The Board is not persuaded by Chelsea's argument that Ms. Harris's post-PFD argument that the Town Plan contained clear, written community standards that the Project would violate is a "new defense" that would require further evidentiary hearings. Moreover, the Petitioner presents no Board precedent or other case law to support such an interpretation. Chelsea retains the burden of proof to show that the Project is in the public good and would not violate any of the Section 248 criteria. Ms. Harris's argument does not amount to a new defense, but instead is an argument that Chelsea has not presented sufficient evidence to meet its burden of proof.

Further, the Board is not persuaded that additional inquiry into the language of the Town Plan is either necessary or useful. The Board is the ultimate arbiter as to whether the Town Plan

38. DPS April 29 Comments at 9.

39. Bennington May 2 Comments, Opposition to the Motion to Reopen Discovery at 1.

contains a clear, written community standard that is consistent with the Project, or not. Determining whether language in a town plan amounts to a clear, written community standard within the meaning of the Quechee test requires a determination as to the specificity of that language. Board practice is to review the language of regional and municipal planning documents and make a conclusion based on the language of the documents, not on extrinsic evidence as to the intent behind the document.⁴⁰ While we give due consideration to the recommendations of municipal officials, we do not conduct investigations into the meaning of “ambiguous” language or the historic intent of the drafters when we are assessing the language of a town plan.

Therefore, because Ms. Harris’s argument is not the functional equivalent of a “new defense” and because we are not persuaded that the language of the Town Plan is ambiguous such that further inquiry into that language would be appropriate, we are denying Chelsea’s Motion to Reopen Discovery.

C. Request for Judicial Notice

Chelsea asks that the Board take judicial notice of several Bennington planning documents available in the public realm,⁴¹ as well as several past Board decisions approving projects subject to the same Town Plan language as the Project.

The Department recommends that the Board deny the Request for Judicial Notice of the Bennington planning documents because the information is not sufficiently material to warrant reopening the record. As to the past Board decisions, the Department asserts that “decisions are not adjudicative facts and not proper subjects for judicial notice.”⁴²

The Town does not object to the Board taking judicial notice of the Bennington planning documents, but it “disputes the Petitioner’s characterization thereof, and the relevance of the

40. See *Petition of Next Generation Solar Farm, LLC*, Docket 8523, Order of 1/27/17 at 42-45 citing *Amended Petition of UPC Vermont Wind*, Docket 7156, Order of 8/8/07 at 66; see also *In re Halnon*, NM-25, Order of 3/15/01 at 22 n.5 and *In re UPC Vermont Wind*, 185 Vt. 296, 308 (2009).

41. These include versions of the Bennington Town and Regional Plans, the Town of Bennington Land Use and Development Regulations and the amendments thereto, the Bennington Regional and Municipal Energy Plans, and the Bennington Regional Commission’s Renewable Energy Potential Solar Map.

42. DPS April 29 Comments citing the Reporter’s Notes to Rule 201 of the Vermont Rules of Evidence.

materials to this proceeding.” With respect to the prior decisions of the Board, the Town asserts that “judicial notice is not required” and that “these determinations are also of limited relevance” because “none of these determinations were based on the same facts as the case at hand.”⁴³

The practice of taking judicial notice is founded on the assumption that certain matters are not controversial and therefore need not be established for legal purposes by presenting contested evidence to a trier of fact. In proceedings before the Board, Vermont law provides as follows:

Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency’s specialized knowledge. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The agency’s experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.⁴⁴

The Vermont Supreme Court has interpreted the phrase “judicially cognizable” by referring to V.R.E. 201(b), which states that “[a] judicially noticed fact must be one not subject to reasonable dispute in that it is . . . (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”⁴⁵ The purpose is “to save the time and trouble that it would take to present evidence of matters, the truth of which no one can legitimately challenge.”⁴⁶ Accordingly, when a matter is judicially noticed, it is accepted as true without formal evidentiary proof.⁴⁷

43. Bennington May 2 Comments, Response to Request for Judicial Notice at 1.

44. 3 V.S.A. § 810(4); *see e.g.* Docket 7862, Order of 3/29/13, at 5-6, and *In re Vermont Elec. Power Co., Inc.*, Docket 6860, Order of 10/06/04 at 3.

45. *In re Handy*, 144 Vt. 610, 612 (1984).

46. *Amended Petition of Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc., for amendment of their Certificate of Public Good*, Docket 7862, Order of 3/29/13, at 4, quoting Jack H. Friedenthal, Mary Kay Kane, Arthur R. Miller, *Civil Procedure* § 5.22 (2nd ed. 1993).

47. *See Carson v. Department of Employment Security*, 135 Vt. 312, 315 (reversing administrative referee who found it was “common knowledge” that store clerks generally work six days a week because “practice is not so widespread and uniform that its existence may be assumed without proof.”).

1. Past Board Decisions

Chelsea requests judicial notice to enter into evidence other Board determinations where we have approved petitions for projects within the Bennington Rural Conservation District.⁴⁸ Without citing any precedent, Chelsea argues that the Board is “equitably and collaterally estopped”⁴⁹ from finding that the Project would violate the Town Plan because we approved other projects that were also located in the Rural Conservation District and hence were subject to the same Town Plan development standards.

We decline to take judicial notice of these decisions because the facts contained therein are not judicially cognizable, as described above. Nonetheless, these decisions are part of the official Orders of the Board and the parties may cite to them without notice, for argument purposes, just as they could with court cases.

2. Town and Regional Planning Documents

Chelsea premises its request for the late admission of the additional documents on its argument that “[t]he Board has acted contrary to the direction of the Vermont Supreme Court.”⁵⁰ Specifically, Chelsea cites a string of Act 250 cases in which the Court required that the Environmental Board not view a town plan in isolation but instead should examine all the related town planning documents “if there is claim that the town plan constitutes a clear, unambiguous community standard.”⁵¹

While these cases are instructive, the Board’s review of petitions under Section 248 is different from an Act 250 review, even if the Board must give due consideration to the Act 250 criteria under Section 248(b)(5). The Vermont Supreme Court has long held that utility site selection review under § 248 differs from project environmental review under Act 250 “where state and local regulatory review coexist[s].”⁵² The issue of whether there is a “clear, unambiguous community standard” in Act 250 cases differs from whether there is a “clear,

48. Docket 7763, Order of 8/17/12; Docket 8355, Order of 1/7/15; Docket 8393, Order of 12/18/14; and CPG #NMP-6523, Order of 10/14/15.

49. Chelsea Motion for Reconsideration at 25.

50. Chelsea Motion for Reconsideration at 43.

51. *Id.* at 44, citing *In Re Chavez A250 Permit*, 195 Vt. 467 (2014).

52. *Cold River* at ¶ 18.

written community standard” in Section 248 cases. Notably, Chelsea’s argument, which would require a review of zoning bylaws, contradicts its own response to Ms. Harris’s PFD comments in which Chelsea accurately concluded that “it is well settled in Vermont that zoning regulations are not the most appropriate source for a clear, written community standard under the Quechee test and projects under Section 248 are exempt from zoning bylaws.”⁵³

Board review of utility siting cases is accomplished pursuant to 24 V.S.A. § 4413(b), which provides that zoning bylaws “shall not regulate power generating plants and transmission facilities regulated under 30 V.S.A. § 248.”⁵⁴ In Section 248 review, “municipalities have a different role.” The Board must give “due consideration” to municipal recommendations, but “the Board has the final policy decision.”⁵⁵

The Board will “open a closed record for the admission of late material only if such material appear[s] to be highly material.”⁵⁶ The town planning documents requested are not highly material because they are not likely to be dispositive on the question of what constitutes a community standard, especially given the fact that the Town Plan is in evidence and has been relied on. We are not persuaded, therefore, that the additional town planning documents that Chelsea requests are so “highly material” as to require that the closed record be reopened to allow for their judicial notice.

As the party with the burden to prove the Project is in the public good, Chelsea did not enter these documents into evidence for our consideration before we issued the February 16th Order even after two opportunities to do so. The first opportunity was at the technical hearing. The second opportunity was after the January 6 Order was issued, seeking Chelsea’s comments about Ms. Harris’s response to the PFD.

53. Chelsea PFD Response at 6, citing *Petition of Georgia Mountain Community Wind*, Docket 7508, Order of 6/1/10 at 52 (quoting *City of South Burlington*, 133 VT 438, 447 (1975)).

54. See *City of South Burlington*, 133 VT 438, 447-448; see also *Application of Green Mountain Power Corporation for a Certificate of Public Good for an Interconnected Group Net-Metered Wind Turbine*, CPG #NM-1646, Order of 3/27/15 at 5 (Board did not take judicial notice of municipal planning and development bylaws because those bylaws do not regulate public utility power generating plants.)

55. *Cold River* at ¶ 18 and ¶¶ 31-37.

56. *Petitions of Alpine Haven Water Company, Inc.*, Docket 5947, Order of 8/31/00 at 2.

For the foregoing reasons, the Chelsea request for judicial notice of the Town Plan documents is denied.

D. Motion to Amend the Petition

On March 21, 2016, pursuant to Board Rule 2.204, Chelsea made the Motion to Amend the Petition by reducing the size of the Project footprint. In support of the Motion to Amend the Petition, Chelsea attached the prefiled testimony of Brad Wilson as to the “development, design, and operations” of the Project as amended. Chelsea argues that the amended footprint proffered in the Motion to Amend the Petition “implements the Town’s goals with respect to aesthetics”⁵⁷ by compressing the Project’s equipment profile, resulting in less clearing of trees. The Town and the Department object to the amendment of the petition because it would create an unreasonable delay in concluding this proceeding.

Board Rule 2.204 states, in part, that:

Proposed amendments to any filing may be made at any time. If unobjected to by any party within ten days of filing or at the commencement of any hearing in which the amended matter is at issue, whichever is earlier, such amendments shall be deemed effective, except that the Board may at any time dismiss any proposed amendments which it finds to have the effect of unreasonably delaying any proceeding or unreasonably adversely affecting the rights of any party. . . . Proposed amendments shall be clearly identified as such and shall clearly indicate the changes they effect. In the event an amendment makes a substantial change in a filing, the Board may order such additional notice to other parties and the public as justice may require.

Chelsea contends that the proposed amendment overcomes the bases for the Board’s disapproval of the Project. The Motion to Amend the Petition thus must be considered in the procedural context within which it was made and the Board’s bases for denying the Petition. Chelsea made the Motion to Amend the Petition after the Petition was denied and while the finality of the February 16 Order awaited a determination pursuant to V.R.C.P. 59(e).

The Project was not approved for two reasons. First, it would unduly interfere with the orderly development of the region because the Project would violate specific land conservation measures in the Town Plan. And second, the Project violated clear, written community standards

57. Motion to Amend the Petition at 1.

in the Town Plan and thus failed the *Quechee* test as reviewed under the Section 248(b)(5) aesthetics criterion.

The Board appreciates Chelsea's efforts to redesign its Project. However, Chelsea's Motion to Amend the Petition is untimely under Rule 59(e) because it was offered after the February 16 Order. Chelsea seeks to have the Board reconsider its disapproval of the Project based on a proffer of new evidence in the form of a proposed amendment that could have been presented before the February 16 Order denying the petition.

Under Rule 59(e), the Board has "broad power to alter or amend a judgment."⁵⁸ In such a review, "the court may reconsider issues previously before it, and generally may examine the correctness of the judgment itself."⁵⁹ It is not intended to permit parties to simply relitigate issues or revise their tactical approach⁶⁰ or to allow parties to advance arguments that could and should have been presented prior to the decision.⁶¹

The potential to reduce the size of the Project in order to mitigate its aesthetic impact existed throughout this proceeding. The Petitioner could have offered to modify the size and reduce the aesthetic impact at any time, including after Ms. Harris initiated the discussion of the Project's violation of the Town Plan, but the Petitioner made a tactical decision not to do so. The proposed amendment thus goes beyond the scope of reconsideration under 59(e).

Because the amendment was proposed after the evidentiary record closed, it is not appropriate to address the substance of this Motion to Amend the Petition as part of our reconsideration of the February 16 Order. The Motion to Amend the Petition is therefore untimely.

58. *In re Robinson/Keir Partnership*, 154 Vt. 50, 54 (1990) (citations omitted).

59. *Id.* (citations omitted).

60. *In re Cent. Vt. Pub. Serv. Corp.*, Dockets Nos. 6946 and 6988, Order of 5/25/05; *Amended Petition of UPC Vermont Wind, LLC*, Docket 7156, Order of 2/11/11 at 3.

61. *In re SP Land Co., LLC*, 190 Vt. 418, 435, 35 A.3d 1007, 1019 (2011) (observing that it is well settled that Rule 59(e) "does not provide a vehicle for a party to undo its own procedural failures, and it certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the court prior to the judgment" (citations omitted)); *see also Application of Emerson Falls Hydro, Inc.*, CPG #NMP-6757, Order of 3/4/16 at 3-4 (Board denies 59(e) motion for failure to raise any new arguments or provide any further clarification of previously made arguments).

Even if the Board were to consider reopening the record to amend the Petition, the proposed amendment provides insufficient information for us to do so. As required by Board Rule 2.204, the Motion to Amend the Petition clearly indicates the physical changes to the Project that would be amended by providing a revised site plan and the affidavit of the Project developer. However, the Motion to Amend does not include information as to the potentially significant impacts of the proposed changes on all of the Section 248 criteria.⁶²

Unlike the original petition, which provided the testimony of various experts regarding the impacts of that proposal on the various Section 248 criteria, the amendment does not proffer any such testimony as to those impacts. While the testimony of the Project developer does address the potential impact of the proposed amendment on the Project's aesthetics, there is no expert aesthetics testimony or any other proffer of evidence as to the proposed amendment's impact on the other Section 248 criteria. The Motion to Amend is therefore insufficient.

Having determined that the Motion to Amend is untimely and insufficient, it is denied.

E. Motion for a Supplementary Hearing

On March 21, 2016, pursuant to Board Rule 2.204, Chelsea made a Motion for a Supplementary Hearing pursuant to V.R.C.P. 59(a) in order that the Board may make new findings pursuant to V.R.C.P. 52(b). The Town and the Department object to this motion. They assert that the Board properly made its decision and should not exercise its discretion to allow a relitigation of the case.

Chelsea seeks a supplementary hearing under Rule 59(a) because:

Here the affidavits and the [Request for Judicial Notice] establish that reopening the record to admit the evidence requested would lead to a different outcome. Moreover, because the decisive issue was raised after the record closed and the hearings were held, Chelsea has not been fully heard on the findings decided by

62. See *Petition of Vermont Electric Cooperative*, Docket 6544, Order of 2/20/02 at 6; see also Board Rule 5.408 (An amendment to a CPG is required if there is a substantial change to the approved proposal. A substantial change is defined as "one that has the potential for significant impact with respect to any of the criteria of Section 248(b) or on the general good of the state under Section 248(a)").

the Board adverse to Chelsea, and as such a new or continued hearing on those issues should be granted.⁶³

Under Vermont law, V.R.C.P. 59(a) “requires a judge, who is asked to grant a new trial, to weigh the evidence in the light most favorable to the verdict.”⁶⁴

Also, in part, V.R.C.P. 52(b) states:

Upon motion of a party filed not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59.

As the Petitioner in this case, Chelsea had the burden of proof. On January 6, 2016, we provided the parties the opportunity to be heard on Chelsea’s “decisive issue.” Chelsea took advantage of this opportunity and filed the Chelsea PFD Response, which relied upon evidence in the record in an effort to rebut Ms. Harris’s argument regarding the impact of the language of the Town Plan. On February 16, 2016, we made a final determination that Chelsea had not met its burden to overcome that language and disapproved the Petition.

Chelsea’s Motion for a Supplementary Hearing was filed more than one month after our final decision. We deny this motion because it is untimely. In addition, we are not persuaded, after weighing the evidence in the light most favorable to our final decision, that Chelsea should be provided an additional opportunity to provide evidence to meet its burden of proof. The information Chelsea seeks to admit into evidence in a supplementary hearing is not new. To the contrary, the information that Chelsea seeks to admit was reasonably available to Chelsea at the time the case was first litigated. For the foregoing reasons, Chelsea’s Motion for a Supplementary Hearing to amend the February 16 Order is denied.

63. Motion for Reconsideration at 22.

64. *Irving v. Agency of Transportation*, 172 Vt. 527, 528, 768 A.2d 1286, 1288 (2001), citing *Hardy v. Berisha*, 144 Vt. 130, 133, 474 A.2d 93, 95 (1984); see also *Brueckner v. Norwich Univ.*, 169 Vt. 118, 121, 730 A.2d 1086, 1089 (1999) (viewing the evidence in the light most favorable to the verdict when reviewing the denial of a motion for a new trial).

F. Motion for Reconsideration of the February 16 Order

On March 21, 2016, pursuant to Board Rule 2.204, Chelsea made the Motion for Reconsideration pursuant to V.R.C.P. 59(e) in order that the Board may make new findings pursuant to V.R.C.P. 52(b) and “issue a certificate of public good for the Chelsea Solar project.”⁶⁵ The Town with Ms. Harris and the Department with ANR object to this motion. The Town contends that:

Chelsea’s repetitive and confused filing (a) misconstrues the provisions of the Bennington Town Plan and the evidence in the record; (b) ignores statutory pre-emption of zoning regulation of energy projects; (c) wrongly describes the legal and factual applicability of prior Board proceedings; (d) seeks to re-litigate matters on which it failed to carry its burden of proof; and (e) misstates the procedural history in an attempt to re-litigate issues on which it previously had full opportunity to present argument and evidence.⁶⁶

The Department argues that the “Petitioner has stated no grounds upon which the Board’s decision should be disturbed.”⁶⁷ While the Town’s and the Department’s comments on their own appear to provide a sufficient basis for denial, we deny the Motion for Reconsideration because Chelsea’s motion is untimely, having been made more than ten days after the February 16 Order was final.

A request for reconsideration must “present facts which could not, with the exercise of due diligence by counsel, have been placed before the court before the order complained of was issued.”⁶⁸ In this case, Chelsea had the opportunity to present the same facts during the technical hearing as well as in response to the January 6 Order. Chelsea’s Motion for Reconsideration is further restricted because “[m]otions to amend under V.R.C.P. 59(e) must be filed with the trial court within ten days of entry of the judgment.”⁶⁹ Chelsea’s motion, made pursuant to V.R.C.P.

65. Motion for Reconsideration at 1.

66. Bennington May 2 Comments at 1-2.

67. DPS April 29 Comments at 18.

68. *Cent. Vt. Pub. Serv. Corp.*, Docket Nos. 6946/6988, Order of 5/25/05 at 3, quoting *Brown v. International Harvester Corp.*, 142 Vt. 140, 142-43 (1982).

69. *Town of Goshen v. Gionet*, 2002 WL 34422298 (affirming an Environmental Review Board determination to deny a motion pursuant to V.R.C.P. 59(e) made on April 8, 2002, for a decision issued on March 4, 2002), citing *State v. Champlain Cable Corp.*, 147 Vt. 436, 438 (1986).

52(e),⁷⁰ was filed on March 21, 2016, more than ten days after the February 16 Order was issued and is hereby denied.

G. Motion to Strike the Comments of the Department and ANR

On May 13, 2016, Chelsea filed a motion requesting that the Board strike the DPS April 29 Comments and the ANR May 5 Comments, which were in opposition to Chelsea's motions of March 14 and March 21. Chelsea argues that the Department and ANR comments in opposition to Chelsea's motions "represent a breach of the Department's and ANR's written agreements with the Petitioner."⁷¹ The Department, ANR, and Ms. Harris filed comments opposing the Motion to Strike. Chelsea filed comments seeking to rebut the comments of ANR and the Department, arguing that the Department and ANR are breaching their "obligations in the MOUs and [their] duties of good faith, fair dealing, and faithfulness."⁷²

Specifically, Chelsea argues that the opposition of the Department and ANR to Chelsea's motions of March 14 and March 21 represents a breach of contract as reflected by the two DPS MOUs and the two ANR MOUs. Chelsea asserts that by signing the MOUs, the Department and ANR signed a "covenant of good faith and fair dealing" that obliges the "Government" not to oppose the various Chelsea motions addressed herein.⁷³ Chelsea requests that the Board disregard and strike the DPS and ANR comments.

Chelsea asserts that the MOUs should be treated as contracts requiring specific performance by the parties. Chelsea argues that "the definition of the 'covenant of good faith and fair dealing' is broad" and that the Board must hold the Department and ANR to the "highest standard of fairness" as parties to the MOUs.⁷⁴ Chelsea states that "[t]he entire purpose of negotiating MOUs is to obtain the support of the Department and ANR throughout the permitting process" and that therefore "Chelsea was justified in expecting that the Department and ANR

⁷⁰. V.R.C.P. 59(e) states: "(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment."

⁷¹. Motion to Strike at 1.

⁷². Chelsea June 6 Reply at 6.

⁷³. Motion to Strike at 1-3, citing *Langlois v. Town of Proctor*, 2014 VT 130 (2014) at ¶ 58.

⁷⁴. Motion to Strike at 5, citing *United States v. Vaval*, 404 F. 3d 144, 152 (2d Cir. 2005).

would support, and at the very least not oppose, actions taken by Chelsea in furtherance of project approval.”⁷⁵

Chelsea states that the language of the MOUs supports its expectation that neither the Department nor ANR would act to oppose the Project. Specifically, Chelsea points to language in the MOUs stating that all outstanding issues between the parties have been resolved and that the Department and ANR support the admission of all prefiled direct and supplementary testimony and exhibits of Chelsea.⁷⁶

Chelsea requests that the Board strike the DPS April 29 Comments and the ANR May 5 Comments because, Chelsea contends, the Department and ANR are barred by the doctrine of equitable estoppel from taking any action “deviating from the common purpose that the MOUs embody.”⁷⁷ Chelsea argues that “[t]he Department and ANR should be precluded from opposing the Project . . . based on their previous acts of entering into the MOUs.”⁷⁸ Chelsea also asserts that doctrine of promissory estoppel “precludes the Department and ANR from taking positions in opposition to the Project” because Chelsea spent money in reliance on their promise of support in the MOUs.⁷⁹

The Department asserts that the two DPS MOUs are no longer in effect because the Board denied the Petition in the February 16 Order and did not approve the MOUs, and hence the DPS MOUs have been terminated by their own terms.⁸⁰ The Department argues therefore that the Motion to Strike is baseless and should be denied. The Department also argues that the DPS April 29 Comments do not violate its obligations under the MOUs and that it would be entitled to make the comments even if the MOUs had not been terminated.⁸¹

The Department states that it broadly interprets its obligations under Title 30 to include:

75. Motion to Strike at 5.

76. *Id.* at 2

77. *Id.*, citing *In re Lyons*, 178 Vt. 232, 882 A.2d 1143 (2005) (holding that the applicability of judicially-created doctrines, such as equitable estoppel, is a question of law outside of an administrative Board’s special expertise, see *In re Cent. Vt. Pub. Serv. Corp.*, 172 Vt. 14, 19-20, 769 A.2d 668, 673 (2001)).

78. *Id.* at 6.

79. *Id.* at 8.

80. DPS June 3 Comments at 5.

81. *Id.*

[A] duty to support an efficient and orderly process for reviewing all petitions under Section 248; one that ensures fairness to all parties, avoids undue delay, and provides a reasonable degree of finality that the parties and the public may rely upon.⁸²

The Department argues that this duty under Title 30 creates an obligation in this instance to object to the Respondent's motions because they seek to "completely relitigate many aspects of this petition" and require review and resolution of "yet another new set of facts and issues."⁸³

ANR recommends that the Board dismiss the Motion to Strike with prejudice because it is "baseless," serves no productive purpose, and has required the expenditure of additional ANR assets to respond to. ANR states that what it agreed to in the MOUs was that "should the Board issue a CPG, and should the CPG contain the terms and conditions set forth in the two Agency MOUs, then, and only then, would the Agency agree that the Project satisfies the provisions of Section 248(b)(5)."⁸⁴

ANR asserts that Chelsea mischaracterizes the ANR May 5 Comments as a breach of the two ANR MOUs. ANR represents that its May 5 comments were limited to stating support for the DPS April 29 Comments. ANR argues that it "does not oppose the Project as contended by Chelsea. Should the Board issue a CPG which incorporates the terms and conditions contained in the MOUs, the Agency would certainly abide by those terms as agreed to."⁸⁵ Finally, ANR states that while it agreed to the admission without objection of all the evidence filed by Chelsea up to the time the MOUs were signed, it did not agree to any evidence that Chelsea had not yet filed for ANR review and potential objection.

Ms. Harris opposes the Motion to Strike and supports the responses of the Department and ANR. Ms. Harris argues that:

Chelsea Solar has the arrogance to think that if it objects to the judgment of the PSB in denying the Project, and keeps coming back offering baseless, willy nilly arguments and harass the Town and the state agencies and the PSB, then it will be victorious. Enough time and massive amounts of energy have been spent in considering this project and it was denied on the strength of the many reasons given

82. *Id.* at 6.

83. *Id.* at 7.

84. ANR May 25 Comments at 2.

85. *Id.* at 1.

by the PSB. That original opinion should stand and Chelsea denied all of its motions.⁸⁶

We are unpersuaded by Chelsea's argument that the MOUs create an obligation for the Department and ANR to support the Petition throughout the permitting process and therefore deny the Motion to Strike.

The DPS and ANR MOUs contain language of agreement in which the parties stipulate to certain facts about the Project. In particular, the two DPS MOUs address agreements between the Department and Chelsea as to facts about aesthetics, sound, and electrical safety relevant for review under criteria of 30 V.S.A. § 248(b). The two ANR MOUs address agreements between ANR and Chelsea as to facts about stormwater runoff, rare, threatened, or endangered plant species, greenhouse gas data gathering, and secondary containment for the Project transformer relevant for review under 30 V.S.A. § 248(b)(5).

The MOUs also contain language documenting the parties' agreement as to the breadth and precedential value of the MOUs. For example, the first partial DPS MOU states that:

The Parties have discussed various aspects of the Project and have resolved all outstanding issues between them related to the solar array portion of the Project, and as such wish to memorialize their mutual understandings in this Partial Memorandum of Understanding and stipulate as to certain conditions . . .⁸⁷

and

The Stipulating Parties agree that, should the Board fail to approve this Stipulation in all material aspects, the Stipulating Parties' agreements set forth herein shall terminate and the Stipulating Parties shall have the right to submit filings in this docket . . .⁸⁸

The DPS and ANR MOUs both state that the Board may rely on the "evidence" presented in the MOUs in issuing a final order in the proceeding. Also, each of the MOUs has language limiting

86. Harris June 3 Comments at 2.

87. First partial DPS MOU at 1. *See also* second partial DPS MOU at 1-2, first partial ANR MOU at 2, and second partial ANR MOU at 1-2. The respective first MOUs addressed facts related to the solar array while the second MOUs addressed facts related to the electric distribution line to the solar array.

88. The DPS MOUs state the agreements "shall terminate" in the first partial DPS MOU at ¶ 9 and the second partial DPS MOU at ¶ 8. The ANR MOUs state the agreements "may terminate, if such Party determines in its sole discretion" in the first partial ANR MOU at ¶ 11 and the second partial ANR MOU at ¶ 8.

the state agency's agreement to its legal authority under Title 30. In the first partial DPS MOU, the parties agree that the Department's agreement to the factual elements of the first partial DPS MOU is "subject to its obligations under Title 30 of the Vermont Statutes Annotated."⁸⁹ And the ANR MOUs state that they document an agreement that the Project as stipulated to "will satisfy the conditions under Section 248(b)(5)"⁹⁰ of Title 30.

By their own terms, the DPS and ANR MOUs address agreements between those state agencies and the Petitioner to various facts that are of substance in the Board's review of the Petition under Section 248(b) and Section 248(b)(5), respectively. In light of these agreements as to certain facts relevant to review of specific criteria, the state agencies agree not to object to the admission into evidence of prefiled testimony, exhibits, and the MOUs. The MOUs were tailored to be specific to certain facts of concern to the MOU parties and to allow the parties to step away from the MOUs if the Board did not approve them.

Chelsea argues that the Board should interpret this limited language of agreement as binding the Department and ANR to "at least not oppose" the various Chelsea motions. The language of the MOUs fails to support this argument. The MOUs do not state that the Department and ANR are committed to support the Project if the Board denies it or that the Department and ANR would advocate positions otherwise not enumerated in the MOUs. The language in the MOUs does not bind the agencies to "not oppose" the motions. Therefore the Department and ANR were not contractually prohibited from objecting to the various motions made by Chelsea after the Board denied the Petition.

Based on our review of the MOUs and the responses of the Department and ANR, we conclude that Chelsea's expectation that the other parties were bound to support the Project under all circumstances is unreasonable and outside the scope of the agreements of the MOU parties. We therefore deny the Motion to Strike.

89. First partial DPS MOU at ¶ 2.

90. First partial ANR MOU at 2-3; second partial ANR MOU at 2.

H. Motion for an Evidentiary Hearing on the Motions

On May 13, 2016, Chelsea filed a reply to the parties' responses of April 29, 2016, to Chelsea's various motions. Included within that reply, Chelsea made a motion under V.R.C.P. 78(b)(2) to present evidence on the motions. On June 3, 2016, the Department and Ms. Harris each filed comments opposing Chelsea's request for an evidentiary hearing. The Department asserts that no genuine issues of material fact exist in the context of the pending motions and that the Board, in its discretion, should deny the request.⁹¹ Ms. Harris argues that the Board should deny the Motion for an Evidentiary Hearing and "sanction the Petitioner for excessive and frivolous filings."⁹²

The Chelsea Motion for an Evidentiary Hearing is hereby denied for failing to meet the timeliness requirements of V.R.C.P. 7 for moving parties seeking an evidentiary hearing. At pertinent part, V.R.C.P. 7(b)(4) states:

When a moving party wishes to request an opportunity to present evidence pursuant to Rule 78(b), that request shall be submitted with the motion to which it applies or within five days of service of the memorandum in opposition.

Chelsea's request for an evidentiary hearing pursuant to Rule 78(b) was made in a filing on May 13, 2016, two weeks after the parties' memoranda in opposition were filed on April 29, and three months after Chelsea's various motions were filed on March 14 and 21.

V.R.C.P. 78(b)(2) in part states:

An opportunity to present evidence shall be provided, if requested, unless the court finds there to be no genuine issue of material fact. The request for an opportunity to present evidence shall include a statement of the evidence which the party wishes to offer.

As required by Rule 78(b)(2), Chelsea filed a statement of the evidence Chelsea wishes to offer at the evidentiary hearing. Upon review of this proffer, we conclude that not only is the Chelsea Motion for an Evidentiary Hearing untimely, it is also unnecessary because, even if we were to reconsider our February 16 Order, all of the proffered information that Chelsea seeks to place into evidence on the motions is not new but was otherwise reasonably available to Chelsea

91. DPS June 3 Comments at 3.

92. Harris June 3 Comments at 2.

during this proceeding prior to our final determination. That is, there is no genuine issue of material fact.

Taken as a whole, Chelsea's motions seek to reopen the record to admit what it characterizes as new evidence in order that the Board will alter its February 16 Order. The additional information proffered in the various motions and in Chelsea's Rule 78(b)(2) statement of proposed evidence is not "newly discovered evidence which by due diligence could not have been found in time to move for a new trial."⁹³ Instead, it is all information that was or could have been made reasonably available to the Petitioner to present prior to the Board's February 16 Order. We have concluded, therefore, that there is no reasonable basis for the Board to take the extraordinary step of reopening the record of the Docket to hear additional evidence to supplement the Petitioner's motions.

I. Motion for Mediation

On January 24, 2017, pursuant to Board Rules 2.103 and 2.104, Chelsea made a motion "for an order compelling mediation pursuant to V.R.C.P. 16.3" (the "Motion for Mediation"). The Town, the Department, and Ms. Harris oppose the Motion for Mediation. We deny the motion.

Mediation is a regular part of the practice of law in civil courts that has rarely been used in Board proceedings. Mediation does not substitute for our statutory responsibility to make an assessment applying the Section 248 criteria to an evidentiary record; as we have done here. Nonetheless, mediation does have a place in Board practice. For example, in prior Board proceedings parties have voluntarily participated in mediation to resolve specific factual issues leading to agreed-upon factual stipulations subsequently filed with the Board.⁹⁴

Chelsea asserts that mediation is required in all cases before the Board, that it was not used in this case, and that the Board should correct that by ordering mediation to "resolve the dispute among the parties" in this case. Rule 16.3 was amended during the course of this proceeding, and

93. V.R.C.P. Rule 60(b)(2).

94. See e.g., *Investigation into the design and implementation of Green Mountain Power Corporation's residential "Warm Choice" program*, Docket 5684, Order of 10/27/93; and *Joint Petition of Vermont Electric Cooperative, Inc. and FairPoint Communications, pursuant to 30 V.S.A. s 111a, for authority to condemn easement rights in property interests of Kenneth J. Daly*, Docket 7680, Order of 3/11/11.

in its later comments in support of the motion after the Department and the Town recommended denying the motion, Chelsea acknowledges that: “[u]nder the old rule, as under the new rule, the Board has the authority to not order mediation.”⁹⁵

In the February 16 Order, we made a final determination and denied Chelsea’s petition for a CPG. The evidentiary record in this case has long been closed. There are no factual issues between the parties that might be resolved through mediation.

V.R.C.P. 16.3, promulgated on September 12, 2016, states that “the parties must participate in mediation pursuant to this rule unless excused by the judge.” The Reporter’s Notes for the Rule state that “New Rule 16.3(a) essentially carries forward in simplified form the substance of former Rule 16.3(a).” Former Rule 16.3(a) required that a court compel mediation if it “determines from the pleadings that there are issues that could be resolved or clarified” by means of mediation. The purpose of mediation remains “to achieve a voluntary settlement of the litigation without a trial and with as little litigation expense as possible.”⁹⁶ V.R.C.P. 16.3 thus requires that an adjudicator screen each case and make a determination as to whether the parties should participate in mediation because it might facilitate simplified resolution of a dispute.

The Board has denied Chelsea’s Petition, and the evidentiary record is closed. Mediation would be untimely and an unnecessary expense now; therefore Chelsea’s motion to compel mediation between the parties is denied.

J. Second Motion to Strike

Chelsea has requested that we strike the statement “Petitioner has threatened Intervenor Harris more than once to try and coerce her to drop her intervenor status” from Ms. Harris’s reply to the Motion for Mediation. We have reviewed Chelsea’s Second Motion to Strike and Ms. Harris’s response to it. We did not rely upon the statement made by Ms. Harris complained of in Chelsea’s motion. Therefore we are not striking the statement from the record as requested.

95. Chelsea February 21 Comments at 3.

96. *The Electric Man, Inc. v. Charos*, 179 Vt. 351, 356 (2006).

V. CONCLUSION

Based on the foregoing, we hereby deny Chelsea's motions: (1) to vacate the February 16 Order; (2) to reopen discovery in this Docket; (3) to take judicial notice of certain documents; (4) to amend Chelsea's June 19, 2014, petition; (5) to conduct a supplementary hearing pursuant to V.R.C.P. 59(a) in order to make new findings pursuant to V.R.C.P. 52(b); (6) to alter and amend the February 16 Order pursuant to V.R.C.P. 59(e); (7) to strike the responses of the Department and ANR to Chelsea's post-judgment motions; (8) to hold an evidentiary hearing on the motions pursuant to V.R.C.P. § 78(b)(2); and (9) to compel mediation between the parties.

SO ORDERED.

Dated at Montpelier, Vermont, this 14th day of April, 2017.

<u>s/James Volz</u>	)	
	)	PUBLIC SERVICE
	)	
<u>s/Margaret Cheney</u>	)	BOARD
	)	
	)	OF VERMONT
<u>s/Sarah Hofmann</u>	)	

OFFICE OF THE CLERK

FILED: April 14, 2017

ATTEST: s/Judith C. Whitney

Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@vermont.gov).

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and Order.

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 8302

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 at)
500 Apple Hill Road, Bennington, Vermont)

Order entered: 4/17/2017

AMENDMENT TO ORDER ON CHELSEA MOTIONS

On April 14, 2017, the Vermont Public Service Board ("Board") issued an Order (the "April 14 Order") responding to nine motions made by Chelsea Solar LLC ("Chelsea") after the Board's Final Order of February 16, 2016 (the "February 16 Order") that denied Chelsea's petition for a certificate of public good. The April 14 Order denied two of the motions, Chelsea's Motion for a Supplementary Hearing and Motion for Reconsideration, as both substantively deficient and untimely. However, those conclusions did not reflect the fact that on February 25, 2016, Chelsea made a motion for the enlargement of time under Vermont Rule of Civil Procedure ("V.R.C.P.") 6(b) to file motions under V.R.C.P. 52 and 59, and that, on the same day, the Board extended the deadline for Chelsea to file such motions to March 21, 2016 (the "February 25 Order").

This Order amends the April 14 Order to correct our prior omission by adding the February 25 Order to the procedural history and removing our conclusion that these two motions were denied because they were untimely. However, because we also found that each of these motions was substantively deficient, a conclusion that was independent of the timeliness question, our denial of the Motion for a Supplementary Hearing and the Motion for Reconsideration is not altered.

PROCEDURAL HISTORY

The procedural history of the April 14 Order is amended to include the following additional background:

On February 25, 2016, Chelsea made a motion for the enlargement of time under Vermont Rule of Civil Procedure ("V.R.C.P.") 6(b) to file motions under V.R.C.P. 52 and 59. In its motion, Chelsea represented that more time was needed for Chelsea's experts to file affidavits in support of Chelsea's motions. Chelsea further represented that the Vermont Department of Public Service and the Vermont Agency of Natural Resources did not object to Chelsea's motion for enlargement, while Libby Harris did object.

MOTION FOR A SUPPLEMENTARY HEARING

In the April 14 Order, we denied the Motion for a Supplementary Hearing both because it was untimely and because we were not persuaded, after weighing the evidence in the light most favorable to our final decision, that Chelsea should be provided an additional opportunity to provide evidence to meet its burden of proof.¹ The Motion for a Supplementary Hearing was, in fact, timely. The April 14 Order is therefore hereby amended to delete the erroneous conclusion that it was not timely. Notwithstanding this correction, our evaluation of the merits of Chelsea's request remains unchanged and the motion is denied.

MOTION FOR RECONSIDERATION

In the April 14 Order, we denied the Motion for Reconsideration both because it was untimely and because it did not present any facts which could not have been presented to the Board at the technical hearing or in Chelsea's response to our Order of January 6, 2016.² Due to our extension of the deadline, the Motion for Reconsideration was also timely. The April 14 Order is therefore hereby amended to delete the erroneous conclusion that it was not timely. However, we still conclude that Chelsea has not presented any new material that could not have

1. April 14 Order at 23.

2. *Id.* at 25.

been raised before our February 16 Order, so the motion is denied as explained on the April 14 Order.

In sum, the correction to the April 14 Order set out herein does not alter our conclusion that both the Motion for a Supplementary Hearing and the Motion for Reconsideration should be denied. We remain unpersuaded that Chelsea should be provided yet another opportunity to present facts that were reasonably available to it prior to the February 16 Order.

SO ORDERED.

Dated at Montpelier, Vermont, this 17th day of April, 2017.

s/James Volz

s/Margaret Cheney

s/Sarah Hofmann

PUBLIC SERVICE
BOARD
OF VERMONT

A True Copy

OFFICE OF THE CLERK

FILED: April 17, 2017

ATTEST:

Deputy Clerk of the Board

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STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 8302

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of public good, pursuant to 30 V.S.A. § 248,)
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Order entered: 4/17/2017

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This Order amends the April 14 Order to correct our prior omission by adding the February 25 Order to the procedural history and removing our conclusion that these two motions were denied because they were untimely. However, because we also found that each of these motions was substantively deficient, a conclusion that was independent of the timeliness question, our denial of the Motion for a Supplementary Hearing and the Motion for Reconsideration is not altered.

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MOTION FOR A SUPPLEMENTARY HEARING

In the April 14 Order, we denied the Motion for a Supplementary Hearing both because it was untimely and because we were not persuaded, after weighing the evidence in the light most favorable to our final decision, that Chelsea should be provided an additional opportunity to provide evidence to meet its burden of proof.¹ The Motion for a Supplementary Hearing was, in fact, timely. The April 14 Order is therefore hereby amended to delete the erroneous conclusion that it was not timely. Notwithstanding this correction, our evaluation of the merits of Chelsea’s request remains unchanged and the motion is denied.

MOTION FOR RECONSIDERATION

In the April 14 Order, we denied the Motion for Reconsideration both because it was untimely and because it did not present any facts which could not have been presented to the Board at the technical hearing or in Chelsea’s response to our Order of January 6, 2016.² Due to our extension of the deadline, the Motion for Reconsideration was also timely. The April 14 Order is therefore hereby amended to delete the erroneous conclusion that it was not timely. However, we still conclude that Chelsea has not presented any new material that could not have

1. April 14 Order at 23.

2. *Id.* at 25.

been raised before our February 16 Order, so the motion is denied as explained on the April 14 Order.

In sum, the correction to the April 14 Order set out herein does not alter our conclusion that both the Motion for a Supplementary Hearing and the Motion for Reconsideration should be denied. We remain unpersuaded that Chelsea should be provided yet another opportunity to present facts that were reasonably available to it prior to the February 16 Order.

SO ORDERED.

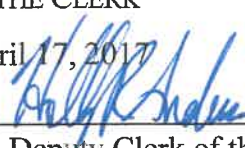
Dated at Montpelier, Vermont, this 17th day of April, 2017.

<u>s/James Volz</u>	)	
	)	PUBLIC SERVICE
	)	
<u>s/Margaret Cheney</u>	)	BOARD
	)	
	)	OF VERMONT
<u>s/Sarah Hofmann</u>	)	

A True Copy

OFFICE OF THE CLERK

FILED: April 17, 2017

ATTEST: 
Deputy Clerk of the Board

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Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and Order.

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Docket No. 8302

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 at)
500 Apple Hill Road, Bennington, Vermont)

Order entered: 10/12/2017

DENIAL OF CHELSEA V.R.C.P. 60(b)(6) MOTION

I. Introduction

On September 8, 2017, in accordance with V.R.C.P. 60(b)(6), Chelsea Solar LLC (“Chelsea”) filed a motion with the Vermont Public Utility Commission (“Commission”) for relief from the Commission’s Orders of February 16, 2016, April 14, 2017, and April 17, 2017 (the “60(b)(6) Motion”). In support of the 60(b)(6) Motion, Chelsea also filed materials reflecting a revision of the proposed project at 500 Apple Hill Road to what effectively amounts to a new project at approximately the same location to be accessed from Willow Road. In today’s Order, the Commission denies Chelsea’s 60(b)(6) Motion.

The Commission also encourages Chelsea to file a new petition reflecting its proposed Willow Road project and proposes measures to achieve its prompt review.

II. Procedural History

On June 19, 2014, Chelsea filed a petition with the Commission with supporting testimony and exhibits, requesting a certificate of public good under 30 V.S.A. § 248 to install and operate a 2.0 MW AC solar electric generating facility at 500 Apple Hill Road in Bennington, Vermont (the “Chelsea Project”).

On February 16, 2016, the Commission issued an Order finding that the Chelsea Project would unduly interfere with the orderly development of the region and would have an undue, adverse impact on aesthetics (the “Denial Order”).

On February 25, 2016, Chelsea made a motion for the enlargement of time under V.R.C.P. 6(b) to file motions under V.R.C.P. 52 and 59. On the same day, the Commission extended the deadline for Chelsea to file such motions to March 21, 2016.

On March 14, 2016, Chelsea filed three motions requesting that the Commission: (1) vacate the February 16 Order, (2) reopen discovery, and (3) take judicial notice of certain documents.

On March 21, 2016, Chelsea filed three motions requesting that the Commission: (1) alter or amend its February 16 Order pursuant to V.R.C.P. 59(e), (2) order a supplementary hearing pursuant to V.R.C.P. 59(a) to make new findings pursuant to V.R.C.P. 52(b), and (3) permit an amendment to its June 19, 2014, petition.

On May 13, 2016, Chelsea filed a motion requesting that the Commission strike comments filed by the Vermont Department of Public Service (the “Department”) and the Vermont Agency of Natural Resources (“ANR”). Chelsea also filed a motion for an evidentiary hearing pursuant to V.R.C.P. 78(b)(2).

On January 24, 2017, Chelsea filed a motion for mediation pursuant to V.R.C.P. 16.3.

On April 14, 2017, the Commission issued an Order denying Chelsea’s motions of March 14, 2016, March 21, 2016, May 13, 2016, and January 24, 2017 (the “Motions Order”).

On April 17, 2017, the Commission issued an amendment to the Motions Order.

On September 8, 2017, Chelsea filed the 60(b)(6) Motion requesting that the Commission vacate the Denial Order and the Motions Order to consider newly filed materials reflecting a revision of the Chelsea Project to a new project at approximately the same location but accessed from Willow Road.

On September 14, 2017, we directed the parties to respond to the 60(b)(6) Motion by September 29, 2017.

On September 22, 2017, the Town of Bennington (“Bennington”) filed comments in opposition to the 60(b)(6) Motion, recommending its denial because the case is currently under appeal in the Vermont Supreme Court (the “Bennington Opposition”).

On September 26, 2017, Chelsea filed a supplement to the 60(b)(6) Motion (the “Chelsea Supplement”) and comments regarding the Commission’s jurisdiction to consider reopening the record to review the proposed Willow Road revision (the “Chelsea Comments”).

On September 29, 2017, Bennington filed a supplemental memorandum responding to the Chelsea Supplement and the Chelsea Comments (the “Bennington Supplement”). Also on September 29th, the Department filed a memorandum in opposition to the 60(b)(6) Motion (the “DPS Opposition”), representing that ANR and Libby Harris joined in its response.

No other comments were filed on the 60(b)(6) Motion.

III. Discussion

Chelsea argues that it would be “common sense” for the Commission to vacate the February 16, 2016, Order and “consider the plans and additional evidence for the Chelsea Project” because “the Town of Bennington has agreed that similar revised plans for the Apple Hill solar project (which the [Commission] has agreed to consider) are consistent with the Town Plan.”¹ Chelsea also asserts that the Commission need not vacate the Orders of February 16, 2016, April 14, 2017, and April 17, 2017, in order to consider the proposed amendment of the Chelsea Project.²

Bennington and the Department assert that the 60(b)(6) Motion “must be denied because the case is currently under appeal in the Vermont Supreme Court, and the Commission accordingly has no jurisdiction to grant the requested relief.”³ Bennington also argues that “the motion should be denied in the [Commission’s] discretion because it duplicates motions already

1. 60(b)(6) Motion at 2. On August 17, 2017, the Bennington Selectboard met in open session to review the proposed revisions to the Chelsea Project and neighboring Apple Hill Solar project. After seeking public comment, the Selectboard voted to (1) continue to oppose the Chelsea Project as originally proposed and denied, and (2) support the proposed revised Apple Hill Solar project.

2. Chelsea Comments at 1.

3. Bennington Opposition at 1, citing *Kotz v. Kotz*, 134 VT. 36 (1975) (ruling that in the absence of a remand, upon appeal to a higher court, the trial court is divested of jurisdiction to grant relief under V.R.C.P. 60(b)).

denied.”⁴ The Department also contends that the Commission acts as a court of record, not merely an independent agency, and thus is required to comply with the precedent set in *Kotz*.⁵

Chelsea has appealed our Orders of February 16, 2016, April 14, 2017, and April 17, 2017, to the Vermont Supreme Court. We therefore have no jurisdiction over the subject matter of that appeal. The subject matter of that appeal includes not only the Denial Order but also our denial of the various motions made by Chelsea as part of its request that we reconsider the Denial Order.

Among the motions we denied that are now under appellate review are a motion to reopen the record under reconsideration to allow for the admission of new evidence reflecting the proposed Willow Road revision, and a request that we amend the Chelsea Project to reflect the Willow Road revision. In our Order of April 14, 2017, we denied Chelsea’s motion to amend the original petition of June 19, 2014, as untimely because it was filed after the petition had been denied in the Denial Order of February 16, 2016.⁶ Chelsea’s appeal to the Vermont Supreme Court specifically includes a request that this denial be vacated.⁷ Now Chelsea requests that we vacate our prior determinations even as these determinations have been filed with the Vermont Supreme Court for appellate review. We decline to do so both because we have no jurisdiction to do so absent a withdrawal or remand of Chelsea’s appeal,⁸ and because these are matters that we have already decided.

Nonetheless, we appreciate Chelsea’s efforts to revise the Chelsea Project and its desire to exercise common sense in response to the Bennington Selectboard’s vote to support the revised Apple Hill project. To this end and to promote judicial efficiency, the Commission encourages Chelsea to withdraw its appeal with the Vermont Supreme Court and file a new petition reflecting

4. Bennington Supplement at 3.

5. DPS Opposition at 2.

6. Docket 8302, Order of 4/14/17 at 22.

7. See Vermont Supreme Court Docket No. 2017-195.

8. We are not persuaded by Chelsea’s argument that the decisions in *Kotz* and *Joint Petition of Green Mountain Power Corporation*, Docket 7628, Order of 10/3/11 (finding that the Commission has no jurisdiction to alter an order during pendency of an appeal in the Vermont Supreme Court) have been “superseded” by a one-sentence Reporter’s Note that the 2006 amendments were made for purposes of internal consistency and for conformity with the federal rule. Reporter’s Notes are typically very detailed in describing the impact of a rule amendment and do not mention an intention that the amendment overrule *Kotz*. Our decision in Docket 7628 correctly relied upon *Kotz*.

the proposed Willow Road project. Continued appeal of our prior decisions and any future appeal of this decision will not facilitate a prompt Commission review of the Willow Road project.

The first step in Chelsea's achieving its goal of a prompt Commission review of the Willow Road project is for Chelsea to withdraw its appeal. The Commission cannot review a new petition for a project in approximately the same location as the Chelsea Project as long as the Chelsea Project is subject to appellate review.

The second step in Chelsea achieving its goal of a prompt Commission review of the Willow Road project is to file a new petition.

If a complete petition for the Willow Road project is filed within six months of the withdrawal of Chelsea's appeal, the Commission would be responsive to a request from Chelsea to further extend the commissioning deadline of its standard-offer contract for one year from the date the complete petition is filed. In filing its petition for the Willow Road project, Chelsea may include any testimony and exhibits previously filed by it in this Docket, to the extent that information remains relevant to the Willow Road petition. However, in order for its new petition to be deemed complete, Chelsea must also include testimony and exhibits addressing any new potential impacts under all applicable criteria that may arise as a result of the reconfigured project.

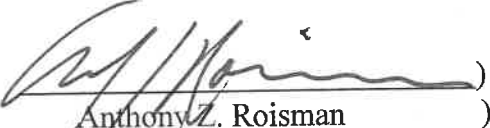
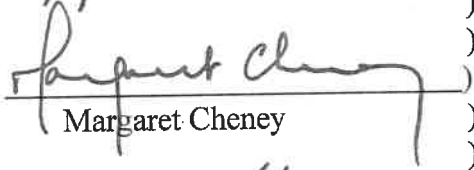
IV. Conclusion

Chelsea's 60(b)(6) Motion is hereby denied. In the interest of judicial economy, should Chelsea withdraw its appeal with the Vermont Supreme Court, the Commission would promptly review a new Chelsea petition reflecting the Willow Road proposal and would be responsive to a request from Chelsea to further extend the operational deadline of its standard-offer contract.

SO ORDERED.

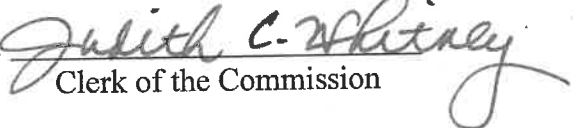
SO ORDERED.

Dated at Montpelier, Vermont, this 12th day of October, 2017.

 Anthony Z. Roisman	)	PUBLIC UTILITY
 Margaret Cheney	)	COMMISSION
 Sarah Hofmann	)	OF VERMONT

OFFICE OF THE CLERK

FILED: October 12, 2017

ATTEST: 
Clerk of the Commission

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: puc.clerk@vermont.gov)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Commission within thirty days. Appeal will not stay the effect of this Order, absent further order by this Commission or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Commission within ten days of the date of this decision and Order.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-195

SEPTEMBER TERM, 2017

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

SEP 22 2017

In re Petition of Chelsea Solar LLC
(Allco Renewable Energy Limited*)

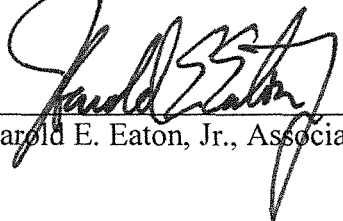
} APPEALED FROM:
}
}
} Public Utility Commission
}
} DOCKET NO. 8302

In the above-entitled cause, the Clerk will enter:

Appellant moves to remand this case to the Public Utility Commission for the taking of additional evidence. The request is denied.

Appellant's motion for an extension of time is granted. Appellant's brief and printed case shall be filed 30 days from entry of this order, or sanctions may be imposed and the appeal dismissed without further notice.

FOR THE COURT:



Harold E. Eaton, Jr., Associate Justice

EXHIBIT F

STATE OF VERMONT
BEFORE THE
PUBLIC SERVICE BOARD

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 at 500 Apple Hill Road,
Bennington, Vermont

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Docket No. 8302

**MOTION TO VACATE THE BOARD'S ORDER OF FEBRUARY 16, 2016
FOR FAILURE TO COMPLY WITH 3 V.S.A. § 811**

Chelsea Solar LLC ("Chelsea Solar") hereby moves to vacate the Board's order of February 16, 2016 (the "Order"), on the basis of the Board's failure to comply with 3 V.S.A. § 811.

Under 30 V.S.A. § 8, the chairman of the Board may appoint a hearing officer to inquire into and examine any matter within the jurisdiction of the Board. That was done in this proceeding. 3 V.S.A. § 811 states that, "[w]hen in a contested case a majority of the officials of the agency who are to render the final decision have not heard the case or read the record, the decision, if adverse to a party to the proceeding [] shall not be made until a proposal for decision is served upon the parties, and an opportunity is afforded to *each party adversely affected* to file exceptions and present briefs and oral argument to the officials who are to render the decision." (emphasis added.)

On October 2, 2015, the hearing officer issued a proposed decision (“PFD”) which was adverse to intervenor Libby Harris, but was not adverse to Chelsea Solar. On February 16, 2016, the Board rejected the hearing officer’s PFD and rendered a final decision adverse to Chelsea Solar. The Board’s discussion at pages 49-63 of the Order states that the Board considered the comments on the hearing officer’s proposed decision (“PFD”) and also considered certain parts of the record. Nowhere does the Board assert that each of the three members of the Board read the entire record. A reading of a part of the record is insufficient under section 811. Moreover, as discussed below, it is clear that the Board did not even read the entire Order, as the Board conflated the Chelsea Solar project with the Apple Hill Solar project in Docket 8454.

3 V.S.A. § 811 requires that “opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision.” In the case of the original PFD, Chelsea Solar was not a party adversely affected by the proposed decision. Now that the Board made findings that *adversely affect Chelsea Solar*, in order to comply with section 811, the Board was required to re-publish a revised proposed decision or read the entire record, both of which it failed to do. Its Order must therefore be vacated.

The Board has denied Chelsea Solar, as a party adversely affected by the decision, the right to “file exceptions and present briefs and oral argument to the officials who are to render the decision.” The procedural protections in section 811 are substantial rights which must be “scrupulously observed and impartially

administered.” *See, In re State Aid Highway No. 1*, 133 VT 4, 11 (1974) (discussing 3 V.S.A. § 811: “Environmental laws affect very substantial rights, and it is vital that the procedures under which they are enforced be scrupulously observed and impartially administered. Any failure in this respect can quickly rise to constitutional dimensions.”)

The fact that the Board did not read the full record is also evident from other portions of the Board’s Order that indicate the Board *did not know what project it was reviewing*. The Board has confused the Apple Hill Solar project (Docket 8454) and the Chelsea Solar project. For example, on p. 53 and p. 60 of the Order, the Board stated that the amount of clearing required for Chelsea Solar would be 10.6 acres. That acreage relates to the Apple Hill project, not the Chelsea Solar project. *See*, Docket 8454, Prefiled Testimony of Brad Wilson, Page 3, Line 14 (“The [Apple Hill] project will incorporate 10.6 acres of clearing area.”) Clearing for the Chelsea project is 14.85 acres. *See*, Docket 8302, Prefiled Testimony of Brad Wilson, Page 3, Line 14.

Worse, it is evident that the Board did not even read the entire Order. At multiple locations in the PFD (which is pages 1-49 of the Order), the Hearing Officer clearly stated that the clearing was 15 acres. *See*, p. 24 (“cutting down approximately 15 acres of forest”); *see*, p. 24 (“the Project means that 15 acres of forest would cease to exist”); *see*, p. 24 (“clearing of 15 acres of trees”); *see*, p. 8 (“the Project would occupy 14.85 acres.”); *see*, p. 31 (“The Project is located on 14.85 acres.”).

The Board's confusion at which project it was reviewing is also evident from its discussion of the visibility of the Chelsea Solar project. It is the Apple Hill solar project that is partially visible (at least under the currently proposed plan in that docket), not the Chelsea Solar project. *See*, the Prefiled Testimony of Mark Kane in Docket 8454 at page 4. Chelsea on the other hand must be evaluated separately as if the Apple Hill Solar project is not built. The cumulative effect of both projects is appropriate to review only in the Apple Hill docket, not in the Chelsea Solar docket.

Visibility from the Welcome Center is an appropriate issue for discussion in the Apple Hill Solar docket 8454. It is not in this docket, for the simple reason that the Chelsea Solar project is not visible at all from the Welcome Center. *See*, Docket 8302, Exhibit CS-MK-7, Figure 6. It is completely shielded from view by the existing trees on the Apple Hill site. *See*, Docket 8302 First Supplemental Prefiled Testimony of Mark Kane page 5, line 7. ("As suggested in my earlier testimony, and as supported by this visual simulation, the retention of vegetation along the southern portion of the property effectively *screens* views of the Project from the Welcome Center.") The utter lack of visibility of the Chelsea Solar project standing alone is visually demonstrated by Exhibit CS-MK-7, Figure 6, which is also attached hereto as Exhibit B. The complete lack of visibility is also re-confirmed by Mark Kane in his declaration attached as Exhibit A. *See also*, Hearing Transcript at pp. 23-24.

Thus the Board's conclusion that the "Project would remain visible on a hillside above the Vermont Welcome Center", Order at 57, is factually incorrect, and

reinforces the Board's confusion with the evidence in this docket with the evidence in docket 8454.

The entire point of Section 811 is for the party affected by an adverse decision to correct mistakes when the decision is not based upon a review of the entire record. Here it is clear that the Board did not meet the requirements of Section 811. It did not hear the case; it did not read the entire record; it did not even read the entire Order and the parts of the record that it did read show the Board's confusion between the Chelsea Solar and Apple Hill solar projects.

The purpose behind section 811 and the need for the issuance of a proposed decision is amply demonstrated by other factors present here. The Board based its decision on its conclusion that the Project violated three of four "specific requirements in the Town Plan for the development in the Rural Conservation District." Order at 57. We will review them in order.

Board Conclusion #1: "First, Chelsea Solar is not proposing a limited residential development." Order at 57. If the Board had re-issued a proposed decision, as required by Section 811, with findings adverse to Chelsea Solar, it could have been pointed out that the Board's conclusion is directly contradicted by the Board's own recent actions. The Board has recently issued four CPGs for projects in the Bennington Rural Conservation ("RCON") District, at least three of which were explicitly supported by the Town of Bennington (the "Town"), and none of which were residential developments.

In Docket 8355 the Board recently approved a wireless communications tower under Section 248a in the RCON District, which was supported by the Town. (*See*, Request for Judicial Notice of Chelsea Solar LLC dated March 11, 2016 (“RJN”), Exhibit J.) Section 248a provides for a more stringent standard with respect to aesthetics, requiring “substantial deference” as opposed to just “due consideration” “to the land conservation measures in the plans of the affected municipalities and the recommendations of the municipal legislative bodies and the municipal and regional planning commissions regarding the municipal and regional plans.” That facility was located entirely in the RCON District. The project was not a limited residential development. Moreover, soaring 90 feet tall, the project was visible on a hillside. If the Town Plan were a clear, unambiguous community standard, the Town should have not supported the project and the Board should not have issued the CPG. But it did, holding that the project did not violate any standard in the Town Plan. *See*, RJN, Exhibit J. (“The Project does not violate any written community standards contained in the applicable town or regional plans.”)

In Docket 8393, the Board approved a 140-foot high wireless communication tower in the RCON District, again supported by the Town. The project was not a limited residential development. Soaring 140 feet tall, the project was visible on a hillside. If the Town Plan were a clear unambiguous community standard, the Town should have not supported the project and the Board should not have issued the CPG. But it did, holding that the project did not violate any standard in the Town Plan. *See*, RJN, Exhibit K (“The Project is consistent with the land

conservation measures in the Bennington Town Plan and the Bennington County Regional Plan.”)

In Docket 7763, the Board approved a major expansion of an electrical facility, a substation, in the RCON District. (*See*, RJN Exhibit I). The work was within an area specifically designated by the Town of Bennington as a scenic resource, which is in stark comparison to the Chelsea Solar site, which has not been so designated. That approved project required the same clearing as the Chelsea Solar project. In addition, it was located on a prominently visible side of Bald Mountain.¹ The project was also far taller than the Chelsea Solar project.² The project was visible from several vantage points, and was within an area designated in Bennington’s scenic resource inventory. *See*, RJN Exhibit I. (“The new VELCO Bennington and CVPS Pickett Hill substations will be visible from several viewpoints to the west and will have an adverse impact on the scenic character of the area surrounding the New Facility, which is within an area identified as being visually sensitive by the Town of Bennington. In particular, the aesthetic impact of the New Facility will be adverse from the Bennington Bypass, the Bennington Downtown and Urban Growth Area, the Old Bennington and Bennington Battle

¹ *See*, RJN Exhibit I. (“The new VELCO Bennington and CVPS Pickett Hill site is located on the eastern edge of the southern portion of the Valley of Vermont physiographic region, on the western lower slopes of Bald Mountain. The area surrounding the property is primarily forested with steep slopes and portions of the eastern boundary of the parcel abut the Green Mountain National Forest. The site is located east of the Bennington Bypass within the Town of Bennington's designated Rural Conservation and Forest zoning districts.”)

² *See*, RJN, Exhibit I (“While a majority of the New Facility's components will be thirty feet high or less, some components will extend to fifty-four feet in height.”)

Monument area, and the Southern Vermont College.”) Yet despite the fact that the project violated all three of the purported standards discussed by the Board in the Order, and additionally was located in the scenic inventory area (which Chelsea Solar is not), the Board had no difficulty concluding that no clear written community standard was violated. *See*, RJN Exhibit I (“The Project does not violate a clear written community standard intended to preserve the aesthetics or scenic beauty of the area.”)

Similarly, the Board recently issued a CPG (#NMP-6523) to the Kobelia Bennington GLC Solar LLC 500kw solar project in the RCON District in Bennington. That facility was located entirely in the RCON District. The project was not a limited residential development, and it was visible from the road. The slope of the land was greater than that of the Chelsea Solar site. Thus, the Board should have denied the CPG. It did not. Rather the Board held that the project did not violate any standard in the Town Plan. *See*, RJN Exhibit L. (“There are no land conservation measures contained in the applicable regional or town plans that would prohibit development in the area where the Project is proposed.”)

Of course, the Board’s conclusion that anything other than limited residential development is prohibited in the RCON District is flatly contradicted by the Town Plan (see Exhibit CS-MK-3, page 25 (colleges, cultural institutions and bed & breakfasts allowed in RCON District)). In addition, the Board’s conclusion regarding residential development is flatly contradicted by the Town’s zoning regulations. The Vermont Supreme Court has clearly held on multiple occasions

that the failure to consider the actual zoning regulations (which the Board refused to do) is clear error. *In Re Kiesel*, 172 VT 124, 128 (2000), when a town has zoning regulations in place it is error to not consider those. (“[I]mplementation of town plan is done through zoning ordinances so that the ordinances control the plan.”) *See also, In re John A. Russell*, 2003 VT 93 (2003) (“As succinctly stated in *Smith*, 140 Vt. at 183, 436 A.2d at 762, ‘the regulations control the plan.’”) *See also, Regan v. Pomerleau*, 2014 VT 99, P16 (2014) (rejecting claims based upon the town plan because they were not “mandatory and set[] forth no specific enforceable standards.”).

Board Conclusion #2—“Second, while Chelsea has developed an extensive visual screening plan, the Project would remain visible on a hillside above the Vermont Welcome Center.” Order at 57. If the Board had re-issued a proposed decision, as required by Section 811, with findings adverse to Chelsea Solar, it could have been pointed out (as discussed above) that the Board confused the Apple Hill project with the Chelsea Solar project. The Chelsea Solar project is not visible at all from the Vermont Welcome Center. It could have also been brought to the Board’s attention that the Vermont Supreme Court has already rejected the proposition that restricting development on a slope or a hillside is a clear unambiguous standard in the absence of specific enforceable definitions and rules. *See, In Re Kiesel*, 172 VT 124 (2000). There the town plan prohibited development on “steep slopes and hillsides”. *Id.* at 129. There as here the town plan “provide[d] no specific standards to enforce the policy.” *Id.* at 130. Because the town plan provided no

specific standards, the Court reversed holding “[a]bsent some objective measure to guide enforcement of the steep-slope prohibition, there was no basis for the Board to conclude that the project was not in compliance with this policy.” *Id.*

Board Conclusion #3—“And third, the Project calls for clear-cutting 10.6 acres of a densely forested and undeveloped 27-acre parcel.” Order at 57. If the Board had re-issued a proposed decision as required by Section 811 with findings adverse to Chelsea Solar, it could have been pointed out that this purported standard on its face is vague as there is no clear guidance as to what the requirements are. *See, In Re Kiesel*, 172 VT at 130.

Minimizing clearing is not a standard that restricts development, but rather a best practice implemented in connection with the development itself. Thus, the result of that best practice varies with the type of project being developed and this Project has minimized clearing. *See*, Exhibit CS-MK-2 to the Kane Pft. at 19. For example, in Docket 7763 in which the Board issued a CPG for an electric facility in the RCON District, 15 acres of clearing was required for the project. The goal of minimizing clearing was met because nothing in addition to what was reasonably required for the project was cleared. Minimize clearing is more aptly characterized as a best practice in designing an otherwise permitted use, not a standard that can prevent a project in the first place.

The situation in *In Re Chaves A250 Permit*, 2014 VT 5 (2014) (“*Chaves*”) is similar to that presented here. In *Chaves*, on appeal, the neighbors argued that the regional and town plans used mandatory language regarding “minimizing impacts”

on historical sites. The Vermont Supreme Court held that the language relied was broad and nonregulatory, espousing general policies about maintaining features, protecting valuable areas, and minimizing impacts, but contained no specific requirements that are legally enforceable. *See, Chaves*, 2014 VT at 12.

It could have also been pointed out that the “minimize clearing” language in question cannot be considered a development standard at all when a variety of permitted uses result in full or virtually full clearing of sites within the RCON District. It could have also been pointed out to the Board that the Town Plan encourages clearing of trees for certain purposes.

Board Conclusion #4—“*These proposed actions would violate this clear, written community standard in the Town Plan, and we therefore conclude that the Project fails the Quechee test.*” Order at 57. If the Board had re-issued a proposed decision as required by Section 811 with findings adverse to Chelsea Solar, it could have been pointed out that the Board’s refusal to consider the Bennington zoning regulations, the Bennington Regional plans, the other parts of the Town Plan and the actions of the Town in implementing and interpreting such plans was clear error, as the Vermont Supreme Court has stated on multiple occasions.

The Vermont Supreme Court recently reviewed the treatment of town plans and again held that town plans cannot be viewed in isolation if there is a claim that the town plan constitutes a clear, unambiguous community standard. *See, Chaves*. As *Chaves* instructs, the land use regulations, other goals in the town plan, other goals in the regional plan and other goals in regional and town energy plans must

also, at a minimum, be reviewed and considered. *See also, In Re Kisiel*, 172 VT 124, 134 (2000) (the Town’s actions in interpreting the town plan must be considered); *Id.* 172 VT at 128 (when a town has zoning regulations in place it is error to not consider those—“[I]mplementation of town plan is done through zoning ordinances so that the ordinances control the plan.”); *See also, In re John A. Russell*, 2003 VT 93 (2003) (“As succinctly stated in *Smith*, 140 Vt. at 183, 436 A.2d at 762, ‘the regulations control the plan.’”)

The situation in *Chaves* is similar to that presented here. In *Chaves*, as here, the project’s conformance to regional and town plans was challenged. In fact, the issues advanced by the project’s challengers in *Chaves* were remarkably similar those advanced here. The challengers cited “the purpose of the rural residential-3 district, where the project [was] located, [was] to ‘provide for agriculture, forestry, *low-density residential development* and other compatible land uses in a manner that maintains the Town’s rural character, scenic landscape and natural resources.” *Chaves*, 2014 VT at 40. (emphasis added.) That is exactly the same argument used here with respect to the RCON District.

The challengers in *Chaves* also cited the town plan’s “stated policy in the scenic areas section [] to ‘[m]aintain natural and man-made features that are of local scenic, cultural and historic significance and protect them from activities that impair their integrity, character and/or quality.’” *Id.* The challengers further cited “the town’s policy [] to ‘[p]rotect places of outstanding cultural, aesthetic, archeological, natural and/or historical value from development that impairs their character and quality.’”

Id. Finally, the challengers relied on language in the regional plan which specified that the type of project at issue, mineral extraction, should “*minimize[]* adverse effects on aesthetics ... and special community resources.” *Id.* (emphasis added.)

The Court held that a town plan cannot be viewed in isolation. The actual land use regulations and other goals in town and regional plans *must be* considered. The Court also rejected the challengers attempt to equate the town plan with the status of an unambiguous, clear and unqualified community standard because it “contain[ed] no specific requirements that [were] legally enforceable.” *Id.* at P41. The Court also cited *In re JAM Golf, LLC*, 2008 VT 110, ¶¶ 13-14, 185 Vt. 201, 969 A.2d 47, which held that ordinances that required design to “‘protect’ natural resources was unconstitutionally vague because it created no real standard.” *Id.*

The Court’s holding in *Chaves* is particularly applicable here, as the Bennington Town Plan does not contain any specific requirements that are *legally enforceable*. The Town of Bennington, Vermont Land Use & Development Regulations (the “Bylaws”) which implement the Town Plan are legally enforceable, but the Town Plan on its own is not. *See also, Regan v. Pomerleau*, 2014 VT 99, P16 (2014) (rejecting claims based upon the town plan because they were not “*mandatory and set[] forth no specific enforceable standards.*”) As the Supreme Court emphasized in *Regan*, to constitute a clear, ambiguous community standard, a town plan must require mandatory compliance and set forth specific enforceable standards.

In addition, as the Supreme Court stated in *In Re Kisiel*, 172 VT 124, 128 (2000), when a town has zoning regulations in place it is error to not consider those.

([I]mplementation of town plan is done through zoning ordinances so that the ordinances control the plan.”) *See also, In re John A. Russell*, 2003 VT 93 (2003) (“As succinctly stated in *Smith*, 140 Vt. at 183, 436 A.2d at 762, ‘the regulations control the plan.’”)³

The Court in *Chaves* faulted the challengers for not recognizing that the town and regional plans expressed other goals, thus ambiguity was by definition created. The Court held that the town plan’s language did “not express unambiguous standards in that *both the town and regional plans* also express other goals.” *Id.* at P42. (emphasis added.) Specifically, the Court noted that the town plan recognized the importance of the project’s proposed operations. *Id.* at P42. That is also the case here, as detailed below. Of significant importance, the *Chaves* Court recognized the “community” for purposes of a “community” standard includes the region—not just the town. Also of particular relevance here is the Court’s recognition of the importance of other goals expressed in the Town Plan. The Bennington Town Plan includes a *multitude* of statements and goals promoting local distributed solar resources, such as the Chelsea Solar project. *See*, Chelsea Solar’s Motion to Reopen Discovery, at pp. 8-13. Moreover, the Bennington Town energy plan describes

³ The Vermont Supreme Court has flatly rejected the approach of the Board reflected in footnote 34 of the Board’s Order dated February 16, 2016. The Board asserted that it was more appropriate to rely on town plans as the primary source of clear written community standards, even when zoning regulations implementing the town plan are in place. The Vermont Supreme Court has characterized that approach as clear error. *In Re Kiesel*, 172 VT 124, 128 (2000), (“[I]mplementation of town plan is done through zoning ordinances so that the ordinances control the plan.”); *In re John A. Russell*, 2003 VT 93 (2003) (“As succinctly stated in *Smith*, 140 Vt. at 183, 436 A.2d at 762, ‘the regulations control the plan.’”)

various goals encouraging solar resources, such as the Chelsea Solar project and the use of trees for biomass.⁴ *See*, Chelsea Solar’s Motion to Reopen Discovery, at pp. 11-13. Of particular note is the Town’s statement that “[s]uch present day objectives as *viewshed protection*, [] *will need to be partially retracted to make way for the compelling future demand for energy.*” *See*, RJN, Exhibit F at p.32.

Similarly, the Bennington regional plan describes various goals which recognizes the importance of solar energy resources, such as the Chelsea Solar project.⁵ *See*, Chelsea Solar’s Motion to Reopen Discovery, at pp. 13-19. Indeed, the current version of the Bennington County Regional Commission’s regional energy planning project designates the Chelsea Solar site as a “prime” location for solar. (*See*, RJN, Exhibit F and H.)⁶

As the Supreme Court stated in *Chaves* these other specific priorities must be considered and are enough to debunk the argument that the town plan creates an unambiguous, clear and unqualified community standard.⁷

⁴ *See also*, RJN, Exhibit G. A municipal plan *must* include an “energy plan, including an analysis of energy resources, needs, scarcities, costs and problems within the municipality, a statement of policy on the conservation of energy, [], a statement of policy on the development of renewable energy resources.” 24 VSA 4382(a)(9).

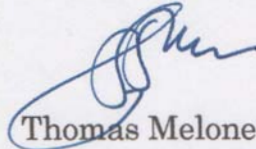
⁵ *See*, RJN Exhibit D, E and F. The purposes of municipal plans are set forth in 24 VSA 4302(a) and include “to encourage the development of renewable resources”. 24 VSA 4302(c) further provides municipal planning shall “further the following specific goals: [] (5) To identify, protect, and preserve important natural and historic features of the Vermont landscape, including: [] (C) significant scenic roads, waterways, and views.”

⁶ As designated in Chelsea Solar’s Motion to Reopen Discovery, many of the other goals in the Town and regional plans were already in the record, even in the absence of the Board’s unwillingness to consider the entire town and regional plans or the zoning regulations.

⁷ Even communities that seem desperate for a way to curtail solar development expressed skepticism at the legal justification for the Board’s Order: “The PSB’s decision in this case

For the reasons stated above, the Order must be vacated, and a CPG issued for the Chelsea Solar Project.

Respectfully submitted,



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Dated: March 11, 2016

is surprising. Many professional planners would be skeptical that the standards included in Bennington's plan constituted 'clear, written community standards,' but the precedence has been established through this case." http://www.trorc.org/wp/wp-content/uploads/2016/02/benningtonPSB_final-1.pdf.