**STATE OF VERMONT**
**PUBLIC UTILITY COMMISSION**

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

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

Chelsea Solar LLC (the "Petitioner" or "Chelsea") files this supplemental opposition to the motion for a protective order filed by the Town of Bennington (the "Town") seeking to prevent the depositions of six members of the Bennington selectboard.[1]

## ARGUMENT

### I. Applicable Law

Administrative proceedings before the Vermont Public Utility Commission ("Commission") are governed by the Vermont Administrative Procedures Act, 3 V.S.A. §§ 801 *et seq*. ("APA"), the Rules of the Commission, and the incorporation therein by reference to the Vermont Rules of Evidence ("V.R.E.") and the Vermont Rules of Civil Procedure ("V.R.C.P."). 3 V.S.A. 810(1); Commission Rule 2.103 (Vermont Rules of Civil Procedure shall apply). Under the APA, Chelsea is entitled to conduct cross examination, respond to, and present evidence on all issues involved, including in this case, the veracity of the positions and representations advanced by the Town's prefiled testimony sponsored by Mr. Monks. *See, e.g.,* 3 V.S.A. § 809(c) ("Opportunity shall be given all parties to respond and present evidence and argument on all issues

[1] Unless otherwise noted, capitalized terms used herein have the meaning set forth in Petitioner's opening opposition to the Town's motion for a protective order.

involved."); 3 V.S.A. § 810(3) ("In contested cases … [a] party may conduct cross-examinations required for a full and true disclosure of the facts.").

Discovery, including oral deposition, is an essential tool to obtain evidence and prepare for cross examination of opposing parties' witnesses. Commission Rule 2.214, which governs discovery, entitles parties to conduct depositions in accordance with V.R.C.P. 30. *See* Rule 2.214(A) ("The provisions of Vermont Rules of Civil Procedure, … 30 (Depositions Upon Oral Examination) … shall apply in proceedings before the Commission. The availability of these procedures shall not limit the availability of any other means of discovery provided by statute or otherwise.").

The depositions are essential to due process and the ascertainment of the truth in this proceeding. *See* V.R.E. 102 (Decisions about evidence in Commission proceedings "shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.")

## II. Because Mr. Monks Lacks Personal Knowledge, the Deposition of the Town Selectboard Members is Essential to Ascertain the Truth of the Statements Ascribed to the Selectboard in the Testimony Submitted by the Town

On June 22, 2018, the Town filed the prefiled testimony of Daniel Monks on behalf of the Town. The Monks PFT summarizes the testimony as follows:

> The following testimony *outlines the reasons for the Town of Bennington Selectboard's conclusion* that the proposed solar array would have an undue adverse impact on aesthetics and orderly development in the region, and would be inconsistent with the land conservation measures set forth in the Bennington Town Plan. *The municipality recommends that the Petition for a Certificate of Public Good be denied.*

(emphasis added).

This testimony is not the testimony of Mr. Monk's regarding his personal knowledge or

views. Instead, it purports to express the views of the Selectboard members. However, there is no foundation that establishes the facts asserted or that they in fact reflect the views and opinions of the Selectboard. Not only is it hearsay, it entirely lacks any foundation or establishes Monks' personal knowledge as to the matters addressed.

The Monks' PFT testifies on behalf of the Town selectboard on a range of issues, concluding that the Project would have an undue adverse impact on aesthetics, an undue adverse effect on orderly development of the region, an undue adverse effect on health and safety, and that the Project would violate the land conservation measures in the Town Plan, the Town's screening ordinance and the Town's siting amendment.

Monks also asserts that the Town selectboard has concluded that the Town Plan contains clear, written community standards and that those purported clear standards are violated because the Project is allegedly sited in a prominent location on a hillside, purportedly does not employ non-reflective materials, allegedly does not employ earth-tone colors because the modules are purportedly not an earth-tone color, and allegedly does not minimize clearing. Monks also asserts that the Town selectboard has concluded that the Project would be visible to "thousands of visitors and motorists each day." Monks PFT at 8. Monks also asserts that the Town selectboard has concluded that the Project "cannot be adequately screened or mitigated to blend into the landscape" and thus further violates the purported clear standards in the Town Plan. Monks PFT at 11.

A deposition of the Selectboard members whose views are purported to be represented by these statements is critical to ascertaining the factual foundation for the claims and the truth of the matters asserted. "The underlying purpose of a deposition is to find out what a witness saw, heard, or did -- what the witness thinks." *Hall v. Clifton Precision*, 150 F.R.D. 525, 528 (E.D. Pa. 1993). Direct questioning of each member of the selectboard is both appropriate and proportional,

and necessary for trial preparation. *See, Am. Broad. Companies, Inc. v. U.S. Info. Agency*, 599 F. Supp. 765, 769 (D.D.C. 1984) ("Depositions are also more reliable, as they are taken under oath, and the deponents' responses are relatively spontaneous.").

Monks entire testimony is a second-hand account of the purported position of the six members of the Town selectboard. Vermont Rule of Evidence precludes testimony of a witness "unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." V.R.E. 602. Monks has no first-hand knowledge of what each member of the selectboard saw, heard, or thinks, or the standards used to reach their conclusions. Yet it is precisely the how and why the selectboard reached the conclusions that Chelsea has a right to inquire about in the broadest manner in this case as part of its trial preparation.

For example, the depositions will elucidate the detailed basis on which the selectboard members reached their conclusions; the process that was followed in reaching the conclusions; the standards used; how each selectboard member evaluated and distinguished the Chelsea Project from other solar projects in the Town (including in the RCON zone) that the Town selectboard either supported or did not oppose; the facts that each selectboard member possessed when evaluating the Project, and comparing it to other projects (solar or otherwise) the Town has supported or not opposed; how the selectboard's conclusions regarding orderly development fit with the Town's designation of specific preferred sites under its current Town Plan (i.e., is there a legitimate basis to distinguish those from the Chelsea site, and if so, what are those bases); what role neighbor opposition had in the member's analysis and deliberative process. Even excluding each member's personal motivations and the role of neighbor opposition, Chelsea is entitled to probe each selectboard member on the substantive issues, process, standards and basis for the purported recommendations and conclusions. Through the questioning of each selectboard

member on each of these critical issues, Chelsea will uncover highly relevant and admissible evidence related to all the issues addressed in Monks' PFT and the level of due consideration to which the selectboard's recommendations should be entitled.

The depositions of each member of the selectboard would all be admissible by Chelsea at the evidentiary hearing (either as direct evidence or as impeachment evidence), and also in a summary judgment motion.

Depositions are also necessary as part of trial preparation in order to determine whether Chelsea would call each of the selectboard members as a witness at trial. Even for selectboard members not called to testify at trial, the depositions would be admissible as non-hearsay. At trial or on a motion for summary judgment, VCRP 32(a) provides that a deposition may be used for impeachment or for any other purposes permitted by the VRE. Under the VRE the evidence from the deposition of each selectboard member would be admissible as non-hearsay.

The statements of the selectboard members would be admissible as direct evidence at trial (and not be hearsay under VRE 801(d)(2)) as an admission by party-opponent, specifically under (d)(2)(D) each statement in the deposition would be "a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship."

The statements of the selectboard members would be admissible as direct evidence at trial (and not be hearsay under VRE 803(3)) as **"**the declarant's then-existing state of mind, emotion, sensation, or physical condition (such as *intent, plan, motive*, design, mental feeling, pain and bodily health)."

The evidence produced through the depositions would also be admissible as direct evidence under 3 VSA §810 as "a type commonly relied upon by reasonably prudent men in the conduct of

their affairs." Of course, all the statements would be admissible in a motion for summary judgment and for impeachment purposes.

The protective order sought by the Town is unsupportable as a matter of law and fact, and if granted would seriously and unfairly impair Chelsea's prosecution of this case, and would contravene the Vermont Supreme Court's directive that "during the pretrial period 'restrictions which may impede the development, presentation and determination of facts should be avoided.'" *Schmitt v. Lalancette*, 2003 VT 24 (2003) at P13 ("*Schmitt*") quoting *Int'l Bus. Mach. Corp. v. Edelstein*, 526 F.2d 37, 41 (2d Cir. 1975).

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

But even setting those personal motivations aside, it is essential for trial preparation and due process for Chelsea to depose each selectboard member on the issues they have testified on through Monks' PFT. As the United States Supreme Court has explained, even assuming

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

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

*Overton Park*, 401 U.S. at 420. That is the case here. No formal findings were issued by the selectboard in support of the conclusions made by them, nor was there any formal administrative process. The only way that Chelsea can prepare its case is by *examining the decisionmakers themselves*. Anything less in this case would violate Chelsea's rights to due process and equal protection and seriously impair its trial preparation.

In addition to the United States Supreme Court in *Citizens to Preserve Overton Park,* other courts including the Vermont Supreme Court agree that direct thorough, probing, in-depth review of the decisionmakers themselves is not only permissible but essential. In applying the *Monti* test, the Ohio Supreme Court recognized in *State ex rel. Summit County Republican Party Exec. Comm. v. Brunner*, 117 Ohio St. 3d 1210, 1211 (Ohio 2008), that the decision and mental processes related to the decision at issue in that case were issues that were appropriate for deposition, and that such a deposition was essential to due process. *See, id*. at 1211

> *The secretary's personal knowledge and thought process in arriving at her decision lies at the heart of this case. No one else can answer the questions the committee has a right to ask.*

(emphasis added.)

So too here. The members of the selectboard made the decision to make the recommendations here. What led the members, individually and collectively, to oppose the Project and make the recommendations strikes at the heart of this case. The members of the selectboard cannot hide behind an appointed representative. That thorough, probing, in-depth review is essential regardless of the extent to which the sekectboard members were influenced or motivated by neighbor opposition.

The extent to which the selectboard members' motivations in opposing the Project were influenced by neighbor opposition is an additional layer of thorough, probing, in-depth review to which Chelsea is entitled as a matter of due process. Of course, to the extent that the Town's recommendations are motived by local opposition, the recommendations would be illegitimate and entitled to no weight. *See, e.g., In re Town Highway No. 20*, 2012 VT 17, P22 (2012) (holding town liable in tort for due process and equal protection violations where just as here "the Town's decisions with regard to [Chelsea's project] have all been guided by one motive: to favor the property rights of his neighbors.").[2]

As argued by Chelsea, other cases also confirm that through depositions Chelsea is entitled to probe the mental and deliberative processes of each selectboard member. *See, e.g., Payne v. District of Columbia*, 279 F.R.D. 1 (D.D.C. 2011); *In re Town Highway No. 20*, 2012 VT 17 (2012); *State v. Valley*, 153 Vt. 380, 395 (1989); *Smith v. Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982); *Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042, 1070-1071 (D. Az.

[2] The Town has also put in issue whether the changes to the Town Plan since 2014 affecting solar were made in good faith. *See*, Town's Opening Brief On Vested Rights at 6.

2014); *Am. Broad. Companies, Inc. v. U.S. Info. Agency*, 599 F. Supp. 765, 769 (D.D.C. 1984).

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

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

Oral depositions are the only method in which Chelsea can adequately make the inquiries necessary to then present a comprehensive case as to the level of due consideration that should be afforded to the selectboard's recommendations, and to prosecute its case that all section 248 criteria are satisfied.[3]

[3] *See also*, *Stagman v. Ryan*, 176 F.3d 986, 994-95 (7th Cir. 1999) (High-Ranking officials should be required to sit for depositions in cases arising out of the performance of their official duties if there is some reason to believe that the deposition will produce or lead to admissible evidence.) Courts do not issue protective orders when there are allegations that the official acted with improper motive or acted outside the scope of his official capacity. *See, e.g., Bagley v. Blagojevich*, 486 F. Supp. 2d 786, 789 (C.D. Ill. 2007) (permitting deposition where plaintiffs alleged that the Governor ordered their jobs eliminated in retaliation for their attempt to organize on behalf of a union that was a rival to a group that had contributed heavily to his election campaign); *Detoy v. City and County of San Francisco*, 196 F.R.D. 362, 370 (N.D. Cal. 2000) (permitting deposition where the chief of police took the "unusual" step of intervening personally in disciplinary proceedings against a police officer to ensure lighter discipline for the officer); *Virgo Corp. v. Paiewonsky*, 39 F.R.D. 9, 10 (D.V.I. 1966) (permitting deposition of a Governor accused of taking arbitrary actions as a result of Congressional pressures and personal friendships); *Atlanta Journal & Constitution v.*

## III. Conclusion

At the end of the day, the Town would remove any transparent review of the Town actions from this case. Granting the Town's requested relief (either in whole or in part) would deprive Chelsea basic due process rights and seriously harm its trial preparation and prosecution of its case.

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

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Respectfully submitted,

*/s/ Thomas Melone*
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*City of Atlanta Dep't of Aviation*, 175 F.R.D. 347, 348 (N.D. Ga. 1997) (permitting regarding the official acts of a mayor when the court was satisfied that he had "pertinent, admissible, discoverable information which [could] be obtained only from him."). Unless the movant can show that the need for the protective order is "sufficient to overcome plaintiffs' legitimate and important interests in trial preparation," high-ranking officials are subject to deposition. *Alexander*, 186 F.R.D. at 1 (citing *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985)).