STATE OF VERMONT
PUBLIC UTILITY COMMISSION

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

TOWN OF BENNINGTON REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER
And
SUPPLEMENTAL BRIEF

The Town of Bennington ("Town") hereby submits this reply in support of its motion for a protective order precluding Chelsea Solar LLC from taking the deposition of individual members of the Town of Bennington Selectboard, and requiring Chelsea Solar to conform to V.R.C.P. 30(b)(6) in seeking testimony on behalf of a municipal entity as to the matters on which the Town has offered evidence. This brief is also the Town's Supplemental Brief in response to the Hearing Officer's request at the July 12, 2018 status conference.

MEMORANDUM

I. THE DEPOSITIONS OF SELECTBOARD MEMBERS IS IMPERMISSIBLE, AND THE BURDEN TO THE TOWN FAR OUTWEIGHS THE NEED FOR SUCH TESTIMONY

Chelsea's opposition seeks to confuse the issues and exhaust the reader by extensively briefing cases largely from foreign jurisdictions with little or no relationship to the issues at hand. Vermont law is clear and settled concerning eliciting testimony from individual legislators regarding the intent and/or history of actions taken in a legislative capacity.

Under Vermont law, "[t]he testimony of individual legislators . . . as to the purpose the legislature had in mind . . . is of doubtful relevance. . . ." *Andrews v. Lathrop*, 132 Vt. 256, 260,

315 A.2d 860, 862. Drawing from U.S. Supreme Court precedent, the *Andrews* Court held that "'judicial inquiries into Congressional motives are at best a hazardous affair, and when the inquiry seeks to go behind objective manifestations, it becomes a dubious affair indeed.'" *Id.* (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)). The *Andrews* Court went on: "No cases have been brought to our attention in which the courts of this State have ever found such testimony to be within the meaning of legislative history for the determination of purpose." *Id.*; *accord Vermont Development Credit Corp v. Kitchel*, 149 Vt. 421, 428, 544 A.2d 1165, 1169 (1988).

Yet that is what Chelsea seeks. It asks to examine individual lawmakers about the purpose and meaning behind decisions made by a municipal legislative body. (*E.g.* Opp. at 6, 11, 20, 26, 28 ("[O]nly the selectboard [sic] members themselves can testify to their actions and intentions.")).[1] However, "[t]he determination of purpose is a question of law, as it is in the process of statutory construction." *Andrews v. Lathrop*, 132 Vt. at 259. Thus, the proper review of the purpose of the Bennington Town Plan provisions, and any other municipal regulations or determinations of the Selectboard, is through legal argument following the principals of statutory construction. "In determining legislative purpose, the whole of the statutory provision may be looked to, its subject matter, and its effect and consequences." *Id.* at 261. Chelsea is free to make legal those legal arguments, following the appropriate principals of statutory construction.

As a matter of Vermont law, courts disfavor testimony of an individual legislator regarding intent or history "because it cannot reflect the thought processes of the entire

[1] The testimony of individual Selectboard members is likely only to confuse the issues and will lead to the conflation of individual views from the recommendation of a municipal body acting as a whole. The testimony is likely to result in future, significant legal disputes about its appropriate use and import.

legislature." *Trudell v. State*, 2013 VT 18, ¶ 27, 193 Vt. 515, 526. Additionally, the meetings at which the Selectboard determined its position on the Chelsea Solar project were held in open session—indeed, Chelsea representative Brad Wilson attended, and made statements for the Selectboard's consideration. The minutes from the meetings are available online.

Chelsea seeks to take these depositions in order to address what it refers to as "standard-less criteria in the Town Plan," which Chelsea asserts would violate Chelsea's constitutional rights. (Opp. at 1, 2, 5, 8, 9, 10, 24, 25, 28, 30, 33, 34). Chelsea wants to get to the bottom of the legislative intent behind the Town Plan by examining individual lawmakers, in their individual capacities. Thus, rather than assert that individual Selectboard members would offer testimony relevant to Petitioner's entitlement to a Certificate of Public Good for the Chelsea Solar Project, Petitioner bases its need for the deposition on examining the constitutionality of the Town's actions vis-à-vis due process, equal protection, and "generalized animus." (Opp. at 5).[2]

However, as Chelsea has itself previously argued, the PUC cannot determine issues of constitutionality. (Brief of Chelsea Solar in Opposition to Motion to Stay in this Docket, at 4 (Feb. 9, 2018) ("The PUC is a creature of statute and its jurisdiction is limited. The PUC has no 'power to decide constitutional issues.'" (citing *Westover v. Barton*, 149 Vt. 356, 359 (1988))). If the PUC has no power to decide whether the Town's actions have infringed upon Chelsea's constitutional rights, the quest for testimony related to that subject is not relevant to the present proceeding.

Even if the issue were appropriate for the forum, Vermont courts have stated a "general rule that review of a governmental action focuses on the action taken and not on the motives of

[2] A court in another jurisdiction has addressed this issue head on: in *Bituminous Materials, Inc. v. Rice County, Minnesota*, the court affirmed a decision to "bar deposition discovery regarding [the] Commissioners' motives for the actions in question" because "unsupported allegations of personal animus did not warrant burdensome depositions of these government officials." 126 F.3d 1068, 1071 n.2 (1997),

lawmakers. . . ." *See, e.g. In re Acquisitions of Chittenden Solid Waste Dist. Of Certain Property Interests by Eminent Domain*, 1996 WL 34421145 (Vt. Super. Ct. Mar. 13, 1996) (citing Am Jur 2d Municipal Corporations).[3]

The *Andrews* case is instructive: A presumption of constitutionality of governmental action "sets the standard" for a review of its purpose. *Andrews*, 132 Vt. at 259. "Inherent within it is the further presumption that the legislature has not acted unreasonably, without purpose." *Id.* Thus, it is not the function of a judicial body to review the validity of legislative concerns or the wisdom of the means chosen to address them, "but merely to determine whether the legislature may have acted in response to such a concern and whether in doing so it acted within its constitutional bounds." *Id.* at 262. As stated in *Andrews*, the testimony of individual legislators as to the motivation behind a particular legislative act is not part of that inquiry. *Id.* at 260.

Chelsea incorrectly asserts that the individual lawmakers have "voluntarily injected themselves into this case by making recommendations to the Public Utility Commission" (Opp. at 2, 9, 24, 32, 35), and that the Town filed testimony that "states the positions taken by the Selectboard members." (Opp. at 32).[4] However, none of the individual Selectboard members

[3] Chelsea cites to *Citizens to Preserve Overton Park, Inc. v. Volpe* for the proposition that official action is subject to review (401 U.S. 402, 415 (1971)). The "thorough, probing, in-depth review" referenced in the Opposition referred to judicial review of agency action, not of Legislative intent or motive. Chelsea also leaves out the holding that in order for the court to require administrative officials to provide testimony explaining their action, "*there must be a strong showing of bad faith or improper behavior before such inquiry may be made*." *Citizens to Preserve Overton Park*, 401 U.S. at 420. No showing of bad faith or improper behavior has been made here.

[4] Chelsea also argues that "[a] *governmental entity* that voluntarily chooses to file 'recommendations' pursuant to its statutory right under 30 V.S.A. § 248 has impliedly waived any basis that it might otherwise have had to refuse to be subjected to scrutiny of those recommendations, the persons responsible for making them, and the deliberative process." (Opp. at 8) (Emphasis added). This exposes the fundamental problem with Chelsea's argument—it does not seek the testimony of the "governmental entity" that made a recommendation—but only of its individual members in their individual capacities. If Chelsea seeks testimony of the governmental entity, the mechanism is V.R.C.P. 30(b)(6).

are parties to this case, none have submitted evidence, and none of the individual members of the Selectboard have made recommendations to the PUC. Only the municipal legislative body as a whole has made a recommendation, and the Town's prefiled testimony states the position of the Selectboard as an entity, making no reference to recommendations of individual members.

It is the PUC that ultimately must apply the § 248 proceeding to this case. 30 V.S.A. § 248 *requires* the Public Utility Commission to give due consideration "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." 30 V.S.A. § 248(b)(1).[5] Under Chelsea's view, any time the Selectboard of a municipality takes a position on a project pursuant to § 248(b), it provides the developer *carte blanche* to expend significant public resources deposing each person involved in the legislative process. That is extraordinarily bad policy. Such a rule will lead to abuse of the discovery process with certain developers, and ultimately result in the inability or unwillingness of municipalities to make recommendations pursuant to § 248(b), or to participate in the process as contemplated under the legal scheme of § 248. That would certainly be in Chelsea's interest, but it would cripple the ability of municipalities to meaningfully participate in the process, defeating the policy behind § 248(b)(1) entirely.

The Town does not seek to deprive Chelsea of deposition testimony from the Town altogether, nor does the Town "seek[] to remove any transparent review of the Town actions

[5] The PUC is *not* required to give due consideration to the opinion of individual Selectboard members (which have not been offered in this proceeding in any case); the testimony of these individuals bears no relevance to the § 248(b) recommendation of a municipal body.

from this process," as Chelsea claims (Opp. at 12, 24, 34).[6] The Town has offered to make available an appropriate institutional deposition witness based on the relevant 30(b)(6) questions that Chelsea may provide pursuant to Rule.

The appropriate manner for taxpayers to engage in developing public policy and to influence municipal decisionmaking is through public participation, *not* through discovery warfare. This means attendance at public forums, voting in municipal elections, and other forms of civic engagement. It is not appropriate to order individual members of the Selectboard to be required to explain what is in their mind whenever they act in a legislative capacity. Opening this door will incapacitate the democratic process, cost taxpayers a fortune, and discourage members of the public from volunteering to serve their communities.

II. THE TOWN AND INDIVIDUAL SELECTBOARD MEMBERS WILL SUFFER SPECIFIC INJURY

Chelsea argues that the party seeking a protective order must make a particularized showing of harm. The Town has already described specific harm that would result from the depositions sought by Chelsea.

Undue burden or expense are both specific injuries which may form the basis of a protective order under V.R.C.P. 26(c). V.R.C.P. 26(c) ("Upon motion by a party or by the person from which discovery is sought, and for good cause shown, any Superior Judge may make an order which justice requires to protect a party or person from . . . undue burden or expense."); *see, e.g. Stratton Corp. v. Intrawest Stratton Development Corporation*, 2015 VT

[6] The case law cited by Chelsea in support of the proposition that depositions are rarely prohibited concerns the taking of a deposition *of a party*. None of the individual Selectboard Members are parties in this proceeding. The Town, which is a party, has offered to designate a witness pursuant to the rule that applies to entities, including municipal corporations.

75, ¶ 17, 199 Vt. 388, 394 ("The court may make such orders as will prevent a party from being embarrassed or put to undue expense. . . ."); *Schmitt v. Lalancette*, 2003 VT 24, ¶ 18.

Vermont courts routinely grant protective orders on the basis of undue burden or expense and where the evidence sought exceeds the scope of discovery. *See, e.g.*, *Longariello v. Windham Southwest Supervisory Union*, 165 Vt. 573, 575, 679 A.2d 337, 339 (1996) ("We agree that the court could find that the requests involved 'undue burden or expense' and acted within its discretion."); *Palmeri v. Todd*, 2006 WL 6153339, *1 (Vt. Super 2006) (Wesley, J.) ("In light of the Plaintiff's persistent interest in evidence which the Court has deemed beyond the scope of discovery, the motion for protective order is GRANTED.").[7]

Courts may also grant a protective order on the basis of undue burden where the limited value of the information sought is outweighed by the burden. *See, e.g.*, *Weatherly v. Gravel and Shea, P.C.*, 2013 WL 12231876, at *2 (Vt. Super. 2013) (Mello, J.) ("Given the limited value of the information Gravel and Shea seeks, the Court concludes the [burden to the party] constitutes an undue burden."); *Siliski v. Dumont*, 1996 WL 34421146 (Vt. Super. 1996) (Norton, J.) (granting protective order where discovery sought related to topic no longer at issue in case).

[7] Chelsea asserts that in *Schmitt* "the Vermont Supreme Court rejected in *Schmitt* the complaint about costs imposed by rightful discovery." (Opp, at 34–35). That is a mischaracterization of *Schmitt*, in which the Court referenced the fact that the party seeking a protective order did not make any argument about the undue expense of discovery. *Schmitt*, 2003 VT 24, ¶ 18 ("Moreover, there was no unnecessary expense to Lalancette. Even Lalancette does not argue that complying with the requested discovery was too expensive."). The Court did not reject undue expense as a basis for good cause, as Chelsea contends, because the party did not make that argument. To the contrary, the Court indicated that an argument of undue expense may have been good cause for a protective order.

Finally, it is within a court's discretion to grant a protective order where there is reason to believe that the purpose of depositions is to "argue the case, use intimidation tactics, ask irrelevant and harassing questions, or otherwise to conduct oneself outside the requirements of legitimate discovery practice." *See, e.g.*, *Jones v. Hart*, 2011 WL 9154669 (Vt. Super. 2011) (Eaton, J.).

The specific injuries at issue with respect to Chelsea's request are (1) undue expense to the Town through waste of Town resources; and (2) the undue burdens on time and undue expense to *volunteer* Selectboard members who are not parties to this case (and whose individualized testimony bears no relevance to the issues in this proceeding).

Chelsea does not dispute that these depositions would result in great expense to the Town. The request would involve three full days of deposition, largely on topics that bear no relevance to the proceeding. Chelsea has indicated that it does not intend to take a 30(b)(6) deposition, thus it seeks no testimony at all on behalf of the municipal entity itself. The Town has also explained that it is not just the time for the deposition itself that will incur expense; witnesses must be prepared for a deposition, which requires each member to meet with counsel in advance. All of this will cost Bennington taxpayers thousands of dollars. The undue expense would also include the cost of obtaining copies of the deposition transcripts, which cost hundreds of dollar each.

Moreover, the individual Selectboard members will be harmed. In Vermont, serving as a Selectboard member is a community service, not a vocation. Thus, Selectboard members also work to make a living, and have other obligations outside of their volunteer role on the Selectboard. Not only will forcing individual Selectboard members to take time off from work

impact them financially and professionally, it will also impact their employers—the majority of which/whom are also members of the community.[8]

Though the Town has prevailed on its motion to dismiss the matter pending before the Environmental Court since the motion for a protective order was made, arguments with respect to prejudice in litigation on other fronts are not withdrawn because a spokesperson for the Chelsea affiliate has stated to the Bennington Banner that "further court appeals are likely concerning the . . . issues raised in the Environmental Court complaint."

III. IN THE ALTERNATIVE, THE TOWN'S COSTS SHOULD BE IMPOSED ON CHELSEA, AND THE SCOPE OF DEPOSITIONS SHOULD BE LIMITED TO THE SUBJECT MATTER OF THIS PROCEEDING

Chelsea argues, based on *Schmitt*, that Chelsea should not be required to pay the Town's fees and costs in the event the depositions are permitted. As explained *supra*, *Schmitt* does not hold that undue expense is not a basis for a protective order, as Chelsea asserts, but the opposite. V.R.C.P. 26(c) clearly grants courts the authority to designate the allocation of fees. (V.R.C.P. 26(c) ("Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, [a court] may make an order . . . that the discovery may be had only on specified terms and conditions, *including a designation of the time or place or the allocation of expenses*.")). The allocation of expenses is well within a court's discretion, and wholly appropriate here.

The Town has already established good cause for protection from these deposition notices. If the depositions are not disallowed altogether, then Chelsea should be required to

[8] Of the Selectboard members who have been able to respond to the deposition notices, one (an educator) has already indicated that this time of year will be difficult as it is the start of the new school year. Another member, also in education, cited to the start of the new school year, including coordinating new student orientation at the local community college.

absorb the cost to taxpayers, including (1) all attorneys' fees for preparing for and attending the depositions; (2) the cost of copies of deposition transcripts; and (3) all other costs attributable to the depositions of the municipal employees taken in their individual capacities.

CONCLUSION

It is bad public policy to discourage municipalities from participating in the § 248 process by exposing them to unnecessarily burdensome discovery. It has the potential for significant abuse of the discovery process which will diminish the ability of Vermonters to have input into development within their localities.

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

Alternatively, Chelsea should be required to pay the expenses, rather than Bennington taxpayers, with the subject matter of the depositions limited to the scope of this proceeding.

At Manchester, Vermont this 18th day of July, 2018.

/s/Merrill E. Bent, Esq.
Woolmington, Campbell, Bent & Stasny, P.C.
Counsel for Town of Bennington
4900 Main Street, PO Box 2748
Manchester Center, VT 05255
merrill@greenmtlaw.com

(802) 362-2560

WOOLMINGTON, CAMPBELL, BENT & STASNY P.C.
MANCHESTER, VERMONT