

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]	

**REPLY BRIEF OF THE APPELLANT
TOWN OF BENNINGTON**

MERRILL E. BENT, ESQ.
Woolmington, Campbell, Bent & Stasny, P.C.
4900 Main Street, P.O. Box 2748
Manchester Center, VT 05255
(802) 362-2560
merrill@greenmtlaw.com
ATTORNEYS FOR THE APPELLANT

ARGUMENT IN REPLY

I. CHELSEA HAS REVERSED ITS POSITION SINCE THE PREHEARING CONFERENCE

Chelsea correctly states that the Town raised the Town Plan amendment at the prehearing conference in this case. Everyone at that hearing, *including Chelsea*, agreed that what was under consideration was a *new petition*. (See Hearing Transcript of March 2, 2018 Status Conference [Exhibit A], at 7, 8, 12, 14 (DPS Attorney: “We are looking at this as a new project, not simply just looking at amendments that were made to the project”; ANR Attorney: “What I have before me is what I view as a new petition”; Chelsea Attorney: “I understand completely that this is a new petition”; Town Attorney: “Mr. Melone who just confirm that . . . he acknowledges that this is a completely new proceeding. It’s a new application, and as such, there is a Town Plan amendment that was adopted prior to the new petition being filed which is applicable.”).¹

Chelsea now takes the opposition position.

II. VERMONT’S VESTED RIGHTS DOCTRINE DOES NOT EXTEND TO CHELSEA’S NEW PETITION

Petitioner’s reliance on *Smith v. Winhall Planning Commission* is misplaced. (140 Vt. 178 (1981). In *Smith*, the Winhall Planning Commission denied a subdivision, which denial was appealed to the Superior Court. While the appeal to the Superior Court was pending, an amendment to the bylaws were enacted. The Superior Court reversed the

¹ Also at the prehearing conference, Chelsea advanced its scheduling arguments by stating: “We filed essentially new testimony on all the criteria.” (Hearing Transcript, at 11–12). Now Chelsea says that “the testimony filed in this case is merely an amended and restated version of the original testimony.” (Brief, at 9). Which is it?

Planning Commission determination, and the Planning Commission appealed to the Vermont Supreme Court. The Court determined that the amended bylaws—passed while the appeal was still pending (i.e., before there was a final judgment in the matter)—would not apply. *Smith*, 140 Vt. at 180. The *Smith* holding is that the passage of a regulatory amendment made after an application was filed, but before a final judgment, does not apply to the subject application.

Smith is good law, but it does not apply to the present facts. The amendment in question was passed in April 2016, *after* the Final Order of the PUC was issued in February 2016. No appeal was pending at the time the Amendment was passed in April 2016.² The present application was filed nearly two years after the Final Order issued, and more than a year and a half after the Town had passed the Solar Siting Amendment.

Indeed, none of the cases cited by Chelsea hold that vested rights apply in a situation involving an amendment that was passed (1) *after* a final order denying the application; and (2) where no appeal was pending. *See In re Ross*, 151 Vt. 54, 557 A.2d 490 (1989) (concerning permit application filed prior to adoption of amendment to Town Plan); *In re Jolley*, 2006 VT 132, 181 Vt. 190 (Order issued “without prejudice to being reopened”; thus not intended as a final order); *In re Appeal of Taft Corners Assocs.*, 171 Vt. 135 (2000) (holding that subdivision permits do not create a vested right to future zoning permits under the zoning ordinance applicable when the subdivision was sought);

² Though an appeal was filed in May 2017 (14 months after the Final Order was issued), it was abandoned prior to briefing or argument.

In re Molgano, 163 Vt. 25, 653 A.2d 772 (1994) (Applicant’s initial application was *granted*, not denied!).³

Petitioner argues that the Commission “chose” the procedural route that it took. (Brief, at 7). Nobody chose the procedural route except for the Petitioner. The PUC held only that Chelsea’s Motion was denied because (1) the PUC was without jurisdiction to consider it; and (2) because it raised matters that the PUC had already decided. (October 12, 2017 Order, at 4). By these words, the PUC made clear that it was *not* open to reconsidering Chelsea’s myriad requests that the prior denial be vacated, to reopen the record, to amend the petition, to alter and amend the Final Order, etc.

On that basis, the Order cannot be understood as a tacit decision to treat the new petition as a continuation of the Docket 8302 proceeding. If that were the meaning of the Order, then the Board would have impliedly granted the very motion that it expressly denied as “already decided.” (October 12, 2017 Order, at 4). Petitioner “acted at its own risk when it went forward” when it withdrew its appeal and filed a new application. *In re McDonald’s Corp.*, 146 Vt. 380, 505 A.2d 1202 (1985). It cannot now claim that the PUC’s Order denying its motion pursuant to 60(b) somehow actually permitted an end-run around the Final Order without an appeal.

³ *L.M. Everhart Construction, Inc. v. Jefferson County Planning Commission*, cited by Chelsea, supports the Town’s arguments. (2 F.3d 48 (4th Cir. 1993)). As an initial matter, the Court found that the vested rights doctrine did not apply in *Everhart*. Next, *Everhart* involved application of a specific West Virginia statute as to which there is no Vermont equivalent. Furthermore, unlike in *Everhart*, the change in regulations at issue here still permits the proposed use of the land, and does not preclude a solar field. Thus, expenditures made on the project could still be used to that end. Finally, unlike in *Everhart*, the Town’s amendment took affect more than one and a half years before Chelsea abandoned its appeal and filed a new application.

III. THE HEARING OFFICER'S CONCLUSIONS WERE IN ERROR

As discussed in more detail in the Town's initial brief, the Hearing Officer's reasoning is incorrect. The Hearing Officer assumes that the vested rights doctrine applies any time an application is filed. But the case law is far more nuanced; vested rights do not apply in every case. See *e.g. In re Taft Corners*, 171 Vt. at 143 (no vested rights); *In re McCormick Management Co., Inc.*, 149 Vt. 585, 547 A.2d 1319 (no vested rights); *In re B&M Realty, LLC*, 2016 VT 114, 203 Vt. 438 (rejecting attempt to expand vested rights beyond the "narrow circumstance" presented in *Winhall v. Smith*). The Hearing Officer's decision also assumes that the PUC's Final Order is not in fact final, and that the PUC's October 12, 2017 Order worked to reverse all of its previous orders denying the various motions to reopen, amend, vacate, etc. This is illogical and contrary to accepted legal principles of finality and the law of the case doctrine.

The Hearing Officer also incorrectly found that the argument against application of the Vested Rights Doctrine "ignores the Commission's October 12 Order." In fact, the argument relies on the plain language of the Order expressly rejecting Chelsea's bid to vacate the Final Order as an issue that was "already decided." (October 12, 2017 Order, at 4). The PUC was not simultaneously creating a backdoor to do just that, particularly when prior motions to amend the application had likewise been "already decided."

In Vermont, "vested rights principles must be based on a balance of the competing interests." *In re Taft Corners*, 171 Vt. at 143. As in *Taft Corners*, "the interests of the municipality and its citizens weigh heavily against such a vesting rule" as articulated by the Petitioner. *Id.* "To adopt [Petitioner's] vested rights theory would strip the Town of the ability to modify its land-use policies. . . ." *Id.* Under Petitioner's theory, developers can

propose development that is completely unworkable at the outset, and then file successive applications years after the initial proposal is denied (as Chelsea did here)—subject only to the laws applicable when its first application was made, “and not to any subsequent amendment or modification of those laws.” *Id.* “The result would be an uncontrollable patchwork of land use rules that would defy rational policy-making or implementation.” *Id.*

CONCLUSION

For the foregoing reasons, the May 17, 2017 Order concerning vested rights should be reversed, and the provisions of the Town Plan and Town Bylaws in effect at the time of Chelsea’s New Petition should be applied to the present proceeding.

Dated at Manchester this 20th day of July, 2018.

/s/ Merrill E. Bent

Merrill E. Bent, Esq.

Woolmington, Campbell, Bent & Stasny, P.C.

4900 Main St. PO Box 2748

Manchester, VT 05255

merrill@greenmtlaw.com

(802) 362-2560

EXHIBIT A

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

CASE NO. 17-5024-PET

PETITION OF CHELSEA SOLAR LLC, PURSUANT TO
30 V.S.A. SECTION 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 --

March 2, 2018
1:30 p.m.

112 State Street
Montpelier, Vermont

Prehearing Conference held before the
Vermont Public Utility Commission, at the Susan M. Hudson
Conference Room, People's United Bank Building, 112 State
Street, Montpelier, Vermont, on March 2, 2018, beginning
at 1:30 p.m.

P R E S E N T

HEARING OFFICER: Michael Tousley, Staff Attorney

CAPITOL COURT REPORTERS, INC.
P.O. BOX 329
BURLINGTON, VERMONT 05402-0329
(802) 863-6067
EMAIL: info@capitolcourtreporters.com

1 MR. MELONE: With respect to the
2 Petitioner, we would like to see a schedule that
3 reflects the December 3, 2018 commissioning date.

4 HEARING OFFICER TOUSLEY: Okay. And is
5 there a reason why the state and the other parties
6 find that unacceptable?

7 MS. LEIBOWITZ: Your Honor, sorry. Is
8 that how I'm supposed to address you or --

9 HEARING OFFICER TOUSLEY: That's okay.
10 Mr. Tousley works.

11 MS. LEIBOWITZ: Mr. Tousley, the
12 Department obviously supports the schedule that we
13 proposed. And I think that the problem -- I would
14 say that the problem with the schedule that the
15 Petitioner proposed is it doesn't allow enough time
16 for a thorough review of the project. We are looking
17 at this as a new project, not simply just looking at
18 amendments that were made to the project that were
19 submitted before.

20 So it's our position that we need to do
21 a full review, and that we need the full amount of
22 time to do that. And the time frame set forth in the
23 Petitioner's schedule doesn't allow for that type of
24 review. And we do have a couple interveners here,
25 and it's important for the Department to see that all

1 parties get a chance to meaningfully participate in
2 the proceedings here. And I don't think that the
3 expedited schedule proposed by the Petitioner would
4 really allow for that.

5 We intend to file testimony in this
6 case, so it's important to the Department to have two
7 rounds of discovery. And then I think as we get into
8 a little bit of the scope, we can point out more
9 specifically what may be taking up time. But that's
10 our position.

11 HEARING OFFICER TOUSLEY: Okay. Does
12 the agency have a separate position?

13 MR. EINHORN: No. I think ours is
14 pretty consistent with the Department's. I mean at
15 this point it's premature to say whether or not we
16 would be filing testimony. I think responses to
17 discovery would ultimately factor into that decision.

18 HEARING OFFICER TOUSLEY: Do you think
19 that there would need to be major changes in the
20 natural resources' criterion testimony between what
21 was filed in 8302 and what would be filed here?

22 MR. EINHORN: I have no idea. What I
23 have before me is what I view as a new petition. I
24 think it's way more efficient to just review the new
25 petition and to address that rather than to try to

1 filed essentially new testimony on all the criteria,
2 which I think we are happy to rely on that for this
3 case.

4 HEARING OFFICER TOUSLEY: Okay. So
5 you're not relying on 8302 testimony.

6 MR. MELONE: No.

7 HEARING OFFICER TOUSLEY: That was my
8 misconception then.

9 MR. MELONE: No. We are relying on the
10 new testimony that's been filed. We are also relying
11 on that October 2017 order from the PUC. I think
12 they put a year extension on the commissioning
13 deadline for a reason, for this to be an expedited
14 proceeding. And the PUC specifically said that this
15 review of this proceeding would be prompt, and I
16 think -- I understand completely that this is a new
17 petition. I understand that the DPS MOU is no longer
18 applicable, and the same thing with ANR, but I
19 realistically -- this is the same project and the
20 same parcel. It's just smaller. And I think to --
21 the schedule should reflect that.

22 And what I'm not hearing from any of
23 the parties; from DPS, from ANR, or from the town are
24 specific issues that they might have with the
25 project. And I think the purpose of this prehearing

1 MS. HARRIS: And they intend to.

2 HEARING OFFICER TOUSLEY: Okay, great.
3 Does the town have comments?

4 MS. BENT: Yeah. I think from the
5 town's perspective, because there had been a final
6 order in the Chelsea docket previously, there are a
7 number of issues that would be restricted by basis of
8 collateral estoppel with regard to interpretation of
9 the Town Plan, although I don't know that those
10 issues are going to be really hotly disputed in this
11 docket. And then I think it was Mr. Melone who just
12 confirmed that, you know, he acknowledges that this
13 is a completely new proceeding. It's a new
14 application, and as such, there is a Town Plan
15 amendment that was adopted prior to the new petition
16 being filed which is applicable.

17 So that's really the only issue that
18 the town is going to intend to address. That said,
19 just by -- for the sake of making sure that we are
20 able to address all the issues in this proceeding
21 thoroughly and have time to do that, and have time to
22 do that, even have time to talk to each other to try
23 to keep things moving forward in an orderly fashion,
24 the town does support the more elongated schedule
25 that was submitted by the Department just by virtue