RESPONDENT'S APPENDIX

TO MOTION FOR PERMISSION TO APPEAL

PRB 25-120

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STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

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Introduction

As provided in A.O. 9, Rule 13(A), Conflict Disciplinary Counsel conducted an investigation into allegations of Respondent's misconduct after a letter of complaint was received from Attorney Merrill Bent. As a result of the investigation, the Petition of Misconduct (hereafter "Petition") was filed against the Respondent on September 26, 2025. The Petition consists of 113 factual allegations. It contains allegations of eight counts of misconduct by the Respondent. Most of the counts assert that Respondent's conduct violated the Vermont Rules of Professional Conduct (hereafter "Rules") in multiple ways.

On October 27, the Respondent filed a multi-part motion which included (1) a special motion to strike under 12 V.S.A. § 1041, (2) a motion to dismiss for failure to state a claim, and (3) a motion for more definite statement. In an entry order dated November 6, 2025, the Hearing Panel resolved the first motion. This order resolves the remaining motions.

The Counts

As noted, the Petition alleges eight counts of misconduct.

Count I alleges that Respondent violated Rules 3.5(d), 4.3, 4.5, and 8.4(d). **Count II** alleges that Respondent violated Rules 4.5 and 8.4(d). **Count III** alleges that Respondent violated Rules 3.5(d), 4.3, and 8.4(d). **Count IV** alleges that Respondent violated Rule 3.5(b)(1). **Count V** alleges that Respondent violated Rules 3.1, 3.3(a)(1), 4.4(a), and 8.4(d). **Count VI** alleges that Respondent violated Rules 3.3(a)(1), 4.4(a), and 8.4(d). **Count VII** alleges that Respondent violated Rules 4.2 and 8.4(d). **Count VIII** alleges that Respondent violated Rule 8.4(d).

The Rules

The relevant rules provide in pertinent part as follows:

Rule 3.1

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.. . .

Rule 3.3(a)(1)

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

Rule 3.5(b)(1)

A lawyer shall not . . .

(b) communicate ex parte

(1) with a judge or other person acting in a judicial or quasi-judicial capacity in a pending or impending adversary proceeding, unless authorized to do so by the Code of Judicial Conduct, by other law, or by court order;

Rule 3.5(d)

A lawyer shall not

(d) engage in undignified or discourteous conduct which is degrading or disrupting to a tribunal.

Rule 4.2

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Rule 4.3

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.

When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Rule 4.4(a)

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Rule 4.5

A lawyer shall not present, participate in presenting, or threaten to present criminal charges in order to obtain an advantage in a civil matter.

Rule 8.4(d)

It is professional misconduct for a lawyer to:

(d) engage in conduct that is prejudicial to the administration of justice;

I. Motion to dismiss for failure to state a claim upon which relief can be granted.

The Rules of Civil Procedure generally govern disciplinary proceedings. *See*, A.O. 9, Rule 20(B):

> **B. Proceedings Governed by Rules of Civil Procedure.** Except as otherwise provided in these rules, the Vermont Rules of Civil Procedure and the Vermont Rules of Evidence apply in discipline and disability cases.

Respondent's motion to dismiss is based upon V.R.C.P. 12(b)(6) which provides that a pleader may file a motion to dismiss by reason of the failure of the complaint—the Petition here—to state a claim upon which relief can be granted.

Respondent's motion repeatedly asserts that charges in the Petition are "frivolous" or "unmeritorious." But these are not the standards by which a motion under Rule 12(b)(6) is determined. When reviewing a motion to dismiss the tribunal must accept as true all well-pleaded factual allegations in the complaint. *Powers v. Office of Child Support*, 173 Vt. 390, 392 (2002). The Petition of Misconduct

conforms to the requirements of V.R.C.P. 8(a) in that it sets forth "a short and plain statement of the claim showing that the pleader is entitled to relief, ..." *See also, Lane v. Town of Grafton,* 166 Vt. 148, 152-53 (1997). It also conforms to the V.R.C.P. 8(e) requirement that each averment "shall be simple, concise, and direct." The rules do not require a specific and detailed statement of the facts which constitute a cause of action, but simply a statement clear enough "to give the [respondent] fair notice of what the [] claim is and the grounds on which it rests." *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99 (1957); *in accord, Levinsky v. Diamond*, 140 Vt. 595, 600 (1982).

Taking as true as required the facts alleged in the pleading, the Panel concludes that each count sets forth claims upon which relief can be granted, i.e. claims upon which the Respondent can be found guilty of the misconduct alleged.

Count I asserts that Respondent violated Rules 3.5(d), 4.3, 4.5, and 8.4(d) by claiming before the Public Utility Commission (PUC) that agents and employees of the Town of Bennington had engaged in criminal conduct. He alleged that they "were engaged in an active 'cover-up conspiracy' and committed acts 'forgery,' engaged in 'counterfeiting,' filed 'false certifications to the state and federal government in violation of criminal statutes,' and filed at least one 'false statement with the [Public Utility] Commission.'"

The Respondent's claims against the Town are set forth in paragraph 61 of the Petition. In paragraph 62, it is alleged that Respondent threatened to file a RICO[1] complaint in federal court. Although the RICO complaint is civil, it must allege "predicate acts" which must be linked to a criminal enterprise. *See e.g., In re Testosterone Replacement Therapy Products*, 159 F.Supp.3d 898, 910-11 (N.D. Ill. 2016). In this case, the threat of civil litigation included a threat to report criminal violations. Allegations in paragraphs 61 through 64 of the Petition provide adequate support for Count I.

Count II asserts that the Respondent violated Rule 4.5 by threatening to present criminal charges against the individuals identified by the initials ML and DG. It also asserts that this misconduct ran afoul of Rule 8.4(d). The allegations made in paragraphs 46 through 55 support these claims. The Petition alleges that ML and DG were opponents of at least one of the applications for a Certificate of Public Good (CPG) filed by one of Respondent's companies. It alleges that Respondent discovered a potentially criminal omission in a bankruptcy petition

[1] RICO is the acronym for "Racketeer Influenced and Corrupt Organizations."

filed by DG and that he advised ML and DG, "I do want you to be aware that we will be asking about it in your deposition." Subsequently, ML and DG withdrew from the PUC proceedings. Nevertheless, in an email Respondent advised, "I think the only way that the various lingering issues from your involvement [in the PUC proceeding] can be removed is if you send letters to the PUC, the Planning Commission and the Select Board supporting both projects.. . ." It can be inferred from Respondent's communications with ML and DG that he was threatening to report them for criminal conduct,

Count III asserts that the Respondent violated Rules 3.5(d), 4.3, and 8.4(d) by presenting "not credible" testimony to the Public Utility Commission regarding site preparation work before obtaining a Certificate of Public Good with respect to a proposed project. Paragraphs 56 through 60 of the Petition support these claims. The Petition alleges that despite the denial of a CPG for a solar project, Respondent's company began site-clearing. At a hearing before the PUC which was to determine if the site-clearing violated 30 V.S.A. § 248(a)(2), Respondent testified that site clearing was done solely for unrelated farming purposes. The PUC found this testimony to be "not credible," and issued a temporary injunction. Despite the injunction, Respondent's company continued its site-clearing activity.

Count IV asserts that the Respondent violated Rule 3.5(b)(1) by sending an *ex parte* communication, an email, to the chair of the Public Utility Commission. The email had been addressed to Vermont House and Senate committees and a copy was sent to the PUC Chair. The email allegedly contained criticism of the PUC and its Chair with respect to its response to one of the CPG applications made by one of Respondent's companies. The Petition alleges that Respondent did not send copies of the email to any of other parties involved in the PUC proceeding. The rule prohibits a lawyer from communicating *ex parte* with a person acting in a quais-judicial capacity in a pending adversary proceeding. Paragraphs 66 through 78 of the Petition support this claim.

Count V asserts that the Respondent violated Rules 3.1, 3.3(a)(1), 4.4(a), and 8.4(d) when he brought or caused to be brought s legal proceeding in the Environmental Division when that court had no subject matter jurisdiction and that he made false statements of law regarding the same. It further asserts that Respondent's purpose was to burden and delay a third person. Paragraphs 79 through 88 of the Petition support these claims.

Count VI asserts that the Respondent violated Rules 3.3(a)(1), 4.4(a), and 8.4(d) by engaging in the following conduct. Investigation of the Respondent's

conduct was initiated by a letter of complaint filed by Attorney Merrill Bent to the Professional Responsibility Program. The Petition alleges that in response, the Respondent sent a letter to Screening Counsel in which he stated that Ms. Bent's allegations in her letter of complaint constituted "actionable defamation *per se.*" Reports of misconduct are privileged, so long as the statements are official and so long as the report about them is fair and accurate. *See, e.g., Wolsfelt v. Gloucester Times*, 98 Mass.App.Ct. 321, 330, 155 N.E.3d 737 (2020).

It further alleges that he complained that Ms. Bent herself was guilty of misconduct by mistreating an employee of her firm. He later admitted that he had no direct knowledge about this conduct or even if Ms. Bent was the member of her firm who was involved. He also asserted that the Rules of Professional Conduct prohibited her from representing a certain client, the Bennington School Board. Despite Respondent's complaints to Screening Counsel, he allegedly did not file a report with the Professional Responsibility Program as he would be required to do under Conduct Rule 8.3(a) if these were, in fact, fair and accurate accusations. Paragraphs 95 through 102 of the Petition support these claims.

Count VII asserts that Respondent sent email communications to employees and officials of the Town of Bennington. The Town was represented by Attorney Merrill Bent at the time. The Petition asserts that the emails constitute violations of Rules 4.2 and 8.4(d). The Petition asserts that by sending emails to town officials who did not have authority to take any action in connection with the complaint that Attorney Bent sent to the Professional Responsibility Program violated the two rules set forth above. The allegation in paragraphs 103 through 113 of the Petition support the assertions in Count VII.

Count VIII asserts that in violation of Rule 8.4(d),

> Over the course of many years in a variety of forums . . . Thomas Melone persistently and deliberately violated the Rules of Professional Conduct and persistently induced his son, Michael Melone, to violate the Rules of Professional Conduct.

In support of Count VIII, Conflict Disciplinary Counsel cites *In re Wright*, 131 Vt. 473 (1973). *Wright* did not hold that a "consistent pattern" of misconduct was, in itself, a violation of the rules. Rather, the Court concluded that the "consistent pattern" was an important consideration in fashioning an appropriate sanction, namely disbarment, for the misconduct found. 131 Vt. at 493.

Nevertheless, the Panel will not dismiss Count VIII at this stage of the proceedings.

> A motion to dismiss for failure to state a claim is not favored and rarely granted.. . . Moreover, courts should be especially reluctant to dismiss on the basis of pleadings when the asserted theory of liability is novel or extreme.. . . The legal theory of a case should be explored in the light of facts as developed by the evidence, and, generally, not dismissed before trial because of the mere novelty of the allegations.

Assoc. of Haystack Property Owner, Inc. v. Sprague, 145 Vt. 143, 146-47 (1985) (internal citations omitted). Dismissal is warranted "only when it is beyond doubt that there exist no facts or circumstances, consistent with the complaint, that would entitle the plaintiff to relief." *Id., see also Bock v. Gold,* 2008 VT 81, ¶ 4, 185 Vt. 575, (mem.). Conflict Disciplinary Counsel will be given the opportunity to prove this allegation at the hearing on the Petition.

The motion to dismiss is *denied.*

II. Motion for more definite statement.

Rule 12(e) of the Rules of Civil Procedure provides:

> **(e) Motion for More Definite Statement.** If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 14 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

The Petition is neither vague nor ambiguous. To the contrary, the Petition makes allegations of specific instances of misconduct. As set forth in section I of this opinion, the Petition contains "short and plain statement[s] of the claim[s] showing that the pleader is entitled to relief, ..." V.R.C.P. 8(a); *See also, Lane v. Town of Grafton,* 166 Vt. 148, 152-53 (1997). As well, it conforms to the V.R.C.P. 8(e) requirement that each averment "shall be simple, concise, and direct."

Respondent seems to complain that the Petition does not lay out exactly how each alleged act violated a particular rule. But this is not required. All that is required is a statement clear enough "to give the [respondent] fair notice of what the [] claim is and the grounds on which it rests." *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99 (1957); *in accord, Levinsky v. Diamond*, 140 Vt. 595, 600 (1982).

The Respondent asserts that, "Each count is based upon separate events and it is impossible [sic] which allegation(s) of the first 113 paragraphs apply to each Count." Respondent's Motion to Dismiss at *50-51 (Oct. 27, 2025). But the Panel is easily able to discern which paragraphs apply to each count. The first forty-five paragraphs are general, background allegations that apply to all counts. Allocation of paragraphs 46 through 113 to particular counts has been generally set forth in section I.

The Petition alleges under most of the counts that the Respondent's conduct violated the Rules of Professional Conduct in multiple ways. This is completely permissible pursuant to V.R.C.P. 8(a). That rule provides in pertinent part that, "Relief [claimed in a complaint] in the alternative or of several different types may be demanded." Under Vermont pleading rules, "a party can present inconsistent claims and demand relief in the alternative or of several different types." *Abatiell Assoc., P.C. v. Nicholas*, No. 2009-339, 2010 WL 1265841, at *2 (Vt. Apr. 1, 2010), citing *Spaulding v. Cahill,* 146 Vt. 386, 389 (1985).

The motion for more definite statement is *denied.*

III. Miscellaneous Issues.

A. Authority of Conflict Disciplinary Counsel.

In the preamble to his multi-part motion, Respondent suggests that Michael Hanley, the Conflict Disciplinary Counsel, does not have authority to bring a complaint under A.O. 9. This is not correct. Mr. Hanley was appointed pursuant to A.O. 9, Rule 1(E)(1)(c) provide that the Professional Responsibility Board has powers and duties which include:

> **(b)** the appointment of alternates when any member of a hearing panel, bar counsel, disciplinary counsel, or staff has a conflict or is otherwise disqualified or unable to serve;[2]

[2] In his reply memorandum, Respondent raises for the first time that CDC was not duly appointed by the PRB Chair. *See,* Resp.'s Reply at *29 (Nov. 20, 2025). The only complaint regarding Mr. Hanley's

The Board has specific authority to appoint alternate disciplinary counsel in case of a conflict.

B. Whether Respondent was representing a client with respect to alleged violations.

The Respondent claims that he could not have violated various rules because he was not representing a client and that the rules do not apply to him unless he was representing a client. The basis for his assertion appears to be an order of the PUC dated June 11, 2021. *See,* Respondent's Motion to Dismiss at *15-16 (Oct. 27, 2025).

The Panel is uncertain why the PUC apparently believed that the Respondent was not representing a client because he appeared *pro se*, but the Panel holds the contrary view. The PUC order does not bind the Panel. To the extent that the PUC believed that a self-represented lawyer does not have a client, it is incorrect, at least in the context of disciplinary proceedings. *See, In re Morisseau,* 763 F.Supp. 2d 648, 652 (S.D.N.Y. 2010) (Respondent's status as a *pro se* litigant does not exempt her from the Disciplinary Rules and Rule of Professional Conduct.) In accord, *Robinson v. Howard University, Inc.,* 335 F.Supp. 3d 13, 22 (D.D.C. 2018) (lawyers are not entitled to any special protection when they appear *pro se*). In addition, V.R.C.P. 83 (a)(3) provides,

> (3) The term "plaintiff's attorney" or "defendant's attorney" or any like term shall include any party appearing without counsel.

Thus, a self-represented litigant is deemed to be an attorney for the purposes of the Rule of Civil Procedure and, by extension, disciplinary proceedings. In this case, the attorney is representing himself; he is his own client.

C. The Petition includes matters beyond those set forth in Attorney Bent's letter of complaint.

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appointment was made by the Respondent in the "Factual Background" section of the original motion. There he asserted that,

> Attorney Michael Hanley *was assigned by the Chair of the PRB to be disciplinary counsel* to conduct the investigation. But there is no provision in A.O. No. 9 that authorizes Michael Hanley to act as disciplinary counsel.. . .

(Emphasis added.) Consequently, the issue of whether the appointment of Mr. Hanley as CDC was properly made is not properly before the Panel.

The Respondent complains that several of the counts presented in the Petition go beyond the matters raised in Attorney Bent's letter of complaint. He believes that he was deprived of the ability to respond to these allegations before they were formalized as provided by A.O. 9, Rule 13(A).

Rule 13(A) provides in pertinent part:

> Disciplinary Counsel must provide respondent with a copy of the complaint or otherwise notify respondent in writing of the substance of the matter under investigation . . ..

It appears that in conducting his investigation, CDC uncovered issues beyond those raised in the Bent complaint. Respondent does not assert that CDC failed to provide a copy of the Bent complaint or notice of the substance of the matter under investigation. There is nothing in the rules—and it is not demanded by logic or experience—that limits a petition of misconduct to the matters originally complained of. The rule does not provide that Respondent has the right to respond to a complaint. Nor is there anything in the rules that requires CDC to notify Respondent of matters that arise in the course of his investigation. Respondent has not provided any legal authority to support his position.

Although Respondent apparently was not advised by CDC of each new issue that arose, he has been so advised by the Petition and, of course, now has the opportunity both to respond to the allegations and to contest them.

ORDER

I. The motion to dismiss for failure to state a claim upon which relief can be granted is *denied.*

II. The motion for more definite statement is *denied.*

Dated this 2nd day of December 2025,

Hearing Panel No. 2

By: _____
Mimi Brill, Esq., Chair

By: _____
Alexander W. Shiver, Esq.

By: _____

Brian Bannon, Public Member

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

In re Thomas Melone
PRB File No. 120-2025

DECISION AND ORDER
RESPONDENT'S MOTION FOR PERMISSION TO APPEAL

The Respondent has filed a motion for permission to pursue an interlocutory appeal to the Supreme Court from the order of the Hearing Panel issued December 2, 2025. For the reasons set forth below, the Respondent's motion is *denied*.

The Panel's decision is directed by two rules set forth in Administrative Order (A.O.) 9, namely Rule 20 A. and 20 B. Rule 20 A. provides:

Disciplinary proceedings are neither civil nor criminal but are *sui generis*.

Rule 20 B. provides:

> Except as otherwise provided in these rules, the Vermont Rules of Civil Procedure and the Vermont Rules of Evidence apply in discipline and disability cases.

The Respondent seeks to pursue an interlocutory appeal pursuant to V.R.A.P. 5 (b).[1] Rule 5 (b) does not apply to disciplinary proceedings. The rule affords a party in a *civil* action the right to seek permission for an interlocutory appeal. Clearly, this proceeding is not a civil action. A.O. 9, Rule 20 A. There is no provision in Rule 5, in any of the other Rules of Appellate Procedure, or in the Rules of Civil Procedure which allows a party to seek an interlocutory appeal in a disciplinary proceeding.

The only authority for appeal in A.O. 9 is found in Rule 13 E. which provides in pertinent part as follows:

> **E. Review by the Court.** All final decisions of the hearing panel which fully dispose of an entire proceeding may be appealed as of right to the Court by respondent or disciplinary counsel pursuant to the Vermont Rules of Appellate Procedure, which rules shall govern the proceedings on appeal

[1] The Respondent does not cite any specific authority for his motion, but his argument tracks the language of V.R.A.P. 5 (b).

except where these rules establish a different procedure. To the extent applicable, all references in the Vermont Rules of Appellate Procedure to the superior court shall be deemed to be a reference to the hearing panel, and all references to the clerk of the superior court shall be deemed to be a reference to the chair of the hearing panel.

* * *

Rule 13 E. states specifically that "only final decisions of the hearing panel *which fully dispose of an entire proceeding* may be appealed." (Emphasis added.) Rule 13 E. clearly provides that the Rules of Appellate Procedure apply only to appeals from final decisions. The Rule is entirely consistent with the "well-established policy [of the Supreme Court] of avoiding piecemeal appeals." *Castle v. Sherburne Corp.*, 141 Vt. 157, 162 (1982).

ORDER

Respondent's motion for permission to take an interlocutory appeal is *denied.*

As contemplated by the order of the Hearing Panel issued December 18, 2025, Respondent's Answer shall be filed no later than January 19, 2026. If the Respondent files a motion to obtain permission for an interlocutory appeal with the Supreme Court, his Answer shall be filed no later than 14 days after the Court resolves his motion.

It is SO ORDERED this 5th day of January 2026,

Hearing Panel No. 2

By: _____
Mimi Brill, Esq., Chair

By: _____
Alexander W. Shiver, Esq.

By: _____
Brian Bannon, Public Member

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

In Re Thomas Melone	)	PRB No. 25-120
	)	
	)	December 15, 2025

RESPONDENT'S MOTION FOR PERMISSION TO APPEAL

Respondent THOMAS MELONE ("Respondent") filed a motion to dismiss and a motion for a more definite statement (the "Motions") in response to the Petition for Misconduct (the "Complaint" or "Petition") filed by Michael Hanley against Respondent on September 26, 2025. Those Motions were denied on December 2, 2025 ("HP Order").

Respondent hereby respectfully moves for permission to appeal the HP Order as it relates to the fundamental and controlling question of whether certain rules apply when Respondent is not representing a client.

The HP Order rejected Respondent's position that he was not representing a client. The HP Order cites two cases, both of which are inapposite, and one of which did exactly the opposite of what the case is cited for. The HP Order cites *In re Morisseau*, 763 F. Supp. 2d 648, 652 (S.D.N.Y. 2010). HP Order at 9. *Morisseau* involved an attorney as a *pro se* litigant and the court held that *pro se* status would not exempt her from the Disciplinary Rules and Rule of Professional Conduct because "Local Civil Rule 1.5(b)(5) [of the Southern District of New York] applies to 'any attorney,' not only those appearing for a client." 763 F. Supp. 2d at 652. But the Vermont Rules of Professional Conduct do not all apply to any attorney *by their own terms*. Thus, *Morisseau* is inapposite. The fundamental question is whether the rules should be applied to Respondent as written. Vermont Bar Counsel Michael Kennedy in 2022 raised the question of whether Vermont's Rules of Professional Conduct should be amended to cover attorneys representing their own interests in response to ABA Formal Opinion 502. *See* below.

The HP Order then stated: "In accord, *Robinson v. Howard University, Inc*., 335 F.Supp. 3d 13, 22 (D.D.C. 2018) (lawyers are not entitled to any special protection when they appear pro se)." *Robinson v. Howard University, Inc.* is not in accord at all. *Robinson* involved a tenured

law professor that was issued a letter of reprimand. "He was also required to participate in sensitivity training, to submit future quiz and exam questions to the Dean's Office for approval, and to have a few of his future lectures monitored. Impenitent, Mr. Robinson sued the University and various University officials. He allege[d] breach of contract, bad faith, violations Title IX of the Education Amendments Act of 1972 ("Title IX"), sex discrimination, intentional infliction of emotional distress, and other claims." 335 F. Supp. 3d at *18.

The HP Order cites *Robinson* for the proposition that "lawyers are not entitled to any special protection when they appear pro se." HP Order at 9. But *Robinson* never held that. In fact, the court did the opposite. The context was whether on a motion to dismiss, the court should provide the normal leeway provided to *pro se* parties and their pleadings. The court observed that question was undecided in the D.C. Circuit, but that the court need not decide the issue because even though Professor Robinson was an attorney, the court would still afford Professor Robinson the leeway typically afforded pro se parties. In other words, the court in that case did the exact opposite of what the HP Order claims. In any event, that case had nothing to do with disciplinary rules.

The HP Order then cites V.R.C.P. 83(a)(3),[1] which provides "(3) The term 'plaintiff's attorney' or 'defendant's attorney' or any like term shall include any party appearing without counsel." The HP Order then states: "[t]hus, a self-represented litigant is deemed to be an attorney for the purposes of the Rule of Civil Procedure and, by extension, disciplinary proceedings." HP Order at 9. The HP Order's conclusion does not follow from Rule 83. Respondent has found one reported case under Rule 83, which illustrates the point of the Rule (which is not to amend the Vermont Rules of Professional Conduct). In *Smith v. Brattleboro Reformer*, 147 Vt. 303, 304 (1986), Rule 83 was referenced in connection with service of a summons. *Id.* ("Defendants correctly point out that under V.R.C.P. 4(a) it is the responsibility of the plaintiff to deliver to the person who is to make the service the necessary complaint and summons with appropriate copies.

[1] The Reporter's Notes indicate that Rule 83 "has no equivalent in the Federal Rules but is based on Maine Rule 83."

… Although the rule places this responsibility on the plaintiff's attorney, in the absence of any contrary indication, the term 'plaintiff's attorney' includes the party appearing without counsel. See V.R.C.P. 83(3); Reporter's Notes, V.R.C.P. 4(a)." (Internal citations and quotations omitted.) In other words, Rule 83(3) is a gap-filler for when there is no "plaintiff's attorney." There is no such gap-filler in the Vermont Rules of Professional Conduct and such Rules differentiate between a lawyer and a lawyer "representing a client."

Under Vt. R. App. P. 5 "[o]n any party's motion in a civil action, the superior court must permit an appeal from an interlocutory order or ruling if the court finds that: (A) the order or ruling involves a controlling question of law about which there exists substantial ground for difference of opinion; and (B) an immediate appeal may materially advance the termination of the litigation."

Respondent's motion satisfies all three requirements. As far as meeting the "controlling" question requirement, at a minimum, a reversal of the HP Order would eliminate Count I (para. 114(b)), Count III (para. 119(b)), Count V (paras. 123(b) & (c)), Count VI entirely and Count VII entirely. As far as meeting the substantial ground for difference of opinion, one need look no further than Bar Counsel Michael Kennedy's commentary on ABA Formal Opinion 502, which is discussed below. As far as meeting the requirement that the appeal may materially advance the termination of the litigation, elimination of the Counts tied to the *pro se* issue would dramatically reduce the litigation time because as it stands now, Respondent would need to subpoena dozens of witnesses related to Bennington in order to prosecute the claims that the Complaint asserts were false.

I. THE HP ORDER INVOLVES A CONTROLLING QUESTION OF LAW ABOUT WHICH THERE EXISTS SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION.

A. The HP Order Involves a Controlling Question of Law.

"[A]n order may [also] be 'controlling' if reversal would have a substantial impact on the litigation, either by saving substantial litigation time, or by significantly narrowing the range of issues, claims, or defenses at trial." *Rivard v. State*, 2023 Vt. Super. LEXIS 135 *9 (October 26, 2023) citing *In re Pyramid Co. of Burlington*, 141 Vt. 294, 303, 449 A.2d 915 (1982).

All of the Counts that Mr. Hanley presents in the Complaint are based upon Respondent acting *pro se.* In other words, none are based upon Respondent representing a third-party client. Respondent thus argued that as a general matter the Vermont Disciplinary Rules that Mr. Hanley alleges have been violated simply do not apply in the first place on their own terms, and certain rules expressly only apply when representing a client. *See, e.g*., Rule 3.3, Comment [1]: "This rule governs the conduct of a lawyer *who is representing a client* in the proceedings of a tribunal."; Rule 4.1: "*In the course of representing a client* a lawyer shall not knowingly make a false statement of material fact or law to a third person."; Rule 4.2: "*In representing a client*, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter." Rule 4.4: "(a) *In representing a client*, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."

A reversal of the HP Order on the issue on Respondent not representing a client issue would certainly have a substantial impact on the litigation, either by saving substantial litigation time, or by significantly narrowing the range of issues, claims, or defenses at trial.

For example, at a minimum, a reversal of the HP Order would eliminate Count I (para. 114(b)) and Count III (para. 119(b)) both of which wrongly accuse Respondent making a false statement. Elimination of those Counts would dramatically reduce the litigation time because as it stands now, Respondent would need to subpoena dozens of witnesses related to Bennington in order to prosecute the claims that the Complaint claims were false. In addition, at a minimum, a reversal of the HP Order would eliminate Count V (paras. 123(b) & (c)), Count VI entirely and Count VII entirely.

B. The HP Order involves a controlling question of law about which there exists substantial ground for difference of opinion.

As discussed below, ABA Formal Opinion 502 and the other authority discussed below provides ample illumination of the substantial ground for difference of opinion. Vermont Bar Counsel Michael Kennedy's commentary, *see* below, reinforces that substantial ground or

difference of opinion, with Mr. Kennedy recommending a rule change to match Oregon's Rule 4.2. *See*, ABA Formal Opinion 502 (dissent):

> Applying Rule 4.2 to pro se lawyers is supported by compelling policy arguments. It is not the result I object to, it is the mode of rule construction that I cannot endorse. Self-representation is simply not "representing a client," nor will an average or even sophisticated reader of these words equate the two situations. See *In re Haley*, 126 P.3d 1262, 1267, 1272 (Wash. 2006) (majority and concurring opinions referencing definitions and authorities). Rather, this is an "ingenious bit of legal fiction." *Haley*, at p. 1272 (Sanders, J., concurring). Further, this approach to construing the rule's language renders the phrase "in representing a client" surplusage, contrary to a basic canon of construction. [2]
>
> It is also simply wrong to perpetuate language that was clear but has been made misleading by opinions effectively reading that language out of the rule. When an attorney consults the rule, it is highly unlikely that the phrase "in representing a client" will be considered to include self-representation. If the attorney goes further and consults Comment [4], the Comment will assure the attorney that, "Parties to a matter may communicate directly with each other." Given this apparent clarity, what will tip off the attorney that further research is required? The lesson here must be that nothing is clear. Clear text cannot be relied upon but may only be understood by reading ethics opinions and discipline decisions. Does the text mean what it actually says, as it does in Connecticut, Kansas, and Texas? n3 Or, does it mean what we wish it said, as several other states have declared?
>
> ***Model Rule 4.2's plain language making it applicable only to lawyers who represent clients has also been recognized by the Restatement, cases applying the rule prospectively because to do otherwise would amount to a deprivation of due process, and by courts modifying the Model Rule to make it expressly applicable to pro se lawyers***.
>
> Thoughtful commentators have identified the problems with Model Rule 4.2's language and inconsistent interpretations, and have recommended fixing the rule rather than straining to achieve its purposes when lawyers represent themselves. By leaving this rule in place, we are also leaving in place a trap. The rule should be amended to achieve the result advocated for in the majority opinion.
>
> (emphasis added).

Even in cases like *Haley*, where the Washington Supreme Court concluded that the rule should be interpreted as applying to a pro se lawyer, the Washington Supreme Court (following the Nevada Supreme Court) held that it would be an unconstitutional violation of due process to do so in the case in which the question was presented. Rather, the Washington Supreme Court

[2] *See* "Surplusage canon," BLACK'S LAW DICTIONARY (11th ed. 2019) ("if possible, every word and every provision in a legal instrument is to be given effect"), citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012) ("it is no more the court's function to revise by subtraction than by addition").

followed the principle of *In re Discipline of Schaefer*, 117 Nev. 496, 507-08, 25 P.3d 191 (2001) that the Rule "was unconstitutionally vague on 'the absence of clear guidance' from the Nevada State Supreme Court and on 'the existence of conflicting authority from other jurisdictions.'"

Also of note is the discussion in *Haley* regarding certain authority from other jurisdictions, particularly California:[3]

> The comment to rule 2-100 of the California RPC, a rule identical to RPC 4.2(a) in all material respects, explicitly permits a lawyer proceeding pro se to contact a represented party:
>
> > [T]he rule does not prohibit a [lawyer] who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party. ***Such a member has independent rights as a party which should not be abrogated because of his or her professional status.*** To prevent any possible abuse in such situations, the counsel for the opposing party may advise that party (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.
>
> Cal. RPC 2-100 []. Likewise, a comment to the restatement specifically provides that "[a] lawyer representing his or her own interests pro se may communicate with an opposing represented nonclient on the same basis as other principals." RESTATEMENT (THIRD) OF THE LAW: THE LAW GOVERNING LAWYERS § 99 cmt. e at 73 (2000).
>
> Alongside these explicit statements permitting the questioned contact, other authorities supported a reasonable inference that our RPC 4.2(a) did not foreclose a pro se lawyer's communication with a represented opposing party. For example, the comparable rule in Oregon, DR 7-104(A)(1), put lawyers acting pro se squarely within the rule's ambit:
>
> (A) During the course of the lawyer's representation of a client, a lawyer shall not: (1) Communicate or cause another to communicate . . . with a person the lawyer knows to be represented by a lawyer. . . . *This prohibition includes a lawyer representing the lawyer's own interests.*
>
> The absence of an explicit prohibition in RPC 4.2(a) could have suggested that Washington's rule was narrower in scope than Oregon's and did not apply to lawyers acting pro se. Additionally, the commentary to model rule 4.2 includes the statement that "[p]arties to a matter may communicate directly with each other." ABA, ANNOTATED MODEL RULES rule 4.2 cmt. 4, at 417. Unlike the commentary to the restatement and to California's RPC 2-100, this comment does

[3] https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct/Previous-Rules/Rule-2-100#:~:text=(A)%20While%20representing%20a%20client,consent%20of%20the%20other%20lawyer.

> not pointedly refer to a lawyer-party acting pro se; consequently, the breadth of the statement permits an inference that all parties may communicate unreservedly with each other. Finally, the holding in *Pinsky v. Statewide Grievance Committee*, 216 Conn. 228, 578 A.2d 1075 (1990), appears to call into question the policy concerns supporting the application of RPC 4.2(a) to lawyers acting pro se. In *Pinsky,* the Connecticut State Supreme Court concluded that a represented lawyer-party had not violated an identical version of RPC 4.2(a) when he directly contacted his landlord, who was also represented by counsel, during an eviction matter. The *Pinsky* court took note that "(c)ontact between litigants . . . is specifically authorized by the comments under rule 4.2" and concluded that Pinsky was not "'representing a client'" as stated in the rule. *Id*. at 236. The *Pinsky* court thus determined that communication between a represented lawyer-party and a represented nonlawyer party did not conflict with a key purpose of RPC 4.2(a)--the protection of a represented nonlawyer party from "possible overreaching by other lawyers who are participating in the matter." ABA, ANNOTATED MODEL RULES rule 4.2 cmt. 1, at 417. Because the *Pinsky* decision did not address why contacts from a lawyer acting pro se would pose a greater threat of overreaching than would contacts from a represented lawyer-party, *Pinsky* provides further equivocal authority on the application of RPC 4.2(a) to lawyers acting pro se.

(Emphasis added).

C. Vermont Bar Counsel Michael Kennedy has recognized there exists substantial ground for difference of opinion.

Vermont Bar Counsel Michael Kennedy has recognized that a rule amendment would be in order to address a situation involving a lawyer representing his own interests. *See* Kennedy, M., *"ABA opinion concludes that the 'no-contact' rule applies to self-represented lawyers. Should we amend Vermont's rule?"* September 29, 2022. *See*, https://vtbarcounsel.wordpress.com/2022/09/29/aba-opinion-concludes-that-the-no-contact-rule-applies-to-self-represented-lawyers-should-vermont-amend-its-rule/. Bar Counsel Kennedy's post is reproduced below proposed following Oregon's Rule 4.2, which says: "In representing a client **or the lawyer's own interests**," instead of simply "in representing a client." (Emphasis supplied by Mr. Kennedy.

> **ABA opinion concludes that the" no-contact" rule applies to self-represented lawyers. Should we amend Vermont's rule?**
>
> The issue of whether a self-represented lawyer is subject to Rule 4.2's "no-contact" provision is not one with which I have much experience. Whether as disciplinary counsel or when I was the screener, if I ever reviewed a single complaint alleging such a violation, I don't remember it. Nor has the topic ever been broached in the context of an ethics inquiry. My only real work on the topic was in this post about the first decision ever issued after Vermont adopted a formal professional responsibility program.[1]

Yesterday, the ABA Standing Committee on Ethics and Professional Responsibility issued *Formal Opinion 502: Communication with a Represented Person by a Pro Se Lawyer*.[4] The Committee concluded that a self-represented lawyer is bound by Rule 4.2. That is, when self-representing, a lawyer cannot communicate about the matter with another person who the lawyer knows to be represented in the matter without the consent of the represented person's lawyer or unless the communication is otherwise authorized by law.

I appreciate the opinion for several reasons.
For one, the opinion is well-researched and provides interesting and informative detail about the history of the debate as to whether Rule 4.2 applies to a self-represented lawyer. For another, I don't necessarily disagree with the conclusion. As the Committee notes, "[t]he key evils intended to be managed by Model Rule 4.2 are (1) overreaching and deception; (2) interference with the integrity of the client-lawyer relationship; and (3) elicitation of uncounseled disclosures, including inappropriate acquisition of confidential lawyer-client communications." Thus, it makes sense to apply the rule to a self-represented lawyer.

Still, the opinion gives me pause. While I support the general conclusion, I'm drawn to the dissenting members' view. That pull leaves me wondering if we should amend V.R.Pr.C. 4.2. Alas, before I discuss the dissent, a bit more background is required.

Comment [4] to both the ABA Model Rule and Vermont's rule includes the following statement:

- "Parties to a matter may communicate directly with each other and a lawyer is not prohibited from advising a client concerning a communication that the client is legally justified to make."

The tension between this statement and the text of the rule drives the debate. Is the self-represented lawyer fish or fowl? That is, a "lawyer" subject to Rule 4.2? Or a "party" to whom Comment [4] applies? In Formal Opinion 502, the Committee answered by stating:

- "It is not possible for a pro se lawyer to 'take off the lawyer hat' and navigate around Rule 4.2 by communicating solely as a client."

Again, I don't necessarily disagree. However, as I indicated, I remain drawn to the dissent.

Like me, the dissent doesn't disagree with the Committee's conclusion, stating:

- "It is not the result I object to, it is the mode of rule construction that I cannot endorse. Self-representation is simply not 'representing a client,' nor will an average or even sophisticated reader of these words equate the two situations."

The dissent continues:

- "When an attorney consults the rule, it is highly unlikely that the phrase "in representing a client" will be considered to include self-representation. If the attorney goes further and consults Comment [4], the Comment will assure the attorney that, 'Parties to a matter may communicate directly with each other.' Given this apparent clarity, what will tip off the attorney that further research is required?"

[4] https://www.americanbar.org/news/abanews/aba-news-archives/2022/09/aba-formal-opinion-502/.

Perhaps the same could be said for the represented person's lawyer. Which might explain why I don't remember this topic having come up very much over the past 24 years.

Finally, the dissent argues:

- "By leaving this rule in place, we are also leaving in place a trap. The rule should be amended to achieve the result advocated for in the majority opinion."

I tend to agree. And amending the rule wouldn't be difficult.[2] Here's the relevant portion of Oregon's Rule 4.2, with my emphasis added.

- "In representing a client **or the lawyer's own interests**, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless: (a) the lawyer has the prior consent of a lawyer representing such other person; (b) the lawyer is authorized by law or by court order to do so . . ."

In any event, that's why I post today. To raise the question of whether to amend Rule 4.2.

To me, it's an interesting question. Again, I don't disagree with the conclusion that a no-contact rule should apply to self-represented lawyers.[3] However, many of the rules include phrases like "when representing a client" or "in representing a client." If, for the purposes of Rule 4.2, a self-represented lawyer is "representing a client," it's interesting to consider the ramifications of construing other rules with like phrases to apply similarly.

"By leaving this rule in place, we are also leaving in place a trap. The rule should be amended to achieve the result advocated for in the majority opinion."

I tend to agree.

II. AN IMMEDIATE APPEAL MAY MATERIALLY ADVANCE THE TERMINATION OF THE LITIGATION

The final requirement is that "an immediate appeal may materially advance the termination of the litigation." This requirement is clearly satisfied. Here, "reversal would have a substantial impact on the litigation, either by saving substantial litigation time, or by significantly narrowing the range of issues, claims, or defenses at trial." *Rivard v. State*, 2023 Vt. Super. LEXIS 135 *9 (October 26, 2023) citing *In re Pyramid Co. of Burlington*, 141 Vt. 294, 303, 449 A.2d 915 (1982). For example, at a minimum, a reversal of the HP Order would eliminate Count I (para. 114(b)) and Count III (para. 119(b)) both of which wrongly accuse Respondent making a false statement. Elimination of those Counts would dramatically reduce the litigation time because as it stands now, Respondent would need to subpoena dozens of witnesses related to Bennington in order to prosecute the claims that the Complaint claims were false. In addition, at a minimum, a reversal of the HP Order would eliminate Count V (paras. 123(b) & (c)), Count VI entirely and Count VII entirely.

Dated: December 15, 2025

Respectfully Submitted,

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Restat 3d of the Law Governing Lawyers, § 99

Restatement of the Law 3d, Law Governing Lawyers - Official Text > Chapter 6- Representing Clients--in General > Topic 3- Lawyer Dealings with a Nonclient > Title B- Contact with a Represented Nonclient

§ 99 A Represented Nonclient--The General Anti-Contact Rule

(1) A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless:

(a) the communication is with a public officer or agency to the extent stated in § 101;

(b) the lawyer is a party and represents no other client in the matter;

(c) the communication is authorized by law;

(d) the communication reasonably responds to an emergency; or

(e) the other lawyer consents.

(2) Subsection (1) does not prohibit the lawyer from assisting the client in otherwise proper communication by the lawyer's client with a represented nonclient.

COMMENTS & ILLUSTRATIONS

Comment:

a. Scope and cross-references. This Section states the general rule prohibiting a lawyer from communicating about a matter involved in a representation with a nonclient involved in the same matter who is represented by another lawyer. Several exceptions are then stated. Narrower prohibitions may apply with respect to communication by a government investigating lawyer (Comment *h* hereto) and communication with represented governmental agencies or officials (Subsection (1)(a) & § 101). On remedial orders and remedies, see Comments *m* and *n*.

Nonclients and representatives of nonclients included within this Section are defined in § 100 (see also Comment *c* hereto). On limitations on communications with confidential agents of a nonclient, see § 102. On the rule limiting communications with an unrepresented nonclient, see § 103.

The rule stated in this Section derives from the lawyer codes and a violation is thus subject to professional discipline (see § 5). Unless the lawyer's conduct is otherwise tortious, for example because the communicating lawyer engages in actionable misrepresentation (see generally § 98), a nonclient has no civil-damage remedy against the offending lawyer (see § 51, Comment *c*). On other possible remedies, such as disqualification of the offending lawyer or suppression of information or an agreement gained through prohibited contact, see Comment *n* hereto. On court orders relaxing the rule or otherwise regulating contact with represented nonclients, see Comment *h*.

b. Rationale. The rules stated in §§ 99-103, protect against overreaching and deception of nonclients. The rule of this Section also protects the relationship between the represented nonclient and that person's lawyer and assures the confidentiality of the nonclient's communications with the lawyer (see also § 102).

The general exception to the rule stated in Subsection (1)(e) requires consent of the opposing lawyer; consent of the client alone does not suffice (see Comment *j*). The rule accordingly has been criticized for requiring three-stage communications (from client, through lawyer, through another lawyer, or vice versa) that are often

more expensive, delayed, and inconvenient than direct communication. In addition, the rule limits client autonomy by requiring that both communication and consent be given by the lawyer (see Comment *j* hereto). Notwithstanding such criticism, the rule is universally followed in American jurisdictions.

A lawyer whose appropriate efforts to communicate with a represented nonclient through that person's lawyer are thus frustrated may in some situations seek the aid of a tribunal to effectuate the communication (see Comment *m*) or complain to an appropriate disciplinary authority. On communications made by a lawyer's client, see Comment *k*.

The anti-contact rule constrains a lawyer who represents another person in the matter. The rule also applies to nonlawyer employees and other agents of a lawyer, such as an investigator. On agents of a client, see Comment *k* hereto.

c. Persons protected by the anti-contact rule. As stated in Subsection (1), the anti-contact prohibition extends to any nonclient that the contacting lawyer knows to be represented by counsel in the matter in which the lawyer is representing a client. It is not limited to situations of opposing parties in litigation or in which persons otherwise have adverse interests. Thus, the rule covers a represented co-party and a nonparty fact witness who is represented by counsel with respect to the matter, as well as a nonclient so represented prior to any suit being filed and regardless of whether such suit is contemplated or eventuates. A lawyer represented by other counsel is a represented person and hence covered by this Section. On inside legal counsel for a corporation or similar organization, see § 100, Comment *c*.

A lawyer who does not represent a person in the matter and who is approached by an already-represented person seeking a second professional opinion or wishing to discuss changing lawyers or retaining additional counsel, may, without consent from or notice to the original lawyer, respond to the request, including giving an opinion concerning the propriety of the first lawyer's representation. If such additional or substituted counsel is retained, an opposing lawyer may, of course, communicate and otherwise deal with new counsel for the nonclient. Thus, a lawyer representing a claimant in an injury case may approach a lawyer personally retained in the matter by an insured defendant even if other counsel have been designated by the defendant's insurer to represent the person in the matter.

d. A communication on an unrelated matter. This Section does not prohibit communications with a represented nonclient in the course of social, business, or other relationships or communications that do not relate to the matter involved in the representation. What matter or matters are involved in a representation depends on the circumstances. For example, a lawyer might know that a witness at a deposition was represented by a lawyer for an opposing party only for purposes of attending the deposition. The lawyer may contact that nonclient following the deposition when representation has ended.

Illustrations:

1. Lawyer A is counsel to Corporation and represents Corporation, among other matters, in connection with a shareholder action filed against it. Officer is separately represented in the matter by Lawyer B. In the course of the other matters on which Lawyer A represents Corporation, Lawyer A and Officer have frequent occasion to speak and correspond. Lawyer A may continue such discussions directly with Officer on matters not related to the matter in which Officer is represented. However, Lawyer A may not discuss with Officer facts or legal issues involved in the shareholder action, unless Lawyer B consents (see Comment *j*).

2. Plaintiff, represented by Lawyer B, has filed a personal-injury action against Defendant. Lawyer A, who is representing Defendant, directs Investigator to make an appointment at Plaintiff's place of business, a beauty parlor. While Plaintiff shampoos, cuts, and sets Investigator's hair, Plaintiff and Investigator engage in small talk unrelated to Plaintiff's lawsuit or physical condition. Investigator reports to Lawyer A, including several observations indicating that Plaintiff is not physically impaired as alleged. Lawyer A has not violated the rule of this Section because Investigator did not engage Plaintiff in conversation relevant to the matter on which Plaintiff is represented and only engaged Plaintiff in activities that Plaintiff engages in regularly in dealing with the public.

e. A lawyer communicating in a nonrepresentational situation. A lawyer representing his or her own interests pro se may communicate with an opposing represented nonclient on the same basis as other principals (see Subsection (1)(b)). A lawyer representing both a client and the lawyer's own interests in the same matter is subject to the anti-contact rule of the Section.

Illustration:

3. Lawyer A, who rents law-office space from Landlord, receives a letter from Lawyer B, representing Landlord, directing Lawyer A to vacate by a certain date. Lawyer A telephones Landlord without the prior consent of Lawyer B and insists to Landlord that the lease prohibits the eviction. Lawyer A has not violated the rule of this Section.

f. Prohibited forms of communication. Under the anti-contact rule of this Section, a lawyer ordinarily is not authorized to communicate with a represented nonclient even by letter with a copy to the opposite lawyer or even if the opposite lawyer wrongfully fails to convey important information to that lawyer's client (see § 20), such as a settlement offer. The rule prohibits all forms of communication, such as sending a represented nonclient a copy of a letter to the nonclient's lawyer or causing communication through someone acting as the agent of the lawyer (see § 5(2) & Comment *f* thereto) (prohibition against violation of duties through agents). The anti-contact rule applies to any communication relating to the lawyer's representation in the matter, whoever initiates the contact and regardless of the content of the ensuing communication.

Illustration:

4. Wife is represented by Lawyer A in a marriage-dissolution action. Husband is represented by Lawyer B. Meeting without Lawyer A or Lawyer B, Wife and Husband negotiate the outlines of an agreement providing for property division and child support. Wife then brings Husband to Lawyer A's office to have the agreement reduced to writing. Lawyer A welcomes both Wife and Husband and engages in a discussion of provisions of the agreement with both of them. Lawyer A has violated the rule of this Section.

g. A communication authorized by law. As stated in Subsection (1)(c), direct communication with a represented nonclient is permissible, without consent of the nonclient's lawyer (cf. Comment *j* hereto), when authorized by law. Where such communication is permissible, it may extend no further than reasonably necessary. No complete list of such authorizations is stated here. Several of the important interests are described below. See also § 101 (contact with officers or employees of represented governmental agency). Whether direct communication is authorized depends on the legal justification for the contact in the situation, having regard for the interest in protecting client-lawyer relationships and avoiding overreaching of represented nonclients (see Comment *b*).

An interest sometimes recognized by law is that of transmitting notice directly to a represented nonclient of certain legally significant matters. Among other things, such notice eliminates the possibility of disputes as to the authority of the nonclient's lawyer to receive such notice. For example, law commonly provides for service of process on a defendant, even in instances where the lawyer for the plaintiff knows that the defendant is represented by a lawyer in the matter. However, after initial notice has been transmitted directly to the represented nonclient, the authority of the defendant's lawyer to act on the defendant's behalf can readily be determined (see § 25). Thereafter, communication with the nonclient ordinarily must be conducted through the nonclient's lawyer.

Direct communication may occur pursuant to court order or under the supervision of a court. Thus, a lawyer is authorized by law to interrogate as a witness an opposing represented nonclient during the course of a duly noticed deposition or at a trial or other hearing. It may also be appropriate for a tribunal to order transmittal of documents, such as settlement offers, directly to a represented client.

A tribunal, in the exercise of its authority over advocates appearing before it (see § 1, Comment *c*) and over proceedings generally, may expand the right of a lawyer to make ex parte contact with a nonclient represented by opposing counsel. Such a court order is usually entered after notice and hearing. For example, although a lawyer for plaintiffs in a certified class action is considered to represent all members of the class (see Comment *l*), the court may permit defense counsel to approach class members directly if in the circumstances the court concludes that such persons will not be subjected to overreaching and that direct contact would otherwise be appropriate. So also, a court may appoint a psychiatrist designated by the prosecutor to conduct a pretrial evaluation of a represented defendant, in contemplation of consultation between the psychiatrist and the prosecutor following the examination.

Contractual notice provisions may explicitly provide for notice to be sent to a designated individual. A lawyer's dispatch of such notice directly to the designated nonclient, even if represented in the matter, is authorized to comply with legal requirements of the contract.

h. A represented nonclient accused or suspected of a crime. Controversy has surrounded the question whether prosecutors are fully subject to the rule of this Section with respect to contact, prior to indictment, with represented nonclients accused or suspected of crime. Certain considerations favor a relaxed anti-contact rule. Law-enforcement officials traditionally have resorted to undercover means of gathering important evidence. If retention of a lawyer alone precluded direct prosecutorial contact, a knowledgeable criminal suspect could obtain immunity from otherwise lawful forms of investigation by retaining a lawyer, while unsophisticated suspects would have no similar protection. Moreover, nonlawyer law-enforcement personnel such as the police are not subject to the rule of this Section. Rigidly extending the anti-contact rule to prosecutors would create unfortunate incentives to eliminate them from involvement in investigations.

On the other hand, certain considerations argue in favor of an anti-contact rule for prosecutors. They are in a position to overreach suspects or interfere in client-lawyer relationships in the same manner as lawyers in private practice and may be tempted to do so to solve a crime. Accordingly, at a minimum, a suspect or accused has constitutional protection of the following kind: against governmental intrusion, including prosecutorial intrusion, into essentials of the client-lawyer relationship, such as attempts to dissuade a nonclient from retaining counsel or from trusting or consulting counsel already retained or assigned; against taking statements from a suspect who is in custody and has not effectively waived the right to counsel; and against such measures as unlawful searches of a lawyer's office or similar threats to client-lawyer confidentiality. Elaboration of such limitations is beyond the scope of this Restatement.

It has been extensively debated whether, beyond such constitutional protections, the anti-contact rule independently imposes all constraints of this Section on prosecutors or, to the contrary, whether the authorized-by-law exception (see Comment *g*) entirely removes such limitations. Both polar positions seem unacceptable. Organizations of prosecutors and lawyers are elaborating rules governing specific situations. The scope of such rules and the law in default of such rules are subjects beyond the scope of this Restatement. Prosecutor contact in compliance with law is within the authorized-by-law exception stated in Subsection (1)(c).

i. A communication reasonably responding to an emergency. Communication with a represented nonclient is authorized to protect life or personal safety and to deal with other emergency situations. As provided in Subsection (1)(d), communication in such situations is permissible to the extent reasonably necessary to deal with the emergency.

Illustration:

5. Lawyer A represents Husband in a divorce action. Wife has retained Lawyer B in connection with the action. Late at night, Wife calls Lawyer A, saying that Husband is threatening to harm her and that she cannot reach Lawyer B. Lawyer A advises Wife to leave the house and that Lawyer A will immediately attempt to calm down Husband. Lawyer A has not violated the rule of this Section.

j. A communication with the consent of the lawyer for the represented nonclient. As stated in Subsection (1)(e), a lawyer otherwise subject to the rule of this Section may communicate with a represented nonclient when that person's lawyer has consented to or acquiesced in the communication. An opposing lawyer may acquiesce, for example, by being present at a meeting and observing the communication. Similarly, consent may be implied rather than express, such as where such direct contact occurs routinely as a matter of custom, unless the opposing lawyer affirmatively protests.

The nonclient's lawyer has a duty to the client to consent when doing so would be in the interest of the client or when the client so instructs the lawyer (see § 21(2)). When determining whether to consent, the lawyer must consider only the client's interest and not the lawyer's personal interest in controlling aspects of the representation.

k. A communication by a client with a represented nonclient. No general rule prevents a lawyer's client, either personally or through a nonlawyer agent, from communicating directly with a represented nonclient. Thus, while neither a lawyer nor a lawyer's investigator or other agent (see Comment *b* hereto) may contact the represented nonclient, the same bar does not extend to the client of the lawyer or the client's investigator or other agent.

As stated in Subsection (2), the anti-contact rule does not prohibit a lawyer from advising the lawyer's own client concerning the client's communication with a represented nonclient, including communications that may occur without the prior consent (compare Comment *j*) or knowledge of the lawyer for the nonclient.

The lawyer for a client intending to make such a communication may advise the client regarding legal aspects of the communication, such as whether an intended communication is libelous or would otherwise create risk for the client. Prohibiting such advice would unduly restrict the client's autonomy, the client's interest in obtaining important legal advice, and the client's ability to communicate fully with the lawyer. The lawyer may suggest that the client make such a communication but must not assist the client inappropriately to seek confidential information, to invite the nonclient to take action without the advice of counsel, or otherwise to overreach the nonclient.

Illustration:

6. Lawyer represents Owner, who has a worsening business relationship with Contractor. From earlier meetings, Lawyer knows that Contractor is represented by a lawyer in the matter. Owner drafts a letter to send to Contractor stating Owner's position in the dispute, showing a copy of the draft to Lawyer. Viewing the draft as inappropriate, Lawyer redrafts the letter, recommending that Client send out the letter as redrafted. Client does so, as Lawyer knew would occur. Lawyer has not violated the rule of this Section.

l. A communication with class members. A lawyer who represents a client opposing a class in a class action is subject to the anticontact rule of this Section. For the purposes of this Section, according to the majority of decisions, once the proceeding has been certified as a class action, the members of the class are considered clients of the lawyer for the class; prior to certification, only those class members with whom the lawyer maintains a personal client-lawyer relationship are clients. Prior to certification and unless the court orders otherwise, in the case of competing putative class actions a lawyer for one set of representatives may contact class members who are only putatively represented by a competing lawyer, but not class representatives or members known to be directly represented in the matter by the other lawyer.

m. Clarifying, protective, and remedial orders of a tribunal. In situations of doubt involving communication with a represented non-client, a clarifying ruling may be sought from a tribunal. A party seeking to protect against impermissible contact by an opposing lawyer may seek a protective or remedial ruling. A ruling may impose conditions on access and may expand or contract the general rule of this Section as appropriate in light of circumstances. For example, a ruling permitting access may require the lawyer to inform each contacted nonclient of the identity and interests of the lawyer's client, the right of the nonclient to refuse to be interviewed, and the right of the nonclient to request the presence of a lawyer during an interview. The court may grant access on condition that no statement taken will be admissible in evidence. Contact pursuant to the terms of such a ruling is authorized by law within the meaning of this Section (see Comment *h*).

n. Disqualification, evidence suppression, and related remedies. When contact has been made in violation of this Section, a court may disqualify the offending lawyer when necessary to protect against a significant risk of future misuse of confidential information obtained through the contact, when the contact has substantially interfered with the client's relationship with the client's lawyer, or when disqualification is appropriate to deter flagrant or reckless violations. A lawyer violating or threatening to violate the rule may be enjoined from doing so. A lawyer who violates the rule of this Section is also subject to professional discipline. Fines and fee-shifting sanctions may be warranted under applicable procedural law.

A court may also suppress or otherwise exclude from evidence statements, documents, or other material obtained in violation of the rule. When a release or other document affecting the interests of a represented nonclient is obtained in violation of the rule, the law against fraud or overreaching may permit the nonclient to obtain a ruling voiding the document. A tribunal may compel production of any statement taken in violation of the rule despite its status otherwise as protected work product (see § 87(3)).

REPORTER'S NOTES

REPORTER'S NOTE

Comment b. Rationale. See generally ABA Model Rules of Professional Conduct, Rule 4.2 (1983) ("In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so"); ABA Model Code of Professional Responsibility, DR 7-104(A)(1) (1969) ("During the course of his representation of a client a lawyer shall not: (1) communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is

authorized by law to do so"); 1 G. Hazard & W. Hodes, The Law of Lawyering § 4.2:101-110 (2d ed.1990); C. Wolfram, Modern Legal Ethics § 11.6.2, at 611 (1986).

ABA Model Rule 4.2 was amended by the ABA House of Delegates in August, 1995, principally by changing the reference from a represented "party" to a represented "person"--clarifying that the rule extended beyond nonclients represented in litigation--and clarifying that a lawyer's knowledge of such a person's representation by counsel could be inferred from the circumstances. See Lawyers' Man. Prof. Conduct 149, 150 (1995); A.B.A. J. 106 (October, 1995). The amendment conformed the wording of the rule to the interpretation favored by most commentators and decisions. See Reporter's Note to Comment *c*.

Commentators have debated the wisdom of the anti-contact rule. Compare Leubsdorf, Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interest, 127 U. Pa. L. Rev. 683 (1979) (professional rule should be changed so lawyer may contact represented nonclient by letter, with contemporaneous copy to opposing lawyer, or in person, after reasonable notice to opposing lawyer of intent to contact), with Stuntz, Lawyers, Deception, and Evidence Gathering, 79 Va. L. Rev. 1903 (1993) (defending the rule in civil cases as primarily a method of regulating deception of opposing parties in evidence-gathering); Kurlantzik, The Prohibition on Communication with an Adverse Party, 51 Conn. B. J. 136 (1977).

On the inapplicability of the rule to a lawyer when a represented person seeks a second opinion or new counsel, see, e.g., Cal. R. Prof. Conduct, Rule 2-100(C)(2) (anti-contact rule inapplicable to "communication initiated by a party seeking advice or representation from an independent lawyer"); Walsh v. O'Neill, 215 N.E.2d 915, 26 A.L.R.3d 673 (Mass. 1966); Martini v. Leland, 455 N.Y.S.2d 354, 355 (N.Y.Civ.Ct.1982); C. Wolfram, Modern Legal Ethics § 11.6.2, at 612 (1986); cf. ABA Model Rule 4.2, Comment P [1] ("[A] lawyer having independent justification . . . for communicating with a represented person is permitted to do so. . . .").

There is no equivalent rule governing unconsented contact between nonlawyer agents of a nonclient and a represented nonclient of opposing interest. E.g., Korson v. Independence Mall I, Ltd., 595 So.2d 1174, 1181 (La.Ct.App.1992).

Comment c. Persons protected by the anti-contact rule. Both the ABA Model Code of Professional Responsibility (1969) and the pre-1995 version of the ABA Model Rules of Professional Conduct (1983) refer to a "party" represented by a lawyer, but commentators have uniformly read the prohibition as if the rules said "person." E.g., 1 G. Hazard & Hodes, The Law of Lawyering § 4.2:105, at 733-34 (2d ed.1990); C. Wolfram, Modern Legal Ethics 611 n.33 (1986); Shoney's, Inc. v. Lewis, 875 S.W.2d 514, 515-16 (Ky.1994) (applies both before and after formal proceedings are initiated); see also Reporter's Note to Comment *b*. The Comment to the ABA Model Rules of Professional Conduct (1983) made the point clear. Id. Rule 4.2, Comment P [3] ("This rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.").

A different reading of the rules would illogically limit the rule to representations involving only litigation. Among other things, that would create disparity based on party status; a plaintiff (but not an unwitting defendant) could evade the rule by withholding the filing of suit until completing ex parte interviews with adverse nonclients, even if they were known to be represented by counsel. But see, e.g., Grievance Committee v. Simels, 48 F.3d 640 (2d Cir.1995) (anti-contact rule narrowly construed to apply only to defense-counsel contact with actual co-defendants to same indictment, thus authorizing contact with unindicted potential adverse witness represented by counsel); United States v. Ryans, 903 F.2d 731, 739 (10th Cir.), cert. denied, 498 U.S. 855, 111 S.Ct. 152, 112 L.Ed.2d 118 (1990) (application of DR 7-104(A)(1) to "party" means that it does not apply in absence of formal adversarial setting); Tucker v. Norfolk & W. Ry., 849 F.Supp. 1096, 1098 (E.D.Va.1994) (dicta) (concurring with view of parties that rule does not govern lawyer's communications prior to filing of action). Even under the amended ABA rule, filing suit may as a practical matter bring the anti-contact rule into play more surely than during pre-filing investigations. A claimant's lawyer will generally not know (as the rule requires) that a prospective defending party is represented by counsel in the matter prior to asserting a claim against the person. See, e.g., Gaylard v. Homemakers of Montgomery, Inc., 675 So.2d 363 (Ala.1996) (in prefiling interview of prospective defending party's employees, lawyer lacked necessary knowledge of representation).

The ABA House of Delegates amended ABA Model Rule 4.2 in August, 1995, to conform it clearly to the majority rule--the rule reflected in the Section and Comment. See Reporter's Note to Comment *b*. That position accorded with the position of the ABA's ethics committee. See ABA Formal Opin. 95-396 (1995).

The 1983 ABA Model Rules in Rule 4.2, Comment P [5] indicate that the anti-contact prohibition applies when a lawyer has "actual knowledge" of the nonclient's representation:

> The prohibition on communications with a represented person only applies . . . in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Terminology. Such an inference may arise in circumstances where there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.
>
> See also, e.g., ABA Formal Opin. 95-396 (1995). But cf., e.g., Faison v. Thornton, 863 F.Supp. 1204, 1214-15 (D.Nev.1993) (violation of anti-contact rule found despite lawyer's assurance to nonclient that he could have counsel present during interview and nonclient's statements that he didn't believe he was represented by a lawyer and consented to interview).

The decisions agree that a client who is represented generally by a lawyer--as a corporation might be represented by inside legal counsel or a business by a general counsel in private practice--is not represented in a matter unless the lawyer has undertaken legal tasks with respect to the matter in question. E.g., Terra Int'l v. Mississippi Chem. Corp., 913 F.Supp. 1306 (N.D.Iowa 1996); Humco Inc. v. Noble, 1999 WL 1207051 (Ky.Ct.App.1999); ABA Formal Opin. 95-396, at 13-15 (1995).

On the application of the rule to coparties, see, e.g., In re Thompson, 492 A.2d 866 (D.C.1985) (co-defendant in criminal case); In re Alcantara, 676 A.2d 1030 (N.J.1995) (same).

On the prohibition against communication through another, the prohibition in the ABA Model Rules is narrower than one arguable interpretation of the wording employed in the ABA Model Code. Compare DR 7-104(A)(1) (1969) ("communicate or cause another to communicate") (emphasis supplied), with ABA Model Rule 4.2 (omitting phrase "or cause another to communicate" while otherwise copying ABA Model Code of Professional Responsibility (1969)). However, the ABA Model Rules do generally prohibit a lawyer from employing an agent of the lawyer to contact a represented nonclient. See ABA Model Rule 5.3(c)(1) (prohibition against ordering or ratifying conduct by nonlawyer assistant that would be violation if engaged in by lawyer); id. Rule 8.4(a) (prohibiting lawyer from violating rule "through the acts of another"). See, e.g., Holdren v. General Motors Corp., 13 F. Supp. 2d 1192 (D.Kan.1998) (affidavits obtained by client in age-discrimination suit against employer from co-workers after lawyer encouraged such; evidence held inadmissible); In re Marietta, 569 P.2d 921 (Kan.1977) (under ABA Model Code, discipline of lawyer for having "caused" client to contact opposing party). The prohibition does not apply, however, if the lawyer was unaware of the contact (and not otherwise accountable for it, such as by failing to supervise an employee). E.g., Barham v. Turner Constr. Co., 803 S.W.2d 731, 739-40 (Tex.Ct.App.1990). On the extent to which a lawyer may assist a client in client-client communications, see Reporter's Note to Comment *k*, infra.

Comment d. A communication on an unrelated matter. See 1 G. Hazard & W. Hodes, The Law of Lawyering § 4.2:104 (2d ed.1990) (noting that the reference in ABA Model Rule 4.2 and DR 7-104(A)(1) to communication on "the subject of the representation" means that communication for other purposes is impliedly permissible); State v. Clawson, 270 S.E.2d 659 (W.Va.1980) (defendant represented in New Jersey prosecution could be questioned about unrelated West Virginia murders). Perhaps an extreme case is United States v. Masullo, 489 F.2d 217 (2d Cir.1973) (no anti-contact violation for federal agents, knowing nonclient was leaving lawyer's office after consultation on pending state narcotics charges, to stop and interrogate concerning federal narcotics charges); contra, e.g., Abeles v. State Bar, 510 P.2d 719 (Cal.1973); State v. Yatman, 320 So.2d 401 (Fla.Dist.Ct.App.1975).

Illustration 2 is based on Mondelli v. Checker Taxi Co., 554 N.E.2d 266 (Ill.App.Ct.1990). On the several potential problems of deception involved, see generally Isbell & Salvi, Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers, 8 Geo. J. Legal Ethics 791 (1995). See also, e.g., Gidatex S.r.L v. Campaniello Imports Ltd., 82 F.Supp.2d 119 (S.D.N.Y.1999) (lawyer for furniture manufacturer could send undercover investigators posing as customers to engage in ordinary business transaction with former distributors' sales clerks to determine whether they were infringing trademark).

Comment e. A lawyer communicating in a nonrepresentational situation. See ABA Model Rules of Professional Conduct, Rule 4.2, Comment P [1] (1983) ("This Rule does not prohibit communication with a party . . . concerning matters outside the representation. . . . Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so"). E.g., In re Mettler, 748 P.2d 1010, 1012 (Or.1988) (lawyer working for state securities examiner not subject to anti-contact rule where position did not require incumbent to be lawyer); N.Y. Cty. Ethics Opin. 705 (1995) (lawyer employed as corporation's personnel director).

Illustration 3 is based on the facts and holding in Pinsky v. Statewide Grievance Comm., 578 A.2d 1075 (Conn.1990). The position of the ABA ethics committee is probably contrary to that in the Section and Comment, although other bar-association committees support it. Compare, e.g., ABA Informal Opin. 982 (1967) (lawyer appearing pro se subject to anti-contact rule), with, e.g., Ass'n B. City of N.Y., Opin. No. 81-8 (1981) (pro se lawyer not subject to rule). There is significant authority contrary to the Section and Comment. E.g., Toliver v. Sullivan Diagnostic Treatment Center, 818 F.Supp. 71, 73 (S.D.N.Y.1993) (dicta) (lawyer representing self subject to anti-contact rule); In re Segall, 509 N.E.2d 988, 990 (Ill.1987) (lawyer appearing pro se in litigation represents himself when he contacts opposing party); In re Smith, 861 P.2d 1013 (Or.1993), cert. denied, 513 U.S. 866, 115 S.Ct. 183, 130 L.Ed.2d 117 (1994) (under version of Oregon rule specifically so providing, pro se lawyer subject to discipline for sending letter directly to president of corporation with which lawyer was in litigation with copy to counsel); Vickery v. Comm'n for Lawyer Discipline, 5 S.W.3d 241 (Tex.Ct.App.1999) (refusing to follow *Pinsky*); Committee on Legal Ethics v. Simmons, 399 S.E.2d 894, 898 (W.Va.1990) (assuming application of anti-contact rule); Sandstrom v. Sandstrom, 880 P.2d 103 (Wyo.1994). In Ryland v. Taylor, Porter, Brooks & Phillips, 496 So.2d 536, 541-42 (La.Ct.App.), writ denied, 497 So.2d 1388 (La.1986), the court suggested a middle ground, permitting direct contact where the lawyer was performing an act that any principal might perform (there, paying a utility bill) but indicating that contact would be prohibited with respect to an act that was representational in character (such as filing an action against the utility company).

Comment f. Prohibited forms of communication. On application of the rule to a lawyer who corresponds by letter with simultaneous copy to the nonclient's lawyer, see, e.g., Committee on Professional Ethics and Conduct v. Hoffman, 402 N.W.2d 449 (Iowa 1987); In re Schenck, 879 P.2d 863, 866-67 (Or.1994) (discipline case); ABA Formal Opin. 92-362, at 2-4 (1992).

As an aspect of the rule that the represented nonclient's consent is irrelevant, the rule extends to communications initiated by either the lawyer or the represented nonclient. See, e.g., In re Herkenhoff, 866 P.2d 350, 352 (N.M.1993); In re Illuzzi, 632 A.2d 346, 354 (Vt.1993); ABA Formal Opin. 95-396 (1995).

Illustration 4 is taken from In re Waldron, 790 S.W.2d 456 (Mo.1990).

Comment g. A communication authorized by law. See ABA Model Rules of Professional Conduct, Rule 4.2 (1983) and ABA Model Code of Professional Responsibility, DR 7-104(A)(1) (1969), both quoted in the Reporter's Note to Comment *b*. See generally Lidge, Government Civil Investigations and the Ethical Ban on Communicating with Represented Parties, 67 Ind. L.J. 549 (1992); ABA Formal Opin. 95-396 (1995). On statutes interpreted to exempt lawyers in particular settings from the anti-contact rule, compare, e.g., United Transp. Union v. Metro-North Commuter R.R., 1995 WL 634906 (S.D.N.Y.1995) (provision of Federal Employers Liability Act (FELA) barring rules inhibiting railroad workers from furnishing information voluntarily), and authorities cited; State ex rel. Atchison, Topeka & Santa Fe R.R. v. O'Malley, 888 S.W.2d 760 (Mo.Ct.App.1994) (same), with, e.g., Queensberry v. Norfolk & W. Ry., 157 F.R.D. 21 (E.D.Va.1993) (refusing to construe FELA to authorize contact in contravention of state ethical rules).

On the applicability of the anti-contact rule to prosecutors, see Comment *h* hereto and Reporter's Note thereto. There is no general exemption applicable to government lawyers, e.g., Tannahill v. United States, 27 Fed. Cl. 724 (Cl.Ct.1992) (Justice Department lawyers investigating civil tax matters); Bearden v. Bearden, 426 S.E.2d 568 (Ga.1993) (lawyers representing child-support recovery unit subject to rule); In re Quinlan, 801 P.2d 1337 (Mont.1990) (discipline of prosecutor for interviewing represented defendant in criminal case); In re Mettler, 748 P.2d 1010, 1012 (Or.1988), and courts generally have shown no disposition to favor a reading of statutes to create exemptions, e.g., In re Williams, 840 P.2d 1280, 1285-86 (Or.1992).

A lawyer's unreasonable refusal to permit opposing counsel to have direct contact contemplated by law may persuade a court that service on the objecting lawyer should be treated as notice to the client. See Bagwell v.

Sportsman Camping Centers, Inc., 241 S.E.2d 602 (Ga.Ct.App.1978) (statutorily required notice sufficiently achieved if given to nonclient's lawyer, who refused permission for direct communication with client to opposing lawyer who was attempting to provide notice under statute).

On communication pursuant to court order, see United States v. Lopez, 4 F.3d 1455, 1461-62 (9th Cir. 1993) (on rehearing) (court order can except lawyer from anti-contact rule under "authorized by law" exception, unless court misled in issuing order). On inapplicability of the anti-contact rule to interrogation during depositions and similar examination, see, e.g., United States v. Schwimmer, 882 F.2d 22, 28 (2d Cir.1989) (interrogation of represented suspect by prosecutor during grand-jury testimony), cert. denied, 493 U.S. 1071, 110 S.Ct. 1114, 107 L.Ed.2d 1021 (1990).

Comment h. A represented nonclient accused or suspected of a crime. See generally 2 G. Hazard & W. Hodes, The Law of Lawyering § 4.2:109 (1991 supp.); C. Wolfram, Modern Legal Ethics 615 (1986); Stuntz, Lawyers, Deception and Evidence Gathering, 79 Va. L. Rev. 1903 (1993); Cramton & Udell, State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules, 53 U. Pitt. L. Rev. 291 (1992); Dash, Contact with Represented Persons: An Alarming Assertion of Power, 78 Judicature 137 (1994).

On applicability of the general anti-contact rule to defense counsel, see, e.g., United States v. Santiago-Lugo, 162 F.R.D. 11 (D.P.R.1995); Attorney Grievance Comm'n v. Kent, 653 A.2d 909 (Md.1995); but cf. Grievance Committee v. Simels, 48 F.3d 640 (2d Cir.1995) (anti-contact rule narrowly construed to apply only to defense-counsel contact with actual co-defendants to same indictment, thus authorizing contact with unindicted potential adverse witness represented by counsel).

On contact after the constitutional right to counsel attaches, see generally Minnick v. Mississippi, 498 U.S. 146, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990) (once accused requested and obtained appointed counsel, prosecutor-initiated interrogation that accused was required to attend without counsel was impermissible under Fifth Amendment and resulting statements were inadmissible in evidence); Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) (under Fifth Amendment, once in-custody accused requests and is entitled to counsel, officials may not reinitiate questioning), as limited by Davis v. United States, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994) (postwaiver request for counsel must be unambiguous and unequivocal); United States v. Henry, 447 U.S. 264, 275 n.14, 100 S.Ct. 2183, 2189, 65 L.Ed.2d 115 (1980) (dicta) (approvingly noting anti-contact rule of DR 7-104(A)(1) in case finding Sixth Amendment violation where prosecutor placed informer in jail cell with represented suspect); Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977) (postarraignment, in-custody interrogation of represented defendant violates Sixth Amendment); Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) (surreptitious questioning of represented defendant following arraignment and release on bail).

With respect to contact with a represented suspect prior to the time the right to counsel attaches, compare, e.g., United States v. Powe, 9 F.3d 68 (9th Cir.1993) (under California lawyer code, pre-indictment, noncustodial conversation through secretly cooperating co-conspirator authorized by law); United States v. Heinz, 983 F.2d 609 (5th Cir.1993) (anti-contact rule does not apply during preindictment, noncustodial information-gathering); United States v. Ryans, 903 F.2d 731, 739 (10th Cir.), cert. denied, 498 U.S. 855, 111 S.Ct. 152, 112 L.Ed.2d 118 (1990), and authorities cited (anti-contact rule of DR 7-104(A)(1) does not apply in absence of relatively formal adversarial setting and thus is inapplicable to preindictment, noncustodial investigations); United States v. Hammad, 858 F.2d 834, 840 (2d Cir.1988), cert. denied, 498 U.S. 871, 111 S.Ct. 192, 112 L.Ed.2d 154 (1990) ("*Hammad II*") ("the use of informants by government prosecutors in a preindictment, noncustodial situation, absent the type of misconduct that occurred in this case, will generally fall within the 'authorized by law' exception of DR 7-104(A)(1) and therefore will not be subject to sanction"); Triple A Mach. Shop, Inc. v. State, 261 Cal.Rptr. 493, 497-98 (Cal.Ct.App.1989); In re Criminal Investigation No. 13, 573 A.2d 51 (Md.Ct.Spec.App.1990); State v. Miller, 600 N.W.2d 457 (Minn.1999) (noncustodial, voluntary interview with managerial-level employee conducted during criminal investigation despite protest of counsel and did not come within "authorized by law" exception).

Hammad II, supra, 858 F.2d at 839, noted that career criminals with permanent "house counsel" were not immune from otherwise appropriate informer infiltration. Nonetheless the court in *Hammad II* held that the prosecutor had violated the anti-contact rule because the prosecutor had engaged in "egregious misconduct"--using the "improper and illegitimate stratagem" of a counterfeit grand-jury subpoena to gain access to the

represented suspect. Accordingly, the court recognized the discretionary power of the trial court to invoke an exclusionary rule and suppress evidence obtained through a violation of DR 7-104(A)(1). See 858 F.2d at 840.

A continuing area of controversy is the policy of the Justice Department concerning contact with represented suspects. One position taken by the Department is contained in a series of rules regulating (but broadly permitting) noncustodial, preindictment contact. See 59 Fed. Reg. 39910 (1994). The ABA has attacked the rules on a number of grounds. See 11 Lawyers' Man. Prof. Conduct 245 (1994); ABA Formal Opin. 95-396 (1995). In a memorandum of June 8, 1989, the then Attorney General purported to exempt Justice Department litigators categorically from the ABA Model Rules of Professional Conduct with respect to precustodial contact. See, e.g., United States v. Western Elec. Co., 1990-2 CCH Trade Cas. P69,148, 6 ABA/BNA Law. Manual Prof. Conduct (Current Reports) 297, 298 (D.D.C.1990) (quoting policy statement); see also, e.g., In re Doe, 801 F.Supp. 478 (D.N.M.1992) (U.S. Attorney General's memorandum did not constitute controlling law and thus was not within "authorized by law" exception to anti-contact rule). See generally, e.g., Cramton & Udell, supra, 53 U. Pitt. L. Rev. at 333-57. The 1994 rules were a revision and formalization of those policies. The formal opinion of the ABA opposing the Justice Department position, ABA Formal Opin. 95-396 (1995), did concede that prevailing judicial decisions permitting preindictment contact constituted the necessary legal authorization under the "authorized by law" exception (see Subsection (1)(c)).

The Supreme Court has held, under the Fifth and Sixth Amendments, that a defendant charged with crime and represented by counsel may voluntarily decide to speak to the police or prosecutor in the absence of the lawyer. A statement obtained under such circumstances is admissible against the defendant. See Michigan v. Harvey, 494 U.S. 344, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990) (Fifth Amendment); Patterson v. Illinois, 487 U.S. 285, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988) (Sixth as well as Fifth Amendment-based right to counsel subject to knowing and intelligent waiver); see also Minnick v. Mississippi, supra, 498 U.S. at 156, 111 S.Ct. at 492 (dicta) (precedent "does not foreclose finding a waiver of Fifth Amendment protection after counsel has been requested, provided the accused has initiated the conversation or discussions with the authorities"). A federal court of appeals has nonetheless held that a local rule adopting a state's anti-contact rule may in some circumstances be binding on a prosecutor with respect to postcharge contact even if initiated by the defendant. See United States v. Lopez, 4 F.3d 1455 (9th Cir.1993) (prosecutor had duty to avoid direct communication with indicted nonclient represented by counsel).

Comment i. A communication reasonably responding to an emergency. No authority, either supporting or opposing the exception, has been found. This exception is justified by superior legal interest and creates no significant risk of harm to the represented nonclient.

Comment j. A communication with the consent of the lawyer for the represented nonclient. See ABA Model Rules of Professional Conduct, Rule 4.2 (1983) & ABA Model Code of Professional Responsibility, DR 7-104(A)(1) (1969), both quoted in the Reporter's Note to Comment *b* hereto. The focus of the rule on consent by the nonclient's lawyer to the exclusion of the represented nonclient has been criticized by commentators. E.g., Leubsdorf, Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interest, 127 U. Pa. L. Rev. 683 (1979); but see Kurlantzik, The Prohibition on Communication with an Adverse Party, 51 Conn. B. J. 136 (1977). On the requirement of consent of opposing counsel regardless of the sophistication of the opposing client, see, e.g., Estate of Vafiades v. Sheppard Bus Service, Inc., 469 A.2d 971, 978 (N.J.Sup.Ct.Law Div.1983) (personal-injury claimant's lawyer violated anti-contact rule through direct settlement discussions with liability-insurance company); In re Illuzzi, 616 A.2d 233 (Vt.1992) (same, in discipline case).

As indicated in the Comment, the represented nonclient is empowered to instruct the lawyer to consent (see § 21(2)), so that the practical effect of the allocation of power to consent is to disable clients unaware of their power to instruct their lawyer on the matter. Among the rare cases involving a lawyer refusing to accede to a client's demand that the lawyer consent to direct contact, see Dagny Management Corp. v. Oppenheim & Meltzer, 606 N.Y.S.2d 337 (N.Y.App. Div.1993) (lawyer subject to discharge and forfeiture of entire fee when lawyer, seeking to protect fee, appeared at closing and insisted, despite client's contrary instruction, that opposing party to transaction conduct all dealings through lawyer, including deposit of funds into lawyer's trust account).

Illustration 6 reflects what is believed to be the prevailing lawyer practice in such situations. No authority directly in point has been found. In such instances, application of the anti-contact rule to prevent the lawyer from

effectively assisting the client who seeks legal guidance on a lawful activity would be inconsistent with both client autonomy and the right to effective legal assistance.

Comment k. A communication by a client with a represented nonclient. E.g., ABA Model Rules of Professional Conduct, Rule 4.2, Comment P [1] (1983) ("parties to a matter may communicate directly with each other"); ABA Formal Opin. 92-362, at 5 (1992) (lawyer for party who wishes to communicate settlement offer directly to opposing party has "duty to that party to discuss . . . the freedom of the offeror-party to communicate with the opposing offeree-party"; but broad and complex questions of precisely what lawyer may advise client not decided); Cal. Formal Opin.1993-131 (1993) (lawyer need not attempt to dissuade client, may in fact encourage such client-client communications to efficiently settle or resolve dispute; lawyer prohibited only from initiating idea of contact or scripting it, but may otherwise advise and assist client concerning it); cf. Ass'n B. City N.Y. Ethics Opin.1991-2 (1991) (lawyer not required to dissuade client-client communication, but may not advise or encourage client to do so or advise client with respect to any negotiations that might ensue); Miano v. AC & R Advertising, Inc., 148 F.R.D. 68 (S.D.N.Y.1993) (following City Bar opinion, but finding no violation on facts shown). Older ABA ethics opinions had asserted that a lawyer was required to attempt to discourage client-client communications, see ABA Formal Opin. 75 (1932) and 524 (1964), but those opinions have been withdrawn as inconsistent with both the ABA Model Code of Professional Responsibility (1969) and the ABA Model Rules, see ABA Formal Opin. 84-350 (1984). An attempt to broaden the anti-contact rule so as to prohibit a lawyer from advising a client with respect to client-client contacts was rejected during the process of developing the ABA Model Rules. See Legislative History of the Model Rules of Professional Conduct: Their Development in the ABA House of Delegates 148-49 (1987); see also, e.g., Crane v. State Bar, 635 P.2d 163 (Cal.1981).

Comment l. A communication with class members. On postcertification contact, see, e.g., Fulco v. Continental Cablevision, Inc., 789 F.Supp. 45, 47 (D.Mass.1992) (once court enters order certifying class, all class members become "represented party" for purposes of anti-contact rule); Haffer v. Temple University, 115 F.R.D. 506 (E.D.Pa.1987); Tedesco v. Mishkin, 629 F.Supp. 1474 (S.D.N.Y.1986); In re Federal Skywalk Cases, 97 F.R.D. 370 (W.D.Mo.1983). On precertification contact, compare, e.g., Babbitt v. Albertson's, Inc., 1993 WL 150300 (N.D.Cal.1993) (precertification communication by defense lawyer with putative class members not in violation of anti-contact rule); Gibbons v. CIT Group/Sales Fin., Inc., 400 S.E.2d 104 (N.C.Ct.App.1991) (affirming trial court order requiring counsel for both sides to notify other in writing within 24 hours of name and address of putative class member contacted, but otherwise permitting contact), with, e.g., Impervious Paint Ind., Inc., v. Ashland Oil, 508 F.Supp. 720 (W.D.Ky.) (pre-certification contact--during opt-out period--violates anti-contact rule), appeal dism'd, 659 F.2d 1081 (6th Cir.1981). On the constitutionality of carefully and narrowly drawn prohibitions against communications with represented class members in violation of the anti-contact rule, see, e.g., Kleiner v. First Nat'l Bank, 751 F.2d 1193, 1205 (11th Cir.1985); In re San Juan Star Co., 662 F.2d 108, 116 (1st Cir.1981). Courts have thus uniformly held that the anti-contact rule is consistent with the holding of the Supreme Court in Gulf Oil Co. v. Bernard, 452 U.S. 89, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981), that contact between a lawyer for the class and members of the class could be restricted by court order only if narrowly drawn and based on a demonstrated need for the restriction in the particular case. E.g., Bower v. Bunker Hill Co., 689 F.Supp. 1032, 1033 (E.D.Wash.1985).

Comment m. Clarifying, protective, and remedial orders of a tribunal. On expanding allowable contact, subject to protective measures, see, e.g., PPG Indus., Inc. v. BASF Corp., 134 F.R.D. 118 (W.D.Pa.1990) (lawyers could contact designated employees, but were first required to hand employees copy of court's opinion and instruct them to read it; at beginning of interview, lawyers must advise interviewees not to disclose privileged information); B.H. by Monahan v. Johnson, 128 F.R.D. 659, 661 (N.D.Ill.1989) (conditioning judicially permitted access on exclusion of any resulting statement from evidence as admission). Courts will not generally require a lawyer to notify the opposing lawyer to permit that lawyer also to attend the interview, fearing that such presence would seriously disrupt the value of the interview. E.g., In re Criminal Investigation No. 13, 573 A.2d 51, 55 (Md.Ct.Spec.App.1990); but cf. In re Opinion 668, 633 A.2d 959, 963 (N.J.1993) (interim rules, pending final resolution of breadth of anti-contact rules, require notification to opposing counsel before interviewing employees of represented organization whose conduct establishes organization's liability). On disallowing or limiting normally permissible contact in view of particular circumstances, see, e.g., United States v. Florida Cities Water Co., 1995 WL 340980 (M.D.Fla.1995) (in view of possible threat to revelation of privileged communications, government must provide notice to corporation and opportunity to attend ex parte interview of

former corporate managerial-level employees); In re Shell Oil Refinery, 143 F.R.D. 105 (E.D.La.1992) (protective order entered precluding lawyer for class from further ex parte contact with any of defendant oil company's employees after lawyer obtained confidential documents from unknown employee).

Comment n. Disqualification, evidence suppression, and related remedies. On disqualifying a lawyer who has gained access to confidential information through violation of the anti-contact rules, see, e.g., Faison v. Thornton, 863 F.Supp. 1204 (D.Nev. 1993) (disqualification, fee sanction, and order excluding evidence); MMR/Wallace Power & Indus. v. Thames Associates, 764 F.Supp. 712 (D.Conn.1991) (lawyer disqualified following ex parte contact with former employee of adversary who had been member of adversary's litigation team); Papanicolaou v. Chase Manhattan Bank, 720 F.Supp. 1080, 1085-87 (S.D.N.Y.1989) (both lawyer and lawyer's firm, by imputation, disqualified in absence of proof that no lawyer in firm shared ill-gained confidential information); Shoney's, Inc. v. Lewis, 875 S.W.2d 514, 516 (Ky.1994). On injunctive relief, see, e.g., American Motors Corp. v. Huffstutler, 575 N.E.2d 116 (Ohio 1991). On professional discipline, see, e.g., In re Wehringer's Case, 547 A.2d 252 (N.H. 1988), cert. denied, 489 U.S. 1001, 109 S.Ct. 1103, 103 L.Ed.2d 169 (1989) (in divorce and child-custody dispute, negotiating settlement directly with represented wife after husband had kidnapped child and communicating husband's threat to take child out of country); In re Waldron, 790 S.W.2d 456 (Mo.1990).

On fines and fee-shifting under procedural-sanction rules, see, e.g., Haffer v. Temple University, supra (counsel for university violated anti-contact rule by communicating with members of class of women student-athletes in connection with pending sex-discrimination suit; sanctions include court-ordered corrective notice, substantial fine, and award of costs and attorney fees). On an offending party's liability in damages to the opposing lawyer, the general rule is that an adversary may not recover damages in the absence of privity or fraud, e.g., Hacker v. Holland, 570 N.E.2d 951, 958 (Ind.Ct.App.1991); Sievers v. Liberty Mut. Ins. Co., 851 S.W.2d 529 (Mo.Ct.App.1992) (state does not recognize cause of action for intentional interference with physician-patient privilege); but see Cross v. American Country Ins. Co., 875 F.2d 625 (7th Cir.1989) (insurer, who had settled with represented claimant in direct dealings unknown to claimant's lawyer, liable to claimant's lawyer for lost contingent fee and substantial punitive damages based on tortious interference with contract); State Farm Mut. Ins. Co. v. St. Joseph's Hospital, 489 P.2d 837 (Ariz. 1971) (same). Contacting a debtor individually who is known to be represented by counsel may constitute a violation of the federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692c(a)(2).

On excluding from evidence a statement taken in violation of an anti-contact rule in a civil matter, see, e.g., Faison v. Thornton, 863 F.Supp. 1204 (D.Nev.1993); Insituform of North America, Inc. v. Midwest Pipeliners, Inc., 139 F.R.D. 622 (S.D.Ohio 1991); University Patents, Inc. v. Kligman, 737 F.Supp. 325, 329 (E.D.Pa.1990); Papanicolaou v. Chase Manhattan Bank, supra, 720 F. Supp. at 1085-87; Cagguila v. Wyeth Labs., Inc., 127 F.R.D. 653 (E.D.Pa.1989) (statement excluded, but witnesses could be called as witness by either side); In re FMC Corp., 430 F.Supp. 1108 (S.D.W.Va.1977); Shoney's, Inc. v. Lewis, 875 S.W.2d 514, 516 (Ky. 1994); contra, Nordhauser v. New York City Health & Hospitals Corp., 575 N.Y.S.2d 117, 120 (N.Y.App.Div. 1991). While an order requiring turnover of documentary and other material obtained in violation of the anti-contact rule would normally involve work product, work-product protection may not extend to material obtained through an anti-contact violation. E.g., University Patents, Inc. v. Kligman, supra, 737 F. Supp. at 329-30; Haffer v. Temple University, supra, 115 F.R.D. at 513 n.3; Resnick v. American Dental Ass'n, 95 F.R.D. 372, 379 (N.D.Ill.1982). See also, e.g., Mintwood Corp. v. Fonseca, 47 U.S.L.W. 2019 (D.C.Super.Ct.1978) (agreements with represented tenants, negotiated by lawyer for landlord in blatant disregard of anti-contact rule, voided as obtained through undue influence); Coffman v. Poole Truck Line, Inc., 811 S.W.2d 908 (Tenn.Ct.App.1991) (new trial ordered where impermissible ex parte interview with opposing party's employee "neutralized" employee for purposes of trial testimony).

In determining whether to award particular remedies for a violation, a tribunal may be influenced by whether the inquiring lawyer gave prior notice (regardless of consent) to the opposing lawyer, see, e.g., Cagguila v. Wyeth Labs., Inc., 127 F.R.D. 653, 654 (E.D.Pa.1989).

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Ethical Grounds

The Unofficial Blog of Vermont's Bar Counsel

ABA opinion concludes that the ” no-contact” rule applies to self-represented lawyers. Should we amend Vermont’s rule?

SEPTEMBER 29, 2022APRIL 16, 2024 MICHAEL 5 COMMENTS

The issue of whether a self-represented lawyer is subject to Rule 4.2’s “no-contact” provision is not one with which I have much experience. Whether as disciplinary counsel or when I was the screener, if I ever reviewed a single complaint alleging such a violation, I don’t remember it. Nor has the topic ever been broached in the context of an ethics inquiry. My only real work on the topic was in this post (https://vtbarcounsel.wordpress.com/2016/12/22/tbt-1990-is-a-self-represented-lawyer-subject-to-rule-4-2/) about the first decision ever issued after Vermont adopted a formal professional responsibility program.[1]

Yesterday, the ABA Standing Committee on Ethics and Professional Responsibility issued *Formal Opinion 502: Communication with a Represented Person by a Pro Se Lawyer (https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-502.pdf)*. The Committee concluded that a self-represented lawyer is bound by Rule 4.2. That is, when self-representing, a lawyer cannot communicate about the matter with another person who the lawyer knows to be represented in the matter without the consent of the represented person’s lawyer or unless the communication is otherwise authorized by law.

I appreciate the opinion for several reasons.

(https://vtbarcounsel.wordpress.com/wp-content/uploads/2022/01/legal-ethics.jpg)

For one, the opinion is well-researched and provides interesting and informative detail about the history of the debate as to whether Rule 4.2 applies to a self-represented lawyer. For another, I don't necessarily disagree with the conclusion. As the Committee notes, "[t]he key evils intended to be managed by Model Rule 4.2 are (1) overreaching and deception; (2) interference with the integrity of the client-lawyer relationship; and (3) elicitation of uncounseled disclosures, including inappropriate acquisition of confidential lawyer-client communications." Thus, it makes sense to apply the rule to a self-represented lawyer.

Still, the opinion gives me pause. While I support the general conclusion, I'm drawn to the dissenting members' view. That pull leaves me wondering if we should amend V.R.Pr.C. 4.2. Alas, before I discuss the dissent, a bit more background is required.

Comment [4] to both the ABA Model Rule and Vermont's rule includes the following statement:

- "Parties to a matter may communicate directly with each other and a lawyer is not prohibited from advising a client concerning a communication that the client is legally justified to make."

The tension between this statement and the text of the rule drives the debate. Is the self-represented lawyer fish or fowl? That is, a "lawyer" subject to Rule 4.2? Or a "party" to whom Comment [4] applies? In Formal Opinion 502, the Committee answered by stating:

- "It is not possible for a pro se lawyer to 'take off the lawyer hat' and navigate around Rule 4.2 by communicating solely as a client."

Again, I don't necessarily disagree. However, as I indicated, I remain drawn to the dissent.

Like me, the dissent doesn't disagree with the Committee's conclusion, stating:

- "It is not the result I object to, it is the mode of rule construction that I cannot endorse. Self-representation is simply not 'representing a client,' nor will an average or even sophisticated reader of these words equate the two situations."

The dissent continues:

- "When an attorney consults the rule, it is highly unlikely that the phrase "in representing a client" will be considered to include self-representation. If the attorney goes further and consults Comment [4], the Comment will assure the attorney that, 'Parties to a matter may communicate directly with each other.' Given this apparent clarity, what will tip off the attorney that further research is required?"

Perhaps the same could be said for the represented person's lawyer. Which might explain why I don't remember this topic having come up very much over the past 24 years.

Finally, the dissent argues:

- "By leaving this rule in place, we are also leaving in place a trap. The rule should be amended to achieve the result advocated for in the majority opinion."

I tend to agree. And amending the rule wouldn't be difficult.[2] Here's the relevant portion of Oregon's Rule 4.2, with my emphasis added.

- "In representing a client **or the lawyer's own interests**, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless: (a) the lawyer has the prior consent of a lawyer representing such other person; (b) the lawyer is authorized by law or by court order to do so . . ."

In any event, that's why I post today. To raise the question of whether to amend Rule 4.2.

To me, it's an interesting question. Again, I don't disagree with the conclusion that a no-contact rule should apply to self-represented lawyers.[3] However, many of the rules include phrases like "when representing a client" or "in representing a client." If, for the purposes of Rule 4.2, a self-represented lawyer is "representing a client," it's interesting to consider the ramifications of construing other rules with like phrases to apply similarly.

I'm at risk of going on and on. So, I'll stop. Please feel free to share thoughts, either in the comment section or by email to Michael.Kennedy@vermont.gov (mailto:Michael.Kennedy@vermont.gov)

As always, let's be careful out there.

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[1] PCB Decision 1 issued in August 1990, the same month that I began my first year in law school. While ostensibly about the application of no-contact rule to a self-represented attorney, the post was an excuse for me to include a picture taken around the same time. In that legions of Vermont lawyers may not now about my former flow, I'm sharing it again.

 (https://vtbarcounsel.wordpress.com/wp-content/uploads/2022/09/image-4.png)

[2] Nor would it be the first time the rule was amended in response to a debate over its meaning. For many years, the rule prohibited communication with a "represented party." Indeed, in 1994, the VBA issued this advisory opinion (https://www.vtbar.org/wp-content/uploads/2021/03/94-03.pdf) in which it stated that "[t]he use of the term 'party' . . . read in light of the purpose of the rule is reasonably interpreted as extending to any person represented by counsel in matters closely related to the subject matter of the client's representation." The next year, and in response to the debate, the ABA changed the Model Rule to "represented person." Vermont followed suit when it adopted the Model Rules in 1999.

[3] There are situations that make me wonder if the rule, either as currently written or amended, should include safe harbors that allow a self-represented lawyer to communicate with a represented person in specified situations. For instance, if a lawyer is self-represented in a contested divorce, can the lawyer communicate with their spouse about issues that, arguably, fall under the umbrella of "parental rights & responsibilities" that are at issue in the litigation? The safe harbors are a topic for another day.
COMMUNICATING WITH A REPRESENTED PERSON

5 thoughts on "ABA opinion concludes that the " no-contact" rule applies to self-represented lawyers. Should we amend Vermont's rule?"

1. **Monday Morning Honors #262 – Ethical Grounds** says:
   October 3, 2022 at 9:32 am
   […] with a represented person without the consent of the represented person's lawyer. See, this blog post. The post generated significant feedback. Then, we had an interesting discussion of […]

2. **The no-contact rule, represented organizations, and . . . basketball? – Ethical Grounds** says:
   October 20, 2022 at 11:58 am
   […] ABA Opinion concludes that the no-contact rule applies to a self-represented lawyer. Should we amend… […]

3. **Update on the no-contact rule and represented organizations. – Ethical Grounds** says:
   November 16, 2022 at 12:03 pm
   […] ABA Opinion concludes that the no-contact rule applies to a self-represented lawyer. Should we amend… […]

4. **With an assist from facial recognition software, a lawyer was kicked out of a holiday show at Radio City Music Hall because she works at a firm that is suing the corporation that owns the venue. – Ethical Grounds**
   says:
   January 3, 2023 at 2:33 pm
   […] ABA Opinion concludes that the no-contact rule applies to a self-represented lawyer. Should we amend… […]

5.

Identified by facial recognition software, a lawyer was kicked out of a holiday show at Radio City Music Hall because she works at a firm that is suing the corporation that owns the venue. – Ethical Grounds

says:

January 3, 2023 at 2:36 pm

[…] ABA Opinion concludes that the no-contact rule applies to a self-represented lawyer. Should we amend… […]

Comments are closed.

No Title in Original

September 28, 2022

Formal Opinion 502
Communication with a Represented Person by a Pro Se Lawyer > Formal Opinion 502
Communication with a Represented Person by a Pro Se Lawyer

Formal Opinion 502
Communication with a Represented Person by a Pro Se Lawyer

Core Terms

pro se, ethic, communicate directly, court order, overreach, represented by counsel, revise, authorized by law, direct communication, majority opinion, disclosure

Text

Under Model Rule 4.2, [1] *if a person is represented in a matter, lawyers for others in the matter may not communicate with that represented person about the subject of the representation but instead must communicate about the matter through the person's lawyer, unless the communication is authorized by law or court order or consented to by the person's lawyer*.

When a lawyer is self-representing, i.e., pro se, that lawyer may wish to communicate directly with another represented person about the subject of the representation and may believe that, because they are not representing another in the matter, the prohibition of Model Rule 4.2 does not apply. In fact, both the language of the Rule and its established purposes support the conclusion that the Rule applies to a pro se lawyer because pro se individuals represent themselves and lawyers are no exception to this principle.

Accordingly, unless the pro se lawyer has the consent of the represented person's lawyer or is authorized by law or court order to communicate directly with the other represented person about the subject of the representation, such communication is prohibited. In this context, if direct pro se lawyer-to-represented person communication about the subject of the representation is desired, the pro se lawyer and counsel for the represented person should reach advance agreement on the permissibility and scope of any direct communications.

I. Introduction

Model Rule 4.2, Communication with Person Represented by Counsel, is commonly known as the "no-contact" or "anticontact" rule. [2] It has been part of the ABA Model Rules of Professional Conduct since their 1983 inception in largely its present form. [3] The rule is "universally followed" in American jurisdictions. [4] It provides as follows:

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[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through 2022. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] ELLEN J. BENNETT & HELEN W. GUNNARSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 454 (9th ed. 2019).

[3] In 1995, an amendment proposed by the ABA Standing Committee on Ethics and Professional Responsibility changed the term "party" to "person" in the text of the rule and revised the Comment. In 2002, amendments proposed by the ABA Ethics 2000 Commission added a reference to "court order" in the text of the rule and revised the Comment. See ART GARWIN, A

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order.

Viewed broadly, the rule requires that a lawyer's communications about a legal matter be routed through a represented person's lawyer; direct communication with the represented person about the subject of the representation is prohibited unless the lawyer has the consent of the represented person's lawyer or is authorized to engage in the communication by law or a court order. The rule "contributes to the proper functioning of the legal system" by preventing lawyers from overreaching, from interfering in other lawyers' relationships with their clients, and from eliciting protected information via "uncounselled disclosure." [5]

When a lawyer engages in self-representation in a legal matter in which that lawyer is personally involved, in other words, when a lawyer is acting pro se, [6] application of Model Rule 4.2 is less straightforward. Such a lawyer might not appear to be "representing a client" in the matter because the lawyer is acting solely on the lawyer's own behalf, i.e., "without a lawyer." [7] Moreover, the commentary to Rule 4.2 specifically states that "Parties to a matter may communicate directly with each other . . . ." [8] However, a pro se lawyer is representing a client. Pro se individuals represent themselves and lawyers are no exception to this principle. [9]

This opinion analyzes applicability of Model Rule 4.2 and the rationale for the anticontact rule in the context of a lawyer engaged in self-representation. The opinion also provides guidance on the advisability in these situations of

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LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013, 558-66 (2013). Model Rule 4.2 can be traced back to Canon 9 of the 1908 ABA Canons of Professional Ethics, which stated that "[a] lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel." The concept carried forward into the 1969 ABA Model Code of Professional Responsibility, DR 7-104(A)(1), which provided that a lawyer should not "communicate . . . on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so." See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-396, at 3-4 (1995) (recounting long history of anti-contact rule); Geoffrey C. Hazard, Jr. & Dana Remus Irwin, *Toward A Revised 4.2 No-Contact Rule*, 60 HASTINGS L.J. 797, 799 (2009).

[4] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. b (2000) [hereinafter RESTATEMENT THIRD].

[5] MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. [1]; ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-396 (1995) ("the anti-contact rules provide protection of the represented person against overreaching by adverse counsel, safeguard the client-lawyer relationship from interference by adverse counsel, and reduce the likelihood that clients will disclose privileged or other information that might harm their interests"). *See also* RESTATEMENT THIRD, *supra* note 4 (purpose is to "protect against overreaching and deception of nonclients," protect "the relationship between the represented nonclient and that person's lawyer" and "assure [] the confidentiality of the nonclient's communications with the lawyer").

[6] Pro se is defined as "For oneself; on one's own behalf; without a lawyer." BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* definition of propria persona as "In his own person." *Id.*

[7] Carl A. Pierce, *Variations on A Basic Theme: Revisiting the ABA's Revision of Model Rule 4.2 (Part II)*, 70 TENN. L. REV. 321, 325 (2003) ("On its face, the reference in the Rule to a lawyer 'representing a client' can be read to suggest a negative inference that it does not apply to communication by a lawyer who is acting pro se, or is represented by another lawyer, in a matter in which she is interested.").

[8] MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. [4].

[9] *See* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS - THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 4.2-5 (2021-2022 ed.) ("when a lawyer represents himself pro se, Rule 4.2 can be interpreted to prohibit the lawyer-party from communicating directly with an opposing represented party"); *In re* Haley, 156 Wash. 2d 324, 338, 126 P.3d 1262, 1269 (2006) ("we hold that a lawyer acting pro se is 'representing a client' for purposes of RPC 4.2(a)").

reaching advance agreement on the permissibility and scope of any direct pro se lawyer-to-represented person communications. [10]

II. ANALYSIS

Although the general prohibition of Model Rule 4.2 is ubiquitous in U.S. jurisdictions, as applied to pro se lawyers the scope of the rule is less clear. [11] Interpretation of the Rule in this circumstance involves consideration of both its plain language and policy purposes.

The language in the Rule that is primarily at issue in this analysis is its first clause: " *In representing a client*, a lawyer shall not . . . ." [12] The key evils intended to be managed by Model Rule 4.2 are (1) overreaching and deception; (2) interference with the integrity of the client-lawyer relationship; and (3) elicitation of uncounselled disclosures, including inappropriate acquisition of confidential lawyer-client communications. [13] In the context of pro se lawyers, balanced against these policy goals is the principle that, as a general proposition, parties to a matter may communicate directly with each other. [14]

Yet, both the language of the Model Rule and its purpose lead to the conclusion that the no-contact rule applies to pro se lawyers. Pro se lawyers represent themselves as "a client," and direct pro se lawyer-to-represented person communication in such circumstances can result in a substantial risk of overreaching, disruption of the represented person's client-lawyer relationship, and acquisition of uncounselled disclosures. That risk outweighs the sometimes-salutary benefit of direct communication. That said, it is important to remember that Model Rule 4.2 applies only when a communication is "about the subject of the representation," i.e., the Rule is matter specific, and a lawyer may speak with another represented person about matters that do not constitute the subject of the representation. See Model Rules R. 4.2, cmt. [4] ("This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation."). [15]

A. Model Rule 4.2 and Pro Se Lawyers

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[10] This opinion does not address the related question of applicability of Rule 4.2 when a lawyer is represented by another lawyer and the represented lawyer wishes to communicate with another represented person about the matter.

[11] Samuel J. Levine, *The Law and the "Spirit of the Law,"* 2015 Prof. Law. 1, 17 (2015) (noting the Model Rules do not expressly address a case in which a lawyer is proceeding as a pro se party to a matter) [hereinafter *Spirit of the Law*]; Margaret Raymond, *Professional Responsibility for the Pro Se Attorney*, 1 ST. MARY'S J. LEGAL MAL. & ETHICS 2, 37 (2011) (issue of whether a lawyer who is pro se is constrained by the no-contact rule when the opposing party is represented by counsel was not explicitly addressed in Model Rule 4.2).

[12] MODEL RULES OF PROF'L CONDUCT R. 4.2 (emphasis added).

[13] *See* MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. [1]; RESTATEMENT THIRD, *supra* note 4.

[14] MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. [4]. *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 92-362 (1992) (noting that Rule 4.2's prohibition on the lawyer does not purport to govern communications by the lawyer's client and observing that in some circumstances a lawyer is obligated to explain to the client the freedom to communicate with an opposing party).

[15] Note, however, that perspectives can differ in this context about whether a lawyer's effort to communicate with a represented person is beyond the scope of the rule. *See In re* Steele, 181 N.E.3d 976 (Ind. 2022) (rejecting respondent's contention that an email was not "about the subject of the representation" but rather "spoke only of matters involving friendship," a contention that was belied both by the language of the email itself, which thrice explicitly requested that the adverse party bypass their lawyer, and by the context in which it was sent, after two weeks of unsuccessful discussions with opposing counsel and the filing of a lawsuit).

Application of the Rule 4.2 anticontact principle to pro se lawyers is a well-documented ethical dilemma. There are decades worth of disciplinary cases, [16] civil cases, [17] and ethics opinions [18] concluding that a lawyer acting in a pro se capacity may not communicate directly with a represented adversary or other represented person about the subject of the representation without the consent of that person's lawyer, unless the communication is authorized by law or court order. [19] These authorities reason that a pro se lawyer is "representing a client" for purposes of Model Rule 4.2, and that the policy underlying the prohibition makes it clear that such communications are "ripe with potential for overreaching and exploitation," [20] and that "the integrity of the relationship between the represented person and counsel is not entitled to less protection merely because the lawyer is appearing pro se." [21]

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[16] *In re* Steele, 181 N.E.3d 976 (Ind. 2022); The Florida Bar v. Faro, Report of Referee, Florida Bar File 2014-70, 913 (11J) (July 24, 2017), *available at* https://lsg.floridabar.org/dasset/DIVADM/ME/MPDisAct.nsf/DISACTVIEW/68D12AE245D19BFB852582AA000A78F3/ ILE/_461.PDF,

ILE/_461.PDF, ILE/_461.PDF, aff'd as modified, Case No. SC16-1408, 2018 WL 4691179 (Fla. Sept. 28, 2018); *In re* Hodge, 407 P.3d 613 (Kan. 2017); Medina County Bar Association v. Cameron, 958 N.E.2d 138 (Ohio 2011); *In re* Lucas,789 N.W.2d 73 (N.D. 2010); *In re* Haley, 126 P.3d 1262 (Wash. 2006); *In re* Schaefer, 25 P.3d 191 (Nev. 2001); Vickery v. Comm'n for Lawyer Discipline, 5 S.W.3d 241 (Tex. Ct. App. 1999); Office of Disciplinary Counsel v. Donnell, 684 N.E.2d 36 (Ohio 1997); Runsvold v. Idaho State Bar, 925 P.2d 1118 (Idaho 1996); *In re* Smith, 861 P.2d 1013 (Or. 1993) (application to corporate representation); In re Segall, 509 N.E.2d 988 (Ill. 1987) (application to corporate representation).

[17] Fichelson v. Skorupa, 13 Mass. L. Rptr. 458 (Mass. Super. Ct. July 31, 2001) (citing ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (4th ed.)); Sandstrom v. Sandstrom, 880 P.2d 103 (Wyo. 1993).

[18] Ala. State Bar Op. RO-85-52 (1985); Alaska Bar Ass'n Op. 95-7 (1995); D.C. Bar Op. 258 (1995); Haw. Disciplinary Bd. Op. 44 (2003); Mass. Bar Ass'n Op. 97-1 (1997); State Bar of Mich. Op. CI-1206 (1988); State Bar of Nev. Standing Comm. On Ethics & Prof 'l Responsibility, Formal Op. 8 (1987); N.Y. City Bar, Formal Op. 2011-01 (2011); Va. State Bar Op. 1527 (1993) (application to corporate representation); Va. State Bar Op. 1890 (2020).

[19] Oregon has adopted a modified version of Model Rule 4.2 to address this issue. Or. Rules of Prof'l Conduct R. 4.2 ("In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject . . . .").

[20] The Florida Bar v. Faro, Report of Referee, Florida Bar File 2014-70, 913 (11J), at 10 (July 24, 2017), https://lsg.floridabar.org/dasset/DIVADM/ME/MPDisAct.nsf/DISACTVIEW/68D12AE245D19BFB852582AA000A78F3/ ILE/_461.PDF,

Viewed in this light, it is not possible for a pro se lawyer to "take off the lawyer hat" and navigate around Rule 4.2 by communicating solely as a client. Consequently, the proposition, set forth in Comment [4] to Model Rule 4.2, that "[p]arties to a matter may communicate directly with each other" n22 does not apply to pro se lawyers. This proposition recognizes that, in general, the rules of professional conduct establish limits on lawyer behavior, not that of their clients. n23 [22] [23] The first clause of Model Rule 4.2-- " *In representing a client*, a lawyer shall not . . . ." n24--may be seen as creating an ambiguity as applied to lawyers representing themselves. The conclusion of many jurisdictions is more persuasive and consistent with the purposes of Model Rule 4.2. n25 A pro se lawyer is self-representing, i.e., "representing a client" for purposes of Model Rule 4.2. The risk in this situation of overreaching, disruption of the represented person's client-lawyer relationship, and acquisition of uncounselled disclosures, is acute, outweighing the potential benefit of direct client-to-client communication. n26 Accordingly, unless a pro se lawyer has the consent of the other represented person's lawyer or is authorized by law or court order to communicate directly with the other represented person about the subject of the representation, such communication is prohibited. n27 [24] [25] [26] [27] **B. Obtaining Consent for Client-to-Client Communication**

In certain situations, otherwise prohibited client-to-client communications involving a pro se lawyer may be beneficial. n28 If a pro se lawyer wishes in good faith to communicate with another represented person about the subject of the representation, that lawyer should contact the represented person's counsel and seek to obtain consent, providing an opportunity for that lawyer to object, consent, or consent by agreement to conditions under which such communications are to take place. If a lawyer receives such a request from a pro se lawyer, it is prudent to discuss with the client in advance the advisability of such communication, along with the risks and benefits of such communication. n29 In some circumstances it may be appropriate to advise the client not to communicate with the pro se lawyer. [28] [29]

Although a lawyer's decision to consent to a pro se lawyer's communication with the lawyer's client is within the lawyer's discretion and will depend on the circumstances, there are certain situations in which direct communication between a pro se lawyer and the represented person are likely necessary or appropriate such that consenting to the communication makes sense.

Conversely, consenting to a communication where the pro se lawyer appears to be overreaching for a strategic advantage--such as seeking the communication for a concession to an extension of time to produce documents, renegotiating terms of an agreed-upon contract, or calling to elicit disclosures--is not advisable.

Advance agreements between counsel for the represented person and the pro se lawyer are important to avoid disputes about compliance and ensure no disruption of Model Rule 4.2's protections. Thus, the agreement should be clear about the scope of any direct pro se lawyer-to-represented person communications. It would be prudent to memorialize the agreement in writing.

III. CONCLUSION

Under Model Rule 4.2, in representing a client, a lawyer may not communicate with a person the lawyer knows is represented by counsel about the subject of the representation, unless that person's counsel has consented to the communication, or the communication is authorized by law or court order. When a lawyer is participating in a matter pro se, that lawyer is engaged in self-representation and is therefore subject to Model Rule 4.2's prohibition.

DISSENT

I must respectfully dissent from the conclusion of the well-written majority opinion because I cannot agree that "both the language of the Model Rule and its purpose lead to the conclusion that the no-contact rule applies to pro se lawyers." While the *purpose* of the rule would clearly be served by extending it to self-represented lawyers, its language clearly prohibits such application. Again, Model Rule 4.2 states:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order. [Emphasis added.]

Our majority opinion thoughtfully and candidly discusses the split of authority interpreting the rule. It is not uncommon for ethics committees to weigh in when there is such a split. But it is, I hope, unusual for a committee to nullify plain language through interpretation, especially when the committee has jurisdiction to propose rule amendments.

The interpretation of our majority opinion and the ethics and discipline opinions cited therein depend upon the conclusion that, "A pro se lawyer is self-representing, i.e., 'representing a client' for purposes of Model Rule 4.2." Majority Opinion, at p. 5. This logic provides the rationale for cases holding that the rule applies to pro se lawyers. n1 The number of opinions following this approach is not convincing if the analysis is not persuasive; error compounded is still error. [1]

Applying Rule 4.2 to pro se lawyers is supported by compelling policy arguments. It is not the result I object to, it is the mode of rule construction that I cannot endorse. Self-representation is simply not "representing a client," nor will an average or even sophisticated reader of these words equate the two situations. See *In re Haley*, 126 P.3d 1262, 1267, 1272 (Wash. 2006) (majority and concurring opinions referencing definitions and authorities). Rather, this is an "ingenious bit of legal fiction." *Haley*, at p. 1272 (Sanders, J., concurring). Further, this approach to construing the rule's language renders the phrase "in representing a client" surplusage, contrary to a basic canon of construction. n2 [2]

It is also simply wrong to perpetuate language that was clear but has been made misleading by opinions effectively reading that language out of the rule. When an attorney consults the rule, it is highly unlikely that the phrase "in representing a client" will be considered to include self-representation. If the attorney goes further and consults Comment [4], the Comment will assure the attorney that, "Parties to a matter may communicate directly with each other." Given this apparent clarity, what will tip off the attorney that further research is required? The lesson here must be that nothing is clear. Clear text cannot be relied upon but may only be understood by reading ethics opinions and discipline decisions. Does the text mean what it actually says, as it does in Connecticut, Kansas, and Texas? n3 Or, does it mean what we wish it said, as several other states have declared? [3]

Model Rule 4.2's plain language making it applicable only to lawyers who represent clients has also been recognized by the Restatement, n4 cases applying the rule prospectively because to do otherwise would amount to a deprivation of due process, n5 and by courts modifying the Model Rule to make it expressly applicable to pro se lawyers. n6 [4] [5] [6]

Thoughtful commentators have identified the problems with Model Rule 4.2's language and inconsistent interpretations, and have recommended fixing the rule rather than straining to achieve its purposes when lawyers represent themselves. n7 By leaving this rule in place, we are also leaving in place a trap. The rule should be amended to achieve the result advocated for in the majority opinion. [7] Mark Armitage Robinjit Eagleson

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[22] MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. [4]; ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-461 (2011) ("Even though parties to a matter are represented by counsel, they have the right to communicate directly with each other.").

[23] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 92-362 (1992) (noting that Model Rule 4.2's prohibition on the lawyer does not purport to govern communications by the lawyer's client); RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS - THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 4.2-5 (2021-2022 ed.) ("The rule governs lawyer, not their clients . . . ."). It is well established, however, that a lawyer cannot direct client-to-client communication as a way of evading Model Rule 4.2's prohibition. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-461 (2011) (when advising a client about direct client-to-client communication, the line between permissible advice and impermissible assistance "must be drawn on the basis of whether the lawyer's assistance is an attempt to circumvent the basic purpose of Rule 4.2"). In the pro se lawyer situation, it is not feasible to parse the distinction between a lawyer acting as a lawyer and a lawyer acting as a client.

[24] MODEL RULES OF PROF'L CONDUCT R. 4.2 (emphasis added).

[25] *See, e.g.*, Md. Bar Ass'n Ethics Comm., *Can Pro Se Lawyer Speak with A Represented Party over the Objection of the Party's Lawyer?*, MD. B.J., Sept./Oct. 2006, at 57, 59 ("We believe the opinions that prohibit a lawyer from having contact with a represented party opponent to be the most persuasive."). We recognize that a handful of authorities, including the Restatement of the Law Governing Lawyers, have come to a different conclusion. *See* RESTATEMENT THIRD, *supra* note 4, cmt. e, at 73 ("[a] lawyer representing his or her own interests pro se may communicate with an opposing represented non-client on the same basis as any other principals."). The Reporter's Note, however, recognizes that "The position of the ABA ethics committee is probably contrary to that in the Section and Comment . . . ." Id. Reporter's Note on Illustration 3 (citing ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 982 (1967)). *See also In re* Benson, 275 Kan. 913, 918, 69 P.3d 544, 548 (2003); Texas Ethics Comm'n Advisory Op. 653 (Jan. 2016); Cal. Rules of Prof'l Conduct R. 4.2, cmt. 3 ("The rule also does not prohibit a lawyer who is a party to a legal matter from communicating on his or her own behalf with a represented person* in that matter."). Cf. N.Y. Rules of Prof'l Conduct R. 4.2(c) ("A lawyer who is acting pro se or is represented by counsel in a matter is subject to paragraph (a), but may communicate with a represented person, unless otherwise prohibited by law and unless the represented person is not legally competent, provided the lawyer or the lawyer's counsel gives reasonable advance notice to the represented person's counsel that such communications will be taking place.").

[26] *See generally Spirit of the Law, supra* note 11 ("The methodologies courts have employed to expand the scope of the no-contact rule to include pro se lawyers exemplify the potential relevance of a spirt of the law approach for the interpretation of ethics codes."). Recognizing the significance of Rule 4.2's underlying public policy, an Illinois appellate court upheld application of Rule 4.2 to a non-lawyer pro se plaintiff in a civil case. *See* Zemater v. Village of Waterman, 157 N.E.3d 1069, 1074 (Ill. App. 2020) ("Protecting defendant under these circumstances also furthered public policy regarding the confidential and fiduciary nature of the attorney-client relationship.").

[27] This conclusion is consistent with this Committee's 1967 analysis of Canon 9 of the former Canons of Professional Ethics. *See* ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 982 (1967) (attorney who is a defendant in a case may not settle the case directly with the plaintiff who is represented by counsel without the knowledge of the plaintiff's counsel).

[28] *See* Att'y Grievance Comm'n of Maryland v. Trye, 444 Md. 201, 221, 118 A.3d 980, 991 (2015) (noting that "direct communication between the principals--leaving the lawyers out of the room--is sometimes the path to settlement of a dispute").

[29] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 92-362 (1992) (in some circumstances a lawyer is obligated to explain to the client the freedom to communicate with an opposing party).

[1] *See, e.g., In re Haley*, 126 P.3d 1262 (Wash. 2006) (forthrightly summarizing authorities and all of the reasons one might think the rule means what it says, but noting that jurisdictions considering the question "have generally concluded that the policies underlying the rule are better served by extending the restriction to lawyers acting pro se"). *See also* Runsvold v. Idaho State Bar, 129 Idaho 419, 421, 925 P.2d 1118, 1120 (1996) ("We thus construe the phrase of Rule 4.2, 'in representing a client' to include the situation in which an attorney is acting pro se because this interpretation better effectuates the purpose of Rule 4.2.").

[2] *See* "Surplusage canon," BLACK'S LAW DICTIONARY (11th ed. 2019) ("if possible, every word and every provision in a legal instrument is to be given effect"), citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012) ("it is no more the court's function to revise by subtraction than by addition").

[3] *See* Pinsky v. Statewide Grievance Comm., 216 Conn. 228, 236, 578 A.2d 1075, 1079 (1990) ("plaintiff's letter was a communication between litigants and that the plaintiff had a right to make such a communication because he was not representing a client"); *In re* Benson, 275 Kan. 913, 918, 69 P.3d 544, 548 (2003) ("violation of KRPC 4.2 was not shown to have occurred, as the rule applies only to acts done '[i]n representing a client.'"); and Texas Comm. on Prof'l Ethics Op. 653 (2016) ("Under the Texas Disciplinary Rules of Professional Conduct, a lawyer who is a party in a legal matter but who does not represent any other party in the matter may communicate concerning the matter directly with a represented adverse party without the consent of the adverse party's lawyer.").

[4] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99(1)(b), and cmt. (e) thereto ("A lawyer representing his or her own interests pro se may communicate with an opposing represented nonclient on the same basis as other principals").

[5] *See, e.g., In re* Discipline of Shaeffer, 25 P.3d 191, 199-202 (Nev. 2001), and *In re* Disciplinary Proceeding Against Haley, 156 Wash. 2d 324, 1267-69; 126 P.3d 1262 (2006).

[6] *See, e.g.*, Or. Rules of Prof'l Conduct R. 4.2: "In representing a client *or the lawyer's own interests*, a lawyer shall not communicate . . ." (emphasis added).

[7] *See, e.g.*, Carl A. Pierce, *Variations on A Basic Theme: Revisiting the ABA's Revision of Model Rule 4.2 (Part II)*, 70 TENN. L. REV. 321, 324-329 (2003) (tracing the Ethics 2000 Commission's failure to address the problem pointed out by the author and others and recommending that states adopt a rule with language clearly prohibiting contact by pro se lawyers); Margaret Raymond, Professional Responsibility for the Pro Se Attorney, 1 ST. MARY'S J. LEGAL MAL. & ETHICS 2, 38 (2011) (recognizing the split, asserting that the rule does not answer the question and consulting the purpose should be done, but stating: "It would, of course, be optimal for rule drafters to consider explicitly whether particular rules apply to pro se lawyers."); and Geoffrey C. Hazard, Jr. & Dana Remus Irwin, *Toward A Revised 4.2 No-Contact Rule*, 60 HASTINGS L.J. 797, 831 (2009) (also recognizing this mess and concluding: "We therefore propose changing the text of the Rule from 'In representing a client, a lawyer shall not . . . .' to 'A lawyer participating in a matter shall not . . . .'").

[21] *In re* Schaefer, 25 P.3d 191, 199 (Nev. 2001).

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In re Discipline of Haley

Supreme Court of Washington

May 10, 2005. ; January 26, 2006, File

No. 200,153-0

Reporter
156 Wn.2d 324 *; 126 P.3d 1262 **; 2006 Wash. LEXIS 115 ***

In the Matter of the Disciplinary Proceeding Against JEFFREY T. HALEY, *an Attorney at Law.*

Subsequent History: [*1]**

Related proceeding at In re Discipline of Haley, 157 Wn.2d 398, 138 P.3d 1044, 2006 Wash. LEXIS 601 (Wash., July 27, 2006)

Counsel: *Jeffrey T. Haley*, pro se.

Randy V. Beitel, for the bar association.

Judges: Authored by Susan Owens. Concurring: James Johnson, Barbara A. Madsen, Bobbe J. Bridge, Charles W. Johnson, Richard B. Sanders, Tom Chambers. Dissenting: Gerry L Alexander, Mary Fairhurst.

Opinion by: Susan Owens

Opinion

En Banc.

[1263] [*327]** P1 OWENS, J. -- Attorney Jeffrey T. Haley appeals the recommendation of the Disciplinary Board of the Washington State Bar Association (Board) that he serve two six-month suspensions pursuant to counts 2 and 3 of his disciplinary proceedings. Regarding count 2, the Board determined that Haley was subject to a six-month suspension for knowingly violating RPC 4.2(a), which provides that, "[i]n representing a client, a lawyer shall not communicate . . . with a party . . . represented by another lawyer." The Board concluded as to count 3 that Haley was subject to a six-month suspension for knowingly violating RPC 1.7, which prohibits a lawyer from representing a client if the representation is "directly adverse to another client" or "may be materially limited by . . . the; lawyer's own interests." RPC 1.7(a), (b). The Board recommended allowing Haley to serve the two six-month suspensions concurrently. **[***2]** The Washington State Bar Association (WSBA) agrees that two six-month suspensions are appropriate but maintains that the suspensions should run consecutively.

P2 Although we hold that, under RPC 4.2(a), a lawyer acting pro se is prohibited from contacting a party represented by counsel in the matter, we apply our interpretation **[*328]** of RPC 4.2(a) prospectively only and dismiss the violation alleged in count 2. We agree that the presumptive sanction for Haley's knowing violation of RPC 1.7 is a suspension, but we conclude that a departure from the Board's recommendation is warranted, particularly in light of the considerable delay in reporting and prosecuting the misconduct. For Haley's violation of RPC 1.7, we therefore impose a reprimand.

FACTS

[1] P3 Counts 2 and 3 of the WSBA's complaint against Haley arose out of separate sets of events that occurred in 1996-1997 and 1988-1991, respectively. Haley does not challenge any finding of fact as made by the hearing examiner or adopted by the Board. Accordingly, such facts are considered verities on appeal to this court. *In re Disciplinary Proceeding Against Brothers*, 149 Wn.2d 575, 582, 70 P.3d 940 (2003). [1]

[*3]** P4 *Count* 2. In 1994, Haley filed a lawsuit against Carl Highland, the former chief executive officer of a defunct closely held corporation, Coresoft, of which Haley was formerly a shareholder and board member. **[**1264]** Initially, Haley acted pro se in the matter but hired counsel when the case went to trial in November 1995. After the trial ended, Haley's counsel filed notice of withdrawal and Haley reverted to pro se status as to appeal and collection issues. Highland was represented by various attorneys at all times during this matter, and Haley knew that Highland was consistently represented by counsel.

P5 The hearing officer and Board concluded that Haley's improper contact with a represented party arose out of two incidents. First, while Haley was acting pro se after the trial, he sent a letter to Highland and his wife proposing **[*329]** settlement. The letter was dated September 9, 1996, and stated in full as follows:

> "I am about to spend approximately $ 25,000 on costs and attorneys fees for the appeal. If the appeal is successful, the personal earnings of both Ronda Hull and Carl Highland will be subject to garnishment to satisfy my judgment and the judgment now held by Carl Highland will **[***4]** be overruled. Also, the amount I am about the [sic] spend on costs and attorneys fees will be added to the judgment.
> "This is the last opportunity to settle the case before I spend the money on the appeal. This settlement offer will not be open after this week and may be withdrawn at any time if it is not promptly accepted. I am offering that all claims and judgments between the parties be releases [sic] with no payments. Please respond directly to me."

Decision Papers (DP) at 38. Highland forwarded the letter to his attorney who, in turn, suggested to Haley that the letter constituted a violation of RPC 4.2(a) and warned him not to have any further contact with Highland. Second, on January 31, 1997, Haley again contacted Highland, this time by telephone. Haley left the following voice message on Highland's phone:

"Carl, this is Jeff Haley . . . .

> "I hope your attorneys have told you . . . Jim Bates decided that your judgment against me is collectable only from my separate assets and I have none; they're all community assets. And, therefore, your judgment is uncollectable (sic). And the chance for appeal of that determination by Jim Bates has run so you **[***5]** can't appeal it . . . so that if the appeal proceeds my position can only improve and yours can only get worse and if you have nothing collectable . . . there's no chance of ever getting anything collectable. It seems to me that we ought to settle this case and if we do so Monday . . . there'll be an opportunity on Monday to do so if you're interested. Give me a call."

DP at 41.

P6 In his "Amended Findings of Fact and Conclusions of Law," the hearing officer stated that Haley's letter and phone message were "clearly prohibit[ed]" by RPC 4.2(a), **[*330]** DP at 46, but he acknowledged that there was some authority supporting Haley's position that attorneys acting pro se are not subject to the prohibition. DP at 46-47. Ultimately, in his "Additional Findings of Fact, Application of Standards, and Recommendation," the hearing officer determined that, "because of the specific language of RPC 4.2 (i.e., 'In representing a client . . . .') and because of the apparent absence of authority within the state of Washington on this specific issue, Mr. Haley could have harbored a sincere belief that contacts with a represented opposing party were not prohibited." DP at 63. Consequently, the hearing officer **[***6]** concluded that the violation was "negligent" and that the presumptive

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[1] The WSBA's motion to strike the appendix attached to Haley's brief is granted pursuant to RAP 10.3(a)(7), but the motion for terms of $ 500 is denied. Haley's motion to file additional briefing and submit a declaration of authenticity by Nicholas Corff is denied. Notably, the substance of the materials disputed in these motions is not germane to our resolution of the issues in this case.

sanction was thus a reprimand. *Id.* (citing ABA, STANDARDS FOR IMPOSING LAWYER SANCTIONS std. 6.33 (1991 & Supp. 1992) (ABA STANDARDS)).

P7 Deleting the hearing officer's conclusion that Haley's violation was negligent, the Board substituted its contrary determination that "Haley's mental state was knowledge" and that the presumptive sanction was therefore a suspension. DP at 7 (citing ABA STANDARDS std. 6.32). In doing so, the Board took note that Haley knew Highland was **[**1265]** represented by counsel at all times and stated that a "reasonable reading of RPC 4.2 prohibits a lawyer, while representing him [self] or herself, from contacting a represented party." DP at 7-8. The Board also faulted Haley for not "taking time to determine whether his conduct was an ethical violation." DP at 8.

P8 *Count* 3. In 1988, Haley and four other individuals formed Coresoft, a Washington corporation in the software development business. The four other shareholder/directors were Nicholas Corff, Donald Padleford, Randolph Cerf, and Bruce Haley. In addition to being a shareholder, board member, and secretary of Coresoft, Haley also **[***7]** served as the principal lawyer for the company.

P9 In raising capital for Coresoft, the corporation obtained a $ 75,000 line of credit directly from Key Bank, which was personally guaranteed by the Coresoft shareholder/directors. This credit was properly secured with a **[*331]** security agreement and UCC-1 financing statement, *see* chapter 62A.9A RCW, and, as a result, Key Bank maintained a first priority security interest in Coresoft's assets. Additional capital was obtained in the form of $ 40,000 loaned to Coresoft by Haley in 1988, the funds for which Haley obtained via personal loan. Haley obtained a promissory note from Coresoft and a signed UCC-1 financing statement as part of the loan transaction. However, there was no separate security agreement securing the note, and the UCC-1 financing statement was not filed until October 1990. [2] Haley's purported security interest had second priority behind Key Bank's interest.

[*8]** P10 In late 1990, the Coresoft board of directors came to realize that the company's financial viability was hopeless. The board concluded that the best option was to form another corporation that would purchase Coresoft's assets for an amount at least covering the $ 75,000 from Key Bank and, thereby, discharge all personal liability they had individually incurred by guaranteeing the line of credit. With the agreement or acquiescence of the board, Haley undertook the following course of action: (1) Haley formed a new corporation, known as Star Software, for the purpose of purchasing Coresoft's assets while leaving as many liabilities as possible behind; [3] (2) Haley conducted a foreclosure sale on Coresoft's assets, which he appeared to be in a position to do as a second priority security interest holder; and (3) acting as Star Software's attorney, the only bidder **[*332]** at the sale, Haley purchased Coresoft's assets for an amount that covered both Key Bank's $ 75,000 and the $ 26,000 remaining due on Haley's $ 40,000 loan to Coresoft. Coresoft became defunct on February 1, 1991.

[*9]** P11 Haley concedes that conflicts of interest arose out of this series of events. Specifically, Haley's duty to Coresoft and its shareholders conflicted with his interests in recovering on his personal loan and in moving Coresoft's assets to his new client, Star Software, at the lowest possible price. The hearing officer found that Haley made certain that Star Software took on only those assets and liabilities beneficial to the new company, including foreclosing on assets not covered by his UCC-1 financing statement. The hearing officer also found Haley's actions harmful or potentially harmful to Coresoft **[**1266]** and its shareholders. While the Coresoft board members agreed to the formation of Star Software and the foreclosure sale, Haley did not obtain an informed written consent from

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[2] Under the Uniform Commercial Code, as adopted in Washington, a security interest in collateral becomes enforceable when "[t]he debtor has authenticated a security agreement that provides a description of the collateral." RCW 62A.9A-203(b)(3)(A). Perfection of a security interest (i.e., acquiring priority over unperfected security interests and lienholders under RCW 62A.9A-317) generally requires filing a UCC-1 financing statement. RCW 62A.9A-310(a). Given these rules, the absence of a separate security agreement and Haley's failure to file the UCC-1 financing statement until Coresoft was failing may have allowed Coresoft to void his security interest; thus, Coresoft and its shareholders might have been in an economic position that was potentially more favorable than they were aware of.

[3] Of the original Coresoft shareholders, only Haley and his brother Bruce became shareholders in Star Software. The other Coresoft shareholders declined Haley's invitation to invest in the new company.

Coresoft before the sale to Star Software. [4] The hearing officer concluded that Haley acted "with knowledge" and that the presumptive sanction for the violation was a suspension. DP at 64-66 (citing ABA STANDARDS std. 4.32).

[*10]** P12 The Board adopted the hearing officer's analysis of the presumptive sanction, but two members of the Board dissented, contending that Haley's failure to obtain written consent was merely negligent and that a reprimand would be the appropriate presumptive sanction.

P13 *Recommended Sanctions for Counts 2 and 3.* The hearing officer found three aggravating factors (prior disciplinary offense, multiple offenses, and substantial experience) and two mitigating factors (cooperative attitude and delay in the disciplinary proceedings). *See* ABA STANDARDS stds. 9.22(a), (d), (i); 9.32(e), (j). The hearing officer recommended that Haley be reprimanded for the count 2 violation and suspended for 60 days for the count 3 violation. Having **[*333]** adopted the hearing officer's aggravating and mitigating factors, the Board recommended a six-month suspension for each count, with the two suspensions to be served concurrently.

ISSUES

P14 1. Does RPC 4.2(a) prohibit a lawyer who is acting pro se from contacting a party who is represented by counsel? If so, should the rule be applied in the present case?

P15 2. What is the appropriate sanction for Haley's violation of RPC 1.7

ANALYSIS

[2] [3] [4] [5] P16 *Standard of Review.* **[***11]** When a lawyer discipline decision by the Board is appealed, this court has "plenary authority" on review. *In re Disciplinary Proceeding Against Whitt*, 149 Wn.2d 707, 716, 72 P.3d 173 (2003). While we "do[] not lightly depart from the Board's recommendation," we are "not bound by it." *In re Disciplinary Proceeding Against Tasker*, 141 Wn.2d 557, 565, 9 P.3d 822 (2000). The court reviews conclusions of law de novo. *Whitt*, 149 Wn.2d at 716-17. We have "the inherent power to promulgate rules of discipline, *to interpret them,* and to enforce them." *In re Disciplinary Proceeding Against Stroh*, 97 Wn.2d 289, 294, 644 P.2d 1161 (1982) (emphasis added); *see also* ELC 2.1 (recognizing this court's "inherent power to maintain appropriate standards of professional conduct").

[6] P17 *Applicability of RPC 4.2(a)* to Lawyer Acting Pro Se. RPC 4.2(a) reads in full as follows:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized **[***12]** by law to do so.

[*334] The rule is virtually identical to model rule 4.2. *See* ABA, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (5th ed. 2003)(ABA ANNOTATED MODEL RULES) rule 4.2. While we have not formally adopted the commentary to the ABA *Annotated Model Rules,*we have noted that it "may be 'instructive in exploring the underlying policy of the rules.'" *In re Disciplinary Proceeding Against Carmick*, 146 Wn.2d 582, 595, 48 P.3d 311 (2002) (quoting *State v. Hunsaker*, 74 Wn. App. 38, 46, 873 P.2d 540 (1994)). As the comment to model rule 4.2 explains, the rule aims to protect those represented by counsel "against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation." [5] **[**1267]** In *Carmick,* we acknowledged that "[t]he rule's purpose is to prevent situations in which a represented party is taken advantage of

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[4] None of Coresoft's shareholder/directors are complaining parties in this disciplinary matter. The grievance was filed by Highland after Haley initiated the litigation described in count 2.

[5] ABA, ANNOTATED MODEL RULES rule 4.2 cmt. 1, at 417. The annotation to model rule 4.2 summarizes that "Rule 4.2 preserves the lawyer-client relationship, protects clients against overreaching by other lawyers, and reduces the likelihood that clients will disclose confidential or damaging information." *Id.* at 418 (citing ABA Formal Ethics Op. 95-396 (1995)).

by adverse counsel." 146 Wn.2d at 597 (citing *Wright v. Group Health Hosp*., 103 Wn.2d 192, 197, 691 P.2d 564 (1984)).

[*13]** P18 At issue in the present case is whether RPC 4.2(a) applies to lawyers acting pro se -- or, more precisely, whether a lawyer who is representing himself or herself is, in the words of RPC 4.2(a), "representing a client." This court has not previously addressed this issue; nor has the WSBA issued an ethics opinion, formal or informal, on the question. Other jurisdictions that have considered the rule's applicability to lawyers acting pro se have generally concluded that the policies underlying the rule are better served by extending the restriction to lawyers acting pro se. *See In re Segall*, 117 Ill. 2d 1, 5-6, 509 N.E.2d 988, 109 Ill. Dec. 149 (1987); *Comm. on Legal Ethics v. Simmons*, 184 W. Va. 183, 185, 399 S.E.2d 894 (1990); *Sandstrom v. Sandstrom*, 880 P.2d 103, 108-09 (Wyo. 1994); *Runsvold v. Idaho State Bar*, 129 Idaho 419, 420-21, 925 P.2d 1118 **[*335]** (1996); *Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241, 259 (Tex. Ct. App. 1999); *In re Discipline of Schaefer*, 117 Nev. 496, 507-08, 25 P.3d 191 (2001).

P19 Haley asks this court to take the contrary view and hold that the plain meaning **[***14]** of the word "client" in RPC 4.2(a) precludes application of the rule to a lawyer acting pro se. The word "client" is variously defined as "(a) person or entity that employs a professional for advice or help in that professional's line of work," BLACK'S LAW DICTIONARY 271 (8th ed. 2004), and "a person who engages the professional advice or services of another." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 422 (2002). Thus, for the rule to apply to lawyers acting pro se, such lawyers would, in effect, be employing or engaging themselves for advice, help, or services. This, as Haley contends, suggests that lawyers who are acting pro se are excluded from the scope of the rule because such lawyers have no client.

P20 In the alternative, Haley maintains that, even if RPC 4.2(a) were construed to restrict pro se lawyers from contacting represented parties, we should conclude that the rule as applied to him, a lawyer proceeding pro se, was unconstitutionally vague, violating his constitutional due process rights. Such a resolution finds support in *Schaefer*, 117 Nev. 496. There, the Nevada State Supreme Court relied on the principle that "a statute or **[***15]** rule is impermissibly vague if it 'either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Id*. at 511 (quoting *Connally v. Gen. Constr. Co*., 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)). [6] The **[*336]** *Schaefer* court based its determination that Nevada's Supreme Court Rule 182, a rule identical to RPC 4.2(a), was unconstitutionally vague on "the absence of clear guidance" from the Nevada State Supreme Court and on "the existence of conflicting authority from other jurisdictions." 117 Nev. at 512; *see State Bar of Tex. v. Tinning*, 875 S.W.2d 403, 408 (Tex. App. 1994) **[**1268]** (applying standard that "statute, rule, regulation, or order is fatally vague only when it exposes a potential actor to some risk or detriment without giving fair warning of the nature of the proscribed conduct"); *see also In re Ruffalo*, 390 U.S. 544, 552, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968) (holding that, in state disbarment proceeding, "absence of fair notice as to the reach of the grievance procedure" violated attorney's **[***16]** due process rights).

P21 Both factors relied on in *Schaefer* are present here. First, as noted above, no prior opinion of this court has addressed the application of RPC 4.2(a) to lawyers proceeding **[***17]** pro se. Second, in late 1996 and early 1997 when Haley contacted Highland, authority permitting such contacts counterbalanced the prohibitions then existing from four jurisdictions. *See Segall*, 117 Ill. 2d at 5-6 (1987); *Simmons*, 184 W. Va. at 185; *Sandstrom*, 880 P.2d at

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[6] The dissent recalls that in *Haley v. Medical Disciplinary Board*, 117 Wn.2d 720, 818 P.2d 1062 (1991), we cited *Connally* but nevertheless "affirmed sanctions against a physician for violating a statute prohibiting '"moral turpitude"' although we recognized 'uncertainties associated with' the statutory language in question." Dissent at 353 (quoting *Haley*, 117 Wn.2d at 740). The dissent fails to acknowledge, however, that more recently in *In re Disciplinary Proceeding Against Halverson*, 140 Wn.2d 475, 998 P.2d 833 (2000), this court distinguished Haley and declined to find a violation of RLD 1.1 ("Commission of Act of Moral Turpitude") because "a bright-line rule prohibiting attorney-client sexual relations [did] not exist." *Id*. at 491-92.

108-09; *Runsvold*, 129 Idaho at 420-21. [7] The comment to rule 2-100 of the California RPC, a rule identical to RPC 4.2(a) in all material respects, explicitly permits a lawyer proceeding pro se to contact a represented party:

> [T]he rule does not prohibit a [lawyer] who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party. Such a member has independent rights as a party which should not be abrogated because of his or her professional status. To prevent any possible abuse in such situations, the counsel for the opposing party may advise that party (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.

[*337] Cal. RPC 2-100 discussion P2. Likewise, a comment **[***18]** to the restatement specifically provides that "[a] lawyer representing his or her own interests pro se may communicate with an opposing represented nonclient on the same basis as other principals." RESTATEMENT (THIRD) OF THE LAW: THE LAW GOVERNING LAWYERS § 99 cmt. e at 73 (2000).

P22 Alongside these explicit statements permitting the questioned contact, other authorities supported a reasonable inference that our RPC 4.2(a) did not foreclose a pro se lawyer's communication with a represented opposing party. For example, the comparable rule in Oregon, DR 7-104(A)(1), put lawyers acting pro se squarely within the rule's ambit:

> (A) During the course of the lawyer's representation of a client, a lawyer shall not:
>
> (1) Communicate or cause another to communicate . . . with a person the **[***19]** lawyer knows to be represented by a lawyer. . . . *This prohibition includes a lawyer representing the lawyer's own interests.*

[8] **[***21]**

The absence of an explicit prohibition in RPC 4.2(a) could have suggested that Washington's rule was narrower in scope than Oregon's and did not apply to lawyers acting pro se. Additionally, the commentary to model rule 4.2 includes the statement that "[p]arties to a matter may communicate directly with each other." ABA, ANNOTATED MODEL RULES rule 4.2 cmt. 4, at 417. Unlike the commentary to the restatement and to California's RPC 2-100, this comment does not pointedly refer to a lawyer-party acting pro se; consequently, the breadth of the statement permits an inference that all parties may communicate unreservedly with each other. Finally, the holding in *Pinsky v. Statewide Grievance Committee*, 216 Conn. 228, 578 A.2d 1075 (1990), appears to call into question the policy concerns supporting the **[**1269]** application **[*338]** of RPC 4.2(a) to lawyers acting pro se. In *Pinsky,* the Connecticut State Supreme Court concluded that a represented lawyer-party had not violated an identical version of RPC 4.2(a) when he directly contacted his landlord, **[***20]** who was also represented by counsel, during an eviction matter. The *Pinsky* court took note that "(c)ontact between litigants . . . is specifically authorized by the comments under rule 4.2" and concluded that Pinsky was not "'representing a client'" as stated in the rule. *Id*. at 236. The *Pinsky* court thus determined that communication between a represented lawyer-party and a represented nonlawyer party did not conflict with a key purpose of RPC 4.2(a)-- the protection of a represented nonlawyer party from "possible overreaching by other lawyers who are participating in the matter." ABA, ANNOTATED MODEL RULES rule 4.2 cmt. 1, at 417. Because the *Pinsky* decision did not address why contacts from a lawyer acting pro

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[7] Looking no further than these four cases, the dissent ignores the counterbalancing authority found in rules, commentaries, and case law from other jurisdictions. Dissent at 352.

[8] *In re Conduct of Smith*, 318 Or. 47, 49 n.1, 861 P.2d 1013 (1993) (quoting DR 7-104(A)(1). Oregon's RPC 4.2 (adopted effective Jan. 1, 2005) likewise makes explicit that the prohibition applies to lawyers acting pro se: "In representing a client *or the lawyer's own interests,* a lawyer shall not communicate . . . with a person the lawyer knows to be represented by a lawyer. . . ." (Emphasis added.)

se would pose a greater threat of overreaching than would contacts from a represented lawyer-party, [9] *Pinsky* provides further equivocal authority on the application of RPC 4.2(a) to lawyers acting pro se.

[7] P23 In sum, consistent with the resolution of the same issue in *Schaefer* we hold that a lawyer acting pro se is "representing a client" for purposes of RPC 4.2(a), but given the absence of a prior decision from this court, along with the presence of conflicting or equivocal authority from other jurisdictions and legal commentaries, we find the rule impermissibly vague as to its applicability to pro se attorneys and thus apply our interpretation of the rule prospectively only. [10] We therefore dismiss the violation alleged in **[*339]** count 2. We need not reach Haley's alternative contention that the application of RPC 4.2(a) to his communications with Highland violated his free speech rights.

[*22]** [8] [9] [10] P24 *Sanction Analysis for Violation of RPC 1.7* Our court has determined that the ABA *Standards* should guide our determination of appropriate sanctions in bar disciplinary cases. *In re Disciplinary Proceeding Against Johnson*, 114 Wn.2d 737, 745, 790 P.2d 1227 (1990); *In re Disciplinary Proceeding Against Halverson*, 140 Wn.2d 475, 492, 998 P.2d 833 (2000). Under the ABA *Standards,* after misconduct is found, the court performs a two-part analysis. *Halverson*, 140 Wn.2d at 492-93. First, the court determines the presumptive sanction based on the ethical duty violated, the attorney's mental state, and the extent of actual or potential harm caused by the conduct. *Id.* Second, the court considers aggravating and mitigating factors, which may alter the presumptive sanction or decrease or lengthen a suspension. *Id*. at 496; *see* ABA STANDARDS stds. 9.22, 9.32. The court will generally adopt the Board's recommended sanction unless the sanction departs significantly from sanctions imposed in other cases or the Board was not unanimous in its decision. *See In re Disciplinary Proceeding Against Kuvara*, 149 Wn.2d 237, 259, 66 P.3d 1057 (2003) **[***23]** (holding that the court would "retain the *Noble* factors of proportionality and degree of unanimity, but discard the remaining three as redundant due to the existence of similar provisions in the *Standards* and the ELC"); *In re Disciplinary Proceeding Against Noble*, 100 Wn.2d 88, 95-96, 667 P.2d 608 (1983) (identifying five factors to be considered in determining appropriate sanction).

[1270]** [11] [12] P25 The determination of the presumptive sanction is straightforward. Haley concedes that his dual representation of Coresoft and Star Software was prohibited by RPC 1.7(a) and his representation of Coresoft was materially limited under RPC 1.7(b) by his own interest in **[*340]** foreclosing on his security interest and transferring Coresoft's assets to Star Software. Therefore, we look to the presumptive sanctions for conflict of interest violations under RPC 1.7:

> Suspension is generally appropriate when a lawyer *knows of a conflict of interest* and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.
>
> Reprimand is generally appropriate when a lawyer is *negligent in determining whether the representation **[***24]** of a client may be materially affected* by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.

ABA STANDARDS stds. 4.32, 4.33 (emphasis added). As to Haley's mental state, the hearing officer concluded that Haley "could not have reasonably believed that the representation of his own interests as a secured party (if, indeed, he was a secured party) or that his role as lawyer for, officer of, and shareholder of Star Software were not directly adverse to, or materially limited by his responsibilities to Coresoft." DP at 47. Haley offers no argument that

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[9] That a lawyer-party seeks representation may at least suggest that he or she does not have "the superior knowledge and skill of the opposing lawyer" in the subject of the litigation, a circumstance that would arguably diminish the risk of overreaching in the represented lawyer-party's contacts with other represented parties. *Pinsky*, 216 Conn. at 236.

[10] We join the dissent's rejection of "the position taken by Justice Sanders in his concurring opinion that attorney discipline is a punishment scheme and therefore is subject to the rule of lenity -- a criminal law doctrine." Dissent at 354. As we stated in *In re Disciplinary Proceeding Against Noble*, 100 Wn.2d 88, 667 P.2d 608 (1983), "because we are committed to the proposition that discipline is not imposed as punishment for the misconduct, then our primary concern is with protecting the public and deterring other lawyers from similar misconduct." *Id*. at 95.

he failed to recognize that the conflicts of interest existed, and the conclusion by the Board and hearing officer that Haley knew there was a conflict is well supported by the record. In particular, Haley went to members of Coresoft's board of directors for oral authorization regarding some of his actions. It is also undisputed that Haley's actions created the potential for harm to Coresoft and its shareholder/directors. Consequently, Haley is subject to standard 4.32, which makes suspension the presumptive sanction when a lawyer **[***25]** knows of a conflict and causes potential injury to a client. [11]

[*341] P26 Having determined that suspension is the presumptive sanction under the ABA *Standards,* we next turn to the aggravating and mitigating factors under standards 9.22 and 9.32. The hearing officer determined that three aggravating factors were present: a prior disciplinary offense, multiple offenses, and substantial experience in practice. *See* ABA *Standards* stds. 9.22(a), (d), (i). The hearing officer identified as mitigating factors Haley's cooperative **[***26]** attitude and the substantial delay in the proceedings. *See id.* at stds. 9.32(e), (j).

[13] P27 As an initial matter, we note that the "prior disciplinary offense" aggravating factor is no longer present given our resolution of the RPC 4.2(a) issue. In finding that Haley had a prior disciplinary offense, the hearing examiner relied on an unrelated violation of RPC 4.2(a) for which Haley was censured in 1999. The conduct underlying that violation occurred in March 1996, and the subsequent grievance was filed sometime before May 10, 1996, when it was reported to Haley. *See* Ex. 27. Conversely, the findings of fact indicate that Highland's grievance against Haley relating to the violation of RPC 1.7 could not have been made to the WSBA earlier than July 1996. *See* DP at 68 (noting the two grievances leading to this matter were filed in July 1996 and February 1997). We have previously held that an after-the-fact offense operates as a prior offense for aggravating factor purposes as long as the lawyer knew he or she was under investigation for the older offense when committing the more recent offense. *Brothers*, 149 Wn.2d at 586. However, that holding has no application **[***27]** in this case because nothing in the record suggests that **[**1271]** Haley was under investigation for the RPC 1.7 violation when the so-called "prior offense" (Haley's March 1996 violation of RPC 4.2) occurred. As a result, we are left to consider only the two remaining mitigating and aggravating factors.

[14] P28 The mitigating factors present in this case, in particular the delay in the disciplinary proceedings, are significant enough to justify altering the presumptive sanction. In *Tasker,* this court found the delay in prosecution "so substantial" and "so compelling" as to reduce the presumptive **[*342]** sanction from disbarment to a two-year suspension. 141 Wn.2d at 570. Tasker's violations occurred and began to be investigated by the WSBA in 1993-1994. *Id*. at 561-62. However, the WSBA's formal complaint against Tasker was not filed until February 1998. *Id*. at 562. In relying on delay as the factor tipping the balance toward suspension, the court recognized that Tasker did not cause the delay, that he was subject to the opprobrium of his legal community in the interim, and that the delay resulted from understaffing and slack prosecution by the WSBA. *Id*. at 568. **[***28]** Here, Haley's violation of RPC 1.7 occurred in 1990-1991 but was not reported to the WSBA until July 1996. The formal complaint was not filed until November 21, 2000. Thus, the delay between the grievances and formal complaint in both *Tasker* and this case spanned approximately four years. We must also take note that the substantial delay between Haley's violations and the grievance have now resulted in a near 15-year delay in resolving this case, which weighs heavily in favor of altering the presumptive sanction. [12]

[15] P29 In contrast to the substantial delay factor, the two remaining aggravating factors are relatively insignificant in this case. First, the "substantial experience in practice" aggravating factor **[***29]** is not marked by an exceedingly long period of prior practice. Haley became a member of the Washington bar in 1979 and began practicing law in 1982. Thus, at the time of the violation of RPC 1.7, Haley had been in practice approximately 8 to

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[11] Haley does contend that the Board erred in concluding that his violation of RPC 1.7 was done knowingly, suggesting that he was merely negligent in failing to obtain written consent rather than oral consent. This argument is without merit. There is no intent element related to obtaining informed written consent, which either exists or does not. If written consent does exist, there is simply no violation of the RPCs, and the ABA *Standards* for imposing discipline are inapplicable.

[12] Haley agreed not to present argument regarding the "substantial delay" factor in consideration for an extension of time before review by the Board. Clerk's Papers at 371. However, substantial delay is an unchallenged finding by the hearing officer, and this court remains free to consider its effect.

10 years. Second, the "multiple offenses" aggravating factor is largely obviated by our holding that Haley did not violate RPC 4.2(a). Instead, we are left only with the hearing officer's finding that "each count itself reflects multiple events constituting misconduct." DP at 67. While Haley's violation of RPC 1.7(a) and (b) occurred more than once during his representation of Coresoft between 1988 and 1991, we cannot **[*343]** conclude that this fact weighs strongly against altering the presumptive sanction.

[16] P30 After establishing the presumptive sanction and weighing the mitigating and aggravating factors, we consider whether, in light of the two remaining *Noble* factors of proportionality and Board unanimity, the Board's recommendation should be altered. *Kuvara*, 149 Wn.2d at 259; *Noble*, 100 Wn.2d at 95-96. We are not persuaded that a downward departure from the presumptive sanction of suspension would be disproportionate **[***30]** under these circumstances. As to unanimity, the Board was split as to the RPC 1.7 violation, with an 11-member majority recommending suspension and 2 dissenting members recommending reprimand. In considering the unanimity of the Board, we give less deference to the decision of a divided board. *Whitt*, 149 Wn.2d at 723. Although the division was not especially marked in this case, the lack of unanimity supports altering the presumptive sanction from suspension to reprimand. In sum, the substantial weight of the mitigating factors over the aggravating factors, along with the considerations required by the two *Noble* factors, leads us to conclude that reprimand rather than suspension is the appropriate sanction for Haley's violation of RPC 1.7.

CONCLUSION

P31 We hold that RPC 4.2(a) prohibits a lawyer who is representing his own interests **[**1272]** in a matter from contacting another party whom he knows to be represented by counsel. However, because we conclude that RPC 4.2(a) was impermissibly vague as applied to Haley, we apply our interpretation of RPC 4.2(a) prospectively only and thus dismiss count 2 in the complaint. We further conclude that, although the presumptive sanction **[***31]** for Haley's knowing violation of RPC 1.7 is suspension, the mitigating factors, in particular the extensive delay in both reporting and prosecution, demand a more lenient sanction. We therefore depart from the Board's recommendation of a six-month **[*344]** suspension and impose a reprimand for Haley's violation of RPC 1.7.

C. Johnson, Bridge, Chambers, and J.M. Johnson, JJ., concur.

Concur by: MADSEN; SANDERS

Concur

P32 MADSEN, J. (concurring) -- I agree with part one of Justice Sanders' concurrence. This court currently has a new set of RPCs pending before it. Because I agree with the majority that the better policy is to include self-represented lawyers within the prohibition of RPC 4.2(a), I would revise that rule in conjunction with the review of the RPCs and avoid the issue of prospectivity.

P33 SANDERS, J. (concurring) -- The majority holds that self-represented lawyers are "representing a client" under RPC 4.2(a) and therefore may not contact a represented party. But it refrains from sanctioning Haley, implicitly holding that the scope of RPC 4.2(a) is ambiguous. I concur only in the result, because the majority incorrectly construes RPC 4.2(a). The plain language of RPC 4.2(a) exempts self-represented lawyers. And the rule of lenity requires strict and narrow construction **[***32]** of an ambiguous penal statute. We must apply RPC 4.2(a) prospectively just as we apply it today.

I. THE PLAIN LANGUAGE OF RPC 4.2(a) PERMITS SELF-REPRESENTED LAWYERS TO CONTACT REPRESENTED PARTIES

P34 Court rules like the Code of Professional Responsibility "are subject to the same principles of construction as are statutes." *In re Disciplinary Proceeding Against McGlothlen*, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983). Thus, when interpreting a rule we give "the words their ordinary meaning, reading the language as a whole and seeking to give effect to all of it." *Heinemann v. Whitman County Dist. Court*, 105 Wn.2d 796, 802, 718 P.2d 789 (1986). If the

plain language of the rule is unambiguous, additional interpretation is unnecessary. *See Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 815, **[*345]** 947 P.2d 721 (1997); *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682-87, 80 P.3d 598 (2003).

P35 The plain language of RPC 4.2(a) unambiguously exempts self-represented lawyers. "*In representing a client,* a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless **[***33]** the lawyer has the consent of the other lawyer or is authorized by law to do so." RPC 4.2(a) (emphasis added). A "client" is "a person who consults or engages the services of a legal advisor," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 422 (2002), or a "person or entity that employs a professional for advice or help in that professional's line of wort." BLACK'S LAW DICTIONARY 271 (8th ed. 2004). In other words, a "client" is a *third party* who engages a lawyer. Because self-represented lawyers have no client, *see Somers v. Statewide Grievance Comm.*, 245 Conn. 277, 287, 715 A.2d 712 (1998), under RPC 4.2(a) they may contact a represented party.

P36 The majority concedes that RPC 4.2(a) applies only when a lawyer is "representing a client" but nonetheless construes it to cover self-represented lawyers. Majority at 338. Apparently, the majority concludes that self-represented lawyers are "employing or engaging themselves for advice, help, or services." *Id.* at 335.

P37 This ingenious bit of legal fiction illustrates the wisdom of avoiding interpretations "conceivable in the metaphysical sense" when the plain language of a statute "is both **[**1273]** necessary and sufficient." *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005). **[***34]** Assuming that a self-represented lawyer represents a "client" certainly produces the majority's preferred outcome. Unfortunately, it does so only at the expense of coherence. Lawyers cannot retain themselves any more than *pro se* litigants can claim legal malpractice or ineffective assistance of counsel. *See, e.g.*, *Faretta v. California*, 422 U.S. 806, 834 n.46, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) (holding that "a defendant who elects to represent himself cannot thereafter complain **[*346]** that the quality of his own defense amounted to a denial of 'effective assistance of counsel'"); *State v. DeWeese*, 117 Wn.2d 369, 379, 816 P.2d 1 (1991); *Gall v. Parker*, 231 F.3d 265, 320 (6th Cir. 2000). Undoubtedly, wise lawyers follow their own counsel. But it is a neat trick indeed to advise oneself.

P38 The majority's claim to follow an emerging majority rule is unavailing. Indeed, it cites decisions from six states concluding that self-represented lawyers are their own clients. *See In re Segall*, 117 Ill. 2d 1, 509 N.E.2d 988, 109 Ill. Dec. 149 (1987); *Comm. on Legal Ethics v. Simmons*, 184 W. Va. 183, 399 S.E.2d 894 (1990); **[***35]** *Sandstrom v. Sandstrom*, 880 P.2d 103 (Wyo. 1994); *Runsvold v. Idaho State Bar*, 129 Idaho 419, 925 P.2d 1118 (1996); *Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241 (Tex. App. 1999); *In re Discipline of Schaefer*, 117 Nev. 496, 25 P.3d 191 (2001). But none offers any more convincing a rationale for this curious conclusion than the majority. Conclusory statements cannot substitute for legal reasoning, and another court's error cannot justify our own.

P39 Likewise, the majority's reliance on the "purpose" of RPC 4.2(a) is misplaced. As the author of the court rules, we are "in a position to reveal the actual meaning which was sought to be conveyed." *Heinemann*, 105 Wn.2d at 802. But in the interest of certainty and consistency, we approach them "as though they had been drafted by the Legislature." *Id.* Whatever the purpose of RPC 4.2(a), it cannot extend to persons and actions its plain language excludes. We may not expand the scope of a rule by fiat. If we conclude that self-represented lawyers should not contact represented parties, we should simply rewrite the rule to clearly prohibit that conduct. **[***36]** Other states have already done so. *Compare* CAL. R. PROF. COND. 2-100 discussion § 2 (explicitly permitting self-represented lawyers to contact represented parties) *with In re Conduct of Smith*, 318 Ore. 47, 53 n.5, 861 P.2d 1013 (1993) (noting that DR 7-102, Oregon's equivalent to RPC 4.2, "was amended effective January 1991, to add the phrase, 'or in representing the lawyer's **[*347]** own interests'"). Lawyers should not have to read slip opinions to divine their professional obligations.

II. THE RULE OF LENITY REQUIRES A CONSTRUCTION OF RPC 4.2(a) EXEMPTING SELF-REPRESENTED LAWYERS

P40 Even assuming that the plain language of RPC 4.2(a) is somehow ambiguous, the rule of lenity requires a strict and narrow construction exempting self-represented lawyers. The rule of lenity is a venerable canon of statutory interpretation, requiring courts "to interpret ambiguous criminal statutes in the defendant's favor." *In re Pers. Restraint of Stenson*, 153 Wn.2d 137, 149 n.7, 102 P.3d 151 (2004). *See also United States v. Enmons*, 410 U.S. 396, 411, 93 S. Ct. 1007, 35 L. Ed. 2d 379 (1973) ("This being a criminal statute, it must be strictly construed, and any **[***37]** ambiguity must be resolved in favor of lenity."); *Bell v. United States*, 349 U.S. 81, 83, 75 S. Ct. 620, 99 L. Ed. 905 (1955) (holding "ambiguity should be resolved in favor of lenity"). While the Rules of Professional Conduct are only "quasi-criminal," *In re Discipline of Little*, 40 Wn.2d 421, 430, 244 P.2d 255 (1952), the rule of lenity applies to both criminal and quasi-criminal statutes. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982). The deciding factor is the nature of the sanction imposed.

P41 As a general rule, courts apply the rule of lenity to any statute imposing penal **[**1274]** sanctions. *See, e.g.*, *Kahler v. Kernes*, 42 Wn. App. 303, 308, 711 P.2d 1043 (1985) (applying rule of lenity to civil statute imposing penal sanction). "We are mindful of the maxim that penal statutes should be strictly construed." *United States v. Cook*, 384 U.S. 257, 262, 86 S. Ct. 1412, 16 L. Ed. 2d 516 (1966). *And see* Roberta S. Karmel, *Creating Law at the Securities and Exchange Commission: The Lawyer as Prosecutor,* **[***38]** 61 LAW & CONTEMP. PROBS. 33, 34 n.6 (1998) (noting that courts "have sometimes used the doctrine of lenity to interpret a statute narrowly in a civil case because the statute also has criminal sanctions"). A statute is penal if it "can be punished by imprisonment **[*348]** and/or a fine" and remedial if it "provides for the remission of penalties and affords a remedy for the enforcement of rights and the redress of injuries." *State v. Eilts*, 94 Wn.2d 489, 494 n.3, 617 P.2d 993 (1980).

P42 The Rules of Professional Conduct are penal because they concern punishing an offender, not compensating a victim. Professional discipline "is punitive, unavoidably so, despite the fact that it is not designed for that purpose." *Little*, 40 Wn.2d at 430. *See also In re Ruffalo*, 390 U.S. 544, 550, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968) (noting that disbarment "is a punishment or penalty imposed on the lawyer"); *In re Fordham*, 423 Mass. 481, 668 N.E.2d 816, 824 (1996) (stating that disciplinary sanctions constitute a punishment or penalty); *Stegall v. Miss. State Bar*, 618 So. 2d 1291, 1294 (Miss. 1993); *In re Disciplinary Proceeding Against Rentel*, 107 Wn.2d 276, 282, 729 P.2d 615 (1986); **[***39]** *Gay v. Va. State Bar*, 239 Va. 401, 389 S.E.2d 470 (1990) (referring to lawyer sanctions as "punishments"); *Comm. on Legal Ethics v. Hobbs*, 190 W. Va. 606, 439 S.E.2d 629, 634 (1993) (considering what steps would "appropriately punish" the attorney); *and People v. Senn*, 824 P.2d 822, 825 (Colo. 1992) (holding that "disciplinary proceedings supplement the work of the criminal courts to maintain respect for the rule of law and protect the public"). *See also Nguyen v. Dep't of Health*, 144 Wn.2d 516, 525, 29 P.3d 689 (2001) (characterizing medical discipline as "quasi-criminal" and penal); *Commonwealth v. Lundergan*, 847 S.W.2d 729, 731 (Ky. 1993) (finding Kentucky's Legislative Ethics Act a "penal statute" to which "the 'rule of lenity' is applicable"); Julie Rose O'Sullivan, *Professional Discipline for Law Firms? A Response to Professor Schneyer's Proposal,* 16 GEO. J. LEGAL ETHICS 1, 14 (2002) (noting that "disciplinary proceedings seek many of the aims of criminal law and employ similarly punitive and stigmatizing penalties"). While the "purpose of disciplining an attorney is not **[***40]** primarily to punish the wrongdoer," *In re Disciplinary Proceeding Against Selden*, 107 Wn.2d 246, 253, 728 P.2d 1036 (1986) (emphasis added), punishment is an important **[*349]** purpose -- and a necessary consequence -- of professional discipline.

P43 Courts have long recognized that disbarment is "penal in its nature" and subject to the rule of lenity. *Moutray v. People*, 162 Ill. 194, 198, 44 N.E. 496 (1896) (holding statutes authorizing disbarment must be "strictly construed, and not extended by implication to things not expressly within their terms"). *See also Ruffalo*, 390 U.S. at 550-51 ("Disbarment . . . is a punishment or penalty imposed on the lawyer" involving "adversary proceedings of a quasi-criminal nature."); *Charlton v. Fed. Trade Comm'n*, 177 U.S. App. D.C. 418, 543 F.2d 903, 906 (1976)); *In re McBride*, 602 A.2d 626, 640-41 (D.C. 1992) (applying rule of lenity to statute governing disbarment). The same; holds for all other sanctions. "Because attorney suspension is a quasi-criminal punishment in character, any disciplinary rules used to impose this sanction on attorneys must be strictly construed resolving **[***41]** ambiguities in favor of the person charged." *United States v. Brown*, 72 F.3d 25, 29 (5th Cir. 1995); *In re Thalheim*, 853 F.2d 383, 388 (5th Cir. 1988).

P44 In his dissent, Chief Justice Alexander suggests that the Rules of Professional Conduct can tolerate a degree of vagueness. Dissent at 353-54. But RPC 4.2(a) is not vague. It is ambiguous. And the Rules of Professional Conduct certainly cannot tolerate ambiguity.

[1275]** P45 A statute is *ambiguous* if it "refers to *P, P* can alternatively encompass either *a* or *b,* and it is beyond dispute that the defendant did *a*" and *vague* if it "refers to *X,* but we cannot tell whether the disputed event is an *X.*" Lawrence M. Solan, *Law, Language, and Lenity,* 40 WM. AND MARY L. REV. 57, 62, 78 (1998). No one disputes what Haley did: While representing himself, he contacted a represented party. The only question is whether the term "representing a client" encompasses self-represented lawyers, as well as lawyers representing third parties. And if the term "representing a client" is "susceptible to more than one reasonable meaning," it is ambiguous. *City of Seattle v. Guay*, 150 Wn.2d 288, 300, 76 P.3d 231 (2003). **[***42]**

[*350] P46 Courts routinely apply the rule of lenity to ambiguous statutes. *See, e.g.*, *United States v. Granderson*, 511 U.S. 39, 114 S. Ct. 1259, 127 L. Ed. 2d 611 (1994) (applying lenity because statutory term ambiguous). *And see generally* Lawrence M. Solan, *supra,* at 117-20. And the rule of lenity is peculiarly appropriate to the Rules of Professional Conduct. We have recognized that "in a disciplinary proceeding, all doubts should be resolved in favor of the attorney." *In re Disciplinary Proceeding Against Krogh*, 85 Wn.2d 462, 483, 536 P.2d 578 (1975). *See also In re Discipline of Little*, 40 Wn.2d 421, 430, 244 P.2d 255 (1952). Because lawyers "are subject to professional discipline only for acts that are described as prohibited in an applicable lawyer code, statute, or rule of court," courts "should be circumspect in avoiding overbroad readings or resorting to standards other than those fairly encompassed within an applicable lawyer code." RESTATEMENT (THIRD) OF THE LAW: THE LAW GOVERNING LAWYERS § 5 cmts. b, c at 49, 50 (2000). *See also* Bruce A. Green, **[***43]** *The Criminal Regulation of Lawyers,* 67 FORDHAM L. REV. 327, 387 (1998) (suggesting "courts should be more accommodating of professional norms than the restatement contemplates" when interpreting ambiguous rules of professional conduct). Application of the rule of lenity reflects that caution. It demands that we adopt the stricter, narrower construction, excluding self-represented lawyers.

III. CONCLUSION

P47 The majority objects to the plain language of RPC 4.2(a) only because it believes that permitting self-represented lawyers to contact represented parties would violate the "purpose" of the rule. But the putative "spirit and intent" of a rule can trump only a "strained and unlikely" interpretation. *State v. Wittenbarger*, 124 Wn.2d 467, 485, 880 P.2d 517 (1994). And the plain language of RPC 4.2(a) is neither strained nor unlikely. It prohibits a lawyer representing a client -- but not a self-represented lawyer -- from contacting a represented party. As the majority concedes, **[*351]** several commentators and courts have found the plain language of essentially identical rules entirely unambiguous. Majority at 336-38. *See, e.g.*, *Pinsky v. Statewide Grievance Comm.*, 216 Conn. 228, 236, 578 A.2d 1075 (1990); **[***44]** CAL. R. PROF. COND. 2-100 discussion § 2; *and* RESTATEMENT (THIRD) OF THE LAW: THE LAW GOVERNING LAWYERS § 99 cmt. e at 73 (2000). We must not manufacture ambiguity and rely on legal fictions to arrive at a. preferred result. Especially when we may simply write that result into law.

P48 I therefore concur in result.

Dissent by: ALEXANDER

Dissent

P49 ALEXANDER, C.J. (dissenting) -- I agree; with the majority that RPC 4.2(a) prohibits lawyers who are representing themselves from communicating directly with opposing, represented parties unless they first obtain the consent of the parties' counsel. I disagree, however, with the majority's decision to limit application of this important rule to future violators. I know of no authority that supports imposition of a rule of professional conduct prospectively only. I believe, therefore, that this court should suspend Jeffrey Haley from the practice of law for his violation of RPC 4.2(a). The violation **[**1276]** is especially egregious in light of Haley's claim that he "studied the rule" before

directly contacting his opposing party, [13] and in view of the fact that he contacted the party a second time after the party's lawyer **[***45]** warned him that doing so would violate RPC 4.2(a). Because the majority concludes that Haley should not be subjected to discipline for a violation of RPC 4.2(a), I dissent.

P50 The majority correctly observes that among states considering the question with which we are here presented, **[*352]** the prevailing trend has been to apply RPC 4.2(a) to attorneys acting pro se, as was Haley, **[***46]** and not just to attorneys representing someone other than themselves. The majority acknowledges, additionally, that in late 1996 and early 1997, when Haley twice attempted to negotiate a settlement without going through the opposing party's lawyer, at least four jurisdictions already had concluded that RPC 4.2(a) prohibited such contacts. Yet none of the four jurisdictions mentioned by the majority applied the rule to pro se attorneys on a prospective basis only, as the majority does here. Rather, all four jurisdictions applied the rule to the facts before them, as this court should do. *See Runsvold v. Idaho State Bar*, 129 Idaho 419, 421, 925 P.2d 1118 (1996) (attorney reprimanded because Idaho's version of RPC 4.2(a) "applies to prevent the *pro se* attorney from directly contacting a represented opposing party"); *In re Segall*, 117 Ill. 2d 1, 6, 509 N.E.2d 988, 109 Ill. Dec. 149 (1987) ("A party, having employed counsel to act as an intermediary between himself and opposing counsel, does not lose the protection of the rule merely because opposing counsel is also a party to the litigation. Consequently, an attorney who is himself a litigant may be **[***47]** disciplined . . . when, as in the case at bar, he directly contacts an opposing party without permission from that party's counsel."); *Comm. on Legal Ethics v. Simmons*, 184 W.Va. 183, 185, 399 S.E.2d 894 (1990) (attorney suspended for six months); *Sandstrom v. Sandstrom*, 880 P.2d 103, 109 (Wyo. 1994) (district court did not err in applying RPC 4.2 to prohibit an attorney from contacting his wife during their divorce). These four opinions, all cited by the majority, are sound and make it clear that at the time Haley engaged in the prohibited conduct, the weight of authority supported the disciplining of violators and did not even hint at the prospective-only application embraced by the majority in this case. In shielding Haley from application of RPC 4.2(a), the majority borrows from the reasoning of the Nevada Supreme Court in *In re Discipline of Schaefer*, 117 Nev. 496, 25 P.3d 191 (2001). There, the Nevada court declined to punish an attorney's violation of the Nevada equivalent of **[*353]** RPC 4.2(a) because of (a) the "absence of clear guidance" from the court and (b) "conflicting authority from other jurisdictions" as to whether the **[***48]** rule applied to pro se attorneys. *Schaefer*, 117 Nev. at 512, 501. In effect, the majority establishes a new test: if there is any doubt about how a rule will be construed, a violator will not be punished. That is a dangerous message to send.

P51 Furthermore, whereas the *Schaefer* court relied on due process principles articulated by the United States Supreme Court in *Connally* [14] in applying the Nevada rule prospectively, it is worth noting that this court has never drawn from *Connally* the proposition that discipline is inappropriate just because a rule is being interpreted for the first time. In fact, in *Haley v. Medical Disciplinary Board*, 117 Wn.2d 720, 818 P.2d 1062 (1991), the only discipline case in which this court cited *Connally,* we affirmed sanctions against a physician for violating a statute **[**1277]** prohibiting "'moral turpitude"' although we recognized "uncertainties associated with" the statutory language in question. *Haley*, 117 Wn.2d at 740. Thus, this court has previously declined to interpret *Connally* in the way the Nevada court did in *Schaefer* and the majority does here -- as if professional license holders **[***49]** have a due process right to avoid discipline simply because a court is newly construing the rule in question. Such an interpretation will have far-reaching impact, as many discipline cases that come before this court raise an issue of construction. In declining to sanction Haley for violating RPC 4.2(a), despite the fact that Haley had "studied" the rule and should have known that the prevailing construction prohibited his conduct, the majority suggests that questionable conduct will be tolerated as long as there is no prior Washington court decision exactly on point.

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[13] *See* Br. of Resp't Lawyer at 16: "Before contacting Mr. Highland directly, I studied the rule. Being a person of common intelligence, I relied on the plain meaning of the rule." *See also* Reply Br. of Resp't Lawyer at 10: "Counsel for the Bar Association repeatedly asserts that I did no legal research or insufficient legal research on Rule 4.2. This position could not be more wrong. I read the rule with great care before I took action." Finally, on page 11 of his reply, Haley said, "I studied the rule and it was perfectly clear on the issue before me. Under modern rule of law, this meant that there was no reason to do more research."

[14] *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 322 (1926).

P52 We must remember that our purpose in disciplining attorneys is to "'protect the public and to preserve confidence in the legal system.'" *In re Disciplinary Proceeding* **[*354]** *Against Curran*, 115 Wn.2d 747, 762, 801 P.2d 962 (1990) (quoting *In re Disciplinary Proceeding Against Rentel*, 107 Wn.2d 276, 282, 729 P.2d 615 (1986)). **[***50]** In *Curran,* an attorney argued that he should not be punished for violating RLD 1.1(a) because, in forbidding actions that reflect "disregard for the rule of law," the rule was unconstitutionally vague. *Id*. at 758. This court said, "[W]e choose to give these words a narrowing construction. . . . This law is not so vague as to be unconstitutional, given this limiting construction." *Id.* We noted that "a statute will not be considered unconstitutionally vague just because it is difficult to determine whether certain marginal offenses are within the meaning of the language under attack." *Id*. at 759 (citing *Jordan v. DeGeorge*, 341 U.S. 223, 231, 71 S. Ct. 703, 95 L. Ed. 886 (1951)). This court suspended the attorney, Curran, saying, "Standards may be used in lawyer disciplinary cases which would be impermissibly vague in other contexts." *Id.* (citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 666, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985)) (Brennan, J., dissenting)). Just as we disciplined Curran there, despite uncertainty about the rule in question, so should Haley be disciplined for violating RPC 4.2(a) in order to "'protect the public and to preserve **[***51]** confidence in the legal system.'" *Curran*, 115 Wn.2d at 762 (emphasis omitted) (quoting *Rentel,* 107 Wn.2d at 282).

P53 *Curran* also weighs against the position taken by Justice Sanders in his concurring opinion that attorney discipline is a punishment scheme and therefore is subject to the rule of lenity -- a criminal law doctrine. We said in that case, "[T]he purposes of bar discipline do not precisely duplicate the purposes of the criminal law." *Curran*, 115 Wn.2d at 762 (citing *In re Disciplinary Proceeding Against Brown*, 97 Wn.2d 273, 275, 644 P.2d 669 (1982)). More notably, we have said numerous times that "punishment is not a proper basis for discipline." *Brown*, 97 Wn.2d at 275 (citing *In re Disciplinary Proceedings Against Purvis*, 51 Wn.2d 206, 223, 316 P.2d 1081 (1957)). In *In re Disbarment of Beakley*, 6 Wn.2d 410, 424, 107 P.2d 1097 (1940), we said:

> **[*355]** Neither disbarment nor suspension is ordered for the purpose of punishment, but wholly for the protection of the public. When a matter such as this comes before the court, the question presented is not: What punishment should be inflicted on this man? The question **[***52]** presented to each of its judges is simply this: Can I, in view of what has been clearly shown as to this man's conduct, conscientiously participate in continuing to hold him out to the public as worthy of that confidence which a client is compelled to repose in his attorney?

Thus, this court has long rejected the notion that attorney discipline is penal, and the concurrence cannot point to any discipline case in which, we have applied the rule of lenity to resolve ambiguity in the attorney's favor.

P54 In sum, because the purpose of attorney discipline is to protect the public, it is our duty to enforce RPC 4.2(a) in this case. **[**1278]** The majority provides no authority for applying RPC 4.2(a) to pro se attorneys prospectively only. I would apply the rule to Haley and suspend him for six months.

Fairhurst, J., concurs with Alexander, C.J.

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STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

In re: Thomas Melone
PRB File No. 120-2025

CONFLICT DISCIPLINARY COUNSEL'S OBJECTION TO THOMAS MELONE'S *MOTION FOR PERMISSION TO APPEAL*

The Hearing Panel should deny Thomas Melone's *Motion for Permission to Appeal*.

Memorandum

I. Introduction

On September 5, 2025, after obtaining a finding of probable cause, I filed a *Petition of Misconduct* (Petition) against Thomas Melone alleging a substantial number of violations of the Vermont Rules of Professional Conduct.

In response to the Petition, Mr. Melone has filed almost 500 pages of pleadings, repeatedly asserting that either the Hearing Panel or the Supreme Court should dismiss the Petition and the Rules of Professional Conduct do not apply to the conduct described in the Petition.

Mr. Melone's many motions include a *Verified Complaint for Extraordinary Relief* (164 pages) filed in the Vermont Supreme Court on October 23, 2025 asking that the Petition be dismissed. On October 30, 2025, the Supreme Court issued a one sentence ruling dismissing Mr. Melone's *Verified Complaint for Extraordinary Relief* stating it failed to satisfy the criteria under Vermont Rule of Appellate Procedure 21. Undeterred, Mr. Melone filed a *Motion for Clarification* in the Supreme Court on November 2, 2025. On November 5, 2025 the Supreme Court issued an order which said, in full: "Petitioner's motion to clarify is denied." Still

undeterred, on December 15, 2025, Mr. Melone filed a *Motion for Permission to Appeal* (50 pages) with the Hearing Panel.

In his *Motion for Permission to Appeal*, Mr. Melone argues that before the Hearing Panel hears the evidence, the Supreme Court should determine whether he was "not representing a client"[1] and whether various "rules"[2] [emphasis added] do not apply because, according to him, he appeared pro se. In very large part, the *Motion for Permission to Appeal* makes the same arguments Mr. Melone made, and the Supreme Court denied, in his *Verified Complaint for Extraordinary Relief*.

II. Interlocutory Appeals from A Hearing Panel to the Vermont Supreme Court

In proceedings in the Professional Responsibility Program, in very limited circumstances, the Vermont Supreme Court may hear all or part of case before the Hearing Panel has entered a final order. However, the Supreme Court greatly disfavors piecemeal appeals and, as a result, there are only three very narrow ways to transfer a legal question from the Hearing Panel to the Supreme Court. First, under V.R.A.P. 5(a)(1), the parties and the Hearing Panel may stipulate to an interlocutory appeal. Second, under V.R.A.P. 5(b)(2), a party may move for permission to appeal. Finally, under V.R.A.P. 5.1, when there is a "collateral final order" involving a controlling question of law, and there are substantial grounds for a difference opinion, the Hearing Panel may grant a party's motion for an interlocutory appeal. In all three circumstances, interlocutory appeal is allowed only if the appeal will materially advance the termination of the litigation.

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[1] *Respondent's Motion for Permission to Appeal*, p. 1.

[2] *Id.*, p. 1.

A. V.R.A.P. 5(a)(1)

V.R.A.P. 5(a)(1) allows disciplinary counsel, the respondent and the Hearing Panel to agree that a legal question in the case merits immediate appellate review because "the Supreme Court's disposition would finally dispose of the action in at least one alternative." There is no such agreement in this case. As a result, the Hearing Panel may not certify a question of law to the Supreme Court before the entry of a final order.

B. V.R.A.P. 5(b)(1)

In the absence of a stipulation, if a moving party demonstrates to a hearing panel that there is a controlling question of law about which there exists a substantial ground for a difference of opinion, and an immediate appeal will materially advance the termination of the litigation, a hearing panel may grant a motion for permission to appeal.

C. V.R.A.P. 5.1

Finally, the collateral order doctrine, recognized in V.R.A.P. 5.1(a)(1), is an exception to the general rule barring interlocutory appeals. The doctrine traces its origins to Cohen v. Beneficial Indust. Loan Corp., 337 U.S. 541 (1949). The doctrine is narrow, and only allows appeals to resolve crucial, separable issues that would be lost if the appellant had to wait for the entire case to end. For example, decisions on qualified immunity or double jeopardy sometimes come within the collateral order doctrine. In order to qualify, the appeal must conclusively determine a disputed question, be separate from the main case's merits, and be unreviewable later.

III. Mr. Melone's *Motion for Permission to Appeal*

Mr. Melone's *Motion for Permission to Appeal* fails to state whether his motion is based

on V.R.A.P. 5(a)(1), V.R.A.P. 5(b)(1) or V.R.A.P. 5.1.

Likewise, his motion never addresses the fact that he made the same arguments in his *Verified Complaint for Extraordinary Relief*, and the Supreme Court refused to consider those arguments.

In the absence of clarity from Mr. Melone, I assume that he does not rely on V.R.A.P. 5(a)(1) because there is no stipulation, and he does not rely on V.R.A.P.5.1 because he does not assert there is a collateral final order. As result, I assume that Mr. Melone's motion is based on V.R.A.P. 5(b)(1).

IV. Mr. Melone's *Motion for Permission to Appeal* Only Address the No Contact Rule, V.R.Pr.C. 4.2

Mr. Melone asserts there is a controlling question of law about which there exists a substantial ground for a difference of opinion. He asserts that there is a "fundamental and controlling question of whether certain rules [emphasis added] apply when Respondent is not representing a client."[3]

However, it is important to note that Mr. Melone only cites cases or authorities which discuss the no contact rule set forth in V.R.Pr.C. 4.2. In his 50 page motion, he cites no cases or authorities regarding any other Rule of Professional Conduct.

V. Mr. Melone Represented Various Business Organizations and Was Not Pro Se

A corporation or a limited liability company is a distinct person, separate from its owners. Business organizations own assets, incur debts, enter into contracts and can be taxed independently from their owners. Business organizations provide owners with limited liability

[3] *Id.*, p. 1.

and, in many instances, continue beyond their owners' lives. The entire purpose of Mr. Melone's more than 80 limited liability companies was to limit his personal liability by creating separate legal persons. We can be sure that if a judgment creditor of one Mr. Melone's limited liability companies asserted that Mr. Melone was personally liable for a judgement against one of his limited liability companies, Mr. Melone would object and say he was separate from the company. In the actions which resulted in the Petition, Mr. Melone did not represent himself, he represented a variety of limited liability corporations, all of which are legal persons separate and distinct from Mr. Melone.

VI. Even if Mr. Melone Was Pro Se, There Is Not Substantial Ground for a Difference of Opinion as to Whether the No Contact Rule Applies to Pro Se Attorneys

All but one of the courts which have considered the question of whether the no contact rule applies to a pro se attorney have ruled that it does. See In re Steele, 181 N.E.3d 976, 980 (Ind. 2022) (holding a pro se lawyer is subject to the no-contact rule); In re Disciplinary Action Against Lucas, 789 N.W.2d 73, 76 (N.D. 2010) ("Most courts have held Rule 4.2 applies to attorneys representing themselves because it is consistent with the purpose of the rule."); In re Disciplinary Action Against Haley, 126 P.3d 1262, 1269 (Wash. 2006) ("We hold that RPC 4.2(a) prohibits a lawyer who is representing his own interests in a matter from contacting another party whom he knows to be represented by counsel"); In re Discipline of Schaefer, 25 P.3d 191, 199 - 200 (Nev. 2001) ("[T]he purposes of the rule are better served by applying it to lawyers who are representing themselves."); Runsvold v. Idaho State Bar, 925 P.2d 1118, 1120 (Id. 1996) ("[W]e hold that a pro se lawyer/litigant does represent a client when representing himself or herself in a matter; thus, I.R.P.C. 4.2 applies to prevent the pro se attorney from

directly contacting a represented opposing party"); Sandstrom v. Sandstrom, 880 P.2d 103 (Wyo. 1994) (same); In re Segall, 509 N.E.2d 988, 990 (Il. 1987) (same); *see also*, Medina Cnty. Bar Ass'n v. Cameron, 958 N.E.2d 138, 140 - 41, 141 n.1 (Ohio 2011) (stating, in dicta, that a pro se lawyer is subject to the no-contact rule); Ruth v. Comm'n for Law. Discipline, 696 S.W.3d 233, 238 - 39 (Tex. App. 2024), *review granted* June 20, 2025.

The sole exception to the near uniform case law is Pinsky v. Statewide Grievance Comm., 578 A.2d 1075, 1079 (Conn. 1990) which held that the no-contact rule did not apply when the lawyer was representing himself.

At this point, I am required to note that Mr. Melone's comments regarding the cases on the no contact rule are inaccurate and grossly overstated. For instance, he cites In re Disciplinary Action Against Haley in support of his position.[4] In fact, in Washington, a pro se lawyer who directly communicates with an opposing party has been subject to discipline since 2006. The fact that almost twenty years ago the Washington Supreme Court decided to "apply our interpretation of the rule prospectively"[5] does not obscure the fact that every court that has addressed this question since Pinsky did so in 1990 has ruled against the argument made by Mr. Melone.

Similarly, Mr. Melone cites ABA Comm. On Ethics & Pro. Resp., Formal Op. 22-502 (2022) in support of his position. However, in Formal Opinion 22-502, the ABA Ethics Committee determined "the language of the Rule and its established purposes lead to the conclusion that the Rule applies to pro se lawyers."[6] It went on to say that "[t]here are decades

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4 *Id.*, p. 5.

5 Haley, at 338.

6 Formal Op. 22-502 (2022), p. 1.

worth of disciplinary cases, civil cases and ethics opinions concluding that a lawyer acting in a pro se capacity may not communicate directly with a represented adversary or other represented person about the subject of the representation without the consent of that person's lawyer, unless the communication is authorized by law or court order."[7] The committee reasoned that "[p]ro se lawyers represent themselves as 'a client,' and direct pro se lawyer-to-represented person communication in such circumstances can result in a substantial risk of overreaching, disruption of the represented person's client-lawyer relationship, and acquisition of uncounselled disclosures."[8] The fact that one member of the committee dissented from this opinion does not mean a substantial ground for a difference of opinion on this topic.

Finally, this brings us to Mr. Melone's comments about Bar Counsel Michael Kennedy's blog allegedly "recommending a rule change."[9] What Mr. Kennedy said was that while "I tend to agree" with the dissent to Formal Opinion 22-502, "I don't disagree with the conclusion that a no-contact rule should apply to self-represented lawyers." As to Mr. Melone's claim that Mr. Kennedy recommended a rule change, the most Mr. Kennedy said was: "ABA opinion concludes that the 'no contact' rule applies to self-represented lawyers. Should we amend Vermont's rule?"

What then did the dissent to Formal Opinion 22-502 say? Among other things it said "[a]pplying Rule 4.2 to pro se lawyers is supported by compelling policy arguments."[10] The only point of the dissent was that the language of the Rule should be clearer. The dissent did not, as

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7 *Id.*, p. 4.

8 *Id.*, p. 3.

9 *Motion for Permission to Appeal*, p. 5.

10 Formal Op. 22-502 (2022), p. 7.

Mr. Melone suggests, assert that a pro se lawyer should be free to contact a represented person.

In summary, V.R.A.P. 5(b)(1) requires "substantial grounds for a difference of opinion," something substantially more than a single case or commentary suggesting that the Rule 4.2 should be better drafted.

VII. An Immediate Appeal Will Not Materially Advance the Termination of the Litigation

Contrary to what Mr. Melone's motion suggests, this case involves far more than an alleged violation of the no contact rule. This alleged violation appears in Count VII of the Petition, which contains eight counts. As a result, in the highly unlikely event that the Hearing Panel or the Supreme Court should rule that Mr. Melone (1) was pro se and (2) V.R.Pr.C. 4.2 does not apply to pro se lawyers, the Hearing Panel would still have to determine whether Thomas Melone's:

- claims in the Public Utilities Commission that the Town of Bennington and its officials, agents and employees engaged in criminal conduct violated Rules 3.3(a), 3.5(d), 4.5 and 8.4(d);[11]
- communications with ML and DJ violated Rules 4.5 and 8.4(d);[12]
- site preparation without a Certificate of Public Good and his "not credible" testimony in the Public Utility Commission violated Rule 3.3, 3.5(d) and 8.4(d);[13]
- March 24, 2025 email to Public Utility Commission Chair Ed McNamara violated

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[11] Count I of the Petition.

[12] Count II of the Petition.

[13] Count III of the Petition.

Rule 3.5(b)(1);[14]

- conduct with respect to the Bennington High Project violated Rules 3.1, 3.3(a)(1), 4.4(a) and 8.4(d);[15]
- statements to Screening Counsel Strauss with respect to Merrill Bent's complaint to the Professional Responsibility Program violated Rules 3.3(a)(1), 4.4(a) and 8.4(d);[16] and
- persistent and deliberate violations of the Rules of Professional Conduct violated Rule 8.4(d).[17]

VIII. Conclusion

Before this matter is considered by the Supreme Court, the Hearing Panel should consider, and rule upon, all allegations of misconduct and, in the event of findings of misconduct, rule upon the appropriate sanction. Thomas Melone's *Motion for Permission to Appeal* fails to meet the requirements of V.R.A.P. 5(a)(1), 5(b)(1) or 5.1 and should be denied.

Dated: December 29, 2025

/s/Michael F. Hanley

Michael F. Hanley
Conflict Disciplinary Counsel
Plante & Hanley, P.C.
Post Office Box 708
White River Junction, VT 05001
802-295-3151, Ext. 102
mfhanley@plantehanley.com

[14] Count IV of the Petition.

[15] Count V of the Petition.

[16] Count VI of the Petition.

[17] Count VIII of the Petition.

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

In Re Thomas Melone	)	PRB No. 120-2025
	)	
	)	

RESPONDENT'S MOTION TO VACATE THE ORDER OF JANUARY 5, 2026

Respondent, Thomas Melone, respectfully requests that the Hearing Panel vacate its order of January 5, 2026 (the "Order") (which was served on Respondent on January 6, 2026) regarding Respondent's motion for permission to appeal (1) to allow Respondent to file a reply to Mr. Hanley's opposition as provided by the Vermont Rules of Civil Procedure before ruling on the motion, and (2) because the Order crucially misquotes A.O. 9, Rule 13 (as explained below, the word "only" does not appear in Rule 13.)

INTRODUCTION

This case was initiated by a complaint filed by Attorney Merrill Bent, who claimed she was compelled to do by and under color of State law, *i.e.*, VRPC 8.3. Ms. Bent filed the complaint shortly after two things happened. First, Respondent made a filing on January 10, 2025 with Vermont Public Utility Commission ("PUC") *publicly* disclosing alleged government malfeasance (which filing forms the sole basis for Count I). Second, in a subsequent filing with the PUC on January 29, 2025, Respondent disclosed that Bennington Town Manager, Stuart Hurd, implicated an attorney in the alleged cover-up involving the expiration of the Bennington Town Plan (which filing relates to Count VI). *See* **Exhibit 1** ("We believe we have sufficient documentation and a legal opinion supporting our position. It's not a lie if one believes what one's saying.")

Respondent's filing stated that "presumably" the opinion is from Merrill Bent. In her reply, Merrill Bent stated: "Petitioner speculates that this must mean that the undersigned counsel has provided a legal opinion to the Town relating to the validity of the Town Plan. Town Counsel's communications with its client are protected by attorney-client privilege."[1] Attorney Bent neither admitted nor denied that she provided the legal opinion that Mr. Hurd claimed that it had. Attorney

[1] *See*, Ms. Bent's reply memorandum in support of motion to strike, PUC docket 24-3517 at 7 (February 11, 2025).

Stasny's motion to quash in this case, however, strongly implies that the "legal opinion" was in fact given by Merrill Bent or someone in her firm. And Mr. Hurd's stated reliance on the legal opinion may have waived any attorney-client privilege that may have otherwise applied.[2] And if Ms. Bent was in fact involved in furthering the town's alleged malfeasance, then the crime-tort-fraud exception to the attorney-client privilege may apply in any event.[3].

I. The Hearing Panel's order "erod[es] the principle of party presentation so basic to our system of adjudication," *Arizona v. California*, 530 U.S. 392, 413 (2000), and eliminates Respondent's right under V.R.C.P. Rule 7(b)(4) to reply.

Respondent filed and served a motion for permission to appeal on December 15, 2025.

V.R.C.P. Rule 7(b)(4) provides:

> Memorandum in Opposition. Any party opposed to the granting of a written dispositive motion, including a motion for summary judgment under Rule 56, shall file a memorandum in opposition thereto not more than 30 days after service of the motion, unless otherwise ordered by the court. A memorandum in opposition to any nondispositive motion shall be filed not more than 14 days after service of the motion, unless otherwise ordered by the court. **Any party may file a reply to a memorandum in opposition, including a memorandum in opposition to a motion for summary judgment under Rule 56(b), within 14 days after service of the memorandum.** The court may also allow a surreply memorandum if the memorandum would assist in clarifying the issues, particularly where the party seeking to file the memorandum is addressing newly raised factual or legal arguments by the opposing party.

(Emphasis added).

Mr. Hanley filed opposition on December 29, 2025.

Under V.R.C.P 7(b)(4), Respondent was entitled to file a reply to Mr. Hanley's opposition within 14 days of December 29, *i.e*., by January 12, 2026. Yet on January 5, 2026, the Hearing Panel denied the motion and did so on grounds not argued by Mr. Hanley.

Mr. Hanley argued that "in very limited circumstances, the Vermont Supreme Court may hear all or part of case before the Hearing Panel has entered a final order." Opp. at 2. He then discussed three possible bases for interlocutory appeal. Respondent agrees that the three bases

[2] *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir.) (criminal defendant waived privilege when he asserted that he had a good faith belief that his actions were legal), *cert. denied*, 502 U.S. 813, 116 L. Ed. 2d 39, 112 S. Ct. 63 (1991).
[3] *See, e.g., United States v. Spinosa*, No. 21 CR 206, 2021 U.S. Dist. LEXIS 120141, *14-15 (S.D.N.Y. 2021).

described by Mr. Hanley are appropriate bases for interlocutory appeal even in this case, and are so ingrained in federal and state practice as to be an essential element of fair process.[4] *See, e.g., Will v. Hallock*, 546 U.S. 345, 352 (2006) stating that a collateral order appeal is appropriate an individual is subject to (as here) "the enormous prosecutorial power of the Government to subject an individual 'to embarrassment, expense and ordeal . . . compelling him to live in a continuing state of anxiety.'" (internal citations omitted). The United States Supreme Court stated that "the only way to alleviate these consequences of the Government's superior position was by collateral order appeal." *Id*. It "boils down to a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement." *Id*. at 351-352.

The Hearing Panel's January 5 order (which itself constitutes a collateral order on the issue of appealability) is now the second time in this case that the Hearing Panel has decided a motion on grounds not presented by either Respondent or Mr. Hanley, or without a prior request from the Hearing Panel to brief a specific issue that the Hearing Panel would like to have addressed that was not raised by either Respondent or Mr. Hanley.

The Hearing Panel's two orders "erod[e] the principle of party presentation so basic to our system of adjudication." *Arizona v. California*, 530 U.S. 392, 413 (2000). Put another way, such a process is simply unfair, especially in a case in which the stakes are extraordinarily high as here, and have the potential to ripple through like an earthquake to the Respondent's licenses to practice law in the States of California, Connecticut, New Jersey, New York, Florida, Pennsylvania and Massachusetts.

---

[4] Vermont Rules of Appellate Procedure Rule 1 states:

> (a) Scope of Rules. These rules govern procedure in all appeals to the Supreme Court from the Superior Court or an administrative board or agency and in matters of original jurisdiction unless expressly modified by rule or statute.
> (b) Rules Do Not Affect Jurisdiction. These rules do not extend or limit the Supreme Court's jurisdiction.
> (c) Terminology. For the purpose of appeals under these rules:
> (1) the term "superior court" includes the Civil, Criminal, Family, and Environmental Divisions of the Superior Court, and also includes the Probate Division or any administrative board or agency when an appeal is taken from a decision in which an appeal is permitted by law.

II. The Hearing Panel's Order Is Based Upon Language That Does Not Appear In Rule 13.

The Hearing Panel's January 5 order seems to put a lot of weight on Administrative Order No. 9's statement that "Disciplinary proceedings are neither civil nor criminal but are *sui generis*." Order at 1. That statement does not mean there is no process unless specifically provided. Disciplinary proceedings are "unique" because they have historically been considered to be a cross between criminal and civil actions. In *In re Ruffalo*, 390 U.S. 544, 551 (1968), the attorney disciplinary proceeding was characterized as quasi-criminal for purposes of procedural due process. *Id*. ("These are adversary proceedings of a quasi-criminal nature. *Cf. In re Gault*, 387 U.S. 1, 33. The charge must be known before the proceedings commence.") In other words, the law has struggled with whether the higher due process protections applicable to criminal actions should apply in part to disciplinary proceedings. *See In re Cordova-Gonzalez*, 996 F.2d 1334, 1336 (1st Cir. 1993) (noting that the due process rights of the respondent "do not extend so far as to guarantee the full panoply of rights afforded to an accused in a criminal case" (quoting *Razatos v. Colo. Supreme Court*, 746 F.2d 1429, 1435 (10th Cir. 1984))).

The Hearing Panel states:

> Rule 13 E. states specifically that "only final decisions of the hearing panel *which fully dispose of an entire proceeding* may be appealed."

(Emphasis in original.)

Based upon what is posted on Lexis/Nexis as the current Rule 13, the Hearing Panel has misquoted the Rule in critical part. As posted on Lexis/Nexis, *see* **Exhibit 2**, the Rule does not use the word "only."

The Hearing Panel's order is plain error and should be vacated. If the Hearing Panel wishes for further briefing on the issue of appealability, it certainly has the right to ask Respondent and Mr. Hanley to provide that briefing.

Moreover, in addition to erroneously adding the word "only", the Hearing Panel ignores the fact that the words "may be appealed," are followed by "as of right." In other words, the actual language only states the general rule that a final decision disposing of an entire proceeding is

appealable as of right. It does not, as the Hearing Panel implies state that such an appeal is the only appeal.

Respondent respectfully requests that the Hearing Panel vacate the January 5, 2026, order, allow the Respondent to reply to Mr. Hanley's opposition within 14 days of the date that the Hearing Panel vacates the January 5, 2026 order, and issue a list of any additional issues that the Hearing Panel wishes Respondent and Mr. Hanley to provide further briefing on.

Respectfully Submitted,

/s/ Thomas Melone
Thomas Melone
601 S Ocean Blvd
Delray Beach, FL 33483
(212) 681-1120
Thomas.Melone@AllcoUS.com

EXHIBIT 1

---------- Forwarded message ---------
From: **Stuart Hurd** <shurd@benningtonvt.org>
Date: Tue, Oct 15, 2024 at 4:44 AM
Subject: RE: Town Website
To: Joey Kulkin <jkulkin71@gmail.com>, Ned <edwardnperkins@gmail.com>

We believe we have sufficient documentation and a legal opinion supporting our position. It's not a lie if one believes what one's saying. We're moving on. Enjoy the day.

Stuart A. Hurd

Town Manager

Town of Bennington

205 South Street

PO Box 469

shurd@benningtonvt.org

From: Joey Kulkin <jkulkin71@gmail.com>
Sent: Monday, October 14, 2024 7:02 PM
To: Stuart Hurd <shurd@benningtonvt.org>; Ned <edwardnperkins@gmail.com>
Subject: Re: Town Website

Hi, Stu, you just lied to the public again about the town plan which expired on 10/6/23.

This time you said the town plan is valid in the eyes of the state.

Please produce communications from the state confirming what you just said. Because it's a lie.

We've got the documents.

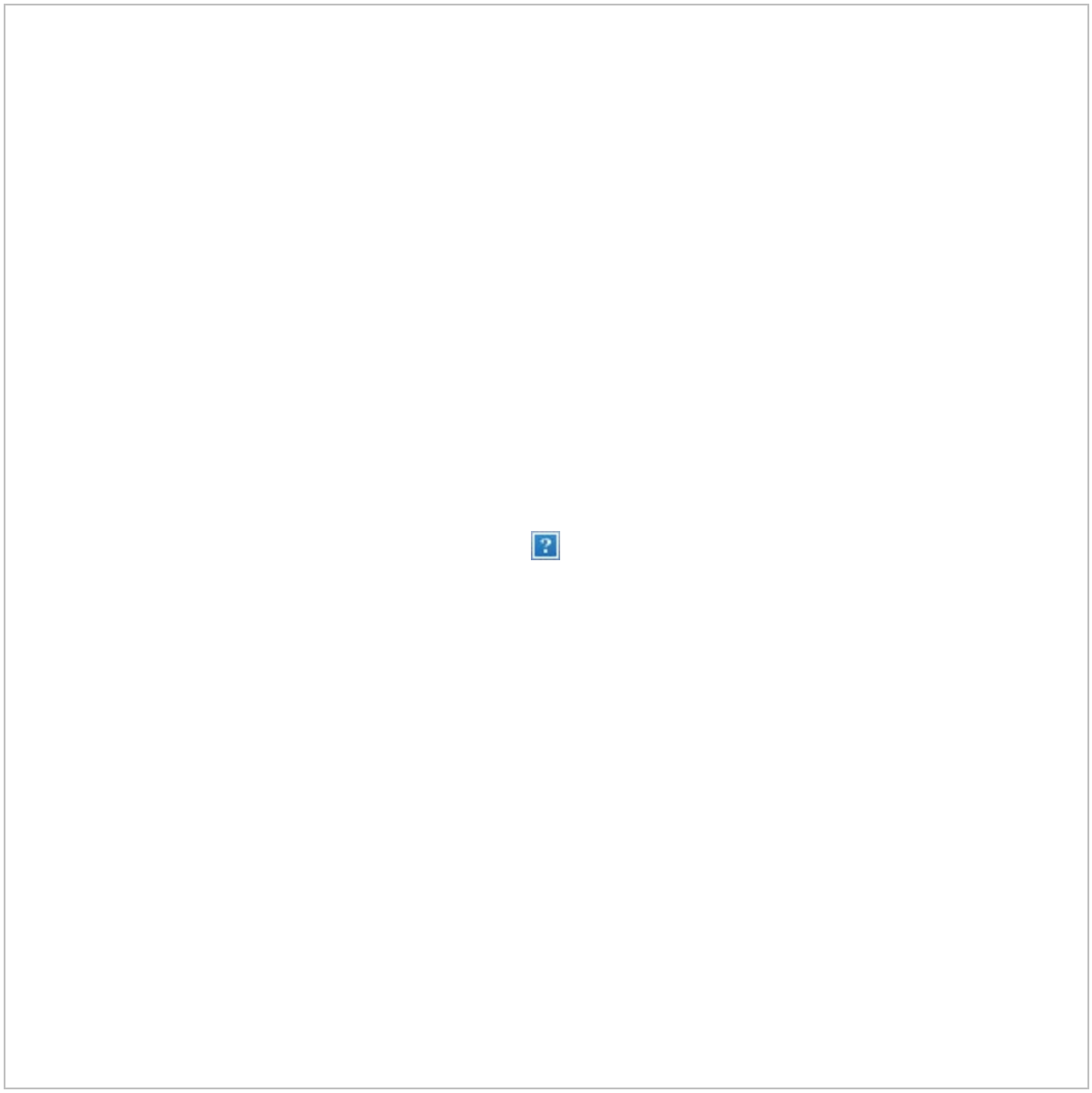
You don't.

Thanks!

On Fri, Oct 11, 2024 at 3:22 PM Joey Kulkin <jkulkin71@gmail.com> wrote:

> Hi, Stu, someone from your staff replaced the cover page on the state database in recent days but it's still based on a lie.
>
> **QUESTIONS**:
>
> - On what day did a member of your staff upload the ACCD database with this new cover page?
> - Who uploaded it?
> - Who authorized this person to make the change?
>
> **REQUEST**:

- Please provide email authorization by you to the member of staff who uploaded this new (and false) cover page.



On Wed, Oct 9, 2024 at 10:57 AM Stuart Hurd <shurd@benningtonvt.org> wrote:

> The Plan is valid until 2026. Have a great day.
>
> Stuart A. Hurd
>
> Town Manager

Town of Bennington

205 South Street

PO Box 469

shurd@benningtonvt.org

From: Joey Kulkin <jkulkin71@gmail.com>
Sent: Wednesday, October 9, 2024 10:38 AM
To: Stuart Hurd <shurd@benningtonvt.org>; Ned <edwardnperkins@gmail.com>
Subject: Re: Town Website

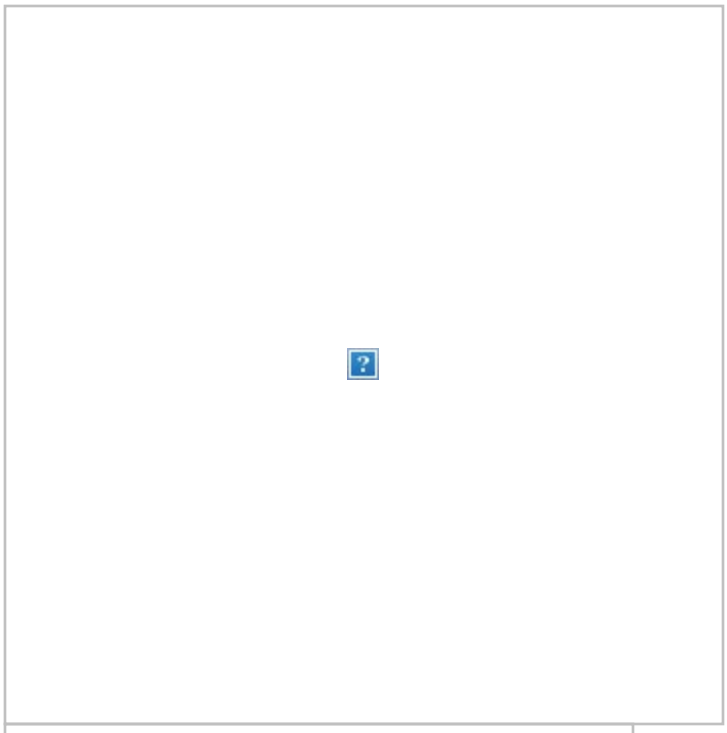
I was wrong: the photo is from the SVSU meeting dealing with Shaftsbury Elementary.

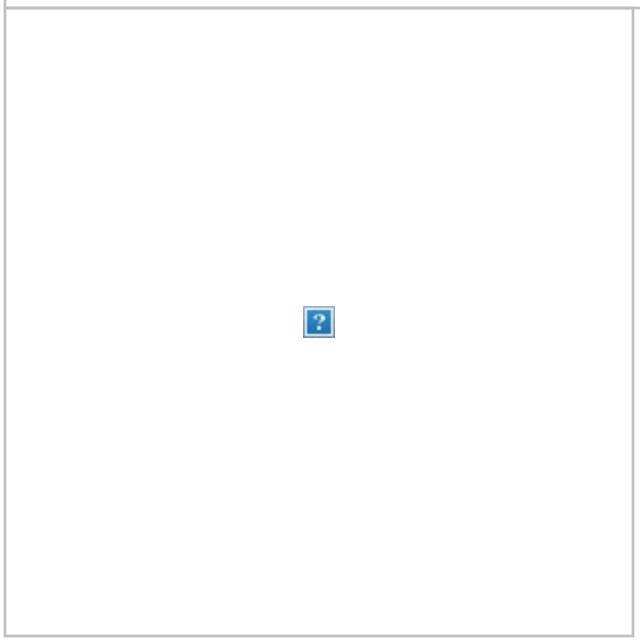
See, it's not hard to admit wrongdoing.

That's all you had to do with the Town Plan but it's too late for simple apologies.

On Wed, Oct 9, 2024 at 10:10 AM Joey Kulkin <jkulkin71@gmail.com> wrote:

> Hi, Stu,
>
> I have a few questions ...
>
> Last week several people went to the town website and saw that the cover page of the adopted 2015 town plan was changed.





This was done without an official action of the Select Board and the citizens of Bennington definitely didn't know about it.

Questions:

1, On what day was the cover page changed?

2, Who went into the system and uploaded the new cover page?

3, Who gave authorization to upload the new cover page?

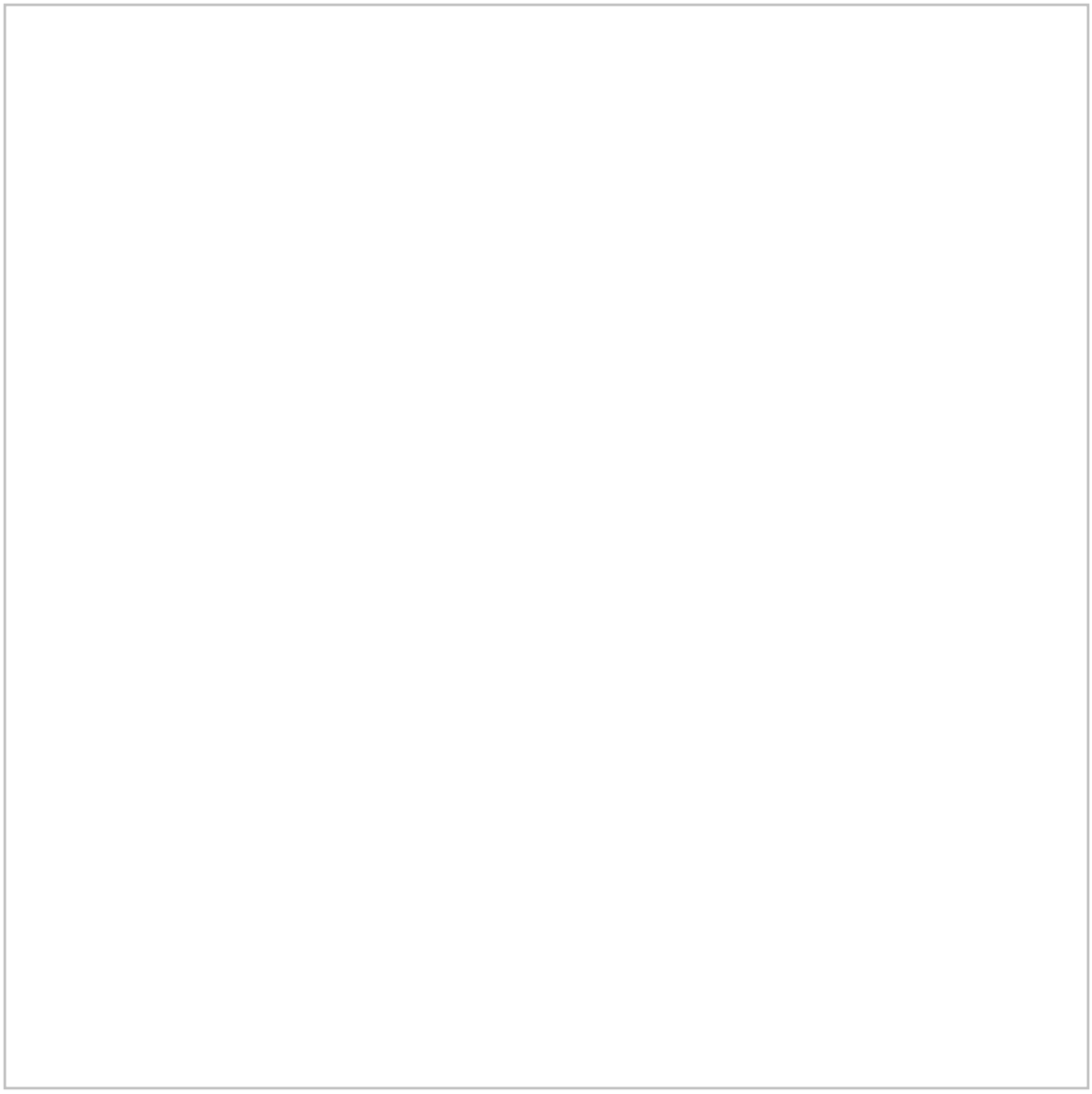
4, Please send over the email giving authorization to upload the new cover page.

Thank you,

Joey

This was the Shaftsbury Select Board meeting last night.

Just wait till the people of Bennington wake up, and it's happening.



CONFIDENTIALITY/DISCLOSURE NOTICE: This message is intended for the use of the individual or entity to which it is addressed and may contain information that is confidential, privileged and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, you are hereby notified that any printing, copying, dissemination, distribution, disclosure or forwarding of this communication is strictly prohibited. If you have received this communication in error, please contact the sender immediately and delete it from your system. Please note that this email message, along with any response or reply, may be considered public record, and thus, subject to disclosure under the Vermont Public Records

Law (1 V.S.A. §§ 315-320).

EXHIBIT 2

Vt. A.O. 9 Rule 13

Current with rule changes received through December 12, 2025

VT - Vermont State & Federal Court Rules > Supreme Court Administrative Orders and Rules > Administrative Orders of the Supreme Court > Administrative Order No. 9. Permanent Rules Governing Establishment and Operation of the Professional Responsibility Program >

Rule 13. Disciplinary and Disability Proceedings

A. Investigation and Notice. If initial review pursuant to Rule 14.A indicates that an investigation is warranted, the matter must be referred to disciplinary counsel with notice to complainant and respondent. All investigations and disciplinary or disability proceedings are conducted or supervised by disciplinary counsel. Disciplinary counsel must provide respondent with a copy of the complaint or otherwise notify respondent in writing of the substance of the matter under investigation unless disciplinary counsel determines that there is a substantial likelihood that a client would be harmed, evidence would be destroyed, or for other good cause. If respondent is not subject to the jurisdiction of the Court, and if the allegations or information, if true, would constitute misconduct or disability, the matter must be referred to the appropriate entity in the jurisdiction in which the lawyer is admitted.

B. Review by Disciplinary Counsel. Following an investigation, disciplinary counsel may dismiss the complaint, refer it to the Bar Assistance Program or other dispute resolution program, initiate formal disciplinary or disability proceedings in accordance with Rule 13.D, or initiate disability proceedings in accordance with Rule 25. Disciplinary counsel must inform the complainant of the disposition of the complaint and reasons.

C. Probable Cause Review. Disciplinary counsel's decision to proceed with a petition of misconduct shall be reviewed for probable cause by a hearing panel assigned by the chair of the Board pursuant to a fixed rotation, and such review shall be based upon written application and affidavit setting forth a factual basis for the charges. If the panel finds probable cause to believe that a violation has occurred, disciplinary counsel shall present formal charges to a different hearing panel assigned by the chair of the Board, unless a stipulation to misconduct is earlier submitted.

D. Formal Proceedings.

(1) Filing of charges; notice to complainant. Disciplinary counsel may initiate formal disciplinary proceedings either: (a) by filing with the Board facts stipulated to by the respondent, along with any proposed legal conclusions and recommended sanction which disciplinary counsel and respondent, either separately or jointly, would like the hearing panel to consider; or (b) by filing with the Board and serving upon respondent a petition of misconduct which is sufficiently clear to inform respondent of the alleged misconduct and the rules alleged to have been violated.

Disciplinary counsel shall inform the complainant of the filing of formal charges against the respondent.

(2) Assignment of hearing panel. Upon receipt of the stipulation or petition, the Board shall assign the matter to a hearing panel pursuant to a fixed rotation. Substitution of members will be allowed only in the event of conflicts of interest or unavailability.

(3) Answer. If proceedings are initiated by petition, respondent shall serve an answer upon disciplinary counsel and file the original with the Board within 20 days after the service of the petition, unless the time is extended by the chair of the hearing panel. In the event the respondent fails to answer within the prescribed time, the charges shall be deemed admitted, unless good cause is shown.

(4) Hearing. If an answer to a petition of misconduct is filed, the hearing panel shall serve a notice of hearing upon disciplinary counsel and respondent, stating the date and place of hearing at least 25 days in advance thereof. If stipulated facts are filed, the hearing may be scheduled sooner at the discretion of the chair. The notice of hearing on a petition of misconduct shall state that the respondent is entitled to be represented by a lawyer, to cross-examine witnesses, and to present evidence. Disciplinary counsel shall further inform the complainant of the date and place of the hearing. The hearing shall be recorded.

(5) Hearing panel decision; service; finality:

(a) Where proceedings have been initiated by stipulated facts, the hearing panel shall review the stipulation and either: (i) reject the stipulation, in which case the parties may amend and resubmit it, or disciplinary counsel may reinstitute proceedings by filing a petition of misconduct in accordance with this rule; or (ii) accept the stipulation and adopt it as its own findings of fact, although the panel may take further evidence on the issue of sanctions.

(b) Where proceedings have been initiated by petition, disciplinary counsel shall have the burden of proving the alleged violations by clear and convincing evidence. In its discretion, the hearing panel may bifurcate the hearing in order to consider evidence relevant to the charged violations separately from evidence relevant to sanctions.

(c) The hearing panel shall in every case issue a decision containing its findings of fact, conclusions of law, and the sanction imposed, if any, within 60 days after the conclusion of the hearing. The panel shall promptly serve its decision on disciplinary counsel and the respondent, and submit a copy, together with a record of its proceedings, pleadings and briefs, if any were submitted, to the Board for filing with the Court. The Board shall promptly inform the complainant of the decision and provide a copy to the complainant if so requested. If no appeal is served and filed within 30 days of the hearing panel decision, and the Court does not otherwise order review on its own motion, the decision shall become final, and shall have the same force and effect as an order of the Court.

E. Review by the Court. All final decisions of the hearing panel which fully dispose of an entire proceeding may be appealed as of right to the Court by respondent or disciplinary counsel pursuant to the Vermont Rules of Appellate Procedure, which rules shall govern the proceedings on appeal except where these rules establish a different procedure. To the extent applicable, all references in the Vermont Rules of Appellate Procedure to the superior court shall be deemed to be a reference to the hearing panel, and all references to the clerk of the superior court shall be deemed to be a reference to the chair of the hearing panel.

If no appeal or petition for review is filed with the Court, the Court may order review on its own motion within 30 days of the date the hearing panel decision is filed with the Court. The Court may remand a case to the hearing panel or modify its decision only upon notice and opportunity to be heard.

The Court shall not receive any additional evidence. Arguments not advanced before the hearing panel shall not be presented to the Court, except for good cause shown. Findings of fact shall not be set aside unless clearly erroneous. If a hearing panel suspends or disbars the respondent and an appeal is taken or the Court orders review on its own motion, the hearing panel decision shall be stayed for the duration of the appeal.

History

Amended Nov. 2, 2021, eff. Apr. 1, 2021; Feb. 7, 2022, eff. Apr. 11, 2022; Jan. 9, 2023, eff. Mar. 13, 2023; Apr. 10, 2023, eff. July 3, 2023.

Annotations

Notes

Reporter's Note—Second 2023 Amendment

The changes to Rule 13.D(3) are not substantive. Rather, they reflect an intent to remove gender-specific pronouns from Administrative Order 9.

Reporter's Note—First 2023 Amendment

Prior to this amendment, an argument existed that the rule allowed a disciplinary suspension to be enforced and to expire before the Court could fully review and dispose of an appeal. The amendment clarifies that a lawyer (1) will not have to serve a suspension prior to receiving an opportunity to challenge it; and (2) cannot moot the Court's review of a disciplinary decision by "serving" a suspension before the Court fully reviews and disposes of a disciplinary matter.

The amendment is consistent with the law and current practice. The Rules of Civil Procedure apply to disciplinary proceedings. A.O. 9, Rule 20.B. But for exceptions that do not apply in attorney discipline cases, Vermont Rule of Civil Procedure 62(a) prohibits enforcement of a judgment until 30 days have passed or the time to appeal has run. When an appeal is taken from a judgment that falls within the scope of Civil Rule 62(a), the appeal operates to stay the underlying judgment for the duration of the appeal. V.R.C.P. 62(d). This amendment clarifies that when a hearing panel decision is appealed or reviewed by the Court, the decision is stayed for the duration of the appeal.

The new language does not change or alter the language in Rule 22. When a hearing panel decision is appealed or reviewed by the Court, while the decision is stayed, Disciplinary Counsel and the Court retain the authority granted by Rule 22 to request and to issue an interim suspension of the respondent's law license for threat or harm.

Reporter's Notes—2022 Amendment

Rule 13.B is amended to correct a cross reference from Rule 15.D to Rule 13.D.

Reporter's Notes—2021 Amendment

Former Rule 11 is renumbered Rule 13 and amended to provide that disciplinary matters formerly referred to an assistance panel will, under the new rules, be referred to the Bar Assistance Program. Minor language edits are made, and cross references are updated.

ANNOTATIONS

Cited.

Cited in

In re Andres, 2004 VT 71, 177 Vt. 511, 857 A.2d 803, 2004 Vt. LEXIS 248 (2004); In re Hongisto, 2010 VT 51, 188 Vt. 553, 998 A.2d 1065, 2010 Vt. LEXIS 71 (2010) (mem.).

Research References & Practice Aids

Hierarchy Notes:

Vt. A.O. No. 9

End of Document

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

In re Thomas Melone
PRB File No. 120-2025

ENTRY ORDER
RESPONDENT'S MOTION TO STRIKE ORDER OF JANUARY 5, 2026

On January 5, 2026, the Hearing Panel issued an order denying Respondent's motion for permission to take an interlocutory appeal from the order denying Respondent's motion to dismiss issued on December 2, 2025. On January 12, Respondent filed the instant motion in which complains that he was not given the opportunity to file a reply memorandum as permitted by V.R.C.P. 7(b)(4).[1] For the reasons set forth herein, the motion is *denied*.

The Panel issued its order without awaiting a reply memo because it is beyond dispute that interlocutory appeals are not permitted in disciplinary proceedings. Rule 13 E of A.O. 9 provides for appeal of only final decisions of hearing panel.[2] The Rule is in accord with the "well-established policy [of the Supreme Court] of avoiding piecemeal appeals." *Castle v. Sherburne Corp.*, 141 Vt. 157, 162 (1982).

The position of Conflict Disciplinary Counsel did not and does not alter the Panel's decision. The Panel is not required to adopt the position of either party that it concludes is erroneous.

Respondent also appears to rely on the language of Rule 1 of the Vermont Rules of Appellate Procedure. V.R.A.P. 1(a) provides that the rules of appellate

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[1] V.R.C.P 7(b) states that "any party *may* file a reply to a memorandum in opposition, ..." (Emphasis added.) Many litigants do not file reply memos. Nevertheless, the Hearing Panel apologizes to the Respondent for not awaiting his reply memo for this motion. It will await a reply memo in the future unless, as here, the resolution is clear. The better practice would be for the parties to advise the Panel—they may do so by email—that they intend to file a reply memo.
[2] Respondent correctly notes that the Hearing Panel misquoted Rule 13 E in its January 5 order. The sentence should have read. "only 'final decisions of the hearing panel *which fully dispose of an entire proceeding* may be appealed.'" (Emphasis in original order.) The misquote does not change the tenor of the order.

procedure "govern procedure in all appeals to the Supreme Court from the Superior Court or an administrative board or agency . . .." Rule 1(c)(1) provides:

> the term "superior court" includes the Civil, Criminal, Family, and Environmental Divisions of the Superior Court, and also includes the Probate Division or any administrative board or agency when an appeal is taken from a decision in which an appeal is permitted by law;

Hearing Panels of the Professional Responsibility Program are not included in the list of entities included in the rule. A panel is obviously not a court. Nor is it an administrative board or agency. It is *sui generis*. A.O. 9, Rule 20 A. And even if the Hearing Panel were deemed an administrative board or agency, Rule 1 applies only when "an appeal is taken from a decision in which an appeal is permitted by law." A.O. 9, Rule 13 E does not permit interlocutory appeals.

Respondent complains that the Panel's failure to await his filing of a reply memorandum and its failure to give the parties an opportunity to brief the issue not previously raised by the parties without giving them the opportunity to brief the same "erod[es] the principle of party presentation so basic to our system of adjudication." Resp.'s motion to strike, Jan. 12, 2026, at *3 (quoting *Arizona v. California*, 530 U.S. 392, 413 (2000). But Respondent failed to quote the Court's complete sentence which reads in full,

> Where no judicial resources have been spent on the resolution of a question, *trial courts must be cautious about raising a preclusion bar* <u>*sua sponte*,</u> thereby eroding the principle of party presentation so basic to our system of a adjudication.

Id. (Emphasis added.) The Court opined that a *sua sponte* decision may be appropriate under certain circumstances. The Panel believes that this is one of them.

Whatever the merits of the argument based upon the *Arizona v. California* quotation, Respondent has an expeditious avenue to a potential remedy. If he believes, contrary to the decision of the Hearing Panel, that V.R.A.P. 5 (b) affords him the right to take an appeal from an interlocutory order, he can immediately request that the Supreme Court review the question. V.R.A.P. 5 (b)(7).

ORDER

Respondent's motion to vacate the January 5, 2026, is *denied*.

Because Respondent was not served with the January 5, Order until January 6, and because of the delayed issuance of this order, he shall file his Answer no later than January 26, 2026. If Respondent files a motion for permission to take an interlocutory appeal pursuant to V.R.A.P. 5(b)(7), his Answer shall be filed no later than 14 days after the Supreme Court resolves his motion.

It is SO ORDERED this 15th day of January 2026

Hearing Panel No. 2

By: _____
Mimi Brill, Esq., Chair

By: _____
Alexander W. Shiver, Esq.

By: _____
Brian Bannon, Public Member

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Petition of Apple Hill 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 located off Willow Road in Bennington, Vermont	)	Docket No. 24-3517-PET

APPLE HILL SOLAR LLC'S PRELIMINARY COMMENTS OF THE DEPARTMENT OF PUBLIC SERVICE'S MOTION TO STAY

Apple Hill Solar LLC ("AHS") will be prepared to preliminarily address the Motion to Stay of the Department of Public Service ("DPS") and the Town of Benington's comments at the scheduling conference set for January 13, 2025.

In advance of the conference, AHS provides the following preliminary comments.

1. AHS has already explained to DPS that AHS is proceeding with the petition under the assumption that it would be a merchant generator. That is the same basis on which the Commission reviewed the project initially in docket 8797, which then eventually became a project with a standard offer contract *after* the CPG was issued. There is no difference here. AHS is not seeking to rely on any waivers. If DPS needs AHS to say that in different ways or clarify testimony, AHS is happy to do so.

2. With respect to Commission Rule 5.403(A)(19), it is difficult to believe that DPS even raised that point because the existence of Chelsea Solar has such a storied history. AHS has supplemented the testimony to state that the Chelsea Solar LLC project currently before the Commission in Case 23-0249 is a project described in Rule 5.403(A)(19), and that there are no others.

3. With respect to the AHS project in docket 8454, the issue of estoppel may be interesting, after all, the Commission held that the Chelsea Solar project satisfied all the requirements for a CPG but only denied the CPG based upon a then newly announced single plant rule. If estoppel is at play then the CPG for Chelsea Solar in case 23-0249 should be summarily

granted now that the Commission denied the extension of the AHS standard offer contract. Counsel to Chelsea Solar will review the estoppel issue for that proceeding and make the appropriate motion for summary judgment.

4. As for the AHS project itself in this docket, the petition itself describes the differences that would be material from the prior one such as, for example, the smaller footprint, the removal of what the Commission referred to as a "black box," and the growth in existing vegetation.

5. Some of the players have also changed. For example, the closest neighbor to the project has filed written support for the projects. So too have other neighbors. And those neighbors spoke out in support of the project before the Town's planning commission. In fact, more than twice the number of people spoke out in favor of the Project than against it.

6. There are other differences as well, including, *inter alia*, that there is no Bennington Town Plan in effect. Thanks to the doggedness of two honest Bennington Select Board members and a number of whistleblowers, AHS has become aware that the Bennington Town Plan expired under 24 V.S.A. §4387 on October 6, 2023, eight years after its adoption. What has ensued is a multi-faceted conspiracy to cover up that fact for a variety of reasons, including reasons related to the AHS and Chelsea Solar projects. The still active cover-up conspiracy includes all of the Select Board members but the two aforementioned and other Does and has resulted, *inter alia*, in the Town fraudulently obtaining grants from various entities, including federal funds, all of which require a Town Plan to be in effect. The expiration of the Town Plan also resulted, *inter alia*, in the loss of the Downtown Designation and the Town's Bolio Amendment being *void ab initio.*

7. The cover up and overt acts include the forgery, counterfeiting and publication of official town and regional documents in violation of 13 V.S.A §1801 and §1802 and the submission of false certifications to the State and Federal government in violation of 13 V.S.A §2002 and 32 V.S.A §631(a)(9). The dramatic scope of the cover up is not surprising considering that since the expiration of the Town Plan in 2023, the Town has applied for and/or received millions of dollars in state and federal funds through grants and tax benefits as well as other types

of benefits from various programs that specifically require that a duly adopted municipal town plan be in place. The cover-up also includes filing false statements with the Commission that are based upon the existence of a Town Plan, but for which the Town knows does not exist and has not existed since October 6, 2023.

8. AHS's parent Allco Finance Limited is finalizing a complaint to be filed in Federal District Court against the Town of Bennington, its Select Board members (other than the two aforementioned), the town planner and town manager involving their conspiracy to cover-up the fact that the Town Plan expired on October 6, 2023, as well as other claims, such as breach of contract (i.e., the settlement agreement between AHS and the Town), violations of the Racketeer Influenced and Corrupt Organizations Act (18 U.SC. § 1962(c)), injunctive and declaratory relief, and violations of civil rights. The complaint will also set the record straight on why the Mount Anthony Country Club (who the Town was and may still be working with) withdrew as an intervenor in the Chelsea Solar case.

Dated: January 10, 2025

Respectfully Submitted,

APPLE HILL SOLAR LLC
By: */s/ Thomas Melone*
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Apple Hill Solar LLC
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STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Petition of Apple Hill Solar LLC, pursuant to 30 V.S.A. § 248, for a certificate of public good authorizing the installation and operation of the "Apple Hill Solar Project," a 2.0 MW solar electric generation facility located off Willow Road in Bennington, Vermont	)	Docket No. 24-3517-PET

PETITIONER'S RESPONSE TO THE TOWN OF BENNINGTON'S MOTION TO STRIKE

On January 15, 2025, the Attorney Merrill Bent, purportedly on behalf of the Town of Bennington ("Town"), filed a Motion to Strike (the "Motion") the Petitioner's January 10, 2025, and January 12, 2025 comments, that were filed by Petitioner in response to the State of Vermont's Motion to Stay and Initial Comments filed by Attorney Merrill Bent, purportedly on behalf of the Town of Bennington. Attorney Bent posits that the filings should be stricken because purportedly they involve "ad hominem attacks on members of the public who are not involved in this docket, town officials, and elected officials (who serve their community as volunteers) [and] were neither responsive nor relevant to the matters raised before the PUC." Motion at 1. Both assertions by Attorney Bent, as explained below, are false.

Attorney Bent further alleges that the filings were made for "an improper purpose in violation of Commission Rule 2.203(C)," without any evidentiary basis or even explaining what the "improper purpose" allegedly is. Motion at 1. That claim by Attorney Bent is false *too*. Then while conceding that the Petitioner's filings *are* "responsive to the issues raised by the other parties," Attorney Bent doesn't want to do any work now to respond to them. As per usual, the motion is short on facts and short on the law.

A. Attorney Bent Is Not Authorized To Speak On Behalf Of The Town of Bennington.

1. Attorney Bent's Purported Representation And Filings Violate The Vermont Open Meeting Law.

Attorney Bent states that she is acting on behalf of the Town of Bennington in this case. But there was no *public meeting* held by the Select Board that authorized Attorney Bent to file

anything in this case, nor act on behalf of the Town opposing the AHS project. The Town has held a single meeting regarding the Project in this case, at which more than twice the number of people spoke out in favor of the Project than against it.

1 V.S.A. § 312 provides:

> **Right to attend meetings of public agencies**
>
> (a)(1) All meetings of a public body are declared to be open to the public at all times, except as provided in section 313 of this title. **No resolution, rule, regulation, appointment, or formal action shall be considered binding** except as taken or made at such open meeting, except as provided under subdivision 313(a)(2) of this title.
>
> [Emphasis added.]
>
> ***
>
> (b)(1) Minutes shall be taken of all meetings of public bodies. The minutes shall cover all topics and motions that arise at the meeting and give a true indication of the business of the meeting.

Attorney Bent could only be appointed to act on behalf of the Town in this case after a duly noticed open meeting of the Select Board with her appointment being a duly noticed agenda item. *No such meeting occurred*. Nor did the Planning Commission hold any meeting listing as an agenda item the appointment of Merrill Bent. No duly noticed meeting was held by any public body in Bennington authorizing Merrill Bent to intervene on behalf of the Town.

Likewise, because Attorney Bent's filings in this case have taken definite positions *in opposition* to the Project, those too need to be authorized by the Select Board after a duly noticed open meeting of the Select Board with the AHS project being duly noticed agenda item. *No such meeting occurred*. Because properly noticed meetings never occurred, the public and taxpayers in Bennington were denied their rights to speak under the Open Meeting Law and under the First Amendment. While the landowner for the Project intends to file suit against the Town for violating the Open Meeting Law, for purposes of this case, Attorney Bent's motion to strike should be summarily denied and rejected unless Attorney Bent provides documentary evidence that was the

product of compliance with Vermont's Open Meetings Law that she is authorized to make filings on behalf of the Town and take positions in opposition to the AHS project.[1]

2. Attorney Bent's Representation Would Violate The Vermont And New York Rules of Professional Conduct.

Similarly, even if Attorney Bent's filings were properly authorized by the Select Board (which they were not), Attorney Bent's representation would be a violation of multiple rules of the Vermont and New York attorney rules of professional conduct. Attorney Bent is admitted to practice in Vermont and New York, and as such is bound by both sets of rules.

i. Merrill Bent's Purported Representation Of The Town Violates Rule 3.7.

First, unless the Town stipulates that the Town Plan expired on October 6, 2023, Merrill Bent is a key witness and as such is disqualified from representing the Town under Vermont Rules of Professional Conduct 3.7 states:

> Rule 3.7. Lawyer as Witness
> **(a)** A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
> **(1)** the testimony relates to an uncontested issue;
> **(2)** the testimony relates to the nature and value of legal services rendered in the case; or
> **(3)** disqualification of the lawyer would work substantial hardship on the client.

And Rule 3.7 of the New York Rules of Professional Conduct which states:

> (a) A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:
> (1) the testimony relates solely to an uncontested issue; (2) the testimony relates solely to the nature and value of legal services rendered in the matter; (3) disqualification of the lawyer would work substantial hardship on the client; (4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or
> (5) the testimony is authorized by the tribunal.
>
> (b) A lawyer may not act as advocate before a tribunal in a matter if:
> (1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or (2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

[1] The Town's purported intervention and filings in this case also constitute a breach of a settlement agreement dated September 14, 2018, between AHS and the Town. AHS intends to file a separate lawsuit against the Town making just that claim.

The Town Plan expired on October 6, 2023, but the story that Town Manager Stu Hurd and a majority of the Select Board have been spinning is that the adoption of the Energy Amendment in 2018 is considered a readoption to the entire Town Plan, which is clearly contrary to the *actual* facts and the law.

Nevertheless Mr. Hurd claims that he and the Select Board have a "legal opinion" to that effect presumably from the Town's only regular attorney Merrill Bent, a prolific opinion writer. *See* **Exhibit 1** which is an attached email from Hurd stating: "We believe we have sufficient documentation and a legal opinion supporting our position. *It's not a lie if one believes what one's saying*."

Mr. Hurd and a majority of the Select Board seem to also claim as part of their scheme that the Bennington County Regional Commission ("BCRC") has accepted the Town's position. But whether the BCRC "accepts" the Town's position is statutorily irrelevant, which*, inter alia*, has been confirmed by the general counsel to the grant making entity—ACCD. *See* **Exhibit 2**.

Attorney Merrill Bent can no longer advise the Select Board on issues related to the Town Plan. She has been implicated by Stu Hurd (*see* **Exhibit 1**) and at a minimum would be a key witness which prevents her representing the Select Board. As a result, under both the Vermont and New York Rule of Professional Conduct 3.7, she is prohibited from representing the Select Board.

Mr. Hurd's and a majority of the Select Board's claim also is expressly contradicted by the Select Board's certification attached as **Exhibit 3**, which correctly certifies that the last Town Plan was put in place in 2015. The certification, however, diverges from the facts when it claims that the 2015 Town Plan was still effective in 2024.[2]

[2] All grants through the Vermont Community Development Program (the "VCDP") require that the municipality certify that it has a duly adopted and has a current municipal plan in effect On August 26, 2024, Select Board members Sarah Perrin, Jeanne Jenkins, Ed Woods, Tom Haley and Jeanne Conner executed a "Resolution for VCDP Grant Application Authority", and submitted it to the VCDP in connection with the Town's planning grant for the Shires Housing Merger. The VCDP is a division within the DHCD, which in turn is a division of the Vermont Agency of Commerce and Community Development (the "ACCD"). The VCDP operates the Community Development Block Grant Program ("CDBG") of the U.S. Department of Housing and Urban

ii. Merrill Bent's Purported Representation Of The Town Violates Rule 1.7.

Attorney Merrill Bent can also no longer advise the members of the Select Board for another reason. On January 13, 2025, in a secret executive session meeting held after the scheduling conference in this case, Merrill Bent imposed a gag order on the members of the Select Board, instructing them not say anything about the Town Plan. Right off the bat, Bent's advising all *individual* seven members of the Select Board what to do and what not to do, has created a conflict under Rule 1.7 that prevents her from representing the Board or any member absent informed written consent, which does not exist.

Vermont Rules of Professional Conduct 1.7 states:

> Rule 1.7. Conflict of Interest: Current Clients
> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
> (1) the representation of one client will be directly adverse to another client; or
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> (2) the representation is not prohibited by law;
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> (4) each affected client gives informed consent, confirmed in writing.

New York Rule of Professional Conduct Rule 1.7, which is more restrictive than the Vermont rule states:

> CONFLICT OF INTEREST: CURRENT CLIENTS
> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:
> (1) the representation will involve the lawyer in representing differing interests; or

Development ("HUD"). VCDP provides CDBG grant funds to municipalities throughout Vermont for housing, economic development and other community development projects to benefit primarily low-to-moderate income persons.

> (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> (2) the representation is not prohibited by law;
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> (4) each affected client gives informed consent, confirmed in writing.

There are multiple reasons why Merrill Bent's purported representation of the Town would violate both Vermont and New York Rule 1.7. *First*, as stated above, Bent's advising all *individual* seven members of the Select Board what to do and what not to do, has created a conflict under Rule 1.7 that prevents her from representing the Board or any member absent informed written consent, which does not exist. Second, Bent's gag order plainly violates each Select Board member's First Amendment rights. This gag order followed on the heels of action targeted at two specific Select Board members—Clark and Adams. The majority of the Select Board's efforts to quash Select Board member Clark Adams's various Facebook posts (reflected in the minutes of January 2, 2025) are improper and patently unconstitutional. Government efforts to "dictat[e] the subjects about which persons may speak," *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 784-785, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978), or to suppress protected speech are "'presumptively unconstitutional,'" *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 830, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995). And that is so regardless of whether the Government carries out the censorship itself or uses a third party "'to accomplish what . . . is constitutionally forbidden.'" *Norwood* v. *Harrison*, 413 U. S. 455, 465, 93 S. Ct. 2804, 37 L. Ed. 2d 723 (1973).

Likewise, Merrill Bent issued a written opinion dated September 4, 2024, which targeted Select Board member Nancy White. Nancy White has constantly questioned the issue of the expiration of the Town Plan. Nancy White contacted the State of Vermont directly regarding a specific grant. Merrill Bent, presumably at the urging of the majority of the Select Board issued a

written opinion targeting White, stating that Nancy White's "outreach [to the State] exceeded the authority of any single member of the Bennington Selectboard." Bent's opinion was a patently unconstitutional use of government funds to chill Nancy White's First Amendment rights. Some would say that Nancy White had a *duty* to follow her conscience and check with the State on the issues which concerned her. Substantively, Nancy White clearly had a valid basis for that contact, and a valid basis to query whether "the proper federal and or state guidelines have not been followed." Among other things, of course, without a valid Town Plan, applying for the grant was impermissible.

iii. Merrill Bent's Purported Representation Of The Town Violates Rule 1.7 and Rule 3.7 Because Of The Violations Of The Open Meeting Law.

As discussed above, *either* Merrill Bent went rogue and just intervened in the case because of close personal relationships with opponents of the project, *or* the Open Meeting Law was violated. Either way Merrill Bent is a key witness, and would have conflicting representation interest, including concerns regarding herself becoming a defendant as well as a witness. Those direct conflicts prevent Merrill Bent from representing any party in this case.

B. The Filings Did Not Contain *Ad Hominem* Attacks.

Bent conflates *ad hominem* comments with observations of the credibility of certain individuals. Observations on an individual's credibility that are based upon evidence are not *ad hominem* attacks, and that is the case here. *See, e.g., Hass & Gottlieb v. Sook Hi Lee*, 55 A.D.3d 433, 434, 866 N.Y.S.2d 72 (N.Y. App. Div. 2008) (the "remarks complained of were not ad hominem attacks, but observations of defendant's credibility.") And Bent opened the door by raising the issue of estoppel.

1. Observations on Maru and David Griffin's credibility are based upon evidence and are not *ad hominem* attacks.

As shown in AHS filing dated January 12, 2025, the Griffins failed to disclose assets in the bankruptcy case. There were at least two properties in Florida, the sale documents for which were attached to the AHS filings conclusively establishing the Griffins concealment. Hiding assets can also extend the statute of limitations on debt collection.

In AHS's filing it states: "If Leon and Griffin had no problem with defrauding the federal government through the Bankruptcy Court or creditors, the filing false testimony with the Commission would seem like a walk in the park. And that false testimony served the purposes of the core opponents of the projects and was in large part used as the basis for the Commission to deny the CPG in docket 8454." That is not an *ad hominem* attack because it is based upon incontrovertible evidence—the sale documents that bear David Griffin's signature. AHS's "remarks complained of were not ad hominem attacks, but observations of [Griffins] credibility.")

And as AHS stated, the Commission denied the CPG in case 8454 based upon the claim repeated by the Griffins and their core group on the basis that purportedly "the whole facility would be prominently visible from the golf course." *Petition of Apple Hill Solar LLC, Order Adopting Proposal For Decision On Remand And Denying Petition,* Docket 8454 (May 7, 2020) at 37. And when the Griffins sought to repeat that made up claim in case 23-0249, the petitioner sought to depose the purported "owners" of the Mount Anthony Country Club—Maru Leon and David Griffin.

Then Leon and Griffin withdrew from case 23-0249 but only after filing a long-winded tirade reciting false reasons why they were withdrawing—those statements too are relevant to, and undercut, their credibility. Then in subsequent filings, both DPS and the Town regurgitated those false premises for why Leon and Griffin purportedly withdrew. And then likewise, the Commission backed the hearing officer's backing the home team by imposing stringent limitations on petitioner's rights to discovery and due process. Those discovery orders have been appealed to the Superior Court, and the Griffins conduct in both the Bankruptcy proceeding and the long-winded tirade are relevant to that appeal and will be an issue there as well. So too will the conduct of the Town discussed in AHS's prior filings and below.

But there's more to the Griffin credibility story. The discharge received in Case 13-10693 was only for David Griffin and Maru Leon in their individual capacities. But the petition shows that many of the debts listed were actually in the name of the corporation, Down to Earth Golf Course Development, Inc. ("DTE"), the business registrant for the Mount Anthony Country Club.

No discharge was issued to the corporation. No discharge was issued either to the Griffin Family Qualified Domestic Trust, which was a clear third-party beneficiary of many of the debts. Thus, those debts appear to still be valid, still accruing interest and not discharged.

2. The Town.

The AHS filings also reference conduct by various Town personnel related to the expiration of the Town Plan—a key factor in the prior AHS case. As noted in AHS's filings and in the attached **Exhibit 1**, the Town is using Seinfeld's George Costanza defense. *See, The Rise of the Costanza Defense*, New York Times (May 6, 2016),[3] *i.e.,* "*It's not a lie if one believes what one's saying*." As discussed in AHS's filings and further below, there is plenty of evidence that whistleblowers have provided to AHS that supports the statements regarding Town personnel.

C. The Town's Motion Is So Vague That It Must Be Summarily Denied.

Pursuant to Commission Rule 2.204(E)(1)(e), the Commission may strike from any filing any redundant, immaterial, impertinent, or scandalous matter. The Town does not indicate which statements in the Responses it feels are "redundant, immaterial, impertinent, or scandalous". In fact, the Town does not even reference Rule 2.204(E)(1)(e) at all. For that reason alone, the Motion to Strike should be denied.

In typical postcard fashion, the Town's Motion to Strike summarily requests that the entirety of the Responses be stricken. The Town refuses to allege with specificity which statements it takes issue with because the Town knows that the devil is in the details. If forced to actually do the work and adhere to the confines of Rule 2.204(E)(1)(e), the Town knows it will have no success with respect to a motion to strike as none of the facts contained in the Responses are "redundant, immaterial, impertinent, or scandalous." So the Town does what it typically does, just phones it in and makes sweeping vague and ambiguous assertions and expects the other parties to do the work. The Town even concedes that some of Petitioner's allegations are responsive but refuses to identify which ones those are.

[3] https://www.nytimes.com/2016/05/07/business/dealbook/the-rise-of-the-costanza-defense.html.

Like all motions, a motion to strike must state with particularity the grounds for seeking the order. ***"[A] sweeping, indiscriminate motion to strike, without any explanation as to how or why the targeted paragraphs are immaterial or redundant, does not contain the requisite particularity or otherwise clearly show that an order to strike is warranted***." *Arias-Zeballos v. Tan*, 2006 U.S. Dist. LEXIS 78884, 2006 WL 3075528, slip op. at 10 (S.D.N.Y. 2006)(Emphasis added.) "A motion to strike must state with particularity the grounds therefor and set forth the nature of relief or type of order sought." *Credit General Ins. Co. v. Midwest Indem. Corp.* 916 F. Supp. 766, 771 (N.D. Ill. 1996) (citing 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1380 (2d ed. 1990)). Typically, unnecessary evidentiary details in a pleading will not be stricken. *Credit General*, 916 F. Supp. 771. In moving to strike matters as irrelevant, a movant must *clearly show that the matter is outside the issues in the case and is prejudicial*. *Id.* (Emphasis added.) *Cumis Ins. Soc'y Inc. v. Peters*, 983 F. Supp. 787, 798 (N.D. Ill. 1997); *Trust Mark Life Ins. Co. v. Univ. of Chicago Hosps.*, 1996 U.S. Dist. LEXIS 1614, No. 94 C 4692, 1996 WL 68009 at *1 (N.D. Ill. Feb. 14, 1996). The Town has not made any specific arguments as to why certain matters are "redundant, immaterial, impertinent, or scandalous". They have not identified any paragraphs or pages that they take issue with. In fact, the Town's assertions are so vague and ambiguous it is difficult for AHS to even respond to the Motion. Notwithstanding, AHS will assume that Bent is referring to matters relating to (i) the Town Plan expiration and the Town's active conspiracy to cover up the expiration and (ii) the Griffins a/k/a Mount Anthony Country Club. The Griffins have been discussed above.

D. Bent's Raising Estoppel Opened The Door To AHS's Statements.

By raising the issue of estoppel Bent has introduced multiple issues on which the AHS's filings regarding the Griffins and the Town Plan are directly relevant. See, Trepanier v. Getting Organized, 155 Vt. 259, 265-266 (1990). *For one*, the issue must be the same as the one raised in the later action, and, here, the expiration of the Town Plan and the Town's actions related thereto means the issue *is different*. *Second*, there was not a full and fair opportunity to litigate the issue in the earlier action because, among other things, the PUC excluded relevant evidence, the PUC

decision was based upon evidence not in the record, and the conclusions regarding the Mount Anthony Country Club were not based upon credible evidence. *Third,* applying preclusion in the later action would not be fair. *Trepanier v. Getting Organized*, 155 Vt. 259, 265-266 (1990).

Regardless, even if Bent could meet the base requirements for preclusion (which she cannot), there are many exceptions to preclusion applicable here to which the AHS filings are directly relevant.

Exception 1. *Restatement (Second) of Judgments* §28(2)(b).[4] Preclusion is not applicable if: the "issue is one of law and [] a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the law." This exception applies here because, as argued above, the Town Plan has expired and to apply preclusion would surely be inequitable.

Exception 2. *Restatement (Second) of Judgments* §28(3). "A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts." This exception applies here because, as argued above, the PUC excluded relevant evidence and based its decision on non-credible evidence and evidence not in the record.

Exception 3. *Restatement (Second) of Judgments* §28(5). "There is a clear and convincing need for a new determination of the issue." This criterion is easily met for all the reasons set forth herein and in AHS's other filings that Bent seeks to strike.

Exception 4. AHS is entitled to attack the earlier decision when and if other parties assert preclusion. *See, Restatement (Second) of Judgments*, §80 ("When a judgment is relied upon as the basis of a claim or defense in a subsequent action, relief from the judgment may be obtained.")

The credibility of the Griffins and the Mount Anthony Country Cub testimony, and the Town's actions regarding the Town Plan are clearly relevant to the estoppel issue raised by Bent.

[4] *See, Trepanier*, 155 Vt. at 265 for the Vermont Supreme Court's endorsement of the *Restatement (Second) of Judgments* §28.

1. The Town Plan Expiration

The expiration of the Town Plan is relevant because both the Town and DPS raised the issue of estoppel. The project in Case 8454 was denied because it purportedly violated certain provisions of the Town Plan, specifically related to the Rural Conservation District. Now those provisions of the Town Plan no longer apply because there is no Town Plan as the Town Plan expired on October 6, 2023.

The Town bears the burden of establishing the elements of preclusion. *Greenberg v. Bd. of Governors of Fed. Reserve Sys.*, 968 F.2d 164, 170 (2d Cir. 1992).

Pursuant to 24 V.S.A. §4387, the 2015 Bennington Town Plan was set to expire on October 6, 2023. The town plan adoption process is laid out in 24 V.S.A. §4302, and §§4381-4387 and is formidable (due to an intervening change in the requirements of the statute) and will often take years to accomplish. Section 4387(b)(1)(A) mandates that the planning commission "engage in community outreach and involvement in updating the plan". As the time to begin the process to head off an October 6, 2023, expiration date of the 2015 Town Plan was fast approaching, the Town was actively involved in litigation with Allco and affiliates over the proposed Chelsea Solar project and the AHS project.

Fearing that Allco would insert itself into the now more onerous planning process with respect to any newly proposed Town Plan, certain Select Board and Planning Commission members (together with the town manager and town planner) hatched a scheme to buy more time, hoping that Allco would have given up by the extended schedule.

The way in which the Town attempted to do that was to claim that the 2015 Town Plan had actually been *re-adopted* in 2018 when the Town passed the Energy Amendment, such that the Town Plan would not expire in 2023 but in 2026. The obvious issue with that scheme (besides getting caught) is that the town plan adoption process in 24 V.S.A. §4302, and §§4381-4387 cannot be circumvented and nothing that was required of the Town to *re-adopt* the Town Plan was actually accomplished in 2018.

Among other things, 24 V.S.A. §4387(a) requires that re-adoption take place in accordance with 24 V.S.A. §4385 which requires public notice and two hearings as a condition precedent to duly adopting a new town plan or re-adopting an old one. The Planning Commission never issued a public notice concerning a public hearing on the re-adoption of the Town Plan. The Planning Commission never voted on a re-adoption of the Town Plan. The Select Board never issued a public notice concerning a public hearing on the re-adoption of the Town Plan. The Select Board never voted on a re-adoption of the Town Plan. And, of course, the requirement under §4387(b)(1)(A) that the planning commission "engage in community outreach and involvement in updating the plan" was never done because that is exactly what the players were seeking to avoid when they came up with the lie regarding the Town Plan. All that was ever done by the Town of Bennington on January 22, 2018, was pass an amendment to the Town Plan (i.e., the Energy Amendment), which was a process that was hijacked by the core opponents of the Chelsea and AHS projects.

Moreover, 24 V.S.A. §4387(b) requires the Planning Commission to take the following actions if it were adopting a Town Plan (none of which occurred):

> (A) consider the recommendations of the regional planning commission provided pursuant to subdivision 4350(c)(2) of this title;
> (B) engage in community outreach and involvement in updating the plan;
> (C) consider consistency with the goals established in section 4302 of this title;
> (D) address the required plan elements under section 4382 of this title;
> (E) evaluate the plan for internal consistency among plan elements, goals, objectives, and community standards;
> (F) address compatibility with the regional plan and the approved plans of adjoining municipalities; and
> (G) establish a program and schedule for implementing the plan.

No matter what the Energy Amendment might say, all that was accomplished by the Select Board was an adoption of the Energy *Amendment*.

And documentation provided by whistleblowers proves beyond a shadow of a doubt that the 2018 exercise of adopting the Energy *Amendment* was an *amendment only* and not a *readoption*.

Dated: January 29, 2025

Respectfully Submitted,

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New Haven, CT 06510
Thomas.Melone@AllcoUS.com
212-681-1120

EXHIBIT 1

EXHIBIT 2

EXHIBIT 3

.

EXHIBIT 1

---------- Forwarded message ---------
From: **Stuart Hurd** <shurd@benningtonvt.org>
Date: Tue, Oct 15, 2024 at 4:44 AM
Subject: RE: Town Website
To: Joey Kulkin <jkulkin71@gmail.com>, Ned <edwardnperkins@gmail.com>

We believe we have sufficient documentation and a legal opinion supporting our position. It's not a lie if one believes what one's saying. We're moving on. Enjoy the day.

Stuart A. Hurd

Town Manager

Town of Bennington

205 South Street

PO Box 469

shurd@benningtonvt.org

From: Joey Kulkin <jkulkin71@gmail.com>
Sent: Monday, October 14, 2024 7:02 PM
To: Stuart Hurd <shurd@benningtonvt.org>; Ned <edwardnperkins@gmail.com>
Subject: Re: Town Website

Hi, Stu, you just lied to the public again about the town plan which expired on 10/6/23.

This time you said the town plan is valid in the eyes of the state.

Please produce communications from the state confirming what you just said. Because it's a lie.

We've got the documents.

You don't.

Thanks!

On Fri, Oct 11, 2024 at 3:22 PM Joey Kulkin <jkulkin71@gmail.com> wrote:

> Hi, Stu, someone from your staff replaced the cover page on the state database in recent days but it's still based on a lie.
>
> **QUESTIONS**:
>
> - On what day did a member of your staff upload the ACCD database with this new cover page?
> - Who uploaded it?
> - Who authorized this person to make the change?
>
> **REQUEST**:

EXHIBIT 2

From: "Krieger, Maxwell" <Maxwell.Krieger@vermont.gov>
Date: October 18, 2024 at 4:27:43 PM EDT
To: Ned Perkins <EdwardNPerkins@gmail.com>
Subject: RE: Freedom of Information Act - Public Records Request

Ned,

As a strict caveat, the Department, nor I can offer you legal advice or interpretation of statute. If you are seeking a legal opinion you will need to consult a private attorney.

The most relevant statute is Vermont Title 24, Chapter 117.

From the Department's perspective, the short answer to your question is no. The RPC can provide technical assistance through the municipal planning process, and the RPC must ultimately receive and review the plan for conformance with the requirements of the planning statute and regional planning goals, but the municipality itself must adopt the municipal plan.

Thank you,

-Max

Maxwell I. Krieger, Esq., General Counsel

Department of Housing and Community Development

Vermont Agency of Commerce and Community Development

1 National Life Dr., Deane C. Davis Bldg, 6th Floor

Montpelier, VT 05620

(802) 522-3132

Maxwell.krieger@vermont.gov

accd.vermont.gov

From: Ned Perkins <edwardnperkins@gmail.com>
Sent: Friday, October 18, 2024 4:17 PM
To: Krieger, Maxwell <Maxwell.Krieger@vermont.gov>
Subject: RE: Freedom of Information Act - Public Records Request

Hi Max,

One more question for you –

Do the statutes authorize a Regional Planning Commission to adopt a Municipal Town Plan on the Municipality's behalf?

Thanks for your help,

Ned

Ned Perkins

2229 South Stream Road

Bennington, VT 05201

802-442-9660 (h)

802-733-7149 (c)

From: Krieger, Maxwell [mailto:Maxwell.Krieger@vermont.gov]
Sent: Tuesday, October 15, 2024 9:16 AM
To: Ned Perkins
Subject: RE: Freedom of Information Act - Public Records Request

Mr. Perkins,

The Agency is not statutorily tasked with reviewing or approving the content of the plans and bylaws submitted to the database. The Agency is solely tasked with maintaining the database with the submissions from the municipalities and regional planning commissions. The Agency relies upon the submissions and representations of the municipalities and regional planning commissions with regard to evaluating the status of bylaws or plans.

If you have specific questions about the status of a municipal plan or bylaw, the municipality itself and/or the regional planning commission would be the best resources for more information.

Thank you,

-Max

Maxwell I. Krieger, Esq., General Counsel

Department of Housing and Community Development

Vermont Agency of Commerce and Community Development

1 National Life Dr., Deane C. Davis Bldg, 6th Floor

Montpelier, VT 05620

(802) 522-3132

Maxwell.krieger@vermont.gov

accd.vermont.gov

From: Ned Perkins <edwardnperkins@gmail.com>
Sent: Tuesday, October 15, 2024 9:10 AM
To: Krieger, Maxwell <Maxwell.Krieger@vermont.gov>
Subject: RE: Freedom of Information Act - Public Records Request

Good Morning Max,

Thank you for getting back to me. I have a quick follow-up question-

Does the Agency of Housing and Community Development formally review and/or approve submissions of Town Plans or Town Plan Amendments from individual towns to the agency?

If so, please supply copies of all documents regarding the review of the Town of Bennington's January 22, 2018 Amended Bennington Town Plan.

Thanks again,

Ned

Ned Perkins

2229 South Stream Road

Bennington, VT 05201

802-442-9660 (h)

802-733-7149 (c)

From: Krieger, Maxwell [mailto:Maxwell.Krieger@vermont.gov]
Sent: Monday, October 14, 2024 10:51 AM
To: Ned Perkins
Subject: RE: Freedom of Information Act - Public Records Request

Mr. Perkins,

Attached, please find the documents submitted to the Department in 2018. At that time, the documents were sent directly via email to the DHCD Staff Person administering the database, who then uploaded them. The Commissioner did not receive the documents directly.

This concludes the Department's response,

-Max

Maxwell I. Krieger, Esq., General Counsel

Department of Housing and Community Development

Vermont Agency of Commerce and Community Development

1 National Life Dr., Deane C. Davis Bldg, 6th Floor

Montpelier, VT 05620

(802) 522-3132

Maxwell.krieger@vermont.gov

accd.vermont.gov

From: Ned Perkins <edwardnperkins@gmail.com>
Sent: Tuesday, October 8, 2024 5:12 PM
To: Krieger, Maxwell <Maxwell.Krieger@vermont.gov>
Subject: Freedom of Information Act - Public Records Request

Hello Max,

Please supply a copy of the letter and all accompanying documents sent by the Town of Bennington to the Vermont Commissioner of Housing and Community Development conveying the January 22, 2018 Amended Bennington Town Plan, per VSA 4385 which states:

"Copies of newly adopted plans and amendments shall be provided to the regional planning commission and to the Commissioner of Housing and Community Development within 30 days after adoption."

Thanks,

Ned Perkins

2229 South Stream Road

Bennington, VT 05201

802-442-9660 (h)

802-733-7149 (c)

EXHIBIT 3

.

RESOLUTION FOR VCDP GRANT APPLICATION AUTHORITY

Single Applicant

WHEREAS, the Town of Bennington (hereinafter "Applicant") is applying for a Grant under the Vermont Community Development Program VCDP planning grant (PG) for Shires Housing merger ; and WHEREAS, it is necessary that an application be made and agreements be entered into with the State of Vermont.

Now, THEREFORE, BE IT RESOLVED as follows:

1. that Applicant possesses the legal authority as defined in the State Act [10 VSA §683(8)] to apply for the grant and to administer the program; and
2. that Applicant apply for a grant under the terms and conditions of said program and agree hereby to enter into Certifications and Assurances there of; and
3. the Applicant has a duly adopted and current Municipal Plan from October 6, 2015 (Date Adopted) and that the project is consistent with said plan; and
4. the Applicant has received documentation from the Regional Planning Commission that the project is consistent with the "Regional Plan; and
5. that Shannon Barsotti is hereby authorized to be Contact Person and as such to provide, on behalf of Applicant, all documents and information necessary for the completion of said application and to provide such coordination as may be necessary for said application; and
6. that (Name) Stuart Hurd Title Bennington Town Manager who is either the Chief Executive Officer (CEO), as defined by 10 VSA §683(8), or is the Town Manager, the City Manager, or the Town Administrator, is hereby designated to serve as the Municipal Authorizing Official (MAO) for the Grants Management On-line System, Intelligrants; and
7. that it is understood that, if the application is funded, the receipt of CDBG funds, as federal funds passed through the State of Vermont, may require that an audit of the Applicant be conducted under the provisions of the Single Audit Act, as amended, and that CDBG funds may be used to fund only a limited portion of the audit cost.

Passed this 26 day of August, 2024.

LEGISLATIVE BODY

Stuart BR
Jason Jr
Edward Woods
[illegible]
Deanne Carver

The above resolution is a true and correct copy of the resolution as adopted at a meeting of the Legislative Body held on the 26 day of August, 2024 and duly filed in my office.

IN WITNESS WHEREOF, I hereunto set my hand this 26 day of August, 2024

Cassandra Barbeau
Clerk

Cassandra Barbeau
Signature

STATE OF VERMONT
PROFESSIONAL RESPONSIBILTY PROGRAM

In re: Thomas Melone
PRB File No. 120-2025

TOWN OF BENNINGTON'S OBJECTION TO SUBPOENAS TO DANIEL MONKS, SHANNON BARSOTTI, JEANETTE JENKINS, AND JAMES SULLIVAN

Pursuant to V.R.C.P. 45(c)(2)(B), the Town of Bennington files and serves this objection to subpoenas duces tecum issued by Attorney Thomas Melone to two town employees (Town Manager Daniel Monks and Community Development Director Shannon Barsotti), a member of the Bennington Selectboard (James Sullivan), and a former member of the Bennington Selectboard (Jeanette Jenkins) (collectively, "Bennington Recipients"). The Town objects on behalf of the Bennington Recipients because the documents sought in the request belong to the Town, not to its individual employees and board members. Further, the requests also implicate claims of privilege which also belong to the Town, not to individual employees and board members. Accordingly, the Town has standing to object to the subpoenas on behalf of the Bennington Recipients. The Bennington Recipients each object in their individual capacity as well.

The subpoenas impose an undue burden on the Bennington Recipients, and also seek material subject to a claim of privilege. Although Rules 45 and 26 allow for broad discovery in matters, limits do exist. Rule 45 requires that "[a] party or an attorney responsible for issuance and service of a subpoena shall take reasonable

steps to avoid imposing undue burden or expense on a person subject to that subpoena." V.R.C.P. 45(c)(1). The Rule commands that a court quash or modify a subpoena if it "subjects a person to undue burden." V.R.C.P. 45(c)(3)(A)(iv). In short, a court must quash or modify a subpoena that imposes an undue burden on the recipient.

Subpoenas issued under Rule 45 cannot exceed the permissible scope of discovery set forth in Rule 26, which permits parties discovery upon "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, an whether the burden or expense of the proposed discovery outweighs its likely benefit." V.R.C.P. 26(b)(1). "[R]equested information is not relevant to . . . the pending action if the inquiry is based on the party's mere suspicion or speculation." *Micro Motion, Inc. v. Kane Steel Co., Inc.*, 894 F.2d 1318, 1326 (Fed. Cir. 1990) ("The discovery rules are designed to assist a party to prove a claim it reasonably believes to be viable *without discovery*, not to find out if it has any basis for a claim.") (emphasis in original).

Additionally, where a subpoena "sweepingly pursues material with little apparent or likely relevance to the subject matter," it risks being found "overbroad and unreasonable." *Concord Boat Corp. v. Brunswick Corp.*, 169 F.R.D. 44, 51 (S.D.N.Y. 1996). A subpoena that is overbroad on its face and which exceeds the

bounds of fair discovery "falls with Rule 45(c)(3)(A)'s prohibition on subpoenas that subject a witness to 'undue burden.'" *Id.* In other words, when a subpoena is overly broad on its face, that alone justifies quashing it.

"An evaluation of undue burden requires [a] court to weigh the burden to the subpoenaed party against the value of the information to the serving party." *Travelers Indem. Co. v. Metro Life Ins. Co.*, 228 F.R.D. 111, 113 (D. Conn. 2005). "Whether a subpoena imposes an 'undue burden' depends upon 'such factors as relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described and the burden imposed.'" *Id.* quoting *United States v. Int'l Bus. Mach. Corp.*, 83 F.R.D. 97, 104 (S.D.N.Y. 1979). "[C]ourts give *special weight* to the burden on *non-parties* of producing documents to parties involved in litigation." *Id.* (emphasis added); *see also Tucker v. American Intern. Group, Inc.*, 281 F.R.D. 85, 92 (D. Conn. 2012) (in balancing burden against need, "courts have considered the fact that discovery is being sought *from a third or non-party*, which weighs against permitting discovery"); *Rossman v. EN Engineering, LLC*, 467 F. Supp. 3d 586, 590 (N.D. Ill. 2020) ("[C]ourts have consistently held that 'non-party status is a significant factor to be considered in determining whether the burden imposed by subpoena is undue").

The subpoenas issued to the Bennington Recipients each contain the same request for documents, directing that the recipient produce

> All e-mails, memoranda, text messages, electronic messages (including messages sent through an application-based messaging

> service, such as Slack or WhatsApp), analyses, manuals, evaluations, opinions, and other documents in your possession or control concerning, mentioning, or relating to (A) the validity of the current Town Plan of the Town of Bennington, Vermont, including without limitation (i) the purported re-adoption of the Town Plan of the Town of Bennington, Vermont, in 2018 or (ii) claims that the Town Plan of the Town of Bennington, Vermont expired in 2023 and (B) all grants applied for by the Town of Bennington since January 1, 2023, to the Vermont Agency of Commerce and Community Development or any subdivision thereof, and (C) Coronavirus State and Local Fiscal Recovery funds received by the Town of Bennington.[1]

In addition to the above-referenced request, the subpoena issued to Mr. Monks also seeks:

> All e-mails, memoranda, text messages, electronic messages (including messages sent through an application based messaging service) and other documents in your possession or control that evidence the hiring of Attorney Merrill Bent to represent the Town of Bennington in connection with (a) Public Utility Commission Case 23-0249, (b) Public Utility Commission Case 24-3517, (c) Vermont Superior Court Docket No. 25-ENV-00016, (d) Vermont Superior Court Docket No. 25-cv-01872, (e) Vermont Supreme Court Docket No. 25-AP-175, and (f) Vermont Superior Court, Docket No. 25-CV-01902.

With regard to the request for information relating to the Town Plan, the subpoena is unreasonably broad, and premised on speculation. There is no good faith dispute of fact in the above-captioned proceeding that would require the Town or its employees, non-parties, to respond to the burdensome, sweeping request. The Misconduct Petition alleges that Mr. Melone accused members of the Town of Bennington of a "cover-up conspiracy," and of committing acts of "forgery" and

[1] The subpoena served on Ms. Barsotti did not include the request for materials relating to the Town Plan.

"counterfeiting," as well as of filing "false certifications to the state and federal government in violation of criminal statutes," and "false statements with the [Public Utility Commission]." Compl. ¶¶ 62–64, 115.[2] The Complaint further alleges that Mr. Melone "never filed a complaint alleging 'RICO' violations by the Town of Bennington in any court," which Mr. Melone admits. Compl. ¶ 64; Answer, ¶ 64. The Complaint alleges that Mr. Melone's statements to the PUC alleging criminal misconduct relating to the Bennington Town Plan violated Rules of Professional Conduct 3.5(d), 4.3, 4.5, and 8.4(d).

Documents and communications relating to the readoption of the Bennington Town Plan and/or information relating to grants or Coronavirus Relief Act funding will not shed any light on whether Mr. Melone made the statements at issue (which is not in dispute), or on whether his conduct violates the Rules of Professional Conduct. The allegations of misconduct arise from the forum and manner in which Mr. Melone made the statements. Further, Mr. Melone's subpoenas issued to the Bennington Recipients reveal that he does not and did not have factual support for serious accusations of criminal conduct when he made them to the PUC. He now seeks sweeping discovery from a non-party in hopes that some post-hoc rationalization for his assertions will emerge. Mr. Melone has never articulated a

[2] There is no legitimate dispute that Mr. Melone made the allegations attributed to him—they were publicly filed with the Vermont Public Utility Commission bearing his signature. Mr. Melone acknowledges that he made the filing in which the assertions appeared (though he inexplicably denies the statements attributed to him even though they are direct quotations from that filing with the immaterial exception that there should have been brackets around "criminal statutes").

good-faith basis for his claims of a vast criminal conspiracy; rather, he has only made conclusory assertions without any factual support. Even if, arguendo, the Town of Bennington had failed to satisfy all of the procedural requirements of a re-adoption of its Town Plan in 2018, Mr. Melone has never even alluded to any support for reaching the conclusion that public servants are engaging in a vast criminal conspiracy (let alone one that would provide no personal benefit to any of them, nor any benefit to the Town).

The burden on the Bennington Recipients is unquestionable. Mr. Monks and Ms. Barsotti are public servants who work hard every day to keep governmental operations running smoothly in the Town of Bennington. They both already have plenty to do in that regard. Ms. Jenkins and Mr. Sullivan are both members (one current, one former) of the Town Selectboard, giving of their time in public service on a volunteer basis. As a former Selectboard member, Ms. Jenkins does not even have access to the material sought anymore. The Town estimates that, given the number of emails that concern the Town Plan, grants from the Vermont Agency of Commerce and Community Development, and Coronavirus State and Local Fiscal Recovery Funds, responding to the subpoenas would take approximately 50-100 hours of staff time. The Town would also have to engage its attorney to review for claims of privilege.

With regard to Mr. Melone request for documents relating to Attorney Bent's representation of the Town of Bennington in various dockets, the Petition alleges that Mr. Melone alleged that "[A]ttorney Bent's representation [of the Town of

Bennington] would be a violation of multiple rules of the Vermont and New York Rules of Professional Conduct." Compl. ¶ 65. The Complaint alleges that Mr. Melone never filed a professional responsibility complaint against Attorney Bent for alleged misconduct, which Mr. Melone also admits (nor did he file a motion to disqualify Attorney Bent). Compl. ¶ 102; Answer, ¶ 102. The Complaint alleges that Mr. Melone's statements relating to Attorney Bent violated Rules of Professional Conduct 3.3(a)(1), 4.4(a), and 8.4(d).

In his request, Mr. Melone seeks documents that are subject to claims of attorney-client privilege. Attorney Bent's law firm, Woolmington, Campbell, Bent & Stasny, P.C. provides general legal services to the Town, and is listed as the Town's law firm year after year as an exception to the Town's Purchasing Policy (see, e.g., 2024 Exceptions to Purchasing Policy, Ex. A hereto (stating that Woolmington, Campbell, Bent & Stasny, P.C. "Provides legal services for all departments not covered by our Property and Casualty")). The Town's instructions to its attorney to enter an appearance in a particular matter are privileged communications not subject to any exception.

The subpoenas will subject the Bennington Recipients to an undue burden, and they also plainly seek the production of privileged material with respect to which no exception or waiver applies. The Town and the Bennington Recipients, therefore object to the subpoenas pursuant to V.R.C.P. 45(c)(2)(B).

Dated this 11th day of December 2025.

TOWN OF BENNINGTON, by

/s/ John D. Stasny
John D. Stasny, Esq.
Woolmington, Campbell, Bent & Stasny, P.C.
4900 Main Street, PO Box 2748
Manchester Ctr., VT 05255
(802) 362-2560
john@greenmtlaw.com

Daniel Monks

Shannon Barsotti

James Sullivan

Jeanette Jenkins

Dated this ____ day of December 2025.

TOWN OF BENNINGTON, by

/s/ John D. Stasny
John D. Stasny, Esq.
Woolmington, Campbell, Bent & Stasny, P.C.
4900 Main Street, PO Box 2748
Manchester Ctr., VT 05255
(802) 362-2560
john@greenmtlaw.com

Daniel Monks

Shannon Barsotti

James Sullivan

Jeanette Jenkins

Dated this ____ day of December 2025.

TOWN OF BENNINGTON, by

/s/ John D. Stasny
John D. Stasny, Esq.
Woolmington, Campbell, Bent & Stasny, P.C.
4900 Main Street, PO Box 2748
Manchester Ctr., VT 05255
(802) 362-2560
john@greenmtlaw.com

Daniel Monks

Shannon Barsotti

James Sullivan

Jeanette Jenkins

MEMORANDUM

To: Select Board

From: Stuart A. Hurd, Town Manager

Re: Exceptions to the Purchasing Policy
Multi Year Agreements

Date: April 15, 2024

The Purchasing Policy requires notification to the Board no later than April 30th of a given year for Professional Services Exceptions. The Policy also requires notification to the Board for Sole Source Purchases within 30 days. I will be including these Sole Source vendors because this is the first year and some of these were in place before the Policy was revised. Multi Year Agreements must also be sent to the Board. I will include the current vendors as well.

Professional Services Exceptions
These exceptions are "characterized by a high degree of professional judgement, discretion and continuity including legal, financial, auditing, engineering, and insurance services".

MSK Engineering
Provides engineering and surveying services for the municipal water system, for pathway projects, for forestry and land management purposes.
Roy Schiff
River science engineering
Paul Miller
Provides environmental engineering services for pollution/contamination matters.
Woolmington, Campbell, Bent and Stasny PC
Provides legal services for all departments except those covered by our Property and Casualty Insurer, PACIF (VLCT).
RHR Smith and Company
Auditing services
Newport Group
Provides retirement group actuarial services for the audit, a new GASB requirement.
A+E Engineering
Provides engineering and surveying services for the municipal wastewater system and treatment plant
White & Burke
Real estate development assistance

Sole Source Exceptions
These vendors have been selected because they are the only possible source.

A&K Slipformimg
Concrete curb installation
Lafaso Electric
Provides traffic control services for signal lights and controllers.
Morse Repair
Provides repair services for all heavy equipment and large trucks not under warranty from dealer. They are the only one local with the capabilities.
Peckham Industries
Provides all concrete for municipal projects; the only one available.
Sherwin Williams Paints
Only provider of traffic paint.
Electrical Installations Ins
Provides WTF SCADA maintenance.
LCS Controls
Provides WWTF SCADA maintenance.
Hach
Provides water instrumentation service and calibration.
Green Mountain Pipeline
Slip lining services-only competitive bidder.
Surpass Chemical
Provides polymer and chlorine to WTF.
Airgas
Bulk carbon dioxide for WTF
Holland Company
Provides sodium bisulfate.
Evoqua
Provides sodium bioxide for odor at West Rd sewer pump station.
Endyne
Does water quality testing for water and wastewater.
EMA
Provide maintenance on variable frequency drives for water and wastewater.
BDP
Provides repair parts and labor for all dewatering and compost equipment.

Multi Year Agreements
These are agreements ranging in length from three years to five years.

Wells Communications
Provides radio maintenance services to all departments.
Repeat Business Solutions
Provides copier lease agreements for most departments ranging in length as noted above.

First Choice Communications
Provides telephone hardware and maintenance services.
Consolidated Communications
Provides telephone, internet, and ELAN Network services for all departments.
Ingram Micro
Provides Cisco/Meraki product and design services.
Streak Wave
Provides WIFI gear and managed products.
Promethean
Provides BPD smartboards.
RCS Consulting
Provides internet and computer software assistance.
R.C. Pembroke and Sons
Provides tree planting and maintenance and island planting and maintenance for multiple locations.
Sweet William Garden Design
Provides downtown planting design and maintenance.
Procom
Provides radio maintenance services to DPW.
Prue Electric/Hathaway Electric/Monument Electric/Bronson Electric
Provide electrical services for water, wastewater, buildings and grounds, and highway.
Brookfield
Provides Generator maintenance for DPW.

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Petition of Apple Hill Solar LLC pursuant to 30 V.S.A. § 248, for a certificate of public good Authorizing the installation and operation of the "Apple Hill Solar Project," a 2.0 MW solar Electric generation facility located off Willow Road in Bennington, Vermont	))))))	Case No. 24-3517-PET

TOWN OF BENNINGTON'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO STRIKE

Petitioner's opposition misstates the law and is without support. It should be disregarded and the motion to strike should be granted.

I. Petitioner's allegations are not relevant to this matter.

The Town's motion did not need to be lengthy, as the content of Petitioner's filings speaks for itself. The Town specifically identified the offending components of the pleading as "ad hominem attacks on members of the public who are not involved in this docket, town officials and elected officials . . . which were neither responsive nor relevant to the matters raised before the PUC." This description was sufficient to put Petitioner on notice of the offending aspects of its pleadings without repeating them, and Petitioner did, in fact, identify the Town's concern and responded.[1] This Commission's rules require that:

> All factual contentions have evidentiary support, or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) The petition, motion, or other filing is not being done for delay or any other inappropriate purpose.

1 Petitioner's opposition also contains a multitude of arguments that were not responsive to the motion, and which the Commission need not address to adjudicate it.

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

Rule 2.203(C). Petitioner's submissions fail this test.

A. Petitioner's impermissible attempts at intimidation are not germane.

The core of Petitioner's argument is that the public process the Town undertook in 2018 with regard to its Town Plan was not effective to extend its expiration date to January 22, 2026. Petitioner engages in mere surmise and conjecture to suggest that Town officials have falsely claimed that the Bennington Town Plan was readopted in 2018 in order to prevent Petitioner from participating in the readoption process. Petitioner does not explain what benefit the Town would achieve from avoiding Petitioner's participation in that process, and indeed there is none. Petitioners would have this Commission accept that the Town chose to risk the validity of its Town Plan by knowingly allowing it to expire. They provide no grounds for this suggestion. The reality is that the Town is presently undergoing the public process of reviewing its Town Plan in anticipation of the Plan's expiration on January 22, 2026—a process which began in 2023 (when Petitioner asserts the Town engaged in a criminal conspiracy to avoid the very process it commenced).[2]

Relative to the present motion to strike, speculation about the mental state of

2 The Town already has a written agreement with the Petitioner and its affiliates providing that Petitioners

> will not develop any solar facilities above 150kw on any site within the Town unless such site is (i) on a mapped Preferred Area under the Energy Amendment and as approve[d] under the Solar Screening Ordinance or (ii) specifically approved by the Town and as to which the Town approves under the Solar Screening Ordinance.

If the preferred site designations have expired as Petitioner claims, then the only path forward under the agreement is entirely subject to the Town's discretion.

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

Town officials and inflammatory, unsupported accusations that Town officials have engaged in various crimes such as forgery, counterfeiting, submission of false documents, etc., are not germane to the legal argument about the effect of the process that the Town undertook in 2018, nor do they comport with the respect and dignity of proceedings before this Commission. Because Petitioner's inflammatory accusations are irrelevant to assessing the parties' respective legal positions concerning the validity of the Town Plan, and will not be adjudicated by the PUC, they are presented to the Commission for an improper purpose of intimidation in violation of Rule 2.203(C).

B. Petitioner misapprehends the ad hominem nature of its unsupported attempts at intimidation.

Petitioner also asserts that its inflammatory assertions are not *ad hominem* attacks. Opposition, at 6–7. Merriam-Webster defines *ad hominem* as "appealing to feelings or prejudices rather than intellect" and "marked by or being an attack on an opponent's character rather than by an answer to the contentions made." In its filings, Petitioner levels allegations that town employees and volunteer elected officials conspired to commit numerous crimes. These allegations are bare, personal insults, with no support or legitimate purpose in this proceeding. There can be no question that accusations of a criminal conspiracy are scandalous[3] and *ad hominem*.[4] Given the

3 "'Scandalous' matter is that which improperly casts a derogatory light on someone, most typically on a party to the action." Wright & Miller, Federal Practice and Procedure, 5C Fed. Prac. & Proc. Civ. § 1382 (Motion to Strike—Redundant, Immaterial, Impertinent, or Scandalous Matter).

4 The inclusion of a private citizen's petition in bankruptcy and accusations of scandalous allegedly fraudulent conduct concerning Town residents who have not even participated in this proceeding, and which are in no way relevant to anything the Commission must adjudicate, plainly meets the definition of an *ad hominem* attack.

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

context in which they were made—in response to the Town's initial comment requesting elucidation of threshold issues in this case about solar siting—they are also immaterial and impertinent. Because the offending statements are woven throughout the offending filings, the filings should be stricken.

Petitioner can, in an appropriate manner and setting, present its legal argument relating to alleged deficiencies in the readoption of the Town Plan in 2018, if it can do so without inserting conjectural assertions of criminal machinations.

II. Petitioner's arguments relative to the town's legal representation are nonresponsive and incorrect.

This Commission's rules require that:

> The signature of [the filer] constitutes a certification by that person that, based on a reasonable inquiry and a good-faith basis, to the best of their knowledge, information, and belief . . . All legal contentions are supported by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

Rule 2.203(C). Petitioner's submissions misstate the law and fail this test.

A. Town Counsel has been engaged to represent the Town

Petitioner asserts that undersigned counsel lacks authority to represent the Town in this proceeding absent a public meeting specifically authorizing such representation. Petitioner also suggests that undersigned counsel's appearance in this matter violates the Open Meeting Law. The argument ignores Vermont case law and statute.

First, the PUC does not have jurisdiction to adjudicate an alleged Open Meeting Law violation and, as such, this argument is improper. *In re Acorn Energy Solar 2, LLC*, 2021 VT 3, ¶ 104, 214 Vt. 73 (the PUC lacks jurisdiction to adjudicate alleged Open

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Meeting Law violations).

Second, the Vermont Supreme Court has considered and rejected Petitioner's argument as legally unfounded. In *Herron v. Town of Guilford*, the Court held that a Town may engage its legal counsel without first holding a public meeting. *Herron v. Town of Guilford*, No. 23-AP-402, 2024 WL 3461206, *2 (Vt. July 12, 2024) (mem.).[5] The *Herron* Court relied on powers implicit from those set forth in 24 V.S.A. § 872 (enumerating the general powers of the Selectboard).

The same applies in a Town Manager system. Bennington's Town Manager, has "general supervision of the affairs of the town, [is] the administrative head of all departments of the town governments, and [is] responsible for the efficient administration thereof." 24 V.S.A. § 1235. The Manager has the authority to perform all of the duties of the Selectboard with certain exceptions not relevant here. 24 V.S.A § 1236(2). Under Vermont Law a Town Manager, directly or by delegation, has the authority to direct municipal counsel to enter an appearance in a matter in which the Town has an interest without selectboard authorization at a public meeting. The Town Manager has due authority to exercise his or her authority for the day to day management of the Town independently of the selectboard and may follow his or her own judgment, subject to the provisions of 24 V.S.A. § 1233 which permit the Selectboard to remove the Town Manager for cause.

5 Even assuming Petitioner was correct that action at an open meeting was required to direct municipal counsel to enter an appearance on behalf of the Town, the Town could easily cure such an infirmity through ratification. *In re Acorn Energy Solar 2, LLC*, 2021 VT 3, ¶ 107, 214 Vt. 73.

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Contrary to Petitioner's assertions the Town has yet to take a position on the project or make a recommendation pursuant to § 248. Like the Department of Public Service, the Town has thus far merely raised threshold evidentiary deficiencies and inconsistencies for further examination. Indeed, in its initial comments the Town expressly indicated that it had yet to make a recommendation pursuant to § 248, and that it may do so "following further consideration by [the Selectboard and Planning Commission] at future meetings." Town's Initial Comments, at 2.

B. Town Counsel's Appearance Does Not Violate the Vermont Rules of Professional Conduct[6]

Petitioner asserts that the Town's counsel cannot appear in this proceeding without violating the Rules of Professional Conduct. Given that Petitioner's opposition is not a motion to disqualify the Town's counsel, the PUC need not address these arguments to decide the pending motion to strike. The Town nonetheless offers relevant authority in order to assist the Commission and in the absence of any supplied by Petitioner.

1. Rule 3.7 does not prohibit Town Counsel's representation.

Petitioner argues that "unless the Town stipulates that the Town Plan expired on October 6, 2023, [its counsel] is a key witness and as such is disqualified from

6 Petitioner presents arguments under both Vermont and New York Rules of Professional Conduct. The Town addresses only the Vermont rules as the choice of law provision in both states' Rules of Professional Conduct provides that "[f]or conduct in connection with a proceeding in a [tribunal/court] before which a lawyer has been admitted to practice . . . the rules to be applied shall be the rules of the jurisdiction in which the [tribunal/court] sits . . . ." Vermont Rules of Professional Conduct 8.5; New York Rules of Professional Conduct 8.5.

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representing the Town under Vermont Rules of Professional Conduct 3.7." Opposition, at 2. Petitioner's sole basis for this assertion is a reference to a legal opinion relating to the Town Plan in an email between Bennington Town Manager Stuart Hurt and a third party. Petitioner speculates that this must mean that the undersigned counsel has provided a legal opinion to the Town relating to the validity of the Town Plan. Town Counsel's communications with its client are protected by attorney-client privilege, and therefore will not be the subject of witness testimony in this proceeding. *See* Vermont Rule of Evidence 502 ("A client has the privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between the client or the client's representative and the client's lawyer or the lawyer's representative . . . .").

Testimony from the Town's counsel is also unnecessary to determine the legal issue Petitioner's seek to raise concerning the renewal of the Town Plan. As such, counsel is not a necessary witness.

That conclusion does not change if Petitioner announces an intention to call the Town's lawyer as a witness. "Disqualification of counsel is a 'drastic measure' and the moving party bears the burden of supporting a motion to disqualify.'" *In re Watts*, 2024 VT 48, ¶ 26, 325 A.2d 108 (quoting *Cody v. Cody*, 2005 VT 116, ¶¶ 16, 23, 179 Vt. 90). "The party seeking disqualification must carry a heavy burden, and must meet a high standard of proof." *Cody*, 2005 VT 16, ¶ 16. "Motions to disqualify counsel 'should be resolved with extreme caution because they may be used abusively as a litigation tactic.'" *Id*. (quoting *Nelson v. Green Builders, Inc.*, 823 F.Supp 1439, 1444 (E.D. Wis. 1993)).

Courts in other jurisdictions have explained that:

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> Disqualification motions premised upon the advocate-witness rule are subjected to strict scrutiny because of the 'strong potential for abuse' when a lawyer invokes the need to call opposing counsel as a witness and then acts to disqualify him as counsel.

Paramount Comms., Inc. v. Donaghy, 858 F.Supp. 391, 394 (S.D.N.Y. 1994); *see also Forrest v. Par Pharmaceutical, Inc.*, 46 F. Supp. 2d 244, 248 (S.D.N.Y. 1999). Courts assessing such motions must determine whether the testimony to be given by the lawyer is necessary. *Weaver v. Weaver*, 2018 VT 56, ¶ 5, 207 Vt. 564; *see also Forrest*, 46 F.Supp 2d at 248 ("[t]estimony may be relevant and even highly useful but not strictly necessary."). Petitioner's desire to remove the undersigned counsel does not and cannot satisfy the heavy burden to disqualify counsel on the basis of Rule 3.7.

2. Rule 1.7 does not prohibit Town Counsel's representation.

Petitioner also argues, without authority, that Town counsel's representation in this matter violates Rule 1.7 of the Rules of Professional Conduct based on its speculation about the substance of a privileged discussion alleged to have occurred in an executive session. Opposition, at 4. This, too, is incorrect, and misapprehends the relationship between municipal counsel and individual members of a municipal legislative body.

First, the Town has not waived privilege, and will not respond to speculation about alleged attorney-client communications. Regardless, Petitioner's legal contention is incorrect. Municipal counsel's client is the Town, not its individual officers. Rule 1.13(a) of the Vermont Rules of Professional Conduct provides that a "lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." The Vermont Supreme Court has explained that "[a]n

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organization's lawyer, such as a city attorney or corporate counsel, works only for its constituents, including its employees and officials, in order to serve the organization, *not to serve those individuals personally*." *Handverger v. City of Winooski*, 2011 VT 123, ¶¶ 8–9, 191 Vt. 84, 88 (citing *Bovee v. Gravel*, 174 Vt. 486, 487, 811 A.2d 137, 140 (2002) (mem.) (affirming "the general rule that an attorney representing a corporation owes a duty of care solely to the corporation, not to its separate shareholders, officers or directors")). "[A] municipal attorney is not in a personal attorney-client relationship with municipal staff." *Id.* (citation omitted).

III. The balance of petitioner's arguments are personal attacks that warrant no response.

Petitioner's remaining contentions constitute personal attacks that are premised on rank speculation, unsupported by its own exhibits, and are also inflammatory. The Town declines to step into an endless loop of responding to improper filings by the Petitioner, other than to suggest that the Commission has the responsibility to insist on professionalism and decorum just as any court, and that a failure by the Commission to adequately address unprofessional behavior diminishes the integrity of proceedings before it. "An advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants . . . . An advocate can present [its] cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics." Rule of Professional Conduct, Comment 4 to Rule 3.5. If this Commission's Rule 2.203 is to be heeded, either in this matter or others, Petitioner's most recent of its many breaches

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thereof demand to be addressed and striking the offending filings is the least of the responses that the Commission should consider.

Dated at Manchester Center, Vermont on February 11, 2025.

/s/ Merrill E. Bent
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STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

In re: Thomas Melone
PRB File No. 120-2025

CONFLICT DISCIPLINARY COUNSEL'S OBJECTION TO THOMAS MELONE'S *MOTION TO REVISE HP ORDER*

The Hearing Panel should deny Thomas Melone's *Motion to Revise HP Order*.

I. The Grounds for a Motion to Revise or a Motion for Reconsideration

Although described as a "motion to revise," Mr. Melone's latest pleading is usually called a motion for reconsideration. In this motion, filed on December 16, 2025, Mr. Melone asks the Hearing Panel to reconsider its December 2, 2025 Order denying his *Motion to Dismiss* the *Petition of Misconduct*.

Although there is no Vermont Rule of Civil Procedure rule which expressly provides for motions for reconsideration, a hearing panel may revise an interlocutory order. What Mr. Melone does not address are the grounds for granting a motion for reconsideration or, as he calls it, a motion to revise. There is very little law on this topic in Vermont beyond statements that "the trial court has discretion to decide a motion to ro reconsider and may dispose of such a motion with a hearing." Fed. Nat'l Mortgage Assoc. v. Johnston, 207 Vt. 473, 479 (2018).

Because the Vermont Rules of Civil Procedure are based on the Federal Rules of Civil Procedure, in the absence of Vermont case law, Vermont court look to the federal case law on point. As in Vermont Rules of Civil Procedure, there is no "motion for 'reconsideration' in the Federal Rules of Civil Procedure." Bass v. United States Dep't of Agriculture, 211 F.3d 959, 962 (5th Cir. 2000). However, the federal case law makes clear that motions to reconsider seek

an extraordinary remedy, granted only in highly unusual circumstances. McDowell v. Calderon, 197 F.3d 1253, 1255 (9th Cir. 1999). *See also*, U. S. ex rel Becker v. Westinghouse Savannah River Co., 305 F.3d 284, 290 (4th Cir. 2002) (simple disagreement with court's ruling will not support Rule 59(e) relief"). Courts frequently say that these motions do not provide litigants with an opportunity for a second bite at the apple. Motions for reconsideration are not vehicles for litigating relitigating old issues.

In almost all courts, a motion for reconsideration may be made only on the grounds of:

1. a material difference in the facts or the law which in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of the decision; or
2. the emergence of new material facts or a change of law after the decision; or
3. a failure by the court to consider material facts or law presented to it before the decision.

Additionally, most courts do not allow a motion for reconsideration to repeat an argument made in support of or in opposition to the original motion. "Unhappiness with the outcome is not included within the rule; unless the moving party shows that one of the stated grounds for reconsideration exists, the Court will not grant a reconsideration." Gish v. Newsom, Case No. 5:20-cv-00755-JGB (KKx), 2020 WL 6054912, at *2 (C.D. Cal. Oct. 9, 2020) (citation omitted).

II. Mr. Melone's Motion to Revise Merely Expresses Unhappiness with the Denial of His Motion to Dismiss

Mr. Melone makes no effort to show a fact or a law different from that he presented to the Hearing Panel in his *Motion to Dismiss*, or in any of his many other pleadings. He does not

claim the emergence of new material facts. He does not claim a change of law occurring after the denial of his *Motion to Dismiss*. On the contrary, Mr. Melone simply makes the same arguments he made in the Supreme Court in his *Verified Complaint for Extraordinary Relief*, and the very same arguments he made to the Hearing Panel in his *Special Motion to Strike*, his *Supplement to* his *Special Motion to Strike*, his *Motion to Dismiss*, his *Motion for More Definite Statement* and his *Motion for Permission to Appeal*. Mr. Melone's *Motion to Revise HP Order* does nothing more than restate arguments repeatedly made in prior pleadings.

III. Conclusion

Motions to dismiss for failure for failure to state a claim are not favored and rarely granted. Assoc. of Haystack Property Owners, Inc. Sprague, 145 Vt 443, 146 - 47 (1985). Also see Bock v. Gold, 2008 VT 81 ¶ 4. Motions to reconsider are also greatly disfavored and rarely granted. A motion to reconsider the denial of a motion to dismiss, absent the rarest of rare circumstances, none of which are even argued by Mr. Melone, must be denied.

Dated: December 29, 2025

/s/Michael F. Hanley

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UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

PLH VINEYARD SKY LLC and APPLE HILL SOLAR LLC, Plaintiffs, v. TOWN OF BENNINGTON Defendant	Case No. 2:25-cv-469

COMPLAINT FOR DECLARATORY JUDGMENT

NOW COMES PLH Vineyard Sky LLC ("PLH") and Apple Hill Solar LLC ("Apple Hill" or "AHS", and collectively with PLH, the "Plaintiffs") by way of complaint against the Town of Bennington (the "Town") which respectfully files this petition for declaratory relief.

NATURE OF THE ACTION

1. On October 6, 2015, the Town of Bennington by action of the Select Board adopted a Town Plan (the "2015 Town Plan"). Under 24 V.S.A. §4387(a), the 2015 Bennington Town Plan was set to expire after 8 years on October 6, 2023. Under 24 V.S.A. §4385, a municipality can amend its town plan at any time, however, under 24 V.S.A. §4385(d) an amendment to a plan does not affect or extend the plan's expiration date. Under 24 V.S.A. §4387(b)(1), a municipality may readopt an entire town plan that has expired or about to expire; provided that the Town satisfies a number of requirements including, *inter alia*, certain notice requirements and that the planning commission reviews and updates the information on which the plan is based. In 2016, Vermont House Bill 367 was passed into law and modified 4 V.S.A. §4387(b) by adding several other requirements for a municipality to readopt a town plan, including more extensive public

participation than previously required. Thoe new requirements of HB 367 are enumerated in 24 V.S.A. §4387(b)(1)(A) through (G), including a requirement of community outreach and involvement (24 V.S.A. §4387(b)(1)(B)).

2. The town plan readoption process, as modified by HB 367, is formidable and will often take years to accomplish. For example, the Town has hired consultants to assist it with creating the next version of its Town Plan and has been working on that version for the last two years.[1] That is not surprising given that HB 367 requires the planning process be opened to the public and that the public is to be involved in the process.

3. Rather than engage in community outreach and involvement in updating the 2015 Town Plan as required by statute, the Town opted to try to buy itself several more years. The way in which the Town attempted to do that was to claim that the 2015 Town Plan had actually been re-adopted in 2018 when the Town passed the Energy Amendment, such that the Town Plan would not expire in 2023 but in 2026. The obvious issue with that scheme is that the town plan adoption process in 24 V.S.A. §4302 and §§4381-4387 cannot be circumvented and nothing that was actually required of the Town to re-adopt the Town Plan was actually accomplished in 2018.

4. Thus, the 2015 Town Plan expired on October 6, 2023. There are real consequences of a town plan expiring in Vermont as the Town of Calais recently discovered, when the expiration of their town plan made them ineligible for grants that require Towns to have a duly adopted and current Town Plan.[2] The major difference between Calais and Bennington, however, is that the

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1 https://benningtonvt.org/services/planning___permitting/planning_commission/town_plan_update1.php

2 https://www.timesargus.com/news/local/expired-plan-nullifies-zoning-changes/article_c018dbf2-ac24-11ef-a5b9-af741d61a594.html.

Town of Calais actually owned up to the fact that their Town Plan expired whereas the Defendant have continued to actively deny it. Plaintiffs ask this Court to declare that the 2015 Town Plan expired on October 6, 2023. The expiration of the Town Plan directly impacts the disposition of the pending petition for certificate of public good (the "CPG") at the Vermont Public Utility Commission (the "PUC") filed by Plaintiff Apple Hill Solar LLC (Case No. 24-3517-PET). The PUC has no jurisdiction to determine whether a Town Plan is valid.

PARTIES

5. Plaintiff PLH Vineyard Sky LLC is a Florida limited liability company with its registered Vermont office located at 145 Pine Haven Shores, Suite 1000A, Shelburne, Vermont 05482. Plaintiff PLH Vineyard Sky LLC's single member is Thomas Melone who is a citizen of the State of Florida. Plaintiff PLH Vineyard Sky LLC is a citizen of Florida and only Florida. PLH owns the following real property in the Town: Property #23-50-16-00, 27.18 acres, (ii) Property #23-50-20-00, 40.6 acres and (iii) Property #29-50-31-00, 27.04 acres (the "Chelsea/Apple Hill Property").

6. Plaintiff Apple Hill Solar LLC is a Vermont limited liability company whose single member is Allco Finance Limited. Allco Finance Limited is a Florida corporation and a citizen of Florida. Plaintiff Apple Hill Solar LLC is a citizen of Florida and only Florida.

7. Defendant Town is a town in Vermont chartered in 1749.

JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction over this action pursuant to Article III, section 2 of the United States Constitution: "The judicial Power shall extend to all Cases, in Law and Equity, … between Citizens of different States." *Id.* Chief Justice John Marshall declared during the early days of the republic that "[w]e have no more right to decline the exercise of

jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. 264, 404 (1821). This Court also has subject matter jurisdiction over this action under 28 U.S.C. § 1332 because of diversity of citizenship under 28 U.S.C. §1332 and the amount in controversy exceeds $75,000.

9. The Court is empowered to grant declaratory relief by 28 U.S.C. §§ 2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure.

10. This Court has personal jurisdiction over Defendant because the Defendant resides in Vermont and conducts its activities in the District of Vermont.

11. Venue is proper in this District under 28 U.S.C. § 1391(b)(1) and (2) because a substantial part of the events giving rise to this action occurred in the District of Vermont.

FACTS APPLICABLE TO ALL COUNTS

I. The Town Plan Expiration

12. Pursuant to 24 V.S.A. §4387, the 2015 Bennington Town Plan was set to expire on October 6, 2023.

13. Rather than engage in community outreach and involvement in updating the 2015 Town Plan as required by statute, the Town opted to try to buy itself several more years. The story that Defendant has been telling regarding the status of its town plan is simple on its face: the Defendant claims that the Town Plan was re-adopted on January 22, 2018 (i.e., 5 whole years before expiration), when the Town adopted an amendment to the Town Plan by adopting an enhanced energy element (the "Energy Amendment") and sought from the Bennington County Regional Commission (the "BCRC") (i) Act 174 certification of the Energy Amendment and (ii) approval of its Energy Amendment under 24 V.S.A. §4350.

14. To better understand the story the Town is telling, one has to understand (i) the Act 174 certification process and (ii) 24 V.S.A. §4350, which requires a regional planning commission to review the planning process of its members (the "Planning Process"). See 24 V.S.A. §4350(a)(1).

A. Act 174 Certification.

15. Act 174 of 2016 established a new set of municipal and regional energy planning standards, which if met allow those plans to carry greater weight - substantial deference - in the section 248 siting process for energy generation before the Vermont Public Utility Commission (the "PUC"). Meeting the standards is entirely voluntary; if regions and municipalities do not wish to update their plans, they will continue to receive due consideration in the section 248 process.

16. In order to support regional and municipal planners with the process of developing or revising enhanced energy plans, the Vermont Department of Public Service (the "Department") developed a number of data tools and guidance documents. One of those tools is the "Energy Planning Standards for Municipal Plans", which is filled out by and submitted by the Town to the BCRC in order to receive confirmation of energy compliance under Act 174 (see **Exhibit 1** hereto, the "Act 174 Review Tool"). The Act 174 Review Tool is explicit in its description of how municipalities in Vermont can receive a determination of energy compliance under Act 174:

> Act 174 requires that municipal plans be adopted and approved in order to qualify for a determination of energy compliance. **In the near term, it is likely municipalities will revise and submit isolated energy plans or elements, particularly due to long planning cycles. Therefore, the plan adoption requirement can be met through an amendment to an existing plan in the form of an energy element or energy plan, as long as the amendment or plan itself is duly adopted as part of the municipal plan** and incorporated by reference or appended to the underlying, full plan (i.e., is officially "in" the municipal plan), as well as approved for confirmation with the region. (emphasis added)

17. In 2018 The Town desired an energy plan that would be entitled to substantial deference in the section 248 siting process for energy generation before the PUC. However, the 2015 Town Plan was not set to expire for another 5 years so the Town did exactly what the Act 174 Review Tool suggested municipalities do, adopt an isolated energy plan or element in the interim.

18. In response to the question in the Act 174 Review Tool "Has your plan been duly adopted and approved from confirmation according to 24 V.S.A. §4350?", the Town responded:

> **The Town of Bennington's enhanced energy element was adopted as an amendment to the Bennington Town Plan on Monday, January 22, 2018.** A draft plan was published in November 2017 and ___ public meetings were duly warned and held in ____ 2018 prior to adoption. The Bennington Town Plan ("Town Plan") was originally adopted on October 6, 2015. The town has requested that the BCRC confirm its plan as amended at the commission's next meeting on March 15, 2018. (emphasis added)

Faced with the choice of adopting a new town plan 5 years in advance of its regularly scheduled planning cycle or adopting an enhanced energy element as an amendment to 2015 Town Plan in order to receive the determination of energy compliance in the near term, theTown elected to adopt an amendment to the 2015 Town Plan.

19. On January 22, 2018, the Town adopted an amendment to the Town Plan by adopting the Energy Amendment. The Energy Amendment did not extend the expiration date of the 2015 Town Plan because amendments to town plans are incapable of extending expiration dates. *See* 24 V.S.A. §4385(c): "An amendment to a plan does not affect or extend the plan's expiration date." The Town then submitted the Energy Amendment (along with the Act 174 Review Tool) to the BCRC for (i) Act 174 Certification and (ii) approval of the Energy Amendment pursuant to 24 V.S.A. §4350.

B. The BCRC Planning Process Confirmation.

20. 24 V.S.A. §4350 requires a regional planning commission to review the planning process of its members (the "Planning Process"). *See* 24 V.S.A. §4350(a)(1). During the period of time when a municipal Planning Process is confirmed, the municipality shall be eligible to receive additional funds from the municipal and regional planning fund, among other benefits. *See* 24 V.S.A. §4350(d)(4). In order to obtain or retain confirmation of the Planning Process, a municipality must have an approved plan. *See* 24 V.S.A. §4350(b)(1). A regional planning commission shall review and approve plans of its member municipalities, when approval is requested and warranted. *Id.* Once the Defendant approved the Energy Amendment on January 24, 2018, it sought BCRC approval of the Energy Amendment under 24 V.S.A. §4350 (see **Exhibit 2**). This is the same process that Bennington followed under 24 V.S.A. §4350 for two subsequent amendments as well (see **Exhibit 3** hereto).

21. As set forth on **Exhibit 2**, on January 24, 2018, the Town sought confirmation from the BCRC (i) that the Energy Amendment met the energy planning standards (24 V.S.A. §4352) of Act 174 and (ii) approval of the 2015 Town Plan as amended by the Energy Amendment under 24 V.S.A. §4350. In response to the request, the BCRC issued a "Certificate of Energy Compliance" on March 15, 2018, and nothing else (see **Exhibit 4** hereto). In other words, not only did the BCRC not approve a newly adopted Town Plan (because there was none), the BCRC did not even approve the 2015 Town Plan as amended by the Energy Amendment. There was no BCRC approval under 24 V.S.A. §4350 in the wake of the Energy Amendment.

22. Regardless, in a throwback to the television series *Seinfeld*, when a citizen of Bennington challenged Town manager Stu Hurd's claim that the Town Plan didn't expire in 2023, Mr. Hurd said: "*It's not a lie if one believes what one's saying*." (See **Exhibit 5** hereto)

C. Why the Town's Position Trips at the Starting Gate.

23. 24 V.S.A. §4387(a) requires that re-adoption take place in accordance with 24 V.S.A. §4385 which requires public notice and two hearings as a condition precedent to duly adopting a new town plan or re-adopting an old one. The Bennington Planning Commission never issued a public notice concerning a public hearing on a "re-adoption" of the Town Plan. The Planning Commission never voted on a re-adoption of the Town Plan. The Select Board never issued a public notice concerning a public hearing on the re-adoption of the Town Plan. The Select Board never voted on a re-adoption of the Town Plan. And, of course, the requirement under §4387(b)(1)(A) that the planning commission "engage in community outreach and involvement in updating the plan" was never done. All that was ever done by the Town of Bennington on January 22, 2018, was pass an amendment to the Town Plan (i.e., the Energy Amendment).

24. No matter how comprehensive the Energy Amendment, none of the statutory requirements to re-adopt the Town Plan were satisfied. Likewise, no matter how comprehensive the Energy Amendment might have been, the BCRC has no authority to determine that the action taken by the Town is actually a re-adoption of the Town Plan rather than an amendment thereto. Under 24 V.S.A. § 4345b(e), the BCRC has no authority to perform essential legislative functions, the power to re-adopt the Town Plan being one of those essential legislative functions. The process of re-adoption cannot be short circuited by the BCRC, even if the Town asks them to short circuit it. There is no end-around the requirements of 24 V.S.A. §4385.

25. Neither the Town nor the BCRC has the authority to circumvent the requirements of (i) 24 V.S.A. §4387(a), which requires public notice and hearings on any re-adoption and (ii) 24 V.S.A. §4387(b) which requires the Planning Commission to take the following actions (none of which occurred):

> (A) consider the recommendations of the regional planning commission provided pursuant to subdivision 4350(c)(2) of this title;

(B) engage in community outreach and involvement in updating the plan;
(C) consider consistency with the goals established in section 4302 of this title;
(D) address the required plan elements under section 4382 of this title;
(E) evaluate the plan for internal consistency among plan elements, goals, objectives, and community standards;
(F) address compatibility with the regional plan and the approved plans of adjoining municipalities; and
(G) establish a program and schedule for implementing the plan.

26. No matter how comprehensive the Energy Amendment might have been, all that was accomplished by the Select Board on that date was an adoption of the Energy Amendment. That is made abundantly clear by (1) the public notices sent out in advance of the January 8, 2018, and January 22, 2018, Select Board hearings on the Energy Amendment (the "SB Energy Amendment Hearings") (see **Exhibit 6** hereto), (2) the transcripts of the SB Energy Amendment Hearings (see **Exhibit 7** hereto), (3) the minutes of the SB Energy Amendment Hearings (**Exhibit 8** hereto), (4) the Agendas for the SB Energy Amendment Hearings (see **Exhibit 9** hereto), (5) the public notice sent out in advance of the Planning Commission meeting on October 16, 2017 discussing the Energy Amendment (the "PC Energy Amendment Hearing") (see **Exhibit 10** hereto), (6) the minutes for the PC Energy Amendment Hearing (see **Exhibit 11** hereto), (8) the Agenda for the PC Energy Amendment Hearing (see **Exhibit 12** hereto), (7) the Memorandum from the Planning Commission to the Select Board submitting the Energy Amendment for approval (see **Exhibit 13** hereto) and (8) the Certificate of Energy Compliance issued by the Bennington County Regional Commission ("BCRC") on January 22, 2018 (see **Exhibit 4** hereto).

27. One of the most telling pieces of evidence is the Act 174 Review Tool discussed above as it encapsulates the Act 174 certification process before the BCRC. The Act 174 Review Tool was filled out by, and submitted by, the Town to the BCRC in order to receive confirmation of energy compliance under Act 174. In response to the question in the Act 174 Review Tool

"Has your plan been duly adopted and approved from confirmation according to 24 V.S.A. §4350?", the Town responded:

> **The Town of Bennington's enhanced energy element was adopted as an amendment to the Bennington Town Pan on Monday, January 22, 2018.** A draft plan was published in November 2017 and ___ public meetings were duly warned and held in ____ 2018 prior to adoption. The Bennington Town Plan ("Town Plan") was originally adopted on October 6, 2015. The town has requested that the BCRC confirm its plan as amended at the commission's next meeting on March 15, 2018. (emphasis added)

There is no mystery as to what happened on January 22, 2018, because the Town explicitly stated what happened when it went before the BCRC seeking Act 174 certification. The Town only ever sent the Energy Amendment to the BCRC to review (see **Exhibit 2** hereto) and the BCRC only ever issued the Certificate of Energy Compliance (see **Exhibit 4** hereto).

28. Perhaps just as telling as Act 174 Review Tool is a quick review of the Agency of Commerce and Community Development's website which includes a link to their "plan and bylaw database."[3] 24 V.S.A. § 4385(c) requires that copies of newly adopted plans and amendments shall be provided to the Commissioner of Housing and Community Development within 30 days of adoption. The 2010 Bennington Town Plan is there. The 2015 Bennington Town Plan is there. But the only thing that is there for 2018 is a copy of the Energy Amendment (*see* **Exhibit 14** hereto). Obviously if the Town Plan had been readopted in 2018, the Town would have uploaded the entire Town Plan **as required by law**. In fact, the Town as recently as August 26, 2024, was still submitting official documents and certifications to the State indicating a Town Plan adoption

[3] https://outside.vermont.gov/agency/ACCD/bylaws/Bylaws%20and%20Plans%20Approved/Forms/Group%20by%20Municipality.aspx?_gl=1*d1esa6*_ga*MTQzMTIxMTk2MC4xNzMzMjQzNzI5*_ga_V9WQH77KLW*MTc0NTU5MjUwNy42My4wLjE3NDU1OTI1MTMuMC4wLjA.

date of October 6, 2015 (see **Exhibit 15** hereto). Clearly, if the Town Plan had been readopted in 2018, the Town would have stated as much in its certifications to the State.

29. As each of the aforementioned Exhibits makes clear, the Town Plan was not re-adopted on January 22, 2018, it was simply amended by the passage of the Energy Amendment. If it was the intent to re-adopt the Town Plan, then the Town would have been required to hold public hearings on exactly that pursuant to 24 V.S.A. §4385(a). As the evidence clearly shows, the public hearings that were held were limited to the passage of the Energy Amendment and there was not **a single** mention of re-adoption of the Town Plan at any of them. If the Town sought to re-adopt the 2015 Town Plan, it would also have to abide by the procedures set forth in 24 V.S.A. §4387(b), which requires, among other things, the Planning Commission to review and update **all of the information** on which the plan is based (not just information concerning the Energy Amendment) and consider the criteria set forth in §4387(b)(1)(A) through (G) listed above, none of which occurred.[4]

30. As the evidence clearly indicates, the passage of the Energy Amendment was exactly that, the approval of an amendment to the Town Plan. As §4385(d) makes abundantly clear, "An amendment to a plan does not affect or extend the plan's expiration date." As such, the Town Plan expired on October 6, 2023.

[4] One of the requirements under §4387(b)(1)(A) is that the planning commission "engage in community outreach and involvement in updating the plan". On October 23, 2023, the Town Select Board adopted a resolution approving a Municipal Planning Grant Application from the DHCD in the amount of $26,500 to hire consultants to aid the BCRC in a comprehensive update of the Town Plan. Tellingly, this process did not occur prior to the adoption of the Energy Amendment.

II. Why the Expiration of the Bennington Town Plan Matters to Plaintiffs.

31. Plaintiff Apple Hill Solar LLC ("AHS") filed its petition for a CPG with the PUC on November 26, 2024, which is when there was no valid Town Plan in effect. The petition is docketed as Case No. 24-3517-PET. That AHS petition was filed as a result of a prior denial of a CPG in docket no. 8454 that resulted *solely* from a purported inconsistency of the solar project with the Bennington Town Plan. In other words, but for that purported inconsistency, AHS would have been issued a CPG for its solar project. This Court issuing the requested declaratory relief will significantly increase the likelihood that the Plaintiffs' Apple Hill solar project will obtain a CPG and will be built. The Plaintiffs would have decreased costs, increased likelihood of the project being built, a decrease in the risk of losses to Plaintiffs, and increased opportunities.

32. The value of Plaintiffs' two-megawatt solar project and the costs and losses that are at issue far exceed $75,000.

33. The Town has taken final definitive positions which stand as an obstacle to the prize that Plaintiffs seek: a CPG. There are no more steps needed to make Plaintiffs' claims ripe. All requested relief involves issues where the Defendant has taken a definitive position regarding how its purported Town Plan zoning restrictions apply to the project site and Plaintiff's solar project. Each such definitive position taken by the Defendant stands in the way of Plaintiffs' land being used for solar, and the land and personal property not diminishing or losing some or all of its value. The Second Circuit's opinion in *Allco Finance Ltd. v. Klee,* 861 F.3d 82 (2d Cir. 2017) ("*Klee*") and its recent opinion in *Allco Finance Ltd. v. Roisman*, No. 22-2276, 2023 U.S. App. LEXIS 18179 *14-15, 2023 WL 4571965 (2d Cir. July 18, 2023) ("*Roisman*") establishes that Plaintiffs have standing here and that Article III's requirements are met. As here, the plaintiffs in both *Klee* and *Roisman* sought declaratory and injunctive relief challenging a decision or policy of a

governmental entity. At issue in those two cases were energy contracts, which the Second Circuit described as the ultimate prize that plaintiffs sought. Notably in both of those cases even if the plaintiffs obtained the relief they sought from the federal district court, there was no guarantee they would obtain the ultimate prize.[5] But because, as here, the government's policy stood as an obstacle to the prize plaintiffs sought, the plaintiffs had standing to challenge it. *See, Klee* at 95, fn. 10, *Roisman* at *14-15. Here, the prize that Plaintiffs seek is a CPG under 30 V.S.A. §248. Just as in *Klee* and *Roisman*, it is the Defendant's claim and its definitive position that the Town Plan did not expire on October 6, 2023, that stand as an obstacle in the Plaintiffs' way.

CAUSES OF ACTION

COUNT I

DECLARATORY JUDGMENT THAT THE 2015 TOWN PLAN WAS NOT RE-ADOPTED ON JANUARY 22, 2018 AND EXPIRED ON OCTOBER 6, 2023.

34. Plaintiffs repeat and re-allege the allegations contained in each and every preceding paragraph of this Complaint.

35. As set forth above, there is an actual, present controversy concerning whether the 2015 Town Plan has expired.

36. The unconverted evidence concerning the approval process of the Energy Amendment submitted by the Plaintiffs confirms that the only action taken by the Town Select

[5] Success in achieving a Plaintiffs' ultimate goal, here a CPG, has never been a requirement of Article III standing and redressability. *See, e.g., discussed infra, Clinton v. City of New York*, 524 U.S. 417, 433 n. 22 (1998); *Natural Resources Defense Council, Inc. v. FDA*, 710 F.3d 71, 81 (2d Cir. 2013); *Ne. Fla. Chapter, Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993)); *FEC v. Akins*, 524 U.S. 11, 25 (1998); *Utah v. Evans*, 536 U.S. 452, 464, 122 S. Ct. 2191 (2002); *Winding Creek Solar LLC v. Peterman*, 932 F .3d 861 (9th Cir. 2019). *Winding Creek* is another Allco-related case.

Board on January 22, 2018, was to adopt the Energy Amendment. There was no re-adoption of the Town Plan.

37. For the reasons stated herein, Plaintiff asks for a declaratory judgment that the 2015 Town Plan expired on October 6, 2023.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter Judgment against the Defendant as follows:

a. That this Court grant judgment in favor of Plaintiffs and against Defendant;

b. That this Court issue the declaration requested herein by Plaintiffs;

c. That the Plaintiffs be granted such other and further relief as this Court deems just and proper.

JURY DEMAND

Plaintiffs hereby demand a trial by jury of all issues so triable.

Dated: May 2, 2025

Respectfully submitted,

/s/Michael Melone
Michael Melone
Allco Renewable Energy Inc.
157 Church Street, 19th floor
New Haven, CT 06510
Phone: (212) 681-6974
Email: mjmelone@AllcoUS.com

Attorney for Plaintiffs

PLAINTIFFS' INDEX OF EXHBITS

Exhibit Number	Description
1	Vermont Department of Public Service Act 174 Review Tool
2	Town Email Request to BCRC For Energy Amendment Approval
3	BCRC Approval of Bolio and SVC Amendments to Town Plan
4	BCRC Certificate of Energy Compliance
5	Stuart Hurd Email 10-15-24
6	Public Notice of Select Board Hearings on Energy Amendment
7	Transcript of the Select Board Hearings on Energy Amendment
8	Minutes of the Select Board Hearings on Energy Amendment
9	Agenda of the Select Board Hearings on Energy Amendment
10	Public Notice of the Planning Commission Hearing on Energy Amendment
11	Minutes of the Planning Commission Hearing on Energy Amendment
12	Agenda of the Planning Commission Hearing on Energy Amendment
13	Memorandum from Planning Commission to Select Board Regarding Submission of Energy Amendment
14	Screenshot of Agency of Commerce and Community Development Plan and Bylaw Database
15	Town Resolution to Agency of Commerce and Community Development, August 26, 2024

EXHIBIT 1

Energy Planning Standards for Municipal Plans

Instructions

Before proceeding, please review the requirements of Parts I and II below, as well as the Overview document. Submitting a Municipal Plan for review under the standards below is entirely voluntary, as enabled under Act 174, the Energy Development Improvement Act of 2016. If a Municipal Plan meets the standards, it will be given an affirmative "determination of energy compliance," and will be given "substantial deference" in the Public Service Board's review of whether an energy project meets the orderly development criterion in the Section 248 process. Specifically, with respect to an in-state electric generation facility, the Board:

> *[S]hall give substantial deference to the land conservation measures and specific policies contained in a duly adopted regional and municipal plan that has received an affirmative determination of energy compliance under 24 V.S.A. § 4352. In this subdivision (C), "substantial deference" means that a land conservation measure or specific policy shall be applied in accordance with its terms unless there is a clear and convincing demonstration that other factors affecting the general good of the State outweigh the application of the measure or policy. The term shall not include consideration of whether the determination of energy compliance should or should not have been affirmative under 24 V.S.A. § 4352.*

Municipal Plans should be submitted by the municipality's legislative body to the Regional Planning Commission (RPC) if the Regional Plan has received an affirmative determination of energy compliance. If a Regional Plan has not received such a determination, until July 1, 2018[1], a municipality may submit its adopted and approved Municipal Plan to the Department of Public Service (DPS) for a determination of energy compliance (determination), along with the completed checklist below. After a Municipal Plan and completed checklist have been submitted to the RPC (or DPS), the RPC or DPS will schedule a public hearing noticed at least 15 days in advance by direct mail to the requesting municipal legislative body, on the RPC or DPS website, and in a newspaper of general publication in the municipality. The RPC or DPS shall issue a determination in writing within two months of the receipt of a request. If the determination is negative, the RPC or DPS shall state the reasons for the denial in writing and, if appropriate, suggest acceptable modifications. Submissions for a new determination following a negative determination shall receive a new determination within 45 days.

The plans that Municipalities submit must:

- Be adopted
- Be confirmed under 24 V.S.A. § 4350
- Include an energy element that has the same components as described in 24 V.S.A. § 4348a(a)(3)
- Be consistent with state energy policy (described below), in the manner described in 24 V.S.A. § 4302(f)(1)
- Meet all standards for issuing a determination of energy compliance (see below)

[1] These standards will be revised after July 1, 2018 to reflect that Municipal Plans should be submitted only to the Regional Planning Commissions – which will all have had an opportunity to seek a determination of energy compliance – from that point forward.

Municipalities are encouraged to consult with their reviewer (either their RPC or DPS) before undertaking the process of plan adoption, which may help in identifying any deficiencies or inconsistencies with the standards or other requirements that would be more difficult to remedy after a plan has gone through the formal adoption process.

The state's Comprehensive Energy Plan (CEP) is revised on a 6-year basis. When the next CEP is published in 2022, it will include a revised set of standards, as well as Recommendations that are customized to regions and municipalities. The Recommendations that accompany this initial set of Standards represent a subset of recommendations from the 2016 CEP, which were not written with regions and municipalities specifically in mind. A Guidance document – which is expected to evolve as best practices from regions and municipalities emerge – will be published shortly after the Standards are issued. It will serve as the warehouse for relevant recommendations from the 2016 CEP, links to data sources, instructions on conducting analysis and mapping, and sample language/best practices. Once issued and until the 2022 CEP is published, this Guidance document will supplant the Recommendations document.

Affirmative determinations last for the life cycle of a revision of the Municipal Plan, and Municipal Plans that are submitted after the 2022 CEP is issued will be expected to meet the Standards that are issued at that time. Municipalities are encouraged to consult with their RPC or DPS regarding interim amendments that might affect any of the standards below, to discuss whether a new review is triggered.

If you wish to submit your Municipal Plan to your RPC or to DPS for a determination, please read closely the specific instructions at the start of each section below, and attach your Municipal Plan to this checklist.

Determination requests to an RPC (and any other questions) should be submitted to your RPC's designated contact. Determination requests to DPS until July 1, 2018 – and only for municipalities whose Regions' plans have not received an affirmative determination – should be submitted to: PSD.PlanningStandards@vermont.gov.

Part I: Applicant Information		
The plan being submitted for review is a:	☒ Municipal Plan in a region whose regional plan has received an affirmative determination of energy compliance from the Commissioner of Public Service **Please submit these plans to your RPC**	☐ Municipal Plan in a region whose regional plan has not received a determination of energy compliance **Until July 1, 2018, please submit these to the DPS. After July 1, 2018, this option ceases to exist.**
Applicant:	Town of Bennington	
Contact person:	Dan Monks, Planning Director	
Contact information:	dmonks@benningtonvt.org	
Received by: Click here to enter text.	**Date:** Click here to enter text.	

Part II: Determination Standards Checklist

The checklist below will be used to evaluate your plan's consistency with statutory requirements under Act 174, including the requirement to be adopted and approved, contain an enhanced energy element, be consistent with state energy policy, and meet a set of standards designed to ensure consistency with state energy goals and policies.

Please review and attach your plan (or adopted energy element/plan, along with supporting documentation) and self-evaluate whether it contains the following components. Use the Notes column to briefly describe how your plan is consistent with the standard, including relevant page references (you may include additional pages to expand upon Notes). If you feel a standard is not relevant or attainable, please check N/A where it is available and use the Notes column to describe the situation, explaining why the standard is not relevant or attainable, and indicate what measures your municipality is taking instead to mitigate any adverse effects of not making substantial progress toward this standard. If N/A is not made available, the standard must be met (unless the instructions for that standard indicate otherwise) and checked "Yes" in order to receive an affirmative determination. There is no penalty for checking (or limit on the number of times you may check) N/A where it is available, as long as a reasonable justification is provided in the Notes column.

Plan Adoption Requirement

Act 174 requires that municipal plans be adopted and approved in order to qualify for a determination of energy compliance. In the near term, it is likely municipalities will revise and submit isolated energy plans or elements, particularly due to long planning cycles. Therefore, the plan adoption requirement can be met through an amendment to an existing plan in the form of an energy element or energy plan, as long as the amendment or plan itself is duly adopted as part of the municipal plan and incorporated by reference or appended to the underlying, full plan (i.e., is officially "in" the municipal plan), as well as approved for confirmation with the region. If this route is chosen, the municipality should also attach the planning commission report required for plan amendments under 24 V.S.A. § 4384, which should address the internal consistency of the energy plan/element with other related elements of the underlying plan (particularly Transportation and Land Use), and/or whether the energy plan/element supersedes language in those other elements. Standards 1 and 2 below must be answered in the affirmative in order for a plan to receive an affirmative determination of energy compliance.

1. Has your plan been duly adopted and approved for confirmation according to 24 V.S.A. § 4350?	☒ Yes. Adoption date: January 22, 2018 Confirmation date: See notes	☐ No	The Town of Bennington's enhanced energy element was adopted as an amendment to the Bennington Town Plan on Monday, January 22, 2018. A draft plan was published in November 2017 and __ public meetings were duly warned and held in ____ 2018 prior to adoption. The Bennington Town Plan ("Town Plan") was originally adopted on October 6, 2015. The town has requested that the BCRC

			confirm its plan as amended at the commission's next meeting on March 15, 2018.
2. Is a copy of the plan (or adopted energy element/plan, along with underlying plan and planning commission report addressing consistency of energy element/plan with other elements of underlying plan) attached to this checklist?	☒ Yes	☐ No	Notes: This Act 174 standards checklist is accompanied by three appendices: Appendix A: The amended Town Plan, with the enhanced energy element integrated as Chapter 8: Energy Chapter (pages 97-125); Appendix B: Municipal Plan Review Tool regarding the Town Plan's consistency with state goals and statorily required elements, completed by BCRC staff; Appendix C: Findings of staff review for Act 171 compliance.

Energy Element Requirement
To obtain a determination of energy compliance, Act 174 requires municipalities to include an "energy element" that contains the same components described in 24 V.S.A. § 4348a(a)(3), which was revised through Act 174 to explicitly address energy across all sectors and to identify potential and unsuitable areas for siting renewable energy resources: *An energy element, which may include an analysis of resources, needs, scarcities, costs, and problems within the region across all energy sectors, including electric, thermal, and transportation; a statement of policy on the conservation and efficient use of energy and the development and siting of renewable energy resources; a statement of policy on patterns and densities of land use likely to result in conservation of energy; and an identification of potential areas for the development and siting of renewable energy resources and areas that are unsuitable for siting those resources or particular categories or sizes of those resources.*

The standards below are generally organized to integrate each component of the enhanced energy element with related determination standards that evaluate the plan's consistency with state goals and policies. **Energy element components are identified in bolded text.** While municipalities may choose to primarily address energy used for heating, transportation, and electricity in the required energy element, they may also choose to address some of these components in related plan elements (e.g., Transportation and Land Use) and should indicate as much in the Notes column. To the extent an energy element is designed to comprehensively address energy, it should be complementary to and reference other relevant plan elements.			
3. **Does the plan contain an energy element, that contains the same components described in 24 V.S.A. § 4348a(a)(3)?** *Individual components of the energy element will be evaluated through the standards below.*	☒ Yes	☐ No	Page: Chapter 8: Energy Chapter (pg 97-125) of the Town Plan Notes: The Town Plan contains an enhanced energy element (Chapter 8) that specifically addresses requirements for Act 174 compliance including detailed discussions of current and future energy use, strategies and policies to meet future energy goals, and renewable energy production. Other chapters in the Town Plan dealing with land use, transportation, and community facilities provide further details on the concepts and strategies outlined in the energy element. The town's comprehensive energy strategies and policies are outlined in pages 113 to 125. In addition, chapters of the Town Plan covering land use, housing, and transportation provide more specific policies encouraging conservation and efficient use of energy, expanding renewable energy use, and reducing reliance on fossil fuels.

Consistency with State Goals and Policies Requirement
Act 174 states that regional and municipal plans must be consistent with the following state goals and policies: • Greenhouse gas reduction goals under 10 V.S.A. § 578(a) (50% from 1990 levels by 2028; 75% by 2050) • The 25 x 25 goal for renewable energy under 10 V.S.A. § 580 (25% in-state renewables supply for all energy uses by 2025) • Building efficiency goals under 10 V.S.A. § 581 (25% of homes – or 80,000 units – made efficient by 2020)

- State energy policy under 30 V.S.A. § 202a and the recommendations for regional and municipal planning pertaining to the efficient use of energy and the siting and development of renewable energy resources contained in the State energy plans adopted pursuant to 30 V.S.A. §§ 202 and 202b
- The distributed renewable generation and energy transformation categories of resources to meet the requirements of the Renewable Energy Standard under 30 V.S.A. §§ 8004 and 8005

The standards in the checklist below will be used to determine whether a plan is consistent with these goals and policies. The standards are broken out by category. *Analysis and Targets* standards address how energy analyses are done within plans, and whether targets are established for energy conservation, efficiency, fuel switching, and use of renewable energy across sectors. *Pathways (Implementation Actions)* standards address the identification of actions to achieve the targets. *Mapping* standards address the identification of suitable and unsuitable areas for the development of renewable energy.

Municipalities may choose to incorporate the information necessary to meet the standards in their energy elements, and/or in other sections of their plans (many transportation items may fit best in the Transportation chapters of plans, for instance). However, plans must be internally consistent, and applicants should cross-reference wherever possible.

Analysis and Targets Standards

For the *Analysis & Targets* determination standards below, municipalities will be provided with analyses and targets derived from regional analyses and targets no later than April 30, 2017 (and likely much sooner). Municipalities may choose to rely on these "municipalized" analyses and targets to meet the standards in this section. Municipalities which elect to use the analysis and targets provided by a region will be presumed to have met the standards in this section. Alternatively, municipalities may develop their own custom analyses and targets or supplement the analyses and targets provided by the regions with specific local data; if this option is chosen, the analysis and targets must include all of the same components and meet the standards required of regions, as described below.

For municipalities that choose to undertake their own analysis and target-setting (and for regions), DPS is providing a guidance document to explain the expected level of detail in and data sources and methodologies available for meeting the standards (including areas where it is understood data at the municipal level is unavailable, and therefore not expected). Note that standards 5A-4E are all derived directly from requirements in Act 174 (with minor modifications to make them feasible) and must be met affirmatively in order for a municipal plan to receive an affirmative determination of energy compliance.

Targets set by regions and municipalities should be aligned with state energy policy (see the goals and policies listed above). Where targets (and efforts to reach them) depart significantly from state energy goals and policies, an explanation for how the plan otherwise achieves the intent of the state goal or policy should be provided. The guidance document also offers additional clarification on alignment with state goals and policies.

The analysis items below are intended to provide regions and municipalities with an overview of their current energy use, and with a sense of the trajectories and pace of change needed to meet targets, which can be translated into concrete actions in the *Pathways* standards below. Targets provide regions and municipalities with milestones or checkpoints along the way toward a path of meeting 90% of their total energy needs with renewable energy, and can be

compared with the potential renewable energy generation from areas identified as potentially suitable in the *Mapping* standards exercise below to give regions and municipalities a sense of their ability to accommodate renewable energy that would meet their needs.			
4. **Does your plan's energy element contain an analysis of resources, needs, scarcities, costs, and problems within the municipality across all energy sectors (electric, thermal, transportation)?**	☒ Yes	☐ No	Page: 97-112 Notes: The Energy Chapter of the Town Plan discusses current energy use and projected future needs in sections 8.1 and 8.2.
5. Does your plan contain an analysis that addresses A-E below, either as provided by your Regional Planning Commission or as developed by your municipality? *Municipalities may meet this standard by using the analysis and targets provided by their regions, or by developing their own analyses and targets. If using the analysis & targets provided by your region, please answer "Yes-Region" and skip ahead to #6. If developing a custom analysis, please answer "Yes-Custom" and address 5A-5E separately, below.*	☒ Yes-Region ☐ Yes-Custom	☐ No	Page: 98-112 Paragraph #: Click here to enter text. Notes: The town used analyses prepared by the Bennington County Regional Commission (BCRC). Analysis is distributed accordingly: Transportation (municipal pg 105) (personal and commercial/industrial pg 109-111), Heating (residential pg 98-101) (municipal pg 103-104, 106-107) (commercial/ industrial pg 101-102, 107-109), Electric (residential pg 99-100, 110-112) (municipal pg 103-107) (commercial/ industrial 101-102) (renewable electricity generation pg 112)
A. Does the plan estimate current energy use across transportation, heating, and electric sectors?	☐ Yes	☐ No	Page: Click here to enter text. Paragraph #: Click here to enter text. Notes: Click here to enter text.
B. Does the plan establish 2025, 2035, and 2050 targets for thermal and electric efficiency improvements, and use of renewable energy for transportation, heating, and electricity?	☐ Yes	☐ No	Page: Click here to enter text. Paragraph #: Click here to enter text. Notes: Click here to enter text.
C. Does the plan evaluate the amount of thermal-sector conservation, efficiency, and conversion to alternative heating fuels needed to achieve these targets?	☐ Yes	☐ No	Page: Click here to enter text. Paragraph #: Click here to enter text. Notes: Click here to enter text.
D. Does the plan evaluate transportation system changes and land use strategies needed to achieve these targets?	☐ Yes	☐ No	Page: Click here to enter text. Paragraph #: Click here to enter text. Notes: Click here to enter text.
E. Does the plan evaluate electric-sector conservation and efficiency needed to achieve these targets?	☐ Yes	☐ No	Page: Click here to enter text. Paragraph #: Click here to enter text. Notes: Click here to enter text.

Pathways (Implementation Actions) Standards			
This section examines whether plans meet the Act 174 expectation that they include pathways and recommended actions to achieve the targets identified through the *Analysis and Targets* section of the Standards (above). Plans are expected to include or otherwise address all of the pathways (implementation actions) below; some actions may not be applicable or equally relevant to all applicants (small vs. large municipalities, for instance), in which case N/A may be checked (if available) and the justification provided in the Notes column. There is no penalty for choosing N/A one or more times, as long as a reasonable justification is provided in the Notes column, preferably including an explanation of how the plan alternatively achieves attainment of the targets should be included. If N/A is not provided as an option, the standard must be met, and "Yes" must be checked, in order for the plan to meet the requirements for a determination (unless the instructions particular to that standard indicate otherwise). DPS will be issuing a guidance document in the near term providing potential implementation actions derived from the Comprehensive Energy Plan (relevant formal Recommendations as well as opportunities not specifically called out as Recommendations), from recent regional and municipal plans, and from other sources. The guidance document will be revised after the regions have compiled best practices from early municipalities pursuing energy planning to seek a determination of energy compliance, in the summer of 2017. For the time being, we offer potential implementation action options for consideration as italicized text under each standard. Plans are encouraged to promote as diverse a portfolio of approaches as possible in each sector, or if not, to explain why they take a more targeted approach. Implementation actions may fit best in a holistic discussion contained within a plan's energy element, though cross-referencing to other relevant plan elements is also acceptable. Municipalities must demonstrate a commitment to achieving each standard in both policies and implementation measures in clear, action-oriented language.			
6. **Does your plan's energy element contain a statement of policy on the conservation and efficient use of energy?**	☒ Yes	☐ No	Page: 97; 113-117 Paragraph #: Click here to enter text. Notes: The Energy Chapter opens with a review of the town's four energy goals, the second of which is "the promotion of energy conservation and efficiency in residential, commercial, and industrial structures and operations" (pg 97). Specific policies promoting the conservation and efficient use of energy are contained in section 8.3 of the Energy Chapter, pages 113-117.
A. Does the plan encourage conservation by individuals and organizations? *(Actions could include educational activities and events such as convening or sponsoring weatherization workshops, establishing local energy committees, encouraging the use of existing utility and other efficiency and conservation programs and funding sources, etc.)*	☒ Yes	☐ No	Page: Pages 113 - 116 Paragraph #: Click here to enter text. Notes: See policies 3, 6, 7, 8, 9, 10 (pg 113), 11, 15, 16, 17, 18, 19 (pg 114), 20, 21, 22, 23, 24, 26, 27, 28, 30 (pg 115), 34, 36, 37, 38 (pg 116). Policies include supporting high-

			density mixed-use development within the designated growth center such as the Putnam Block Redevelopment, promoting building assessments and endorsing local programs that provide resources for homeowners and rental properties about building efficiency, encouraging businesses to pursue energy audits and upgrade to LED lighting, raising awareness of public transportation and carpooling options locally including school bus use, maintaining and developing more bike and pedestrian pathways according to Complete Streets principles, and requiring that new developments include EV charging stations and accomodate public transportation stops.
B. Does the plan promote efficient buildings? *(Actions could include promoting compliance with residential and commercial building energy standards for new construction and existing buildings, including additions, alterations, renovations and repairs; promoting the implementation of residential and commercial building efficiency ratings and labeling; considering adoption of stretch codes, etc.)*	☒ Yes	☐ No	Page: Pages 113, 114, 116 of the Energy Chapter and pages 56-57, 59 of the Housing Chapter Paragraph #: Click here to enter text. Notes: See policies 5, 6, 7, 8, 9 (pg 113), 11, 13, 14 (pg 114), 31, 32, 35 (pg 116). Policies include providing information on and verifying compliance with Residential and Commercial Building Energy Standards and similar assessment programs, locally promoting and facilitating programs of Efficiency VT, BROC, and NWWVT for building weatherization and financial assistance, and completing energy audits and improvements in all municipal buildings and schools. The Housing chapter notes that the town should require new development conform to VT Residential Building Energy Standards,

			that building renovation should prioritize properties within the Growth Boundary, and Housing Policy #10 encourages residential energy conseration and efficiency and incentives for residential renewable energy systems.
C. Does the plan promote decreased use of fossil fuels for heating? *(Actions and policies could promote switching to wood, liquid biofuels, biogas, geothermal, and/or electricity. Suitable devices include advanced wood heating systems and cold-climate heat pumps, as well as use of more energy efficient heating systems; and identifying potential locations for, and barriers to, deployment of biomass district heating and/or thermal-led combined heat and power systems in the municipality)*	☒ Yes	☐ No	Page: Pages 113, 114, 116 Paragraph #: Click here to enter text. Notes: See policies 10 (pg 113), 11, 12, 13, 15 (pg 114), 31, 32, 37, 38, and 42 (pg116). Policies include encouraging home and business owners and rental properties to switch to high-efficiency wood and pellet stoves and cold-climate heat pumps, supporting the development of local biomass businesses, providing information for new developments about the advantages of heat pump and geothermal systems, and supporting biomass heating systems for municipal buildings and local institutions.
D. Does the plan demonstrate the municipality's leadership by example with respect to the efficiency of municipal buildings? *(Actions could include building audits and weatherization projects in schools and town offices, etc.)*	☒ Yes	☐ No ☐ N/A	Page: Page 116 Paragraph #: Click here to enter text. Notes: See policies 31, 32, 3, 34 on page 116. Municipal policies include energy audits and electrical upgrades at the town offices, Chamber of Commerce building, and police station; consideration of renewable energy sources for heating municipal buildings and the recreation center and for fueling municipal equipment; upgrading the municipal and police vehicle fleets; and publicizing the Town's successful LED streetlight conversion initiative.
E. Other (please use the notes section to describe additional approaches that your municipality is taking)	☒ Yes	☐ No ☐ N/A	Page: Click here to enter text. Paragraph #: Click here to enter text.

			Notes: See policies 1, 4 (pg 113), 14 (pg 114), 15 (pg 115), 39, 40, 41 (pg 116). Policies include reestablishing its municipal energy committee, planning all new development so that it takes advantage of solar energy, encouraging new commercial development to use the 'Stretch Codes' mandated through Act 250, supporting a more robust local food and agriculture system, and planning for a smart grid system through cooperation wih GMP and VELCO as they build out grid infrastructure and by integrating future advanced storage capacity for locally-produced electricity.
7. Does your plan's energy element contain a statement of policy on reducing transportation energy demand and single-occupancy vehicle use, and encouraging use of renewable or lower-emission energy sources for transportation?	☒ Yes	☐ No	Page: Page 115 and 116 Paragraph #: Click here to enter text. Notes: Specific policies aimed at reducing total transportation energy use and encouraging more efficient transportation systems and behaviors are contained in section 8.3 of the Energy Chapter, on page 115.
A. Does the plan encourage increased use of public transit? *(Actions could include participation in efforts to identify and develop new public transit routes, promote full utilization of existing routes, integrate park-and-rides with transit routes, etc.)*	☒ Yes	☐ No ☐ N/A	Page: 115 of the Energy Chapter, and pages 66, 74-75 of the Transportation Chapter Paragraph #: Click here to enter text. Notes: See policies 22, 24, and 29. Policies include working with GMCN to encourage greater use of their public transit network, supporting expansion of intercity bus travel opportunities such as the shuttle service to the Rensselaer Amtrak station and other local stops and transfer locations, and requiring new developments to provide a location for a public transportation stop.

			The Transportation Chapter notes that extensive downtown parking space is not appropriate, thereby encouraging alternative modes of transportation to the dense center of town. A section on Public Transportation and Intercity Bus Travel encourages continuation of existing transit routes and their improvement with better bus stop shelters, benches, and signs.
B. Does the plan promote a shift away from single-occupancy vehicle trips, through strategies appropriate to the municipality? *(Actions could include rideshare, vanpool, car-sharing initiatives; efforts to develop or increase park-and-rides; enhancement of options such as rail and telecommuting; education; intergovernmental cooperation; etc.)*	☒ Yes	☐ No	Page: 115 of the Energy Chapter and pages 71-72 of the Transportation Chapter Paragraph #: Click here to enter text. Notes: See policies 22, 23, 24, 28, and 29. Policies include those listed in 7A, encouraging greater use of school buses and walking and biking to schools, and promoting the Go Vermont website and the 'Way to Go' alternative commuting programs to raise awareness of carpooling in the area. The Transportation Chapter recommends town support for rail line maintenance due to the possibility of future passenger rail returning to the region. The chapter supports an Amtrack shuttle service to the Rensselaer Train Station, which was recently established.
C. Does the plan promote a shift away from gas/diesel vehicles to electric or other non-fossil fuel transportation options through strategies appropriate to the municipality? *(Actions could include promoting the installation of electric vehicle charging infrastructure, providing education and outreach to potential users, supporting non-fossil fuel vehicle availability through outreach to vehicle dealers, etc.)*	☒ Yes	☐ No	Page: 115 and 116 of the Energy Chapter and pages 60 and 77 of the Transportation Chapter Paragraph #: Click here to enter text. Notes: See policies 26, 27, 29 (pg 115), and 43 (pg 116). Policies include promoting Drive Electric Vermont and other resources to encourage EV use, contacting local auto

			dealers to supply plug-in and full EVs, installing EV charging stations in public parking lots and encouraging business owners to do so as well, requiring that new development provide EV charging stations, and supporting efforts to develop cost-effective liquid biofuel production especially at farms to supplement their own fuel use. The Transportation Chapter notes that current roadway design and infrastructure must consider the eventual transformation of the transportation sector away from fossil fuels and toward electric vehicles. Transportation Policy #22 promotes the utilization of alternative fuel vehicles in the transportation system.
D. Does the plan facilitate the development of walking and biking infrastructure through strategies appropriate to the municipality? *(Actions could include studying, planning for, seeking funding for, or implementing improvements that encourage safe and convenient walking and biking; adopting a "Complete Streets" policy, etc.)*	☒ Yes	☐ No ☐ N/A	Page: 115 of the Energy Chapter and pages 67-71 and 75-77 of the Transportation Chapter Paragraph #: Click here to enter text. Notes: See policies 20, 21, and 23 (pg 115). Policies include maintaining and amplifying off-road bicycle and pedestrian pathways, incorporating Complete Streets principles whenever possible, and modifying existing roadways to be safer for bicyle and pedestrian users, and encouraging walking and biking to schools. Transportation Chapter sections on Traffic Calming, Pedestrian and Bicycle Transportation, and the Bennington Pathway System discuss the need to plan for and expand sidewalks and crosswalks, bike lanes

			and paved shoulders, multi-use pathways, and traffic calming devices in areas of high demand. Priority areas are highlighted and strategic street design principles identified.
E. Does the plan demonstrate the municipality's leadership by example with respect to the efficiency of municipal transportation? *(Actions could include purchasing energy efficient municipal and fleet vehicles when practicable, installing electric vehicle charging infrastructure, etc.)*	☒ Yes	☐ No ☐ N/A	Page: 115 and 116 Paragraph #: Click here to enter text. Notes: See policies 27 (pg 115), 32, and 33 (pg 116). Policies include installing EV charging stations at public parking lots, considering a demonstration project with liquid biofuels for some town equipment, and considering the purchase of more fuel efficient vehicles for all departments – but in particular the police department, which may benefit from new anti-idling technologies.
F. Other (please use the notes section to describe additional approaches that your municipality is taking)	☒ Yes	☐ No ☐ N/A	Page: 115 Paragraph #: Click here to enter text. Notes: See policy 25 (pg 115). This policy calls for participating in rail planning projects to promote commercial and industrial development that could use rail for freight shipment. This policy also supports transportation budget expenditures to maintain and upgrade rail infrastructure.
8. **Does your plan's energy element contain a statement of policy on patterns and densities of land use likely to result in conservation of energy?**	☒ Yes	☐ No	Page: Page 113 Paragraph #: Click here to enter text. Notes: Specific policies calling for dense and mixed-use settlement patterns are contained in section 8.3 of the Energy Chapter, on page 113.
A. Does the plan include land use policies (and descriptions of current and future land use categories) that demonstrate a commitment to reducing sprawl and minimizing low-density development? *(Actions could include adopting limited sewer service areas, maximum building sizes along highways, policies or zoning that require design features*	☒ Yes	☐ No	Page: Page 113 of Energy Chapter and pages 17-26 of the Land Use Chapter Paragraph #: Click here to enter text. Notes: See policies 2 and 3 (pg 113) in the Energy Chapter. Policies include

that minimize the characteristics of strip development [multiple stories, parking lot to the side or back of the store], and requirements that development in those areas be connected by means other than roads and cars; adopting a capital budget and program that furthers land use and transportation policies; etc.)			implementing land use policies that high-density mixed-use develop in the designated growth center and low density development that does not require intensive services in rural areas, and actively supporting investments in the downtown and surrounding neighborhoods – especially projects that bring housing, essential businesses, and employment into the walkable town center. The Land Use Chapter of the Town Plan emphasizes the role that the designated Growth Center and Urban Growth Boundary will play in concentrating new development in the downtown, minimizing strip development to make mixed uses and alternative transportation options more viable. Smart growth principles, mixed use zoning, and development design guidelines characterize the land use districts where future commercial and multi-unit residences are permitted. The Town Plan recommends that the town consider use of form-based code to simplify their regulations while maintaining the same goals for dense, mixed-use development.
B. Does the plan strongly prioritize development in compact, mixed-use centers when physically feasible and appropriate to the use of the development, or identify steps to make such compact development more feasible? *(Actions could include participating in the state designation program, such as obtaining state designated village centers, downtowns, neighborhoods, new town centers, or growth centers; exploration of water or sewage solutions that enable compact development; etc.)*	☒ Yes	☐ No ☐ N/A	Page: Page 113 in the Energy Chapter Paragraph #: Click here to enter text. Notes: See policies 2 and 3 (pg 113) in the Energy Chapter. Policies include those listed in 8B. See also reponse to 8A, such as the use of a state-designated Growth Center

C. Other (please use the notes section to describe additional approaches that your municipality is taking)	☐ Yes	☒ No ☐ N/A	Page: Click here to enter text. Paragraph #: Click here to enter text. Notes: Click here to enter text.
9. **Does your plan's energy element contain a statement of policy on the development and siting of renewable energy resources?**	☒ Yes	☐ No	Notes: Specific policies on the support for and siting of renewable energy facilities are contained in section 8.3 of the Energy Chapter, on pages 113 - 117.
A. Does the plan evaluate (estimates of or actual) generation from existing renewable energy generation in the municipality? *Municipalities should be able to obtain this information from their regions.*	☒ Yes	☐ No	Page: Page 112 Paragraph #: Click here to enter text. Notes: The Energy Chapter report that there is about 360 kW capacity hydroelectric in the town and 3 MW solar capacity in small private and moderate-sized commercial photovoltaic systems. The plan refers readers to the online resource 'Community Energy Dashboard' for up-to-date generation statistics and locations.
B. Does the plan analyze generation potential, through the mapping exercise (see *Mapping* standards, below), to determine potential from preferred and potentially suitable areas in the municipality? *Municipalities should be able to obtain this information from their regions.*	☒ Yes	☐ No	Page: Pages 117-120, 122, 124, and 125 Paragraph #: Click here to enter text. Notes: Potential hydroelectric capacity is discussed on page 117 and mapped on page 118. Map analysis shows that as much as 430 kW of additional hydroelectric is possible and town policy supports development of this potential. Wind potential is discussed on pages 117 and 118. Wind development is limited by several factors, but some smaller-scale wind turbines may be appropriate in areas that do not violate state noise and environmental regulations. The potential solar generation mapping analysis is discussed in pages 119-120 and

EXHIBIT 2

Dan Monks

From: Dan Monks
Sent: Wednesday, January 24, 2018 3:49 PM
To: Jim Sullivan (jsullivan@bcrcvt.org)
Subject: Amended Town Plan
Attachments: 2018 Bennington Energy Plan - final.pdf

Hello Jim:

Please see attached amended Energy Section of the Bennington Town Plan. In accordance with 24 VSA Section 4385(c), the Town of Bennington is providing the Bennington County Regional Commission with a copy of the newly adopted amended Energy Section (Chapter 8) of the Bennington Town Plan.

In addition, the Town of Bennington requests approval by BCRC of the amended Town Plan under the provisions of 24 VSA Section 4350.

Finally, the Town of Bennington requests that BCRC determine that the amended Town Plan meets the energy planning standards (24 VSA Section 4352) of Act 174 of 2016.

Please confirm that you have received this e-mail and the attached Town Plan. Also, please Let me know when the required public hearings for approval of the Town Plan under Section 4350 and Act 174 are scheduled.

Thanks,

Dan

Daniel Monks
Assistant Town Manager
& Planning Director
Town of Bennington
802-447-9708
dmonks@benningtonvt.org

EXHIBIT 3

BCRC
Bennington County Regional Commission

111 SOUTH STREET • SUITE 203 • BENNINGTON, VERMONT 05201 • (802) 442-0713 OR 442-0682 • FAX (802) 442-0439

July 11, 2022

Daniel Monks, Assistant Town Manager
205 South Street
P.O. Box 469
Bennington, VT 05201

Re: Town Plan Amendment – Continuation of BCRC Plan Approval

Dear Mr. Monks,

The Town of Bennington recently adopted an amendment to the Bennington Town Plan that modifies the boundaries of two adjacent land use districts involving property on the former campus of Southern Vermont College (SVC), along with minor changes to related land development guidelines. This amendment provides the basis for amendments to the Town's Land Use and Development Regulations, which are intended to implement the Plan. A portion of the former SVC campus is now included in the adjacent district that allows for various institutional and professional uses, with specific site planning and design guidelines.

The Bennington County Regional Commission has reviewed the Town Plan amendment in the context of 24 V.S.A. Section 4350 and has determined that the changes do not affect the basis for the BCRC's previous approval of that Town Plan (approved by the BCRC on March 15, 2018) based findings that the Plan, as amended:

(A) is consistent with the goals established in 24 V.S.A. Section 4302;

(B) is compatible with its Regional Plan;

(C) is compatible with approved plans of other municipalities in the region; and

(D) contains all the elements included in subdivisions 24 V.S.A. Section 4382(a)(1)-(12).

Therefore, the Town Plan, which remains in effect through its expiration date of January 22, 2026, will continue to be documented as approved by the BCRC and thus support the determination that the Town's planning process remains confirmed under 24 V.S.A. Section 4350.

Let me know if you have any questions about this determination. Thank you.

Sincerely,

James D. Sullivan
Director

BCRC

Bennington County Regional Commission

210 SOUTH STREET ● SUITE 6 ● BENNINGTON, VERMONT 05201 ● (802) 442-0713

September 20, 2024

Daniel Monks, Assistant Town Manager
205 South Street
P.O. Box 469
Bennington, VT 05201
dmonks@benningtonvt.org

Re: Town Plan Amendment – Continuation of Plan Approval

Dear Mr. Monks:

Recently, the Town of Bennington adopted an amendment to the *Bennington Town Plan* that modifies the boundaries of two adjacent land use districts. This amendment provides the basis for amendments to the *Bennington Land Use and Development Regulations*, which are intended to implement the plan. Two adjacent parcels on North Branch Street were reclassified from Industrial to Village Residential allowing for residential development on approximately six acres.

The Bennington County Regional Commission (BCRC) has reviewed the town plan amendment in the context of 24 V.S.A. Section 4350 and by a vote of commissioners on September 19, 2024 has affirmed Bennington's plan and planning process. Hence, the minor amendment does not affect the BCRC's previous approval that the *Bennington Town Plan* (adopted January 22, 2018) is compliant with statutory requirements. In short, the BCRC found that the plan, as amended on June 24, 2024:

(A) is consistent with the goals established in 24 V.S.A. Section 4302;
(B) is compatible with the regional plan
(C) is compatible with the approved plans of other municipalities in the region; and
(D) contains all the elements included in subdivisions 24 V.S.A. Section 4382(a)(1)-(12).

Therefore, the Bennington Town Plan, which remains in effect through its expiration date of January 22, 2026, will continue to be documented as approved by the BCRC and Bennington's planning process remains confirmed pursuant to 24 V.S.A. Section 4350.

Please let me know if you have any questions about this determination.

Sincerely,

William Colvin
Director

EXHIBIT 4

BCRC
Bennington County Regional Commission

111 SOUTH STREET • SUITE 203 • BENNINGTON, VERMONT 05201 • (802) 442-0713 OR 442-0682 • FAX (802) 442-0439

CERTIFICATE OF ENERGY COMPLIANCE
Bennington Town Plan

On this 15th day of March, 2018, by vote of the Bennington County Regional Commission, it was determined that the Bennington Town Plan, as amended and adopted by the Town of Bennington on January 22, 2018, complies with the energy planning requirements set forth in 24 V.S.A. Section 4352.

Janet Hurley, Chair

Bennington County Regional Commission

EXHIBIT 5

---------- Forwarded message ---------
From: **Stuart Hurd** <shurd@benningtonvt.org>
Date: Tue, Oct 15, 2024 at 4:44 AM
Subject: RE: Town Website
To: Joey Kulkin <jkulkin71@gmail.com>, Ned <edwardnperkins@gmail.com>

We believe we have sufficient documentation and a legal opinion supporting our position. It's not a lie if one believes what one's saying. We're moving on. Enjoy the day.

Stuart A. Hurd

Town Manager

Town of Bennington

205 South Street

PO Box 469

shurd@benningtonvt.org

From: Joey Kulkin <jkulkin71@gmail.com>
Sent: Monday, October 14, 2024 7:02 PM
To: Stuart Hurd <shurd@benningtonvt.org>; Ned <edwardnperkins@gmail.com>
Subject: Re: Town Website

Hi, Stu, you just lied to the public again about the town plan which expired on 10/6/23.

This time you said the town plan is valid in the eyes of the state.

Please produce communications from the state confirming what you just said. Because it's a lie.

We've got the documents.

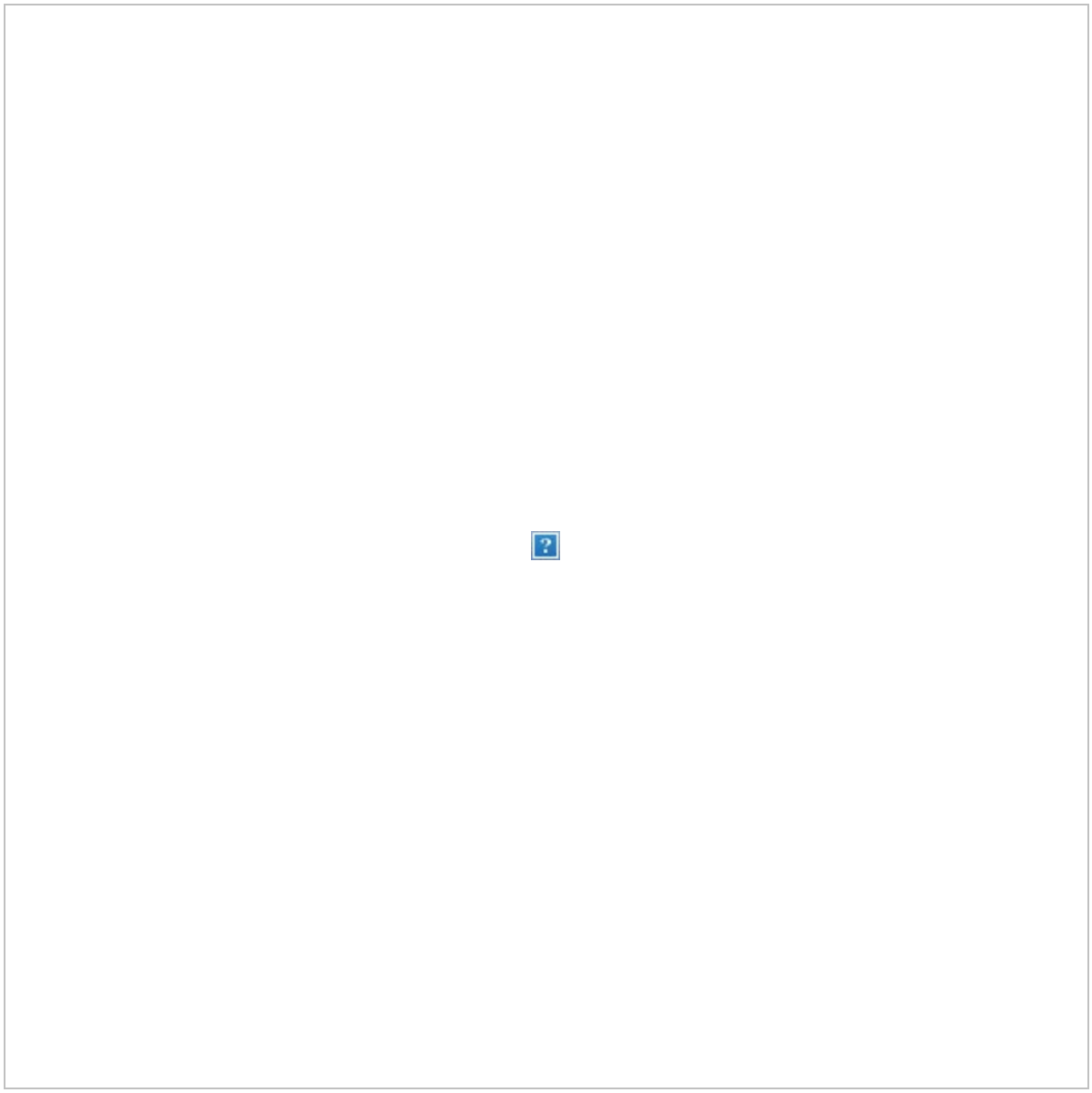
You don't.

Thanks!

On Fri, Oct 11, 2024 at 3:22 PM Joey Kulkin <jkulkin71@gmail.com> wrote:

> Hi, Stu, someone from your staff replaced the cover page on the state database in recent days but it's still based on a lie.
>
> **QUESTIONS**:
>
> - On what day did a member of your staff upload the ACCD database with this new cover page?
> - Who uploaded it?
> - Who authorized this person to make the change?
>
> **REQUEST**:

- Please provide email authorization by you to the member of staff who uploaded this new (and false) cover page.



On Wed, Oct 9, 2024 at 10:57 AM Stuart Hurd <shurd@benningtonvt.org> wrote:

> The Plan is valid until 2026. Have a great day.
>
> Stuart A. Hurd
>
> Town Manager

Town of Bennington

205 South Street

PO Box 469

shurd@benningtonvt.org

From: Joey Kulkin <jkulkin71@gmail.com>
Sent: Wednesday, October 9, 2024 10:38 AM
To: Stuart Hurd <shurd@benningtonvt.org>; Ned <edwardnperkins@gmail.com>
Subject: Re: Town Website

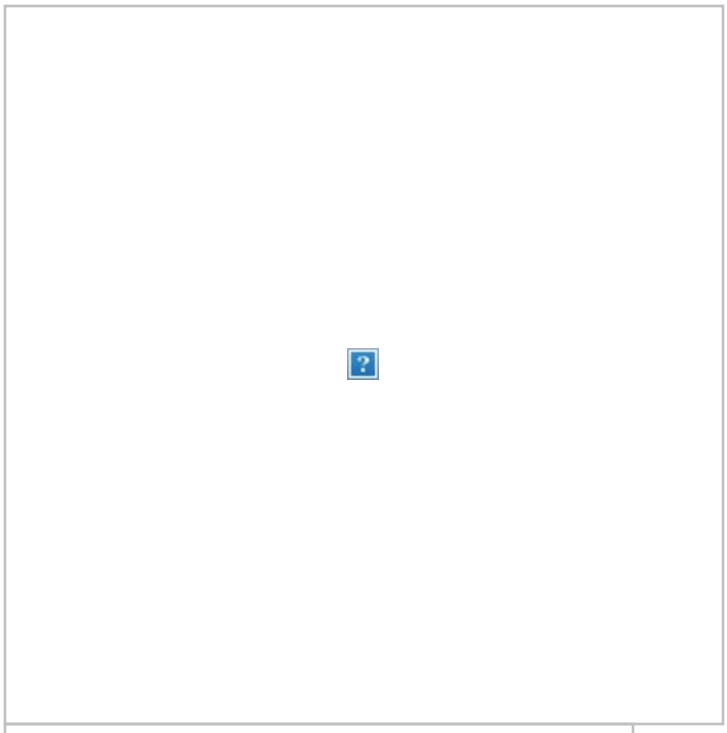
I was wrong: the photo is from the SVSU meeting dealing with Shaftsbury Elementary.

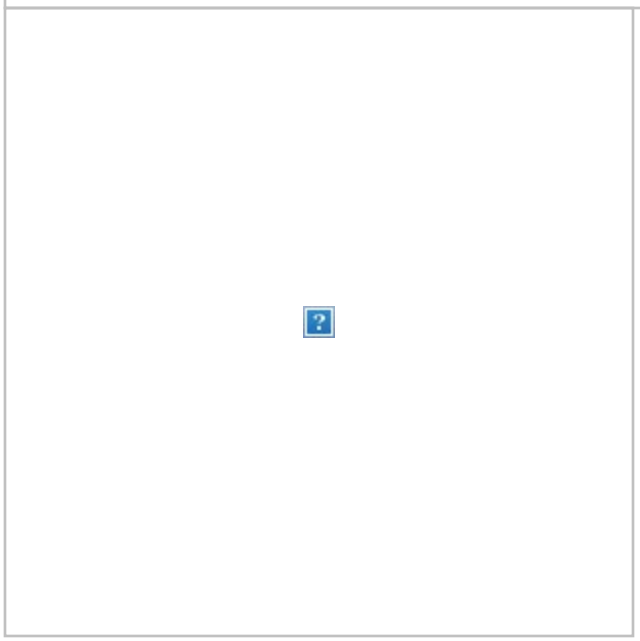
See, it's not hard to admit wrongdoing.

That's all you had to do with the Town Plan but it's too late for simple apologies.

On Wed, Oct 9, 2024 at 10:10 AM Joey Kulkin <jkulkin71@gmail.com> wrote:

> Hi, Stu,
>
> I have a few questions ...
>
> Last week several people went to the town website and saw that the cover page of the adopted 2015 town plan was changed.





This was done without an official action of the Select Board and the citizens of Bennington definitely didn't know about it.

Questions:

1, On what day was the cover page changed?

2, Who went into the system and uploaded the new cover page?

3, Who gave authorization to upload the new cover page?

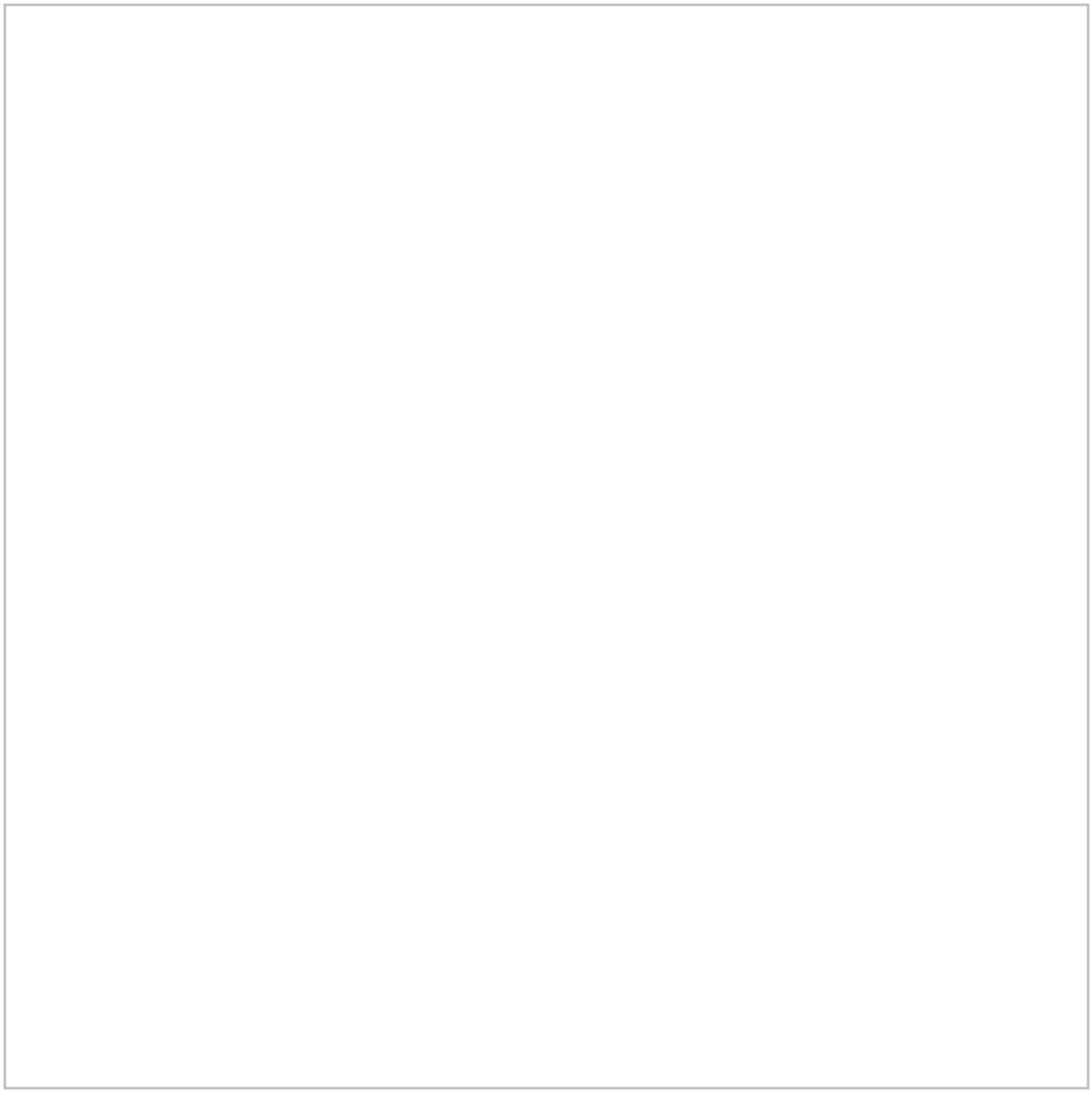
4, Please send over the email giving authorization to upload the new cover page.

Thank you,

Joey

This was the Shaftsbury Select Board meeting last night.

Just wait till the people of Bennington wake up, and it's happening.



CONFIDENTIALITY/DISCLOSURE NOTICE: This message is intended for the use of the individual or entity to which it is addressed and may contain information that is confidential, privileged and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, you are hereby notified that any printing, copying, dissemination, distribution, disclosure or forwarding of this communication is strictly prohibited. If you have received this communication in error, please contact the sender immediately and delete it from your system. Please note that this email message, along with any response or reply, may be considered public record, and thus, subject to disclosure under the Vermont Public Records

Law (1 V.S.A. §§ 315-320).

EXHIBIT 6

Classifieds

To place your ad,
call 1-800-234-7404

NOTICE OF TAX SALE

The resident and non-resident owners, lienholders and mortgagees of property in the Town of Pownal, in the County of Bennington and State of Vermont, are hereby notified that the 2015-2016 and 2016-2017 taxes assessed by such Town remain, either in whole or in part, unpaid on the following described property, to wit:

It being all and the same lands and premises conveyed to Lynda M. Prince and James Hvolbek (both now deceased) by Decree of Distribution of the District of Bennington Probate Court in re the Estate of Mary Hvolbek, dated August 13, 1992 and recorded on August 24, 1992 in Book 77 at Page 64 of the Pownal Land Records. (E911 address: Hidden Valley Road; Parcel #083-12)

And pursuant to 32 V.S.A. Section 5254, such property will be sold at public auction at the Pownal Town Office, a public place located on Center Street in the Town of Pownal, on the 6th day of December, 2017, at 10:00 o'clock in the morning, as shall be requisite to discharge such taxes with costs, unless previously paid.

Dated at Pownal, Vermont this 2nd day of November, 2017.
ELLEN STROHMAIER,
Collector of Delinquent Taxes
11/04/17, 11/11/17, 11/18/17

NOTICE OF TAX SALE

The resident and non-resident owners, lienholders and mortgagees of property in the Town of Pownal, in the County of Bennington and State of Vermont, are hereby notified that the 2016-2017 taxes and sewer usage fees assessed by such Town for 2015-2016 and 2016-2017 remain, either in whole or in part, unpaid on the following described property, to wit:

It being all and the same lands and premises conveyed to Alan R. Osgood and Cherie L. Osgood by Quit Claim Deed of Beverly R. Belville, dated August 25, 2004 and recorded on August 25, 2004 in Book 136 at Page 165 of the Pownal Land Records. (E911 address: 3126 Route 346; Parcel #346-77)

And pursuant to 32 V.S.A. Section 5254, such property will be sold at public auction at the Pownal Town Office, a public place located on Center Street in the Town of Pownal, on the 6th day of December, 2017, at 10:00 o'clock

2015-2016 and 2016-2017 remain, either in whole or in part, unpaid on the following described property, to wit:

It being all and the same lands and premises conveyed to Robert C. Hurley by Warranty Deed of Eric Lloyd, dated September 24, 2002 and recorded on November 12, 2002 in Book 127 at Page 261 of the Pownal Land Records. (E911 address: 3028 Route 346; Parcel #346-73)

And pursuant to 32 V.S.A. Section 5254, such property will be sold at public auction at the Pownal Town Office, a public place located on Center Street in the Town of Pownal, on the 6th day of December, 2017, at 10:00 o'clock in the morning, as shall be requisite to discharge such taxes with costs, unless previously paid.

Dated at Pownal, Vermont this 2nd day of November, 2017.
ELLEN STROHMAIER,
Collector of Delinquent Taxes
11/04/17, 11/11/17, 11/18/17

NOTICE OF TAX SALE

The resident and non-resident owners, lienholders and mortgagees of property in the Town of Pownal, in the County of Bennington and State of Vermont, are hereby notified that 2016-2017 taxes and sewer usage fees assessed by such Town for 2015-2016 and 2016-2017 remain, either in whole or in part, unpaid on the following described property, to wit:

It being that portion located westerly of Route 346 conveyed to Edna Mary Hurley Tanner (now Edna M. Bentley)(now deceased) and Norman Lawrence Bentley (now deceased) by Quitclaim Deed of Laura B. Hurley, dated July 20, 1977 and recorded on July 20, 1977 in Book 73 at Page 114 of the Pownal Land Records, excepting those lands and premises conveyed to the Town of Pownal by Warranty Deed of Edna Bentley, dated February 18, 2005 and recorded on February 21, 2005 in the Pownal Land Records, together with the 28 x 52' 1986 Titan New England Mobile Home Serial Number 19863281484 situated thereon, conveyed to Edna Bentley and Norman Bentley by Vermont Mobile Home Bill of Sale of Independent Mobile Homes, dated February 27, 1996 and recorded on March 8, 1996 in Book 103 at Page 535 of the Pownal Land Records. (E911 address: 3691 Route 346, Parcel #346-52-1)

And pursuant to 32 V.S.A. Section 5254, such property will be sold at public auction at the Pownal Town Office, a public place located on Center Street in the Town of Pownal, on the 6th day of December, 2017, at 10:00 o'clock in the morning, as shall be requisite to discharge such taxes with costs, unless previously paid.

Dated at Pownal, Vermont this 2nd day of November, 2017.
ELLEN STROHMAIER,
Collector of Delinquent Taxes
11/04/17, 11/11/17, 11/18/17

**SELECT BOARD
NOTICE OF PUBLIC HEARINGS
AMENDMENT TO
BENNINGTON TOWN PLAN**

The Bennington Select Board will conduct Public Hearings on **January 8, 2018 at 6:00 PM and on January 22, 2018 at 6:00 PM at the Bennington Fire Facility, 3rd Floor Assembly Room, 130 River Street, Bennington, Vermont** for the purpose of adopting an amended Energy section of the Bennington Town Plan.

A. STATEMENT OF PURPOSE:
The purpose of the amended Energy section of the Bennington Town Plan is to further the goal of a sustainable energy future in a manner that minimizes environmental impacts and supports the local economy.

B. AREA COVERED
The proposed amendment to the Town Plan impacts all areas of the Town of Bennington.

C. SECTIONS OF PROPOSED AMENDEMENT
I. Introduction, II. Energy Use in Bennington, and III. Energy Conservation, Efficiency, and Renewable Energy Strategies

D. WHERE THE FULL AMENDMENT MAY BE EXAMINED:
Copies of the full text of the proposed amendment to the Bennington Town Plan, and accompanying report, are available for examination at the Bennington Town Office at 205 South Street, in Bennington, Vermont.

Thomas Jacobs, Chairperson,
Town of Bennington Select Board
11/18/17

BENNINGTON. 1 bedroom, 1st floor W/D hook ups. No smoking/pets $700/month. 802-447-1953.

BENNINGTON. 1 BR. W/D, heat, and hot water included. $800/mo & up. No smoking. No pets. Call 802-346-2775

Bennington, Bar, Bus.
$1,450/mo. Call for details
802-753-6665

★ NEW AD TODAY ★

BENNINGTON. Quiet, in town efficiency. $595. 802-578-0788

COLONIAL GARDENS BY
OLD BENNINGTON
1-2 BDR, CARPORTS,
SMALL PETS WELCOME
413-662-2663

POWNAL. Newly renovated 2 bdrm cottage. References and security required. $695/month. 802-823-5238

BENNINGTON. Lovely, older 4 BD, 2 BA house. Several options for office and/or residential. Handicap accessible. Excellent location. Available December. 802-442-8888.

BBA Advancement Office seeking part-time Annual Fund Coordinator

The Advancement Office at Burr and Burton Academy is seeking a part-time employee to fill the position of Annual Fund Coordinator. The job responsibilities include coordination of and solicitation for the Corporate Sponsorship program, the Employee Appeal, the Parent Fund outreach and general support for all Annual Fund activities. In addition, this position helps support the Parent Association meetings, works with the Senior Class to establish a relationship with the school before graduating, works with the Parent Association Gala committee to secure sponsorships, and helps to coordinate the production of the Annual Appreciation report at the close of the fiscal year. Other duties such as attendance at donor-focused events are expected, which includes occasional weekend and evening work. Must be able to drive. The position is approximately 20 hours per week, and a flexible schedule is possible. Looking for a candidate who is team oriented, outgoing, creative and willing to work hard to meet the fundraising goals of the school.

Please send your resume to Cynthia Gebb, Director of Advancement, PO Box 498, Manchester, VT 05254 or by email to cgebb@burrburton.org.

QC Technician 2nd Shift

Taconic, a global leader in the manufacturing of PTFE coated fiberglass fabric, belts and tapes is seeking a **Quality Control Technician**.

Responsible for collection, testing, data management and reporting of test data for Industrial Products and Advanced Dielectric production samples, as well as general test equipment maintenance.

HS diploma or equivalent experience. Must have good attention to detail with ability to understand and interpret product specifications, work instructions and drawings. Ability to operate and understand dimensional, electrical and mechanical test equipment such as micrometer, two fluid cell, peel tester, FSR, strip line testing equipment, tensile tester, dielectric tester, weight scale. Basic math skills and computer familiarity necessary, with the ability to work with spreadsheets a must. Ability to work with chemicals is required. Should have a fundamental understanding of Taconic's product line. Must be able to

A203

SELECT BOARD
NOTICE OF PUBLIC HEARINGS
AMENDMENT TO
BENNINGTON TOWN PLAN

The Bennington Select Board will conduct Public Hearings on January 8, 2018 at 6:00 PM and on January 22, 2018 at 6:00 PM at the Bennington Fire Facility, 3rd Floor Assembly Room, 130 River Street, Bennington, Vermont for the purpose of adopting an amended Energy section of the Bennington Town Plan.

A. STATEMENT OF PURPOSE:

The purpose of the amended Energy section of the Bennington Town Plan is to further the goal of a sustainable energy future in a manner that minimizes environmental impacts and supports the local economy

B. AREA COVERED

The proposed amendment to the Town Plan impacts all areas of the Town of Bennington.

C. SECTIONS OF PROPOSED AMENDEMENT

I. Introduction, II. Energy Use in Bennington, and III. Energy Conservation, Efficiency, and Renewable Energy Strategies

D. WHERE THE FULL AMENDMENT MAY BE EXAMINED:

Copies of the full text of the proposed amendment to the Bennington Town Plan, and accompanying report, are available for examination at the Bennington Town Office at 205 South Street, in Bennington, Vermont.

Thomas Jacobs, Chairperson,
Town of Bennington Select Board
11/18/17

TOWN OF BENNINGTON, VERMONT

BENNINGTON SELECT BOARD MEETING

JANUARY 22, 2018

TRANSCRIPT OF

BENNINGTON SELECT BOARD MEETING

HELD ON

MONDAY, JANUARY 22, 2018

HELD AT

BENNINGTON FIRE HOUSE

130 RIVER STREET

BENNINGTON, VERMONT 05201

BENNINGTON SELECT BOARD PARTICIPANTS

January 22, 2018

DONALD CAMPBELL, Acting Board Chair (for Thomas Jacobs)
NANCY LIVELY, Board Secretary
STUART HURD, Town Manager
DAN MONKS, Assistant Town Manger
CHAD GORDON
JEANNIE JENKINS
JIM CARROLL
CARSON THURBER

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MR. CAMPBELL: Good evening. Welcome to the Bennington Select Board meeting, the January 22nd Select Board meeting. I'm not Tom Jacobs. I'm Donald Campbell. I'm standing in for him for the night. He's off at some lovely warm place, so let's not think about him tonight. But I would like to ask the Board to introduce themselves. And Jeanne, would you please start?

MS. CONNER: Good evening. I'm Jeanne Conner.

MR. THURBER: Good evening, Carson Thurber.

MR. CARROLL: I'm Jim Carroll.

MS. JENKINS: Hello, I'm Jeannie Jenkins.

MR. GORDON: Good evening, Chad Gordon.

MS. LIVELY: Nancy Lively, Secretary.

MR. CAMPBELL: And Nancy Lively with her own microphone tonight.

MS. LIVELY: I know.

MR. CAMPBELL: Feel free to speak up tonight. Before we start, I'd love to have the Pledge of Allegiance, Jeanne.

I pledge allegiance to the flag of the United States of America, and to the republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.

MR. CAMPBELL: Okay. Thank you. I'm maybe not the same orderly guy that Tom is, so we're going to -- I'm going to ask the Board if we would immediately be willing to switch the agenda up a little bit. We have one of our illustrious politicians in the house. Mary has to get north, and the weather is -- is terrible. The weather forecast is terrible. I'm sorry you have to drive it all, but I would love to ask the Board if we could take a vote on moving the public hearing for the Bennington Town Plan Amendment to the first order of business.

MR. THURBER: So moved.

MR. HURD: Second.

MR. CAMPBELL: Okay. And all in favor?

ALL BOARD MEMBERS: Aye.

MR. CAMPBELL: Okay. So that meeting is warned for six o'clock, although it's on the agenda

for 6:40. And maybe, Jeanne, you could remind me at 6:40, but if anybody comes in after 6:40 and wants to speak on the matter, we should let them because we've posted the agenda for 6:40. But so, everybody ready to make a quick sit-through? There's -- there's probably not too much that needs to be done here. This is the second of two required hearings.

Dan, do you have any updates for us that you'd like to give us, please?

DAN UNKNOWN: I don't have any updates, but just to remind everybody, this is the second of two required hearings for the Town Plan Amendment. It's the energy section. So after this evening, you folks can close the public hearing, and then you have several actions that are open to you. You could choose to adopt it as is. You could choose to reject it. You could choose to make changes and have two more public hearings. After appropriately posting, you could send it back to the Planning Commission to -- for more review and come back up through the hearing process. Or you could simply wait a few weeks or months, as long as you work back within a year to make a decision upon it. So it's really up to you folks. I do know that there are some -- there were some public comments presented by

Alcoa that you folks may want to review legal advice upon before making a decision but other than that, you folks, obviously, are free to make any decision after this public hearing that you feel is appropriate.

MR. CAMPBELL: Okay. So, did you have a chance to speak with our Town attorney?

DAN MONKS: I did and actually I just received their advice, which is, perhaps you haven't turned it over yet, on your, in front of you.

MR. CAMPBELL: Ah.

DAN MONKS: So it just came in at about 4:45 this evening. So, I haven't even had a chance to read it thoroughly.

MR. CAMPBELL: Seven pages?

MR. CARROLL: There's a summary at the end.

MR. CAMPBELL: Okay. Anything else that -- any new information or anything else you'd like to add?

DAN MONKS: No new information. I see lots of familiar faces here, most of whom I've spoken previously on -- in favor of the amendment. So I don't know if there's any new faces here this evening who would like to speak on it. But I do see

lots of familiar faces who have -- who've supported this throughout.

MR. CAMPBELL: Yeah. And hopefully the Board remembers that this -- this -- this plan was created by three then Select Board members, along with a number of community members and Morris' help, so. I guess thank you, Dan.

DAN MONKS: Thank you.

MR. CAMPBELL: I'd open it up for any public comment if there's anybody that wants to speak that hasn't had a chance to speak on this, or that has had a chance to speak and has something new to bring to the question. Crickets. No? Okay. So Board, it would be my opinion that we should at very least have an executive session. This is a confidential memorandum. We should have an executive session at the end of this meeting to see if we can get a -- I don't know if we have time to even get a summary of this. But at least --

MR. THURBER: It's only seven pages.

MR. CAMPBELL: -- give it a quick look and see if there's any action we feel like we can take tonight and if not, then we'd not do that. So we have an executive session scheduled. Everybody happy with that?

UNIDENTIFIED FEMALE BOARD MEMBER: Yeah.

MR CAMPBELL: Mary?

MARY: So what would be the process if you stop tonight or don't take action? What would be the process going forward?

MR. CAMPBELL: All right. My sense would be that we -- we would go into executive session. We'd review our legal counsel's advice and if -- if their advice is that we're fine to take a vote on it, then we'd just come out of executive session tonight and -- and take a vote on it. And if -- if there's some reason for us to feel we need to be cautious and move more slowly, then I'd imagine we'd take a little bit more time and probably schedule an executive session between now and our next meeting and then vote on it on the next meeting.

MARY: And we're (inaudible).

MR. CAMPBELL: Not tonight. Any other questions? If there are no other questions, I guess I would look for a motion to close the hearing.

UNIDENTIFIED FEMALE BOARD MEMBER: So moved.

UNIDENTIFIED MALE BOARD MEMBER: Second.

MR. CAMPBELL: Seconded. Okay. Any discussion?

UNIDENTIFIED FEMALE BOARD MEMBER: No.

UNIDENTIFIED FEMALE BOARD MEMBER: Unless someone will reopen the hearing if someone comes at 6:40? Do we need to leave the hearing open?

MR. CAMPBELL: I don't know. Let's see.

UNIDENTIFIED FEMALE BOARD MEMBER: Can we reopen it?

DAN MONKS: Yes.

UNIDENTIFIED FEMALE BOARD MEMBER: I'll just -- I'll just remove -- I'll just --

MR. CAMPBELL: We can reopen it. Okay. Why don't we reopen the hearing if somebody comes at 6:40 and really wants to speak. Otherwise, all in favor of closing the hearing at this point?

ALL BOARD MEMBERS: Aye.

MR. CAMPBELL: Okay. It looks like it's a unanimous vote. So that's closed. And we'll keep you posted, Mary. Oh, if you'd like, I can send you a text or something.

MARY: Thank you.

MR. CAMPBELL: All right. So now we're going to move on to the consent agenda, which is for the minutes of January 2nd, January 6th, January 8th. It's been a busy budget season as well as the warrants, which you've all had a chance to look at.

And I guess I would look for a motion to accept this consent agenda.

UNIDENTIFIED FEMALE BOARD MEMBER: So moved.

UNIDENTIFIED MALE BOARD MEMBER: Second.

MR. CAMPBELL: Moved and seconded. Any discussion about any of these? No? Hearing none, all in favor of passing the consent agenda, say aye.

ALL BOARD MEMBERS: Aye.

MR. CAMPBELL: Okay. So that's unanimous. The next thing on our agenda is the NeighborWorks Grant presentation. And so I can see Ludy. Is Ludy out there? Well, maybe Zerwat will open it up. Would you be willing to kind of queue this up for us and tell us what we need to know?

ZERWAT: I have a slightly creaky voice here now. It's slightly difficult to talk about this because this is really NeighborWorks' presentation today, but --

MR. CAMPBELL: Should we put it off?

ZERWAT: I think we should wait until they're here because this is their request for an enhancement grant and I think they should have a chance to make their case for why they should do so.

MR. CAMPBELL: Apparently, the roads are

already terrible up north, so.

ZERWAT: We can always wait and see if they can get here maybe a little bit later if that's okay. If we can table it for now.

MR. CAMPBELL: So why don't we -- motion to table this?

UNIDENTIFIED MALE BOARD MEMBER: So moved.

MR. CAMPBELL: Okay.

UNIDENTIFIED MALE BOARD MEMBER: Second.

MR. CAMPBELL: All in favor?

ALL BOARD MEMBERS: Aye.

MR. CAMPBELL: Okay. So we're going to table the NeighborWorks for now.

ZERWATS: Thank you.

MR. CAMPBELL: Thank you, Zerwat. Jason, that brings us to lead reduction grant presentation. Are you ready to reduce our lead?

MR. DOLMETSCH: I'm ready to talk about the grant.

MR. CAMPBELL: I'm sorry. I kind of swung that on you. You didn't have a chance to get your -- your gear together.

UNIDENTIFIED MALE BOARD MEMBER: I guess he gets -- was there public comment?

MR. CAMPBELL: There are two public

comments which we'll -- oh I'm sorry, my mic wasn't on. There are two public comments that we'll get to. That must have thrown you off.

MS. LIVELY: And there may be a third person that was going to come.

MR. CAMPBELL: All right.

MS. LIVELY: Then we may get those comments.

MR. CAMPBELL: Okay.

MR. DOLMETSCH: So I'm all set.

MR. CAMPBELL: Okay.

MR. DOLMETSCH My name's Jason Dolmetsch, I'm with MSK Engineering. I'm just giving, I'm here tonight to give you guys a brief introduction and update to the lead grant that the Town of Bennington received and to describe some of the goals and objectives of the lead grant and then to give a -- provide a brief status report of where we are in the process and some of the things that are going to be coming up next, which includes some public outreach. So in general, the purpose of -- so just to give a brief primer on lead, we'll just do a -- just to tell people where lead can exist in your water supply. We all know about the Flint water system and how important it is to reduce lead exposure,

particularly among youth. But lead can be present in a water system in -- in several locations. There are lead service lines, which is what this particular project is looking to identify. But also there are lead solder in -- inside of your building plumbing. If your -- if your house was constructed prior to 1986 and you have copper pipes, there's a likelihood or there's a possibility that the copper is soldered together with a lead solder. And then additionally, lead free fixtures weren't required in Vermont until 2012. So there are many brass fittings in houses, particularly older homes today, that also contain lead. So each one of those locations, lead service lines, either owned by the Town, which would be prior to the curb stop and inside the right of way or on the customer-owned side where there's lead and then there would be lead inside the distribution system or lead inside the fixtures. Any of these locations may present themselves or place lead into the drinking -- into your drinking water. So this slide is -- or this -- the goal of this grant is really to be able to identify where lead service lines are and to find a way, without excavating, how to locate lead service lines inside the Town of Bennington's water system.

So in general, the Town of Bennington in 2016, the water department went and looked at all approximately 3,600 individual service connections that are located inside the Town's water system and they classified them according to what they knew about the service lines. So either service lines that were constructed after the lead ban was in place. Well, and so they are presumed to be not -- to not contain lead. There are other about 900 units where the Town has already replaced or done a partial lead service line replacement inside -- inside the Town's lead service line but that -- there may be a service -- customer-owned service line that is lead -- is leaded. There are 28 known sites that have either a customer or Town owned lead service line and then approximately 960 units where we -- where the Town does not know what the material type is. So in general, depending on what we find or what the investigation yields, there could be up to 1900 service lines that contain either complete or partial lead service lines. So what are -- what's our goals? The goals of our grant here is really to map the Bennington's water distribution system, particularly to collect curb stops and service lines, and distribution systems --

the distribution lines inside of the area of Town where lead service lines may be present. And then to develop a protocol for sampling water systems where those units -- the units material type is not known. There's an EPA draft protocol which we are going to utilize in order to trace, essentially trace through testing -- instantaneous testing inside the home to determine whether we can definitively determine that there's a lead service line present, without excavating outside. And then lastly to develop a lead service line replacement program, funding strategies, and an outreach program to educate people about lead so. And then just as a general status, where we are in the -- in the grant is we have taken the Town's diligent work and we have classified -- we have mapped each of the classified units. So there's lots of colors on the map here, lots of dots, but the -- there -- we've basically looked at all of the downtown as well as the Town's water system to see where we -- where the highest concentration of unknown potential lead service lines are and that's where our mapping process is going to begin. And so if -- in a much larger scale, you can see that the basically the downtown is where the majority of either unknown or

known lead service lines exist. So that's been completed. We're also -- we're in the process in the next two months, we'll be mapping all of those == all of these areas and placing them in a GIS-based system that the Town is going to have access to manage their water system. And then lastly, what we're about to begin doing is reaching out to customers who fall into one of three criteria, which would be they are -- they own a unit where they are -- we are -- have known or confirmed lead service lines. They either or they own a unit where they have non-lead service line, but are very likely to have copper lines with lead solder. Or lastly, have either a home that does not have copper and lead solder, not lead service line, but is likely has fixtures which contain -- which contain lead. And the purpose of reaching out to those particular units is to complete the benchmark sampling where we'll be able to trace -- be able to trace the lead levels inside the unit and tie them to either a service line, lead solder, or leaded fixtures so that we can have adequate data to essentially and ultimately confirm all of these -- the material type of all of these 1900 unknown lead service or unknown service lines. We've included inside the Select

Board packet a general description, which I've just gone over, as well as a draft letter that we'll be sending to the residences. And so tonight, we basically want to inform you of our future outreach so people know that -- what the purpose -- of our reaching out to particular customers are and to get any kind of feedback from either the public or the Select Board prior to doing it.

MR. CAMPBELL: So your -- your last sentence says, "MSK is seeking the Board's support in promoting this project." Any specific support?

MR. DOLMETSCH: Just -- just supporting -- determining leads -- supporting the effort to determine how many lead service lines we have in Town.

MR. CAMPBELL: That's good. We just got through budget season, so the word support always makes us feel a little nervous.

MR. DOLMETSCH: There's -- there's no financial support that I'm requesting at this time.

MR. CAMPBELL: Thank you.

MR. DOLMETSCH: Only moral support.

MR. CAMPBELL: All right. Thank you. Questions from the Board for Jason? Nothing from you, Jim. This is always something you seem to have

thoughts on.

MR. CARROLL: I was just ruminating for a moment. You said that you're -- you have instant detection ability now to go into somebody's home and --

MR. DOLMETSCH: Well, I can't walk in and experience it. But what we'll be doing is the EPA has a draft protocol, which essentially because we have three potential sources of lead inside the unit, either the lead service line, the solder, or the lead fixtures themselves, we essentially have to test for and separate essentially the lead signature for each one of those.

MR. CARROLL: Okay.

MR. DOLMETSCH: So we've purchased an analyzer which we can take a sample at the site. And the protocol, I don't have it memorized yet. It's a little difficult for me to explain. But essentially what it's going to do is -- our goal is to isolate the signature of the lead service line alone. So that hopefully when we've completed the benchmark sampling, we can go into a home, go through a flushing procedure, and then be able to identify that if the test that we take inside the unit at that time is above a certain concentration,

that we can feel fairly certain that it's coming from a lead service line and not from some other potential source. So we will be able to have an immediate -- we will be able to make an immediate determination at that point.

MR. CARROLL: So within minutes rather than weeks where you --

MR. DOLMETSCH: That's correct.

MR. CARROLL: Okay. But you won't be able to determine the -- the precise source of the leads. It could be soldered, it could be a service line.

MR. DOLMETSCH: Well, but the purpose of it would be to -- would be to break those out. Right? So it's -- Montreal did a test. They -- they essentially did this protocol. And what they found was that -- they found definitively that if you went in and you took a flush sample, right, not -- not a first draw sample, which is what we also take to see what level of lead you may have in your drinking water. But if you take a flush sample, in -- in Montreal, if their concentrations that they tested inside of that flush sample were above three micrograms per liter, they were certain -- they felt certain that that meant that there was a lead service line coming into the unit. We may find a

different bench -- a different baseline in Bennington just based on the water characteristics But yes, we would -- we would immediately know.

MR. CARROLL: Are you aware of -- and Stu, I think you would probably ought to pipe in on this one, are you aware of Bennington's efforts now to coat those lead lines with what are the chemicals that we use?

MR. HURD: Well, there are various forms of sodium -- sodium hydroxide, sodium bicarbonate. We use lime now. And that was going to be one of my questions, Jason. We treat the system to prevent the leaching of lead into -- into homes and into service lines. You're going to be able to even in spite of that, you're going to be able to detect

MR. DOLMETSCH: That's our hope. We haven't -- we -- because we haven't actually asked and gotten into homes and done the analysis, that's our -- our expectation is that we're still going to see a lead signature. But yes, the Town of Bennington does -- the Town of Bennington, we know that the Town of Bennington does corrosion control. That is going to have an impact on what -- what lead levels we may see at -- at those house locations during the flush. Corrosion control is -- is a

great way of reducing the amount of lead that you may receive from your drinking water

MR. CARROLL: And currently, are -- have you made any study or looked at the current lead level to give some reassurance to the drinking public, water drinking public?

MR. DOLMETSCH: What I can say is that the Town is below -- the Town's tests that they complete are below action limit for -- for the EPA.

MR. CARROLL: Stu, you want to back that up?

MR. HURD: I think he said it very well.

MR. CARROLL: Okay.

MR. HURD: And we test, I think it's once every three years.

MR. DOLMETSCH: Correct.

MR. HURD: Some -- is it 30 locations? I'm never quite sure --

MR. DOLMETSCH: Yes, I believe so.

MR. HURD: -- of the number and we are consistently below what's called the action level, which is the minimum safe level.

MR. CARROLL: It's good.

MR. DOLMETSCH: It's not actually. So the action level just sorry to break in there, Stu.

MR. HURD: No, it's all right.

MR. DOLMETSCH: The action level is actually the level at which the EPA requires you to take action. Right? So you guys have already taken the first step, which the EPA would have required you to do, which is to implement corrosion control.

MR. CARROLL: And what's the action level?

MR. DOLMETSCH: The action level is 15 micrograms per liter.

MR. CARROLL: And what is ours?

MR. DOLMETSCH: It's going to vary throughout the system. So you take 30 sample sites and they all spread anywhere from, you know, less than one microgram per liter, which is usually the test limit, to I think up to, you know, anywhere. We -- we took samples, just to give you a little bit of background, we took lead samples of all the houses, as many houses as we -- as were willing to give us samples back, of all the units that were connecting to this water system as a part of the expansion to take care of the contamination for PFOA. We got 78 results back. I think 70 percent of them contained -- had some concentration of lead, and none of them have lead service lines. They're also not connected to the water system right now.

But those ranged anywhere from 1.8 micrograms per liter to 54.

MR. CARROLL: Does it vacillate over time?

MR. DOLMETSCH: It really depends on, those were all first draw samples, so that means the water's going to stagnate inside the line for up to eight hours. And so it's the first time you turn the faucet on in the morning. But it will change over time.

MR. CAMPBELL: So run your faucets. Run your faucets before you use them. Anyone else? Other questions from the Board? Thank you. Jim? Carbon?

UNIDENTIFIED FEMALE BOARD MEMBER: No, go ahead.

MR. THURBER: I just had a cost question. There's no fee for residents for you guys to come in and do this sampling.

MR. DOLMETSCH: That's right. We would love to take volunteers, which is why we're doing this initial outreach, is if you would like to participate in -- in our benchmark sampling and then later our sampling program, then we would love to hear from you.

MR. THURBER: Great. And so this letter

that you have drafted here is going to go to a sample size? Is it going to go to all Bennington residents?

MR. DOLMETSCH: It's going to go to a sample set. We're really aiming for the first 30. So we're aiming for 10 to be in each of the -- in each of the classifications of homes that we're looking at sampling for the benchmark sampling.

MR. THURBER: So a pretty low number of --

MR. DOLMETSCH: It's a low number. What we're going to aim to do after that is the goal will be to sample as many units as possible inside the confines of the lead grant. I -- I don't see us being able to do all 1900 in this, mainly due to the time constraints. It takes a long time to just take the outreach. But if we get a flood of requests, then we'll be really excited about it.

MR. CARROLL: I've got one more.

MR. CAMPBELL: Let's -- Jeanne, do you have something?

MS. CONNER: Yeah, you can sign me up.

MR. DOLMETSCH: Okay. Great.

MS. CONNER: I also have a question.

MR. DOLMETSCH: Sure.

MS. CONNER: And it's money related and

you may not be able to answer this, but let's just say something's found. Someone has lead in a fixture. Is there money or is this just a study or is there money available for people to replace fixtures or, you know, remedy the problems?

MR. DOLMETSCH: So this is -- this is really -- this is purely data collection, outreach and study. I think the goal, the next step that we may come back and talk about is what kind of funding strategies we can undertake. The average and as you know, a customer owns their service line, the section of the service line that's on their property after the curb stop, right? So the -- to replace a lead service line that's customer owned, you know, costs approximately $7,000 to complete. And that's countrywide, but that's generally what the cost is. So if you look at, let's say we find that -- let's say we find that every single unit or the high or a high percentage of units that we had that were either unknown or the Town had already replaced out their lead service line, all had lead service lines, then we'd be talking about a project that would would be in the millions of dollars if we tried to do it at once. So it's going to be, I think we're going to have to -- we're going to be looking for

and determining what types of potential funding strategies there would be for lead service line replacement program, what that might look like.

MS. CONNER: And I was even thinking about you needed to get a new faucet.

MR. DOLMETSCH: Oh, you mean so to replace out your lead fixtures?

MS. CONNER: Something as simple as that, yeah. I mean, if you have to start replacing four faucets in your home, that can be expensive. I didn't know if there was money.

MR. DOLMETSCH: I don't -- I'm not aware of those kinds of funding opportunities for individuals at this point, but that's going to be part of the work that we're doing.

MR. CARROLL: Just trying to see what kind of a problem we have.

MS. CONNER: Yeah, great. Thank you.

MR. CAMPBELL: Chad? Jeannie? Anything from either of you? Yeah, go ahead.

MR. CARROLL: Have you conducted this survey before?

MR. DOLMETSCH: This is a new initiative by the state of Vermont. So we're one of two communities in the state that have received this

funding.

MR. CARROLL: I'm just thinking ahead. You know, I'm curious to -- for the people of Bennington to know if there are certain segments of the Town that higher -- where you find higher concentrations would be helpful.

MR. DOLMETSCH: That -- that's going to be part of the outreach. You know, as you know, as we discussed, the Town's undertaken the -- the Town has undertaken corrosion control as a method. So if there are high lead levels inside the home, then there are other, you know, there are things that the customer can do to reduce their potential exposure to lead inside their drinking water.

MR. CARROLL: And more to what Stu said, when we do our testing, it's done at the water treatment plant. Is that right?

MR. HURD: No. No. No. It's done in the home.

MR. CARROLL: It's done in the home.

MR. HURD: Yes. And it's -- it's -- it's done as a first draw. So you -- you -- as -- as one of the volunteers who do that test on a three year basis, you rise in the morning. You -- the first draw out of your faucet, you fill the -- fill the

jar and return it to the water department. And that way you know whether or not you have higher amounts of lead in your -- in your system than normal. If you run or flush the water, it is likely that that concentration will drop because you're -- you're bringing the protection into your system that hasn't been there overnight.

MR. DOLMETSCH: It's also had less time to react inside the unit, inside the line.

MR. CAMPBELL: So three -- three quick things from me, Jason, I guess, just to confirm this is completely voluntary, right? So the people will be getting a letter and they can agree to it or not. I guess I wonder a little bit when I look at this map about the extent of the map. What happens to the left and the right and the top and the bottom of it? You know, how much bigger is our problem than we have? And maybe that's a question for another day.

MR. DOLMETSCH: This was just an example. We have the entire system.

MR. CAMPBELL: Okay.

MR. DOLMETSCH: We have every all 3600 service connections mapped and classified based on the Town's classification.

MR. CAMPBELL: I understand.

MR. DOLMETSCH: And as you can guess, imagine the older sections of Town are -- are more impacted.

MR. CAMPBELL: Yeah.

MR. DOLMETSCH: But it -- it's -- it's not relegated just to inside this box.

MR. CAMPBELL: Okay.

MR. DOLMETSCH: This is more an example of what you can see on a larger scale.

MR. CAMPBELL: Well, I for one can't possibly see any downside to this except that it would be nice to have the study be even larger if -- if there was more money. But at least it -- it sounds to me like we're we're going to really address this problem squarely and with as much funding as we can bring to it at this point. And if we find we have a problem, then we'll have to look deeper into it, right?

MR. DOLMETSCH: I -- I think it's -- it's less about finding a problem as, it's more about determining the scope and educating the public and identifying a collective approach on -- on the solution.

MR. CAMPBELL: Well said. Well said. Any

other thoughts from the Board? I think it would be my opinion, we should send him off with our blessing. I don't suppose you need a motion on this, but.

MS. JENKINS: Can I ask one more? So the timeframe, you probably said this, what is the timeframe for this?

MR. DOLMETSCH: The overall timeframe for the project runs through the end of August but we're aiming to complete our benchmark testing by the end of March.

MS. JENKINS: Okay. So it's really quick. Okay.

MR. CAMPBELL: All right. So okay to say the consensus of the Board is go man go?

MS. JENKINS: Absolutely.

MR. CAMPBELL: Great. Thanks very much, Jason.

MR. DOLMETSCH: Thank you.

MR. CAMPBELL: So I see that NeighborWorks made it down. How are the roads?

MS. BIDDLE: So far so good.

MR. CAMPBELL: Oh yeah?

MS. BIDDLE: It started raining.

MR. CAMPBELL: Okay. All right. So we

have tabled the NeighborWorks discussion, but let's bring that up now. So, Judy and Zerwat.

ZERWAT: Thank you. I'm just here to introduce our guests here tonight. I have Ludy Biddle, who's the executive director of NeighborWorks of Western Vermont and Gregg Over, who's the director and NeighborWorks received, as you saw probably in the summary that -- the executive summary that they -- that they provided and that I also provided to you, NeighborWorks received a VCDP grant of $250,000 last year, July 2016, to conduct a rental rehab pilot. So this was a program to incentivize local landlords to acquire and rehabilitate rental units in Bennington. So they're here to tell you a little bit about what they've done this past year and some plans for the future.

MS. BIDDLE: Yes, thank you. Thank you very much for having us and thank you for moving us around in the agenda for the -- due to the weather. That's very nice. Yes. We are here actually the business before our -- for the -- the reason we're here tonight is to ask you to consider supporting our request for an amendment to the original application. The amendment would be for additional

sum of money that would allow us to do 15 more projects, 15 more rental units in Bennington. We've accomplished 10. We'll give you details on what we've done. But the request would be subsidy from VCDP that would go towards incentivizing landlords to do 15 more units. Our proposal is that with the original grant, there is enough money left in program management that we can pay the -- the -- the staff costs and the administrative costs out of the original grant. So we're just asking for an additional $100,000 which would be subsidies to the additional landlords.

MR. OVER: One hundred five.

MS. BIDDLE: One hundred five so. But I wanted to just begin by saying that the original grant has made a huge difference to us in that it allowed us finally to have a satellite office in Bennington. We're on North Main in a lovely space, it actually belongs to Shires Housing. We're partnering with Shires Housing on as many -- in as many ways as possible. We have a long-range plan to co-locate with them when the time comes. And having a -- having a presence, a full-time presence in Bennington has enabled us to bring all our other programs in a much more immediate and constant and

reliable fashion as opposed to sort of working out of West Rutland on an -- on a not as frequent basis. So our home buyer education classes are taught here. The -- the attendance has doubled. Our lending officers come down to actually sit down with clients for our lending program. We share some space in our space with Habitat, which is very nice for sort of social reasons as well. But just having a presence in Bennington has meant a great deal to us. We've been serving Bennington since 2004, but this is the first time we've actually had a satellite permanent office. I'm going to let Gregg talk, oh, I -- I should also say two examples of additional benefits. We started two programs in Rutland last winter. One is called We Can Fix It, which is a home maintenance course for women, taught by a woman. And it's been extremely popular in the Rutland area. And Shires is going to help us co-host and provide that course to the at, for starters anyway, at the community center in Apple, in the new, in the revised, or the renovated Applegate housing complex. And the other program is called Everyday Chef whereby a wonderful chef teaches a course to -- about cooking with local foods and healthy foods but teaching a course to people who struggle to have, you know, adequate or,

you know, adequate cooking facilities. So she literally teaches how to cook with a microwave, or how to cook with a -- with a hot plate, or how to cook on a grill, if that's all you have. And she teaches these courses in places where people are having a hard time such as Recovery House in Rutland and so forth. So we are expanding that course with the help and partnership of Shires as well. There are just a few, there -- there are just other ways that NeighborWorks will hopefully be bringing some of our resources into Bennington, as I say, and with the permanent space that we have. So I'm just going to ask Greg to give some details on what we've actually accomplished with the rental rehab. But and do you have numbers on how many other rehabs we've done?

MR. OVER: Actually I don't, but I know it's around a dozen.

MS. BIDDLE: Yeah.

MR. OVER: From your handout there, I tried to give a history of what we've done so far. But I'd like to go over the fact that we have three buildings that we're currently working on at 272, 274 Union -- Union Avenue, I believe it is.

MR. CAMPBELL: Street.

MR. OVER: That building owner has invested $128,000 into that building to take two units and make them four. It's about 35 percent complete at this time. Then we have a second building on 32224 Gage Street. And that is one unit plus repairs to the -- to the two-unit building. That gentleman is going to be investing over $40,000 into that and it's about 25 percent complete. And then there's a third building on Safford Street at 343 that houses three units. Those people are going to be gut rehabbing the two main units and probably reconstructing a third unit on the back that was attached by just a breezeway and set of stairs. So there'll be three units there and they've taken a building grant and they're going to be investing over $155,000 in that building, for a total of 10 units, which was our commitment for the first round of the grant. Now, for the second round of the grant, we've lowered the -- the grant amount from 8,500 down to 7,000. Hopefully -- hoping that we can produce more units and still incentivize the landlords to take advantage of this program. Currently, we have one person that's extremely committed to -- to remodel a four-unit building. Is there a Grove Street around here? Close?

MR. HURD: Grove Street, yes.

MR. OVER: Is there a Grove close to here? It's, the -- the units are very close to here and he's -- he's looking to take a grant for each unit plus make some significant improvements for the building. Any questions? So now I'd like to answer questions that I, you know, whatever I can.

MR. CAMPBELL: All right. So just to be clear, as I understand it, eventually we're looking -- you're looking for the approval of the Bennington Select Board to begin the process of applying to VCDB for a second year of enhancement. Have I got that right?

MS. BIDDLE: That's correct.

MR. CAMPBELL: That's what you'd like from us tonight? Okay.

MS. BIDDLE: Yeah.

MR. CAMPBELL: So questions from the Board? Anything from you, Chad?

MR. GORDON: Yeah, I guess I could start. What does someone have to do to be eligible to apply for these grants?

MR. OVER: Just be willing to look over the -- the grant commitments that you have to make on the building. And we have developed a sheet that

-- that where we sit down and talk with the individual property owner to start with and make them aware that they, you know, they must commit to -- to all these conditions. You know, those conditions are to the effect of they must rent at least 51 percent of the units to people that are 80 percent AMI and below. And if I talk too many acronyms, just tell me.

MR. GORDON: Yeah, you might want to just de-acronym a couple of those.

MR. OVER: Okay.

MS. BIDDLE: De-acronym.

MR. OVER: Fifty-one percent of the building must be rented to people who are 80 percent or below the average median income of the county. That usually works out to be somewhere in the $40,000 range, depending on the amount of dependents. There are HUD housing and urban development guidelines on -- on rent and they're not allowed to exceed those guidelines. They must rent within the HUD guidelines.

MS. BIDDLE: For five years.

MR. OVER: For, well, for five years or the life of the loan commitment, whichever comes -- whichever comes first. And they have to give a --

they have to supply NeighborWorks with income information annually from the clients that they're renting to, to make sure that they're abiding by the -- the covenants of the grant.

MS. BIDDLE: And they have to make health and, they -- they have to use the funds for health, safety, efficiency improvements. The goal being to improve the quality of -- of housing either to create new units, which would be the -- the super achievement, to create new units that are affordable to low-income households and that meet very high standards for health, safety and efficiency.

MR. OVER: Yeah, our number one criteria was if units were vacant or offline or, I believe the building at 343 Stafford had sat sat vacant for quite a few years as a foreclosure. So that was our first commitment to -- to bring new units online here in Town.

MS. BIDDLE: It's also had the benefit of making improvements to historic housing stock because in most cases these are, you know, older homes that have been converted or something. And in many cases and this is, you know, this is what the landlords -- this is why the landlords wanted to work with us. They've been under maintained or

simply needed expensive repairs and this was sort of the -- the jumpstart to getting those repairs done.

MR. CAMPBELL: So Jeannie?

MS. JENKINS: So -- so, I have -- I have a couple questions. Thank you. So I'm wondering, can you talk a little bit about how you do outreach? Who are you looking for and how do you go about it? And how you found the individuals that you're working with now?

MS. BIDDLE: Well, we started with a sort of steering committee. I'm not sure remember all the members of the steering committee, but we talked to the director of Shires Housing. We talked to two, we invited several, but we had two landlords come and advise on how it would work for them. We had two inspectors.

MR. OVER: I think they were the building inspectors for the Town were -- were present at our meetings and the interim, what was it?

ZERWAT: Community Development Director.

MR. OVER: The Community Development Director, the interim that was working at the time.

MS. BIDDLE: Yeah. Okay. So we had sort of an ad hoc advisory group to sort of establish and test what guidelines we were proposing. This is a

pilot. It's never been done before. So we were getting the best advice we could. We also consulted Joe Giancola, who's a big landowner in Rutland, who wanted it for Rutland, but sorry.

MS. JENKINS: So I -- I guess I was thinking, so that's your -- your steering committee, but I was wondering how you did the outreach and who you were looking for. So beyond getting advice.

MR. OVER: We had Chris who knew --

MS. BIDDLE: Yeah. Yeah.

MR. OVER: The person that we selected for, to do the management of the program here in Bennington was very well connected and knew I, what I feel to be 50, 60 percent of the community because he was in construction for a long time.

MS. JENKINS: Is that -- is that Chris?

MS. BIDDLE: Yes.

MS. JENKINS: Okay.

MR. OVER: And he knew a lot of the people that -- that eventually ended up in the program, if not all.

MS. JENKINS: So what, how did you do the outreach? I mean, was it through Chris Callaert?

MR. OVER: Yes.

MS. BIDDLE: Mostly through Chris Callaert

because we were just getting started here. And -- and then we -- we took various proposals from people. In some ways, it was a first come, first serve, if you qualified, you met the standards that we wanted to see for the improvements to the property and -- and were willing to, you know, agree to the covenants and so forth.

MS. JENKINS: So I'm just sort of wondering so it was Chris reaching out rather than, did you have something that went out in the paper and talked about this? Did you send things to, I don't know, area, I know there's an area landlord list or.

MS. BIDDLE: I don't know that we did.

MR. OVER: Certainly our website.

MS. BIDDLE: Yeah.

MR. OVER: We had it, you know, plugged in very well.

MS. JENKINS: Okay. All right.

MS. BIDDLE: But those are very good suggestions.

MR. OVER: And, you know, and social media also.

MS. JENKINS: Okay. All right. All right.

MR. OVER: It went out on.

MS. JENKINS: All right. And then if I may. So I -- so bear with me because I don't know a lot about this. So the -- the units that you were referring to are, are -- those new units as opposed to rehabs? I mean, you'd ask the number of rehab units and then.

MR. OVER: There were seven new units and one unit that was being brought back online because it had fallen out of compliance to be rentable.

MS. JENKINS: And that was Safford? There was one on Safford?

MR. OVER: That was at Gage Street.

MS. JENKINS: Gage. Okay.

MR. OVER: And three of them -- each -- each of the units got a building grant to make improvements that would -- that would affect the -- the entire building, i.e., you know, all the people that are living there.

MS. JENKINS: Okay.

MR. OVER: Or would be.

MS. JENKINS: And then what were the, so then what were rehab units? Sorry.

MR. OVER: The rehab unit -- there were four at 272, 274 Union. And there were three at 343 Safford.

MR. CAMPBELL: He's listing the same units there. So there were a total of seven units --

MR. OVER: Eight units.

MR. CAMPBELL: A total of eight units that were improved or that were brought online as a result of your funding.

MR. OVER: Correct.

MS. JENKINS: Thank you.

MR. CAMPBELL: And these -- these --

MS. JENKINS: Okay.

MR. THURBER: Or the hope is to bring them online because currently they're -- they're in process.

MS. BIDDLE: They're in process.

MR. THURBER: Yeah some of them are not even in the -- in the vicinity of coming online.

MR. OVER: Not yet.

MS. JENKINS: So they're 35 percent, 25 percent and then Safford is --

MR. OVER: Twenty-five percent and one we're still working through --

MS. JENKINS: Safford is zero percent.

MR. OVER: -- the Department of Historical Preservation to enact guidelines that they have to use for the exterior of the building.

MS. JENKINS: Okay.

MS. BIDDLE: Because it's a historic building.

MS. JENKINS: Okay. Thank you.

MR. CAMPBELL: Jeannie, anything else? No?

MS. JENKINS: I think that's -- I'll stop there.

MR. CAMPBELL: Why don't I go last. Jim, anything from you? No? Carson?

MR. THURBER: As as you commented, year one, pilot program, initial funding. I know all the -- everyone's heart was in the right place in getting this off the ground. But I -- I know through conversations with the individuals that you're interacting with, it's definitely a trying process in respect to what you need to do to get the money and it's creating some incredibly lengthy delays. Is that fair?

MS. BIDDLE: I would say some of the delays are just the fact that we're getting -- we were starting the program last year. I don't think we have to -- some of those delays will be much easier. But yes and this -- there is a way -- there is a, you know, a problem or there are requirements

because these are federal funds.

MR. THURBER: Yeah

MS. BIDDLE: And they do have more, you know, more strings attached and there are more loops, you know, to jump through. And Gregg has to do an environmental review. We have to do an historical review. We have to do -- do we -- we don't --

MR. OVER: Asbestos.

MS. BIDDLE: Yeah, so there -- there are a lot of -- there are a lot of issues that arise when you are using federal funds.

MR. THURBER: Are you optimistic in -- in year two as you kind of increase the number of units that you're hoping to to have these funds flow to that the ability for individuals, small landlords, which is the goal, to -- to obtain those funds is -- is going to be a little easier? Because the landlords you selected in year one, I would not be going out on a limb to say are -- are probably some of the -- are some of the most competent and probably efficient landlords you could have picked in this community. One of -- a couple of them are some of the largest landlords. So it -- it just kind of -- the picking process was -- is interesting

to me. As far as small landlords, they weren't all small landlords. And right now, there are -- some of them are the most efficient and they're struggling to get through the paperwork.

MS. BIDDLE: We would love those landlords to participate. I will say, I -- there were articles in the paper and some people did contact us after articles in the paper when the grant was announced and when the process -- the project was sort of described in the paper. I don't know that we put out a press release ourselves. I honestly don't remember. But I know that there were articles in the paper and people did call us. And we, but we'd be very, very, very pleased to have the smaller landlords.

MR. OVER: The small landlord that's struggling right now to bring his units online because of insufficient funds, we would give top priority to in the second round. In other words, if you have, you know, two -- two units that you own and I don't know, even connected to your house and -- and you know, you just don't have the financial resources to -- to make the improvements or the-- or the code -- the code compliance repair work that it takes. Those are the people that we're truly

looking for.

MR. THURBER: Yeah.

MR. OVER: And we don't have to keep this to 11. It might be that, you know, that some of the landlords don't need a full grant, that they could get -- get by with a, with -- with a $16,000 project, which means they'd only be eligible for a $4,000 grant. So we would like to stretch this out as far as we possibly could.

MR. THURBER: And I agree. I think in the 30,000-foot level, the -- the funds that were awarded and in year one, as I kind of settle on the idea of it being year one, they're --

MR. OVER: Well, we didn't know what to expect to be quite honest with you.

MR. THURBER: Agreed. And I think as year two comes online, it's going to be hopefully --

MR. OVER: The grant -- the grant conditions now say that -- that no one property owner is eligible for more than eight. That might even be a little bit -- a little bit too much. If somebody's already, you know, hed the ability to -- to heve five grants and -- and restore a building, we would certainly not jump to -- to refund them again.

MR. THURBER: Yeah, we saw that in year one

MR. OVER: We would look for those other -- for other people in order to distribute the wealth, right.

MR. CAMPBELL: Thank you. Good hard questions. Jeanne?

MS. CONNER: Yeah, forgive me. I don't know a lot about what you do. So forgive me if you feel like I'm being a little nitpicky but I would just like to reiterate, I -- I -- I'm -- I'm a little concerned that all the landlords that may have been eligible didn't know. So that makes me a little bit uncomfortable that there may be people out there that would have come forward had they known. So I guess I would encourage you to maybe do a better job of making sure that the smaller landlords do know about the program. The other couple things I've thought of is, is -- is there some sort of a time constraint that, in -- in other words, you don't want units under construction for years. The goal is to get them rehabilitated and --

MR. OVER: Our grant agreements specify six months.

MS. CONNER: Okay. Great.

MR. OVER: Okay? We do extend that for certain --

MS. CONNER: Sure. Things happen.

MR. OVER: -- criteria. But that's what we -- that's what we try to get our projects done in.

MS. CONNER: And is there some sort of penalty of things --

MR. OVER: Well, we don't have liquidated damages or anything like that.

MS. CONNER: Yeah.

MR. OVER: You know --

MS. CONNER: It's difficult.

MR. OVER: -- the construction manager tries to keep abreast of of what's going on. And -- and if it's falling behind, why they let us know.

MS. CONNER: And how does the money come to the landlord? Are there bills paid for them out of their money?

MR. OVER: No.

MS. CONNER: Okay.

MR. OVER: The -- the grant and the loan and or the funds that the landlord supplies are deposited in an escrow account With NeighborWorks.

MS. CONNER: Okay.

MR. OVER: And we take care of all the distribution funds.

MS. CONNER: Okay. And the other thing because things not only sometimes take longer than they were supposed to, they sometimes end up costing more than they were supposed to. So is there some sort of --

MR. OVER: We have a -- we do have -- we have built in an agreement in with each landlord that they will be responsible if funds that -- that are in play do not create the units. That it's -- it's their responsibility to take those units to the point where they are rentable.

MS. CONNER: I guess I'm, what I was going to say was, is there any verification that they have the finances to complete the project in addition to.

MR. OVER: There is.

MS. CONNER: Okay.

MR. OVER: That's correct.

MS. CONNER: That's it. You did great.

MR. CAMPBELL: Way to soldier through Jeanne. Well, so, you know, we know we want to work on our affordable housing stock in Bennington and -- and we're thankful for help, any help, any good help that we can get. I think I probably speak for the

whole Board when I say that. Many of us have heard rumors of the process being slow and -- and maybe inefficient.

MR. OVER: Can I just add one thing to that?

MR. CAMPBELL: Yeah. Let me finish this thought and then I'll get there.

MR. OVER: All right.

MR. CAMPBELL: I -- I think enough people have asked us if it's, whether or not it's worth it. So I -- I think that's your challenge, not ours at some level. So we're -- we're, you know, happy enough to let you continue to improve things as they go on. I think we really would love to see some -- some good progress to get the whole 15 units or something next year. But my one question that I'd really like to ask is, are we giving anything up by offering to support this grant? So the VCDP grant funds, I don't know how they're -- how competitive they are. I don't know how they're distributed to communities. Is there anything that we are giving up by supporting this? And if not, why would we not support further investment in our community, I guess?

MS. BIDDLE: Well, I can't --

MR. OVER: I've always been told that one grant from VCDP does not impact anything else down the road that you might apply for is the way I've been --

MS. BIDDLE: You're not competing against yourself --

MR. OVER: Right.

MS. BIDDLE: -- for those funds.

MR. OVER: It's like there isn't a quota and you -- you know, because you're investing another 500, 105,000 into this program that, you know, that you won't be eligible for something else down the road is the way I've always been told.

MR. CAMPBELL: Okay. Do we have anything else in the pipeline for VCDP that we're anxious about, Zerwat?

ZERWAT: The only thing I would add to that is that every time we apply for a new VCDP grant we -- we from the Town's end, because we're the fiscal agents for these grants, have to demonstrate that we're on top of all of our grants. So I think when we ask for what is the accounting process, how well are the funds rolling out into the community, we have to show that the, you know, the outcome of that process to the state, we have to

report on that. And I've spoken to Ludy about this a little bit. You know, I think what would be helpful to know is, you know, for example, is Chris staying on with the program? You know, who is going to be involved in the program in year two because VCDP sends us the money, but if they're not getting the feedback that it is being used in the community, and if this is how it's being translated, do we get a penalty? Do we not? I can only speculate, but it doesn't look good on our portfolios.

MR. CAMPBELL: Can you tell a little bit more about how much work it is to oversee those funds or?

ZERWAT: Well, I mean, again, you know, every time, for example, you know, the funds come, go through us to NeighborWorks, who then distributes it to the landlords. In this case, you know, it's really kind of an advance to the landlords, and then we reimburse NeighborWorks in some ways. But, you know, as I, again, spoke with Ludy, that requisition process is not very straightforward, just because of also some changes in the administration at NeighborWorks. So I would certainly feel better knowing that, as the person who's responsible for this, from the Town's end, that I have competent

colleagues at NeighborWorks to work with on this project, that I know who the person is on the ground in Bennington. You know, as NeighborWorks is building a Bennington presence, who are the faces with that? How well known are those entities? How reliable are they? So that if I call them and I say, "A report is due tomorrow," they're going to be available. They know the, you know, information they need to provide me, and so on and so forth.

MR. CAMPBELL: So you're confident the first pancake always comes out looking a little funny, right? So you re confident that the second pancake, we -- we can probably improve things and smooth out the process a little bit? Would that be

ZERWAT: I think, you know, again, I speak very, you know, I spoke with, I had a very frank and honest conversation with Ludy about this. And I think Carson raised some of the concerns that I've also had, which is, you know, the project is a really valuable one. We have, you know, housing that is remaining vacant, that really our community benefits from having converted into occupiable housing. But if it's, you know, how quickly that turnover is happening, who's actually moving into

any of these units? I mean, I think, you know, how quickly is a project being completed? And also, you know, it's great for landlords to have funds available, but what percentage of their total project? I mean, keep in mind that each unit gets $8,500. If, you know, there's a big, you know, project that has to comply with, as Ludy said earlier, health, efficiency and safety, I think it's really important for landlords to know what percentage of that grant is going to go towards meeting those standards, and what percentage is actually going towards the housing conversion. So I don't think, I mean, Ludy has my full sympathy that this isn't just, you know, a question of how NeighborWorks is doing it. But I do think we have to be very frank about what converting a house to be code compliant really entails, and how well do landlords, you know, know that that's what they're signing up for?

MR. THURBER: And can I just add on to that? Also, at the end, there are restrictions on the income levels you can rent to people with. And so that puts us into a very interesting dynamic with other organizations that are providing housing to -- to lower income individuals. So if we're, if

individuals who are doing renovations, are doing these costly renovations, although there might be a loan attached to it in this program, who you're renting to, your hands are tied to a little bit. So it puts you into a competitive market if you need to keep your rents low, you paid quite a bit to finance, you know, new renovations, and then you're competing with other organizations that may not be holding the notes on those apartments. So it's a very tough dynamic you're putting some landlords into, especially if they're small landlords. I could talk to you offline about it, I'm happy to -- to go through the economics. I'm one of them right now. It's -- it's a very peculiar situation so.

MR. CAMPBELL: So, but Carson, you know, you seem to have -- be closest to this of all of us. What's your sense on what the Town should do?

MR. THURBER: I think there's a sharp learning curve for year two that needs to come out of year one. I don't know about staffing situations at Bennington right now, if you guys have an individual from NeighborWorks on the ground right now, is that -- is the staffing back up to --

MS. BIDDLE: We are -- we don't. Chris Callaert has resigned and we just came from an

interview with someone that we're very pleased about, but I can't announce that.

MR. THURBER: I think in theory it's a. I mean, it's a fantastic program. I just think there are some, you know, first pancake dilemma. It's not to steal your thunder there, but there's -- there's a lot to improve upon, which I'd look at as an opportunity not to dwell on what happened in year one. I think we all know that there's really green pastures here. We just need to figure out how to make it work for small landlords because it's tough to bring these old buildings up to code. I mean, I've done three this in the last year and it's a pain and it's really expensive. And the loan structuring sometimes that you're offering seems wonderful, but it can -- it can be trying.

MR. CAMPBELL: So it sounds to me like the program is costing the Town very little to administer, that we feel like it's going to get better and that I'm hearing some reassurances that things are going to go more smoothly in the second year. I wonder if we have any more questions for these folks before we move on?

MS. JENKINS: I'm thinking, I think I have two more questions. So in the -- in terms of

completion rates, is what -- what -- what -- to what do you attribute the -- the low percentage of completion? Is it, I mean, is it that it's costly and therefore things are moving slowly? Is it that the paperwork burden was intense and that meant that things just didn't happen?

MR. OVER: First of all, first of all, we had -- we had to take what we have been doing for scattered site projects for the last 20 years and adapt it to -- to fit rental rehab and adapt it to fit a property owner that owns multiple units as opposed to a -- a single family resident. And that took -- that took quite a bit of development through our lending division and it had to, obviously it had to be checked for legality and everything. Then there's the actual lending process itself. And what I was going to say is we are, the lending department is only as fast as the people trying to borrow the money get the information to them. Okay? And my best example is the person that applied third for the program was the person that finished first because they had a handle on the paperwork that needed to be supplied. So some of that is, you know, it's a 50/50. It does take time to process these loans. We're getting better at it because,

you know, we're now, you know, into a second cycle. And we always tell the homeowners and the landlords, "Get your paperwork in as fast as possible because that's what's going to expedite things."

MS. JENKINS: Okay. So a bit of it is the first-year learning curve of, and that, so that -- that hold up won't happen again. So my other question is just, I -- I had an energy audit done through you guys and someone from Rutland came down to do it. And I know there's been conversation in Bennington about not having enough energy certified folks to come out to do audits, et cetera. Is -- is it the case that you need to bring people from other communities that have a certification or -- or can someone that's not certified work under you with some kind of -- some kind of, I don't know, dispensation from you?

MS. BIDDLE: So our heat squad program is designed such that we have on staff three BPI certified -- Building Performance Institute certified efficiency auditors. And so our auditors came to your house, one of them, and they -- the auditors do an assessment of the home, right? A proposed scope of work for the home, discuss the cost, you know, offer the loan, et cetera. And then

the work is given to local contractors.

MS. JENKINS: Even if they're not certified.

MS. BIDDLE: No, they -- they -- they -- they would -- they have to be certified. Well, let me think. Not in every case. They don't have to be certified in every case. The work has to be tested at the end, and the quality of work has to meet the standards for the BPI.

MS. JENKINS: Okay. But it does open it up for people who are not energy certified.

MS. BIDDLE: Yeah. So it's the local contractors that are getting the work to actually do the air sealing and installation.

MS. JENKINS: Okay. All right. Okay. Great. Thank you.

MR. CAMPBELL: Okay. So how are people feeling about this? If people are feeling positive about it, I'd accept a motion to begin the process of applying for a second year. Let's see. What would you like? Just a motion of support for your application?

MR. OVER: Yes, that's what we need.

MR. CAMPBELL: Would anybody like to be -- make that kind of a motion?

MR. THURBER: And just a reminder to the watching public in the audience, this has -- these funds are not related to anything Bennington-driven, tax dollars, or anything along those lines. I think it's just important to re-clarify.

MR. CAMPBELL: And we've also established that we're not giving up anything by applying for them. So it's, not to say money over the transom, but it's -- it's something that we're very happy to have you bringing to our community.

MR. THURBER: Yeah. This is an information session, and I hope you don't realize I'm not being critical. It's just feedback from the general community that I think it's an amazing opportunity for small landlords, and even more so in year two.

MS. BIDDLE: So we don't -- I don't -- we don't feel criticized or whatever.

MR. THURBER: Everything I've brought up, you've heard it over and over again.

MS. BIDDLE: It's the fact of life when you start a pilot program, you just have, you know, bumps and starts.

MR. THURBER: Yeah, agreed.

MS. BIDDLE: And we have them all, and

we're delighted that we can think about a second year and do more with less.

ZERWAT: Can I just quickly add, and again, I can say all of this because I've spoken with Ludy in detail about this. Keep in mind that, you know, even with the year one, absolutely there's a learning curve, but a significant percentage of the grant did go into program management. And I would like to see whether it's a, you know, slightly more regular calendar of reporting about how some of these changes are being pursued and traced for year two. I think that would be helpful both for NeighborWorks and for the Town.

MR. CAMPBELL: Do you have an MOU or something with NeighborWorks? Is there something written at this point?

MS. BIDDLE: Yeah.

ZERWAT: Yeah.

MR. CAMPBELL: And could we -- could we open that up just a little bit to ask for a little bit more reporting on that?

MS. BIDDLE: I can look into that. Yes.

MS. JENKINS: I'm wondering if we could also add a little bit more about how people find out about the program. I -- I'm just -- I am concerned

that -- that -- that it not just be an individual saying, "Okay, I know these four people, let's go ask them." I -- I would really like the public to be able to invite themselves into it.

MS. BIDDLE: And part of our conversations too with Zerwat was we could use help in finding the landlords. We'd love to be -- we'd love some guidance as to where you, you know, what -- what portions of your Town you might like to see some investment. What -- what landlords you'd like us to work with. You know, we're -- we're not as familiar with people on the ground here as you are and suggestions in helping and selecting would be very welcome.

MS. JENKINS: Okay.

MR. CAMPBELL: Happy with that?

MS. JENKINS: Mm-hmm.

MR. CAMPBELL: Yeah.

MS. JENKINS: Yes. Thank you.

MR. CAMPBELL: First year in a new community. Yeah.

MR. CARROLL: I would, that, you know, as far as finding landlords, it should be fairly simple to do if you went to the assessor's office. They can identify multiple units and let you know who the

landlords are.

MR. CAMPBELL: Do you need a letter of support on this or just a motion in the minutes?

MS. BIDDLE: A letter of support never hurts.

MR. CAMPBELL: That's not quite what I asked.

MS. BIDDLE: I don't believe it's required in the amendment process.

MR. CAMPBELL: Uh-huh.

MR. OVER: Please (inaudible).

MR. CAMPBELL: Do you have, Stuart, some sort of letter or something that we could --

MR. HURT: Well, we could probably pull something together depending on the outcome of your motion and support.

MR. CAMPBELL: Okay. All right. What's the board's pleasure here?

MR. THURBER: Motion to support.

MS. JENKINS: With --

MR. CAMPBELL: Motion to support. Okay.

MS. JENKINS: With, do we want to have some stipulations in there or is it not?

MR. CAMPBELL: I think we've just heard Zerwat saying that she's going to look at the MOU

and she's going to look at some performance standards and -- and a little better sense of how it's how the award's disseminated. Yeah.

MS. JENKINS: Okay.

MR. CAMPBELL: Is that fair? Zerwat, did I get that right? Okay. Okay. So motion to support this grant application in the form of a letter or just in the form of a letter?

MR. THURBER: Sure.

MR. CAMPBELL: Any second on that?

MR. GORDON: Second.

MR. CAMPBELL: Chad's seconding it. Any discussion? All in favor?

ALL BOARD MEMBERS: Aye.

MR. CAMPBELL: Okay. So we are unanimous. Thank you very much for coming to our community and bringing some money and helping out. We hope you have a great 2018. We look forward to your progress.

MS. BIDDLE: Thank you.

MR. CAMPBELL: Okay. The next item on our agenda is -- oh yes, thank you for reminding me. So did anybody come in that was expecting to speak at the public hearing for the Bennington Town Plan Amendment? We did that very first in the meeting so

Mary Morrissey could be on a road to Montpelier. Is there anybody that came in a little bit late and would like to speak because we can open this back up if -- if we need to. Laura, would you like to speak?

LAURA: I wonder what's going on because I came in late thinking that's going to be now.

MR. CAMPBELL: Understood. That's what I'm saying. Yeah we changed it at Mary's request so. So okay, I guess we probably need a motion to open that back up then. Would somebody give me a motion?

MS. CONNER: So moved -- so moved to open the public hearing for the energy plan.

MR. CARROLL: Second.

MR. CAMPBELL: Okay. All in favor?

ALL BOARD MEMBERS: Aye.

MR. CAMPBELL: Okay. So we have now reopened the public hearing for the Bennington Town Plan Amendment and would be happy to hear from you, Laura if you'd like to come on up and speak to us.

LAURA: I'm really here to find out what was happening because I wasn't here when you started with the first -- with the issue when you moved the agenda around and I understand there's going to be

an executive session at the end and then what's the intention what -- what are you expecting to do?

MR. CAMPBELL: We're going to review our legal counsel's advice which we literally just got as we sat down tonight and then we'll decide -- we'll either come out of the executive session and take a vote or we will, if we decide we need more time to understand our legal -- the legal opinion of our lawyer, we will schedule a -- schedule an action at our next regular scheduled meeting.

LAURA: At the next -- so you think it will come back --

MR. CAMPBELL: Yes, we'll come back --

LAURA: -- if you don't make a decision?

MR. CAMPBELL: In one form or another, yes.

LAURA: Okay. Because I actually have been really disappointed at how long this has been going on. It's been dragging on and dragging on from the time of the creation of the energy amendment, which was done way back in the spring I think and we were expecting it to come to you and it was -- I don't know what the causes of all the delays were. It didn't come to the Planning Commission rather. It took a long, long time to

finally get to the Planning Commission and then they expedited it pretty quickly and then it came here. But I think now we're facing the problem of sort of a last minute wrench thrown into the works by the developers which would not have been -- maybe they would have done it anyway. But it seems like this -- I really am sorry that it's been taken taking so long and I really don't understand why and I know that because these two projects, Chelsea and Apple Hill solar projects, are now winding their ways through the Public Utility Commission, that if the Town had gotten its act together and either passed or not passed this amendment earlier, it would have made everything a lot easier at the Public Utility Commission. So it's very aggravating for us or me, I should just speak for me as a neighbor, to see that this has -- there's been a lot of feet dragging and I'm not blaming any individuals because I don't even know why. But now we're stuck with this and it's really unfortunate.

MR. CAMPBELL: Stuck with what?

LAURA: We're stuck with this issue that now you are having to rightfully ask the attorney to look at this complaint that was dumped on your lap here and but -- and it could have been -- all of

this could have been done months and months and months ago if it had been put to the Select Board when -- we kept being told it was going to be passed by the or looked at and approved presumably by the Planning Commission and then brought to the Select Board. So I'm just concerned about the timing.

MR. CAMPBELL: We've asked Dan to explain the timing several times and he's given us several explanations of the process and I do not believe there was foot dragging involved in any of this. We worked through the process in an orderly way to the best of our ability. And yes, it is a wrench that's been thrown in the works at a late time. At our last meeting, we received a rather threatening letter from the developer and we do not feel comfortable taking action until we get the advice of our lawyer to let us know whether or not there's anything substantial in that -- in the claims that the -- that the --

LAURA: No, I understand that. I'm not disputing or questioning what you are doing tonight. I, you -- obviously you have to because that serves the purposes of the developers. The longer our energy plan is not -- takes to adopt, the more likely they will be able to move forward at the

Public Utility Commission and skirt their project in without this amendment. That's what I'm getting at.

MR. CAMPBELL: We understand that. Thank you.

LAURA: And I know you understand that and I think a lot of us understand that and they've been very successful in playing chess with us and winning so far.

MR. THURBER: I don't -- I wouldn't go that far. Well I think our staff are doing a very good job and that we really with these individuals as you know we need to probably make sure we're doing everything in our power to ensure that our legal team looks at things. We take the time to look at them. Hence that's why we just got this. I mean as we were sitting down and want to take the time to review in executive session. If it takes an extra meeting.

LAURA: I mean I'm not talking about that. I understand that. I'm talking about the months and months and months that it took before it even came to you. It was finished a long time ago.

MR. CAMPBELL: Yeah so we worked on it for a long time.

LAURA: That's what I'm talking about.

Prior steps.

MR. CAMPBELL: I'm disinclined to ask Dan to go through that whole process again unless you really want to.

MR. THURBER: No I'm comfortable. I just -- I respect how much work they put into this.

MR. CAMPBELL: I think where we can meet you Laura is that we're sorry it's taken so long for all of us and it's been somewhat -- it's -- it's frustrating but I do think good things take time and we've worked hard on this thing. I think we're not going to at the last minute lunge into something with -- without doing our full due diligence. So we'll try to move through this as quickly as we can.

LAURA: Well I do hope it comes up at the next regularly scheduled meeting instead of having to be postponed and postponed and postponed whatever you decide at executive session.

MR. CAMPBELL: Well, we'll bring it up in some form or another but we have to kind of review what the lawyers say. Thank you very much. Any other comments while we have this hearing open? All right. So motion to re-close this hearing?

MR. THURBER: So moved.

MR. CAMPBELL: Second?

MS. JENKINS: Second.

MR. CAMPBELL: All right. All in favor?

ALL BOARD MEMBERS: Aye.

MR. CAMPBELL: Okay. So now barring any further foolishness, the Bennington public hearing on the Bennington Town Plan Amendment is closed. We'll have an executive session on the subject at the end of this meeting and we'll come out of that executive session and just and let people know what we're doing at the point. Okay? All right. So the next item on the agenda is public -- is the citizens' comment. We have two people that have signed up for that. Before we go to citizens' comment, the Chair and me in my role as Vice Chair, have asked Stuart in the light of our Town Manager, Stuart Hurd in light of the, well largely the Banner editorial on Saturday, if he would further explain the process around the mitigation grant. It has been explained several times to -- to some of us on the Select Board and I'm -- I'm pretty happy with the explanation I've gotten but I do feel like the general public could stand to hear a little bit more about it and Stuart, if you'd be willing to, I'd love to -- I'd love to --

MR. HURD: Sure thing.

MR. CAMPBELL: -- let you say what you have. Thank you.

MR. HURD: I will summarize. I sent a letter to the editor this afternoon clarifying in -- in -- in great detail the process that we went through with regard, not only to the construction and the design -- the design and construction of the shed, but also the concurrent move on the mitigation grant program. And I will summarize here. In 2016, we began to design a facility and a salt and sand shed. We always knew that would be a separate facility from our public works facility. In May of 2017 we, following a successful bond vote, we acquired the former -- the former Poisson building on Bowen Road and located a proposed site for the salt and sand shed which had already been pretty fully designed outside of the -- the process. On August 24th, construction documents were finished. Bid documents were sent out for construction of the shed. Ultimately contracts were awarded on September 13th. Concurrently with that, staff became aware of the mitigation grant program when a BCRC employee indicated that VTrans was looking for submittals because very few folks had applied for the dollars that were offered in the mitigation

grant program. One of our staff, working with BCRC, came in on Battle Day holiday which was August 14th, to put together the one-page application form and get that off in time for the deadline, which was the following day, August 15th. The application clearly showed the shed's location and its design. We received a notification of the award via an email on September 25th. A letter had been drafted apparently on September 14th and that was attached to the email. Around that time, a story appeared in the Banner because VTrans announced the awards for those grants. So we had -- we had already essentially awarded contracts and were moving towards a construction deadline. So I asked staff to take a look at the eligibility requirements that are attached to the award documents to ensure that we were eligible because we're fairly far along in the process. As it turns out, this is a federal process. There are 20 steps to follow if you are to be eligible for the federal grants. And it starts with project selection and authorization to proceed. I'm not going to go through all the details of the steps. But we were or had completed work that would have taken us through the first 18 steps without following the federal process. We were not required

to follow it because we weren't accepting -- at that time, we were not accepting any federal funds or not anticipating the acceptance of federal funds. So based on that fact, that we were that far along in the process, the application actually should not have been awarded to us. It should have been denied by VTrans. Having said hat, the award came. And the question is could the Town have scrapped the entire effort and restarted the process. The answer is yes, we probably could have. But the amount of money and funds spent to do the design to that date would have not been eligible for federal funding. So we would have lost those funds and then the design work would have to follow the federal regulations, which includes procurement of engineering firms, the National Environmental Protection Act, federal wage requirements for construction, contractor qualification requirements for construction, and a host of other requirements that are required for all of these federal dollars. The NEEPA process, New England Environmental Protection Act, that process alone can be at least six months and perhaps longer, depending on the project. So here we were sitting, ready to go with contractors, looking at a federal process that was

obviously going to push us way out. So given those time constraints and the fact that more than likely, the cost to do it using federal standards would be higher, we declined the grant. And I'll give you an example of the process. We've all been talking about the Pleasant Street enhancement grant. It's one that we've been carrying forward in each highway budget, hoping to complete the process with VTrans using the federal standards, because these too are federal monies. The original grant was first awarded in 2008, January. Here we are, ten years later, and we still haven't gotten through to the final approval to go forward with the federal dollars. In fact, it s taken so long, we went ahead with local dollars and did a major portion of that project, including paving and sidewalks, that would have been a part of the project and eligible for the federal funds, had we decided to wait. We didn't think we could. So that gives you an idea of the timing that these federal projects take. And so given that, we believe that the federal process would have driven the cost of the shed up, would have obviously perhaps stalled construction of the shed for anywhere from, I would guess, three to seven years. There was no right-of-way acquisition

included, and that's sometimes the problem in the enhancement grants. And remember, we had very competitive bids. We were ready to start. And bond funds, once appropriated, cannot be prepaid or repaid before the bond schedule because the banks are selling bonds to individuals. It's a money-making opportunity for individuals who buy bonds. You have to pay those out on a 20-year schedule. So there would have been no change in the bond cost had we seen even any kind of savings if the project had moved forward quickly. That's a summary of the reasons why we looked at the project as a project that was ready to go and could be utilized relatively quickly at a very cost-effective price versus a federal process that could have dragged on for years and perhaps not saved a heck of a lot of money.

MR. CAMPBELL: Okay. Thank you very much.

MR. CARROLL: I've got some questions.

MR. CAMPBELL: Yeah. Be pointed, if you would, please.

MR. CARROLL: I will. I'm going to.

MR. CAMPBELL: Because this is a public comment session we're moving into.

MR. CARROLL: I will. I will be. So what

I heard you say is that even with this federal grant money of $340,000, it would not have changed the total that we would have to pay back with respect to the bond.

MR. HURD: More than likely not. If in fact there were savings, theoretically you can, with permission of the agency on the federal dollars, because this was a grant for a salt and sand shed, you might have been able to take some of those savings and done something additional at the facility that was not related to the salt and sand shed. That would require agency approval. Or you could have taken those savings, should there be any, and set them aside and use them as part of your first or second payment on the bond.

MR. CARROLL: You said it would be more expensive if we went with the federal guidelines, which would have, what you're suggesting is it would have eaten into the overall bond. Do you have any estimate of how much more it might have cost?

MR. HURD: Hard to know. It would really depend on the time. I mean if construction projects, depending on the cost of materials and contractor availability, a construction project that is ready to go on year one, that goes off on year

five or six, could be anywhere from, I would guess anywhere from 10 to 30 percent higher, perhaps even more, depending on what's happening with inflation and everything else. So it's hard to know, Jim. You can't guess what it would be, but based on our experience with the federal programs and specifically the enhancement projects that we have worked on, we think that the savings would have been lost in lost time and increased cost.

MR. CAMPBELL: Okay. Thank you for doing that. Too bad the Banner didn't ask you for that information at first.

MR. HURD: The letter will appear in the Banner tomorrow. They've assured me that they have it and will run it.

MR. CAMPBELL: Okay. Great.

MR. THURBER: Can I ask a question? This is not an opportunity for, are we offering --

MR. CAMPBELL: No, we're not.

MR. THURBER: -- public comment.

MR. CAMPBELL: Well, we're moving into public comment. We have two people that are both going to talk about, I think, at least one of them wants to talk about this issue.

MS. JENKINS: Could we ask if there's

anyone that came, given we're in public comment, is there anyone else that didn't sign up to speak during the public comment period that would like to? Okay.

MR. CAMPBELL: We'll -- we'll add you in when you get up here. Great. Thank you very much. Okay. First person on the list is Mr. Culkin.

MR. CULKIN: Hello. Joey Culkin, Bennington. It's kind of funny that, you know, we get three minutes every two weeks and then you try to quash us and tell us what we can or can't say. I just want to say Stu -- Stu, that was a lovely narrative. I know you and your employees worked very diligently on that. So just to remind folks at home, two weeks ago, Stu admitted that he knowingly violated state law to build the salt shed without a wetlands permit, which is why the Town is under investigation and taxpayers may be fined $42,000. Not to mention we lost $340,000, the possibility to get $340,000. It's funny that you say, you know, it wouldn't have been a good grant to get and yet RJ rushed in to submit it on behalf of the Town. That doesn't really make sense. Being that this is under investigation, I think there are some questions that haven't been answered and they need to be on the

record whether you choose to answer them or not. I hope you all will act like leaders that were elected to answer questions. And if you don't answer them from me, the Banner's here, maybe they'll take the questions and run. So I'm going to ask four questions and ask each of you for the answers. You can answer or just sit there in silence.

MR. CAMPBELL: I'm going to remind the Board that we are in citizens' comment here, which is the time to hear from citizens and to take under advisement what they have to say. But it's not a time for debate. I'm sorry.

MR. CULKIN: So Bojica, you know, it's like, you know, you ask us not to interrupt you and yet you interrupt me. Question number one, when did each of you Board members first gain knowledge of the permit issue? Number two, when did the first shovel start digging up dirt for the salt shed? Number three, did any one of you ask for favors gaining the Act 250 permit and whom did you ask? And who else other than Dan Monks, Larry McLeod, RJ Jolie knew about the lack of permits?

MR. HURD: I think it's RJ Jolly.

MR. CULKIN: Great. Thank you.

MR. HURD: I just wanted to make sure.

MR. CULKIN: Mr. Jolly, I apologize. So Jeanne, would you like to --

MR. CAMPBELL: No, Joe, we're not doing this.

MR. CULKIN: But I have three minutes until I can, if you don't want to answer, but I'm going to ask you to --

MR. CAMPBELL: You may do your public comment and then you may sit down.

MR. CULKIN: Carson?

MR. THURBER: No, I think I'm with Donald.

MR. CULKIN: Jimmy?

MR. CARROLL: I think it's necessary that we be as transparent as possible, even though this may be as unpleasant as it's appearing to be. But let me answer your first question. I think we all became -- well I can't speak for the rest of the Board, but I became aware of this approximately six to eight weeks ago. So first that I heard of it and we deliberated on it. Not in a public fashion, but in an executive session over the last six -- approximately six to eight weeks. We just haven't worn it on our sleeve much to the dislike of you who prefer that we air it. But that is not how we conduct ourselves. We try to be --

MR. CULKIN: Right --

MR. CARROLL: I'm not done.

MR. CULKIN: And secretly.

MR. CARROLL: We try to be deliberative and purposeful. And as far as favors -- favors? Are you kidding? Look at the people that sit around this table. They're all men and women of integrity. And asking favors? That's insulting.

MR. CAMPBELL: So yeah. I feel your -- I feel your pain, Jim. But I'm going to really ask if we can move on. Let's not even but if anybody else wants to speak, I'm not going to stop you.

MR. CULKIN: So I'll just go down the line. Donald, I guess that's a no. Jeannie?

MS. JENKINS: It's public comment period, and you know that. I'm not -- I'm not saying that your questions aren't things that people can -- that you can ask.

MR. CAMPBELL: We'll be happy to talk with you about them later.

MS. JENKINS: Yeah, but this is not the place to do it.

MR. CULKIN: Well, of course it is. Again, we get three minutes over two weeks. We're at your mercy. And you shove us back into the hole.

Mr. Gordon, Chad?

MR. GORDON: No comment. I'm going to follow Board procedure.

MR. CAMPBELL: Okay. Anything else? Thank you for your comments. We'll take them under advisement. All right. The next person that is on our list tonight is William Stewart. Good evening, Mr. Stewart.

MR. STEWART: Good evening. William Stewart, of Bennington, Vermont. I just have a few short questions for everybody. Seeing as we have the explanation from Stuart about how everything went down and everything was handled, how does the Select Board try to handle on recouping the $340,000 that we lost by negligence?

MR. THURBER: Is that your opinion?

MR. STEWART: That's my question. How are we going to try to recoup this $340,000 that taxpayers are going to have to pay for now?

MR. CAMPBELL: So we just had an explanation of that. Did you follow his explanation?

MR. STEWART: I followed his explanation but I was asking you, you know, how are you having any ideas how we're going to recoup this money? And

talking about bonding, by the way, Stuart Hurd is our manager, is in charge of the Town. Is there -- why isn't he bonded against negligence like this? And if not, why aren't we looking into bonding to have insurance against this happening anymore? Are we bonded?

MR. CAMPBELL: Don't know the answer to that question.

MR. HURD: I am bonded.

MR. CAMPBELL: He's bonded.

MR. STEWART: Okay. So there's the answer to that. So as loses -- losses come to us as taxpayers, why aren't we looking into the bonding aspect of the losses, continued losses, and any future losses?

MR. CAMPBELL: Well, thank you for your comment. Do you have any more?

MR. STEWART: I need an answer for that.

MR. CAMPBELL: We're not -- we're not sitting here and doing a debate tonight. We're -- we're here to get --

MR. STEWART: It's not -- Mr. Campbell --

MR. CAMPBELL: -- we'll listen to your questions.

MR. STEWART: One more time, the three

minutes that I was entitled to, I asked the question, a simple question, it wasn't a hard one. He said he's bonded. So why is the fact that we as taxpayers have to pay the whole $450,000? We only had to pay $110,000. We lost $340,000, which would have covered the whole cost minus just what we had included to $110,000.

MR. CAMPBELL: Well, I thought his explanation was plenty thorough, and I don't need to go back to it. Does anybody else want to go back to it.

MR. STEWART: Well, it's a clouded issue. You know, he can cloud the issue all he wants, but the bottom line is, it is what it is. And you can - and you can all quiet everything down. Everything's a big hush hush about it. You never want to answer. That s the reason why I asked the questions. You don't want to answer, and the Town needs to see that. Thank you.

MR. CAMPBELL: It's a process we're following. Thank you. Thank you for your comments. Okay. One more comment. Would you -- would state your name, please?, Mr. Smith.

MR. SMITH: I'm a resident of Bennington. I just have a few questions unrelated to anything

here tonight. This involves the senior center. I'm wondering if there's plans to put more staff at the senior center?

MR. CAMPBELL: Not this year.

MR. SMITH: Okay.

MR. CAMPBELL: It's not in the budget this year. No. But you may give us your thoughts if you'd like.

MR. SMITH: Okay. Well, I think it needs staff. There's a lot of part-timers. Not part-timers. They're volunteers. I'm one of their volunteers, and I also sit on the Board for the advisory committee. But my question is this: Are the volunteers covered by liability insurance like the Town employees are covered? So if someone falls, someone chokes, and nothing happens, do the volunteers put themselves at risk to be sued?

MR. CAMPBELL: Don't know. Can we get back to you on that?

MR. SMITH: I'd like you to do that. Yeah. Thanks.

MR. THURBER: Okay. Before you walk away, Zerwat, I'm not going to put you on the spot, but maybe a little bit. The reallocation of potential recreational staff.

MR. HURD: I was going to clarify that.

MR. THURBER: Okay. Yeah. To your original question there about the staffing. Yes. And we have some individuals in the audience that are here steadfast in relation to the senior center.

MR. HURD: I'll take it.

MR. THURBER: Take the mic as far as how that's going to be looked at.

MR. HURD: My first answer was we're not bringing on any new staff.

MR. SMITH: Okay.

MR. HURD: We do have full-time staff at the recreation center, as you know. And for a time, they were covering absences that Susan had or when she was traveling, so that we tried to have a full time staff person there most of the time. For some reason, that process stopped. And I had a meeting with Zerwat, Tracy Knights, and Susan Hogue to get that reestablished.

MR. SMITH: Good.

MR. HURD: We're also looking to perhaps move some of the additional part-time staff at the rec center that we use there to see if they can be available for those times where our full-time staff are involved at functions at the rec center. So we

will -- our goal is to bring an employee of the Town to the center at all times. So that if there are liability issues associated with the volunteerism, that they would be in fact, handled by the Town's liability insurance and the employees are, therefore, covered. If someone does fall at the center or if someone is injured at the center, our liability insurance would cover them as well. Unless the fall was created by the volunteer, then that's perhaps another question. But I wouldn't expect that you would have those kinds of issues.

MR. SMITH: Okay.

UNIDENTIFIED FEMALE: Why don't you just answer?

MR. HURD: I just did answer.

UNIDENTIFIED FEMALE: No, you didn't.

MR. HURD: Yes, I did.

MR. CAMPBELL: So I think this is probably delving into, you know, we can get back to you with more information if you like.

MR. SMITH: Yeah.

MR. CAMPBELL: Since this is citizens' comment, we'd like to just hear what's on your mind and try to get back to you if we can.

MR. SMITH: Yeah, I think people need to

be assured they're not going to be held responsible. If somebody chokes and they do the Heimlich and they break a rib or they hurt the person or the person dies, is that volunteer going to be at risk? And you know the world today.

MR. CAMPBELL: Yeah.

MR. HURD: And I can't answer that particular question.

MR. SMITH: Okay. Thank you.

MR. CAMPBELL: Thank you. We'll get back to you. Were there any other citizens that came in after the period of time that we had to sign up? No? Okay. We will move on to the oh, I'm sorry.

ROSE: Can we get a mic?

MR. CAMPBELL: If you'd like to.

ROSE: I want to know why we can't get somebody to help us at the senior center.

MR. CAMPBELL: Oh, okay. Thank you for that comment.

ROSE: It's not a comment. I want to know why.

MR. CAMPBELL: Well we've done our budgeting process for the year and we've had the recommendations from the staff and we're getting ready to vote on that next.

ROSE: Are you serious?

MS. JENKINS: Can I -- can I ask whether in so I -- I haven't heard before that maybe there's some part-time staff that could be covering. Is there a way to build a relationship so that if there is a part-time staffer that is splitting their time? I mean, we talked about some sort of moving, you know, moving people around. I'm just, I think it's very hard to have sort of, okay, Thursday we're going to need somebody to cover from 11 to 2. Is there a way to have, I'm making it up, you know, Dixie is the person who you know, who has -- who understands the protocol in the senior center so that there's, so that they're at least there, if we're going to have somebody sort of on call, that there's someone who's very familiar with the processes there?

MR. HURD: The goal -- the goal is to identify those folks at the recreation center, both full and part-time employees who could perhaps provide that coverage. I don't think you can look to one individual to always be available. But if -- if there are several of our employees that are familiar with the protocols and processes at the center, they would be the ones that would fill those

gaps. At least that's the plan.

MS. JENKINS: So can I ask where, how -- when in the year is this an appropriate topic I guess to really figure out? Because, you know, it, it doesn't really work at budget time because then we're sort of passed, you know, we're, we're passed the, we're passed the point where we're sort of looking at, at our needs in that way. So I want to make sure that we don't go another year without really thinking about how -- how, whether, see, you know, what recreation looks like as one of, and within that topic, how we staff appropriately.

MR. HURD: I have, I've challenged Susan and -- and Tracy to work with Zerwat and others to come up with a plan to do just that.

MS. JENKINS: Okay.

MR. HURD: And that -- that should be underway, not perhaps tonight, but it's -- they should be thinking about it and working up and coming back to me with a recommendation.

MS. JENKINS: Okay. Thank you.

MR. CAMPBELL: And presumably your staff is working on it throughout the year. And -- and we did have a long conversation about this at the budget meeting when we talked about the senior

center budget too. So it's not like it -- it happens without us knowing about it

MS. JENKINS: Yeah. So Rose.

ROSE: And we're not covered -- when Sue was out and they knew it and they closed the center.

MS. JENKINS: So Rose, our hope is that this year now that, you know, thanks to the efforts of people using the senior center and to Sue, we're much more aware of the need. And so that is the plan for this year is to figure out how we're going to how we're going to -- how we're going to staff appropriately. Okay.

ROSE: To know the need and help. Do you realize she's the only full-time person there?

MS. JENKINS: I do.

ROSE: What -- what do they do if all the volunteers leave? So I'm thinking seriously.

MS. JENKINS: Let's take this offline. We'll talk about it at break. We'll talk about it afterwards. Okay?

MR. CAMPBELL: Okay. Thank you for your comments. Okay. We're now going to move into item number seven on the budget. I'm sorry we're behind schedule a bit here but we will be talking about adopting the 2019 budget for approval of the annual

meeting. Right Stuart? What have you got for us?

MR. HURD: That's correct. We would be looking for a motion to adopt the budget as approved by the Board or adopt finalized by the Board at its last budget meeting and to approve the warning and circulate it for signature.

MR. CAMPBELL: So any comments from the Board on this?

MS. CONNER: Do you want a motion first?

MR. CAMPBELL: I'd love a motion.

MR. THURBER: So moved.

MR. CARROLL: Second.

MR. CAMPBELL: Okay. We have a motion to approve for warning the budget as we created over the past month or more. Anyone have any comments? No? Okay. All in favor.

MR. THURBER: I have a lot of comments.

MS. CONNER: Actually, I do have a question. Is the way the warn -- what are these things called?

MR. HURD: The warning.

MS. CONNER: The warning or the ballot items, is this the exact wording that will appear on the ballots?

MR. HURD: Yes.

MS. CONNER: Okay.

MR. CAMPBELL: That is the exact wording that was petitioned.

MS. CONNER: Okay.

MR. CAMPBELL: Happy with that?

MS. CONNER: I'm thrilled with that.

MR. CAMPBELL: Okay. All right. All in favor of moving this nice frugal budget forward, say aye.

ALL BOARD MEMBERS: Aye.

MR. CAMPBELL: Okay. Thank you, Stuart for taking us through that process. It was long but it was lots of fun.

MR. HURD: I'll be circulating this for signature.

MR. CAMPBELL: We are next going to hear from Stuart on speed limit amendments.

MR. HURD: Yes, this is -- this is a housekeeping amendment actually. The, as you know, the state of Vermont is planning to pave Route 9 throughout -- throughout -- through the community as well as Route 7 south to north and as part of their preliminary design process, they hire an engineering firm to actually go through, mark all of the speed limits, mark the signage because a lot of the

signage will be upgraded to the most recent municipal traffic standards. And one of the things this engineering firm discovered is that we have two speed zones where it drops from 50 to 40 and then to 30 as you come in from Route 7 south down by the Greenberg Reserve up to around the former village line or what we know as the Park Lawn entrance. There's a 40 mile per hour speed zone there. There is also a 40 mile per hour speed zone as you come into town from the east. It -- it starts around at the present time Barney Road and terminates just -- just before Kelly Fuels. For whatever reason those -- those speed zones were never added to the Bennington traffic ordinance Section 10-1903 and the engineers caught that and suggested that we should adopt those zones so they can be properly signed and otherwise, they would not sign them. So we're here tonight asking you to adopt the two zones as described. They are each four tenths of a mile long. They expand that 40 mile per hour speed limit slightly to the east and to the south. But we did that in order to find some appropriate markers so that we can easily describe where they start and where they stop and I would look for a motion to adopt this particular ordinance amendment, circulate

this for signature and these take effect within 60 days which should then be just in time for the start of construction.

MR. CAMPBELL: All right. Anybody have a motion on this?

MS. CONNER: I move that we accept the --

MR. THURBE: Already established speed limits in those zones.

MS. CONNER: Yeah.

MR. HURD: Thank you.

MR. THURBER: It's just a piece of paper, right?

MR. CAMPBELL: All right. So we have a motion to accept the proposal. Do I hear a second?

MR. THURBER: Second.

MR. CAMPBELL: All right. Any discussion? Any concerns? Seems like a good idea. All in favor?

MR. CARROLL: I'm going to abstain because I wasn't here to hear everything.

MR. CAMPBELL: Okay.

MR. THURBER: If you got a speeding ticket in a certain area in Bennington -- I'm just kidding. I don't want to snatch it, Nancy.

MR. CAMPBELL: Sorry Jim, we just forged

ahead without you.

MR. CARROLL: That's okay.

MR. CAMPBELL: All right. Liquor licenses?

MR. HURD: Yes, I have to be circulated. These are all renewals. One first class license for Sodexo Vermont, two and then one, two, three, four, five, second class renewals, Apple Barn, two Jolly establishments. That s not our Jolly but the Jolly Company. The Beverage Den and North Bennington variety. And these I just need to circulate so that you can sign. No motion necessary.

MR. CAMPBELL: Okay. Do you have a Manager's report you'd like to share with us Stuart?

MR. HURD: Yes, I do. I just have one action item this evening. And then a special note that I want to announce. We have been working with Shires Housing about a development that they are attempting to bring to fruition in the Town of Shaftesbury, just over their line from North Bennington Village. They are seeking from us municipal sewer to serve that particular development. Over the last, I would say probably decade or so, I've been having a number of conversations with the Town of Shaftesbury and

various representatives about how we might bring municipal sewer into Shaftesbury to serve Shaftesbury. And while our treatment plant might have capacity, there are some issues associated with that. And most of them go to how do you shut the sewer off, if they don't pay? With the village of North Bennington, we have an agreement that should somebody not be paying appropriately, the village of North Bennington will allow us to actually dig into the road and stop service to that home. Because we don't have a similar agreement with Shaftesbury at the present time, I'm using this as a model that I've talked with a number of their different representatives. Shires has agreed, through a memorandum of understanding, that it will build the sewer line all the way to the village line and maintain it. It will allow for installation of a stop device or a closer device in the line should they not pay. So there will be no need to dig up the service line to turn it off. And they have agreed to prepay on an annual basis sewer service for those units. And that would be based on the estimated usage as first established. And at the end of the year, we would true up. So that if in fact they had overpaid based on the usage, it will

be metered, we would return funds to them. If they hadn't paid enough, then they would agree to pay promptly any overage. And I'm looking for you folks to authorize me to sign that memorandum of understanding with the Shires Housing which will allow them to then proceed at least to try to get the additional permits necessary to move this development forward.

MS. JENKINS: Wow. (Inaudible.)

MR. THURBER: Do you need a decision on this tonight?

MR. HURD: If you would like to wait a couple of weeks, that's fine. I'm good with that.

MR. CAMPBELL: It's hard to with that short description, it's hard to imagine why we wouldn't do this. But I also don't feel like I have a great deal of depth on this.

MR. THURBER: I mean I don't want to take all the time but I have some questions but I can talk to him offline about it. I just want more information. That's all.

MR. CAMPBELL: All right.

MR. THURBER: I'm not trying to be tough. I just.

MR. HURD: No, that's okay.

MR. THURBER: I'm really just -- well I'd like to know more.

MR. CAMPBELL: There's no rush on this. Stuart?

MR. HURD: No.

MR. CAMPBELL: Okay.

MR. HURD: We're just at the point where Shires has finally agreed that they'd like to start moving forward. The project had been on hold for a short time.

MR. THURBER: Just one example is, you know, are there other where in Shaftsbury kind of what other individuals might want to be included. Just kind of things like that where.

MR. HURD: Well yeah. In this particular case just to answer that question quickly, this would be a standalone project. The line would be wholly within their property. It wouldn't be in public rights of way. It would leave the North Bennington system which we operate into their property and run for a distance to serve the housing units. And it would be all theirs, essentially a service main for the entire development.

MR. THURBER: Okay.

MR. CARROLL: What does true up mean?

MR. HURD: True up. Well it means that you -- you take a look at the payment received at the beginning of the year. If it's -- if it was excessive, you return funds to the customer. If it wasn't enough, then the customer agrees to pay you the difference.

MS. JENKINS: I'm just -- I mean I'm -- I'm a bit curious about your questions because from my reading of this, it seems like a wonderful arrangement. Very -- I mean they're -- they're paying up front. They're entering into an MOU with us. And it's specific to their project.

MR. HURD: That's correct.

MS. JENKINS: So I -- so I don't know if you're if you're

MR. THURBER: I'm just wondering on -- I mean I can again I don't waste time. I'm curious on location. I'm curious on a couple other things too. I just I'd just like to take an extra little bit.

MR. HURD: Yeah.

MR. THURBER: That's all.

MS. JENKINS: I mean I'm just -- I mean I don't know anymore. I'm just thinking that it could be interesting. It could be useful for everyone to hear.

MR. HURD: What? Location. I should have actually attached a map. There is a plan layout and design that in order to move this evening forward, perhaps -- I'll provide a map for the next meeting. You guys will all get it ahead of time and that'll give you a much better idea.

MR. CAMPBELL: We can have a -- let's have another conversation and we can ask about how the fees were established or whatever else that, you know, whatever we want to ask at that point. We'll make it an agenda item.

MR. HURD: That would be fine.

MR. CAMPBELL: So okay and as long as there's no rush.

MS. CONNER: Full disclosure, I'm on the board of Shires and we have a meeting tomorrow night, so if anyone has any questions you want me to bring back to Shires, let me know.

MR. CAMPBELL: I would not send back a suspicious report.

MS. CONNER: No, no, no. Not at all.

MR. CAMPBELL: I'm like Carson. I just would like to get a little more information. It's the kind of long-term commitment we get into you know and it'd be nice to know we're doing the right

thing so.

MS. CONNER: And Stephanie would be happy --

MR. CAMPBELL: I do trust our staff's recommendation on this but I think, you know, I feel like Carson, I'd just like a few more details before I vote on it.

MS. CONNER: This -- this is -- this project is not all that new to Shires. It's just not moving forward primarily because of this reason so.

MR. CAMPBELL: I see.

MR. GORDON: Is this something we could add to our special meeting next week if we needed to act on it sooner? Or just wait till the next scheduled meeting?

MR. HURD: I think -- I think it would be better to do it at a regular business meeting.

MR. CAMPBELL: Okay.

MS. CONNER: If you'd like Stephanie to come just, all you have to do is invite her and she'll come.

MR. HURD: And then just a quick announcement. We have an applicant for the Housing Authority Board. This individual must be a person

who is a resident or a beneficiary of Housing Authority Services. He is. And my question to you folks is do you want to conduct an interview with this individual prior to considering his appointment?

MS. JENKINS: I would. We've done it for everyone else.

MS. CONNER: Yeah. I feel like we need to be consistent.

MR. HURD: Okay. We'll try to set that up probably perhaps just before the next business meeting.

MS. CONNER: Okay.

MR. CAMPBELL: That'd be great.

MR. HURD: And then one last point. Just a -- the Putnam block as or the Bennington Redevelopment Group, has asked the Town to step in as a -- in a temporary position as the grantee in a Vermont Housing Conservation Board funding application. It appears that our acting as grantee will be extremely temporary. They -- they are making arrangements to find -- find another 501(c)(3) to act. But I wanted you to know that I did commit the Town to do that in case they couldn't find anyone. And should we step into that, should

the award come and we be forced to step into that location, they would come to us at the second meeting in February and make a full presentation as to the -- what the housing is and what it's going to cover and how it's going to be done so. But I wanted to put that out there.

MS. JENKINS: Okay. Thank you.

MR. HURD: And that's all I have.

MR. CAMPBELL: Okay. Other business? Who wants to start. Jeanne, how are you feeling about other business?

MS. CONNER: Pretty blank.

MR. CAMPBELL: Pretty blank You don't have to drum anything up. Carson?

MR. THURBER: No.

MR. CARROLL: I just want to make one thing clear to the general public with respect to the salt shed and Stu issue that I wish I had said earlier. In that -- that is -- this is a personnel issue which prohibits us from discussing it in public and that needs to be made clear. It's not -- I think it may even be illegal to discuss it in public what we discussed in executive session. It's not that we're deliberately being secretive or keeping it from anybody. Those are the rules.

Thanks.

MR. CAMPBELL: Jeannie?

MS. JENKINS: Nothing.

MR. CAMPBELL: Chad?

MR. GORDON: Nothing.

MR. CAMPBELL: No? I -- I would invite the Board offline to give me comments on if you feel like we're on the wrong track with citizens' comment, I'd be open to hearing it. My opinion on citizens' comment is it's a time for people to come and for us to listen. I know that was scratchy and difficult tonight and I apologize if anyone felt uncomfortable with that. But I feel quite strongly that citizens' comment really is a time for us to listen and not for us to debate. So that's my that's where I am. But I invite other opinions from you offline. Okay. So if anyone would like to -- we need to have an executive session on a legal matter. Could I have a motion to go into an executive session for a legal matter?

MR. CARROLL: So moved.

MR. CAMPBELL: We have a first. And a second?

MR. THURBER: Comment.

MR. CAMPBELL: Are you seconding or are

you.

MR. THURBER: I'll second and then --

MR. CAMPBELL: Yeah.

MR. THURBER: So we have some individuals here that are still wanting to find out kind of what comes out of this. Are we going to make a kind of a comment after to give them some rest assurance?

MR. HURD: Come back to staff --

MR. CAMPBELL: Here's what I'd like to do. If this -- if this works for --

MR. THURBER: That's the least we can do.

MR. CAMPBELL: -- if this works for the, you know, folks that are kind of concerned about what happens tonight. I'd like to go into executive session. Well, first of all I'd like to get some chairs out in the hallway so people don't have to stand.

MR. HURD: We've made arrangements to take them down to the conference room.

MR. CAMPBELL: Okay.

MR. HURD: On the second floor.

MR. CAMPBELL: Okay. All right. So a place to sit. Got that -- got that feedback, Laura. Thanks. So there's a comfortable place for them to sit. We'll go into executive session. We consider

this -- what we've gotten from our lawyer. I haven't even looked at it yet. But if we think it's something we can move on quickly, we should. If it's not something we can move on quickly, we should -- we should come out of executive session and plan a longer session to go through it, would be my opinion. So I do feel like we owe it to somewhat to the people that will be waiting not to leave them sitting down in the hallway for a long time.

MS. JENKINS: May I. Chad had a great suggestion.

MR. GORDON: I just thought to not inconvenience the audience, would it be easier for us to go to the conference room and then come back?

MR. CAMPBELL: Is the conference room open?

MR. HURD: It is.

MR. GORDON: So they don't have to move, they can stay here and wait for us to come back.

MR. CAMPBELL: We can do that.

MS. JENKINS: That might be easier.

MR. CAMPBELL: We can do that. All right. So Dan.

DAN MONKS: Just thinking about these folks, maybe we can set up actual time limits and

they don't --

MR. CAMPBELL: It' seven pages. I'm a pretty quick reader. We'll try to get back to -- we'll send Dan out in you know 15-20 minutes --

MS. JENKINS: -- for sandwiches.

MR. CAMPBELL: Okay. Thank you everybody.

(WHEREUPON, the Board adjourned for an executive session.)

(WHEREUPON, the Board returned from executive session at 8:28 p.m.)

MR. CAMPBELL: Okay. All right. We are coming back into session at 8:30 -- 8:28, having been in executive session to discuss a legal matter. And the legal matter that we discussed was the Bennington Town Plan Amendment. Do I have any motions?

MR. CARROLL: I'd like to make a motion that we adopt the amendment to the Town Plan as written.

MR. CAMPBELL: Anyone second that?

MR. THURBER: Second.

MR. CAMPBELL: Any discussion? All in favor? Okay.

ALL BOARD MEMBERS: Aye.

MR. CAMPBELL: Okay. It's unanimous. We

have adopted the amendment. And I would now ask for a motion to close this meeting and go home.

MR. CARROLL: So moved.

MR. CAMPBELL: All right.

MR. THURBER: Second.

MR. CAMPBELL: All in favor?

ALL BOARD MEMBERS: Aye.

MR. CAMPBELL: Good night.

(WHEREUPON, the Board Meeting concluded.)

CERTIFICATE

I, Pamela Ross Neil, do hereby certify that the proceeding named herein was professionally transcribed on the date set forth in the certificate herein; that I transcribed all testimony adduced and other oral proceedings had in the foregoing matter; and that the foregoing transcript pages constitute a full, true, and correct record of such testimony adduced and oral proceeding had and of the whole thereof.

IN WITNESS HEREOF, I have hereunto set my hand this 19th day of November, 2024.

Pamela Ross Neil

Pamela Ross Neil

EXHIBIT 8

BENNINGTON SELECT BOARD AND PLANNING COMMISSION JOINT MEETING

BENNINGTON FIRE FACILITY

130 RIVER STREET

BENNINGTON, VERMONT 05201

JANUARY 8, 2018

MINUTES

SELECT BOARD MEMBERS PRESENT: Thomas Jacobs-Chair; Donald Campbell-Vice Chair; Jim Carroll; Carson Thurber; Jeannie Jenkins; Chad Gordon and Jeanne Conner.

SELECT BOARD MEMBERS ABSENT: None.

ALSO PRESENT: Stuart Hurd-Town Manager; Dan Monks-Zoning Administrator and Assistant Town Manager; Jim Sullivan-BCRC; Lynn Green-Grow Bennington Initiative; Peter Lawrence; Laura Block; Dianna Leazer; Bob Cabelia; Joe Schoenig; Joey Kulkin; Sam Restino; Robert Ebert; Daniel Malmborg; 20 citizens; CAT-TV; Jim Therrien-Bennington Banner and Nancy H. Lively-Secretary.

At 6:00 pm, Chair Thomas Jacobs called the meeting to order.

1. PLEDGE OF ALLEGIANCE

Recited by all present.

2. CONSENT AGENDA

A. MINUTES OF DECEMBER 19, 2017 AND DECEMBER 27, 2017

B. WARRANTS

Donald Campbell moved and Jim Carroll seconded to approve the Consent Agenda as submitted. The motion carried unanimously.

3. PUBLIC HEARING, BENNINGTON TOWN PLAN AMENDMENT, ENERGY ELEMENT

Mr. Monks explained that the Bennington Town Plan Energy Element, approved by the Planning Commission on November 6, 2017 was in response to Act 174. The town's goals are:

- Reducing our dependence on non-renewable and imported energy sources;
- Promoting energy conservation and efficiency in residential, commercial, and industrial structures and operations;
- Reducing energy consumption in all taxpayer funded buildings and operations; and
- Developing sustainable, local renewable energy resources.

These goals are consistent with Vermont's energy goals and policies, including:

- Obtaining 90% of energy for all uses from renewable sources by 2050;
- Reducing greenhouse gas emissions to 50% below 1990 levels by 2028 and 75% by 2050;
- Relying on in-state renewable energy sources to supply 25% of energy use by 2025;
- Improving the energy efficiency of 25% of homes by 2020;

- Meeting the Vermont Renewable Energy Standard through renewable generation and energy transformation.

The first section of the Plan consists of statistics in all areas - residential, municipal, commercial and industrial - while the second section offers suggestions on renewable resources to achieve our goals, such as biomass, hydro and solar. "This is a comprehensive energy plan."

Mr. Sullivan added that the BCRC had developed a regional energy plan that was determined by the State to be compliant with the Act 174 standards which allows them to approach individual towns. Bennington was the first town to submit a Town Plan Amendment to the BCRC for approval, however, other towns in the region, as well as, throughout the State will be doing so in the future. It is important to remember that this is part of the Town Plan and not a stand-alone document.

Board questions/comments:

Ms. Conner: The table on Page 10 doesn't include the recent installation of new windows, and Mr. Sullivan agreed. The text, however, does indicate the savings from those upgrades.

Mr. Carroll: There has been a substantial decrease in propane use at the Recreation Center and will this follow in other facilities, and Mr. Hurd answered that the focus had been the Rec Center and the Waste Water Treatment facility because they were the highest energy users but energy improvements have also been done at the Senior Center with insulation and window upgrades as much as is allowed in our historic buildings.

Mr. Carroll: Reiterated his request to get cost numbers on geothermal for some of our buildings. Mr. Sullivan stated that the capital cost of geothermal is very high and is most competitive on new construction and well insulated buildings.

Mr. Campbell: Stated the Board had received a letter today from Thomas M. Melone, President and Senior General Counsel for Allco Renewable Energy Limited that criticizes many aspects of the proposed energy amendment with one comment being that "the energy amendment and siting map are a product of unconstitutional discrimination". Mr. Campbell asked for an explanation of their process and Mr. Monks noted that the State had identified the following environmental constraints that are not even able to be considered:

- Class 1 and 2 wetlands, vernal pools, and hydric soils;
- Mapped river corridors and FEMA-defined floodways;
- Natural communities and rare, threatened, and endangered species;
- Federal wilderness areas;
- "Primary" and "Statewide" significant agricultural soils;
- FEMA-defined special flood hazard areas;
- Lands protected for conservation purposes;
- Deer wintering areas; and
- State-identified high priority "Conservation Design Forest Blocks".

In addition, we then applied our local criteria, such as, to protect historical areas and not visually appealing areas that brought us to 348 acres of preferred sites.

Mr. Sullivan added that Act 174 requires documentation to backup any local restraints that have been applied to properties and Bennington would be required to contribute 25 megawatts of generated capacity to the region by 2050. The total capacity in the Plan exceeds 100 megawatts.

The letter from Allco will be made available to the public within the next two weeks.

Ms. Jenkins: Thanked everyone for their work and is pleased that Bennington is the first with an Energy Plan.

Mr. Gordon: Thanked everyone for the report.

Mr. Jacobs: Noted that a significant number of the sites are in industrial zones and asked what percentage that is. Mr. Monks agreed that it was a substantial number but did not know the exact number.

Mr. Jacobs: Is 40% of the preferred sites controlled by the Town, and Mr. Monks answered that one of the sites is the landfill with substantial acreage but thought the 40% included public and state owned lands, as well.

Public questions/comments:

Laura Block: Supports the Plan and encouraged the Board to adopt it. *(Applause from the public.)*

Dianna Leazer: Thanked everyone for their work on the project.

Bob Cabelia: Stated that he has a solar farm on his 4 acres of steep property which would normally take up 5 acres. He also has other steep property that he feels should be considered for solar panels. Apparently it has not been considered because he is located in a "rural conservation" area, but the property he is offering is not able to be farmed and is not visible. Mr. Monks noted that the Planning Commission determined that rural conservation areas were not preferred sites for large scale solar but the Board may reverse that if they wish.

Joe Schoenig: Feels that we could maximize the productivity of the solar panels if they were placed at a steeper angle, and Mr. Sullivan agreed that this was a good point but was not addressed, per se, within the Plan.

At 6:47 pm, the Public Hearing, Bennington Town Plan Amendment, Energy Element was closed.

Mr. Hurd read a statement to the Board and community concerning the construction of the salt shed this fall. He apologized to everyone for his decision to go forward with this construction prior to receiving the wetland's permit to do so. The building is entirely on what was a paved parking lot and no wetlands were to be disturbed. Conversations with the wetlands division began in May 2017 and in September 2017 we were concerned with the lengthy permit process and believed that it would be coming imminently. We had competitive bids for the work and contractors were making purchases. We had a tight timeline to complete the project hoping to use it this winter, and had we postponed the project, we would have lost the savings of $60,000-$75,000 on the bids that we had. The building actually provides an additional buffer to the wetlands. No salt or sand will be put in the shed until all conditions of the recently issued permit have been satisfied. The wetlands permit was issued on January 3, 2018.

Mr. Jacobs stated that the Board was "disappointed" that they were unaware of this construction taking place. "Dice were rolled that shouldn't have been rolled" and we should have waited until we had permits in hand. The Board will be addressing this issue with Mr. Hurd in Executive Session.

Mr. Carroll asked why Mr. Hurd didn't go to the Governor, and Mr. Hurd answered that he will stand by his statement.

4. CITIZENS COMMENTS

Joey Kulkin congratulated Mr. Campbell and Mr. Carroll for running for re-election and asked about the budget and TIF bond. Mr. Jacobs answered that the Board is still having budget meetings and it is premature to discuss either at this time. Mr. Campbell added that it isn't appropriate to campaign during Citizens Comments.

Sam Restino asked if a sidewalk could be built between Molly Stark and Applegate, and Mr. Monks answered that all of the paperwork is in process to go from Molly Stark to Applegate and Willow Brook with the hope for completion to be in time for the next school year.

Mr. Restino also encouraged everyone to adopt a fire hydrant to keep them clear of snow and visible for the fire department.

5. GROW BENNINGTON INITIATIVE

Ms. Green shared the following highlights on the Grow Bennington Initiative:

- Everyone benefits and can contribute to a thriving Downtown.
- The Internet and Amazon.com have presented different challenges to downtowns everywhere.
- We need to attract visitors and millennials and provide a place to walk with our families.
- The Initiative began about a year ago with ideas from business owners that were together for a different reason.
- Research has shown that out of 20,000 cities and towns in the country, all but 1,000 have populations under 40,000.
- We have started with the following changes:
  - Create a Sense of Arrival with pole banners.
  - Increase our footprint with gas lamps over time.
  - Put winter string lighting on 30-35 trees downtown and up lighting in the summer. We already have some of the winter lights because Home Depot arranged for the purchase and Enterprise volunteered to drive to Philadelphia to get them.
  - A presence of perpendicular signs on as many buildings as possible with work to be done to be sure they conform to our sign ordnances.
  - Extend building thresholds and streetscapes with artful displays and façade planters.
  - Improving and expanding our wayfinding signs and shop window placards.
  - Build a small downtown playground.
  - All ideas are welcome.
- Our fundraising goal is $101,000 and the Downtown Alliance is our fiduciary agent so we are a 501c3. There is a page on the Downtown Alliance website and donations can be made online.

Several local businesses and individuals have already contributed with cash and/or in kind services. As of today, we're already at $25,000.

Mr. Jacobs noted Ms. Green's enthusiasm and will keep that in mind during budget discussions.

Mr. Gordon offered the volunteer help of the football players and his January Select Board check of ~$100 as a donation with the challenge to the community that, if we have $1,000 of donations by the end of January, he would also donate his February check.

Ms. Conner will up the challenge and donate her January and February Board checks, as well.

6. CHARTER COMMITTEE REPORT DISCUSSION - SECTION 1. POWERS OF THE TOWN, SECTION 2. OFFICERS, SECTION 3. SELECT BOARD

Mr. Jacobs explained the Bylaw change process in that the Charter Review Committee has presented their change recommendations to the Select Board; the Select Board will review those changes and tweak or suggest other changes and decide what is to be presented to the voters for their vote; and what is accepted by the voters then goes to the Legislature for their approval.

- ✓ *The Preamble* - recommendation to add "and to improve the operation of Town government" because this was specifically mentioned as the charge of the Committee in the §806. Charter Review Committee.
- ✓ *Subchapter I - Section 102 - Additional Town Power* - was combined with Section 302. Additional Powers of the Select Board. This recommendation was approved by the Committee's Charter Counsel, Jim Barlow.
- ✓ *Subchapter I - Section 104(b) - Recall* - remove the requirement of "within 15 calendar days of its issue" because it was an unclear deadline.
- ✓ *Subchapter 2 - Section 202(a) - Appointive Officers* - remove the requirement of a Constable because we haven't had a Constable in years and the State now requires that a Constable be certified as a law enforcement officer, and we have a Police Department so certified.
- ✓ *Subchapter 3 - Section 302(2) - Additional powers of the Select Board to adopt ordinances* - recommendation to incorporate the waste removal powers enumerated in Section 102 and the statutory definition of "solid waste" to clarify the power of the town.
- ✓ *Subchapter 3 - Section 302(5) - Additional powers of the Select Board to adopt ordinances* - recommendation that powers enumerated in Section 102 relating to construction be incorporated into Section 302 and that limitations on this power not be limited to mere hazard or danger.
- ✓ *Subchapter 3 - Section 302(9) - Additional powers of the Select Board to adopt ordinances* - recommendation that the Select Board have the power to regulate intrusive technologies, including drones that may intrude upon the interests of its citizens to provide the right balance between recreational interests, commercial opportunity, law enforcement and the protection of fundamental rights of citizens.
- ✓ *Subchapter 3 Section 303(1) Further powers of the Select Board* - looking to the future, when there may be a need to pay certain members of the fire department, the Committee wanted to write language into the Charter that would allow the Select Board to pay volunteers, if necessary, and at the same time keep the autonomy of the Fire Department. Mr. Ebert added that it has been his experience that volunteer fire departments may reach the point when they need to pay people such as drivers to be at the station 24/7. This language is the result of multiple meetings between the Committee and the Fire

Department including its members. It does not require any change. It just gives the Select Board and Fire Department the tool to come to the table if change is needed.

- ✓ *Subchapter 3 - Section 304(a) - Organization of Select Board* - recommendation to designate the Chair of the Select Board as the head of Town government for ceremonial purposes as is done in a number of Vermont towns. The intent is to set the expectation that the Chair will provide leadership and vision for the town. The Committee had much discussion on the Strong Mayor, Weak (ceremonial) Mayor, and Town Manager/Select Board forms of government. No one was in favor of the Strong Mayor so we tried to adapt the public comments of more leadership and vision to our existing Town Manager/Select Board form of government. The accountability of the Town Manager to the Select Board is much better representation that assuming the person that is elected Mayor is qualified for the job, or that the Town even has a stable of people that are.

There was discussion that "(a) The chair shall be the head of Town government for all ceremonial purposes." put too much responsibility on the Chair, whereas, it doesn't say that the Chair has to attend all events. As "the head of Town government" he/she could designate another Board member to actually attend some events.

- ✓ *Subchapter 3 - Section 304(g) - Organization of Select Board* - recommendation that the Select Board create "Select Board Rules of Procedure and Conduct" and review annually.
- ✓ *Subchapter 3 - Section 304(h) - Organization of Select Board* - recommendation that a Select Board member who is absent from four consecutive warned Select Board meetings or 50% or more of warned Select Board meetings in any 6-month period be removed from the Select Board. It is in the best interest of the Town that all Select Board members be present, and this leaves it objective to the Board that needs to enforce this Section. It is in the State statute that, if you phone in or skype, you are considered present at a meeting.

The Charter Review Committee Report is on the Town's website and Committee Co-Chairs Sean-Marie Oller and Robert Plunkett will be taped on CAT-TV on Wednesday, January 10, 2018, to go over the report and explain the decision process for the changes.

7. MANAGER'S REPORT

The 2018 Certificate of Highway Mileage was circulated for signatures. No additional mileage was added for this year.

Mr. Hurd explained that when there is a petition that could change the Charter, such as the Mayor Form of Government petition, there needs to be two public hearings. The first one cannot be closer than 30 days before the vote, and the second one, must be within 10 days of the first one. Rob Woolmington has drafted the notice for the public hearings for the Board's signatures.

Donald Campbell moved and Jeannie Jenkins seconded to hold Public Hearings for the Mayor Form of Government Petition on January 29, 2018 at 6:00pm and February 5, 2018 at 6:00pm, respectively. The motion carried unanimously.

8. OTHER BUSINESS

Ms. Conner asked if the Board needed to take any action on the Bennington Housing Authority issue, nd Mr. Hurd said not at this time.

9. EXECUTIVE SESSION

A. PERSONNEL

At 8:43 pm, Donald Campbell moved and Carson Thurber seconded finding that an Executive Session be held on Personnel as premature public knowledge would place a person involved in the subject matter at a substantial disadvantage. The motion carried unanimously.

Respectfully submitted,

Nancy H. Lively

Secretary

BENNINGTON SELECT BOARD

BENNINGTON FIRE FACILITY

130 RIVER STREET

BENNINGTON, VERMONT 05201

JANUARY 22, 2018

MINUTES

SELECT BOARD MEMBERS PRESENT: Donald Campbell-Vice Chair; Jim Carroll; Carson Thurber; Jeannie Jenkins; Chad Gordon and Jeanne Conner.

SELECT BOARD MEMBERS ABSENT: Thomas Jacobs.

ALSO PRESENT: Stuart Hurd-Town Manager; Dan Monks-Zoning Administrator and Assistant Town Manager; Zirwat Chowdhury-Community Development Director; Representative Mary Morrissey; Jason Dolmetsch-MSK Engineering and Design President; Ludy Biddle-NeighborhoodWorks Executive Director; Gregg Over-NeighborhoodWorks Project Manager; Laura Block; Joey Kulkin; William Stewart; Steve Smith; 18 citizens; CAT-TV; Jim Therrien-Bennington Banner and Nancy H. Lively-Secretary.

At 6:00 pm, Vice Chair Donald Campbell called the meeting to order.

1. PLEDGE OF ALLEGIANCE

Recited by all present.

Jeanne Conner moved and Carson Thurber seconded to move Agenda 5. Public Hearing, Bennington Town Plan Amendment, Energy Element Continued to be the first agenda item. The motion carried unanimously.

5. PUBLIC HEARING, BENNINGTON TOWN PLAN AMENDMENT, ENERGY ELEMENT CONTINUED

Mr. Campbell noted that the Hearing was warned for 6:40pm and should anyone want to speak at that time they will be allowed to.

Mr. Monks explained that this is the second of two required Hearings. After the Hearing is closed, the Board can choose to adopt it as is, reject it, make changes to it and have two more Hearings, send it back to the Planning Commission for their opinion followed by two more Hearings, or do nothing at this time, as long as, something is done within a year.

Mr. Campbell stated that the Board had just received a 7-page letter from the Town's legal counsel in response to the letter from Allco Renewable Energy Limited dated January 8, 2018. This will be reviewed in Executive Session with a decision on the Board's action on the Energy Amendment following that review.

At 6:07pm, Jeanne Conner moved and Chad Gordon seconded to close the Public Hearing. The motion carried unanimously.

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2. CONSENT AGENDA

A. MINUTES OF JANUARY 2, 2018; JANUARY 6, 2018; JANUARY 8, 2018

B. WARRANTS

In the Minutes of January 8, 2018, change "Cabelia" to "Kobelia" on Page 1 and Page 3.

Jeannie Jenkins moved and Jim Carroll seconded to approve the Consent Agenda as amended with the spelling change as indicated. The motion carried unanimously.

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3. NEIGHBORWORKS GRANT PRESENTATION

Jim Carroll moved and Carson Thurber seconded to table the NeighborWorks Grant Presentation until later in the meeting. The motion carried unanimously.

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4. LEAD REDUCTION GRANT PRESENTATION

Jason Dolmetsch shared the following information on the Lead Reduction Grant:

- Lead can be present in several locations - service line made of lead pipe; service line containing a lead "gooseneck" or "pigtail" or other fitting; or copper pipes with solder containing lead.
- This grant is for the purpose of determining where there are lead service lines in Bennington.
- There are 28 known sites that either the Town or the customer has a lead service line, and there are 960 where the service line material is not known.
- There could ultimately be as many as 1,900 service lines that are completely or partially lead.
- The goal of the grant is to collect curbsides and service lines inside the area where lead service lines may be present, develop protocol where the unit material type is not known; and to develop a lead replacement program with funding strategies.
- A letter has been drafted to reach out to the customers that may be part of the 1,900 units and volunteers are encouraged to come forward.
- The overall project runs until the end of August 2018 with sampling and testing to be completed by March 31, 2018.
- EPA protocol with an analyzer enables the determination of the presence of lead within minutes.
- The Town currently does corrosion control which greatly reduces the amount of lead in the system and is consistently below the EPA "action level".

It was the consensus of the Board to support the Lead Reduction Strategies Grant work done by MSK Engineering and Design.

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3. NEIGHBORWORKS GRANT PRESENTATION

Ludy Biddle, Executive Director, and Gregg Over, Project Manager, of NeighborWorks are requesting an amendment to the 2016 VCDP grant for 15 more rental units in Bennington, or an additional $105,000 to incentify landlords to do more units. They shared the following presentation with the Board:

- There is enough money left from the original grant of $250,000 to pay staff so the $105,000 request is strictly for landlord incentives.
- The original grant has also enabled the establishment of a Bennington satellite office with more presence in town instead of only working out of West Rutland.
- Two courses, We Can Fix It for women, and the Everyday Chef for how to cook with what cooking mechanism you have, are now being offered in Bennington.
- Work is currently being done on three buildings - 272/274 Union Street with an investment of $128,000 to go from two units to four and is 35% complete; 322/324 Gage Street with an investment of over $40,000 for three units and is 25% complete; and 343 Safford Street with an investment of $155,000 to renovate three units, for a total of 10 units.
- The $105,000 request would be 15 grants of $7,000 each to inspire and empower more landlords to rehab and create 12-15 additional rental units with five year covenants, which will remain affordable to low income households in Bennington for up to five years.

Board comments/questions:

- Mr. Gordon: What does someone have to do to be eligible to apply for the grants, and Mr. Over answered to adhere to the covenants of the grant, such as, renting 51% of the units to individuals who are 80% or below the average median income (AMI), rent within the HUD guidelines, and make health, safety and efficiencies for the units
- Ms. Jenkins: How do you outreach to the landlords, and Ms. Biddle stated through Kris Callaert, the website and Facebook. Ms. Jenkins added that there needs to be improvement in the outreach process going forward.
- Mr. Carroll: Added that a list of landlords can be found at the Assessor's Office.
- Ms. Jenkins: How do you explain the low completion rates (35% and 25%), and Mr. Over noted that the lending office has had some of its own inefficiencies with the other holdup being the receipt of the necessary paperwork from the landlords, themselves.
- Ms. Jenkins: What is the availability of certified energy auditors, and Ms. Biddle stated that they have three building performance institute (BPI) certified on staff in West Rutland with any work that needs to be done given to local contractors.
- Mr. Thurber: Understanding it is a pilot project, some individuals have indicated that it is an extremely slow process to get the money, and Ms. Biddle explained that there are many "hoops to jump through" because these are federal dollars.
- Mr. Thurber: Most of the landlords that participated in the first year were large, successful landlords and would think that the small, struggling landlords would be more for what these funds are for. Mr. Over stated that they hope to bring more on board with this project. Mr. Thurber added that the first year has been a learning experience, and given the expense of rehabilitating these units for low income housing rents, is very difficult for the small landlords and these funds would be a great help to them.
- Ms. Conner: Is concerned that all of the eligible landlords were not made aware of the funds and encouraged NeighborWorks to do a better job of informing the smaller landlords of what is available. Also, is there a deadline for completion, and Mr. Over answered 6 months with extensions for certain criteria. NeighborWorks receives all of the grant funds and distributes them to the landlords. The landlords are also personally responsible for any overages that may occur.
- Mr. Campbell: Is the Town giving up anything by supporting this grant, and Mr. Over said that it is his understanding that one VCDP grant does not overlap with another. Ms. Chowdhury added that we are

responsible for reporting the outcomes of the grants to VCDP and she would need to know how to obtain this information from NeighborWorks. Ms. Chowdhury will look at the Memorandum of Understanding (MOU) that the Town has with NeighborWorks and review the performance standards.

Carson Thurber moved and Chad Gordon seconded to send a Letter of Support for the Vermont Community Development Program (VCDP) Implementation Grant SS-2015 amendment application in the amount of $105,000 with NeighborWorks of Western Vermont (NWWVT) to act as the sub-grantee. The motion carried unanimously.

At 7:10pm, Jeanne Conner moved and Jim Carroll seconded to re-open the Public Hearing, Bennington Town Plan Amendment, Energy Element Continued. The motion carried unanimously.

Laura Block asked how the Board was going to proceed with their decision on the Town Plan Energy Element Amendment, and Mr. Campbell answered that the Board will review the letter they just received this evening from counsel in Executive Session, and then either vote after that this evening or, if deemed necessary to get more legal advice, at the next meeting.

Ms. Block expressed how disappointed she was with the length of time this process has taken.

At 7:17pm, Jeanne Conner moved and Jeannie Jenkins seconded to close the Public Hearing, Bennington Town Plan Amendment, Energy Element Continued. The motion carried unanimously.

Mr. Hurd summarized the process that was done for the salt shed design and construction and the subsequent mitigation grant program as follows:

- In 2016, the public works facility and sand/salt shed were designed.
- In May 2017, a successful bond vote was received for the public works facility on Bowen Road, and a proposed location for the sand/salt shed was established.
- On August 24, 2017 the sand/salt shed design was finished, construction bids were sent out, and contracts were awarded on September 13, 2017.
- Concurrent with this process, staff at the BCRC were made aware that there were few applicants for the Mitigation Grant.
- On August 14, 2017, one of our staff put together the one page application that was due the next day that clearly showed the shed's design and location.
- We received verification of the grant award on September 25, 2017 with a letter dated September 14, 2017 attached.
- We had already awarded contracts for the project which was well into its progression.
- This is a federal grant and there are 20 steps that you need to follow to be eligible. We had already completed 18 of the steps without following the federal process.
- We were not required to follow the federal process because, at that time, we were not anticipating the use of any federal funds.
- Because we were so far along in the process, the grant never should have been awarded to us. Nevertheless, the award came.

- Could we have scrapped the entire process and started over? Yes, we could have, but the monies that had been spent to date would not have been eligible for federal funding. And, then, the process would have had to start over under federal guidelines.
- Given the loss of dollars that had already been spent, the expense of re-doing everything while following federal regulations, and the extended time frame of completion - we declined the grant.
- An example when federal dollars are involved is the Pleasant Street Enhancement Grant. The grant was first awarded in January 2008 and 10 years later we still haven't gotten the final approval to go ahead with federal dollars.
- Had we accepted the grant, the cost would have increased, there would potentially have been no change in the bond payment, and the time to completion would have been an estimated 3 to 7 years.

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6. CITIZENS COMMENTS

Joey Kulkin stated that Mr. Hurd decided to build the sand/salt shed without a wetlands permit, the Town is under investigation and may be fined $42,000, and we've declined the opportunity to get a $340,000 grant.

Mr. Kulkin was going to poll the Board with the following 4 questions - 1. When was the Board first aware of the permit issues?; 2. When did the first shovel start digging up dirt for the salt shed?; 3. Did any Board member ask for favors in gaining the Act 250 permit and who did you ask?; Who other than Larry McLeod, Dan Monks, and R.J. Joly know about the permits?, but Mr. Campbell stated that this was a time for citizens comments "and not a debate".

Mr. Carroll answered two of the questions - 1. 6-8 weeks ago and have been discussing it in Executive Session since; 3. "Favors? Favors, are you kidding me?....that's insulting".

No other Board members had any comments.

William Stewart asked how the Board plans on recouping the $340,000 lost "out of negligence" and was Mr. Hurd bonded? Mr. Campbell reiterated that this was Citizens Comments and not a debate. Mr. Hurd added that he is bonded.

Steve Smith wondered if there were plans to put more staff at the Senior Center, and Mr. Hurd stated that meetings are being held to resurrect coverage at the Senior Center from staff at the Rec Center with the goal being to have a Rec Center staff person there at all times.

Mr. Smith noted that there are several volunteers at the Senior Center and asked if they are covered by liability insurance, and Mr. Hurd answered that they were unless the volunteer causes the injury.

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7. ADOPT THE FY2019 BUDGET; APPROVE THE ANNUAL MEETING WARNING

Carson Thurber moved and Jim Carroll seconded to approve the FY2019 Budget and the Annual Meeting Warning as submitted.

Ms. Conner asked if this wording is as it will appear on the ballot, and Mr. Hurd said that it was.

The motion carried unanimously.

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8. SPEED LIMIT AMENDMENTS

Mr. Hurd explained that this is a "housekeeping issue" because the 40 mph speed zones on Route 7 South and Route 9 East were never added to the town's Article 10 Traffic Control Ordinance.

Jeanne Conner moved and Chad Gordon seconded to adopt the ordinance amendment as follows:

Article 10 Traffic Control Ordinance

10-19.03 Speed Limits

2. The maximum speed limit shall be 40 mph as follows:

- ***On Vermont Route 9, beginning at the easterly exit drive at the Chain-up area 0.4 miles west to the easterly entrance of Kelley Fuels.***
- ***On Vermont Route 7, beginning at the entrance to the Greenberg Reserve 0.4 miles north to the former Bennington Village boundary line.***

The motion carried with Jim Carroll abstaining.

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9. LIQUOR LICENSES

The following 2018 Liquor License Renewal Applications were circulated for signatures:

1st Class Renewals -

1. Sodexo Vermont, Inc. (SVC)

2nd Class Renewals -

1. Apple Barn
2. Bennington Jolley #117
3. Bennington Jolley #145
4. Beverage Den
5. North Bennington Variety

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10. MANAGER'S REPORT

Mr. Hurd reported that Shires Housing, Inc. plans to construct a housing development just over the North Bennington Village line in Shaftsbury, and in order to do this, they require municipal sewer from the Town of Bennington. Mr. Hurd is requesting Board authorization to enter into an MOU which would allow the development to move forward. The MOU states that Shires Housing will build and maintain the sewer line up

to the Village line with the ability to stop service for non-payment without digging it up, and it requires an upfront payment for anticipated use with a true up at year end.

The Board would like more information on the project before going forward, and Mr. Hurd will supply that for the next meeting.

Mr. Hurd stated that there is an applicant for the Housing Authority Board and he will set up the Board interview just before the next business meeting.

Mr. Hurd reported that he has authorized the Bennington Redevelopment Group (BRG) to use the Town as the short term Grantee in its application for a $630,000 VHCB grant for housing in the rehabilitated Putnam Block with the understanding that BRG will make a presentation to the Select Board in February if they do not have another 501c3 in place. The application deadline is January 24th.

11. OTHER BUSINESS

Mr. Carroll clarified that the salt shed decision is a Personnel issue which prevents the Board from discussing it in public.

Mr. Campbell stated that he feels that Citizens Comments is a time for citizens to comment and for the Board to listen, and offered to discuss this with other Board members offline if they interpreted it differently.

12. EXECUTIVE SESSION

A. LEGAL

At 7:58pm, Chad Gordon moved and Carson Thurber seconded finding that an Executive Session be held on Legal as premature public knowledge would place a person involved in the subject matter at a substantial disadvantage. The motion carried unanimously.

Respectfully submitted,

Nancy H. Lively

Secretary

EXHIBIT 9

M E E T I N G N O T I C E
BENNINGTON SELECT BOARD
PLANNING COMMISSION

Monday, January 8, 2018
Bennington Fire Facility
Multi-Purpose Room - 3rd Floor
130 River Street
Bennington, VT 05201

A G E N D A
6:00 PM

1. Pledge of Allegiance

2. Consent Agenda (6:00 PM - 6:05 PM)
   A. Minutes December 19, 2017; December 27, 2017
   B. Warrants

3. Public Hearing
   Bennington Town Plan Amendment
   Energy Element
   (6:05 PM)

4. Citizens Comments (15 minutes)

5. Grow Bennington Initiative - (20 minutes)

6. Charter Committee Report discussion; (40 minutes)
   Section 1.Powers of the Town, Section 2.Officers
   Section 3.Select Board

7. Manager's Report (5 minutes)

8. Other Business (10 minutes)

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M E E T I N G N O T I C E
BENNINGTON SELECT BOARD

Monday, January 22, 2018
Bennington Fire Facility
Multi-Purpose Room – 3rd Floor
130 River Street
Bennington, VT 05201

A G E N D A
6:00 PM

1. Pledge of Allegiance

2. Consent Agenda (6:00 PM – 6:05 PM)
   A. Minutes January 2, 2018; January 6, 2018; January 8, 2018
   B. Warrants

3. NeighborWorks Grant Presentation (6:05 PM –6:20 PM)

4. Lead Reduction Grant Presentation (6:20 PM – 6:40 PM)

5. Public Hearing
   Bennington Town Plan Amendment
   Energy Element continued (6:40 PM – 7:00 PM)

6. Citizens Comments (7:00 PM – 7:15 PM)

7. Adopt the FY2019 budget; Approve the Annual Meeting Warning (7:15 PM – 7:30 PM)

8. Speed Limit Amendments (7:30 PM – 7:40 PM)

9. Liquor Licenses (7:40 PM – 7:45 PM)

10. Manager's Report (7:45 PM – 7:50 PM)

11. Other Business (7:50 PM – 8:00 PM)

12. Executive Session
    A. Legal

EXHIBIT 10

PLANNING COMMISSION
NOTICE OF PUBLIC HEARING
AMENDMENT TO
BENNINGTON TOWN PLAN

The Bennington Planning Commission will conduct a Public Hearing on Monday, October 16, 2017 at 6:00 p.m. at the Bennington Fire Facility, 3rd Floor Assembly Room, 130 River Street in Bennington, Vermont for the purpose of adopting an amended Energy section of the Bennington Town Plan.

A. STATEMENT OF PURPOSE:

The purpose of the amended Energy section of the Bennington Town Plan is to further the goal of a sustainable energy future in a manner that minimizes environmental impacts and supports the local economy.

B. AREA COVERED

The proposed amendment to the Town Plan impacts all areas of the Town of Bennington.

C. SECTIONS OF PROPOSED AMENDEMENT

I. Introduction, II. Energy Use in Bennington, and III. Energy Conservation, Efficiency, and Renewable Energy Strategies.

D. WHERE THE FULL AMENDMENT MAY BE EXAMINED:

Copies of the full text of the proposed amendment to the Bennington Town Plan, and accompanying report, are available for examination at the Bennington Town Office at 205 South Street, in Bennington, Vermont.

Michael McDonough, Chairperson, Town of Bennington Planning Commission

TOWN OF BENNINGTON

TO: Chair, Town Planning Commissions, Towns of: Glastenbury, Pownal, Shaftsbury, Woodford and Hoosick, NY, and Villages of: Old Bennington and North Bennington, Vermont Department of Housing and Community Development, Bennington County Regional Commission

FROM: Michael McDonough, Chairman, Town of Bennington Planning Commission, 205 South Street

Date: August 28, 2017

Re: Proposed amendment to Bennington Town Plan

Enclosed is one copy of the proposed amendment to the Bennington Town Plan Energy section, and a copy of the report regarding the proposed amendment.

The Planning Commission has scheduled a Public Hearing to consider the adoption of the proposed amendment to the Town Plan on Monday, October 16, 2017 at 6:00 p.m. at the Bennington Fire Facility, 3rd Floor Assembly Room, 130 River Street, in Bennington, Vermont. If the amendment is approved by the Planning Commission, it will be submitted to the Select Board for review and approval.

Per 24 VSA, Chapter 117 § 4384 (e) the Bennington Planning Commission is soliciting comments, especially from Bennington's municipal neighbors and the Bennington County Regional Commission, through this notice.

Please address any questions, comments, or concerns, to my attention at the above address at your earliest convenience. Thank you.

Enc: Proposed amendment to Bennington Town Plan, report, and Legal Notice for Planning Commission Public Hearing.

205 SOUTH STREET P.O. BOX 469 BENNINGTON, VERMONT 05201
802-442-1037 FAX (802) 442-1068

Planning Commission Reporting Form for Proposed Municipal Plan Amendment

Pursuant to 24 V.S.A.§4384(c), which states:

"When considering an amendment to a plan, the planning commission shall prepare a written report on the proposal. The report shall address the extent to which the plan, as amended, is consistent with the goals established in §4302 of this title."

the Bennington Planning Commission has prepared the following report on the proposed amendment to the Bennington Town Plan, which will receive input at a public hearing scheduled for October 16, 2017.

The Bennington Planning Commission has prepared an Energy Element to be adopted as an amendment to the Bennington Town Plan. The amendment was developed with technical support from Bennington County Regional Commission staff throughout the spring and summer of 2017. The amendment will replace the current Energy Chapter of the Bennington Town Plan (adopted October 6, 2015 and amended April 11, 2016).

The proposed amendment alters the designation of specific land areas in the town by designating preferred sites and preferred areas for commercial solar energy facilities larger than 150kW capacity. Preferred sites are shown on the Solar Energy Resource Map (pg. 27), and preferred areas include the following types of sites: roof-mounted systems; proximity to existing commercial and industrial buildings; proximity to vegetation or topographical features that provide natural screening; former brownfields; and previously disturbed areas such as gravel pits, closed landfills, or former quarries.

Projected impacts on areas surrounding preferred sites include limited increase in traffic to install and maintain electric facilities and no impact on overall pattern of land use. There will be long-term benefits to the municipality from this designation since designated areas will incentivize concentrated renewable energy generation to meet local energy demand. There are no existing areas currently subject to the proposed designation. A majority of newly designated preferred sites are currently vacant or underutilized. Selected areas are advantageous compared to other areas for one or more of the following reasons: selected areas are publicly-owned lands with few possible alternative uses; they are properties where owners are amenable to developing solar energy facilities; areas are previously disturbed areas such as a covered landfill or sandpit; and areas are zoned for commercial/industrial uses. The preferred sites total an appropriate land area (about 350 acres of solar resource within preferred sites) consistent with Bennington's municipal solar generation target (25.1 MW) identified in the Bennington County Regional Energy Plan (2017).

Otherwise the amendment is consistent with goals established in 24 V.S.A. §4302, and designation changes have no negative impact on these same goals. The intent of the amendment is to support the efficient use of energy, energy conservation, and responsible development of local renewable energy resources.

Copies of the proposed Bennington Town Plan with new Energy Element Amendment are available for review at the Town Offices during regular hours; additional information is available by calling the Town Offices at 802-442-1037.

Michael McDonough, Chair
Bennington Planning Commission

EXHIBIT 11

Town of Bennington
Planning Commission

Monday, November 6, 2017
6:00 p.m.
Bennington Fire Facility
130 River Street
Bennington, Vermont 05201

MINUTES

Members Present: Michael McDonough, Charles Copp, Robert Ebert, Nick Lasoff, Ken Sweirad
Also Present: Dan Monks, Jim Sullivan, Catherine Bryers, Bhima Nitta, Bob Block, Laura Block, Bill Knight, Peter Lawrence, Joe Schoenig, Mary Morrissey, Rick Carroll, Diana Leuzer, Wendy Lawrence, Brad Wilson, Jim Carroll, Libby Harris and others that did not identify themseleves.

Meeting was called to order at 5:00 p.m.

Public Hearing –Amendment to Town Plan – Revised Energy Section of Bennington Town Plan
Jim Sullivan, BCRC, presented a brief overview of the revised Energy section prepared by him and his staff. Jim then discussed some minor changes that he suggested making, including: adding a map that just shows the preferred sites; showing the RCON District as a possible constraint on the maps; clarifications in format to clearly indicate which sections apply to all solar facilities and which sections apply only to large scale solar facilities; clarification that the preferred solar sites are, in total, 570 acres and that 340 acres are have no known constraints; and that the plan accommodates projected rooftop, large scale and small scale solar projects of up to 72 megawatts in total. Jim noted that none of the changes modify the policies of the revised energy section. In particular, the policy to restrict large scale solar to preferred sites is not modified in any way.

Jim discussed two additional changes. A change to recognize community solar projects that are not located in prohibited areas as preferred sites and a change to clarify that statewide and primary agricultural soils are a state identified environmental constraint.

Several people, including residents of the Apple Hill neighborhood, expressed support for the revised Energy Plan and urged the Planning commission to approve the plan as written.

Brad Wilson, Ecos Energy, presented several concerns about compliance with Act 174 that he felt should be addressed before the amendment was submitted to the Select Board. A memo outlining his concerns are attached to these minutes. Mr. Wilson also requested that the proposed Chelsea solar site and Battle Creek 2 site be included on the preferred sites map.

Jim Sullivan addressed each of the concerns raised and indicated that it was his opinion that the revised Energy section of the Town Plan complies with Act 174.

Robert Ebert made a motion to approve the proposed revised Energy section of the Bennington Town Plan, dated November 6, 2017, with a modified Solar Resources Map identifying the RCON Zoning District local constraint as a possible constraint as opposed to a known constraint.

Nick Lasoff seconded the motion. The motion passed unanimously.

The meeting was adjourned.

Respectfully submitted

Daniel W. Monks
Planning Director

I. Introduction

The Town of Bennington recognizes that it is necessary to work toward a sustainable energy future in a manner that minimizes environmental impacts and supports the local economy. The purpose of this energy element is to further those goals and recommended actions by increasing public awareness of energy issues, assessing local energy use and conservation opportunities, reducing the number of energy-related dollars exported from the town, and evaluating the potential for utilization of various renewable energy resources to meet the town's stated goals of:

- Reducing our dependence on non-renewable and imported energy sources;
- Promoting energy conservation and efficiency in residential, commercial, and industrial structures and operations;
- Reducing energy consumption in all taxpayer funded buildings and operations; and
- Developing sustainable, local renewable energy resources.

These goals are consistent with Vermont's energy goals and policies, including:

- ◊ Obtaining 90% of energy for all uses from renewable sources by 2050;
- ◊ Reducing greenhouse gas emissions to 50% below 1990 levels by 2028 and 75% by 2050;
- ◊ Relying on in-state renewable energy sources to supply 25% of energy use by 2025;
- ◊ Improving the energy efficiency of 25% of homes by 2020;
- ◊ Meeting the Vermont Renewable Energy Standard through renewable generation and energy transformation.

A thorough understanding of energy and a plan to address future challenges is essential because energy is critical to every aspect of our lives. At the most basic level, we need the energy we obtain from food to survive. And it is the energy contained in oil, propane, and wood that heats our homes and the energy in gasoline and diesel fuel that moves our vehicles. Energy also generates the electricity that runs our appliances, machinery, computers, and telecommunication systems.

Most of the energy that we use, and have come to rely upon, is derived from "nonrenewable" fossil fuels and, to a lesser extent, nuclear fuels. This energy has been abundant and cheap, but supplies are becoming scarcer and oil, natural gas, coal, and uranium will become increasingly expensive to obtain. Moreover, serious and longstanding environmental concerns with coal mining, offshore oil drilling, acid rain, and other pollution resulting from fossil fuel use are now overshadowed by potentially catastrophic global climate change that is driven by the release of tens of millions of years of stored carbon in just a few decades.

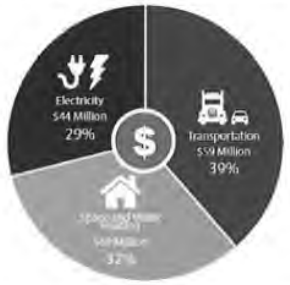
Fortunately, alternative energy sources such as solar, wind, hydroelectric, and biomass-based fuels can provide significant amounts of clean energy well into the future. Developing these resources is extremely important, but the total amount of energy that can be extracted from such resources is markedly less than what we currently obtain from fossil fuels. To maintain a good quality of life, vibrant communities, and prospering economies, we will have to develop conservation strategies and improve energy efficiency as we transition to the widespread use of renewable energy.

II. Energy Use in Bennington

Bennington County Regional Energy Plan contains a detailed review of regional and statewide energy data. It shows that total energy consumption in Vermont has risen over the past 50 years and that during that time, the transportation sector eclipsed the residential sector as the largest consumer of energy (Figure 1). Over $150 million is spent annually in the region on energy for space and

water heating, transportation, and electricity – with most of that money leaving the area to pay for imported fuels. The following section will provide estimates of current energy use by sector as well as projections illustrating the magnitude of conservation, efficiency, and transition to alternative fuels needed to meet Bennington's energy goals.

Figure 1. Energy Use by Sector in the Bennington Region. *Source: 2017 Bennington County Regional Energy Plan.*



Residential Sector Energy Demand

With over 6,000 residential units in Bennington, space and water heating and electricity usage for lighting and appliances consumes a large amount of energy and offers opportunities for considerable energy savings in the future. A majority of home heating in Bennington continues to rely on oil, although fuel switching to wood (particularly wood pellets in recent years) has been observed to occur with oil prices increase. Transportation energy demand also is influenced by the location of residential development, and that data will be presented separately in the discussion of the transportation sector.

The magnitude of residential energy consumption in Bennington can be estimated by considering the fuel usage of a typical Vermont home. An average single family home in the northeast requires approximately 60,000 Btu (British Thermal Units) of energy per square foot for annual space heating. A gallon of home heating oil contains approximately 140,000 Btu of energy. The average annual heating oil consumption of a Vermont home – 850 gallons – (based on an average house size of 2,000 square feet) is consistent with this data. An evaluation of the composition of Bennington's housing stock and heating fuel and electricity usage provides an estimate of total residential energy consumption (Table 1).

It is useful to consider scenarios illustrating how this level of energy demand and accompanying mix of fuels may change over time in a way that would allow the town to meet its energy goals. The BCRC, working with the Vermont Energy Investment Corporation, made use of the Long-range Energy Alternatives Planning ("LEAP") computer modeling tool to assess how the region's energy demand profile might change over time based on a realistic trajectory toward achieving 90% of all energy from renewable sources by 2050.

The model first was run at the statewide level, and then adjusted based on regional conditions and the output customized for the Bennington Region. The resulting regional data was then used to provide town-level estimates (consequently, the data in Table 1 will not align perfectly with the LEAP data, but the trends and the magnitude of the changes are clear). Several key points become clear when looking at the overall residential energy demand for the Bennington County region (Figure 2). Of particular importance is the significant reduction in the total amount of energy used. The reduction displayed on the graph assumes continuing and effective deployment of existing conservation and efficiency programs plus additional measures that result in a further increase in the number of existing homes that are weatherized and additional efficiency gains from advanced heating and cooling systems (the "Avoided vs. Reference" blocks on the chart). The transitions in fuel usage (for space and water heating; i.e., not including non-thermal electric use) within the Town of Bennington that correlate with the regional LEAP scenario are outlined in Tables 2 and 3.

Table 1. Estimate of Bennington's annual residential energy use and cost.

	Residential Units	Total Oil Use	Total LP Gas Use (gallons)	Total Wood Use (pellet bags)	Electric Use for Heat (kwH)	Non-heat Electric Use (kwH)
Single Family	3,508	2,414,850	501,800	44,280	3,080,000	24,556,000
Two-Family	638	335,900	69,160	6,096	425,600	3,828,000
Multi-Family	1,722	627,750	130,221	11,448	797,650	8,610,000
Mobile Home	510	265,200	55,328	4,925	345,800	2,550,000
Total	6,378	3,643,700	756,509	66,749	4,649,050	39,544,000
Cost Factor		$2.50/gal	$3.50/gal	$5.00/bag	$0.15/kwH	$0.15/kwH
Total Cost		**$9,109,250**	**$2,647,782**	**$333,745**	**$697,358**	**$5,931,600**

This data provides a rough estimate of total residential energy consumption and costs for Bennington. The combined total cost of residential purchases of heating oil, LP gas, wood/pellets, and electricity is $18,719,735; with a population of 15,764, the per capita cost of residential energy use (not including transportation energy costs) is $1,187. Data was obtained from the 2010 US Census, the Vermont State Data Center—Housing Statistics, and the US Energy Information Administration. The following assumptions were used in the calculations: average single-family house size of 2,000 square feet, two-family dwelling unit of 1,500 square feet, and multi-family dwelling unit at 1,000 square feet (estimates of fuel usage rounded to nearest 50 gallons of oil/lp gas and ratios used for wood and electric heating use calculations. Heating fuel usage for mobile homes were generated based on the two-family dwelling unit (larger than a typical mobile home) because of generally lower insulation values and inefficient heating geometry for mobile homes. Electric use estimated at 7,000 KwH per year for a single-family home, 6,000 KwH per year for a two-family dwelling unit, and 5,000 KwH per year for a multi-family dwelling unit and mobile home. Energy use for domestic hot water production assumed included in the space heating and/or electric usage data. "Wood" heat includes both cord wood and wood pellet fuel; for simplicity, quantities and cost are presented using only wood pellet data.

Trends evident in the LEAP projections (Figure 2) include a large-scale reduction in total energy use driven by conservation and efficiency, an increased reliance on electricity and liquid biofuels (such as biodiesel), and a larger share of remaining energy use from renewable wood products (cord wood and wood pellets). Under this LEAP scenario, these changes result from development of much more efficient buildings, through construction that meets or exceeds energy codes and weatherization of existing buildings, and greater reliance on electricity and liquid biofuels for home heating and cooling in the residential sector (as well as in the transportation sector, discussed later in this chapter).

The transition in home heating anticipated by the LEAP model is dramatic; by 2050 oil will have been phased out as a heating fuel and propane use will have been reduced by about 70 percent. Inefficient electric resistance heating systems also will be phased out, but efficient air source heat pumps, and some geothermal source heat pumps for new construction, will become a primary heating and cooling technology used in over 40 percent of the town's housing units. Heat pumps represent a particularly valuable technology because they are powered by electricity that can be generated from renewable sources such as solar, wind, and hydro. Existing houses and apartments also can be converted relatively easily, and at moderate cost, from fossil fuel based heating systems to heat pumps. Heat pumps may need to be supplemented with alternative heating systems in extremely cold weather, but when combined with thorough weatherization, heat pumps can provide for most of a residential building's heat load.

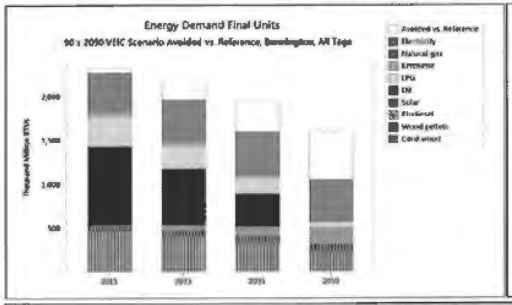


Figure 2. Total residential energy demand for the Bennington County Region, 2015 through 2050, based on one LEAP model scenario that charts progress toward the goal of achieving 90% of the state's energy from renewable sources by 2050.

Table 2 Total Residential Thermal Energy Demand By Fuel
Town of Bennington—LEAP 90x2050 Model Projections
Standard Fuel Measurement Units

Fuel	2015	2025	2035	2050
Biodiesel (gallons)	35,691	191,434	347,177	590,525
Cord Wood (cords)	9,750	8,321	6,790	4,782
Wood pellets (tons)	1,179	1,656	1,907	2,158
Electric Resistance (kWH)	8,978,898	7,765,533	4,368,113	1,213,365
Heat Pump (kWH)	1,941,383	10,313,599	19,413,834	26,087,339
Kerosene (gallons)	196,267	138,000	82,800	-
LPG (gallons)	1,582,950	1,265,383	845,217	254,054
Oil (gallons)	2,723,466	1,944,043	1,134,527	-

Table 3 Total Residential Thermal Energy Demand By Fuel
Town of Bennington Number of Households
Derived from Regional 90X2050 LEAP projections and adjusted to increase the number of households using heat pumps as a primary heat source.

Fuel	2015	2025	2035	2050
Biodiesel	35	199	432	1,144
Cord Wood	1,501	1,356	1,323	1,451
Wood pellets	150	223	307	540
Electric Resistance	236	216	145	63
Heat Pump	51	896	1,550	2,570
Kerosene	204	152	109	-
LPG	1,033	874	698	327
Oil	2,885	2,179	1,521	-
Total	6,095	6,095	6,095	6,095

Table 2 illustrates how the mix of fuels used to heat homes could change in Bennington consistent with meeting state energy goals and Table 3 shows how the number of households using each fuel source for heating changes over the same timeframe. Because of Bennington's dense development, household heat pump use shown in Table 3 is increased beyond the level projected by the fuel comparison shown in Table 2.

Another fuel that may contribute to a relatively straightforward transition away from oil and propane based heating systems is biodiesel—with similar properties to petroleum diesel, but produced from oil crops such as canola, sunflower, and even algae. While efficiencies in production technologies are needed to make these fuels affordable and to meet renewable standards, once developed (an assumption built into this LEAP scenario), biodiesel powered furnaces and boilers can take advantage of existing fuel delivery infrastructure and in-home ductwork and plumbing.

Vermont has an abundant supply of wood that can be used for space heating. The LEAP scenarios project an increased reliance on wood as a thermal energy source for the residential sector, even though the total amount of wood energy use declines slightly (attributable to building efficiency improvements). The use of wood pellets, produced in or near the region, is expected to expand significantly, either as a primary home heating fuel or as a cold-weather supplement to air source heat pumps. Larger multifamily residential buildings and residential complexes such as apartment/condominium developments, dormitories, and even mobile home parks may convert to pellet or wood-chip based heating systems. A recent example of this efficient and renewable energy based residential "district heating" is the replacement of 29 oil-burning boilers at the 104 unit Applegate Apartment complex with a single efficient biomass boiler (together with major weatherization improvements to the buildings).

Commercial and Industrial Energy Demand

Bennington is an important center of business activity in southwestern Vermont so it is not surprising that energy consumption in those sectors is substantial. Annual expenditures on energy in the local commercial and industrial sectors are estimated to approach $30 million (Table 4). In addition to on-site energy use, many businesses rely on shipments of raw materials to their facilities, exports of finished products to markets, and/or transportation of people to the region and to their

Table 4. Estimated commercial and manufacturing building energy consumption, Bennington, Vermont.

	Estimated Floor Area (square feet) (1)	Annual Electricity Consumption (KwH) (2)	Annual Oil/Gas Consumption (gallons) (2)
Manufacturing	1,234,000		
Commercial	4,721,624		
Total Consumption		89,957,000	5,404,216
Cost Factor (3)		$0.15/KwH	$3.00/gallon
Total Cost		**$13,493,550**	**$16,216,390**

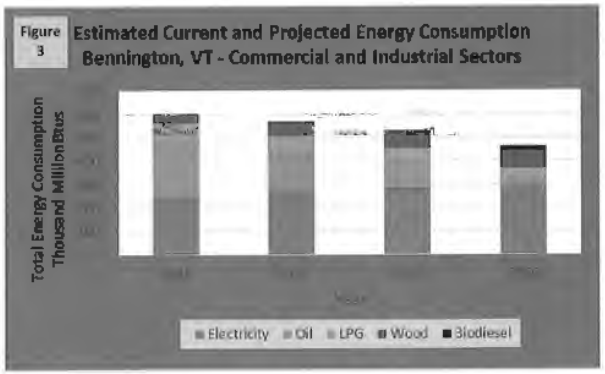
(1) Floor area estimates were computed by multiplying the number of employees in each sector (2010 Vermont Department of Labor Covered Employment data) by 766 square feet (US EPA estimate of average commercial/industrial floor space per employee).

(2) Total manufacturing sector energy consumption was calculated by multiplying total floor area by 450,000 Btu/square foot (average of low and high estimates for various types of industries—data developed by E Source Companies, LLC "Managing Energy Costs in Manufacturing Facilities). Total commercial sector energy consumption was calculated by multiplying total floor area by 90,500 Btu/square foot (average for all commercial uses, US Energy Information Administration). For Oil and LP gas were combined for the analysis and Btu content used in the calculations (125,000 Btu/gallon is an average weighted slightly toward the Btu content of oil.

(3) Electricity consumption data obtained from Efficiency Vermont, based on actual metered usage. A cost factor of $0.15 was used to be consistent with the residential rate, although varying commercial rates apply. Because oil and gas were combined, a conservative cost factor of $3.00 was used in the calculations.

establishments. Those energy demands are accounted for in the transportation sector—which has seen a very large increase in consumption of fossil fuels in recent years.

The LEAP energy forecasting models project a decrease of over 20 percent in overall commercial and industrial energy demand in Bennington through 2050 (Figure 3). This reduction is achieved through both conservation and deployment of more efficient systems, often utilizing alternative fuels. Use of petroleum oil is expected to decline by over 80 percent during this period, while propane (LPG) use is expected to fall by over 50 percent. On the other hand, use of woody biomass, a locally available fuel, is projected to nearly double, while biodiesel consumption is expected to begin to become a regionally significant fuel in these sectors. Electricity use will displace much of the current nonrenewable fuel demand in these sectors while contributing to the overall reduction in energy consumption through use of more efficient electrical systems.



Municipal and Institutional Energy Usage

Local government, schools, colleges, and other institutional uses such as the Southwestern Vermont Medical Center all are major users of energy. The costs associated with energy use by those entities has a direct bearing on taxes and critical issues such as the cost of education and health care. Energy conservation and the use of alternative energy systems in this sector have the potential to produce significant savings and to promote economic development.

Municipal Government

The Town of Bennington relies on energy to provide services to the community. The town owns and operates several buildings, a large fleet of vehicles and equipment, and is responsible for other services such as the provision of water, disposal of wastewater, and street lighting. The town already has taken steps to reduce its energy use through use of more efficient lighting and equipment in office buildings, installation of a hydroelectric generator at the water treatment facility, and by pursuing other initiatives through Efficiency Vermont and other resources. An assessment of municipal energy use was conducted recently and is reported in this section.

Municipal Buildings and Infrastructure

Energy consumption data at five municipal buildings was gathered through a project coordinated by EPA's Energy Star initiative. Those buildings support a variety of services and are used in significantly different ways, so opportunities for energy savings in each will differ. Each of the buildings requires energy for space heating (and in the case of the Recreation Center, pool water heating) and electricity for lighting, air conditioning, office equipment, and other functions. Information on energy use at the water and wastewater facilities was obtained from recent municipal records. Total energy use and estimated costs for these buildings and related infrastructure is presented in Table 5.

Table 5. Annual Energy Consumption (2012) — Bennington Municipal Buildings and Infrastructure

Building	Oil (gallons @$2.50)	/ Cost	Propane (gallons @ $3.50)	/ Cost	Electricity (kwH, rate specific to use)	/ Cost	Total Cost
Fire Station	6,222	$15,555	154	$539	99,624	$13,947	$30,041
BBC/BCIC	1,150	$2,875	-	-	12,432	$1,492	$4,367
Police Station	-	-	18,420	$64,470	212,940	$27,684	$92,154
Recreation Center	-	-	54,000	$189,000	173,400	$36,414	$155,677
Town Offices	2,961	$7,403	<100	-	66,612	$9,651	$17,054
Water Department/ Filtration Plant	8,239**	$20,598	1,196**	$4,186	-	$32,911	$57,695
Water Infrastructure*	-	-	-	-	-	$33,052	$33,053
Wastewater Plant	6,216**	15,540	647**	$2,265	-	$171,671	$189,476
Wastewater Infrastructure *	-	-	-	-	-	$5,705	$5,705
Total	**24,788**	**$61,970**	**54,312**	**$260,460**	-	**$332,527**	**$654,957**

* Infrastructure includes facilities such as pumping stations and other equipment that utilize electricity.
** Gallons imputed from cost information obtained from municipal records.

The Bennington Fire Station is a relatively new building, located on River Street. It houses the Bennington Fire Department's vehicles, equipment, and support offices and facilities. A large meeting room on the third floor is used for public meetings by local government and other organizations. Although the largest of the town-owned buildings surveyed, much of the building is not used on a daily basis and it includes a large garage area that is not heated to the level of the rest of the structure. As a consequence, heating fuel use is relatively low, averaging 6,222 gallons of oil per year. Electricity use at the building is significant, although the total cost is below the space heating expense. The monthly average of 8,320 kwH is typically exceeded by 50 percent during summer months (and is generally consistently lower the rest of the year), indicating that air conditioning probably is driving a significant portion of the electricity demand during warm weather. The Fire Station also uses a small amount of propane (approximately 150 gallons per year).

The "Blacksmith Shop" at the corner of South and Elm Streets, is leased to the Bennington Downtown Alliance (BDA). It encompasses 3,600 square feet and includes offices for several people on the first and second floors, a meeting room, and a visitor welcome center/display area. As a renovated

The Police Station must remain active around the clock every day, contributing to a high rate of electricity usage.

historic building with a high heating cost per square foot, it can be assumed that there exist significant opportunities for weatherization. Electricity use for the building averages approximately 1,036 kwH per month.

The Police Department is housed in the historic stone building on South Street that used to serve as a federal building. It includes 10,360 square feet of space, numerous office and meeting rooms, and significantly—from an energy perspective– is occupied twenty-four hours per day. The structure is heated with a propane-fired system that consumes an average of 18,420 gallons of that fuel each year. Although from a cost standpoint, propane use is the most significant at the building, it is the electricity consumption at the building that is most striking. The Police Station uses twice as much electricity per square foot as the Town Office Building and far more than the Blacksmith Shop—attributable, in part, to its non-stop operation, but moisture, especially in the basement, requires constant use of pumps and dehumidifiers. The existing heating and air conditioning systems, and the design of the doorways, results in [illegible].

The Recreation Center, located on Gage Street, provides residents with access to a fitness center and an indoor swimming pool. The facility uses a considerable amount of propane, with demand highest in the winter months, but substantial year-round. Approximately 54,000 gallons of propane were used in 2012 (Table 5), but installation of two high-efficiency propane boilers and a high-efficiency propane pool heater has reduced propane use to 29,350 gallons.

The Town Office Building, located on South Street, includes the Town Clerk's office and most of the administrative activities that support the full range of services offered by the municipal government. The offices are housed in a renovated historic house—with additions—that occupies 6,214 square feet. Space heating is provided by an oil-fired system that, during the sampling period, used an average of 2,961 gallons of oil per year. Electricity use at the building is fairly consistent year-round, averaging just over 5,000 KwH per month.

The town operates public water supply and wastewater disposal systems that cover defined areas, primarily in the state-designated growth center. This infrastructure is essential to allow the type of concentrated development pattern that is consistent with the Town Plan and which leads to long-term energy savings. Both functions require considerable energy inputs, both to heat buildings and to operate equipment (Table 5). The water system, for example, utilizes numerous pumping stations that require a considerable amount of electrical energy and the wastewater treatment plant uses more electricity than any other municipal facility. As noted earlier, the town has taken steps to limit energy consumption; the hydroelectric generator at the water filtration plant and the decision to compost biosolids at the wastewater treatment plant are two examples. Efficiency Vermont has assigned an energy efficiency expert to work on a range of municipal projects, including planned improvements to the wastewater facilities which are expected to significantly improve overall energy efficiency.

Municipal Vehicles and Equipment

The town operates a sizeable fleet of vehicles and heavy equipment that use gasoline and diesel fuel. Total expenditures on fuel in a recent 12-month period were over $200,000 (Table 6), and with

rising costs that number can be expected to increase significantly in the current and ensuing years. Several municipal departments (Fire, Recreation, Senior Center, Planning and Code Enforcement), use relatively little fuel for transportation and to operate their equipment, but others (Police, Highway, Water, and Wastewater) depend heavily on those fuels to accomplish their work.

Table 6. Fuel cost - municipal vehicles and equipment.

Department	Inventory	Annual Fuel Cost
Police	9 vehicles	$54,607
Fire	6 trucks and one sedan	$3,348
Recreation	1 pickup truck and 2 mowers	$3,350
Senior Center	2 vans	$2,904
Highway	10 dump trucks, 9 pickup trucks 16 pieces heavy equipment	$113,291
Water	6 pickup trucks, 1 dump truck, 2 pieces heavy equipment	$16,293
Wastewater	4 pickup trucks 5 pieces heavy equipment	$9,194
Planning and Code Enforcement	1 sedan	$547
Total		$203,534

The Bennington Police Department has specific requirements for the types of vehicles it operates. The department has indicated a preference for SUVs because of their capacity and greater durability; use of hybrid SUVs and battery systems that allow for reduced idling might achieve significant fuel savings. Some limited patrols also are conducted on foot. The Highway Department, with its dump trucks, pickup trucks, and array of heavy equipment is the largest user of transportation fuel in the local government. Consequently, its costs will rise more rapidly than any other department as gasoline and diesel fuel costs increase. The Water and Wastewater Departments also rely on vehicles and heavy equipment, together spending over $25,000 per year on transportation fuels.

Streetlighting

The town recently took advantage of a program coordinated by Efficiency Vermont whereby it replaced all of its old (mostly 150W high pressure sodium) streetlights with new energy efficient LED streetlights (the town also has identified 12 streetlights that are not necessary and which were removed altogether). The new LED streetlights are much more energy efficient, with 52W units replacing the old 150W high pressure sodium units. The light from the LED units also is much more "natural" and is distributed evenly, with very little wasted light or areas of overlapping illumination between adjacent lights. This streetlight replacement program has reduced electricity

New LED streetlights like this one have been installed throughout the town, saving energy, and saving the town about $30,000 per year.

use by approximately 50% while saving the town over 20% on its streetlighting bill. The electric distribution company, Green Mountain Power, also benefits because it achieves comparable savings on the amount of electricity it must purchase.

Public Schools

The Bennington School District maintains three public elementary schools in town and the Mount Anthony Union District maintains the local public middle school and high school. The schools are of varying age and the relative energy efficiency of each is partially attributable to the original design and construction of the buildings (Table 7). Each of the schools has participated in at least one Efficiency Vermont and/or Vermont School Energy Management Program review, and a number of efficiency improvements have been implemented in the past, with major improvement projects being completed at the three elementary schools this year (summer of 2017). The transportation section of this plan considers the energy and health related benefits of walking, bicycling, carpooling, and use of school buses rather than personal vehicles.

Table 7. Recent annual energy use at Bennington's public schools (prior to current efficiency upgrades).

School	Oil (gallons)	Oil Cost	Woodchips (Tons)	Woodchip Cost	Electricity (KWH)	Electricity Cost	Propane (gallons)	Propane Cost	Total Cost
Bennington Elementary	21,000	$67,059	-	-	180,000	$35,302	-	-	$102,361
Molly Stark	14,000	$54,238	-	-	380,000	$59,911	-	-	$114,149
Monument	9,000	$29,250	-	-	120,000	$19,429	-	-	$48,679
MAUMS	13,000	$43,137	810	$52,555	958,000	$114,476	3,500	$5,100	$215,268
MAUHS	20,000	$76,590	1,100	$65,924	1,600,000	$185,686	6,900	$11,843	$340,043
Total	**77,000**	**$270,274**	**1,910**	**$118,479**	**3,118,120**	**$414,804**	**10,400**	**$16,943**	**$820,500**

Notes
Square feet of floor space in each school: Bennington Elementary—41,200; Molly Stark—52,000; Monument—24,000; MAUMS—150,000; MAUHS 225,000.
Fuel and electricity consumption data obtained from the facilities director for each school district; in some cases consumption was averaged over more than one year. Cost data was obtained from annual reports using actual expenses.

One of the most obvious differences between the schools has been the cost of heating the buildings. The three elementary schools are older than the middle school and high school, and the elementary schools have relied solely on oil for space heating. The secondary schools, on the other hand, each derive a significant portion of their heat from wood chip (biomass) based boilers that greatly reduce the utilization of more expensive heating oil. Annual heating costs at both the middle school and high school average approximately $0.63 per square foot, while annual heating costs at the elementary schools have ranged from $1.04 per square foot at Molly Stark to $1.63 per square foot at Bennington Elementary.

All of the schools have benefited from some lighting system upgrades, with older interior fluorescent lights being replaced with energy-saving T-5 and T-8 lights, and inefficient exterior floodlights replaced with highly efficient LED lights. Estimated energy savings from these upgrades amounted to 153,000 KWH, and $25,000, annually between the three elementary schools and an additional

$18,000 in savings at the high school. The most recently constructed school building, Mount Anthony Union Middle School, also benefited from $52,000 in energy conservation incentives (light and heating controls and other measures) during its construction several years ago.

The current energy efficiency work being completed at each of the three elementary schools involve a range of improvements, including:

- Installation of efficient LP boilers and elimination of oil boilers from the schools;
- Upgraded control systems and new energy recovery ventilators;
- Replacement of interior and exterior lighting with high efficiency LED fixtures;
- Air sealing and other weatherization work.

Total cost savings to be realized as a result of these improvements is expected to exceed $107,000 per year.

Hospital Campus

The Southwestern Vermont Health Care's (SVHC) main campus in Bennington includes a full-service 99-bed hospital, a 150-bed nursing facility, a medical office building, cancer treatment center, and smaller buildings housing additional administrative and medical functions. SVHC currently is in the final stages of developing a plan for modernization of its facilities, and those plans include replacement of the aging oil boilers, along with other improvements that will affect energy use on the campus. At the present time, SVHC consumes over 600,000 gallons of (# 6) heating oil per year and uses over of 12 million KWH of electricity—clearly, medical facilities are among the biggest energy users in most communities, and certainly in Bennington. Consider, for example, that SVHC annually uses as much oil as nearly 1,000 average houses and as much electricity as several thousand houses. Fortunately, SVHC recently has placed a strong emphasis on energy efficiency, having cooperated with Efficiency Vermont in conducting a comprehensive analysis of its facilities and considering alternative options for replacing its heating plant.

SVHC has commissioned several studies to evaluate alternative solutions for replacing the heating plant. That facility until recently was also used to provide energy for a large institutional laundry, but all laundering is now done off-site. In addition, the facility has converted to an electric chiller system, further reducing future need for energy derived from the heating plant. By removing the laundry function, converting to an electric chiller system, and installing more efficient boilers that utilize compressed natural gas (CNG) rather than #6 heating oil (currently planned and permitted), SVHC has significantly reduced its overall energy demand.

In planning for the new central boiler plant, it became clear that the most energy-efficient and cost-effect option, from an operational standpoint, is a system that uses a woodchip-based boiler with new CNG boilers as a backup. That option, however, is the most expensive to construct initially, even though an analysis completed for SVHC by the Biomass Energy Resource Center shows that, factoring in the cost of financing as well as expected rates of increase in both oil and woodchips, the annual savings associated with the woodchip/oil system exceed $1 million annually.

SVHC has decided to install the new CNG-powered system, but to include a primary convertible boiler to allow for woodchip use should that option become preferable based on future fuel costs. The site plan and buildings have been designed to accommodate the future change with minimal disruption or additional expense.

Forests cover most of Bennington County; the wood available from Bennington County and surrounding areas can provide energy for facilities such as this 400 horsepower wood boiler system at Bennington College, which has reduced oil consumption on the campus by more than 300,000 gallons per year.

College Campuses

Bennington is home to two college campuses, Bennington College and Southern Vermont College (the smaller Community College of Vermont, the Vermont Technical College, and the Northeast Baptist College, are considered for the purposes of this analysis to be part of the commercial sector). Colleges use a considerable amount of energy for heating residential and academic buildings, and to power the lights, computers, and other special equipment required at such institutions.

Several years ago Bennington College installed a biomass heating system to serve as the primary heat source for most of the college's buildings. According to a study of that system conducted by the Biomass Resource Center, the college uses approximately 4,000 tons of woodchips annually($208,000 at current prices), displacing approximately 350,000 gallons of oil use. Oil boilers still are used as a supplement and back up to the primary biomass system. The college has reported that the biomass system has been reliable and has saved several hundred thousand dollars per year in fuel costs. The college's facilities director has reported that the campus uses approximately 3,186,000 KWH of electricity per year, at a total cost of $552,000. Bennington College has worked with Efficiency Vermont to implement a wide array of measures to reduce electric usage, and, in addition to its biomass heating system, has constructed a new building that is highly energy efficient and which uses a geothermal heating system. Many of the older buildings on campus would benefit from air-sealing, insulation, and other weatherization work; projects that will be taken on as funding becomes available.

Southern Vermont College is a smaller campus (in terms of both student enrollment and buildings); with approximately half of the number of residential students, two main academic buildings, and a field house/gymnasium, so its energy consumption is significantly less than that of Bennington College. Because the campus does not have a biomass boiler system like Bennington College, it's heat energy must be provided by oil and propane gas—and the campus uses approximately 16,000 gallons of propane and 15,000 gallons of oil per year. Annual electricity consumption amounts to 703,000 KwH per year at a cost of $130,000. Many of SVC's buildings are relatively new, although the main academic building (The Mansion) is a historic stone building that certainly could benefit from weatherization work—the design and historic nature of the building will complicate any such work, however.

Both colleges are interested in using local food in their dining halls, and both have considerable acreages of prime agricultural land on their campuses, suggesting the potential for cultivation and processing of food at appropriate locations on their campuses.

Transportation Sector Energy Demand

The amount of energy used for transportation in Vermont has grown steadily and now accounts for more energy consumption than any other single sector. Although significant gains in the overall efficiency of the combined vehicle fleet have not been observed during this time period, improved technology has led to the production of some highly efficient vehicles. However, low fuel prices for gasoline and diesel (generally half to one-third of what consumers pay in many developed countries) have encouraged people to buy large fuel-inefficient vehicles; and even people with fuel-efficient vehicles are able to drive more miles so may not actually be conserving much energy relative to their SUV-driving neighbors.

Inexpensive energy in the transportation sector also has facilitated a land use pattern where people live relatively far from where they work, attend school, shop, and obtain other important services. Until the era of good roads and inexpensive fuel, most people lived in close proximity to urban and village centers where goods and services were close at hand. People who lived in the countryside had to be more self-sufficient, and indeed, most were involved in some type of agricultural activity. Some people have observed that cheap and easy personal transportation has allowed people to live an urban lifestyle in rural locations.

The personal automobile has come to be seen as an indispensable component of modern life, used to get to work, shopping, school, visiting friends, recreational and entertainment venues, and more. Consequently, the amount of fuel used—and dollars spent– to drive ourselves around has become an increasingly important issue for many people. The amount of money spent on gasoline by Bennington residents, for example, is approximately equal to the amount of money spent on all fuels for home heating and electricity (Table 8). According to the 2010 US Census, the average Bennington worker commutes a total of approximately 15 miles per day; with over 8,000 resident workers, mostly commuting in single-occupancy vehicles, commuting alone accounts for over 100,000 miles per day of travel, and over 1.1 million gallons per year (and $3,000,000) of gasoline consumption.

A number of electric and "plug-in hybrid" electric vehicles recently have been introduced to the market and some area residents and businesses have purchased them, although relatively few are

Table 8. Transportation fuel use (personal and commercial/industrial) estimates for Bennington.

		Annual Miles Driven (2)	Gallons Fuel Used (3)	Total Fuel Expenditures (4)
Number of Personal Vehicles	12,118	169,652,000	6,786,080	$16,965,200
Commercial/Industrial Diesel Fuel Use			1,357,200	$4,071,600
Total			**8,143,280**	**$21,036,800**

(1) 6,378 housing units * 1.90 average vehicles per unit (2010 US Census).
(2) Based on 14,000 miles per year per vehicle—current estimates, Federal Highway Administration.
(3) Personal vehicle fuel (gasoline) consumption based on 25 miles per gallon average (US EPA); commercial/industrial estimate based on 20% of personal vehicle fuel consumption (Vermont Department of Public Service data).
(4) Expenditures based on gasoline cost of $2.50/gallon and diesel fuel cost of $3.00/gallon.

The Town of Bennington has installed several new high-speed electric vehicle charging stations in municipal parking lots in the downtown area.

available from local dealerships. The Town has obtained grant funding to install several EV charging stations in the downtown area, and they receive considerable usage.

The composition of the fuel mix used for transportation in the region will need to change dramatically over time, according to the LEAP model scenarios, to attain the level of renewable fuel use required to support the "90x2050" statewide energy goal (Figure 4, Table 9). This LEAP model scenario for light-duty vehicles shows that gasoline and petroleum diesel powered cars and light trucks in the region will be largely replaced by vehicles powered by electricity (generated from renewable sources) and liquid biofuels by 2050. A comparable trend is expected in Bennington, to be consistent with the modeling criteria. An analysis of the LEAP projections show, for example, that the number of gasoline-fueled vehicles (including gas-ethanol mix fuels) in Bennington would decrease by over 90 percent to less than 1,000 vehicles by 2050. Corresponding growth in use of electricity as a primary fuel would lead to a dramatic expansion in the use of electric vehicles (over 8,000 EVs in Bennington by 2050) and vehicles that burn biodiesel fuel.

The town's transportation infrastructure includes the system of local and state roadways, bicycle and pedestrian facilities, local and regional public transportation, and railway and airport facilities. These facilities and services are essential components of the transportation system and are discussed in more detail in the transportation section of this Town Plan. The town has been maintaining and expanding its bicycle and pedestrian facilities and has been working with local, state, and regional partners to ensure that other, non-automotive, modes of transportation are accessible to residents, visitors, and businesses—all key to reducing reliance on fossil fuels in this sector.

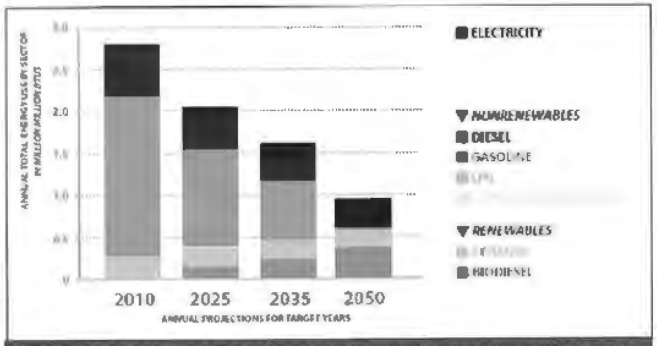


Figure 4. Change in the use of fuels in the regional transportation sector through 2050, based on LEAP model analysis.

Table 9. Fuel use and number of vehicles using each fuel as a primary energy source through 2050 LEAP model projections (Vermont Energy Investment Corporation.

Fuel Type	2015 # Vehicles	2015 Total Fuel Demand	2025 # Vehicles	2025 Total Fuel Demand	2035 # Vehicles	2035 Total Fuel Demand
Gasoline (gallons)	7,177	3,444,902	6,859	2,743,563		
Ethanol (gallons)	981	654,296	761	434,733		
Electricity (KwH)	36	109,027	572	1,526,377		
Diesel (gallons)	300	102,754	207	62,193		
Biodiesel (gallons)	23	8,746	128	43,732		

Notes: Although, vehicle numbers for base year differ from current estimates (Table 8) because projections are derived from statewide "LEAP" model data—trends are consistent. The model assumes no overall growth in total miles driven. Ethanol includes mix with gasoline and vehicle numbers can be combined for gas/ethanol.

Local Energy Production

The vast majority of energy used in Bennington is imported from outside the town (and generally from outside the state and nation) in the form of gasoline, oil, propane, and electricity. Some of the imported electricity is generated from renewable sources, primarily electricity obtained from hydroelectric generating facilities in Quebec and Labrador (via utility contracts with Hydro Quebec). Some energy production currently occurs in Bennington, all of which is electricity generated from renewable sources including a 360 KW capacity hydroelectric facility on the Walloomsac River and roughly 3 MW of solar capacity in small private and moderate-sized commercial photovoltaic systems. For current generation sites and capacities, refer to the Community Energy Dashboard: http://www.vtenergydashboard.org/my-community/bennington/statistics.

A local energy entrepreneur re-established the hydroelectric generating capacity at the "Paper Mill" site along the Walloomsack River in Bennington. The facility is rated at 360KW generating capacity and produces electricity with greater consistency and reliability than solar or wind facilities.

This 6 KW residential scale solar array is fixed to a bi-directional tracking base so that it can orient the panels to take maximum advantage of solar radiation at any time of the day. Backyard and home rooftop solar arrays as well as larger array, both on the ground and on commercial rooftops, can generate significant amounts of electricity, although generation peaks in the summer and is limited in the winter months. Bennington has approximately 3MW of installed solar generating capacity in town—location and size of existing facilities can be viewed online at the Community Energy Dashboard, an energy resource and mapping tool currently maintained by the Energy Action Network.

III. Energy Conservation, Efficiency, and Renewable Energy Strategies

A diverse array of targeted policies and actions will be required to effectively advance the town toward its conservation, efficiency, and renewable energy goals and to support attainment of Vermont's goal of obtaining 90 percent of all energy used in the state from renewable sources by 2050. The following strategies have been identified as most appropriate for the Town of Bennington to pursue at this time. Additional information on land use and transportation policies and recommended actions can be found in the land use and transportation sections of this Town Plan. More detail on many of the approaches can be found in the 2017 Bennington County Regional Energy Plan (*Bennington County Regional Commission, March 2017*) and in the Guidance for Municipal Enhanced Energy Planning Standards (*Vermont Department of Public Service, March 2017*).

Town Energy and Land Use Planning

1. The town should reestablish, maintain, and support its municipal energy committee. That committee should pursue implementation of this plan, advocate for energy conservation and renewable energy projects, and report on a regular basis to the Select Board.
2. Continue implementing land use planning policies that encourage efficient development with high density mixed-used development in the designated growth center and low density development that does not require extensive infrastructure or services in rural areas, consistent with the land use plan and policies set forth in this Town Plan.
3. Actively support investments in the downtown and surrounding neighborhoods, especially projects such as the Putnam Block Redevelopment, that bring new housing and essential businesses such as food stores and hardware stores, as well as employment opportunities, into the walkable center of the community.

4. All developments should be planned to take advantage of opportunities for utilization of solar energy.

Residential Sector Energy Conservation and Efficiency

5. The town should routinely provide information on the state mandated Residential Building Energy Standards to all building permit applicants, and take steps to require and verify that all new residential building meets those Standards.
6. The town should promote use of the "Energy Star" building performance rating system and related building practices that limit energy consumption in new and remodeled homes, and promote the use of Vermont's residential building energy label/score.
7. Energy education programs sponsored by Efficiency Vermont, the Bennington County Regional Commission, and other organizations—particularly those that focus on home weatherization improvements and energy savings—should be supported and widely publicized.
8. Programs that provide funding for weatherization of the homes of lower-income residents, including the Weatherization Assistance Program offered through the Bennington Rutland Opportunity Council (BROC), should be supported.
9. Work with NeighborWorks of Western Vermont (NWWVT) to widely publicize their "Heat Squad" home energy improvement programs, including low-cost audits and assistance with construction and financing.
10. Efforts to assist homeowners to switch to alternative space heating systems, including stoves and systems that burn wood and wood pellets, as well as air source heat pumps, should be supported. Woody biomass fuels can be sourced locally and heat pumps are highly efficient systems powered by electricity that can be generated from renewable energy sources.
11. A high percentage of Bennington's housing stock are rental properties, and many of those in the center of town would benefit from energy audits, weatherization work, and installation of alternative heating systems, especially air source heat pumps. The town should work with the BCRC to organize and hold another walk-thorough and information session for owners of residential rental properties.

Commercial and Industrial Sector Energy Conservation and Efficiency

12. Obtaining feedstock for heating systems from local sources supports regional economic development and renewable energy goals. The town should work with the regional development corporation, the Bennington County Sustainable Forestry Consortium, and other organizations to support existing forest products businesses and new businesses involved in managing forest lands, transporting and processing woody biomass for home, business, or institutional applications, and should assist with locating sites for manufacturing facilities (especially production of wood pellets).
13. The town should cooperate in efforts to reach out to electrical contractors and others to provide information about opportunities to sell, install, and service heat pumps. Air source heat pumps are an efficient and cost-effective way to reduce reliance on oil and/or propane fuels in many homes and businesses. Bennington also is well-suited for new geothermal heat pump systems—an option that may be particularly viable for new construction and larger commercial/industrial projects. Developers of such projects should be made aware of the value of geothermal systems and efforts to support development of business that provide geothermal system and support (well drillers, excavators, etc.) and coordination between those businesses and electrical contractors should be supported.

14. All new commercial and industrial buildings must meet the state mandated Commercial Building Energy Standards. The town should encourage developers of commercial properties to consider using the "Stretch Codes," mandated through Act 250, in any new commercial construction.
15. Commercial and industrial business owners should be encouraged to work with Efficiency Vermont and energy service companies to assess the potential for converting all or part of their space heating and cooling to efficient air source heat pumps.
16. Business owners should be encouraged to obtain the services of an energy auditor who can assist in identifying measures to adjust operations to minimize energy use.
17. Employees should consider alternative ways of commuting to work and employers should provide facilities to encourage bicycling, walking, and carpooling. Local business groups and the town should promote participation in the annual "Way to Go" commuter program.
18. Business should be provided information about electric vehicle charging stations and encouraged to install such facilities to support employees who would like to use electric vehicles for commuting.
19. The town should make sure that incentives offered through Efficiency Vermont are widely publicized to businesses.

Energy Conservation and Efficiency in the Transportation Sector

20. The town should continue to improve and maintain the town's network of off-road bicycle and pedestrian facilities, identifying safety improvement needs, gaps between important destinations, and other needs. The town should continue to seek funding through the VTrans Bicycle – Pedestrian and Transportation Alternatives programs, as well as from local funds and other sources to plan and implement those projects.
21. The town should ensure that local and state roadway construction and maintenance projects include accommodations for pedestrian and bicycle travel, incorporating "Complete Streets" principles whenever possible. The town should continue to work with the BCRC to plan and implement modifications to local streets to make them more bicycle and pedestrian friendly and to present more attractive streetscapes for all residents and users of the transportation system.
22. The town should work with the Green Mountain Community Network (GMCN) to support wider utilization of the local public transportation system. Employers, shopping centers, and service centers should be contacted and asked to provide information about GMCN routes and services to employees, customers, and clients.
23. Outreach should be conducted through the local school system to encourage greater use of school buses (rather than individual cars) and walking and biking to school.
24. Actively support expansion of intercity bus travel, including the new direct bus connection to the Amtrak rail station in Rensselaer. Work with the Bennington Area Chamber of Commerce and local businesses to ensure that the services are well publicized and that stop and transfer locations are convenient, comfortable, and attractive.
25. Continue to participate in rail planning projects to promote commercial and industrial development that can use rail for freight shipments. Support expenditure of transportation funds on projects to maintain and upgrade rail lines, bridges, crossings, and other critical infrastructure.
26. Actively promote electric vehicle use through cooperation with Drive Electric Vermont and other organizations. Encourage local auto dealers to supply electric and plug-in hybrid electric vehicles.
27. Install EV charging stations in public parking lots and encourage businesses, to install charging stations for their employers and customers. The Bennington Area Chamber and other organizations should highlight the availability and location of EV infrastructure in the community through their websites and other methods.

28. Promote the Go Vermont website to support carpooling, ridesharing, and other opportunities. Support efforts to broaden participation in the "Way to Go" alternative commuting program.
29. Large new commercial, industrial, and multifamily developments should be required to provide EV charging stations at convenient locations, and to provide a location for a public transportation stop.

Local Food Systems

30. Support efforts to develop a more robust local food and agricultural system; participate in efforts to match food producers with large institutional and other consumers.

Municipal Government Energy Practices

31. Pursue energy audits at municipal buildings focusing on weatherization work at older buildings such as the town office building and old blacksmith shop and heating and electrical upgrades at the police station.
32. Consider alternative energy systems such as a small biomass district heat project to heat public buildings in the downtown, solar hot water production at the recreation center, and a demonstration project with liquid biofuels for some town equipment. Assess the potential for deploying air source heat pumps for heating and cooling in all municipal buildings.
33. Consider purchase of more fuel efficient vehicles, including electric vehicles where practical, for all departments; hybrid sedans and SUVs might be particularly effective for the police department, as would new anti-idling technologies.
34. Publicize the successful LED streetlight conversion and encourage business owners to make similar changes on their external lights.

Energy Use in Schools and Institutions

35. The public schools should regularly participate in the School Energy Management Program reviews and continue to work with Efficiency Vermont to obtain incentives for weatherization and efficiency improvements.
36. All schools should promote and encourage the use of school buses and walking and biking to school—including participation in the Safe Routes to Schools program—to reduce reliance on single-passenger vehicle transport.
37. The Southwestern Vermont Medical Center should continue to work with Efficiency Vermont to improve energy conservation at its campus and should continue to move toward utilization of locally sourced woody biomass fuel for use in its new central boiler plant.
38. Southern Vermont College should investigate development of a central biomass based district heating system for its campus.

General Electricity Conservation and Efficiency Measures

39. Support integration of advanced energy storage in the area through cooperation with utilities and review of town plan policies and land use standards.
40. Support full integration of "smart grid" technology throughout the town and region and use of "smart rate" pricing plans.

41. Cooperate with Green Mountain Power and VELCO to ensure that areas planned for new renewable energy generation are consistent with the capacity of the grid infrastructure and to ensure that any upgrades needed are implemented.

Renewable Energy Development

Biomass and Liquid Biofuels

42. The town should support efforts to develop appropriate cost-effective biomass energy resources and help promote combined heat and power biomass projects.
43. The town should support efforts to help farmers produce oil seed crops and liquid biofuels that can be used to operate equipment and machinery on their farms, and potentially supply other businesses and the town with renewable fuels.

Hydroelectric Generation

44. The town has added hydroelectric generation equipment at its water supply facility and has supported development of the 350 KW hydro generating facility at the "Paper Mill" dam site on the Walloomsac River. The town should continue to look for opportunities to develop small hydro projects to support efficient municipal operations. Additional commercial-scale hydroelectric generation is limited due to the fact that the only existing dam sites (other than the Paper Mill dam) are located on Paran Creek in North Bennington Village, between Lake Paran and the Walloomsac River (Figure 5). The town supports efforts by North Bennington, Bennington College, and involved property owners to develop the hydro potential at that series of small dams on Paran Creek.

Generation from Wind Resources

45. Bennington has limited potential for utility-scale wind energy development, as areas with sufficient access to consistent wind are restricted primarily to higher elevations on Mount Anthony and adjacent ridgelines. These areas are relatively close to established residences, and Mount Anthony has been specifically identified as a critical scenic resource for the town in its Scenic Resource Inventory. Development in that area would have a profoundly negative impact on critical viewsheds throughout the community, as the natural profile of the mountain forms an iconic backdrop from both in-town and rural valley locations. The town has consistently objected to and testified against development, including construction of larger telecommunication towers, on and near the summit and ridgeline of Mount Anthony. Because no other locations in Bennington have suitable wind resource, infrastructure availability, or are free from significant environmental constraints (Figure 6), no utility-scale (100 KW capacity or greater) wind energy facilities should be located n the town. Smaller scale wind projects, including residential-scale turbines (generally less than 10 KW) and turbines that may be installed at farms, institutions (such as college campuses), or small businesses, up to 100 KW, may be appropriate as long as noise from the turbines does not adversely affect neighboring residential properties and as long as they are not prominently visible from any town-identified historic district.

Solar Energy Generation

46. The town particularly encourages solar energy development, of any scale, on building rooftops.

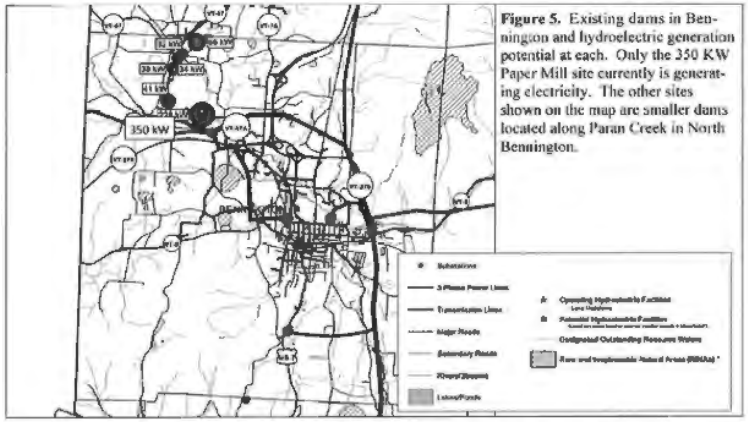


Figure 5. Existing dams in Bennington and hydroelectric generation potential at each. Only the 350 KW Paper Mill site currently is generating electricity. The other sites shown on the map are smaller dams located along Paran Creek in North Bennington.

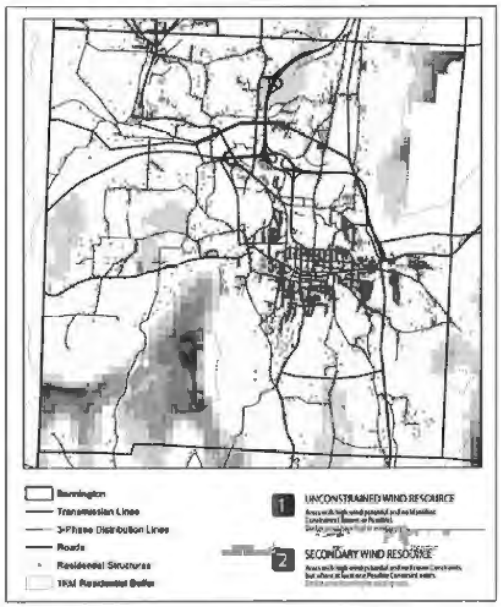


Figure 6. Wind energy resources sufficient for utility-scale generation are limited in Bennington by topography and existing homes and critical environmental resources preclude development in most locations. The summit of Mount Anthony and adjacent ridgelines are unsuitable for wind energy development because of impacts on identified scenic resources. Smaller scale wind turbines generating electricity for residences, small businesses, and institutions may be appropriate at suitable sites that do not violate state noise or environmental standards.

47. The town strongly supports the development of small-scale (150 KW capacity or less) electricity generation from solar energy at homes, businesses, schools, and other institutions, as well as community solar projects.

Community Solar Projects

Community solar projects offer an opportunity for a range of people, who might not otherwise have access to the benefits of solar energy generation, to participate in a clean energy project. These individuals may include people who do not own property themselves or those who own buildings with limitations caused by shading or the size, orientation, or structural stability of a roof. Moreover, community solar projects offer efficiencies of scale that make individual investments more viable for people of moderate incomes.

Community solar projects, as discussed in this section, are group net metered solar energy installations between 15kW and 150kW in size , with shares in the facility sold to the site owner, neighbors, community members, nonprofit organizations, and local businesses. These energy users buy shares in proportion to their annual electrical usage. When construction is completed, power is fed directly into the grid, and a group net metering document is filed with the utility showing the allocation of shares among the various members. The utility then splits the output of the solar farm among the members in proportion to their share size, crediting their utility accounts.

Community solar projects, as described above, are encouraged and may be located anywhere in town not specifically identified as a "Prohibited (Exclusion) Area" in the Solar Facility Siting Criteria set forth in this section. Moreover, any community solar project located on a site that is not a prohibited/ exclusion area shall be considered as being located on a preferred site and eligible for all of the regulatory and financial incentives associated with larger scale solar energy installations pursuant to Public Utility Commission Rule 5.100 and 30 V.S.A. Section 248. The town does encourage community solar projects to be located on sites identified as having high potential for electricity generation based on solar resource availability.

Any larger scale solar development (greater than 150 kW capacity) shall be subject to the following policies, map, siting guidelines, and the town's solar facility screening ordinance.

Solar Energy Facility Siting Policy and Map

The Solar Energy Resource Map (Figure 7) shall serve as a guide for developers wishing to identify land suitable for solar energy generation facilities within the Town of Bennington. This map identifies sites which have been determined by the Town of Bennington, through official action of the Select Board, to be suitable for solar facilities and sites which are preferred sites for solar energy generating facilities. Only sites identified as preferred sites on this map or located in a preferred area as defined in this section of the Town Plan may be developed with solar generating facilities in excess 150 KW of rated capacity.

The Solar Energy Resource Map (Figure 7) shall be used in concert with the Town's Screening of Solar Facilities Ordinance and the Solar Facility Siting Guidelines (incorporating the Community Standards and Siting Criteria) included in this section of the Town Plan to direct the development and design of solar facilities. Although solar energy development at these preferred sites and locations is an appropriate land use, all such development shall be carefully planned to limit adverse impacts to neighboring properties and to public viewsheds, giving consideration to The Town's Screening of Solar Facilities Ordinance and Solar Facility Siting Guidelines.

The sites indicated on this map as suitable for solar energy development were selected after a thorough analysis of available geographic data, including an assessment of access to solar energy as well as environmental, aesthetic, cultural, and related regulatory constraints. State-identified environmental constraints are discussed in more detail in the Bennington County Regional Energy Plan, and include the following resource areas:

- Class 1 and 2 wetlands, vernal pools, and hydric soils;
- Mapped river corridors and FEMA-defined floodways;
- Natural communities and rare, threatened, and endangered species;
- Federal wilderness areas;
- "Primary" and "Statewide" significant agricultural soils;
- FEMA-defined special flood hazard areas;
- Lands protected for conservation purposes;
- Deer wintering areas; and
- State-identified high priority "Conservation Design Forest Blocks."

Lands with one or more of the above constraints were excluded from consideration as preferred sites, while areas that did not have any state-identified constraints were carefully analyzed by the Town, and sites most likely to comply with the Town Plan's Community Standards and Siting Standards for Solar Facilities were identified as potentially suitable. Specifically excluded from consideration as sites suitable for development were land located in the Forest or Agriculture land use districts, privately owned land in the Rural Conservation land use district, land within 100 feet of public roads, land within 0.25 miles of any of the three covered bridges, Willow Park, and land within scenic viewsheds identified in the Scenic Resource Inventory of Bennington. Potentially suitable sites were determined to be appropriate for development only if they were likely to be developed with solar generating facilities based on property size, landowner interest, proximity to infrastructure, and community benefit.

Approximately 540 acres of land are shown on the Solar Energy Resource Map as being suitable and preferred for development of these facilities. This acreage, together with projected future development on rooftops and other preferred locations, far exceeds the acreage needed to meet the town's solar energy generation target, 25 MW of capacity by the year 2050, identified in the Bennington County Regional Energy Plan. Moreover, that targeted level of generation includes residential, rooftop, and other small-scale generation that is expected to account for up to 10 MW of capacity by 2050. Therefore, all locations other than these mapped areas and land specifically identified as preferred areas in this Town Plan, are considered unsuitable for solar generating facilities in excess of 150 KW of rated capacity.

Solar Electricity Facility Siting Guidelines

The term "solar facility" shall have the following meaning: a solar electricity generation and transmission facility with a 150kW(AC) or greater capacity, including all on-site and off-site improvements necessary for the development and operation, and on-going maintenance of the facility.

The Town of Bennington has developed community standards and siting standards for the development of solar facilities for reference and use by facility developers and local property owners and for consideration in Section 248 proceedings (30 VSA §248). These standards are set forth below. In addition, The Bennington Planning Commission, in consultation with the Bennington County Regional Commission, has identified and mapped (Figure 7) those areas of Bennington that are most suitable for solar facility development based on facility siting requirements and municipal energy, conservation, and development policies and objectives set forth in the Bennington Town Plan, the Bennington Screening of Solar Facilities Ordinance, and the Bennington Land Use and Development Regulations.

Pursuant to 30 VSA Sec. 248, prior to the construction of a solar facility, the VT Public Utility Commission (PUC) must issue a Certificate of Public Good. A Section 248 review addresses environmental, economic, and social impacts associated with a particular project, similar to Act 250. In making its determination, the PUC must give due consideration to the recommendations of municipal planning commissions and their respective plan(s). Accordingly, it is appropriate that Bennington's Town Plan address these land uses and provide guidance to town officials, regulators, and facility developers.

The Town of Bennington may participate in the Public Utility Commission's review of new and expanded generation facilities to ensure that local energy, resource conservation, and development objectives are identified and considered in proposed utility development. This may include joint participation and collaboration with other affected municipalities and the Bennington County Regional Commission for projects that may have significant regional impact. It is acknowledged that the PUC's primary focus is on administering state public policy and regulating actions that are directed at ensuring that utility services promote the general good of the state.

The Planning Commission, in consultation with the Bennington Select Board, should develop guidelines to direct local participation in Section 248 proceedings related to solar facilities located in Bennington or in neighboring communities which may affect the town. The guidelines should reflect levels of participation or formal intervention in relation to the type, location, scale, operation, and magnitude of a proposed project, and its potential benefits, detriments to, and impacts on the community.

Community Standards

The following community standards are to be considered in undertaking municipal solar electricity projects and programs, in updating Bennington's Land Use and Development Regulations to address solar facilities subject to local regulation, and in the review of new or upgraded solar facilities by the Town of Bennington and the Public Service Board (Section 248 review).

- Plan Conformance: New solar facilities and proposed system upgrades should be consistent with the Vermont Comprehensive Energy Plan, the Vermont Long-Range Transmission Plan, and utilities Integrated Resource Planning (IRP).
- Benefits: A demonstrated statewide public need that outweighs adverse impacts to local residents and resources must be documented for municipal support of new solar facilities located within or which may otherwise affect Bennington. Facility development must benefit Town of Bennington and State residents, businesses, and property owners in direct proportion to the impacts of the proposed development.
- Impacts: New solar facilities must be evaluated for consistency with community and regional development objectives and shall avoid undue adverse impacts to significant cultural, natural, and scenic resources and aesthetic values identified by the community in the Bennington Town Plan and the Scenic Resources Inventory. When evaluating impacts of a proposed solar facility under the criteria set forth in this Town Plan, the cumulative impact of existing solar facilities, approved pending solar facilities and the proposed solar facility shall be considered. It is explicitly understood that a proposed solar facility which by itself may not have an adverse impact may be deemed to have an adverse impact when considered in light of the cumulative impacts of the proposed solar facility and existing solar facilities and pending already approved solar facilities.
- Decommissioning: All facility certificates shall specify conditions for system decommissioning, including required sureties (bonds) for facility removal and site restoration to a safe, useful, and envi-

ronmentally stable condition. All hazardous materials and structures, including foundations, pads and accessory structures, must be removed from the site and safely disposed of in accordance with regulations and best practices current at the time of decommissioning

Solar Facility Siting Criteria

Bennington supports development of solar energy generation facilities consistent with the policies and guidelines set forth in this plan. It recognizes that financial considerations require projects to be located in close proximity to electric power lines capable of distributing the load proposed to be generated and to have convenient access from major transportation networks for construction. However, the town desires to maintain the open landscape and scenic views important to Bennington's sense of place, tourism economy, and rural cultural aesthetic. Not all solar facilities proposed can meet this standard. Projects must meet the following criteria in order to be supported by this Town Plan:

- Siting Requirements: New solar facilities shall be sited in locations that do not adversely impact the community's traditional and planned patterns of growth, of compact (downtown/village) centers surrounded by a rural countryside, including working farms and forest land. Solar facilities shall, therefore, not be sited in locations that adversely impact scenic views, roads, or other areas identified in the Scenic Resources Inventory, nor shall solar facilities be sited in locations that adversely impact any of the following scenic attributes identified in the Scenic Resource Inventory: views across open fields, especially when those fields form an important foreground; prominent ridgelines or hillsides that can be seen from many public vantage points and thus form a natural backdrop for many landscapes; historic buildings and districts and gateways to historic districts; and, scenes that include important contrasting elements such as water. The impact on prime and statewide agricultural soils currently in production shall be minimized during project design.
- Preferred Areas: The following areas are specifically identified as preferred areas for solar facilities, as they are most likely to meet the siting requirements:
  - Roof-mounted systems;
  - Systems located in proximity to existing large scale, commercial or industrial buildings;
  - Proximity to existing hedgerows or other topographical features that naturally screen the entire proposed array;
  - Reuse of former brownfields;
  - Facilities that are sited in disturbed areas, such as gravel pits, closed landfills, or former quarries;
  - Areas specifically identified as suitable for solar facilities on the Solar Energy Resource Map (Figure 7).
- Prohibited (Exclusion) Areas: In addition to those areas that do not meet the siting requirements set forth above, development of solar generating facilities shall be excluded from (prohibited within), and shall not be supported by the Town, in the following locations:
  - Floodways shown on Flood Insurance Rate Maps (FIRMs);
  - Fluvial erosion hazard areas (river corridors) as shown in the Town of Bennington Land Use and Development Regulations;
  - Class I or II wetlands;
  - A location that would significantly diminish the economic viability or potential economic viability of the town's working landscape, including productive forest land and primary

agricultural soils (as defined in Act 250 and as mapped by the U.S. Natural Resource Conservation Service);

- ◊ Rare, threatened, or endangered species habitat or communities as mapped or identified through site investigation, and core habitat areas, migratory routes and travel corridors;
- ◊ Ridgelines: Mount Anthony, Whipstock Hill, Bald Mountain (Green Mountains);
- ◊ Steep slopes (>25%)
- ◊ Surface waters and riparian buffer areas (except for stream crossings);
- ◊ Topography that causes a facility to be prominently visible against the skyline from public and private vantage points such as roads, homes, and neighborhoods;
- ◊ A site in proximity to and interfering with a significant viewshed identified in the Scenic Resource Inventory;
- ◊ A site on which a solar facility project cannot comply with Bennington's prescribed siting and screening standards, including the screening requirements set forth in Bennington's Screening of Solar Facilities Ordinance;
- ◊ A site that causes adverse impacts to historical or cultural resources, including state or federal designated historic districts, sites and structures, and locally significant cultural resources identified in the municipal plan. Prohibited impacts to historical and cultural resources include:
  - removal or demolition;
  - physical or structural damage, significant visual intrusion, or threat to the use;
  - significant intrusion in a rural historic district or historic landscape with a high degree of integrity;
  - significant visual intrusion into a hillside that serves as a backdrop to a historic site or structure;
  - creating a focal point that would disrupt or distract from elements of a historic landscape;
  - a significant intrusion in a rural historic district or historic landscape that has a high degree of integrity;
  - impairing a vista or viewshed from a historic resource that is a significant component of its historic character and history of use;
  - visually overwhelming a historic setting, such as by being dramatically out of scale;
  - isolating a historic resource from its historic setting, or introducing incongruous or incompatible uses, or new visual, audible or atmospheric elements.

- Mass and Scale: Except for projects located on preferred sites, solar facilities larger than 10 acres, individually or cumulatively, cannot be adequately screened or mitigated to blend into the municipality's landscape and are, therefore, explicitly prohibited.

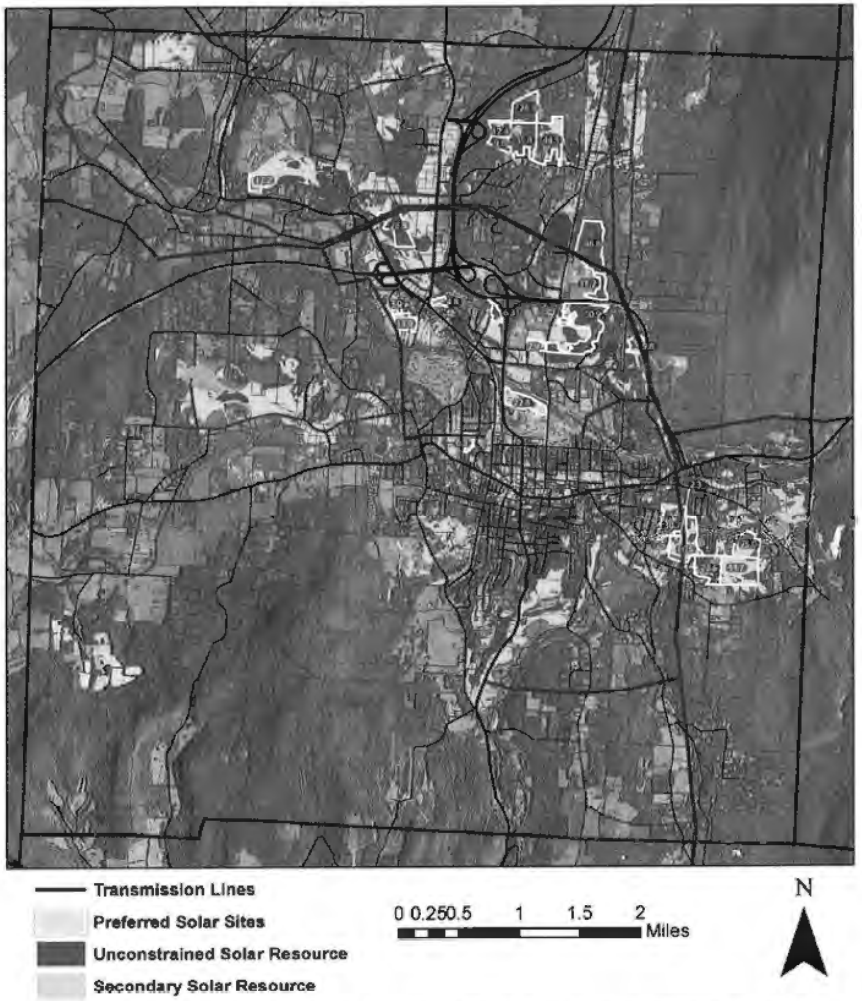


Figure 7. Solar Energy Resource Map. Outlined areas show preferred sites: solar energy facilities in excess of 150 KW of capacity shall be restricted to these sites and to building rooftops and other locations specifically identified in this section as preferred areas for solar energy development; other sites are considered unsuitable for solar energy development in excess of 150 KW of capacity. All facility siting is subject to the specific Siting Guidelines set forth in this section of the Town Plan.

MEMO

TO: Town of Bennington Planning Commission

FROM: Brad Wilson, Project Developer
Ecos Energy LLC, PLH LLC, Otter Creek Solar LLC,
Chelsea Solar LLC, and Apple Hill Solar LLC

RE: Comments on August 7, 2017 Draft Energy Plan

DATE: October 31, 2017

I am sending these comments in advance of the scheduled November 6, 2017 meeting of the Bennington Planning Commission. This meeting will be a public hearing regarding the proposed draft of an energy plan amendment to the Bennington Town Plan. My comments describe issues with the draft amendment that should be addressed and corrected before the Planning Commission recommends the amendment to the Select Board for approval and adoption.

Act 174, passed into law by the Vermont State Legislature in 2016, encourages towns in Vermont to design and adopt new energy plans (as amendments to their town plans). If a new energy plan is written in a certain way, a town may have their energy plan certified for compliance with state standards. Once a town receives certification of such a plan, that town will receive substantial deference in future proceedings before the Vermont Public Utility Commission ("PUC"). Substantial deference means that a town's plan will be given more weight when deciding the outcome of PUC cases such as the siting/permitting of renewable energy facilities.

Certification will only be granted if the energy plan adopted by the Town is written in compliance with specific standards that have been set forth by the Vermont Department of Public Service ("DPS"). DPS has issued very clear guidance and standards that describe what a new energy plan must and must not contain in order to be certified. These standards must be followed completely and exactly or certification cannot be granted.

I fully support Bennington's goal of achieving certification and gaining substantial deference before the PUC. That goal will not be achieved if the Bennington Select Board adopts the current draft of the energy plan amendment. The current draft includes a number of mistakes and omissions that clearly fail to meet the required plan standards. I assume that the Planning Commission has no interest in recommending a draft plan to the Select Board that is not capable of passing certification review. I respectfully request your consideration of my comments and, if you agree that my comments have merit, that you be willing to rule that the draft plan needs additional work before it can be recommended to the Select Board.

I understand how much time, effort, and resources have gone into bringing the draft plan to its current state. I have great respect for that effort, and I truly wish for that effort to ultimately succeed. Nonetheless, that effort must be performed in compliance with required standards. It is not my intent to introduce arbitrary roadblocks. I don't raise these issues for sport, pleasure, or

profit, as may be suggested by other public commenters. It is true that I represent a renewable energy developer that has business interests which could be affected by the draft plan; I would not have reviewed the draft plan otherwise. Still, I don't believe my professional affiliation has any effect on the facts that I will present to you, and I appreciate your unbiased review of my comments.

NOTE. In my comments, I will reference a number of other documents. I have included copies of these documents with this memo:

- ("Energy Plan") *Town of Bennington Draft Town Plan Energy Element, dated 11.06.17*
- ("Act 174") *Vermont State Legislature Act 174, enacted 06.13.16*
- ("Standards Overview") *A narrative overview of the required standards for municipal energy plans, prepared by DPS*
- ("Standards Guidance") *A guidance document prepared by DPS to assist towns in drafting municipal energy plans*
- ("Standards Checklist") *A checklist of the formal standards that are required for a municipal energy plan to receive certification of compliance*

Problem: Method for identification of unsuitable areas for commercial-scale solar energy facilities

(fails Municipal Standards 13A and 13B)

The Energy Plan identifies a vast and overwhelming majority of properties and acres in the Town as unsuitable for commercial-scale solar energy facilities (solar generating facilities in excess of 150 kW of rated capacity). The Energy Plan identifies these properties as unsuitable by stating that the Energy Plan has identified a sufficient area of preferred sites for commercial scale solar; therefore, all other properties in Town are unsuitable. See the specific language spanning pages 22 and 23 of the Energy Plan:

> "Approximately 540 acres of land are shown on the Solar Energy Resource Map as being suitable and preferred for development of these facilities. This acreage, together with projected future development on rooftops and other preferred locations, far exceeds the acreage needed to meet the town's solar energy generation target, 25 MW of capacity by the year 2050, identified in the Bennington County Regional Energy Plan. Moreover, that targeted level of generation includes residential, rooftop, and other small-scale generation that is expected to account for up to 10 MW of capacity by 2050. **Therefore, all locations other than these mapped areas and land specifically identified as preferred areas in this Town Plan, are considered unsuitable for solar generating facilities in excess of 150 KW of rated capacity.**" *(Energy Plan, pages 22 and 23)*

The Standards Guidance and Standards Checklist encourage towns to identify unsuitable areas for particular types or sizes of energy generation. However, those unsuitable areas must be identified using a specific methodology, and the method used in the Energy Plan is grossly out of compliance with the requirements.

A complete reading of the Standards Overview, Standards Guidance, and Standards Checklist makes it clear how unsuitable areas for any type or size of renewable energy generator must be identified. Please review these relevant sections:

> "Unsuitable Areas: When municipalities designate areas as unsuitable for certain types and scales of renewable energy generation, having clear policies becomes particularly important. Municipalities must treat renewable energy generation facilities in a similar manner to other types and scales of development, in terms of allowable land uses in particular areas. This will not be reflected in the maps, but must be articulated in the policies. For example, if a plan designated certain land as unsuitable for all development because it is above 1,700 feet and within priority forest blocks necessary for landscape scale connectivity, it would therefore be acceptable to designate as unsuitable for a type and/or scale of renewable energy technology."
> (*Standards Guidance, Pages 19 and 20*)

This section also communicates a couple of key points. First, a town may designate certain areas or sites as unsuitable for particular types or scales of renewable energy generation, but such a designation must be tied to clearly articulated land use policies that exist elsewhere in the Town Plan. For example:

1) "Commercial-scale solar facilities are not allowed in this area because there are enough preferred areas identified elsewhere."

   or

2) "Commercial-scale solar facilities are not allowed in this area because the committee that wrote this section of the plan doesn't feel that commercial-scale solar belongs there."

Examples 1 and 2 are not tied to articulated land use policies that apply to other development and are therefore not valid methods for identifying unsuitable areas. Now see Example 3:

3) "Development within highest priority forest and connectivity blocks is not allowed within the Forest District described in Chapter 3 of the Town. Therefore, these are unsuitable areas for commercial-scale solar facilities."

Example 3 identifies an unsuitable area by using a clearly articulated land use policy. I hope that the difference between Examples 1/2 and Example 3 is easy to understand.

The second key point communicated in the Standards Guidance section above is also critical. Per the Guidance, areas may only be identified as unsuitable for particular types or sizes of renewable

energy generation as long as those areas are also off-limits for all other similar types or sizes of development under the Town Plan. Commercial-scale solar cannot be singled out as prohibited in an area if other types of development are allowed. Let's examine another example:

4) "Commercial-scale solar facilities are not allowed on privately owned properties within the Rural Conservation District."

Example 4 fails the standard because it prohibits commercial-scale solar in an area where other types of development of similar scale are allowed. A 150 kW solar facility may have a footprint size of around 1.2 acres. A look at the Bennington Land Use Regulations for the Rural Conservation District reveals a list of allowed uses (with DRB approval) that could easily exceed a development footprint of 1.2 acres, including Extraction of Earth Resources, Golf Course, Cemetery, or College/University.

Again, a particular type or size of energy generator cannot be prohibited in an area where other types of development with similar (or greater) scale are allowed. This section of the Guidance is very clear on this when it says that, "*Municipalities must treat renewable energy generation facilities in a similar manner to other types and scales of development, in terms of allowable land uses in particular areas.*"

Going back to Example 3, above; this example conforms to the requirements of the Guidance and Standards because it restricts all types of development in the identified area. There is no type of development that is similar in scale to commercial solar (greater than 1.2 acres) that is allowed; therefore, it is acceptable to designate this area as unsuitable for commercial-scale solar.

These two points are further supported by other language within the Standards and Guidance. Turning to the Standards Checklist itself; this document contains requirements that *must* be met in order for an energy plan to receive certification. The Checklist contains standards that deal directly with identification of unsuitable areas, and these items are *not optional*.

> "The attached regional and municipal determination standards are constructed as a checklist-based application form. [...] The standards measure whether the submitted plan meets the statutory requirements for enhanced energy planning. [...] If Not Applicable is not available as an option, the standard must be marked "Yes" in order for the plan to receive an affirmative determination of energy compliance."
> (*Standards Checklist, page 2*)

Pasted below is an image of requirements 13, 13A, and 13B from the Standards Checklist. Please review them carefully:

13. **Does the plan identify areas that are unsuitable for siting renewable energy resources or particular categories or sizes of those resources?** *Either Yes or No ("No" if the plan chooses not to designate any areas as unsuitable) is an acceptable answer here. "Resources" is synonymous with "generators."*	☐ Yes ("Yes" for A and B must also be selected below)	☐ No
A. Are areas identified as unsuitable for particular categories or sizes of generators consistent with resource availability and/or land use policies in the regional or municipal plan applicable to other types of	☐ Yes	☐ No ☐ N/A (if no unsuita
land development (answer only required if "Yes" selected above, indicating unsuitable areas have been identified)? *If areas are considered unsuitable for energy generation, then the land use policies applicable to other forms of development in this area should similarly prohibit other types of development. Please note these policies in the Notes column.*		ble areas are identifie d)
B. Does the plan ensure that any regional or local constraints (regionally or locally designated resources or critical resources, from 12b-12c above) identified are supported through data or studies, are consistent with the remainder of the plan, and do not include an arbitrary prohibition or interference with the intended function of any particular renewable resource size or type? *Please explain in the Notes column.*	☐ Yes	☐ No

(*Standards Checklist, pages 13 and 14*)

The method in the Energy Plan for identifying unsuitable areas for commercial-scale solar clearly fails standard 13A. There is no way that 13A could possibly be checked "Yes" if the Energy Plan includes its current methodology. That methodology broadly identifies an overwhelming majority of properties in the Town as unsuitable for commercial-scale solar. These are properties within every Land Use District in the Town, and these are properties where a wide variety of other types of development of similar or larger scale are allowed. If 13A is checked "No," then the Energy Plan cannot receive certification of compliance.

The Energy Plan also clearly fails standard 13B. This standard expands upon the earlier discussion regarding clearly articulated land use policies. This standard protects against a Town arbitrarily designating a site or area as unsuitable; instead it requires a designation of unsuitable to be supported by clear and specific land/resource conservation policies contained in the Town Plan. Again, this standard must be checked "Yes" to receive certification. The Energy Plan's approach for identifying unsuitable areas for commercial-scale solar clearly does not meet this standard.

Standard 13B is not the only standard in the Checklist that addresses the need for clearly articulated (and universally applied) policies when identifying unsuitable areas. Portions of Section 9 of the

Standards Guidance address the development of "constraints" that would lead to the identification of certain areas as unsuitable (or possibly unsuitable).

> "9E. Does the plan include statements of policy to accompany maps (could include general siting guidelines), including statements of policy to accompany any preferred, potential, and unsuitable areas for siting generation (see 11 and 12 under Mapping, below)?
>
> Land Conservation Measures: While the maps are extremely important to show where resources, constraints, and unsuitable areas exist, it is also necessary to include text in the plan that describes these mapped elements. Specifically, plans must include descriptions of land conservation measures as well as specific policies that say where development should and shouldn't happen, and why. These are what the Public Service Board will review when they are looking to understand whether a project will interfere with orderly development of the region, which is one of the criteria reviewed during the Section 248 process. Moreover, it is essential that such land conservation measures and policies are not only specific but also written in clear and unqualified language, articulating mandatory terms, for example by using the terms shall (not should) and must (not may). Both the locations and the reasoning behind their selection (for either preferred, potential, or unsuitable areas) should be described in the plan and reflected in the policies."
> (*Guidance, page 19*)

Unsuitable areas for commercial-scale solar are identified in the Energy Plan with a single sentence:

> "Therefore, all locations other than these mapped areas and land specifically identified as preferred-areas in this Town Plan, are considered unsuitable for solar generating facilities in excess of 150 KW of rated capacity."
> (*Energy Plan, page 21*)

This does not meet the level of detailed land conservation measures and specific policies that the Guidance requires.

Standards 12B and 12C on the Standards Checklist include the following language, respectively:

> "If areas are constrained for the development of renewable energy due to the desire to protect a locally designated critical resource (whether a natural resource or a community-identified resource), then the land use policies applicable to other forms of development in this area must be similarly restrictive; for this category, policies must prohibit all permanent development." (*Standards Checklist, page 11, section 12B*)

> "If locations are constrained for the development of renewable energy due to the desire to protect a locally designated resource (whether or natural resource or community-identified resource, like a view), then the land use policies applicable to other forms of development must be similarly restrictive." (*Standards Checklist, page 12, section 12C*)

These sections further illustrate the requirement for any constraints that lead to a designation of unsuitable area must be universally applied to other forms of development and not just to the type or size of renewable generator in question. The method for identifying unsuitable areas for commercial-scale solar in the Energy Plan fails to do so; other forms of development are not restricted.

Wrapping up discussion on this issue, here's a bit of my own personal opinion, and you can take it or leave it. The unsuitable area designation is powerful. When implemented, it restricts certain land development rights from private landowners. I think the Guidance and Standards make it clear that the State intends it to be quite difficult for a Town to identify any area as unsuitable, and in order to do so, such a decision must be supported by detailed land use policy that is objective, based upon data and studies, and not discriminatory towards a single type of development (commercial-scale solar in this case). Whether or not you agree with this, I hope you are able to see the problems with the Energy Plan's method for identifying unsuitable areas for commercial-scale solar. If the current draft of the Energy Plan is adopted by the Select Board, it will fail compliance review for the reasons described above. The Planning Commission should recommend that this element of the Energy Plan should be re-designed before it can be sent on to the Select Board.

Problem: Method for excluding sites from consideration as suitable for development

(fails Municipal Standards 12B and 12C)

Page 22 of the Energy Plan describes the process by which the map of preferred sites for solar facilities (page 27) was generated. This process generally seems to follow the methods outlined in the Standards Guidance and Standards Checklist. That is, beginning with a Town map provided by the Regional Commission that identifies solar resources along with areas of state-identified resource constraints (such as wetlands, river corridors, or endangered species). Next, identifying sites that would be potentially suitable for commercial-scale solar by excluding other sites if they contain one or more state- or local-level constraints that were selected by the committee that worked on the map. Any sites left over after the exclusions were marked potentially suitable and further evaluated for identification as preferred sites (or not). Here is the text on page 22:

> "The sites indicated on this map as suitable for solar energy development were selected after a thorough analysis of available geographic data, including an assessment of access to solar energy as well as environmental, aesthetic, cultural, and related regulatory constraints. State-identified environmental constraints are discussed in more detail in the Bennington County Regional Energy Plan, and include the following resource areas:
>
> (List omitted – See Energy Plan page 22 for full text)
>
> Lands with one or more of the above constraints were excluded from consideration as preferred sites, while areas that did not have any state-identified constraints were carefully analyzed by the Town, and sites most likely to comply with the Town Plan's Community

> Standards and Siting Standards for Solar were identified as potentially suitable. Specifically excluded from consideration as sites suitable for development were land located in the Forest or Agriculture land use districts, privately owned land in the Rural Conservation land use district, land within 100 feet of public road, land within 0.25 miles of any of the three covered bridges, Willow Park, and land within scenic viewsheds identified in the Scenic Resource Inventory of Bennington. Potentially suitable sites were determined to be appropriate for development only if they were likely to be developed with solar generating facilities based on property size, landowner interest, proximity to infrastructure, and community benefit."
> *(Energy Plan, page 22)*

While this approach seems to generally comply with the method described in the Guidance and Standards, there are serious problems with some of the constraints or criteria that were selected and used to exclude properties from consideration as potentially suitable (or preferred) sites. The Guidance and Standards allow towns to choose their own locally-identified constraints, but the Guidance and Standards are also very clear about what types of constraints cannot be used. Using constraints that are clearly not allowed will result in the Energy Plan failing standards 12B and 12C on the standards checklist. The Energy Plan uses constraints that are clearly not allowed.

There is some overlap here with the previous discussion regarding unsuitable areas. Specifically, the sections of Standards 12B and 12C stating that locally-identified constraints can only be used if the Town Plan also applies those constraints to other types of development (not just commercial-scale solar, in this case). A number of constraints identified in the Energy Plan clearly do not meet this requirement. Standards 12B and 12C are mandatory requirements. Again, the text from 12B and 12C:

> "If areas are constrained for the development of renewable energy due to the desire to protect a locally designated critical resource (whether a natural resource or a community-identified resource), then **the land use policies applicable to other forms of development in this area must be similarly restructure; for this category, policies must prohibit all permanent development.**"
> *(Standards Checklist, page 11, section 12B)*

> "If locations are constrained for the development of renewable energy due to the desire to protect a locally designated resource (whether or natural resource or community-identified resource, like a view), then **the land use policies applicable to other forms of development must be similarly restrictive.**"
> *(Standards Checklist, page 12, section 12C)*

The Guidance also calls for locally-identified constraints to be supported by significant detail in the plan. This text is from section 9D in the Guidance:

> "Municipalities may add locally designated resources or critical resources to the known and possible constraint layers in the Mapping Standards. [...] These will ultimately flow through to the Primary and Secondary Resource Potential maps, and can have the effect

of designating areas as possibly or likely unsuitable for renewable energy development. [...] Providing maps, narratives, and even supporting documentation (like natural or scenic resource inventories) describing locally designated resources and the analysis of generation potential (Standard 9B) is critical for this criteria."
(*Standards Guidance, page 19*)

Please note the language used here. Providing this type of supporting information and detail for locally-identified constraints is *critical*. In the Energy Plan, the locally-identified constraints are simply listed, and there is no explanation or supporting detail given for how each one was selected or why each one is valid for the purpose of restricting commercial-scale solar development.

The Energy Plan identifies a number of locally-identified constraints that resulted in properties being excluded from consideration as possibly suitable sites or preferred sites for commercial-scale solar. Because of the way the Energy Plan identifies unsuitable areas, these constraints directly resulted in properties being deemed unsuitable for commercial-scale solar (and this compounds the problems with how the constraints were identified). Identified constraints that are clearly problematic include:

1) **"Primary and Statewide Significant agricultural soils"**

   The Energy Plan includes "Primary and Statewide Significant agricultural soils" on a list of constraints that would result in a property being excluded as a preferred site (and therefore being identified as an unsuitable site). However, the Bennington Town Plan does not prohibit any other type of development in any area of town on the basis of Primary and Statewide Significant agricultural soils. The use of this constraint in this manner clearly fails standards 12B and 12C. This particular use of agricultural soils to discriminate solely against solar facilities is also addressed specifically in the PUC *Cold River Solar* case (Docket # 8188) and the corresponding Vermont Supreme Court Decision (*In re Petition of Rutland Renewable Energy, LLC*).

2) **"Lands with one or more of the above constraints were excluded from consideration as preferred sites, while areas that did not have any state-identified constraints were carefully analyzed by the Town, and sites most likely to comply with the Town Plan's Community Standards and Siting Standards for Solar were identified as potentially suitable."**

   This item states that only sites which were determined to be most likely to comply with the Town Plan's Community Standards and Siting Standards for Solar were identified as potentially suitable (and therefore eligible to be selected as preferred sites). This item would not necessarily be problematic, if not for the fact that the Energy Plan goes on to deem all non-preferred sites to be unsuitable. As such, likelihood of compliance with the Solar Siting Standards becomes a constraint. There are two problems here. First, there is zero information given about the process used to determine "likelihood of compliance." Second, for obvious reasons, this is not a standard that is applied to any other type of development in the Town. The Solar Siting Standards certainly have their place in the

Town Plan, but not as a constraint in this exercise. The use of this constraint in this manner clearly fails standards 12B and 12C.

3) **"Privately owned land in the Rural Conservation land use district"**

   This constraint appears in the Energy Plan without any supporting information or justification, which is odd because it is clearly discriminatory against landowners in a specific land use district. Why not private landowners in Rural Residential, or Village Commercial? Why not all privately-owned land? Or, why the focus on privately owned land in the first place? The Energy Plan goes on to identify as preferred sites a number of properties in the Rural Conservation district that are owned by the Town of Bennington, and it should be apparent that there are serious problems with the Town restricting private landowners in a certain area but giving the Town itself preferential treatment in that same area.

   Additionally, this constraint fails to meet the requirements set forth in the Checklist under Standards 12B and 12C. As I've previously mentioned, the Town Plan and Town Land Use Regulations allow a number of other types of development with equal or greater scale to commercial solar facilities on privately owned land in the Rural Conservation district. The use of this constraint in this manner clearly fails standards 12B and 12C, and it cannot be included in the Energy Plan.

4) **"Land within 100 feet of public roads"**

   There are a wide variety of other uses in the Town Plan and Town Land Use Regulations that carry no such restriction. I am aware that Vermont state law requires a 100-foot setback from public roads for solar generation projects (30 V.S.A. § 248(s)) but that same law also allows solar project developers to seek an agreement of reduced setback with towns and adjoining landowners on a project-by-project basis. The use of this constraint in this manner clearly fails standards 12B and 12C.

5) **"Land within scenic viewsheds identified in the Scenic Resource Inventory of Bennington"**

   You may officially think of me as a broken record at this point. The Town Plan includes no such restriction on other types of development. It is true that the Town Plan suggests that development within these viewshed areas is performed in a manner that is sensitive to scenic resources, but development is not outright prohibited in these areas. The use of this constraint in this manner clearly fails standards 12B and 12C.

This is not to suggest that the Town couldn't use these types of criteria to assist in their selection of preferred sites for commercial-scale solar. However, big problems arise because the Energy Plan designates all non-preferred properties as unsuitable for commercial-scale solar. These constraints are not simply being used to help identify preferred sites; rather, they are being used to identify unsuitable sites where development of commercial-scale solar is prohibited. As such, compliance with standards 12B and 12C becomes critical. If the Energy Plan is adopted by the

Select Board in its current form, it will fail standards 12D and 12C for the reasons described above. The Planning Commission should require that the Energy Plan only include constraints that are compliant with 12B and 12C.

Problem: The Energy Plan does not identify potentially suitable areas for commercial-scale solar

(fails Municipal Standard 12)

In multiple locations, the Standards Guidance and the Standards Checklist refer to the need to identify three types of areas for the siting of renewable energy generators; preferred areas, potentially suitable areas, and unsuitable areas. The Energy Plan only results in two types of areas for commercial-scale solar; preferred and unsuitable. It is clear that the Guidance and Checklist consider "potential" and "preferred" areas to be separate and distinct and that a compliant map of solar resources sites would include all three designations.

> "The Mapping standards lay out a sequence of steps for planners to examine existing renewable resources and to identify **potential (and preferred) areas** for renewable energy development, and to identify likely unsuitable areas for development, by layering constraint map layers on to raw energy resource potential map layers."
> *(Standards Checklist, page 10)*
>
> "Does the plan analyze generation potential through the mapping exercise (see Mapping standards, below), to determine potential from **preferred and potentially suitable areas** in the municipality?"
> *(Standards Checklist, page 9, standard 9B)*
>
> "Does the plan include statements of policy to accompany maps (could include general siting guidelines), including statements of policy to accompany any **preferred, potential, and unsuitable areas** for siting generation (see 12 and 13 under Mapping, below)?"
> *(Standards Checklist, page 9, standard 9E)*
>
> "For ground-mounted solar, municipalities should estimate the amount of solar that could be developed in their **preferred and potentially suitable areas**."
> *(Standards Guidance, page 16)*
>
> "Capacity (megawatts, or MW) = acres available in **preferred and potentially suitable areas** / 8 acres per MW of solar"
> *(Standards Guidance, page 16)*
>
> "In Standard 9B, above, municipalities identified solar and wind resource potential from **preferred and potentially suitable areas**. [...] In order to account for the fact that land in the **preferred and potentially suitable areas** may ultimately be available or suitable for siting

> solar, municipalities should built a contingency into their calculations..." *(Standards Guidance, page 16)*
>
> "A municipality may restrict development in certain areas, but there must be sufficient land left in the **preferred and potentially suitable areas** to meet selected targets."
> *(Standards Guidance, page 19)*
>
> "Both the locations and the reasoning behind their selection (for either **preferred, potential, or unsuitable areas**) should be described in the plan and reflected in the policies."
> *(Standards Guidance, page 19)*
>
> "The identification of both **preferred and unsuitable – along with the middle ground of 'potential' – areas** also lays out a vision for future energy development in your municipality that can be understood and applied in a regulatory proceeding."
> *(Standards Guidance, page 20)*

This example is particularly informative:

> "Furthermore, municipalities are being asked under this standard to demonstrate a commitment to prioritizing renewable generation in preferred locations. This can be done not only by identifying preferred locations (generally, as well as specific parcels), but also by having a discussion in the plan of the relative amount of the municipality's renewable generation target that could potentially be sited in such location, alleviating siting pressure on the unsuitable and even the **potential (but not preferred) locations**."
> *(Standards Guidance, page 20)*

The mapping exercise described on page 22 of the Energy Plan seems to begin in the correct way (although it uses invalid constraints as discussed earlier). It begins with a raw resource potential map and then attempts to exclude clearly unsuitable areas based on identified constraints. The result is a map of potentially suitable areas (for commercial-scale solar in this case). Then, the potentially suitable areas are further evaluated, and preferred sites are selected.

Up to this point, the Energy Plan generally follows the prescribed steps, but from here it takes a wrong turn. At this point, once the preferred sites are identified, the Energy Plan then designates all remaining potentially suitable sites as unsuitable, solely because they are not preferred sites. This leaves the resulting map of commercial solar resource locations with only two types of site; preferred and unsuitable. This approach is not supported by any element of the Standards Guidance or Standards Checklist, and the resulting lack of the third "potentially suitable" area is not compliant with the required process for the mapping exercise.

A map prepared the correct way includes all three elements:

- **Preferred Areas** – Project developers strongly encouraged to focus their efforts here and they can reasonably count on the support of the Town for facilities proposed on these sites
- **Potentially Suitable Areas** – Maybe the Town will support a project on one of these sites, maybe it won't. It will depend on an objective project-specific review of the proposed facility's compliance with the Town Plan and all relevant design standards. This is not fundamentally different than the status quo under current rules.
- **Unsuitable Areas** – Projects proposed in these areas will not be supported by the Town, count on it.

If the 12B and 12C standards regarding allowable constraints are followed, such a map would consist primarily of Potentially Suitable Areas. Preferred Areas and Unsuitable Areas represent smaller portions of the map; these are special areas that were selected objectively, carefully, and deliberately. Projects proposed in the Potentially Suitable Areas aren't guaranteed the support of the Town, but they aren't outright prohibited either. Projects in these areas can continue to be evaluated on a case-by-case basis with the expectation that relevant sections of the Town Plan are adhered to. Under this scenario, over 90 percent of the land in the Town would not be wholesale off-limits to commercial scale solar. And under that type of scenario, the Energy Plan would have a better chance of meeting Act 174 requirements.

It may very well be that outright prohibiting commercial-scale solar on over 90 percent of the land in the Town was a specific goal of the volunteers who worked on the draft map and plan. However, the Standards Guidance and Standards Checklist were designed to create a very high bar for any town seeking to implement such broad and sweeping restrictions. The approach taken in the Energy Plan does not clear the bar. The Planning Commission should require a re-working of how Potentially Suitable Areas for commercial-scale solar are handled in the Energy Plan.

Problem: The Energy Plan does not identify sufficient land for solar energy generation

(fails Municipal Standards 9C and 12E)

Both the Standards Guidance and Standards Checklist are clear that the Energy Plan must identify sufficient land in the Town for renewable energy development to reasonably reach the year 2050 targets contained in the Regional Energy Plan for renewable electric generation. The Energy Plan fails to meet this requirement, although it includes an attempt at doing so. However, any attempt must be performed in accordance with the requirements. Here are the specific requirements of Standard 9C:

> "Does the plan identify sufficient land in the municipality for renewable energy development to reasonably reach 2050 targets for renewable electric generation, based on population and energy resource potential (from potential resources identified in the

> Mapping exercise, below), accounting for the fact that land may not be available due to private property constraints, site-specific constraints, or grid-related constraints?"
> (*Standards Checklist, page 9, standard 9C*)

The Guidance goes into more detail regarding this requirement:

> "Sufficient Land for Solar: In Standards 9B, above, municipalities identified solar and wind resource potential from preferred and potentially suitable areas. For ground-mounted solar, an estimate of potential was based on an average of 8 acres/MW. In order to account for the fact that the land in the preferred and potentially suitable areas may not ultimately be available or suitable for siting solar, municipalities should build a contingency into their calculations of whether they have identified sufficient land in these areas to meet targets. One method to determine sufficient land for ground-mounted solar is to adopt a contingency figure of 60 acres per MW of target generation. By substituting "60" for "8" in the ground-mounted solar potential calculation above, you will be able to determine whether you have identified enough land in preferred and suitable areas to meet your selected targets. This allows for the fact that some property owners may not be interested in hosting solar, that interconnection costs may be high in some locations, that competition between possible sites will encourage low-cost and thoughtful siting, that some suitable areas may be small or awkwardly shaped, etc."
> (*Standards Guidance, page 18*)

The attempt in the Energy Plan to meet this requirement is described on pages 22 and 23:

> "Approximately 540 acres of land are shown on the Solar Energy Resource Map as being suitable and preferred for development of these facilities. This acreage, together with projected future development on rooftops and other preferred locations, far exceeds the acreage needed to meet the town's solar energy generation target, 25 MW of capacity by the year 2050, identified in the Bennington County Regional Energy Plan. Moreover, that targeted level of generation includes residential, rooftop, and other small-scale generation that is expected to account for up to 10 MW of capacity by 2050."
> (*Energy Plan, pages 22 and 23*)

This element of the Energy Plan fails to meet the required standard (9C) in two primary ways. The first mistake is the conclusion that the identification of 540 acres of land for solar is sufficient to meet the standard. Per the guidance given on page 18 of the Standards Guidance, towns should multiply their year 2050 solar capacity goal by a contingency factor of 60 acres per MW to generate a number of acres that would realistically be capable of supporting the goal. In the Energy Plan, the Town assigns 10 MW to expected future residential, rooftop, and other small-scale generation, leaving 15 MW to be accounted for. The Energy Plan contains no detail or basis for the 10 MW assumption. Assuming for a moment that 15 MW is a reasonable number, 15 MW multiplied times 60 acres per MW equals 900 acres, a significantly larger number than 540 acres. There is no description in the Energy Plan regarding how the 540 acre number was determined to "far exceed" the required capacity, and there is no indication whatsoever that the required contingency calculations were implemented.

The second mistake is that the 540 acres that were identified do not actually total 540 acres of suitable land for commercial-scale solar development. Many of the properties that were identified as preferred contain one or more features that would not allow construction of a solar facility on a portion of the property in question. Yet, the undevelopable portions of these properties are being counted as part of the 540 acres that the Energy Plan says would be available to meet the year 2050 goals. Standard 12E specifically prohibits this:

> "The locations identified as preferred must not be impractical for developing a technology with regard to the presence of the renewable resource and access to transmission/distribution infrastructure."
> (*Standards Checklist, pages 12 and 13, standard 12E*)

I will illustrate this point with three examples. I would be happy to provide additional examples if requested.

(*examples follow on next three pages*)

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Figure 1: This is an aerial view of a 44.5 acre property that is identified as a preferred site for commercial-scale solar in the Energy Plan. Notice the yellow shape, which is a mapped Class II wetland that covers approximately half of the property and divides the non-wetland portions of the property into smaller disjointed chunks. Due to the Class II wetland, most of this property is undevelopable for commercial-scale solar, yet the entire 44.5 acres is being counted towards the 540 acres that the Energy Plan identifies as sufficient to meet the Act 174 requirements.

(*Figure 2 next page*)

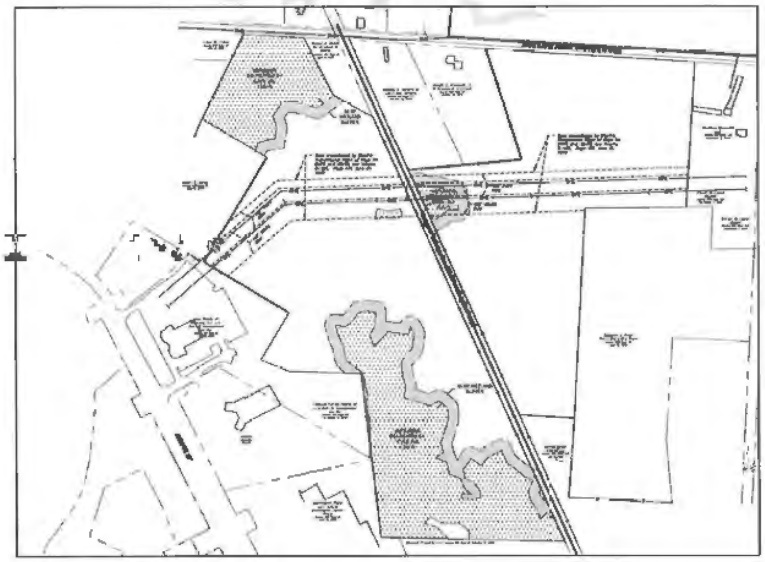


Figure 2: This is an image of a 40.6-acre property; the southern-most 28.8 acres have been identified as a preferred site for commercial-scale solar in the Energy Plan. The 28.8 acre portion includes an approximately 3-acre area that is being used as a transmission line corridor, and these 3 acres are not developable for solar. Also, notice the dotted blue area, which is a delineated Class II wetland along with the solid blue area that represents a required 50-foot buffer around the wetland perimeter. These wetland and buffer areas are undevelopable for commercial-scale solar. The wetland and buffer areas account for nearly half of the 28.8 acres, yet the entire 28.8 acres is being counted towards the 540 acres that the Energy Plan identifies as sufficient to meet the Act 174 requirements.

(*Figure 3 next page*)

Figure 3: This is an aerial view of a 9.8 acre property that is identified as a preferred site for commercial-scale solar in the Energy Plan. Notice the green shape, which is a mapped high priority habitat block covers approximately a third of the property, not to mention the Route 279 corridor that bisects the property. Due to these features, a significant portion of this property is undevelopable for commercial-scale solar, yet the entire 9.8 acres is being counted towards the 540 acres that the Energy Plan identifies as sufficient to meet the Act 174 requirements.

It is clear that the 540 acres of preferred area for commercial solar identified in the Energy Plan do not actually represent 540 acres that could be developed for commercial scale solar. These types of site-specific limitations are exactly why the standards require the implementation of the contingency calculations that were previously discussed.

It should be noted that the standards do not require a town to identify "sufficient land for solar" in preferred areas only. Land within potentially suitable areas would also apply, which further highlights the need for the Energy Plan's treatment of potentially suitable areas to be re-evaluated.

Request for Information: Why are two specific properties not identified as preferred areas for commercial-scale solar and therefore identified as unsuitable areas for commercial-scale solar?

PLH LLC owns two properties in the Town of Bennington that were not identified as preferred areas for commercial-scale solar. It appears that language in the current draft of the Energy plan attempts to designate these two properties as unsuitable sites for commercial-scale solar.

Under current rules, commercial-scale solar facilities are not prohibited on these properties, and the property owner has the right to propose commercial-scale solar facilities that are in compliance with relevant state/local rules and regulations. The current draft of the Energy Plan attempts to eliminate this property development right on these two parcels.

Every member of the volunteer committee that worked on designing the preferred sites map (and by extension designating all other properties unsuitable sites) is familiar with PLH/Allco and is well aware of our ownership of these two properties and our intent to potentially use these properties for commercial-scale solar facilities. For this committee to design policy that intends to strip us of our currently-held development rights on these properties without even reaching out to us for comment or discussion is highly inappropriate.

We must now use the public hearing process to be heard, and *I formally request a deliberate reconsideration of these properties as preferred sites*, or at the very least not designating them as wholesale unsuitable for commercial-scale solar.

The first property is a 27.18-acre parcel located between North Bennington Road and Harwood Hill Road that we commonly refer to as the "Battle Creek 2" site. This property is bisected by a VELCO transmission line corridor. Approximately 11 acres south of the transmission corridor is zoned Industrial, and the remainder of the property is zoned Rural Residential. The parcel number for this property is 23501600. An aerial view of this property is shown on the next page. The aerial view also shows the neighboring "Battle Creek 1" site that is also owned by PLH LLC.

The second property is a 27.3-acre parcel located adjacent to the Route 279 / Route 7 interchange that we commonly refer to as the "Chelsea / Apple Hill" site. This property sits within the Rural Conservation zoning district. The parcel number for this property is 29503100. An aerial view of this property is also shown on the next page.

Figure 4: Aerial view of the "Battle Creek 2" site and the neighboring "Battle Creek 1" site

Figure 5: Aerial view of the "Chelsea / Apple Hill" site

The Battle Creek 2 Site

1) I hereby request that the Planning Commission produce a detailed list of all constraints, criteria, and any other evaluations that were used to exclude the Battle Creek 2 site from the list of preferred sites.

2) The Battle Creek 2 site sits directly adjacent to the neighboring Battle Creek 1 site. The 28.8-acre Industrial-zoned portion of the Battle Creek 1 site was identified as a preferred site for commercial-scale solar. I hereby request that the Planning Commission explain why this portion of the Battle Creek 1 site was designated as preferred while the Industrial-zoned portion of the Battle Creek 2 site was not. What constraints, criteria, and any other evaluations are different between these two parcels that led to completely different designations?

3) The Planning Commission should add the Industrial-zoned portion of the Battle Creek 2 site as a preferred site for commercial-scale solar. None of the (valid) constraints or criteria described in the Energy Plan would result in this portion of the Battle Creek 2 site being excluded.

   This portion of the Battle Creek 2 site is zoned Industrial, and it is surrounded on three sides by existing Industrial and Commercial development. It is difficult to imagine how the Town could support a variety of significant-impact Industrial and Commercial uses on this parcel while declaring the site unsuitable for solar panels. Furthermore, a nearly identical property (the adjacent "Battle Creek 1" site) was designated as a preferred site. Please reconsider the exclusion of the Battle Creek 2 site from the list of preferred sites.

The Chelsea / Apple Hill Site

1) I hereby request that the Planning Commission produce a detailed list of all constraints, criteria, and any other evaluations that were used to exclude the Chelsea / Apple Hill site from the list of preferred sites.

2) The Planning Commission should add the Chelsea / Apple Hill site as a preferred site or potentially suitable for commercial-scale solar. None of the (valid) constraints or criteria described in the Energy Plan would result in this site being excluded.

   This parcel sits within the Rural Conservation zoning district and is located within a transitional area between the heavily developed Route 279 / Route 7 interchange and a residential area to the north. The policy in the Energy Plan that prohibits commercial-scale solar on all privately-owned property within the Rural Conservation zoning district is clearly not allowed under the Guidance and Standards for Act 174 compliance. Act 174 has not changed the fact that Vermont State Law prohibits Town's from introducing zoning-bylaw-style restrictions on energy generation projects.

   The Town's attorney is on record as saying that the Town Plan doesn't prohibit commercial-scale solar in the Rural Conservation zoning district, as long as facilities are

proposed in compliance with the relevant design standards, and those design standards can be met on this property. Furthermore, the solar resource map in the Bennington County Regional Energy Plan identifies this site as one of the very best solar generation resource locations in the entire Town. That map doesn't guarantee a site is ultimately suitable, but a Town should have lawful and valid reasons for excluding such a site.
Please reconsider the exclusion of the Chelsea / Apple Hill site from the list of preferred sites.

Conclusion

Thank you for reading the entirety of my comments. I appreciate your fair and deliberate consideration of the issues that I have described and the requests that I have made. I will attend the Planning Commission's public hearing on November 6, 2017, where I will summarize these comments during the public comment period. In the interest of making the most efficient use of time at the November 6 hearing, please do not hesitate to contact me via email with any questions or discussion you may have in advance.

Bennington is a leader in the State, one of the first municipalities to attempt drafting an Act 174-compliant Energy Plan. How Bennington pursues this goal will be used as an example in other communities. Bennington must do it right, and the Planning Commission should not ignore legitimate problems that have been identified with the first draft.

Sending the Energy Plan back to committee for additional work will not be a popular decision with some members of the audience at the November 6 hearing. Still, I hope the Planning Commission can see that there are clear issues with the current draft of the Energy Plan. As currently written, the Energy Plan completely fails multiple required standards for Act 174 compliance certification. Please vote that the Energy Plan needs revisions and repair before it can be recommended to the Select Board.

Sincerely,

Brad Wilson
Project Developer, Ecos Energy LLC
brad.wilson@ecosrenewble.com
(612) 460-8605

EXHIBIT 12

TOWN OF BENNINGTON
PLANNING COMMISSION

Bennington Fire Facility, 3rd Floor
130 River Street, Bennington, Vermont

Monday, October 16, 2017
6:00 p.m.
AGENDA

1. **Public Hearing: Amendment to Town Plan – Revised Energy Section of Bennington Town Plan**

2. **Other Business**

EXHIBIT 13

TOWN OF BENNINGTON

MEMORANDUM

To: Bennington Select Board
From: Daniel W. Monks
Date: November 9, 2017
Re: Adoption of Amendment of Town Plan of Bennington – Energy Section

With this memorandum, the Planning Commission is submitting for review and adoption an amendment to the Town Plan for the Town of Bennington. Attached is the proposed amendment to the Town Plan as approved by the Planning Commission on November 6, 2017. The amendment – a new Energy Section - was prepared by the Bennington County Regional Commission with input regarding solar siting issues from a committee of Select Board members and citizens.

In general, the actions required of the Select Board to adopt the Town Plan are as follows:

1. Acknowledge receipt of proposed Town Plan amendment from Planning Commission.
2. Schedule Public Hearings for Town Plan amendment review (dates for two public hearings must be set - must be held not less than 30 nor more than 120 days after Town Plan submitted to Select Board by Planning Commission).
3. Hold Public Hearings (if substantial changes are made to the Town Plan, new public hearings must be warned).
5. Adopt resolution adopting Town Plan.

A suggested timetable for the Select Board's Town Plan adoption process is enclosed. Please contact me if you have any questions.

Enclosures

- Suggested Timeline for Select Board adoption process
- Proposed Town Plan amendment

205 SOUTH STREET P.O. BOX 469 BENNINGTON, VERMONT 05201
802-442-1037 FAX (802) 442-1068

TOWN OF BENNINGTON
TOWN PLAN AMENDMENT ADOPTION
SUGGESTED ADOPTION SCHEDULE AND PUBLIC HEARING TIME LINE

SELECT BOARD

Acknowledge receipt of proposed Town Plan Amendment.	11/13/17
Schedule Public Hearings re: adoption of Town Plan Amendment. (Public Hearings could be held at Select Board Regular Meetings on 1/08/18 and 1/22/18 or at special meetings.)	11/13/17
Send Warning of Public Hearings to Bennington Banner for publication.	21 days before first hearing
1st and 2nd Public Hearing warning published in the Bennington Banner.	15 days before first hearing
Post public Hearing notice (both meetings.)	15 days before first hearing
Select Board holds 1st Public Hearing.	TBD
Select board holds 2nd Public Hearing.	TBD
Select Board adopts Town Plan Amendment.	TBD

NOTES:

1. The Select Board adopts the Plan amendment at a meeting which is held after the 2nd public hearing; the amendment becomes effective immediately.

2. 1st Public Hearing must be held no less than 30 days but not more than120 days from submittal. If Select Board makes additional, substantial changes at any time after a Public Hearing, another two Public Hearings are required.

I. Introduction

The Town of Bennington recognizes that it is necessary to work toward a sustainable energy future in a manner that minimizes environmental impacts and supports the local economy. The purpose of this energy element is to further those goals and recommended actions by increasing public awareness of energy issues, assessing local energy use and conservation opportunities, reducing the number of energy-related dollars exported from the town, and evaluating the potential for utilization of various renewable energy resources to meet the town's stated goals of:

- Reducing our dependence on non-renewable and imported energy sources;
- Promoting energy conservation and efficiency in residential, commercial, and industrial structures and operations;
- Reducing energy consumption in all taxpayer funded buildings and operations; and
- Developing sustainable, local renewable energy resources.

These goals are consistent with Vermont's energy goals and policies, including:

- ◊ Obtaining 90% of energy for all uses from renewable sources by 2050;
- ◊ Reducing greenhouse gas emissions to 50% below 1990 levels by 2028 and 75% by 2050;
- ◊ Relying on in-state renewable energy sources to supply 25% of energy use by 2025;
- ◊ Improving the energy efficiency of 25% of homes by 2020;
- ◊ Meeting the Vermont Renewable Energy Standard through renewable generation and energy transformation.

A thorough understanding of energy and a plan to address future challenges is essential because energy is critical to every aspect of our lives. At the most basic level, we need the energy we obtain from food to survive. And it is the energy contained in oil, propane, and wood that heats our homes and the energy in gasoline and diesel fuel that moves our vehicles. Energy also generates the electricity that runs our appliances, machinery, computers, and telecommunication systems.

Most of the energy that we use, and have come to rely upon, is derived from "nonrenewable" fossil fuels and, to a lesser extent, nuclear fuels. This energy has been abundant and cheap, but supplies are becoming scarcer and oil, natural gas, coal, and uranium will become increasingly expensive to obtain. Moreover, serious and longstanding environmental concerns with coal mining, offshore oil drilling, acid rain, and other pollution resulting from fossil fuel use are now overshadowed by potentially catastrophic global climate change that is driven by the release of tens of millions of years of stored carbon in just a few decades.

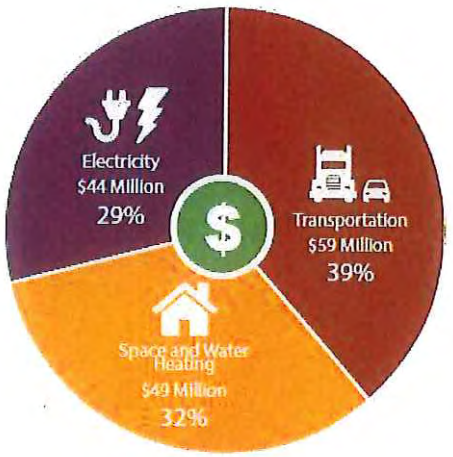
Fortunately, alternative energy sources such as solar, wind, hydroelectric, and biomass-based fuels can provide significant amounts of clean energy well into the future. Developing these resources is extremely important, but the total amount of energy that can be extracted from such resources is markedly less than what we currently obtain from fossil fuels. To maintain a good quality of life, vibrant communities, and prospering economies, we will have to develop conservation strategies and improve energy efficiency as we transition to the widespread use of renewable energy.

II. Energy Use in Bennington

Bennington County Regional Energy Plan contains a detailed review of regional and statewide energy data. It shows that total energy consumption in Vermont has risen over the past 50 years and that during that time, the transportation sector eclipsed the residential sector as the largest consumer of energy (Figure 1). Over $150 million is spent annually in the region on energy for space and

water heating, transportation, and electricity – with most of that money leaving the area to pay for imported fuels. The following section will provide estimates of current energy use by sector as well as projections illustrating the magnitude of conservation, efficiency, and transition to alternative fuels needed to meet Bennington's energy goals.

Figure 1. Energy Use by Sector in the Bennington Region. *Source: 2017 Bennington County Regional Energy Plan.*



Residential Sector Energy Demand

With over 6,000 residential units in Bennington, space and water heating and electricity usage for lighting and appliances consumes a large amount of energy and offers opportunities for considerable energy savings in the future. A majority of home heating in Bennington continues to rely on oil, although fuel switching to wood (particularly wood pellets in recent years) has been observed to occur with oil prices increase. Transportation energy demand also is influenced by the location of residential development, and that data will be presented separately in the discussion of the transportation sector.

The magnitude of residential energy consumption in Bennington can be estimated by considering the fuel usage of a typical Vermont home. An average single family home in the northeast requires approximately 60,000 Btu (British Thermal Units) of energy per square foot for annual space heating. A gallon of home heating oil contains approximately 140,000 Btu of energy. The average annual heating oil consumption of a Vermont home – 850 gallons – (based on an average house size of 2,000 square feet) is consistent with this data. An evaluation of the composition of Bennington's housing stock and heating fuel and electricity usage provides an estimate of total residential energy consumption (Table 1).

It is useful to consider scenarios illustrating how this level of energy demand and accompanying mix of fuels may change over time in a way that would allow the town to meet its energy goals. The BCRC, working with the Vermont Energy Investment Corporation, made use of the Long-range Energy Alternatives Planning ("LEAP") computer modeling tool to assess how the region's energy demand profile might change over time based on a realistic trajectory toward achieving 90% of all energy from renewable sources by 2050.

The model first was run at the statewide level, and then adjusted based on regional conditions and the output customized for the Bennington Region. The resulting regional data was then used to provide town-level estimates (consequently, the data in Table 1 will not align perfectly with the LEAP data, but the trends and the magnitude of the changes are clear). Several key points become clear when looking at the overall residential energy demand for the Bennington County region (Figure 2). Of particular importance is the significant reduction in the total amount of energy used. The reduction displayed on the graph assumes continuing and effective deployment of existing conservation and efficiency programs plus additional measures that result in a further increase in the number of existing homes that are weatherized and additional efficiency gains from advanced heating and cooling systems (the "Avoided vs. Reference" blocks on the chart). The transitions in fuel usage (for space and water heating; i.e., not including non-thermal electric use) within the Town of Bennington that correlate with the regional LEAP scenario are outlined in Tables 2 and 3.

Table 1. Estimate of Bennington's annual residential energy use and cost.

	Residential Units	Total Oil Use (gallons)	Total LP Gas Use (gallons)	Total Wood Use (pellet bags)	Electric Use for Heat (kwH)	Non-heat Electric Use (kwH)
Single Family	3,508	2,414,850	501,800	44,280	3,080,000	24,556,000
Two-Family	638	335,900	69,160	6,096	425,600	3,828,000
Multi-Family	1,722	627,750	130,221	11,448	797,650	8,610,000
Mobile Home	510	265,200	55,328	4,925	345,800	2,550,000
Total	6,378	3,643,700	756,509	66,749	4,649,050	39,544,000
Cost Factor		$2.50/gal	$3.50/gal	$5.00/bag	$0.15/kwH	$0.15/kwH
Total Cost		**$9,109,250**	**$2,647,782**	**$333,745**	**$697,358**	**$5,931,600**

This data provides a rough estimate of total residential energy consumption and costs for Bennington. The combined total cost of residential purchases of heating oil, LP gas, wood/pellets, and electricity is $18,719,735; with a population of 15,764, the per capita cost of residential energy use (not including transportation energy costs) is $1,187. Data was obtained from the 2010 US Census, the Vermont State Data Center—Housing Statistics, and the US Energy Information Administration. The following assumptions were used in the calculations: average single-family house size of 2,000 square feet, two-family dwelling unit of 1,500 square feet, and multi-family dwelling unit at 1,000 square feet (estimates of fuel usage rounded to nearest 50 gallons of oil/lp gas and ratios used for wood and electric heating use calculations. Heating fuel usage for mobile homes were generated based on the two-family dwelling unit (larger than a typical mobile home) because of generally lower insulation values and inefficient heating geometry for mobile homes. Electric use estimated at 7,000 KwH per year for a single-family home, 6,000 KwH per year for a two-family dwelling unit, and 5,000 KwH per year for a multi-family dwelling unit and mobile home. Energy use for domestic hot water production assumed included in the space heating and/or electric usage data. "Wood" heat includes both cord wood and wood pellet fuel; for simplicity, quantities and cost are presented using only wood pellet data.

Trends evident in the LEAP projections (Figure 2) include a large-scale reduction in total energy use driven by conservation and efficiency, an increased reliance on electricity and liquid biofuels (such as biodiesel), and a larger share of remaining energy use from renewable wood products (cord wood and wood pellets). Under this LEAP scenario, these changes result from development of much more efficient buildings, through construction that meets or exceeds energy codes and weatherization of existing buildings, and greater reliance on electricity and liquid biofuels for home heating and cooling in the residential sector (as well as in the transportation sector, discussed later in this chapter).

The transition in home heating anticipated by the LEAP model is dramatic; by 2050 oil will have been phased out as a heating fuel and propane use will have been reduced by about 70 percent. Inefficient electric resistance heating systems also will be phased out, but efficient air source heat pumps, and some geothermal source heat pumps for new construction, will become a primary heating and cooling technology used in over 40 percent of the town's housing units. Heat pumps represent a particularly valuable technology because they are powered by electricity that can be generated from renewable sources such as solar, wind, and hydro. Existing houses and apartments also can be converted relatively easily, and at moderate cost, from fossil fuel based heating systems to heat pumps. Heat pumps may need to be supplemented with alternative heating systems in extremely cold weather, but when combined with thorough weatherization, heat pumps can provide for most of a residential building's heat load.

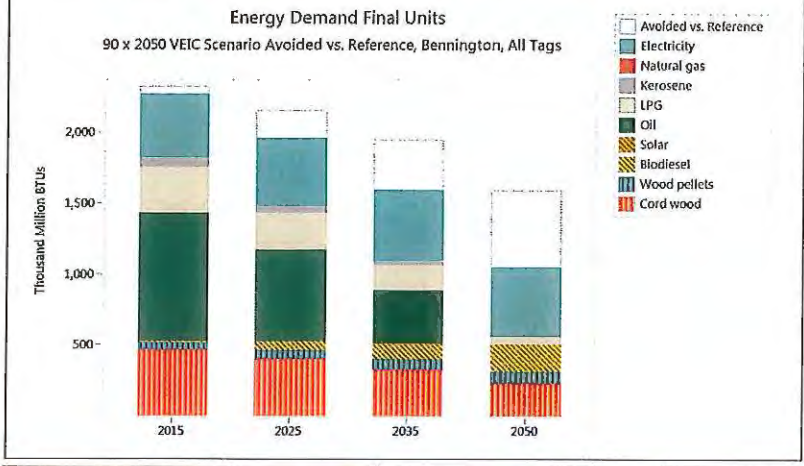


Figure 2. Total residential energy demand for the Bennington County Region, 2015 through 2050, based on one LEAP model scenario that charts progress toward the goal of achieving 90% of the state's energy from renewable sources by 2050.

Table 2 Total Residential Thermal Energy Demand By Fuel
Town of Bennington—LEAP 90x2050 Model Projections
Standard Fuel Measurement Units

Fuel	2015	2025	2035	2050
Biodiesel (gallons)	35,691	191,434	347,177	590,525
Cord Wood (cords)	9,750	8,321	6,790	4,782
Wood pellets (tons)	1,179	1,656	1,907	2,158
Electric Resistance (kWH)	8,978,898	7,765,533	4,368,113	1,213,365
Heat Pump (kWH)	1,941,383	10,313,599	19,413,834	26,087,339
Kerosene (gallons)	196,267	138,000	82,800	-
LPG (gallons)	1,582,950	1,265,383	845,217	254,054
Oil (gallons)	2,723,466	1,944,043	1,134,527	-

Table 3 Total Residential Thermal Energy Demand By Fuel
Town of Bennington - Number of Households
Derived from Regional 90X2050 LEAP projections and adjusted to increase the number of households using heat pumps as a primary heat source.

Fuel	2015	2025	2035	2050
Biodiesel	35	199	432	1,144
Cord Wood	1,501	1,356	1,323	1,451
Wood pellets	150	223	307	540
Electric Resistance	236	216	145	63
Heat Pump	51	896	1,560	2,570
Kerosene	204	152	109	-
LPG	1,033	874	698	327
Oil	2,885	2,179	1,521	-
Total	6,095	6,095	6,095	6,095

Table 2 illustrates how the mix of fuels used to heat homes could change in Bennington consistent with meeting state energy goals and Table 3 shows how the number of households using each fuel source for heating changes over the same timeframe. Because of Bennington's dense development, household heat pump use shown in Table 3 is increased beyond the level projected by the fuel comparison shown in Table 2.

Another fuel that may contribute to a relatively straightforward transition away from oil and propane based heating systems is biodiesel—with similar properties to petroleum diesel, but produced from oil crops such as canola, sunflower, and even algae. While efficiencies in production technologies are needed to make these fuels affordable and to meet renewable standards, once developed (an assumption built into this LEAP scenario), biodiesel powered furnaces and boilers can take advantage of existing fuel delivery infrastructure and in-home ductwork and plumbing.

Vermont has an abundant supply of wood that can be used for space heating. The LEAP scenarios project an increased reliance on wood as a thermal energy source for the residential sector, even though the total amount of wood energy use declines slightly (attributable to building efficiency improvements). The use of wood pellets, produced in or near the region, is expected to expand significantly, either as a primary home heating fuel or as a cold-weather supplement to air source heat pumps. Larger multifamily residential buildings and residential complexes such as apartment/condominium developments, dormitories, and even mobile home parks may convert to pellet or wood-chip based heating systems. A recent example of this efficient and renewable energy based residential "district heating" is the replacement of 29 oil-burning boilers at the 104 unit Applegate Apartment complex with a single efficient biomass boiler (together with major weatherization improvements to the buildings).

Commercial and Industrial Energy Demand

Bennington is an important center of business activity in southwestern Vermont so it is not surprising that energy consumption in those sectors is substantial. Annual expenditures on energy in the local commercial and industrial sectors are estimated to approach $30 million (Table 4). In addition to on-site energy use, many businesses rely on shipments of raw materials to their facilities, exports of finished products to markets, and/or transportation of people to the region and to their

Table 4. Estimated commercial and manufacturing building energy consumption, Bennington, Vermont.

	Estimated Floor Area (square feet) (1)	Annual Electricity Consumption (KwH) (2)	Annual Oil/Gas Consumption (gallons) (2)
Manufacturing	1,234,000		
Commercial	4,721,624		
Total Consumption		89,957,000	5,404,216
Cost Factor (3)		$0.15/KwH	$3.00/gallon
Total Cost		**$13,493,550**	**$16,216,390**

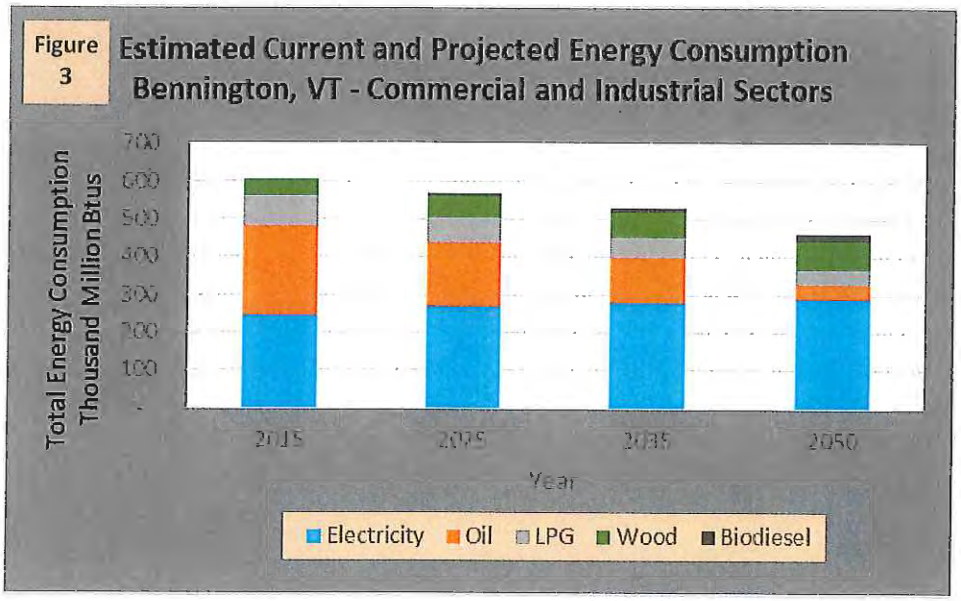
(1) Floor area estimates were computed by multiplying the number of employees in each sector (2010 Vermont Department of Labor Covered Employment data) by 766 square feet (US EPA estimate of average commercial/industrial floor space per employee).

(2) Total manufacturing sector energy consumption was calculated by multiplying total floor area by 450,000 Btu/square foot (average of low and high estimates for various types of industries—data developed by E Source Companies, LLC "Managing Energy Costs in Manufacturing Facilities). Total commercial sector energy consumption was calculated by multiplying total floor area by 90,500 Btu/square foot (average for all commercial uses, US Energy Information Administration). For Oil and LP gas were combined for the analysis and Btu content used in the calculations (125,000 Btu/gallon is an average weighted slightly toward the Btu content of oil.

(3) Electricity consumption data obtained from Efficiency Vermont, based on actual metered usage. A cost factor of $0.15 was used to be consistent with the residential rate, although varying commercial rates apply. Because oil and gas were combined, a conservative cost factor of $3.00 was used in the calculations.

establishments. Those energy demands are accounted for in the transportation sector—which has seen a very large increase in consumption of fossil fuels in recent years.

The LEAP energy forecasting models project a decrease of over 20 percent in overall commercial and industrial energy demand in Bennington through 2050 (Figure 3). This reduction is achieved through both conservation and deployment of more efficient systems, often utilizing alternative fuels. Use of petroleum oil is expected to decline by over 80 percent during this period, while propane (LPG) use is expected to fall by over 50 percent. On the other hand, use of woody biomass, a locally available fuel, is projected to nearly double, while biodiesel consumption is expected to begin to become a regionally significant fuel in these sectors. Electricity use will displace much of the current nonrenewable fuel demand in these sectors while contributing to the overall reduction in energy consumption through use of more efficient electrical systems.



Municipal and Institutional Energy Usage

Local government, schools, colleges, and other institutional uses such as the Southwestern Vermont Medical Center all are major users of energy. The costs associated with energy use by those entities has a direct bearing on taxes and critical issues such as the cost of education and health care. Energy conservation and the use of alternative energy systems in this sector have the potential to produce significant savings and to promote economic development.

Municipal Government

The Town of Bennington relies on energy to provide services to the community. The town owns and operates several buildings, a large fleet of vehicles and equipment, and is responsible for other services such as the provision of water, disposal of wastewater, and street lighting. The town already has taken steps to reduce its energy use through use of more efficient lighting and equipment in office buildings, installation of a hydroelectric generator at the water treatment facility, and by pursuing other initiatives through Efficiency Vermont and other resources. An assessment of municipal energy use was conducted recently and is reported in this section.

Municipal Buildings and Infrastructure

Energy consumption data at five municipal buildings was gathered through a project coordinated by EPA's Energy Star initiative. Those buildings support a variety of services and are used in significantly different ways, so opportunities for energy savings in each will differ. Each of the buildings requires energy for space heating (and in the case of the Recreation Center, pool water heating) and electricity for lighting, air conditioning, office equipment, and other functions. Information on energy use at the water and wastewater facilities was obtained from recent municipal records. Total energy use and estimated costs for these buildings and related infrastructure is presented in Table 5.

Table 5. Annual Energy Consumption (2012) — Bennington Municipal Buildings and Infrastructure

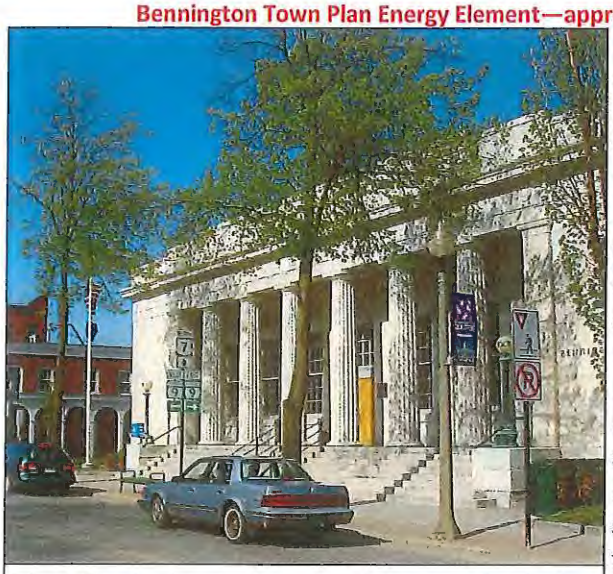
Building	Oil (gallons @$2.50)	Cost	Propane (gallons @ $3.50)	Cost	Electricity (kwH, rate specific to use)	Cost	Total Cost
Fire Station	6,222	$15,555	154	$539	99,624	$13,947	$30,041
BBC/BCIC	1,150	$2,875	-	-	12,432	$1,492	$4,367
Police Station	-	-	18,420	$64,470	212,940	$27,684	$92,154
Recreation Center	-	-	54,000	$189,000	173,400	$36,414	$155,677
Town Offices	2,961	$7,403	<100	-	66,612	$9,651	$17,054
Water Department/ Filtration Plant	8,239**	$20,598	1,196**	$4,186	-	$32,911	$57,695
Water Infrastructure*	-	-	-	-	-	$33,052	$33,053
Wastewater Plant	6,216**	15,540	647**	$2,265	-	$171,671	$189,476
Wastewater Infrastructure *	-	-	-	-	-	$5,705	$5,705
Total	**24,788**	**$61,970**	**54,312**	**$260,460**	**-**	**$332,527**	**$654,957**

* Infrastructure includes facilities such as pumping stations and other equipment that utilize electricity.

** Gallons imputed from cost information obtained from municipal records.

The Bennington Fire Station is a relatively new building, located on River Street. It houses the Bennington Fire Department's vehicles, equipment, and support offices and facilities. A large meeting room on the third floor is used for public meetings by local government and other organizations. Although the largest of the town-owned buildings surveyed, much of the building is not used on a daily basis and it includes a large garage area that is not heated to the level of the rest of the structure. As a consequence, heating fuel use is relatively low, averaging 6,222 gallons of oil per year. Electricity use at the building is significant, although the total cost is below the space heating expense. The monthly average of 8,320 kwH is typically exceeded by 50 percent during summer months (and is generally consistently lower the rest of the year), indicating that air conditioning probably is driving a significant portion of the electricity demand during warm weather. The Fire Station also uses a small amount of propane (approximately 150 gallons per year).

The "Blacksmith Shop" at the corner of South and Elm Streets, is leased to the Bennington Downtown Alliance (BDA). It encompasses 3,600 square feet and includes offices for several people on the first and second floors, a meeting room, and a visitor welcome center/display area. As a renovated



The Police Station must remain active around the clock every day, contributing to a high rate of electricity usage.

historic building with a high heating cost per square foot, it can be assumed that there exist significant opportunities for weatherization. Electricity use for the building averages approximately 1,036 kwH per month.

The Police Department is housed in the historic stone building on South Street that used to serve as a federal building. It includes 10,360 square feet of space, numerous office and meeting rooms, and significantly—from an energy perspective– is occupied twenty-four hours per day. The structure is heated with a propane-fired system that consumes an average of 18,420 gallons of that fuel each year. Although from a cost standpoint, propane use is the most significant at the building, it is the electricity consumption at the building that is most striking. The Police Station uses twice as much electricity per square foot as the Town Office Building and far more than the Blacksmith Shop—attributable, in part, to its non-stop operation, but moisture, especially in the basement, requires constant use of pumps and dehumidifiers. The existing heating and air conditioning systems, and the design of the ductwork, results in further inefficiencies.

The Recreation Center, located on Gage Street, provides residents with access to a fitness center and an indoor swimming pool. The facility uses a considerable amount of propane, with demand highest in the winter months, but substantial year-round. Approximately 54,000 gallons of propane were used in 2012 (Table 5), but installation of two high-efficiency propane boilers and a high-efficiency propane pool heater has reduced propane use to 29,350 gallons.

The Town Office Building, located on South Street, includes the Town Clerk's office and most of the administrative activities that support the full range of services offered by the municipal government. The offices are housed in a renovated historic house—with additions—that occupies 6,214 square feet. Space heating is provided by an oil-fired system that, during the sampling period, used an average of 2,961 gallons of oil per year. Electricity use at the building is fairly consistent year-round, averaging just over 5,000 KwH per month.

The town operates public water supply and wastewater disposal systems that cover defined areas, primarily in the state-designated growth center. This infrastructure is essential to allow the type of concentrated development pattern that is consistent with the Town Plan and which leads to long-term energy savings. Both functions require considerable energy inputs, both to heat buildings and to operate equipment (Table 5). The water system, for example, utilizes numerous pumping stations that require a considerable amount of electrical energy and the wastewater treatment plant uses more electricity than any other municipal facility. As noted earlier, the town has taken steps to limit energy consumption; the hydroelectric generator at the water filtration plant and the decision to compost biosolids at the wastewater treatment plant are two examples. Efficiency Vermont has assigned an energy efficiency expert to work on a range of municipal projects, including planned improvements to the wastewater facilities which are expected to significantly improve overall energy efficiency.

Municipal Vehicles and Equipment

The town operates a sizeable fleet of vehicles and heavy equipment that use gasoline and diesel fuel. Total expenditures on fuel in a recent 12-month period were over $200,000 (Table 6), and with

rising costs that number can be expected to increase significantly in the current and ensuing years. Several municipal departments (Fire, Recreation, Senior Center, Planning and Code Enforcement), use relatively little fuel for transportation and to operate their equipment, but others (Police, Highway, Water, and Wastewater) depend heavily on those fuels to accomplish their work.

Table 6. Fuel cost - municipal vehicles and equipment.

Department	Inventory	Annual Fuel Cost
Police	9 vehicles	$54,607
Fire	6 trucks and one sedan	$3,348
Recreation	1 pickup truck and 2 mowers	$3,350
Senior Center	2 vans	$2,904
Highway	10 dump trucks, 9 pickup trucks 16 pieces heavy equipment	$113,291
Water	6 pickup trucks, 1 dump truck, 2 pieces heavy equipment	$16,293
Wastewater	4 pickup trucks 5 pieces heavy equipment	$9,194
Planning and Code Enforcement	1 sedan	$547
Total		**$203,534**

The Bennington Police Department has specific requirements for the types of vehicles it operates. The department has indicated a preference for SUVs because of their capacity and greater durability; use of hybrid SUVs and battery systems that allow for reduced idling might achieve significant fuel savings. Some limited patrols also are conducted on foot. The Highway Department, with its dump trucks, pickup trucks, and array of heavy equipment is the largest user of transportation fuel in the local government. Consequently, its costs will rise more rapidly than any other department as gasoline and diesel fuel costs increase. The Water and Wastewater Departments also rely on vehicles and heavy equipment, together spending over $25,000 per year on transportation fuels.

Streetlighting

The town recently took advantage of a program coordinated by Efficiency Vermont whereby it replaced all of its old (mostly 150W high pressure sodium) streetlights with new energy efficient LED streetlights (the town also has identified 12 streetlights that are not necessary and which were removed altogether). The new LED streetlights are much more energy efficient, with 52W units replacing the old 150W high pressure sodium units. The light from the LED units also is much more "natural" and is distributed evenly, with very little wasted light or areas of overlapping illumination between adjacent lights. This streetlight replacement program has reduced electricity

New LED streetlights like this one have been installed throughout the town, saving energy, and saving the town about $30,000 per year.

use by approximately 50% while saving the town over 20% on its streetlighting bill. The electric distribution company, Green Mountain Power, also benefits because it achieves comparable savings on the amount of electricity it must purchase.

Public Schools

The Bennington School District maintains three public elementary schools in town and the Mount Anthony Union District maintains the local public middle school and high school. The schools are of varying age and the relative energy efficiency of each is partially attributable to the original design and construction of the buildings (Table 7). Each of the schools has participated in at least one Efficiency Vermont and/or Vermont School Energy Management Program review, and a number of efficiency improvements have been implemented in the past, with major improvement projects being completed at the three elementary schools this year (summer of 2017). The transportation section of this plan considers the energy and health related benefits of walking, bicycling, carpooling, and use of school buses rather than personal vehicles.

Table 7. Recent annual energy use at Bennington's public schools (prior to current efficiency upgrades).

School	Oil (gallons)	Oil Cost	Woodchips (Tons)	Woodchip Cost	Electricity (KWH)	Electricity Cost	Propane (gallons)	Propane Cost	Total Cost
Bennington Elementary	21,000	$67,059	-	-	180,000	$35,302	-	-	$102,361
Molly Stark	14,000	$54,238	-	-	380,000	$59,911	-	-	$114,149
Monument	9,000	$29,250	-	-	120,000	$19,429	-	-	$48,679
MAUMS	13,000	$43,137	810	$52,555	958,000	$114,476	3,500	$5,100	$215,268
MAUHS	20,000	$76,590	1,100	$65,924	1,600,000	$185,686	6,900	$11,843	$340,043
Total	**77,000**	**$270,274**	**1,910**	**$118,479**	**3,118,120**	**$414,804**	**10,400**	**$16,943**	**$820,500**

Notes
Square feet of floor space in each school: Bennington Elementary—41,200; Molly Stark—52,000; Monument—24,000; MAUMS—150,000; MAUHS 225,000.
Fuel and electricity consumption data obtained from the facilities director for each school district; in some cases consumption was averaged over more than one year. Cost data was obtained from annual reports using actual expenses.

One of the most obvious differences between the schools has been the cost of heating the buildings. The three elementary schools are older than the middle school and high school, and the elementary schools have relied solely on oil for space heating. The secondary schools, on the other hand, each derive a significant portion of their heat from wood chip (biomass) based boilers that greatly reduce the utilization of more expensive heating oil. Annual heating costs at both the middle school and high school average approximately $0.63 per square foot, while annual heating costs at the elementary schools have ranged from $1.04 per square foot at Molly Stark to $1.63 per square foot at Bennington Elementary.

All of the schools have benefited from some lighting system upgrades, with older interior fluorescent lights being replaced with energy-saving T-5 and T-8 lights, and inefficient exterior floodlights replaced with highly efficient LED lights. Estimated energy savings from these upgrades amounted to 153,000 KWH, and $25,000, annually between the three elementary schools and an additional

EXHIBIT 14

Group by Municipality | All Documents | Plans & Bylaws home view | ... | Find a file

Name	Adoption Date	RPC	Date of Public Hearing	Number of Likes
Municipality : (4)				
Municipality : ADDISON (2)				
Municipality : ALBANY (1)				
Municipality : ALBURGH (4)				
Municipality : ANDOVER (6)				
Municipality : ARLINGTON (7)				
Municipality : ATHENS (2)				
Municipality : BAKERSFIELD (6)				
Municipality : BALTIMORE (5)				
Municipality : BARNARD (6)				
Municipality : BARNET (9)				
Municipality : BARRE CITY (9)				
Municipality : BARRE TOWN (11)				
Municipality : BARTON (3)				
Municipality : BELVIDERE (4)				
Municipality : BENNINGTON (22)				
Bennington_Adopted_(LandUse and Development)Bylaw_February_2004	2/23/2004	BCRC		Like
Bennington_Adopted_LandUseMap_June_2022	5/23/2022	BCRC		Like
Bennington_Adopted_MunicipalPlan_June_2024	6/24/2024	BCRC		Like
Bennington_Adopted_MunicipalPlan_October_2010	10/11/2010	BCRC		Like
Bennington_Adopted_MunicipalPlan_October_2015	10/6/2015	BCRC		Like
Bennington_Adopted_SolarScreeningOrdinance_November_2015	11/9/2015	BCRC		Like
Bennington_Adopted_ZoningBylawAmendments_June_2024	6/24/2024	BCRC		Like
Bennington_AdoptedAmendment_Energy_MunicipalPlan_February_2018	1/2/2018	BCRC		Like
Bennington_Proposed_LandUseDevelopmentRegulations_March_2024		BCRC	3/28/2024	Like
Bennington_Proposed_MunicipalPlan_April_2015		BCRC	5/4/2015	Like
Bennington_ProposedAmendents_LUDR_January_2021		BCRC	2/18/2021	Like
Bennington_ProposedAmendment_LandUseDevelopmentRegulations_January_2022		BCRC	3/3/2022	Like
Bennington_ProposedAmendment_MunicipalPlan_August_2017		BCRC		Like
Bennington_ProposedAmendment_MunicipalPlan_January_2016		BCRC	2/15/2016	Like
Bennington_ProposedAmendmentNotice_MunicipalPlan_August_2017		BCRC		Like
Bennington_ProposedAmendments_LandUseandDevelopmentRegulations_January_2016		BCRC	2/1/2016	Like
Bennington_ProposedLUDR _April8_2013		BCRC	4/8/2013	Like
NorthBennington_Proposed_MunicipalPlan_September_2018		BCRC	10/23/2018	Like
NorthBennington_ProposedAmendments_ZoningBylaw_April_2025		BCRC	4/16/2025	Like

OldBenningtonVillage_ProposedAmendment_ZoningBylaw_April_2014	BCRC	4/24/2014	Like
OldBenningtonVillage_ProposedAmendment_ZoningBylaw_November_2019	BCRC	12/12/2019	Like
VillageNorthBennington_ProposedAmendments_MunicipalPlan_April_2025	BCRC	4/16/2025	Like

Municipality : BENSON (7)

Municipality : BERKSHIRE (7)

Municipality : BERLIN (16)

Municipality : BETHEL (8)

Municipality : BOLTON (12)

Municipality : BRADFORD (8)

Municipality : BRAINTREE (6)

Municipality : BRANDON (20)

Municipality : BRATTLEBORO (10)

Municipality : BRIDGEWATER (4)

Municipality : BRIDPORT (1)

Municipality : BRIGHTON (7)

Municipality : BRISTOL (5)

Municipality : BROOKFIELD (4)

Municipality : BROOKLINE (3)

Municipality : BROWNINGTON (4)

Municipality : BRUNSWICK (2)

Municipality : BUELS GORE (2)

Municipality : BURKE (8)

Municipality : BURLINGTON (54)

Municipality : CABOT (6)

Municipality : CALAIS (14)

Municipality : CAMBRIDGE (9)

Municipality : CANAAN (5)

Municipality : CASTLETON (14)

Municipality : CAVENDISH (5)

Municipality : CHARLESTON (2)

Municipality : CHARLOTTE (14)

Municipality : CHELSEA (10)

EXHIBIT 15

RESOLUTION FOR VCDP GRANT APPLICATION AUTHORITY

Single Applicant

WHEREAS, the Town of Bennington (hereinafter "Applicant") is applying for a Grant under the Vermont Community Development Program VCDP planning grant (PG) for Shires Housing merger; and WHEREAS, it is necessary that an application be made and agreements be entered into with the State of Vermont.

Now, THEREFORE, BE IT RESOLVED as follows:

1. that Applicant possesses the legal authority as defined in the State Act [10 VSA §683(8)] to apply for the grant and to administer the program; and
2. that Applicant apply for a grant under the terms and conditions of said program and agree hereby to enter into Certifications and Assurances there of; and
3. the Applicant has a duly adopted and current Municipal Plan from October 6, 2015 (Date Adopted) and that the project is consistent with said plan; and
4. the Applicant has received documentation from the Regional Planning Commission that the project is consistent with the "Regional Plan; and
5. that Shannon Barsotti is hereby authorized to be Contact Person and as such to provide, on behalf of Applicant, all documents and information necessary for the completion of said application and to provide such coordination as may be necessary for said application; and
6. that (Name) Stuart Hurd Title Bennington Town Manager who is either the Chief Executive Officer (CEO), as defined by 10 VSA §683(8), or is the Town Manager, the City Manager, or the Town Administrator, is hereby designated to serve as the Municipal Authorizing Official (MAO) for the Grants Management On-line System, Intelligrants; and
7. that it is understood that, if the application is funded, the receipt of CDBG funds, as federal funds passed through the State of Vermont, may require that an audit of the Applicant be conducted under the provisions of the Single Audit Act, as amended, and that CDBG funds may be used to fund only a limited portion of the audit cost.

Passed this 26 day of August, 2024.

LEGISLATIVE BODY

Stuart BH
Jason Jr
Edward Woods
[illegible]
Jeanne Carver

The above resolution is a true and correct copy of the resolution as adopted at a meeting of the Legislative Body held on the 26 day of August, 2024 and duly filed in my office.

IN WITNESS WHEREOF, I hereunto set my hand this 26 day of August, 2024

Cassandra Barbeau
Clerk

Cassandra Barbeau
Signature

RESOLUTION FOR VCDP GRANT APPLICATION AUTHORITY

Single Applicant

WHEREAS, the Town of Bennington (hereinafter "Applicant") is applying for a Grant under the Vermont Community Development Program; and
WHEREAS, it is necessary that an application be made and agreements be entered into with the State of Vermont.
Now, THEREFORE, BE IT RESOLVED as follows:

1. that Applicant possesses the legal authority as defined in the State Act [10 VSA §683(8)] to apply for the grant and to administer the program; and
2. that Applicant apply for a grant under the terms and conditions of said program and agree hereby to enter into Certifications and Assurances there of; and
3. the Applicant has a duly adopted and current Municipal Plan Oct. 2015 (Date Adopted) and that the project is consistent with said plan; and
4. the Applicant has received documentation from the Regional Planning Commission that the project is consistent with the "Regional Plan; and
5. that Shannon Barsotti is hereby authorized to be Contact Person and as such to provide, on behalf of Applicant, all documents and information necessary for the completion of said application and to provide such coordination as may be necessary for said application; and
6. that (Name) Stuart Hurd Title Town Manager who is either the Chief Executive Officer (CEO), as defined by 10 VSA §683(8), or is the Town Manager, the City Manager, or the Town Administrator, is hereby designated to serve as the Authorizing Official (AO) for the Grants Management On-line System, Intelligrants; and
7. that it is understood that, if the application is funded, the receipt of VCDP funds, as federal funds passed through the State of Vermont, may require that an audit of the Applicant be conducted under the provisions of the Single Audit Act, as amended, and that VCDP funds may be used to fund only a limited portion of the audit cost.

Passed this 27th day of March, 2023.

LEGISLATIVE BODY

The above resolution is a true and correct copy of the resolution as adopted at a meeting of the Legislative Body held on the 27th day of March, 2023, and duly filed in my office.

IN WITNESS WHEREOF, I hereunto set my hand this 27 day of March, 2023

Kayla M. Thompson, ASST
Clerk

Signature

JS 44 (Rev. 03/24)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

PLH Vineyard Sky LLC and Apple Hill Solar LLC

(b) County of Residence of First Listed Plaintiff Palm Beach, FL
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*

Michael Melone, Allco Renewable Energy, 157 Church St., 19th Fl., New Haven CT 06510

DEFENDANTS

Town of Bennington, Vermont

County of Residence of First Listed Defendant Bennington, VT
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

Merrill Bent, Woolmington, Campbell, Bent, P.C., 4900 Main St., Manchester Ctr., VT 05244 merrill@greenmtlaw.com

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☒ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*

(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☒ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☒ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

INTELLECTUAL PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent - Abbreviated New Drug Application
- ☐ 840 Trademark
- ☐ 880 Defend Trade Secrets Act of 2016

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit (15 USC 1681 or 1692)
- ☐ 485 Telephone Consumer Protection Act
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☒ 290 All Other Real Property

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
28 U.S.C. §§ 2201, 2202

Brief description of cause:
Declaratory Judgment Action concerning expiration of the Bennington Town Plan on October 6, 2023

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE _____ DOCKET NUMBER _____

DATE
May 2, 2025

SIGNATURE OF ATTORNEY OF RECORD
/s/ Michael Melone

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

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