

1 **BENNINGTON SELECT BOARD - EMERGENCY SPECIAL MEETING**

2 **BENNINGTON COLLEGE**

3 **CAPA SYMPOSIUM ROOM**

4 **BENNINGTON, VERMONT 05201**

5 **SEPTEMBER 12, 2018**

6 **MINUTES**

7 **SELECT BOARD MEMBERS PRESENT:** Donald Campbell-Vice Chair; Jim Carroll; Carson Thurber; Jeanne  
8 Conner; Chad Gordon and Jeannie Jenkins.

9 **SELECT BOARD MEMBERS ABSENT:** Thomas Jacobs.

10 **ALSO PRESENT:** Stuart Hurd-Town Manager; Attorney Meryl Bent; Lora Block; Peter Lawrence; Maru Leon;  
11 Joe Schonack; Bill Lyon; Diane Leaser; Libby Harris; Mary Morrissey; Rick Carroll; Joey Kulkin; 5 citizens; CAT-  
12 TV; Jim Therrien-Bennington Banner and Nancy H. Lively-Secretary.

13 **EXECUTIVE SESSION - INTERVIEWS**

14 At 6:00pm, Vice-Chair Donald Campbell called the meeting to order.

15 **1. SETTLEMENT PROPOSAL - CHELSEA AND RELATED PROJECTS**

16 Attorney Meryl Bent stated that she is representing the Town on the Chelsea matter and on  
17 solar litigations for several years. She explained that developers had proposed the Chelsea and Apple  
18 Hill solar projects in 2014. In 2015, the Town submitted a brief stating that the solar project was not in  
19 conformance with the Town Plan, and the Public Utility Commission (PUC) - then known as the Public  
20 Service Board - agreed that the project was in non-compliance. The Chelsea I Project was denied.  
21 Around that same time, the Town Plan was amended to add more stringent requirements for solar  
22 siting's to apply to all future solar projects.

23 In 2017, Chelsea changed their project and filed again for approval. The changes were in a  
24 reduction to the project size, a reduction to the amount of necessary clearing, and the addition of  
25 additional screening measures. The Town assumed that the amended Town Plan would apply to the  
26 project. However, Chelsea filed a petition in March 2018 stating that the 2014 version of Town Plan  
27 should apply. The Technical Hearing Officer and the PUC agreed with Chelsea that the 2014 version  
28 applied. The Town disputed that decision, and lost. The Town was notified of this on August 30, 2018,  
29 and Ms. Bent has been working on it, for the most part, ever since.

30 The PUC is putting substantial weight on the fact that this is a new, reduced project from the  
31 original that was proposed in 2017 and will have less impact on the area. Also, they have stated that  
32 the original decision was based on the information that was available to them at the time, and cannot  
33 be considered when evaluating the new project.

34 Local opposition to the project has been well represented, however, this is not the only  
35 consideration. The Select Board also has to consider the following:

- 36       ➤ What the Town Plan says, how it will be interpreted by the Hearing Officer and the PUC, and to  
37       look carefully at the wording of the recent PUC decisions.  
38       ➤ The use of Town resources, including taxpayer dollars, and the likelihood of success.

39           Ms. Bent stated that a potential Settlement Agreement has been proposed. Within the  
40 Agreement, the litigant is “allowed some modicum of control with the outcome”. If the decision is left  
41 solely to an administrator, there is no control in the outcome. The need for the Emergency Special  
42 Meeting is that there is a hearing on September 20, 2018 that, if the Town decides, will require much  
43 preparation for. Consideration must also be given to the fact that Chelsea may withdraw this  
44 Settlement Agreement at any time if not acted upon.

45           Ms. Bent shared the following options with the Board during an extensive discussion in  
46 Executive Session on Monday, September 10, 2018:

47       *Option #1.* - To request an interlocutory appeal by the Vermont Supreme Court. While waiting for the  
48 decision we would still need to prepare for the hearing. If denied, we would need to prepare for the  
49 hearing with the 2014 Town Plan. If the Town appealed the decision and won, the process would  
50 begin again, and if the Town lost, “game over”.

51       *Option #2.* - Forego requesting an immediate appeal and go directly to the hearing.

52       *Option #3.* - Accepting the Settlement Agreement.

53           Ms. Bent reviewed the following conditions of the Settlement Agreement:

- 54       1. The Town would withdraw its opposition to the Chelsea Project and that the Chelsea Project is  
55 consistent with the Town Plan in effect in 2014. Withdraw as a party to the Apple Hill Proceeding and  
56 not appeal any decision made by the PUC in either the Chelsea or Apple Hill Proceedings.
- 57       2. The Developer will make a payment to the Town in the amount of \$202,250 to reimburse the Town  
58 for legal fees and staff costs.
- 59       3. The Developer and its affiliated entities and the Town will release any claims as of the effective date  
60 of this Settlement Agreement related to either the Chelsea Project or the Apple Hill Project.
- 61       4. The Developer will drop any now pending claims, or any other, new claims concerning the subject  
62 matter of the Lawsuit, in any venue.
- 63       5. The Parties agree in good faith to extend any applicable filing deadlines in the Lawsuit until such  
64 time the Final Report (as defined below) is received.
- 65       6. Within 10 days of the effective date of this Agreement, the Town agrees to withdraw its cross-appeal  
66 in the Lawsuit.
- 67       7. The Developer agrees not to develop 557 Apple Hill Road, Bennington, Vermont (the Apple  
68 Orchard”) into any other use other than its existing use for the life of the Apple Hill and Chelsea  
69 Projects. For the avoidance of doubt, neither PLH nor the Developer shall have any obligation to  
70 maintain the current condition of the Apple Orchard.

71 8. A side issue to allow a reduced setback of 10 feet along the western side of such project subject to  
72 the Town providing the requisite approvals for Carbone Auto Group's plans to expand their parking lot.

73 9. Chelsea agrees to conduct post construction review with all parties of all proposed mitigation  
74 plantings and agrees to add additional plantings on its property to ensure long term screening if, and as  
75 necessary, in accordance with such Mitigation Plan.

76 10. Projects that were previously referred to as Battle Creek #2 and Battle Creek #3 are now referred to  
77 as the Stark and Warner Projects, respectively. As soon as practicable, the Town agrees to provide  
78 Developer with three names of possible aesthetic consultants - from which the Developer agrees to  
79 choose one - to perform a limited aesthetic analysis with respect to the Stark and Warner Projects to  
80 determine if the Stark and/or Warner Projects, are or are not, located on a "Preferred Site" as used on  
81 page 25 of the 2017 Town Plan Energy Amendment. If the determination is 'Yes', then the Town will  
82 not oppose the project(s), the 45-day waiting period is waived, and the Town will issue a letter to the  
83 PUC stating such.

84 11. The Parties agree that the Final Report is a "work for hire" for Developer and that Developer shall  
85 retain all rights therein and have sole discretion as to whether or not to file the Final Report as  
86 evidence in any proceeding in any jurisdiction.

87 12. If the Final Report states that the Stark and Warner Projects are located on a "Preferred Site" as  
88 such term is used on page 25 of the Energy Amendment, then the following shall occur:

89 (i) The Town agrees not to oppose the Stark or Warner Projects as such projects are set forth on  
90 Exhibit A.

91 (ii) The Town agrees to a reduced setback of 10 feet along the western side of the Warner Project.

92 (iii) The Town agrees to a reduced setback of 40 feet from the edge of the traveled roadway (Rice  
93 Lane) on the northern boundary for the Stark Project.

94 (iv) The Developer Entities and the Town finally and forever release and discharge the other of every  
95 kind which may exist as of the effective date of this Settlement Agreement.

96 (v) The Developer Entities agree that other than the Projects, it will not develop any solar facilities  
97 above 150kw on any site within the Town unless on a Preferred Site and specifically approved by the  
98 Town. Any proposed solar facility of the Developer 150kw or under sill still comply with the Town Plan.

99 (vi) Developer will withdraw the Lawsuit with prejudice within 10 days of receipt of such Final Report.

100 13. Each of the Parties warrant that they have the power to enter into this Agreement.

101 14. This Agreement is governed by Vermont law.

102 15. Each Party agrees to deliver any additional agreements as is reasonably required to carry into effect  
103 the purpose of this Agreement.

104 16. This Agreement may be executed in one or more counterparts, each of which shall be deemed an  
105 original and may be executed by a signature page delivered by telecopier or PDF file via email, in which

106 case the party so executing this Agreement shall promptly thereafter deliver its originally executed  
107 page.

108 17. This Agreement may only be amended in writing.

109 18. Any Party hereto may file this Agreement with any agency or court.

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111 ***Carson Thurber moved and Chad Gordon seconded to accept 'Option #3. Accepting the***  
112 ***Settlement Agreement'.***

113 Board discussion ensued:

114 Mr. Carroll: Asked Ms. Bent to elaborate on her comment in Executive Session Option #1, and she  
115 answered that it eliminates the certainty of the Agreement as presented. In response to the Apple  
116 Orchard, the developers have agreed to not develop it but have no obligation to maintain it in its  
117 current condition.

118 Mr. Carroll: If amendments to the Agreement were made this evening, they would have to go back to  
119 the Developer, and Ms. Bent stated that was correct.

120 Mr. Campbell: Stated that his issue has not been about solar or no solar, it has been about screening.  
121 If we find that we need additional screening, how do we get what we need? Ms. Bent answered  
122 "Chelsea agrees to conduct post construction review with all parties of all proposed mitigation  
123 plantings and agrees to add additional plantings on its property to ensure long term screening if, and as  
124 necessary, in accordance with such Mitigation Plan". It is Ms. Bent's opinion that the 'parties' are the  
125 parties to the PUC proceeding but she will get clarification on that. The Mitigation Plan was developed  
126 from the concerns that were expressed in Chelsea I with recommendations from an aesthetic expert.  
127 This is the Mitigation Plan that is before the PUC.

128 Mr. Campbell: Because of all of the litigations that have taken place over the last three years, there is a  
129 35% overall reduction from the original project with 100'-200' of screening where there was none  
130 before. "We have been fighting long and hard, and everything that we have done up to this point is to  
131 try and stop this.

132 Mr. Campbell: On Condition #2 at \$202,250, we can recapture 100% of legal fees of ~\$105,000 and ¾  
133 of Town staff expenses of ~\$127,000.

134 Mr. Campbell: On Condition #10, if the aesthetic expert deems that it is not a Preferred Site, the  
135 decision can be challenged before the PUC. It was written in the 2017 Town Plan that a Preferred Site  
136 was one that was completely screened with natural vegetation.

137 Ms. Jenkins: Many hours have been spent driving around envisioning how the Project will look from  
138 various locations. The Apple Hill community has been the most vocal, however, they have not been  
139 the only contributors. The only screening that there can be from a higher vantage point is distance.

140

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141 Public comments were heard on the conditions as previously numbered:

142 *Condition #1 -*

143 Lora Block: Is concerned that the Town is agreeing that Chelsea is consistent with the 2014 Town Plan  
144 and would like to remove that sentence from the Agreement. She also expressed concern that the  
145 views would be ruined from multiple locations in Town because black plastic is also used as a screening  
146 mechanism in addition to the trees. Ms. Bent responded that the Town would be agreeing that the  
147 solar project - as it has changed - is consistent with the Town Plan that was in effect at that time since  
148 the PUC has determined that the 2017 Town Plan was not in effect at that time.

149 Peter Lawrence: By leaving that in there, the Town is saying that they agree with Chelsea's position and  
150 that gets used against all of the other intervenors. By taking out this clause, the Malone's are still  
151 getting everything they want and it protects other people in the Town.

152 -----

153 *Condition #2 -*

154 Joe Schonack: Had hoped that the Town didn't take the \$200,000 initially because it has a sense of  
155 doing the right thing "and not appearing as prostitutes". "You're right back there, and worse."

156 -----

157 *Condition #3 -*

158 No comments.

159 -----

160 *Condition #4 -*

161 Peter Lawrence: Explain what is before what courts. Ms. Bent stated that there has been some civil  
162 litigation outside the PUC jurisdiction and it was dismissed by the Malone's in favor of filing a suit in  
163 the Environmental Court. The Town filed a motion to dismiss, it was granted, and the Malone's have  
164 filed an appeal of that decision to the Supreme Court. If the aesthetic expert determines that the Stark  
165 and Warner Projects are on Preferred Sites, the appeal will be dropped.

166 Peter Lawrence: The Developer agrees to withdraw its claims for damages against the Town - were  
167 there damages? Ms. Bent cannot answer that as this is in litigation.

168 -----

169 *Condition #5 -*

170 No comments.

171 -----

172 *Condition #6 -*

173 Peter Lawrence: Is that redundant to Condition #4, and Ms. Bent responded no, because the cross-  
174 appeal is only in regard to fees.

175 -----

176 *Condition #7 -*

177 Libby Harris: A former owner of the Apple Orchard, stated that even though this Agreement states they  
178 have no obligation to maintain the current conditions, there are requirements within the Apple Hill  
179 Association that require the properties be taken care of. Since their Mitigation Plan of screening will  
180 not provide screening of the solar project, they would be dollars ahead to just take care of the property  
181 - which they aren't doing now. Ms. Bent added that this Agreement does not trump the Apple Hill  
182 Association agreement, and this provision, only refers to the Apple Orchard, itself, and not to any  
183 Mitigation Plan. Ms. Harris added that destroying the views throughout the Town is far more  
184 important than just the Apple Hill community.

185 Lora Block: Could language be put in the Agreement to require maintaining the current condition of  
186 the Apple Orchard, and Ms. Bent replied that the Town shouldn't be involved with a private property  
187 Association requirements.

188 Bill Lyon: They are members of the Apple Hill Association and must adhere to the Association Bylaws so  
189 why can't there be language in the Agreement for them to do so, and Ms. Bent reiterated that the  
190 Town shouldn't be involved with a private property Association's rules.

191 Peter Lawrence: Stated that Condition #7 is "vague and contradictory" which opens up grounds for  
192 potential litigation.

193 Joe Schonack: Has been mowing the Apple Orchard for three years. The Malone's have put up 'No  
194 Trespassing' signs and approached him as to why he was doing that. Mr. Campbell commented that  
195 you were mowing someone else's property without their permission, and that is trespassing. "If  
196 someone mowed my property without my permission, I would be furious."

197 Diana Leaser: We were offered \$200,000 a few months ago and we shouldn't be pushed around to  
198 make a decision. "They've come to the table before, they will come again." Mr. Campbell added that,  
199 if we had taken the \$200,000 before, "it would have been a bonus". "The \$202,250 doesn't even cover  
200 our expenses at this point." Ms. Leaser stated that is the "cost of doing business", and Mr. Thurber  
201 stated that the Select Board "is tasked by the community to oversee that budget that is for everyone  
202 and not just a few".

203 Maru Leon: Spoke to the fact that the views throughout the community would be ruined.

204 -----

205 *Condition #8 -*

206 No comments.

207 -----

208 *Condition #9 -*

209 Peter Lawrence: Would not agree to this provision as is because it is "meaningless" because there is no  
210 language as to what happens if both parties disagree on what is "necessary".

211 Lora Block: Is concerned that what they will see are "black plastic boxes" and that there should be  
212 language in the Mitigation Plan to address both the trees and the black boxes. Ms. Bent stated that  
213 anything that is not specifically mentioned in the Agreement can be brought up to the PUC after the  
214 Agreement has been signed, and Ms. Block responded that they "pretty much ignore us".

215 -----

216 *Condition #10 -*

217 Rick Carroll: Offered to take the Board for a view of all of the sites, and encouraged them "not to let  
218 the Town Plan down now. It doesn't deserve it."

219 Peter Lawrence: Cannot agree to this without any language in it that addresses what happens if Stark  
220 and/or Warner are not on Preferred Sites.

221 Peter Lawrence: Would also not limit the consultants to aesthetic experts since there are more than  
222 aesthetics when determining a Preferred Site.

223 Lora Block: Why do you need an aesthetic expert to determine if the Town Plan is being followed, and  
224 Mr. Campbell responded that this is a 3<sup>rd</sup> party expert using our criteria for a Preferred Site to  
225 determine if, it is indeed, a Preferred Site. Ms. Bent added that there was some concession on this  
226 during the negotiation of the agreement for an aesthetic expert to make the determination in this  
227 case. "It's not intended to be anything more than a definition of how things are going to proceed."

228 Diana Leaser: It sounds like there are other litigations tied to this besides this one project. Ms. Bent  
229 noted that "it will all come together and the litigation referred to is already before the Supreme  
230 Court". Mr. Campbell added that "the whole Agreement is a negotiated compromise. It is in our best  
231 interest to work as hard as we could to get the best that we could out of a bad situation".

232 Joe Schonack: Doesn't say "people will lie, but will provide a service to their employers". Ms. Jenkins  
233 stated that "the way the business of environmental experts work, is that your work, is your  
234 reputation". "We will put forward people who will render us an honest answer."

235 -----

236 *Condition #11 -*

237 Peter Lawrence: This goes with Condition #10 and is "completely favorable to the Developer and  
238 completely oppressive to everybody else". If the aesthetic expert says these are not Preferred Sites,  
239 the Developer can say that decision can't be discussed. Ms. Bent responded that if they are not on  
240 Preferred Sites, then "you're at square one, which is where you would be anyway".

241 -----

242 *Condition #12 -*

243 Peter Lawrence: Doesn't see why there is any reference to the Stark and Warner Projects if the  
244 Agreement is for the Chelsea and Apple Hill Projects. The Town doesn't get anything back if they're  
245 not Preferred Sites. Mr. Campbell responded that this Agreement "puts them in a box" after these  
246 next two projects.

247 -----  
248 *Condition #13 -*  
249 No comments.  
250 -----  
251 *Condition #14 -*  
252 No comments.  
253 -----  
254 *Condition #15 -*  
255 Mary Morrissey: Asked about the additional agreements, and Ms. Bent replied that this is if there are  
256 other documents necessary to effect the purposes of this Agreement, both parties are required to  
257 provide them.  
258 -----  
259 *Condition #16 -*  
260 No comments.  
261 -----  
262 *Condition #17 -*  
263 No comments.  
264 -----  
265 *Condition #18 -*  
266 No comments.  
267 -----

268 ***At 8:44pm, Carson Thurber moved and Jim Carroll seconded to go into Deliberative Session to***  
269 ***discuss the Settlement Agreement. The motion carried unanimously.***  
270 -----

271 At 9:30pm, the Select Board returned from Deliberative Session back into Open Session.

272 ***At 9:30pm, Carson Thurber moved and Chad Gordon seconded to withdraw the motion to***  
273 ***accept 'Option #3. Accepting the Settlement Agreement'.***

274 ***Carson Thurber moved and Chad Gordon seconded to amend the Settlement Agreement as***  
275 ***follows:***

- 276 • ***Condition #1, Line 7, delete "and the Chelsea Project is consistent with the Town Plan in effect***  
277 ***in 2014"***



- 278 • **Condition #7, Line 4, add "Subject to clarification that this does not waive legal rights of**
- 279 **others."**
- 280 • **Condition #9, Line 6, add "Clarification that the Town will not require dark sheathing on the**
- 281 **fence if other parties choose to waive."**
- 282 • **Condition #10, Line 9, add "A copy of the Final Report will be provided to the Town."**

283 Ms. Bent stated that it is possible that a Settlement Agreement will not be signed with these  
284 changes, however, if these changes are made, the Select Board will sign the amended Settlement  
285 Agreement. The wording above is a sense of the changes but is not the exact language that will appear  
286 in the amended Agreement.

287 In Condition #10, there were no changes to address if the sites are not deemed Preferred Sites  
288 or that the decision is based on aesthetics only. Mr. Campbell stated that, when the Preferred Site  
289 criteria is reviewed, it is clear that the aesthetics expert is the only one that is necessary.

290 ***The motion carried unanimously.***

291 \_\_\_\_\_

292 ***At 9:45pm, Chad Gordon moved and Jim Carroll seconded the adjournment of the meeting.***

293 ***The motion carried unanimously.***

294

295

296 Respectfully submitted,

297 Nancy H. Lively

298 Secretary