

STATE OF VERMONT

VERMONT SUPERIOR COURT
FRANKLIN UNIT

CIVIL DIVISION
DOCKET NO. S508-10 Fc

TOWN OF ST. ALBANS

v.

CITY OF ST. ALBANS

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND FINAL ORDER**

This action for declaratory judgment was tried to the court on July 29, 30 and 31, 2013. The issue(s) for determination are (1) whether a long-simmering, and historically divisive dispute between the Town and City over the latter's provision of water and sewer services to and for the residents of, and properties and businesses located in the former was finally resolved by an agreement adopted jointly by the Town Selectboard and City Council on February 23, 2009; (2) if so, whether that agreement is ambiguous in one (or more) of its most important terms; (3) if so, then what did the parties themselves actually intend by their 2/23/09 agreement; (4) if the essential and controlling terms of that agreement can be determined by the court, then did either party breach, or repudiate the agreement; and (5) if there was a breach by either side, what should be the consequence(s), and/or relief granted by the court.

Based upon the extensive evidence and testimony presented, the court finds that a key component, if not the most critical piece of the 2/13/09 agreement – what were the controlling terms under this agreement for the Town's initial purchase of water and sewer allocations from the City? – was hopelessly, and fatally ambiguous. Moreover, this crucial ambiguity was so fundamental to the agreement that there never was the required meeting of the collective minds of the Town and City, and therefore no enforceable agreement was ever consummated at all. Thus determination of questions 2 and 3, which yields the conclusion that each side's understanding of and intent behind the agreement existed only in parallel universes, necessarily leads to "No" as the answer to question 1.

After years and years of wrangling as well as litigation, and intermittent efforts at settlement, the parties are unfortunately back to "square one". They are no further ahead towards achieving the necessary working arrangement(s), on this and other issues which have long soured relations between the Town and City, and which any reasonably dispassionate outside observer can readily see must, and actually could be resolved if all of the emotional, and historical baggage was only checked at the door. For better or worse, like it or not, the Town and City are now functionally a single economic zone of

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interlocking and symbiotic interests;¹ the sooner that reality becomes the working credo for both political entities (and their respective citizens), the sooner this dispute, and others which have also resulted in acrimonious litigation, can be mutually resolved by the participants themselves, and not by court dictat.

I. Findings of Fact

1. The City owns, and over many years has spent considerable funds on constructing, improving, enlarging, and maintaining both a public water supply system, and public wastewater and sewage treatment facilities. This public infrastructure (not all of which is actually located within the City itself) consists primarily of 2 water treatment plants and 1 wastewater treatment plant; the latter is located on the shore of Lake Champlain, and was originally constructed by the City in the 1930s, and substantially remodeled and expanded in the 1950s, and again in the 1980s. It has thus been enlarged and remodeled several times, with and without the assistance of state and/or federal funds, as well as bonding by the City itself,² to increase capacity as well as most recently to address environmental protection and water pollution concerns.

2. The wastewater treatment plant has a current design, or hydraulic capacity of around 8 million gpd (“gallons per day”); it is currently permitted for treatment and discharge of up to 4 million gpd. Its actual usage currently is still much less than that, around 2.3 million gpd. No EPA or State approvals, or permit amendments are, or would be required for the City to sell the Town (or any other potential user) the 100,000 gpd of wastewater treatment capacity which was the subject of the disputed agreement. The City Manager believes the FMV, and/or “replacement cost” of the wastewater treatment plant is as much as \$50 million today.

¹ Instead, both sides seem to view the relationship as essentially parasitic, not symbiotic, but there is mutual disagreement (and years of mistrust and suspicion) over which is the host organism. The most fundamental source of this historic distrust is the fact that most of the more recent commercial development in the area has occurred in the Town, while the City’s commercial and business infrastructure (i.e., its tax base) has generally not kept pace. It is also recognized that the City’s population is slowly declining. One obvious manifestation of this reality, and an issue that is repeatedly front and center, is that the City most recently had a non-school tax rate of around 80 cents per \$1000, while the Town rate was only about 33 cents. Many City residents, including the City’s appointed and elected officials involved here, apparently believe the Town’s growth is largely possible only because of the water and sewer services created, maintained, and ultimately provided by the City, especially because (at least as perceived) there is relatively little on-site sewage disposal capacity in the Town.

² The original construction, and then alterations in the 1950s were all accomplished by the City alone, without any state, federal, or Town funds. In the 1980s there were more changes to the sewage treatment plant to address pollution issues as well as to increase capacity again; this time, some \$14 million in federal grants were used, with an additional \$4 million in bonds approved by City voters. Those bonds have already been paid off and retired by the City. An additional bond of \$1 million for dam stabilization and upgrade work at the water supply reservoirs was also recently approved by City voters alone. The City is anticipating going to the voters in the near future to approve a new series of bonds, projected at up to \$15 million, for further upgrades and other maintenance for the wastewater treatment plant.

3. The City's water supply comes from 2 sources, a series of linked reservoirs located somewhat uphill from the City, in Fairfax and/or Fairfield, and from Lake Champlain itself. There are no real permit limitations on water withdrawal from Lake Champlain, and the reservoirs are solely owned by the City. The only limitation on water supply, beyond the availability of the water itself, is the ability to properly treat it in accordance with all applicable health standards. The combined output of the two water supply plants is currently around 2 million gpd.³

4. Since approximately 2001, there has been an informal agreement, or understanding between the City and Town for up to 100,000 gpd of water supply and sewage treatment capacity to be sold to residents, and primarily businesses and other commercial ventures located in the "North End" of the Town along U.S. Route 7. Although the Town apparently adopted a specific ordinance to define a "St. Albans Town Sewer District" and to control the process of how end users would apply for and receive individual water and sewage treatment capacity allocations, there does not appear to be any specific, written agreement between the City and the Town which governs this so-called "North End" arrangement. Nonetheless, it appears to be agreed, and understood that it involves a "reservation" of up to 100,000 gpd each of wastewater treatment and water supply capacity, which can then be re-allocated, and sold to individual end users "as needed," with payment due (i.e., the initial access, or "hook-up fee") only at the time the connection is made to the system(s) and the water and sewage services actually begin to be utilized. Under this arrangement, the City has to date sold a substantial quantity of water and wastewater treatment capacity to Town residents and businesses; it is unclear whether the amount is 75,000 gpd or 25,000 gpd, but not material here.

5. The City imposes, and collects a "surcharge" of 12% on all Town users of its sewage treatment and water supply facilities for the regular operational costs and usage fees; Town residents and businesses thus pay more for identical services, on a gallons-per-day basis, than do City residents. This surcharge is worth about \$225,000 in additional operating revenue annually to the City, given approximately 1300 customers (out of about 4000 total) who reside, or have property using the system in the Town.

6. This surcharge difference in payment rates, plus other historical complaints and other issues, led the Town to sue the City in 2006, alleging *inter alia* that the City was discriminating against the Town and its residents, and violating various State and federal restrictions and other legal provisions. *See Town of St. Albans, et al. v. City of St. Albans*, Dkt. No. S356-06 Fc. This action included but was not limited to allegations that the substantial federal financial assistance received by the City for the most recent prior improvements to the wastewater treatment plant was predicated upon a recognition, at least (allegedly) by the State and EPA, that the sewage treatment plant was to be viewed, and operated as a "regional resource." The Town sought various relief, including a declaration voiding the 12% surcharge, awarding a "refund" of amounts "illegally paid," and an injunction against the City "interfering" in the Town's management of allocated water and sewer treatment capacity.

³ Obviously, the wastewater treatment plant is discharging around 300,000 gpd more than the City's water supply system provides. The difference is most likely from users who obtain their water elsewhere, e.g., from on-site drilled wells.

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7. After more than 2 years of litigation in that 2006 case, the court persuaded the parties to explore some type of negotiated resolution. For reasons not material here, and thus not explored in the evidence or testimony presented in this case, a joint *ad hoc* committee of Town and City officials and interested citizens concluded that creation of a joint water-sewer district between the Town and City was not “feasible.” During the latter part of 2008, and then into early 2009 the committee began to discuss instead the concept of a long-term supply agreement. The seeds for ultimate non-agreement appear to have been planted from the outset even as part of that endeavor; the Town representatives on the committee were essentially expecting any such agreement to be modeled on the “North End” arrangement and understanding already in place, and the City representatives anticipated that the Town would be making a substantial commitment to, and “investment” in the water and sewer supply systems by paying for a large allocation of water and sewer capacity “up front.”

8. There were multiple meetings in late 2008 and early 2009 of what became a “settlement agreement” drafting committee. There was really no designated chair of this *ad hoc* committee, but the City Manager, Dominic Cloud, became the primary note-taker and scrivener for the agreement being drawn up. Cloud, apparently with a consensus of the committee, wanted to keep the agreement “simple” and “in plain English” so that Town and City residents could “understand it themselves,” and not “all lawyered up.” Accordingly, the attorneys for both the Town and the City were essentially kept out of the loop, and not consulted directly as the committee did its work, although their review of the final work product was anticipated. Cloud had never really worked on, or drawn up a settlement agreement like the one being contemplated, or any wastewater treatment and/or water supply agreement between municipal entities.

9. The *ad hoc* negotiating committee met approximately 10 (possibly more) times; not all of the negotiating representatives were always present at all meetings. Each time Cloud would present his most recent draft of a proposed settlement, and “supply” agreement between the Town and City; there were eventually 11 drafts. By late February 2009, there was consensus and agreement on several key points, including further study work on various City and/or Town ordinance amendments which would lead to eventual elimination of the 12% surcharge paid by Town residents receiving sewage treatment and water from the City’s systems, by requiring the City to establish “rates and fees” which would be “reasonable, uniform and fair.”⁴

10. Any supply agreement between the City and Town, and any resolution of the 2006 litigation, would have to be approved and adopted by both the City Council and

⁴ In this action, the parties have stipulated that this terminology in the subject agreement “was intended to mean that rates and fees for service to properties located in the Town would be the same as rates and fees for service to properties located in the City.” See Stipulation, ¶ 3 (filed May 7, 2013). The parties did not agree on “the timing of the rate and fee equalization,” *id.*, and as part of this litigation had asked the court to determine what was meant by other sections of the subject agreement which mentioned that latter issue in terms of “implementation” of the agreement under Article J(1), see Stipulation, ¶s 3, 6(c), (d). Because the court concludes there was no enforceable agreement at all, that latter timing issue is neither addressed nor resolved here.

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mayor for the City, and by the St. Albans Town Selectboard. The penultimate draft of the proposed agreement by the *ad hoc* drafting committee, as of early in the day on February 23, 2009 – a joint session of both the City Council and Selectboard had already been scheduled for that evening – at that point included the following language as Article B(1): “The City hereby grants a wastewater allocation of 100,000 gallons per day (GPD) and a water allocation of 100,000 gallons per day (GPD) to the Town to allocate within its borders.”

11. Article B(4) of the proposed agreement also provided that the allocation referenced in Article B(1) “shall be in addition to the previous allocation granted to the Town in connection with the St. Albans Town Sewer District,” i.e., the existing so-called “North End” arrangement. Article B(4) further stated: “The remaining capacity of the St. Albans Town Sewer District shall be allocated under the same principles as this agreement” Read together, these provisions were at least suggestive of some sort of equivalence between the existing arrangement for the “North End” water and sewer allotments, and the additional capacity being sold to the Town under the proposed agreement.

12. Article C(1) of the proposed agreement would have required the Town “to pay the City for the allocation referenced in Article B. Payment shall be due 60 days from granting of the allocation unless otherwise agreed to by the parties.” Read literally, Articles B and C would seem to suggest that the “allocation” of 100,000 gpd of both wastewater treatment and water supply capacity was “granted” upon execution of the agreement itself, and thus the payment required by the City under Article C(1) would have been due 60 days after execution of the agreement. However, any clarity on this point was then muddled, and made ambiguous by Article J(1), which provided as follows: “This agreement shall become effective at the time of signature and shall be implemented at a mutually agreed upon time, but no later than July 1, 2010, unless mutually extended or shortened”.⁵ The parties appear to have mutually accepted, and later acted (*see below*) in accordance with a mutual understanding that a payment deadline of no later than July 1, 2010 was imposed by these terms.

13. Article C(1) also provided that the “[p]ayment” by the Town to the City for the sewer and water allocations would be in accordance with, and calculated using the City’s “Water and Wastewater Rate and Fees Summary at the time the allocation is granted.” Again, this provision is ambiguous in that the timing of the “grant,” and thus the time for calculation of the payment amount, would appear to be as of when the agreement was executed, but the parties appear to have understood this term to have been the same as a delayed payment deadline of no later than July 1, 2010. There is no dispute, however, that the amount due from the Town to the City if there was a requirement that the Town purchase all 100,000 gpd up front of both wastewater treatment and water supply capacity, would have been approximately \$1.1 million.⁶

⁵ What else was to be “implemented” under the agreement, and when, are issues this court will not be deciding in this case, *see fn. 4 supra*.

⁶ The parties have also stipulated that the City’s fee structure in effect throughout the entire relevant period, including the point at which the Town eventually attempted to purchase at least some sewage

14. All representatives to the *ad hoc* negotiating committee, as well as other Town and City officials, essentially understood, and accepted that the proposed agreement, as drafted as of the morning of 2/23/09, would have required the Town to make an up-front purchase of all 100,000 gpd of both water supply and wastewater treatment capacity no later than July 1, 2010, at a total cost to the Town of \$1.1 million. The City essentially expected that the Town would bond for this entire amount, perhaps reduced to some extent by substantial “up front” capacity purchases by real estate developers or other proposed commercial users in the Town, and the Town would recover its expenses under Article C(2), which provided that the “Town may recover these costs when assigning the allocation to a specific property and a specific use and may charge whatever additional costs or grant whatever reductions the Town deems appropriate.”⁷

15. The significant up-front allocation purchase requirement at \$1.1 million was a source of much consternation among the Town officials, even as the proposed agreement was being finalized by the *ad hoc* committee, and subject to various degrees of criticism from Town residents and others who routinely followed these issues and were active, and/or vocal enough to show up at Town Selectboard meetings held prior to the joint session with the City Council on 2/23/09, or otherwise make their views known. (Whether this sentiment actually reflected the prevailing view in the Town as a whole is unknown, and probably unknowable.) There continued to be substantial discussion within the Town that any long-term supply agreement with the City had to be based on a “pay as you go” approach. It was thus apparent to officials and representatives of both the Town and the City going into the scheduled joint meeting of both boards on the evening of 2/23/09, that the Town Selectboard was unlikely to vote in favor of and adopt the proposed agreement as drafted by the *ad hoc* committee, so long as it still required the up-front purchase of all 100,000 gpd of both sewage treatment and water supply capacity, at a cost of \$1.1 million.

16. At some point during the day on February 23, 2009, prior to the scheduled joint meeting of the two boards, City Manager Cloud in a telephone conversation with the City’s attorney suggested the addition of the words “up to” in Article B(1) of the proposed agreement, to be inserted twice in between “of” and “100,000 gpd”. In Cloud’s opinion this was just a “technical correction” which would “better reflect the intentions of the parties.” Cloud understood, and accepted that the addition of this “up to” language would mean the Town could purchase “something less” than 100,000 gpd each

treatment and water supply capacity, *see* below, essentially provided that each “equivalent unit” (“EU”) of wastewater treatment and water supply capacity for 1 “standard” (i.e., 3-bedroom) single-family residence – 450 gpd each – would cost \$3000 for each EU of wastewater treatment and \$2000 for each EU of water supply as the “hook-up fee,” or a total of \$5,000. Thus the 100,000 gpd allocation would effectively give the Town 222.22 EUs each of wastewater treatment and water supply capacity; at a cost of \$5000 for one EU of each, the total price for the entire up-front allocations purchase would have been \$1.1 million.

⁷ Another long-standing point of contention, and another allegation in the 2006 lawsuit, was the claim that the City was somehow “interfering” in the Town’s right, and ability to control and assign specific individual allocations to sewer and water capacity to individual users and/or properties in the Town. This was another issue the proposed agreement was intended to clarify, and settle once and for all.

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of sewage and water supply capacity, but he still thought it required a “substantial” up-front purchase by the Town in order to “vest,” or “guarantee” the entire 100,000 gpd allocation of both wastewater treatment and water supply. The City Manager continued to believe that even with this language change the Town was still required to buy “a large chunk” of the 100,000 gpd capacity up-front; he was still hoping to generate an initial payment as close to \$1 million as possible to fund capital repairs and improvements for the sewage treatment plant.⁸ Cloud did not intend the change he had suggested to mean the Town could buy sewage treatment and water supply incrementally, on an “installment” or “as needed” basis up to 100,000 gpd each.

17. The attorney for the City communicated this suggested change in the language of Article B(1) – i.e., to add the words “up to” twice in that clause in the agreement – to the Town’s attorney. There is no real evidence of what the attorneys thought, or discussed during this telephone call as to the effect (if any) of this alteration in the agreement’s terms; it is generally denied there was any specific discussion between counsel that this language change would then allow the Town to make multiple incremental purchases of water and sewer capacity, or that it materially altered (i.e., eliminated) the Town’s obligation to make a “substantial” up-front initial purchase.⁹ The addition of “up to” was, however, apparently approved and inserted into the final draft of the proposed settlement and long-term supply agreement to be presented that evening at the joint meeting of the Town Selectboard and City Council. No other changes were made to the agreement as developed by the *ad hoc* negotiating committee.

18. The scheduled joint meeting of the Town Selectboard and City Council on 2/23/09, which was also an open public meeting, began with the presentation of the final draft of the proposed agreement, and reference to, but little initial explanation of the addition of the “up to” language in Article B(1). Public comment was received, primarily from Town residents in attendance, who again (although relatively small in number) were quite vocal about the Town not committing to any large up-front purchase of sewage treatment and/or water supply capacity which would require the Town to bond for the purchase. The Town Selectboard then voted to go into executive session, and the Selectboard members adjourned to meet privately with the Town’s attorney to discuss the proposed agreement, and the addition of the “up to” language in Article B(1).

19. When the Town Selectboard members returned from their executive session to the public joint meeting, the chair of the Selectboard asked the Town’s attorney to summarize, and repeat the Town’s understanding of the proposed agreement, with the

⁸ That desire to generate significant up-front revenue from the sale of capacity was one reason why City Manager Cloud, and the City representatives on the *ad hoc* negotiating committee resisted the notion that the Town should receive any “discount” for its up-front purchase, and why the final draft of the agreement as presented on 2/23/09 had the purchase price tied to the City’s prevailing rates and fee schedule.

⁹ At trial, the attorney for the City testified that she understood the “basic underlying premise” of the agreement as negotiated by the *ad hoc* committee was that the Town had to make some “large up-front bulk purchase” of water and sewer capacity, and so the actual size and/or timing of that initial purchase – no longer the full 100,000 gpd each, but something less, i.e., “up to” – did not need to be specifically defined in the agreement itself. The logic behind that rationale speaks for itself.

addition of the “up to” language in Article B(1). The Town attorney then explained that in his and the Town’s view, the agreement as amended now gave the Town “the option” at its sole discretion to initially purchase “any amount” of wastewater and water supply capacity, up to the stipulated amount of 100,000 gpd, and that the Town could make “multiple buys” after the initial purchase. As noted above, however, there seemed to be a mutual understanding, which the Town’s attorney did not contradict in his public summary and statements on 9/23/09, that this initial purchase had to be made by/no later than July 1, 2010 in order to “vest,” or “implement” the agreement, and that if no purchase at all was made by that date, the agreement and “option” to purchase water and sewer allocations would expire. There was no express statement, or explanation made on behalf of the Town as to any specific, or particular amount of capacity allocation which needed to be included as part of that initial purchase.

20. Members of the City Council, and the City’s mayor and City Manager who were also in attendance at the public joint meeting, were present when the Town’s attorney delivered his summary of what the Town understood was its purchase obligation(s) under the proposed agreement, as amended by addition of the “up to” language in Article B(1). There were no contrary statements made, or any substantial disagreement expressed by any representative of the City during the joint meeting on 2/23/09.

21. Nonetheless, while essentially remaining silent at the 2/23/09 public meeting, the City’s key representatives – City Manager Cloud (who was the principal draftsman of the agreement and had suggested adding the “up to” language), the City’s mayor (who eventually signed the agreement on behalf of the City), and at least one (or more) of the City Council members who voted to approve and adopt the agreement – all believed, and understood Articles B(1), C(1), and J(1) when read together still required the Town to make a “substantial” up-front purchase of wastewater treatment and water supply capacity by July 1, 2010. Indeed, in the minds of many (if not most) of the City representatives involved in negotiating and then approving the agreement, that “substantial” up-front purchase had to be an allocation of at least 40,000 gpd each of sewer treatment and water supply capacity.¹⁰ However, as noted, that belief, or understanding was never verbally, or publically expressed at the 2/23/09 joint meeting.

22. The City’s belief that a minimum purchase of 40,000 gpd in allocations was required from the Town appears to be based primarily on Article B(3) of the agreement, which provides as follows: “The parties shall monitor usage of the allocation and, at a minimum shall meet to establish the terms and conditions under which additional capacity will be sold when there is less than 40,000 GPD available for either water or wastewater.” This article is unclear and ambiguous. It could mean that negotiations on additional purchases of wastewater treatment and/or water supply capacity by the Town should commence whenever the actually available capacity (e.g., as currently permitted) of the wastewater and/or water supply systems was reduced to 40,000 gpd (or less). Or, it could mean that whenever the Town had purchased at least 60,001 gpd of either water

¹⁰ As discussed *infra*, there does not appear to be any basis for this belief in the actual language of the 2/23/09 agreement, and especially not in Article B(3) itself.

supply or wastewater treatment out of the 100,000 gpd allocation granted by the agreement, then the parties would start discussions about awarding the Town additional allocations. The latter is the most probable, and consistent interpretation of Article B(3).

23. However, there is nothing in any part of the 2/23/09 agreement as a whole, or in the express terms of Article B(3), which lends any support to the City's belief that Article B(3) relates to, or imposed a minimum purchase requirement on the Town to initially buy at least 40,000 gpd in sewer and water supply allocations. Nonetheless, several City representatives, including City Manager Cloud – and even the City's attorneys in their post-trial memorandum – continue to assert that Article B(3) does specifically impose such a minimum purchase requirement of at least 40,000 gpd.

24. The Town, on the other hand, appears to have developed its final understanding that the minimum purchase requirement was one EU each of water supply and wastewater treatment, *see* fn. 6 above, over time following the adoption, and execution of the agreement at the 2/23/09 public meeting and joint session, as is discussed further below. Just as the City never expressed, or clearly declared its understanding on 2/23/09 that a minimum purchase of at least 40,000 gpd of both water supply or wastewater treatment capacity was required up-front by July 1, 2010, the Town never expressed, or made any detailed statement at the 2/23/09 public meeting that “up to 100,000 gpd” actually meant the initial purchase of only one EU each of water supply or wastewater treatment capacity, and then subsequent purchases of any amount(s) thereafter up to 100,000 gpd each.

25. At the public meeting, and joint session on 2/23/09, the Town Selectboard voted 4-1 to approve and adopt the agreement as finally amended, and submitted that evening (i.e., with the addition of “up to” in two places in Article B(1)). The City Council unanimously approved, and adopted the agreement. It was signed and executed that evening by the Chair of the Town Selectboard, and the City's mayor.

26. City Manager Cloud has continued to reiterate, and emphasize that his last-minute suggestion, and the addition of the words “up to” in Article B(1), was “not intended” to change the *ad hoc* negotiating committee's “working premise” that the Town would be required to make “one big initial purchase” up-front, or alter the City's intent that the Town needed to make a “substantial investment” in and/or “substantial commitment” to the wastewater and water supply systems, what he termed a “significant buy-in.” However, there are simply no specific terms actually stated, or included in the 2/23/09 agreement which actually address, or define the size or timing of any particular initial minimum purchase requirement by the Town.

27. Larry Carlson was the Town Selectboard member who voted against approval of the agreement on 2/23/09. He declined to approve the agreement because he felt he did “not have enough information” and the agreement was “clearly lacking” in “necessary detail,” the 100,000 gpd capacity guarantee was more than was necessary because not all of that amount was used yet under the “North End” sewer and water arrangement (which he understood did allow for multiple purchases on a “pay-as-you-go” basis), and because the agreement was “just not clear” in terms of what the Town

was obtaining and most importantly what the Town “was committed to purchase.”¹¹ Carlson recalls there was no statement at the 2/23/09 meeting that the Town was required to make a minimum initial purchase of at least 40,000 gpd each of water supply and wastewater treatment capacity. On the other hand, his view was that addition of the “up to” language in Article B(1) did not really “change anything” from the prior draft, or what the *ad hoc* committee had already negotiated.

28. George (“Ron”) Allard was a Town Selectboard member who voted in favor of adopting the agreement on 2/23/09. He understood that addition of the “up to” language in Article B(1) did substantially change the terms of the agreement, because it meant (to him) there was no minimum purchase requirement at all – he would have been OK with the entire agreement simply expiring as of July 1, 2010, with no purchase of any allocations at all – but the Town could later choose the allocation amount(s) it would purchase, although he was unsure whether the Town could do so in multiple increments. He would not have voted for the agreement on 2/23/09 without the change to Article B(1), because he opposed committing the Town to make any substantial up-front purchase of water supply and wastewater treatment capacity. He also recalls there was no mention on 2/23/09 by any City representative that the Town would be required to make any initial purchase, or that it would have to be “substantial” and certainly not that it had to be at least 40,000 gpd each of water supply and wastewater treatment capacity. Allard considered the 2/23/09 agreement to be “the City’s proposal” and “the City’s contract.”

29. Kathy Middlemiss was the Chair of the Town Selectboard on 2/23/09. She had been contacted earlier that day by the Town’s attorney about the addition of the words “up to” in Article B(1). She was in favor of that change, and viewed it as “an important concession by the City,” because she understood the new wording would relieve the Town from having to purchase the entire 100,000 gpd allocation at once, by July 1, 2010, and that it would now be able to do so in multiple increments. Middlemiss did understand that some initial purchase of allocation capacity would have to be made by July 1, 2010 to prevent the agreement from expiring, but had no understanding as of 2/23/09 that this initial purchase had to be in any particular amount; she essentially agreed with the Town attorney’s publically stated assessment that the amount of the initial purchase was at the Town’s “option.” After the agreement was approved on 2/23/09 by both boards, she signed it on behalf of the Town.

30. William Nihan was another Town Selectboard member who voted in favor of the 2/23/09 agreement; he had also been a member of the *ad hoc* negotiating committee. Nihan was quite confident that a bond vote in the Town to pay for the entire up-front purchase of 100,000 gpd of both water supply and wastewater treatment capacity, at \$1.1 million, would have been defeated. He understood the inclusion of the words “up to” in Article B(1) thus allowed the Town to make an initial allocation purchase of anywhere from 0-100,000 gpd each, and then to make additional purchases

¹¹ Several attendees at the 2/23/09 public meeting, again mostly a few Town residents opposed to the Town making any commitment to a large-scale bulk purchase of water and sewer capacity, emphasized in their comments this same lack of clarity and detail in the proposed agreement.

up to 100,000 gpd in multiple increments.¹² Nihan did not understand Article B(3) to have anything to do with the size of the initial minimum purchase; there had never been any discussion or statement, either during the negotiation process, or at the 2/23/09 public meeting, that a minimum up-front purchase of at least 40,000 gpd of water supply and wastewater treatment capacity was required under the agreement. He does not recall that any City representative had ever said the agreement, as revised on 2/23/09, provided for just a “one-time-only” purchase opportunity, or that any such initial purchase had to be “substantial”; any such interpretation was contrary to his understanding of the agreement he voted to approve.

31. James Gallagher was the final Town Selectboard member who voted in favor of the agreement on 2/23/09. His understanding of the addition of the words “up to” in Article B(1) was that the Town could buy “any amount” of water supply and wastewater treatment capacity “at any time” and could do so in multiple increments. He did not express any view on whether at least some minimum purchase had to be made by July 1, 2010. He understood Article B(3) to mean that the parties would begin negotiations on further allocation purchases after the Town had acquired at least 60,000 gpd of water supply and wastewater treatment capacity; he did not have any understanding that Article B(3) had anything to do with, or imposed an initial minimum purchase obligation of at least 40,000 gpd.

32. City Mayor Martin Manahan – a member and chair of the City Council – testified that his understanding on 2/23/09, and another alternative interpretation of adding the “up to” language in Article B(1), was that it simply “clarified” that the Town would have “flexibility” in how the Town would finance, or pay for the initial up-front purchase of the entire 100,000 gpd, at \$1.1 million, but that the Town was still required to make that purchase all at once (i.e., the entire 100,000 gpd of both water supply and wastewater treatment capacity) by/no later than July 1, 2010, because in his view adding the “up to” language to Article B(1) “had no real effect.”¹³ He held this belief even though he was fully aware of the Town’s reluctance to commit to such a significant bulk

¹² However, Nihan’s statement (echoing others, on both sides) that the addition of the words “up to” in Article B(1) simply “clarified” but did not “materially change” the agreement is inexplicable given the entire history and context. Of course it did, dramatically. Nihan himself recognized (as did Cloud, at least eventually, which is why he probably came up with the language) that without those 2 little words, the Town was obligated to buy the entire 100,000 gpd allocation, and the Town had no likely means to finance such a purchase. City Manager Cloud has also testified (repeatedly) to the same view, that there was no “material change.” Both men are entirely credible on this point, in that their testimony accurately reflects what they really think (and thought at the time), but they are both mistaken, as a matter of law.

¹³ At trial, Mayor Manahan also surmised that maybe adding “up to” in Article B(1) meant the parties would have to go back to the table and renegotiate just how big the initial up-front purchase had to be, i.e., something less than 100,000 gpd. However, he did not hold that view, or have that understanding on 2/23/09, when he voted in favor of approving the agreement. Manahan made some other ambiguous comments (e.g., “whatever capacity you buy” and “whatever is purchased”) at the 2/23/09 hearing which the Town seizes on to show that he actually understood the “up to” language allowed the Town the option to initially purchase any amount. The court finds this was just loose talk by the mayor and his basic understanding, and his intent in voting for the agreement was as stated in ¶s 32-33 above. And even so, those words would not necessarily encompass the additional concept of “multiple incremental purchases” which the Town insists on.

purchase, because of direct conversations he had previously had with Nihan and Allard (members of the Town Selectboard).

33. On the other hand, Mayor Manahan also testified that in the years since 2/23/09 he has come to understand that perhaps the initial up-front purchase by the Town could not be less than 40,000 gpd of water supply and wastewater treatment capacity, without citing any real basis, or grounds for that view of the agreement – i.e., it was maybe “plausible” that Article B(3) imposed a minimum purchase amount of 40,000 gpd, although he did not even consider that possibility on 2/23/09. This subsequent testimony is wholly at odds with his stated understanding that the Town’s initial purchase had to be the entire 100,000 gpd each up-front, which was his belief on 2/23/09 and is why he claims he voted in favor of the agreement.

34. The mayor did not understand that the 2/23/09 agreement simply “reserved” 100,000 gpd each of water supply and wastewater treatment capacity for the Town to purchase, or draw down at its “option,” in multiple incremental allotments; he would not have voted in favor of the agreement if that had been the intent and actual terms of the agreement, even with the “up to” language in Article B(1). Obligating the Town to make a “substantial” up-front purchase of water and sewer capacity was in the mayor’s view (as well as Cloud’s) the necessary *quid pro quo* for the City’s agreement to revise its rates and fee schedule to make them “fair and uniform” and eliminate the 12% surcharge applied to all Town users on the water and sewer systems (worth about \$225,000 a year in extra revenues).¹⁴ Manahan would have voted against the 2/23/09 agreement if it had not imposed (in his view) an initial purchase requirement in some “substantial” amount (again at odds with his stated understanding that it had to be the full 100,000 gpd).

35. Peter Chevalier, a City Councilor who voted to approve the 2/23/09 agreement as finally revised, understood the Town would be required to make an initial up-front purchase of “somewhere in the vicinity of 100,000 gpd” of both sewer and water capacity, even though he does not recall any specific discussion of what adding the “up to” language meant, or whether the Town was in fact obligated to make any minimum up-front purchase at all. He would have voted against approval if the intent and purpose of the agreement was to simply “reserve” 100,000 gpd each for the Town to then purchase, or draw on over time, “as needed.”

36. Scott Corrigan was another City Councilor who voted to adopt the 2/23/09 agreement. However, he has no detailed recollection of even voting in favor of the agreement, let alone any specific discussion or understanding at the time of what adding

¹⁴ The parties all seem to agree, or have understood that Article E would have required the City to eventually eliminate the 12% surcharge on all Town users of the two systems, and set “reasonable, uniform and fair” rates for all users, including all existing Town customers, and not just those utilizing the additional capacity allocations created by the 2/23/09 agreement. Nothing in Article E, or in the rest of the agreement, actually or expressly says that. And, City Manager Cloud dissents from that understanding (although supposedly he just implements policy, not decides it); he personally thinks “reasonable, uniform and fair” does not necessarily mean “equal.” Again, these are all interpretation issues the court does not definitively resolve, because there is no enforceable agreement at all.

the “up to” language in Article B(1) meant. At trial he nonetheless agreed that the agreement, as finally revised and adopted, required the Town to “make, and pay for a substantial up-front bulk purchase” of wastewater treatment and water supply capacity. He also believes that Article B(3) does impose a 40,000 gpd minimum purchase requirement. Corrigan also believes there is “nothing in the agreement” that prohibits the Town from making multiple purchases of water and sewer capacity, “just not 1 EU at a time.” How those various understandings of the agreement follow from its specific terms and actual language was not explained.

37. Jeff Laroe was another City Councilor who voted to adopt the 2/23/09 agreement. At the meeting on 2/23/09 he “wasn’t really paying attention very much because he didn’t want to be there.” He does not recall there ever being any discussion that Article B(3) somehow imposed a minimum initial purchase requirement of at least 40,000 gpd. However, Laroe agreed that adding the words “up to” in Article B(1) did allow the Town to buy anything from “1 to 100,000 gpd,” and he disagreed that Article J(1) actually imposed any deadline on when the Town had to make an allocation purchase to avoid the agreement from expiring entirely.

38. As noted, the Town Selectboard voted 4-1 at the public meeting on 2/23/09 to adopt and approve the proposed agreement. The City Council voted unanimously in favor of the agreement. It was duly signed and executed by the Chair of the Selectboard on behalf of the Town, and by the mayor on behalf of the City. It was then attached to, and made part of a Stipulation of Dismissal which this court entered on May 11, 2009. The Stipulation provided that the Town’s 2006 lawsuit against the City over unfair and discriminatory rates, *inter alia*, was “dismissed with prejudice.”¹⁵ See Dkt. No. S356-06 Fc.

39. After the agreement was approved and the prior lawsuit was concluded, the parties set about attempting to set up another working committee to perform the “implementation” chores contemplated by the agreement, such as devising the various ordinances, and the equalized rate and fee structure which was arguably to go into effect no later than July 1, 2010. That committee had maybe 3 meetings and made some progress, but by late 2009, and certainly early 2010, there continued to be obvious discontent in many Town precincts about the agreement, and it became apparent that the Town had no intention of making any “substantial up-front purchase” of water and sewage treatment capacity, let alone the entire 100,000 gpd of each. At that point it was readily obvious to all that both sides had materially different understandings of, and expectations under the 2/23/09 agreement.

40. By the fall of 2009, the Town had also hired a full-time manager, Christine Murphy, who had acquainted herself with the history of the dispute leading up to the 2/23/09 agreement; she was also involved with the working committee on “implementation.” Murphy became familiar with, and agreed with the Town’s position, and understanding that a “substantial” up-front, or initial purchase of water and sewer

¹⁵ Both the mayor and City Manager Cloud professed to be “not particularly concerned” about the Town’s claims in the prior lawsuit, and disavowed that getting rid of the older case was a motivation for the City to enter into the settlement/long-term supply agreement.

capacity was not required under the 2/23/09 agreement. Discussions ensued between Murphy and Cloud, and among other Town and City representatives, about various alternatives to provide the Town with “some flexibility” to make some sort of up-front capacity/allocation purchase acceptable to both the City and the Town, and avoid the agreement arguably expiring entirely as of July 1, 2010.

41. One proposal was simply to extend the “implementation” and initial allocation purchase date of July 1, 2010 (which the parties agreed was imposed by the 2/23/09 agreement, and acted as if it did), but the Town apparently rejected that idea. Alternatively, the Town proposed that it would spend up to \$100,000 on the initial allocation/capacity purchase, but that first had to be approved by voters (at the upcoming March 2010 Town meeting?). Murphy emphasized such a purchase would be a “good will gesture” and not because the Town believed it was obligated to purchase a sizable amount for its initial allocation commitment. There was no further agreement on any of these proposals over the first several months of 2010, and any work towards the implementation of the other provisions of the 2/23/09 agreement stopped completely.

42. The rates and fees charged to the residents and users in the Town of the City’s sewer and water supply systems have not been equalized, and the Town customers still continue to pay the 12% surcharge.

43. In June 2010 there was a flurry of e-mails and correspondence between Murphy and Cloud reiterating the parties’ respective understandings of the agreement, again suggesting possible alternatives, and finally just posturing “for the record.” After the Selectboard met in executive session, the Town on June 29, 2010 eventually tendered the City a check for \$5000, to purchase 1 EU each of wastewater treatment and water supply capacity. By letter dated June 30, 2010, City Manager Cloud rejected the tender of \$5000 and attempted purchase of 1 EU each of wastewater treatment and water supply capacity, as not in compliance with the 2/23/09 agreement. Cloud also rejected the proposal that the Town’s initial purchase could be \$100,000 worth of capacity. Just to make sure there was no “misunderstanding” Cloud sent Murphy another short note on August 4, 2010, stating the City’s position that Town had breached the 2/23/09 agreement and that it had had expired entirely, and that there had been no extension.

44. This action was filed by the Town in November 2010, after further mediation and/or settlement efforts had failed. In response, the City has apparently imposed a “moratorium” on all new water and sewer hook-ups by Town residents and businesses (although it is not clear if this includes properties covered by the earlier, pre-existing “North End” arrangement).

II. Conclusions of Law

“It is of, course, a basic tenet of the law of contracts that in any agreement . . . the offer and acceptance must be concurrent and there must be mutual manifestations of assent or a ‘meeting of the minds’ on all essential particulars. The parties must agree to

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the same thing in the same sense.” *Evarts v. Forte*, 135 Vt. 306, 309 (1977) (cit. omitted) (emphasis added). “[W]hile a binding agreement need not contain each and every contractual term, it must contain all of the material and essential terms. . . . [I]f an instrument that purports to be a complete contract does not contain, or erroneously contains, the substantial terms of a complete contract, it is ineffective as a legal document’.” *Quenneville v. Buttolph*, 2003 VT 82, ¶ 16, 175 Vt. 444, 452, citing & quoting in part *Evarts v. Forte, supra*, 135 Vt. at 309. “Vagueness, indefiniteness and uncertainty of expression as to any of the essential terms of an agreement have been held to preclude the creation of an enforceable contract.” *Id.*, ¶ 14, 175 Vt. at 452, quoting *Evarts, supra*, 135 Vt. at 310 (emphasis added in *Quenneville*). There must be mutual understanding and acceptance on all material and essential contract terms, and the parties’ intent to be bound must be manifest in the purported agreement to be enforced. *See, e.g., Bixler v. Bullard*, 172 Vt. 53, 58–60 (2001). “It is never enough that the parties think they have made a contract; they must express their subjective intent in a manner that is capable of understanding’.” *Quenneville, supra*, ¶ 15, 175 Vt. at 452, quoting *Evarts, supra*, 135 Vt. at 310.

Here the Town and City officials who drafted, and/or voted for the agreement on 2/23/09 had wildly divergent beliefs, and understandings of what it meant, and what it required. Indeed, it is difficult to find any common denominator among the various representatives who voted in favor of approving the agreement, on most, if not all of the key provisions of the agreement. To be sure, some of that is inherent whenever there is collective decision-making by any deliberative or legislative body, but in this instance the level, and range of differences in understanding as to the core elements of the agreement go well beyond the norm of acceptable variation.

Most critical, however, and ultimately determinative, is the complete and utter absence of any specific terms in the agreement spelling out exactly what the Town’s minimum purchase requirement was, and how much of the 100,000 gpd each of water supply and sewer treatment capacity had to be initially purchased up-front. This was perhaps the most fundamental, and essential term of the proposed long-term supply agreement – at least given the importance of that issue as recognized and repeatedly expressed and discussed by both sides – and it is entirely missing from the agreement. The City’s position that Article B(3), in conjunction with Article B(1), somehow imposed a minimum purchase requirement at the outset of at least 40,000 gpd each of wastewater treatment and water supply capacity, is preposterous. Equally untenable are the mutual assertions that addition of the words “up to” in Article B(1) had “no material effect” on the meaning of the agreement. That change clearly, and substantially altered a fundamental term of the agreement, by converting what was – at least as understood and accepted by both sides – an obligation to buy the entire 100,000 gpd each up-front, to something materially different, with the initial purchase amount wholly at the Town’s option, and discretion.

Even the City’s alternate position, that the Town still had to make at least some “substantial” purchase up-front, finds no support whatsoever in the actual language of the 2/23/09 agreement. Yet that is what all of the City representatives voting for the agreement believed and understood, in some form or another. And the City officials held

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to that understanding even as the agreement itself wholly failed to define, or include any term defining exactly what that “substantial amount” was required to be. Meanwhile, the Town representatives all hewed to the view, which at least is consistent with the actual language of Article B(1) as finally amended, that the Town could purchase any amount, from – as one City Councilor candidly acknowledged – “1 to 100,000 gpd” of water supply and sewer capacity. This was wholly, and entirely a failure of the collective minds of the Town and City to meet, and find mutual acceptance on this key element of the agreement, as well as a failure to include this fundamental, and essential term in their agreement.

The Town of course argues that this should be analyzed instead as a unilateral mistake on the part of the City alone, and that Article B(1) as amended should be specifically enforced against the City. While that approach may have some superficial appeal, there are simply too many other undefined or missing terms, and unanswered questions arising out of this agreement for it to be specifically enforced by the court. The “equitable considerations” to be reviewed by the court include, *inter alia*, the “mutuality, certainty and clarity” of the contract, its “completeness and fairness,” and perhaps most importantly the “capability of proper enforcement by decree” *Kelly v. Lord*, 173 Vt. 21, 40 (2001) (cits. omitted); *Johnson v. Johnson*, 125 Vt. 470, 472-73 (1966). *Cf. also, e.g., Quenneville, supra*, ¶ 18, 175 Vt. at 454 (party requesting specific performance must show “substantial and irretrievable change in position” as one factor in equitable determination whether to enforce agreement) (cit. omitted). Where specific performance is declined because there simply was no mutual assent and an enforceable agreement on all essential and material terms, cancellation of the agreement is appropriate. *Johnson, supra*, 125 Vt. at 474.

Here, suppose the Town was correct in invoking its right to buy just one EU each up-front of wastewater treatment and water supply capacity. What then? The remainder of the agreement does not support the Town’s position that it would thereafter be entitled to make multiple, incremental purchases of sewer and water allocations “forever” until the 100,00 gpd of initial allocations were exhausted. Moreover, there are the additional defects alluded to above, in that the agreement does not really address, or expressly provide that rates were to “equalized” for all Town customers, both existing and future. And, there is also the “timing,” or “implementation” dispute which also adds to the agreement’s obvious lack of clarity and completeness. The court would essentially be left to fashion a decree, and permanent injunction which basically makes a contract for the parties, rather than simply enforcing one which already exists and is sufficiently clear as to all material terms. The court cannot do that, and of course declines to do so.

IT IS SO ORDERED, at St. Albans, Vermont, this _____ day of January, 2014.


Dennis R. Pearson, Superior Judge

Vermont Superior Court

JAN 15 2014

FILED: Franklin Unit

STATE OF VERMONT

VERMONT SUPERIOR COURT
FRANKLIN UNIT

CIVIL DIVISION
DOCKET NO. S508-10 Fc

TOWN OF ST. ALBANS

v.

CITY OF ST. ALBANS

FINAL JUDGMENT

It is hereby declared, and adjudged that the "Agreement On Water and Wastewater Services Between The Town of St. Albans And The City of St. Albans," respectively approved and adopted by the Town of St. Albans Selectboard and the City Council of the City of St. Albans on February 23, 2009, is void and unenforceable, for lack of mutual assent and understanding as to essential and material terms of said agreement.

This action is concluded. Each party shall bear its own costs.

IT IS SO ORDERED, at St. Albans, Vermont, this 15th day of January, 2014.



Dennis R. Pearson, Superior Judge

Vermont Superior Court

JAN 15 2014

FILED: Franklin Unit