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DEPARTMENT OF JUSTICE**

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January 6, 2014

Jane Murray, Secretary
NH Site Evaluation Committee
New Hampshire Department of Environmental Services
29 Hazen Drive
Concord, New Hampshire 03301

Re: Application of Groton Wind, LLC
Docket No. 2010-01

Dear Ms. Murray:

Enclosed please find the original and one copy of Brief of the Department of Safety,
Office of the State Fire Marshal for filing in the above-captioned case.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Mary C. Evans".

Mary C. Evans
Legal Assistant
Transportation & Construction Bureau
(603) 271-3675

mce
Enclosure
cc: Service List (electronic mail only)
987354

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

**APPLICATION OF GROTON WIND, LLC
NO. 2010-01**

**BRIEF OF THE DEPARTMENT OF SAFETY,
OFFICE OF THE STATE FIRE MARSHAL**

NOW COME the State of New Hampshire, Department of Safety, and the Office of the State Fire Marshal (hereinafter referred to together as the "Department") by their attorneys, the Office of the Attorney General, and submit this Brief in response to the Committee's "Procedural Order and Notice of Possible Suspension of Certificate of Site and Facility" dated November 4, 2013. In support thereof, the Department states as follows:

The Order requested the parties to brief two issues:

- 1) Did the Department of Environmental Services (hereinafter referred to as "DES") have the authority to modify the Certificate regarding the placement of the O&M building and the turbines?; and
- 2) Does the Office of the State Fire Marshal have the authority to regulate the project, and does he have the authority to request suspension of the certificate in the manner contained in Inspector Anstey's letter dated August 12, 2013?

With regard to question 1, the Department submits that delegation of the authority to change the terms and conditions of the Certificate is prohibited by RSA 162-H:4, and that no such delegation to DES occurred. The Department further submits that the Applicant's failure to return to the Committee and to seek all necessary reviews and approvals from other agencies

related to the modifications, denied the Department notice that the modifications were contemplated, and the opportunity to review the modifications for compliance with the fire and building codes pursuant to its statutory authority. With regard to question 2, it is the Department's position that the relevant statutes and rules make abundantly clear that the State Fire Marshal (hereinafter referred to as the "Fire Marshal") has the authority to enforce all laws of the state relative to the state fire code and the state building code with regard to this project.

ARGUMENT

I. THE COMMITTEE CANNOT, AND DID NOT, DELEGATE THE AUTHORITY TO MODIFY THE TERMS AND CONDITIONS OF THE CERTIFICATE.

In its brief, the Applicant argues that the incorporation of the DES permits into the Certificate, and the requirement for DES to approve any revisions or changes in the Projects site plans, constitute a delegation of authority to modify the Certificate by the Committee to DES. *See* Groton Wind Brief (hereinafter "GW Br.") at pp. 3-6. However, the language in the Certificate relied upon by the Applicant merely establishes that the Committee required the Applicant to seek review by DES before making any changes implicating the wetland and alteration of terrain permits. The Committee never explicitly attempted to delegate its authority to change the terms and conditions of the *Certificate*. DES approval of wetland and alteration of terrain permits does not constitute authorization to proceed with a project without seeking all other required reviews and permits. In fact, the Applicant concedes that DES was only granted "authority to approve modifications or amendments to [its] permits or certificates." GW Br. at 5. That grant does not explicitly state, nor does it even imply, that DES has the authority to approve modifications or amendments to the *Certificate* issued by the Committee or to review and approve issues that are within the jurisdiction of other state agencies.

The Applicant suggests that review and approval solely by DES was appropriate because they are the "subject matter experts". *See* GW Br. at 6. However, DES cannot be said to be subject matter experts as to all of the modifications, because the modifications at issue had implications that went far beyond the jurisdiction of DES. The modifications involve technical issues falling within the jurisdiction of other state agencies, including the Department of Safety, in addition to serious implications for local residents and communities. Failure to return to the Committee for approval of these changes, or to comply directly in any way with the requirements of other state agencies with regard to the changes, resulted in a lack of notice of the changes to all of these other parties. Of primary importance to the Department of Safety is that the Office of the Fire Marshal was denied the opportunity to review the changes, before they were made, for compliance with the fire code and the building code.

While the question to be briefed asks whether DES has the authority to modify the Certificate, that does not appear to be what actually happened. More likely, the approval by DES of the changes to its permits constituted just that, DES approval of the issues within its jurisdiction. Particularly telling is that DES never suggested that its approval constituted *all* of the approval necessary for the Applicant to proceed. Instead, DES expressly provided that the DES permit "does not relieve the Applicant from the obligations to obtain other local, state or federal permits that may be required..." *See e.g.* AoT Amendment dated Dec. 5, 2011. Thus DES made clear to the Applicant that it must still comply with the requirements of all other agencies and the Committee. The Applicant admits in its brief that an entire building was relocated, that at least two turbines were relocated, and that there were roadway modifications, including the elimination of an access road. These are very substantial changes. The burden was on the Applicant to seek all the necessary related permits and approvals, including approval from

the Committee for modification of anything contained in the Certificate, and the fire marshal for compliance with the fire and building codes, among others. *See e.g.* RSA 162-H:8 ("The applicant shall immediately inform the committee of any substantive modification of its application.") The consequences of the Applicant's failure to do so are of its own making.

The law is crystal clear that the Committee cannot delegate the authority to issue certificates or to determine the terms and conditions of a certificate. RSA 162-H:4, III. Enforcement of the certificate is also strictly reserved for the Committee. *Id.* The substantial changes made by the Applicant constitute changes to the terms and conditions of a certificate that can only be made by the Committee. The Applicant's attempt to construe approval of changes to the wetlands and alteration of terrain permits by DES as approval by the Committee as its designee is merely an attempt to explain away its own failure to meet the requirements of the law.

II. THE STATE FIRE MARSHAL HAS THE AUTHORITY TO ENFORCE ALL LAWS OF THE STATE RELATIVE TO THE FIRE CODE AND THE BUILDING CODE FOR THIS PROJECT.

A. The Authority of the State Fire Marshal is Designated by Statute.

As a preliminary matter, the Department submits that the authority of the State Fire Marshal exists as the result of an express grant from the New Hampshire Legislature and that RSA Chapter 162-H does not authorize the Committee to determine the authority of the Fire Marshal, or to review decisions of the Fire Marshal involving the State Fire Code and, in this case, the State Building Code. *See* RSA Chapter 153 and RSA 155-A:2, 7.

The Committee has no jurisdiction to determine the authority of the Department of Safety and the Office of the Fire Marshal. The Site Evaluation Committee is a body created by the Legislature that has been granted limited jurisdiction. *See* RSA 162-H:4. "...[A] tribunal that

exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation.” *Appeal of Campaign for Ratepayers’ Rights*, 162 N.H. 245, 250 (2011) (internal quotations and citations omitted). Nothing in the Committee's enabling statute reflects an intent on the part of the legislature to grant the Committee jurisdiction to decide the statutory authority of another state agency not represented on the Committee. In addition, the Committee's own administrative rules provide that the committee can only issue declaratory rulings "...on matters within its jurisdiction...". Site 203.01. The authority of the State Fire Marshal is clearly not within the jurisdiction of the Committee. Accordingly, the Committee has no jurisdiction to determine the authority of the State Fire Marshal, and the Department of Safety respectfully requests that the Committee decline to render an opinion on the issue and instead take official notice of the authority of the Fire Marshal as set forth herein.

The Department of Safety submits this brief outlining the authority of the Fire Marshal for the Committee's information only, in the hopes that it will assist the Committee in understanding the authority of the Fire Marshal and the requirements of the Fire and Building Codes, with regard to this Applicant and future Applicants. The Department of Safety does not concede the jurisdiction or authority of the Committee to determine or abrogate the authority of the State Fire Marshal by submission of this brief.

B. The State Fire Marshal Has Explicit Statutory Authority to Regulate the Project.

The authority of the State Fire Marshal exists as the result of an explicit grant by the Legislature. *See* RSA Chapter 153; RSA 155-A:2,7. Pursuant to statute, the powers and duties

of the Fire Marshal are broad and highly technical. *Id.* In this case, the Fire Marshal has extensive authority to regulate the project and enforce the fire code and the building code. *Id.*

1. The State Fire Marshal is Authorized to Enforce All Laws Relative to Fire Protection and Related Matters.

The Fire Marshal "shall be responsible for supervising and enforcing *all* laws of the state relative to the protection of life and property from fire, fire hazards and related matters..." RSA 153:4-a, I. The Fire Code, adopted in RSA 153:1, is one of the many laws of the state relative to the protection of life and property from fire that the Fire Marshal "shall" be responsible for supervising and enforcing. The Fire Code includes the entire NFPA 1, the entire NFPA 101, and any other national code, model code, or standard referenced therein. RSA 153:1. As the authority with explicit jurisdiction to enforce the code, the Fire Marshal is an Authority Having Jurisdiction (hereinafter referred to as "AHJ") pursuant to the code. NFPA 1, 1.3.2.3, 3. The general rule of statutory construction is that use of the word shall "requires mandatory enforcement." *Town of Nottingham v. Harvey*, 120 N.H. 889, 895, 424 A.2d 1125 (1980). As a result, the use of the word shall indicates that the statutory authority of the Fire Marshal to enforce these laws is mandatory and not limited to any particular circumstance or forum. Therefore, the Fire Marshal has authority to enforce all these laws, including the entire Fire Code, irrespective of the existence of any other authority at the local or state level. Moreover, the Fire Marshal is the ultimate authority with regard to the fire code. RSA 155-A:2, X. Accordingly, the Fire Marshal's authority cannot be said to be limited by the existence of the Committee or the local fire chief.

The Legislature made clear that this incredibly broad grant of authority to the Fire Marshal is "necessary for the public safety, health, peace, and welfare" of the people of the State

of New Hampshire. RSA 153:25. To that end, the Legislature required that the statutes establishing the authority of the State Fire Marshal are to be liberally construed. *Id.* The Fire Marshal may render interpretations of the Fire Code and make and enforce rules and regulations in order to carry out the application and intent of its provisions. NFPA 1, Section 1.7.3.1. *Only* the Fire Marshal can approve varying, modifying, or waiving the requirements of the Fire Code. RSA 155-A:2, X. Accordingly, it is not permissible for a Committee, local fire chief, or Applicant, to waive, vary, or ignore the requirements of the statutes contained in RSA Chapter 153, including the authority of the Fire Marshal established therein. RSA 155-A:2, X.

The laws that fall within the authority of the Fire Marshal are vast and highly technical. For example, the New Hampshire Fire Code includes the entire Life Safety Code (otherwise known as NFPA 101) and the Uniform Fire Code NFPA 1(2009), as published by the National Fire Protection Association and as amended by the state board of fire control. RSA 153:1; Safe-C 6000. In addition, "the provisions of any other national code, model code, or standard referred to within a code listed in this definition shall be included in the state fire code unless amended in accordance with RSA 153:5." In recognition of the highly technical nature of the codes and the importance of proper enforcement of them, the Legislature mandated that the state fire marshal be "qualified" and appointed by the governor and council. RSA 153:7.

The stated purpose of the NFPA 1 is "to prescribe *minimum* requirements necessary to establish a reasonable level of fire and life safety and property protection from the hazards created by fire, explosion, and dangerous conditions. *See* NFPA 1, 2009 Ed., Section 1.2. "Fire hazard" means any building, premises, place or thing which, because of its nature, location, occupancy, condition, or use, constitutes an unreasonable danger of loss, damage, or injury to

fire or explosion of any origin. RSA 153:1, V. The code applies to both new and existing conditions. *Id.* at 1.3.

Moreover, every new and existing building or structure shall be constructed, arranged, equipped, maintained, and operated in accordance with the Fire Code. NFPA 1, Section 10.1.1. Of direct significance to the issue of the Fire Marshal's authority to enforce the Building Code, the *Fire Code* specifically requires that all new construction *shall* comply with the building code. *Id.* at Section 10.1.3. The Fire Marshal is explicitly authorized to enforce all provisions of the Fire Code, including Section 10.1.3. To that end, contrary to the Applicant's argument, the Fire Marshal has explicit authority "to require plans and specifications to ensure compliance" with the Fire Code. NFPA 1, Section 1.7.11. When the building code requires a certificate of occupancy, the certificate "shall not be issued" until approved by the Fire Marshal. *Id.* at Section 1.7.13. These are just a few of the many provisions of the Fire Code that the Fire Marshal has the authority to enforce. The state fire marshal "shall discharge all duties and responsibilities as are delegated to the fire marshal by law." RSA 153:7. This provision is mandatory and provides no exception of any kind. Notably, there is no exception for projects that are before the Site Evaluation Committee.

In addition to all of the above authority, the Fire Marshal is also *required* to "[supervise] and [enforce] local laws, bylaws, and ordinances where existent, relative to" the prevention of fires and other fire safety matters, and the installation and maintenance of automatic or other fire alarm systems and *fire extinguishing equipment*, among other things. RSA 153:4-a, I. The Fire Marshal is also responsible for "[coordinating] the activities of his office[,] ... [and assisting] ... the officials responsible ... for the organization and efficient operation of fire departments." RSA 153:4-a, II.

The state fire marshal also has extremely broad enforcement authority. "The state fire marshal...upon complaint or whenever the state fire marshal...shall deem it necessary, may inspect all buildings, excluding single family dwellings and multi-unit dwellings containing 2 units, and premises within their jurisdiction and, if consent for such inspection is denied or unobtainable, may obtain an administrative inspection warrant under RSA 595-B. Whenever any of the said officers shall find any condition that such officer deems to be hazardous to life or property, the officer shall order the hazardous condition to be removed or remedied by written order. If such order requires a structural change or alteration, it shall be approved by the state fire marshal...before it is effective." RSA 153:14, II(a). The state fire marshal may issue citations for violations of fire safety rules under RSA 153. RSA 153:4-a, IV. ***Whenever any work is being done contrary to the provisions of the Fire Code, the Fire Marshal has the authority to order such work stopped.*** NFPA 1, Section 1.7.14.3 (emphasis added). Such work shall immediately stop until authorized to proceed. *Id.*

Given the explicit, mandatory grant of authority by the Legislature to the State Fire Marshal to enforce *all* laws of the state relative to the protection of life and property from fire, fire hazards and related matters...", the answer to the question of whether the Fire Marshal has the authority to enforce them with regard to this project is clearly in the affirmative. RSA 153:4-a, I.

2. The State Fire Marshal is Authorized to Enforce the Building Code in This Case.

While the above-referenced statutes alone are more than enough to establish the Fire Marshal's authority to regulate this project, in this case the Fire Marshal has additional authority to regulate the project pursuant to RSA 155-A:7. The version of RSA 155-A:7, I in effect at the time this project commenced, and at the time the certificate was issued, provided that "The local

enforcement agency appointed pursuant to RSA 674:51 shall have the authority to enforce the provisions of the state building code, *provided, however, that where there is no building inspector, the state fire marshal or the state fire marshal's designee shall have the authority to enforce the provisions of the state building code...*" RSA 155-A:7 (2009). It is undisputed that the location of the project is the Town of Groton and that the Town of Groton had no building inspector at the time the project commenced, nor does it currently have one. As a result, the Fire Marshal had explicit authority to enforce the provisions of the state building code with regard to the project.

The Fire Marshal undertook the role of the building inspector for this project pursuant to RSA 155-A:7 two years before the statute was amended. By letter to the Committee dated October 17, 2010, the Fire Marshal made clear that, in addition to his authority to enforce the fire code, he was invoking this statute and assuming the role of building inspector for this project. As a result, all of the requirements of the building code fell within the authority of the Fire Marshal for this project, and the Applicant was thereafter *required* to submit to the authority of the Fire Marshal for purposes of both the fire code and building code. Instead, the Applicant refused to comply with the lawful requests of the Fire Marshal and employed an apparent strategy of delay and ignorance to avoid compliance with the law. It is incredibly disingenuous to assert several years later that, because the Applicant failed to comply with the requests and requirements of the Fire Marshal in a timely manner, it can avoid compliance altogether. To permit such an approach would be to establish the dangerous precedent that delaying and ignoring the lawful requests of an agency with authority to enforce the law is an effective strategy to avoid compliance with the law in New Hampshire. In any event, the Fire Code

specifically requires that all new construction *shall* comply with the building code and the Fire Marshal is universally authorized to enforce the Fire Code. NFPA1, Section 10.1.3.

In its brief, the Applicant takes the position that, because the Town of Groton does not have a building code enforcement officer, only the local fire chief can enforce the building and fire code. In support of its argument, the Applicant relies on RSA 155-A:7, I (2012). Its reliance is misplaced. First, the version of RSA 155-A:7, I the Applicant points to was not in effect either at the time this project commenced, or at the time the Certificate was issued, which are the relevant time periods for this matter. The Applicant fails to point out that the version of RSA 155-A:7, I applicable at the time authorized the state fire marshal to enforce both the provisions of the state building code and the state fire code *without* a written request from the municipality. RSA 155-A:7, I (2009). Second, neither version of RSA 155-A:7 authorizes the local fire chief to enforce the building code where there is no local enforcement agency, they solely authorize the state fire marshal to do so. As a result, the Applicant's reliance on a letter from the local Fire Chief to establish satisfaction of the requirements related to the fire and building codes is improper. *See* Attachment A to GW Br.

Moreover, the letter states that "There are no occupancy requirements for the Town of Groton, N.H." *Id.* This statement is incorrect. State law, not the local community, establishes the minimum occupancy requirements, and these apply to the Town of Groton and every other city and town in the State of New Hampshire. See e.g. International Building Code ("IBC") (2009) Section 111.1 ("Use and occupancy. No building or structure shall be used or occupied, and no change in the existing occupancy classification of a building or structure or portion thereof shall be made, until the building official has issued a certificate of occupancy therefor as provided

herein. Issuance of a certificate of occupancy shall not be construed as an approval of a violation of the provisions of this code or of other ordinances of the jurisdiction.")

Furthermore, whether or not a local community has a building code inspector has absolutely no bearing on whether construction must comply with the codes. State law is very clear that "***All*** buildings, building components, and structures constructed in New Hampshire shall comply with the ***state building code and state fire code***. The construction, design, structure, maintenance, and use of all buildings or structures to be erected and the alteration, renovation, rehabilitation, repair, removal, or demolition of all buildings and structures previously erected *shall* be governed by the provisions of the state building code." See RSA 155-A:2, I (emphasis added). As a result, the Applicant is required by State law to comply with all of the requirements in the codes regardless of whether there is a building inspector in the local community.

3. The Existence of the Site Evaluation Committee Does Not Effect the Fire Marshal's Authority.

The Applicant claims that the authority of the Fire Marshal is eliminated by the existence of the Committee. GW Br. at 9. The Applicant's position is erroneous and unsupported by the law.

a. *The Fire Marshal Did Not, and Cannot, Waive its Authority.*

First, the Applicant essentially argues that the Office of the Fire Marshal waived its regulatory and enforcement authority by failing to respond to the written notice provided by the Committee to the Department of Safety. By way of background, RSA 162-H:7, IV requires each application to contain "sufficient information to satisfy the application requirements of each state agency having jurisdiction, under state or federal law, to regulate *any aspect* of the construction or operation of the proposed facility, and shall include each agency's completed application forms. Upon filing of an application, the committee shall expeditiously forward a copy to the

state agencies having jurisdiction." RSA 162-H:7, IV. The Applicant relies on this provision to support its claim that the Office of the Fire Marshal waived its authority. However, what the Applicant neglects to point out is that it is the *Applicant* who failed to identify the Office of the Fire Marshal in the Application and who failed to include a completed agency application form ("plans review form") as required by the statute.

The Applicant claims that it satisfied the requirement by including a reference to the Department of Safety on the application. However, a review of the application reveals that the Applicant identified the sole basis for the Department's jurisdiction as a "blasting permit". Nowhere in the Application did the Applicant ever identify the jurisdiction of the Office of the Fire Marshal, nor did it contain "sufficient information to satisfy the application requirements" of the Office of the Fire Marshal. As a result, the Application did not meet the requirements of the statute. RSA 162-H:7, IV. Because it was the Applicant who failed to notify the Committee and the Department of Safety of any additional basis for jurisdiction beyond the blasting permit, responsibility for this omission falls solely on the Applicant, not the Department, as the Applicant claims. The Committee simply relied on the Applicant's representations as to the state agencies with jurisdiction to regulate any aspect of the project. The failure to provide adequate notice to the Department of Safety of the issues in the Application within its jurisdiction constitutes yet another violation of the statute by the Applicant. If the Applicant's argument was accepted, it would set a very undesirable precedent that an Applicant can avoid review by, and the requirements of the law within the jurisdiction of, a particular state agency simply by failing to identify the agency or the basis for jurisdiction in the Application.

The Applicant's assertion that it did not have to separately apply to the Fire Marshal because of its application to the Site Evaluation Committee is flawed for the very same reason.

In this case, the application to the Site Evaluation Committee was insufficient and not in compliance with the requirements of the law.

- b. *The Fire Marshal Retains All of His Authority Notwithstanding the Existence of the Committee.*

It is clear that the statutory authority of the Fire Marshal, which is a state agency with jurisdiction under state law to regulate an aspect of the construction or operation of the facility pursuant to RSA 162-H:7, IV, is not eliminated by the existence of the Committee as the Applicant argues. The Applicant's argument that the Fire Marshal's authority is entirely eliminated as a result of the creation of the Committee is unsupported by the Committee's enabling statute which explicitly provides that, "Notwithstanding any other provision of this chapter, each of the other state agencies having jurisdiction *shall retain all of its powers and duties of enforcement.*" The relevant statutes make clear that the authority of the Fire Marshal and of the Committee should be construed as unique and able to coexist. Neither the Office of the Fire Marshal, nor the Department of Safety, are on the Site Evaluation Committee. Moreover, while the committee is comprised of individuals with significant knowledge and expertise, no one on the Committee can be said to be "qualified" to enforce the technical fire and building codes as required by statute. *Id.* As set forth herein above, the Legislature has expressly authorized the Fire Marshal to enforce the referenced laws and codes. The Office of the State Fire Marshal does not need additional authorization from the Committee to do what it is expressly authorized by statute to do. At the same time, the Committee has authority related to the fire, safety, and building codes in this case because it conditioned the Certificate on

compliance with the codes. As a result, the Committee can revoke or suspend the Certificate based upon a failure to comply with the codes.¹

In any event, despite the Applicant's failure to include the Office of the Fire Marshal in its application, the Fire Marshal later discovered the existence of the project and immediately asserted its authority. By letter dated October 17, 2010, the Fire Marshal informed the Committee of its authority and intent to ensure compliance with the fire and building codes. In addition, the Fire Marshal informed the Committee that he was requesting the inclusion of a number of conditions related to the fire and building codes in the Certificate. Each of these conditions was referred to in the Certificate and the Committee explicitly conditioned the Certificate upon compliance with the fire, safety, and building codes. While the Applicant construes the failure of the Committee to explicitly adopt the conditions in the Certificate as a denial of the Fire Marshal's request, the Committee's enabling statute makes clear that the Committee is without authority to deny the Fire Marshal's request in that way. RSA 162-H:16 *requires* the Committee to incorporate in any certificate such terms and conditions as may be specified to the Committee by any other state agency having jurisdiction, under state or federal law, to regulate any aspect of the construction or operation of the facility. RSA 162-H:16, I. As a result, the Committee was required by law to include all of the conditions that the Fire Marshal specified in his letter. The statute goes even further, and establishes that "the Committee *shall* not issue any Certificate under this chapter if any of the other state agencies denies authorization for the proposed activity over which it has jurisdiction." *Id.*

¹In addition to the enforcement authority specifically granted to the Committee and the Fire Marshal, the Legislature provided penalties to be imposed by the superior court for *any* violation of Chapter 162-H, the Committee's enabling statute. RSA 162-H:19. The penalties include civil damages up to \$10,000 per day for construction or operation of energy facilities in violation of the Chapter, or in material violation of the terms and conditions of a certificate issued under this Chapter. RSA 162-H:19, II. In addition a willful violation of the Chapter constitutes a misdemeanor if a natural person, or a felony if any other person. RSA 162-H:19, III.

Moreover, the Committee is expressly prohibited from waiving, varying, or modifying, the requirements of the fire code or the building code. *See* RSA 155-A:2, X. RSA 155-A:2, X establishes that, "No state agency, authority, board, or commission shall vary, modify, or waive the requirements of the state building code or state fire code, unless approved by the state building code review board pursuant to RSA 155-A relative to the state building code or the state fire marshal pursuant to RSA 153:8-a, I(c) for the state fire code." Accordingly, in direct contrast to the Applicant's assertions in its brief and its position since the beginning of the project, *only* the state fire marshal, not the Committee, nor the local fire chief can vary, modify, or waive the requirements of the fire code. The Fire Marshal has, among other things, determined that fire suppression in the nacelles is required by the Fire Code, citing to his statutory authority and several code provisions in support of his conclusion. The Fire Marshal's interpretation of the Fire Code, including the code provisions he has referenced in this case, is entitled to substantial deference. *See Grand China, Inc. v. United Nat. Ins. Co.*, 156 N.H. 429, 433 (2007).

The enforcement mechanisms of the Fire Marshal and the Committee are similarly distinct. The Committee can suspend or revoke the Certificate of the Applicant for failure to comply with its terms. RSA 162-H:12. The adjudicative procedure required to accomplish this is very lengthy, and, as evidenced by the proceedings in this case, can take a year or more to complete. The Fire Marshal, on the other hand, has statutory authority to immediately obtain warrants and issue cease and desist orders. *See e.g.* RSA 153:4-a, IV; 153:14, II(a). This enforcement authority is reasonable because the focus of the Fire Marshal is on preventing hazards and ensuring safety.

Given that the authority of the Fire Marshal and that of the Committee are very different in nature and effect, the authority of one cannot be said to eviscerate the authority of the other. If the authority of the Fire Marshal were supplanted by the existence of the Committee, the people of New Hampshire would be left with only a lengthy adjudicative process to ensure their immediate safety, even in the case of an emergency. This result is not reasonable and is unsupported by the Committee's own enabling statute which explicitly provides that, "Notwithstanding any other provision of this chapter, each of the other state agencies having jurisdiction *shall retain all of its powers and duties of enforcement.*"

III. THE COMMITTEE MAY SUSPEND THE CERTIFICATE BASED UPON THE FIRE MARSHAL'S REPRESENTATIONS.

One of the conditions of the Certificate issued to the Applicant was compliance with all "federal and state fire, safety, and building codes." *See* Decision Granting Certificate of Site and Facility with Conditions at 74. As set forth herein above, the Fire Marshal has the authority to enforce the state fire, safety, and in this case, building codes. As a result, the Fire Marshal is *the* appropriate authority to determine compliance with those codes and to inform the Committee of the Applicant's noncompliance with that condition of the Certificate. RSA 162-H:12 provides that "Whenever the committee determines that any term or condition of any certificate issued under this chapter is being violated, it shall, in writing, notify the person holding the certificate of the specific violation and order the person to immediately terminate the violation. If, 15 days after receipt of the order, the person has failed or neglected to terminate the violation, the committee may suspend the person's certificate." By its letter to the Committee dated August 12, 2013, the Office of the Fire Marshal informed the Committee of the Applicant's failure to comply with the State Fire and Building Codes. Pursuant to its authority under RSA 162-H:12, the

Committee may appropriately determine whether that condition of the Certificate has been violated based on that information. If the Committee determines that it has, the Committee *must* order the Applicant to immediately terminate the violation, failure which may result in suspension of the Certificate. Accordingly, the Fire Marshal properly informed the Committee of the Applicant's violation of the Certificate and requested suspension of the Certificate.

Second, the Fire Marshal informed the Committee that the Applicant misrepresented the position of the Fire Marshal with regard to the requirements of the project. ("Mr. Edward Cherian, project manager, testified that the State Fire Marshal's Office had refined its position on fire suppression and 'now requires only compliance with the [intent of the codes not the actual specifications].' Mr. Cherian's statement is not true.") The alleged misrepresentation by the Applicant related to the official position of the Fire Marshal as to the requirements for this project. The Fire Marshal was uniquely qualified to be aware of whether the Applicant's statement regarding his position was a misrepresentation. Upon learning of the misrepresentation, the Fire Marshal properly informed the Committee of it. Based upon that information, "The Committee may suspend a person's certificate if the committee determines that the person has made a material misrepresentation in the application, *or in the supplemental or additional statements of fact* or studies required of the applicant..." RSA 162-H:12, II.

CONCLUSION

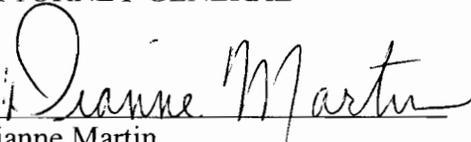
Based upon the foregoing, with regard to Question 1, the Department of Safety respectfully requests that the Committee find that delegation of authority to change the terms and conditions of a Certificate is prohibited by RSA 162-H:4, and that no such delegation to DES occurred; and, with regard to Question 2, the Department of Safety respectfully requests that the Committee decline to issue an opinion as to the authority of the Fire Marshal and instead take

official notice of the broad authority, as set forth herein, granted to the Fire Marshal by statute. In addition, the Department of Safety requests that the Committee find that it may suspend or revoke the Certificate based upon the request and information provided by the State Fire Marshal.

Respectfully submitted,

DEPARTMENT OF SAFETY

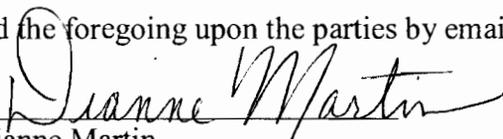
JOSEPH A. FOSTER
ATTORNEY GENERAL


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CERTIFICATE OF SERVICE

I, Dianne Martin, do hereby certify that I served the foregoing upon the parties by email.

January 6, 2014


Dianne Martin