STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

Concerning an Application for a Certificate of Site and Facility
Antrim Wind Energy LLC
Docket No. 2012-01

OBJECTION OF THREE INTERVENOR GROUPS
Edwards-Allen Joint Intervenors
North Branch Resident Intervenors
Abutters' Group Intervenors

to

TOWN OF ANTRIM'S MOTION FOR REHEARING AND/OR RECONSIDERATION

Three Intervenor groupings, as recognized by the New Hampshire Site Evaluation Committee in SEC Docket 2012-01, jointly submit this objection to the Town of Antrim's Motion for Rehearing And/or Reconsideration. The Intervenors joining in this action are all residents and voters in the Town of Antrim and are described as follows:

1. Edwards-Allen Joint Intervenors: (Robert L. Edwards and Mary E. Allen)

2. North Branch Resident Intervenors: (Richard and Loranne Carey Block; Annie Law; Robert A. Cleland; Elsa Voelcker; James Hankard; Samuel E. and Michele D. Apkarian)

3. Abutter's Group Intervenors (Janice Longgood; Mark J., Brenda and Nathan Schaefer; Clark Craig Jr.)

The Intervenors, so described, argue that the Town of Antrim's Motion for Rehearing And/or Reconsideration should be denied for these reasons: (1) The Town's motion does not present new facts or arguments. The Town's motion is essentially a restatement of the Town's post-hearing brief, filed on January 14, 2013,

and does not include information not presented during testimony before the Site Evaluation Committee or during the Committee's deliberations. (2) The Town's agreement to accept $40,000 from the Applicant for improvements at the town-owned beach area was developed outside of the time frame for the Site Evaluation Committee's review. In addition, this agreement is not accurately described in the Town's motion; (3) The Town's motion misstates the outcome of two votes on zoning regulations for large-scale wind energy facilities; (4) The Payment in Lieu of Taxes agreement, referred to in the Town's motion, has been voided by a Hillsborough County Superior Court judge, who ruled the document was developed in violation of New Hampshire's Right-to-Know statutes (RSA 91-A); and (5) Discussion, authorship and review of the "Town of Antrim's Motion for Rehearing And/or Reconsideration" was also developed outside of New Hampshire's "Right-to-Know" statutes (RSA 91-A).

Argument

1) The Town's motion does not present new facts or arguments. The Town's motion is essentially a restatement of the Town's post-hearing brief, filed on January 14, 2013, and does not include additional information not presented during testimony before the Site Evaluation Committee or during the Committee's deliberations.

Each point raised by the Town in its motion was conscientiously considered by the Site Evaluation Committee. There are no grounds to warrant a rehearing or reconsideration.

- The Town now argues a position on the aesthetic impact of the proposed project, yet throughout the Site Evaluation Committee's proceedings, the Town directed no questions related to aesthetics to any witnesses or parties on the stand. Likewise, there is no mention of aesthetic issues in the Town's post-hearing brief.

• The Town argues that the Committee "overlooked" evidence that shows that the project would not be visible from 95 percent of the area within a 10-mile radius. In fact, the Committee thoroughly considered extensive testimonies that disproved this claim.

• The Town argues that the Committee's decision was "inconsistent" with the permitting of past projects, yet the Committee conscientiously pointed out that each project is different and that this project, as proposed, was simply out of scale with the setting and area.

A review of the record of the 11 days of testimony and three days of deliberations clearly shows the Committee heard, discussed and thoroughly reviewed the evidence presented and the potential aesthetic impacts of the proposed project.

(2) The Town's agreement to accept $40,000 from the Applicant for improvements at the town-owned beach was developed outside of the time frame for the Site Evaluation Committee's review, and the scope of this agreement is not accurately described in the Town's motion.

In the months this case was before the Committee, there were no offers or discussion of compensation to the Town for any negative visual impacts on Gregg Lake. Only after the Committee reached its decision to deny a site permit, and in doing so emphasized its concerns about visual impacts on Willard Pond (located more than a mile away from Gregg Lake), was any compensation offered.

The May 13, 2013, agreement to accept $40,000 from Antrim Wind Energy LLC comes well outside the Committee's time frame. The Town had a final opportunity to raise any new evidence, including a desire for compensation, in its post-hearing brief. It did not do so.

Further, it is important to understand exactly what this $40,000 compensation covers … and what it doesn't cover.

In Section 8 of the Town's motion, which describes the agreement with Antrim Wind Energy, there are three references to Gregg Lake. Each reference appears to describe *all of Gregg Lake* (Section 8: …"aesthetics at Gregg Lake" …. "perceived visual impacts to Gregg Lake" … "any perceived visual impacts to Gregg Lake").

In Antrim Wind Energy's "Letter Agreement" concerning the $40,000, dated April 22 and signed May 13, 2013, (attached to the Town's motion), there are four references to Gregg Lake. Three are similar to the Town's description (… "for any perceived visual impacts created by the Antrim Wind Project ("Project") upon the Gregg Lake area" … "the Project's aesthetic impact on Gregg Lake" … "full and acceptable compensation for any perceived visual impacts to the Gregg Lake area.")

It is only in the second paragraph of that letter that we learn the $40,000 agreement concerns only the 3.3-acre town-owned beach and recreation area (… "a commitment by AWE to make a one-time payment of forty thousand dollars ($40,000) to the Town of Antrim to be used for enhancement of the recreational activities and aesthetic experience at the Gregg Lake Recreational Area" …)

The $40,000 compensation by the Applicant will be applied to the town beach area only. The Agreement Letter can hardly be construed to offset "any perceived visual impacts" to a 195-acre lake with more than 40 lakeshore homes, a large Girl Scout camp and the lakeshore community known as White Birch Point, which has recently been determined eligible for listing on the National Register of Historic Places. If a site permit is granted at a future time, Antrim Wind Energy will have to engage more fully with the NH Division of Cultural Resources.

(3) The Town's Motion for Rehearing presents a questionable interpretation of the meaning behind town votes on zoning ordinances for large-scale wind energy facilities.

In Section 4.c of its motion, the Town suggests that: "Votes by Antrim citizens on two wind ordinances indicate that the citizens feel the Project is consistent with the orderly development of the region."

The record shows just the opposite. In November 2011 and March 2012 the majority of Antrim voters rejected new zoning ordinances that would have added provisions to the current zoning laws and permitted large-scale wind projects. The rejected ordinances would have set standards consistent with the review by the Site Evaluation Committee, including sound level maximums for both day and night consistent with the Committee's standards developed in its deliberations of this case.

In fact, Antrim Wind Energy encouraged a negative vote in both 2011 and 2012, using lawn signs, flyers and mailings with the curious slogan: "No Means Yes to Wind."

There is no crystal ball to read the mind of voters, especially with the confusing and technically inaccurate "No" campaign. Did "No" really mean "Yes"? Or did "No" really mean "No" and did the voters twice reject a wind ordinance because they didn't want a wind project in town?

Perhaps a town vote in March 2013 is clearer. Antrim voters passed a zoning amendment then that removed "public utilities" as a permitted use in all zoning districts. A judge had ruled that that description could be applied to Antrim Wind Energy's meteorological tower. If Antrim Selectmen wish to "read the tea leaves"

when it comes to voters' minds, perhaps this most recent vote is the clearest example.

(4) The Payment in Lieu of Taxes agreement, referred to in the Town's motion, has been voided by a court decision.

In its motion, the Town offers this statement under Section 4.b, which urges the Site Evaluation Committee to consider statements from its post-hearing brief: "The Town of Antrim entered into a Payment in Lieu of Taxes agreement with AWE which the Antrim Selectmen believe provides the best per MW payment of any wind farm in New Hampshire."

On May 20, 2013, a Hillsborough County Superior Court judge ruled the PILOT agreement was developed in violation of New Hampshire's Right-to-Know law (RSA 91-A). As part of that decision the judge voided the PILOT agreement (see attached).

The voided PILOT no longer has any bearing in this matter. At this point in time, the Town must rely on ad valorem taxation for this wind energy facility and cannot claim to have a PILOT agreement.

Even if an AWE PILOT were to be legally reinstated, the argument put forward that the PILOT is financially favorable to the Town based on it providing "the best MW payment of any wind farm in New Hampshire" is invalid. To prudently manage the fiscal affairs of the Town under RSA 41:8, the Town must look at the entire "net tax impact" of the Project. It is important to note that the Town would be subject to significant added tax obligations from the ConVal Regional School District and Hillsborough County due to the increase in equalized valuation of the Project. Looking solely at the per-megawatt payment rate is fiscally irresponsible and ignores the "net tax impact" resulting from these increased obligations.

(5) Discussion, authorship and review of the "Town of Antrim's Motion for Rehearing And/or Reconsideration" was developed outside of the New Hampshire's "Right-to-Know" statutes (RSA 91-A).

It appears that the Town's Motion for Rehearing And/or Reconsideration was itself developed, authored and otherwise created outside of the public view and in violation of the state's Right-to-Know statutes. In fact, as admitted by the Town Administrator, the Motion was authored for the Town by the applicant's attorney.[1]

This Motion was first presented to the public at a Selectmen's meeting held the same night (May 13, 2013) as a continued Public Hearing on AWE's $40,000 offer to the Town. And, in fact, though the Motion had not been discussed in public previously, both the Motion and the Agreement Letter for the $40,000 compensation were signed by Selectmen that evening. Both documents are dated May 13, 2013.

Inclusion of this letter in advance as the sole new evidence confirms their clear intent and predetermination to sign regardless of the outcome of the public hearing.

The Town may argue that Antrim Selectmen were not aware of the judge's decision on May 13, as the court order was not released until May 20, 2013, but the Town Administrator and two current Selectmen were present in the courtroom on April 10, 2013, when the case was heard. The judge was very clear … RSA 91-A is a statute that must be adhered to by public officials for such agreements. This Motion for Rehearing And/or Reconsideration, if tested in court, would probably be voided as well.

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[1] See *Residents Question Why Wind Developer Wrote Town's Appeal*, MONADNOCK LEDGER-TRANSCRIPT, May 21, 2013. (http://www.ledgertranscript.com/search/6350696-95/residents-question-why-wind-developer-wrote- towns-appeal)

Conclusion

Because the Town has not demonstrated cause for a rehearing, its Motion should be denied.

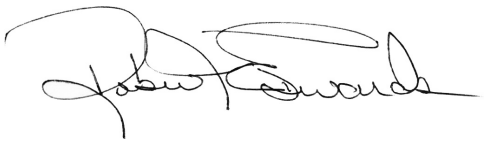
In addition, post-decision negotiations for compensation to the town-owned beach should be rejected as a reason for rehearing. Although the Site Evaluation Committee discussed potential impacts to the town beach, any such impact was not the basis for its decision to deny a permit. Any suggestion by either the Town or by Antrim Wind Energy that this compensation extends beyond the town-owned property should be ignored.

Further, the Town no longer has a Payment in Lieu of Taxes agreement with Antrim Wind Energy LLC and claims of its monetary value to the Town must be dismissed.

WHEREFORE, the Edwards-Allen Joint Intervenors, the North Branch Resident Intervenors, and the Abutters' Group Intervenors respectfully request that the Committee deny the Town's Motion for Rehearing And/or Reconsideration.

Respectfully submitted,

Dated: May 28, 2013



Robert L. Edwards, Joint Intervenor with Allen

Mary E. Allen, Joint Intervenor with Edwards

Richard Block
spokesperson for North Branch Resident Intervenors

Janice Longgood
spokesperson for Abutters' Group Intervenors

Certificate of Service

I, Mary E. Allen, certify that on May 28, 2013, I served a copy of the foregoing on the Parties and Intervenors, as identified on the official service list, by electronic mail.

Mary E. Allen

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

SCANNED

Hillsborough Superior Court Northern District
300 Chestnut Street
Manchester NH 03101

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http://www.courts.state.nh.us

May 21, 2013

JOHN J. RATIGAN, ESQ
DONAHUE TUCKER & CIANDELLA PLLC
225 WATER STREET
EXETER NH 03833

Case Name: **Gordon Allen, et al v Town of Antrim Board of Selectmen**
Case Number: **216-2012-CV-00655**

You are hereby notified that on May 20, 2013, the following order was entered:

RE: PETITION FOR DECLARATORY JUDGMENT:

See copy of order attached - Garfunkel, J.

John M. Safford
Clerk of Court

(539)

C: Robert William Upton, II

REC'D MAY 22 2013

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. SUPERIOR COURT
NORTHERN DISTRICT

Gordon Allen, Mary Allen, Charles Levesque,

Jancie Longgood and Matha Pinello

v.

Town of Antrim Board of Selectmen

Docket No. 2012-CV 00655

ORDER ON PETITION FOR DECLARATORY JUDGEMENT

The petitioners, Gordon Allen, Mary Allen, Charles Levesque, Janice Longgood and Martha Pinello, seek to void a Payment in Lieu of Tax ("PILOT") Agreement entered into between the respondent, Town of Antrim Board of Selectmen (the "Board"), and Antrim Wind Energy LLC ("Antrim Wind"), under the Right-to-Know law, RSA 91-A. The respondent objects, contending that the Right-to-Know law does not apply to negotiations and meetings concerning the Board and PILOT Agreements. The court held a hearing on April 10, 2013, during which former Antrim Selectman Eric Tenney ("Tenney"), Antrim Administrative Assistant Galen Stearns ("Stearns") and petitioner Mary Allen testified. After consideration of the pleadings, arguments, testimony, exhibits and applicable law, the court finds and rules as follows.

Background

The Right-to-Know violations for which the petitioners complain arise out of negotiations between the Board and Antrim Wind regarding the construction of a wind facility in Antrim, New Hampshire. Specifically, Antrim Wind and the Board entered into

non-public, noticed and unnoticed meetings during which a PILOT Agreement was discussed. On June 20, 2012, the Board held a public hearing and approved the PILOT Agreement. The Board does not dispute that numerous noticed and unnoticed, nonpublic meetings were held with Antrim Wind concerning the PILOT Agreement.

For example, Galen Stearns, Antrim's Town Administrator during the PILOT Agreement, testified that based on the advice of town counsel, he believed the PILOT Agreement meetings were not subject to the requirements of the Right-to-Know law. Stearns believed that, under the aegis of the attorney-client privilege, unnoticed, nonpublic meetings were permissible as long as town counsel was present. Stearns also believed that he was only required to issue notice of non-public PILOT Agreement meetings when town counsel was not present.

As a result, Stearns testified that he posted notice of a non-public March 7, 2011, Board meeting with Antrim Wind under exemption RSA 91-A:3 II, a & d.[1] However,

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[1] RSA 91-A:3, II states in pertinent part:

> Only the following matters shall be considered or acted upon in nonpublic session:
>
> (a) The dismissal, promotion, or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against him or her, unless the employee affected (1) has a right to a meeting and (2) requests that the meeting be open, in which case the request shall be granted.
>
> . . .
>
> (c) Matters which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of the public body itself, unless such person requests an open meeting. This exemption shall extend to any application for assistance or tax abatement or waiver of a fee, fine, or other levy, if based on inability to pay or poverty of the applicant.
>
> . . .
>
> (d) Consideration of the acquisition, sale, or lease of real or personal property which, if discussed in public, would likely benefit a party or parties whose interests are adverse to those of the general community.

Tenney, a Selectman during the PILOT Agreement negotiations, testified that the March 7, 2011 meeting did not fall under exemption RSA 91-A:3, II, a & d. Rather, this exemption applied to an unrelated issue at the meeting, in which the town was considering purchasing an easement.

Stearns further testified that the non-public August 24, 2011, meeting concerning Antrim Wind was posted because town counsel was not present. Stearns testified that this August 24, 2011, meeting with Antrim Wind was posted as a non-public meeting under exemption RSA 91-A:3, II, c because he believed this provision was applicable as it involved taxation. However, Stearns agreed with the petitioners' counsel that the PILOT Agreement did not involve Antrim Wind's inability to pay taxes under RSA 91-A:3, II, c.

Tenney testified that the August 24, 2011, probably did not meet RSA 91-A:3, II, c's requirements but based on town counsel's advice the Board believed the PILOT Agreement negotiations could be conducted in non-public meetings. Generally at these non-public meetings, Tenney testified, the Board received a "broad outline" of what Antrim Wind thought the value of the project would be, including general terms, but not including balance sheets or profit and loss statements. Tenney further testified that the information received at the non-public meetings was used in formulating the final PILOT Agreement.

According to Stearns, in addition to the March 7, 2011, and August 24, 2011, meetings, the Board held four other unnoticed, non-public meetings concerning the PILOT Agreement on June 21, 2011; October 25, 2011; February 15, 2012 and May 9, 2012 because town counsel was present. At these meetings Antrim Wind was also

present. Stearns also testified that there were meetings attended by him, Selectmen Webber and Antrim Wind concerning the decommissioning of the project and cost of construction.

At the hearing, town counsel represented to the court that it was his advice upon which the town relied in holding the PILOT Agreement meetings with Antrim Wind in nonpublic sessions.

Analysis

The petitioners allege that the noticed and unnoticed, nonpublic meetings between the Board and Antrim Wind constitute a violation of RSA 91-A, New Hampshire's Right-to-Know law. As a result of this purported violation, the petitioners seek an order from this court invalidating the PILOT Agreement, assessing attorney's fees and costs and requiring the Board to receive remedial training on the Right-to-Know law. The respondent objects and contends that RSA 72:74 allows for non-public meetings when the Board is considering a PILOT Agreement.

1. Right-to-Know Violation

The Board must comply with the requirements of the Right-to-Know law. See RSA 91-A:1-a; Carter v. City of Nashua, 113 N.H. 407, 414 (2001). Accordingly, all Board meetings must be open to the public and recorded unless an exemption applies. RSA 72:74 provides in pertinent part that "[t]he owner of a renewable generation facility and the governing body of the municipality in which the facility is located may, after a duly noticed public hearing, enter into a voluntary agreement to make a payment in lieu of taxes."

The interpretation of a statute is a matter of law. Goodreault v. Kleeman, 158 N.H. 236, 252 (2009). The court will consider the statute as a whole and construe the language in accordance with its plain and ordinary meaning. Id. If the statute's

language is plain and unambiguous, the court need not look beyond it for further indication of legislative intent, and will not consider what the legislature might have said or add language that the legislature did not see fit to include. Id. at 253. By contrast, if the statute is ambiguous, the court will look to the legislative history to aid its analysis. Id.

"Our goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme." Id. (quotation omitted). In light of the statutory purpose of "ensur[ing] the greatest possible public access to . . . records of public bodies, and their accountability to the people," RSA 91-A:1 (2001), the provisions in the Right-to-Know law favoring disclosure will be construed broadly while the provisions citing exemptions will be construed narrowly. Lamy v. N.H. Pub. Utils. Comm'n, 152 N.H. 106, 108 (2005).

Nothing in RSA 91-A:3, II or RSA 72:74 exempts PILOT Agreements from the Right-to-know law. Contrary to the respondent's contention, the plain language of RSA 72:74 supports this conclusion. Furthermore, as the respondent concedes, none of the exemptions in RSA 91-A:3, apply to the respondents. Thus, the court finds the respondent violated the Right-to-Know law by entering into non-public meetings with Antrim Wind for the PILOT Agreement on the numerous occasions detailed above.

2. Remedies

The Right-to-Know law, if violated, provides for three possible remedies: (1) an award of reasonable costs and attorney's fees, RSA 91-A:8, I; (2) an order voiding action taken by a public body or agency, if the circumstances justify such invalidation, RSA 91-A:8, II; and (3) an injunction, RSA 91-A:8, III. The petitioners seek to have the

PILOT Agreement invalidated, request attorney's fees and costs and for the court to order the respondent to seek remedial training on the Right-to-Know Law.

The court GRANTS the petitioners' request to void the PILOT Agreement. As discussed above, the Board conducted numerous noticed and unnoticed, non-public meetings while negotiating the PILOT Agreement. These meetings contravened the fundamental purpose of the Right-to-Know law's goal of transparent and open government. Accordingly, the court finds voiding the Agreement is warranted to redress the Right-to-Know violations. See Lambert v. Belknap County Convention, 157 N.H. 375, 382 (2008).

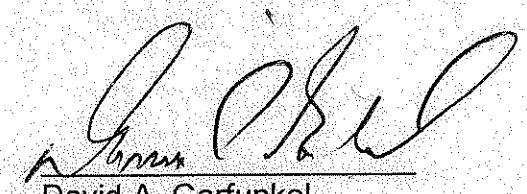
However, the court DENIES the petitioners' request to assess attorney's fees and costs against the respondent. RSA 91-A:8, I expressly states that in order to asses attorney's fees and costs, the court must first find that "the public body, public agency, or person knew or should have known that the conduct engaged in was in violation of this chapter . . . ." Here, Stearns and Tenney testified that they believed the hearings did not have to be public based on the advice of town counsel. Moreover, at the hearing, town counsel agreed that it was his advice regarding RSA 72:74 upon which the town relied. See Voelbel v. Town of Bridgewater, 140 N.H. 446, 448 (1995) (overturning award of attorney's fees when selectmen acted in good faith, relied on town counsel's advice and the Right-to-Know violation was not obvious, deliberate or willful). Accordingly, the court finds the Board did not knowingly engage in the Right-to-Know violation and therefore DENIES the petitioners' request for attorney's fees and costs.

The court also DENIES the petitioners' request to order the respondent to receive remedial training on the Right-to-Know law. As explained above, the selectmen

relied on town counsel's advice regarding application of the Right-to-Know law. Tenney and Stearns both demonstrated an awareness of the Right-to-Know law's requirements and exemptions during their testimony. Thus, the court finds that remedial training is unnecessary because the town's error resulted from its reliance on town counsel's incorrect advice.

SO ORDERED.

May 20, 2013



David A. Garfunkel
Presiding Justice