STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

Docket No. 2012-01
Re: Application of Antrim Wind Energy, LLC

ANTRIM PLANNING BOARD'S MEMORANDUM OF LAW CONCERNING THE COMMITTEE'S LACK OF AUTHORITY OVER SUBDIVISION

Now Comes the Antrim Planning Board, by its special legal counsel, Gardner, Fulton & Waugh, PLLC, and says as follows:

PREFACE

This memorandum's sole purpose is to respond to the SEC's order dated July 11, 2012, asking for "pre-hearing legal memoranda or briefs addressing the authority of the Committee to create a subdivided lot." Please note that the undersigned does not presently represent the Antrim Planning Board for any purpose other than this memorandum.

The issue to be addressed is purely an issue of law. The only relevant facts are those revealed by the application in this case, namely:

(a) The Applicant has requested that the SEC create a subdivision lot which will be transferred by the current owner to PSNH (application, page 45);

(b) The proposed lot does not meet the subdivision approval exceptions contained in RSA 672:14, III or IV – both because it is a fee interest which is proposed to be transferred, rather than an easement, and also because the

size is greater than the 500-square-foot limit applicable to both of those paragraphs.

(c) The proposed lot fails to meet the Town of Antrim's regulations, including those governing lot size and highway/street frontage.

I. A REGISTER OF DEEDS HAS NO AUTHORITY TO RECORD A SUBDIVISION WITHOUT THE PLANNING BOARD'S APPROVAL.

The Applicant asserts on p. 45 of the application that ***if*** the SEC states in its decision that "(1) Antrim Wind Energy, LLC need not obtain any zoning relief or planning board site plan or subdivision approval from the Town of Antrim, and (2) a subdivision plat for the interconnection yard which is approved as part of the Committee's order" ***then*** such approval will comport with RSA 676:18, "and therefore can be recorded by the Hillsborough County Register of Deeds."

The applicant cites no authority for this statement, and it is incorrect. RSA 676:18, paragraph I states plainly and unambiguously that "A register of deeds who files or records a plat of a subdivision without the approval of the planning board shall be guilty of a misdemeanor." There are three express exceptions to this statement: Paragraph II provides for surveys stamped by a licensed surveyor who certifies that the survey is not a subdivision, and that all lines already exist. Paragraph II-a provides for certain plans in existence as of December 31, 1969. Paragraph V provides for decisions of the district, superior and supreme courts.

By contrast with the provision concerning court opinions, there is ***no*** exception governing decisions of administrative bodies such as the Site Evaluation Committee. For example, no exception to the provision of RSA 676:18, I was created by Chapter 65 of the Laws of 2009 – the most recent legislation clarifying the authority of the

SEC. Moreover that legislation did ***not*** alter RSA 676:16, which calls for fines and injunctive relief if any owner transfers or sells subdivided land without the recording of a plat approved by the planning board. That legislation also did ***not*** alter RSA 674:37, which provides that the recording of a plat which has not been approved by the planning board "shall be void."

And finally, the 2009 legislation did ***not*** alter the definition of "subdivision" found in RSA 672:14. That statute (as noted above) does contain two express exceptions inserted for the benefit of public utilities. But neither of those exceptions fits this case. Those existing exceptions demonstrate that the Legislature knew how to create exceptions when it desired to do so. It is a long-established principle of statutory construction that when a statute expressly includes a list of exceptions, any exceptions which are ***not*** so listed do not exist. *See, e.g., State v. Wilton R. Co.*, 89 N.H. 59, 61 (1937). That rule is simply one embodiment of the principle of "*expression unius est exclusion alterius*" – meaning that the expression of one thing in legislation implies the exclusion of another, *see In Re Campaign for Ratepayers' Rights*, 162 N.H. 245, 251 (2011).

In sum, a register of deeds has no statutory authority to record a subdivision approval on the basis suggested by the Applicant. For a register of deeds to do so would constitute a misdemeanor under RSA 676:18, I.

II. S.E.C. AUTHORITY TO APPROVE SUBDIVISION LOTS IS NOT INCLUDED IN RSA 162-H:16, II.

The sole support cited by the Applicant for its theory that the SEC has authority to approve subdivision lots, is the last sentence of RSA 162-H:16, II. That sentence reads as follows: "A certificate shall be conclusive on all questions of siting, land use, air and water quality."

A. The Sentence Is Not An Expression Of Preemption.

However, when read in the context of RSA 162-H:16 as a whole, it is plain that the above-cited sentence is ***not*** an expression of the preemptive jurisdiction of the SEC. Instead, Section 16 of Ch. 162-H addresses the ***process*** of issuing a certificate, and clarifies its ***finality***. The gist of that final sentence is to make clear that a certificate issued by the SEC cannot be collaterally attacked by someone who fails to seek relief during the process of issuance (or in accord with 162-H:11).

The fact that RSA 162-H:16, II is ***not*** an expression of preemption is made plain by the fact that the very same sentence cited by the Applicant with respect to "land use" also says precisely the same thing with respect to "air and water quality." Yet it is obvious that 162-H:16 does ***not*** grant the SEC exclusive and preemptive jurisdiction over air and water quality. On the contrary, paragraph I of that very same statute states 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." Thus applicants are ***not*** exempted from complying with the regulations of other state agencies as they pertain to air and water quality. The Applicant here clearly recognizes this non-preemption in Section D.1 of its application (page 14) where it lists other agencies having jurisdiction – with several of the other types of approval listed being those pertaining to "water quality." The Applicant has ***not*** tried to claim that it is exempt from those water quality regulations by virtue of RSA 162-H:16, II.

It would make no sense that the last sentence of RSA 162-H:16, II – which we ***know*** is ***not*** a statement of preemption with respect to "air and water quality" – could be construed as a statement of preemption with respect to "land use," a term which is treated precisely the same way in that sentence as "air and water quality." Again, the statement is merely one addressing the ***finality*** of the certificate process.

Please understand that the Antrim Planning Board acknowledges that the SEC's process under RSA 162-H ***does*** have some degree of preemptive effect over inconsistent local ordinances. However that preemption applies by virtue of the ***common law*** doctrine of preemption (to be addressed below), as expressed in such cases as *Stablex Corp. v. Town of Hooksett*, 122 N.H. 1091 (1982) and *Bio-EnergyLLC v. Town of Hopkinton*, 153 N.H. 145 (2006) – and ***not*** by virtue of the last sentence of RSA 162-H:16, II.

B. Even Assuming Arguendo *That RSA 162-H:16, II Were Preemptive, It Does Not Preempt Local Subdivision Jurisdiction.*

Even if we were to presume – solely for the sake of argument – that the last sentence of RSA 162-H:16, II was intended to be preemptive, that sentence does not preempt the authority of a Planning Board over subdivision plat approval, as set forth in Section I above. The reason is that subdivision regulation and "land use" regulation are separate and distinct types of regulation:

> "Planning and zoning determine the ***use of land*** within the municipality in relationship to public utilities and the wise allocation of existing resources. Subdivision regulations, on the other hand, are designed to control the ***subdivision*** of land to assure that such divisions and the development thereon are designed to accommodate the needs of the occupants of the subdivision."

Loughlin, 15 N.H. PRACTICE, LAND USE PLANNING & ZONING (4th Ed) at §§ 29.02 and 29.03 (italics added).

One N.H. Supreme Court case illustrating how ***use*** regulation differs from ***subdivision*** regulation is *Lemm Devel. Corp. v. Town of Bartlett*, 133 N.H. 618 (1990). The Town of Bartlett (at that time) had only subdivision regulations. Its planning board had approved a condominium subdivision. Later the owners sought to convert some of the land shown on the plan as open space to tennis courts and a

swimming pool. The Town argued that this change of use could not occur without an amendment to the subdivision plan. The Supreme Court disagreed:

> "The enabling clause of RSA 674:35, II, empowering the planning board to control subdivisions, reads: 'The planning board of a municipality shall have the authority to regulate the subdivision of land....' The phrase 'the subdivision of land' plainly refers to the act of subdividing land, and not to the land that has been subdivided. Thus, the legislature under the enabling legislation relating to subdivisions has granted the town planning board the power to regulate the act of subdividing land, and not the land that has been subdivided."

Id. at 621. Hence the regulation of subdivision does not *ipso facto* include the regulation of land use. And conversely, the reference to "land use" in RSA 162-H:16, II does not include a reference to the planning board's authority to regulate the act of subdividing.

C. Even 'Grandfathered' Subdivisions Still Require Planning Board Approval.

Another indication of the distinction between "land use" regulation and subdivision regulation can be seen in cases such as *Cohen v. Town of Henniker*, 134 N.H. 425, (1991), and *Dovaro 12 Atlantic, LLC v. Town of Hampton*, 158 N.H. 222 (2009), wherein owners sought to convert pre-existing nonconforming uses to the condominium form of ownership. Those cases hold that where the proposed change is only a change in the form of ownership, rather than a change in use, the owner's nonconforming use rights prevent the Planning Board from requiring the project to conform to current land use regulations prior to receiving subdivision approval. Importantly, however, those cases do ***not*** hold that those projects are ***exempt*** from the planning board's approval. (Again, the law prohibits a plan from being recorded without such approval.) Instead, those cases hold only that the planning board is

prohibited from withholding such approval on the basis of failure to conform to the Town's current ***land use*** regulations.

By analogy – even assuming *arguendo* that the SEC were to exercise its preemptive authority to declare the Applicant's project exempt from particular land use regulations of the Town – such an exemption would ***not*** extend to exempting the proposed subdivision lot from the approval of the Planning Board altogether. Regulating subdivision is not the same as regulating land use.

D, Construing The Statutes In A Consistent And Harmonious Manner.

It is another well-established principle of statutory construction that all statutes relating to the same subject matter should be construed, if at all possible, as being consistent with each other rather than as contradicting each other, *see Selectmen of Merrimack v. Planning Board of Merrimack*, 118 N.H. 150, 153 (1978); *State Employees' Assn. v. NH Div. Of Personnel*, 158 N.H. 338, 343 (2009). In this case, where the Legislature has enacted ***no*** relevant exceptions to the provisions governing the planning board's role in approving subdivisions (as summarized in Section I above), the only way of construing RSA 162-H:16, II which is consistent and harmonious with those subdivision laws is to construe it as ***not*** preemptive of the planning board's subdivision authority.

It may be that the Applicant (or even the SEC itself) believes that the SEC ***should*** have authority to preempt the planning board's role in subdivision approval. However, the powers and jurisdiction of an administrative body are entirely dependent on statute, and cannot be expanded by the agency itself, *In Re Campaign for Ratepayers' Rights* (supra).

Furthermore, there is a substantial reason of public policy for the Legislature to treat subdivision authority differently. Land use regulations remain relevant only for so long as a parcel of land is devoted to a particular use, whereas the subdivision of land is more permanent, and continues to affect the development of the area long after the use which is subject to the SEC's jurisdiction may have ceased. In past cases the SEC has paid substantial attention to the question of whether an applicant's facility is capable of being "decommissioned" without placing a burden on the community. However, there is no way to "decommission" a subdivision lot. If the Committee were – in accord with the Applicant's request – to approve a separate lot with no street/highway frontage, the adverse effect of such action (arguably contrary not only to Antrim regulations, but also to RSA 674:40 and 674:41), would continue to adversely effect both the owner of such lot and the provision of municipal services to such lot, long after the Applicant's project had run its useful life.

In any event, the bottom line is that state law does not give the SEC authority to approve such a lot. Therefore no such authority exists.

III. RSA 162-H DOES NOT PREEMPT LOCAL LOT SIZE OR FRONTAGE REQUIREMENTS.

In addition to the argument made thus far in this memorandum – i.e. that the SEC has no authority to set aside the planning board's statutory role in subdivision approval – the Board would also submit that Town's basic subdivision lot size and frontage requirements are not inconsistent with the comprehensive state scheme embodied in RSA 162-H, and hence are not within the ambit of that statute's preemptive effect.

An early major N.H. preemption case is *Stablex Corp. v. Town of Hooksett*, 122 N.H. 1091 (1982). It involved a comprehensive statute similar to RSA 162-H,

which delegated the approval of a specific type of facility (in that case hazardous waste facilities) to a state administrative body. The Court held that the statute entirely preempted the field of hazardous waste regulation, but nevertheless, at the end of the opinion, stated:

> "Any local regulations relating to such matters as traffic and roads, landscaping and building specifications, snow, garbage, and sewage removal, signs, and other related subjects, to which any industrial facility would be subjected and which are administered in good faith and without exclusionary effect, may validly be applied to a facility approved by the State bureau."

122 N.H. at 1104. In the later case of *Town of Pelham v. Browning-Ferris Industries*, 141 N.H. 355 (1996), the Court reaffirmed the existence of this "residual" area of local regulation, and held that the trial court had erred in not determining which aspects of the Town's site plan regulations could be applied "without exclusionary effect." *See also North Country Env. Services v. Town of Bethlehem*, 150 N.H. 606 at 619-20 (2004).

In this case the Town's lot size and frontage regulations – which are an inherent part of the planning board's authority to approve subdivisions – fall squarely within the "residual" authority carved out by the Supreme Court in the above cases. Lot size and frontage regulations are not aimed at renewable energy facilities or any other particular use, and moreover can be applied in good faith "without exclusionary effect." Indeed, it is notable that the Applicant in its application materials has given the Committee no particular reason for the creation of the separate lot, other than its bald statement that: "Public Service Company of New Hampshire requires that it own the land on which the interconnection yard is located" (application at 45). The Committee thus has been given no reason to believe that lot size/frontage regulations would have any exclusionary effect. Therefore those regulations are not preempted.

CONCLUSION

For all of the above reasons, the Town of Antrim Planning Board urges the Committee to find: (1) that the SEC has no legislative authority to set aside the role of the Planning Board in the approval of a new subdivision lot; and moreover (2) that the Planning Board, in the exercise of its subdivision review role, has the authority to apply basic regulations such as lot size and frontage requirements, to which any landowner would be subject, and which are capable of being applied in good faith without exclusionary effect.

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Respectfully submitted this 24th day of July, 2012.

TOWN OF ANTRIM PLANNING BOARD
By its Counsel,

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