**THE STATE OF NEW HAMPSHIRE**
**SITE EVALUATION COMMITTEE**

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| **In the matter of the** | ) | |
| **Application for Certification** | ) | |
| **Pursuant to RSA 162-H of** | ) | **Docket No. 2012-01** |
| **ANTRIM WIND ENERGY, LLC** | ) | |
| | ) | |

**MEMORANDUM OF LAW OF COUNSEL FOR THE PUBLIC ON JURISDICTION OF SITE EVALUATION COMMITTEE TO APPROVE APPLICANT'S SUBDIVISION PLAN**

Counsel for the Public, by his attorneys, the Office of the Attorney General, hereby submits this memorandum of law pursuant to the Order of July 11, 2012. In support hereof, Counsel for the Public respectfully represents as follows:

The Applicant has asked the Committee to enter an order approving a subdivision plan for land owned by Michael J.H. Ott. Once subdivided, a portion of the land of Ott will be sold to Public Service Co. of New Hampshire for construction of a substation. The Committee's jurisdiction as defined in the statute does not reach to a substation in the transmission and distribution system owned by PSNH. In addition, while the Applicant has noted that it has a 25 year lease with Mr. Ott for the property, and an option to purchase the land, it is not at all clear how those interests entitle the Applicant to seek modifications of Mr. Ott's property lines for the ultimate benefit of a non-applicant, Public Service Company of New Hampshire. The Applicant has thus not demonstrated standing to seek subdivision approval.

Even assuming that these hurdles can be overcome, nothing in RSA c.162-H or its lengthy history provides any support for the unprecedented notion that the Committee has the

jurisdiction to wrest subdivision approval from the "exclusive" province of the Town's planning board. RSA 674:42; *see* Peter J. Loughlin, 15 N.H. PRACTICE: LAND USE PLANNING & ZONING (4th ed. 2010) § 26.03 ("Loughlin") ("Once jurisdiction has been granted to a planning board to approve or disapprove subdivisions, that jurisdiction is exclusive.") RSA 162-H is a site selection and environmental protection statute, not a land ownership or local planning statute. The purposes and origins of the subdivision and site evaluation laws are distinct. The application of local subdivision laws will not frustrate the Site Evaluation scheme; they are not repugnant. The legislature intended them to be complimentary. *See* RSA 672:1, III-a. Under principles of preemption and implicit repeal, the Committee is not provided the jurisdiction to approve a subdivision.

"[T]he Committee's review of the issue of jurisdiction is limited to the determination of whether the exercise of such jurisdiction is consistent with the findings and purpose set forth in RSA 162-H:1, as opposed to the comprehensive review that is required for the issuance of a certificate of Site and Facility." *In re Petition for Jurisdiction Over Renewable Energy Facility*, N.H. Site Eval. Comm., no. 2011-02, Jurisdictional Order, dated August 10, 201, at 20.

## I. The Objectives and Purposes of the Site Evaluation Act and the Subdivision Statute Are Distinct and Not In Conflict.

The purposes of the Site Evaluation Act are:

1. To maintain a balance between the environment and the need for new energy facilities in New Hampshire;

2. That undue delay in the construction of needed facilities be avoided; and

3. That full and timely consideration of environmental consequences be provided;

4. That all entities planning to construct facilities in the state be required to provide full and complete disclosure to the public of such plans;

5. That the state ensure that the construction and operation of energy facilities is treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion;

6. To assure that the state has an adequate and reliable supply of energy in conformance with sound environmental principles.

*Jurisdictional Order* at 21-22.

In contrast, the purposes of and logic behind local subdivision approval include:

I. Planning, zoning and related regulations have been and should continue to be the responsibility of municipal government;

II. Zoning, subdivision regulations and related regulations are a legislative tool that enables municipal government to meet more effectively the demands of evolving and growing communities;

III. Proper regulations enhance the public health, safety and general welfare and encourage the appropriate and wise use of land;

III-a. Proper regulations encourage energy efficient patterns of development, the use of solar energy, including adequate access to direct sunlight for solar energy uses, and the use of other renewable forms of energy, and energy conservation. Therefore, the installation of solar, wind, or other renewable energy systems or the building of structures that facilitate the collection of renewable energy shall not be unreasonably limited by use of municipal zoning powers or by the unreasonable interpretation of such powers except where necessary to protect the public health, safety, and welfare;

...

IV. The citizens of a municipality should be actively involved in directing the growth of their community;

...

and

VI. It is the policy of this state that competition and enterprise may be so displaced or limited by municipalities in the exercise of the powers and authority provided in this title as may be necessary to carry out the purposes of this title.

RSA 672:1; *see also Blevens v. Manchester*, 103 N.H. 284, 286 (1961)(describing purposes); RSA 674:36 (setting forth suggested content for subdivision regulations). Two things become readily apparent from the purposes of the subdivision law: 1. the legislature intended municipal planning to be conducted at a local level with citizens involved as deciders; and 2. the legislature considered the impacts of municipal zoning and land use regulations on renewable energy facilities and accepted that in adopting regulations that at least some of those regulations would apply to renewable energy facilities. Zoning legislation in New Hampshire has existed since 1925, and subdivision legislation since 1935. Loughlin § 26.01 (also pointing out that subdivision controls were practiced in ancient Greek and Roman cities).

The Site Evaluation Act since its origins has been recognized as an "environmental" law. SB 217, S. Jour., at 1131 (June 10, 1971) (Sen. Poulsen introducing bill); HB 34, S. Jour. 570 (Mar. 27, 1974) (Sen. Porter addressing bill) ("this is probably the largest environmental bill brought in this session. It is an environmental bill. It is a land use bill."); *see also* 1974 S. Journal at 573-74 (referring to the operation of the law as allowing the Committee to deny a certificate on the basis of environmental impacts); *Id.* at 575 (Sen. Preston: "HB 34 with its amendment hopefully provides the proper procedures and protection for the environmental, economical and sociological impact of a project of this magnitude."); *Report of the Energy Facility Siting Licensing & Operation Study Comm.*, dated Aug. 30, 1990, at 1 (Study Committee formed out of concerns for New Hampshire's ability to "meet its growing energy needs while maintaining environmental quality"). The Study Committee in 1990 expressed a clear interest in one-stop shopping for state permits

and not to allow the kind of local review option akin to that which had been provided towns siting oil refineries. *See 1990 Report* at 1, 8-9. However, none of the changes made as a result of that report expressed this interest in any particular way.

The history of the Site Evaluation Act is true to its name. It is about site selection. The law is true to its purposes, one-stop review of state environmental permits for energy facilities. Subdivision law is not about site selection, and is instead about assimilating the footprint of the selected site into the layout of the community, how the community will be expected to provide services to the new parcel and how the presence of the new layout will effect others already present and those the community expects to come. As shown below, because of the distinct purposes, the limited focus of the law on site selection and environmental and regional economic impacts, means that other authorities, including the police powers of the towns, and their ability to control subdivision of land in their midst is not within the scope of the law's preemption. Leaving subdivision to town officials will not frustrate or contravene the legislative intent of the Site Evaluation Act.

## II. The Committee Does Not Have Jurisdiction Over the Substation.

### A. The Substation Is Not An "Energy Facility."

The Applicant's request to approve the subdivision is for the purpose of enabling Public Service Company of New Hampshire to construct the "project substation," outside of the project's footprint, on land currently not owned by the Applicant. Setting aside for the moment whether there is jurisdiction to approve a subdivision for a facility for an applicant, it is not at all clear that the Committee can take action that concerns a PSNH substation. "Energy Facility" under RSA 162-H:2(b) means "electrical generating station equipment and associated facilities designed for, or capable of, operation at any capacity of 30 mw or more."

A PSNH substation on PSNH land is not electrical generating station equipment or associated facilities at 30 mw within the definitions of c. 162-H. In the context of RSA 162-H:2(b), the substation would be associated equipment to the 115 kv lines owned by PSNH to which it is necessary for step up purposes. The Applicant in this case will not own or operate the substation and it is not to be located on land owned or leased by the Applicant. Where the substation is part of the distribution or transmission system, it is not "associated" equipment for the Applicant's facility and this Committee does not have jurisdiction over it. If somehow, part of the "project substation" is associated with the generation of the facility, the Applicant should establish that with expert testimony. On the evidence in the Application, however, the Applicant has not met its burden. *See United States v. Southern Cal. Edison Co.*, 413 F. Supp. 2d 1101, 1119-22 (E.D. Cal. 2006) (whether substation is within FERC jurisdiction is a question of fact requiring expert testimony on affidavit or trial); Kenworthy Testimony at 2, 8-9 (describing in general terms collection and interconnection but not possessing any electrical engineering qualifications) . Without jurisdiction over the substation, this Committee does not have jurisdiction to approve a subdivision to accommodate it.

### B. The Applicant Has Not Shown That It Is The Real Party In Interest To Seek Subdivision Approval.

The Applicant seeks to have the Committee approve the subdivision of land which it does not own so that the owner may sell it to PSNH which will construct and operate the substation. Ordinarily, a subdivision application to the Town of Antrim must be made by the owner of the land to be subdivided. *See* Antrim Subdivision & Site Plan Review Regulations (June 19, 2008) ("Antrim Regs.") at § IV(B)(1) )("The application shall be made by the

owner of the property or his duly authorized agent.").[1] The Applicant has not demonstrated through its application to the Committee that it is the owner of the land or the "authorized agent" of the owner. The Applicant has alleged that it is the lessee of the owner with an option but holding a leasehold interest with an option does not appoint the lessee agent of the land owner or provide it a sufficient interest to seek an action adverse to the owner's title. *See Ouimette v. Somersworth*, 119 N.H. 292, 295 (1979) (holder of an option lacks standing to seek zoning variance).

## III. The Committee Lacks Jurisdiction to Approve A Subdivision.

### A. RSA 162-H Does Not Repeal By Implication the State's Subdivision Law As It Applies To Energy Facilities.

A "cardinal rule" of statutory construction is that "'repeals by implication are not favored.'" *Morton v. Mancari*, 417 U.S. 535, 549 (1974) (*quoting Posadas v. National City Bank*, 296 U.S. 497, 503 (1936)). "The intention of the legislature to repeal must be 'clear and manifest.'" *United States v. Borden Co.*, 308 U.S. 188, 198 (1939), (*quoting Red Rock v. Henry*, 106 U.S. 596, 602 (1883)). Courts will read the statutes to give effect to each if they can do so while preserving their sense and purpose. *Mancari*, 417 U.S. at 551; *see Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940).

The climate for repeal by implication is "frosty and inhospitable" in New Hampshire. *Opinion of the Justices*, 107 N.H. 325, 328 (1966). Absent evidence of "convincing force" that the legislature intended a repeal, the rule will not be invoked. *State v. Wilton Railroad*, 89 N.H. 59, 61-62 (1937). Repeal by implication will not be found if any reasonable

[1] In the absence of any express authority under State law for the Committee to approve a subdivision, or any standards by which to measure the merits of an application for such, should the Committee venture out onto this ice, it should follow the only program actually designed for doing this, the Antrim Regs., or the Committee could adopt its own rules following RSA 674:36.

construction of the statutes can avoid it. *State v. Miller*, 115 N.H. 662, 663 (1975); *State v. Otis*, 42 N.H. 71, 72-73 (1860) (Doe, J.).

In the present circumstances, the Applicant's request suggests that with respect to energy facilities, RSA 162-H repeals RSA 674:35 which empowers a municipality to designate the planning board to "approve or disapprove, in its discretion," subdivision plans and plats, and RSA 674:37, which provides that no plat may be recorded by the registry unless it has been approved by the planning board. A plat not approved by the planning board is "void." RSA 674:37.

There is no evidence that the legislature intended such a repeal. No provision of RSA 162-H:4 empowers the committee to approve subdivisions or plats or to order their recordation; instead, that jurisdiction is exclusive to the planning board. RSA 674:42. No other provisions of RSA 162-H indicate an intent to allow the Committee to adjudicate boundaries, lot configurations, provision of local services, or any of the subjects ordinarily addressed by a planning board operating under its subdivision powers and rules. There is also nothing in the legislative history indicating that the drafters of the legislation at various times in the 1970s -1990s believed that they were or should be taking subdivision approval authority from the towns or sharing it with the Committee.

What the Site Evaluation Act says about the role of municipal planning bodies is silent on the question of subdivision. Under the Act the Committee must give "due consideration" to the views of municipal and regional planning commissions and municipal governing bodies with respect to the orderly development of the *region*. RSA 162-H:16. This provision expresses deference to those bodies "*views*" with respect to regional impacts but does not say anything about the jurisdiction of those bodies on a municipal level,

suggesting by negative implication that the legislature did not intend to usurp the local powers. *See Groton Wind, LLC*, SEC no. 2010-01, Order dated May 6, 2011, at 37-38 (Committee cannot regulate local issues because they do not affect orderly development of the region).

This is consistent with legislative intent expressed in relatively recent changes to the subdivision statutes with respect to renewable energy facilities. In 2002, the legislature chose to expressly allow planning board jurisdiction to the extent that it does "not unreasonably limit the installation of solar, wind, or other renewable energy systems or the building of structures that facilitate the collection of renewable, except where necessary to protect the public health, safety and welfare." RSA 672:1, III-a. After three years of study, the legislature allowed that reasonable (or greater) limitations on renewable energy facilities could be required by towns under their zoning powers even with the knowledge that the Site Evaluation Act existed. *See In re Appeal of Public Serv. Co. of N.H.*, 141 N.H. 13, 25 (1996); *Barksdale v. Town of Epsom*, 136 N.H. 511, 516 (1992) (legislature is presumed to know of preexisting law); 2002 N.H. Laws c. 73:2 (May 1, 2002). In the same law, the legislature authorized, but did not require, communities to include subdivision regulations concerning renewable energy systems. RSA 674:36, II(k); 2002 N.H. Laws c. 73:3. These changes made in 2002 were for the purpose of promoting the development of renewable energy facilities in New Hampshire. *See* RSA 672:1, III-a ("Proper regulations encourage . . . the use of other renewable forms of energy..."); 2002 N.H. Laws c. 73; HB 701, H. Journ. at 33 (Jan. 2, 2002) ("This bill is a request of the committee established in 1999"); *Interim Report of the Committee To Study Methods to Promote the Use of Renewable Energy Sources*, HB 1462, c.61, 2000, dated Nov. 16, 2000 at 1 ("towards these ends the Committee

will recommend legislation to prohibit (unreasonable) restrictions to the installation of renewable energy sources"); *Final Report, Renewable Energy Sources Promotion Methods Study Comm.*, HB 402, c. 47, dated Nov. 1, 1999 (discussing growth in renewable industry and recommending further study).[2]

In addition, the legislature knew how to write a provision dealing with zoning, subdivision and site plan ordinance issues when interfacing with energy property when it wanted to, including resort to the PUC if the town planning board refuses to grant a waiver or attaches unacceptable conditions. *See* RSA 674:30 ("Local ordinance, codes and regulations enacted pursuant to this title shall apply to public utility structures" subject to certain permissive provisos which the town may choose to utilize). The fact that it has not done so for site evaluation purposes suggests an intent to leave things well enough alone. In fact, RSA 674:30 suggests a strong legislative intent to the contrary where subdivision approval is among the local ordinances, codes and regulations made pursuant to RSA c. 674, which is within title LXIV.[3] Similarly, the legislature has expressly contemplated that the district, superior, and supreme courts may have occasion to make decisions that "affect property boundaries" and that the probate court may have occasion to create "divisions of land" within their jurisdiction. *See* RSA 676:18, V. That the legislature chose to do so for the jurisdiction of those bodies demonstrates that it did not intend to do so for the Committee. *See Gentry v. Warden, N. N.H. Correctional Facility*, 163 N.H. 280, 282 (2012) (*expressio unius est exclusio alterius).*

[2] The 2008 amendments to c. 674, RSA 674:62 – 66, deal with municipal efforts to "regulate the installation and operation of small wind energy systems," and have nothing to do with subdivision.
[3] RSA 31:109 "Local Option for Oil Refinery Siting In Towns" is not to the contrary as this law allows town people by ballot referendum to make the ultimate decision about whether a particularly noxious energy facility type will be allowed in the town under any conditions. This is not an evaluation process.

In general, RSA 162-H deals with broader issues of site selection, not the narrower issues associated with subdivision such as lot configuration, land ownership patterns, zoning issues, or the provision of public services in towns. *See, e.g.*, RSA 162-H:1 (purpose of statute is to "maintain a balance between the environment and the need for new energy facilities" and treat construction and operation as "significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion"); 162-H:7 (information provided with application must be sufficient to satisfy requirements of state or federal agencies having jurisdiction to regulate any aspect of the "construction and operation" of the facility and information describing environmental impacts and proposals for mitigation of those impacts); 162-H:16 (findings made after consideration of environmental impacts include financial, managerial, and technical capability, orderly development of the region, and effects on aesthetics, historic sites, the environment, and public health & safety issues arising from the facility itself); *accord Jurisdictional Order* at 23 (Committee's review of the Applicant's proposal will not duplicate the Town's "limited review" of the zoning issues surrounding the project's meteorological tower). None of the working parts of the statute suggest any legislative intent to supplant local authority on subdivisions or other police and regulatory powers held by the State or the municipalities, including, subdivision approval. *See Stablex Corp. v. Town of Hooksett*, 122 N.H. 1901, 1104 (1982) (comprehensive hazardous waste act preempts town's site plan review process for hazardous waste facilities but leaves intact police and regulatory powers).

A certificate of site and facility does not exempt a project from following generally applicable laws. *Id.* Instead the process is intended to be a form of efficient one-stop

shopping for state agency issued environmental permits. *See* RSA 162-H:1 & 3 (ensures that all environmental, economic, and technical issues are resolved in an integrated fashion"); 162-H:3 (committee makeup includes state level environmental, public health, historic and cultural resources, economic and energy officials); *accord 1990 Report* at 1-2 (improvements to deal with increasingly strict environmental laws, appeals, and stating SEC membership is "each of the major sectors with a stake in the siting of energy producing facilities" – the makeup of the committee does not include municipal planning and zoning officials). It is a site selection law, not a property boundaries, zoning, or community organization/public services law. Consequently, the Site Evaluation Act does not evince legislative intent to repeal local subdivision authority. It instead appears that the legislature contemplated that both laws would work in their separate spheres to advance distinct but complimentary public protection objectives.

### B. RSA 162-H Does Not Preempt The Town's Subdivision Ordinances As They May Apply To Energy Facilities.

Because the Town of Antrim is a subdivision of the State, its powers are those granted by the legislature. *E.g. Arthur Whitcomb, Inc. v. Town of Carroll*, 141 N.H. 402, 405 (1996); *Public Service Co. of N.H. v. Town of Hampton*, 120 N.H. 68, 71 (1980). Local land use ordinances under RSA c. 674 are invalid only if they are repugnant to State law. *Arthur Whitcomb, Inc.*, 141 N.H. at 406. Such repugnancy only exists if the ordinance "expressly contradicts a statute, or else runs counter to the legislative intent underlying a statutory scheme." *Id.*; *Town of Hampton*, 120 N.H. at 71. A local rule runs counter to the statute's legislative intent if the intent is to preempt or fully occupy the field addressed by the two

laws. A town vote on an already final siting decision is preempted by the Site Evaluation Act. *Town of Hampton*, 120 N.H. at 71.

There is more to the tale, however, as developed in more recent cases and enactments. "The mere fact that a state law contains detailed and comprehensive regulations as a subject does not, of itself establish the intent of the legislature to occupy the entire field to the exclusion of local legislation." *North Country Envtl. Servs. v. Town of Bethlehem*, 150 N.H. 606, 611 (2004). The analysis requires addressing issues such as: is there a conflict between the State and local laws? Is the State law intended to be exclusive? Is there a need for uniformity? Is the State scheme so pervasive, that it precludes local regulations? And, does the local ordinance stand as an obstacle to the accomplishment of the State program? *Id.* at 611-12. When the State program has preempted the entire regulatory field, any local law on the subject is preempted regardless of a conflict. *Id.* at 612.

The State's Energy Facility Evaluation Act is in some respects similar to the State's waste disposal facility laws, but in key respects, not. Both were designed to provide for facilities and protect against the environmental impacts of them. Both require a State permit prior to construction issued after a comprehensive application and public administrative process. Both assure public input into that process and the requirement that the process consider the views of citizens and local governing bodies. Both laws provide State level enforcement of the terms and conditions of the permits issued. Both laws require criteria be met for siting a facility. *Id* at 614; *see also Stablex Corp.*, 122 N.H. at 1101-03 (analysis for hazardous wastes).

Importantly, however, a key difference between the programs is immediately evident; while the solid and hazardous waste acts deal with closely regulated and permitted industries

and apply detailed technical specifications to facility construction and operation, the Site Evaluation Act does neither of those things. *See Lakeshore Lodge, Inc. v. Town of New London*, 158 N.H. 164, 169 (2008) ("detailed guidelines for coordinated lake management and shoreland protection plans together with recommendations for implementation" evidence legislative intent to preempt local zoning); *Arthur Whitcomb, Inc.*, 141 N.H. at 406-407 ("specific and technical standards" and "exhaustive treatment" manifest intent to occupy the field and preempt local land use ordinances). Unlike the Solid Waste Act considered in *North Country*, or the hazardous waste program addressed in *Stablex Corp.*, the Site Evaluation Act is not "a comprehensive and detailed regulatory scheme governing the design, construction, operations and closure" of energy facilities. *North Country,* 150 N.H. at 615. Instead, the Site Evaluation Act provides for the application of certain general criteria directed towards determining the balance between the State's need for energy production facilities on the one hand and the environmental and economic impacts of the facility on the other.

With respect to the "site selection" decision, the Supreme Court has held that the Site Evaluation Act is a "comprehensive review." *Town of Hampton*, 120 N.H. at 70. In the absence of "exhaustive treatment," however, the evidence of a legislative intent to occupy the field and preempt all local regulation pursuant to RSA 674, not related to "site selection" is missing and the Town's subdivision ordinances should not be taken over by the Committee. *See Corey v. Town of Merrimack*, 140 N.H. 426, 428 (1995) (no preemption inferred because statutory scheme did not purport to regulate particular field comprehensibly).

*Town of Hampton* is not to the contrary. In that *per curiam* decision (which arguably has been superceded by cases such as *North Country* and rendered superfluous by the 2002 amendments to RSA 672:1 and RSA 674:36), the Supreme Court determined that a town vote to require underground utilities was preempted by a final order of the Site Evaluation Committee which considered the issue over a lengthy process including an appeal to the Court. *Town of Hampton*, 120 N.H. at 70. In light of those realities, much of *Town of Hampton* is dicta.[4] Nevertheless, the focus in that case was on the site selection process that occurs in RSA 162-H for a facility, not on the issue before the Committee today: subdivision of land for a structure that is not the facility, and which is instead, at best "associated" equipment for a facility.

Applying the preemption analysis to subdivision reveals that there is nothing about the Town of Antrim's subdivision approval ordinances and process that would threaten to undermine the legislative intent of the Site Evaluation Act or constitute an unreasonable limitation on the installation of renewable energy. The purpose of subdivision approval is "to guide municipal development, to protect the prospective residents and neighboring owners from problems associated with poorly designed areas...." Loughlin at § 29.02; Loughlin at §29.03 ("Subdivision regulations...are designed to control the subdivision of land to assure that the divisions and the development thereon are designed to accommodate the needs of the occupants of the subdivision."). The underlying premise of subdivision approval is that "a new subdivision is not an island, but an integral part of the whole community which must mesh efficiently with the municipal pattern of street, sewers, water

[4] *Town of Hampton* can be distinguished because of its procedural posture. In that case the transmission lines were an "energy facility" that had themselves been certificated. Here, the substation is not the facility and it has not yet been certificated.

lines, and other installations which provide essential services and vehicular access." Loughlin at § 29.02.

The Antrim Regulations state objectives that are not at odds with the goals and purposes of c.162-H. Like the local wetlands buffer regulations approved in *Cherry v. Town of Hampton Falls*, 150 N.H, 720, 723-24 (2004), the Antrim Regulations cover related but different subject matter. The Antrim Regulations purposes include providing for harmonious and aesthetically pleasing development of the town, proper arrangement and coordination of streets with respect to one and other and those being planned, and traffic, open space, and access for firefighting equipment. Antrim Regs. § II(A); *see also* RSA 674:36 (describing appropriate content for subdivision regulations). Further the Antrim Regulations provide against scattered or premature subdivision as might involve danger to public health and safety because of lack of water supply, inadequate drainage or flooding, inadequate public services, excessive expenditure of public funds through supply of public services, and undesirable and preventable elements of pollution[5] such as noise, smoke, soot, and other discharges. *Id.* § II(B); RSA 674:36.

Given that the Applicant's proposal would likely qualify as a minor subdivision, the requirements, while detailed and specific, do not appear to be especially onerous or complicated. The Antrim Regulations show no animus against commercial or industrial uses. In general, it appears that a properly presented application for the subdivision the Applicant wants could be approved without much fuss within 3-4 months. *See* Antrim Regs. § IV(B)(1), (2) & (C)(1); Antrim Regs. § V (requirements for application for minor

[5] This one consideration of the subdivision regulations may be preempted by 162-H. *See North Country*, 150 N.H. at 620.

subdivisions); Antrim Regs. § IX (general standards and requirements). What is most important, however, is that the Antrim Regulations for subdivision approval cover areas of the exercise of the police and regulatory power that do not conflict with the jurisdiction of the Committee. *See* Antrim Regs. § V(B)(3).[6] The Antrim Regulations appear less concerned with the environmental and regional economic impacts of the *facility* for which much of the Committee's jurisdiction is dedicated, and more concerned for the effects of the *land subdivision* on the Town, its layout and its provision of public services. It is clear that the subdivision rules do not prohibit that which c. 162-H permits or vice versa. *North Country*, 150 N.H. at 618.

The other elements of the preemption test outlined in *North Country* also do not suggest that the Site Evaluation Act preempts local subdivision approval. The Site Evaluation Act was not intended to create exclusive jurisdiction over subdivision in the Committee whereas the planning board's jurisdiction to approve subdivisions is intended to be exclusive. *North Country*, 150 N.H. at 611; RSA 672:1; RSA 674:42. The question of local subdivision regulation does not require uniformity because it is an especially situation specific analysis. The Site Evaluation Act also does not require uniformity in all things – instead the legislature intended developers to go to planning boards and be protected against "unreasonable" conditions. RSA 672:1, III-a (renewable energy facilities); RSA 674:30 (utility structures). Both of these factors militate against preemption. *Id.*

[6] While the subdivision must also show that the use is proper for the zoning, the Applicant's substation proposal appears to be in the Highway Business District. Among the approved uses in that District are "public utilities." *See* Antrim Zoning Ord., Art. V.

## IV. Conclusion

Unlike the dispute over the Committee's jurisdiction over the whole project, this jurisdictional controversy is a very small factually and legally distinct issue. *See Jurisdictional Order* at 20. Significantly, and unlike in the previous jurisdictional dispute, there is no allegation that the Town of Antrim is not equipped with appropriate legal and technical tools to consider and act upon the discrete and non-regional issues involved in considering a request for a subdivision approval by a proper party. *See Jurisdictional Order* at 23-24 (present site plan approval ordinance and town resources do not equip the town to deal with site plan impacts in a timely way). As the dissenting Committee members noted last summer, there is no reason to believe that the Antrim Planning Board will not deal with the Applicant's simple subdivision plan approval request in a fair and timely way. *See In re Petition for Jurisdiction Over Renewable Energy Facility*, N.H. Site Eval. Comm., no. 2011-02, Dissent From Jurisdictional Order, dated August 23, 2011, at 2. There is consequently no evidence that the Town's subdivision approval process would "frustrate the purpose or implementation" of the Site Evaluation process in this case, or any other. *See Lakeside Lodge*, 158 N.H. at 173; *Blagbough Family Realty Tr. v. Town of Wilton*, 153 N.H. 234, 236 (2006); *Town of Hampton*, 120 N.H. at 71. State law protects the Applicant from "unreasonable" conditions on the subdivision approval.

Finally, this Committee has often dealt with the problem faced by an applicant when the non-SEC regulatory process takes longer or is outside the reach of the Committee. In the *Granite Reliable* case, the Subcommittee found,

> ... that the System Impact Study (SIS) and results are not within the mandate of the Subcommittee. The Subcommittee has no authority or control over the Independent System Operator (ISO) and therefore, it would not be appropriate

> for the Decision or Certificate to require the action suggested by IWAG. If the ISO finds that upgrades need to be made to the Coos County loop in order to accommodate the Project, the Applicant will have to comply with that direction …

*Application of Granite Reliable Power, LLC*, Site Eval. Comm. no. 2008-04, Order Denying Motions for Rehearing, dated Nov. 9, 2009, at 6; *see also In re Joint Motion of Laidlaw Berlin Biopower, LLC and Berlin Station, LLC for Transfer and Amendment of Certificate*, N.H. Site Eval. Comm., no. 2009-02, Order and Amended Certificate, dated July 12, 2011, at 4 (conditioning certificate upon final approval of PPA by NHPUC); *Application of Lempster Wind, LLC*, N.H. Site Eval. Comm., no. 2006-01, Decision Issuing Certificate, dated June 28, 2007, Attch. B "Order" at 32 (conditioning certificate on DES conditions which included, "This approval does not relieve the applicant from the obligation to obtain other local, state or federal permits that may be required …"). Clearly the Committee does not view the one stop approach provided by the statute as all encompassing. *Accord* RSA 162-H:16, VI & VII. The Committee's jurisdiction is broad for site selection, but in other aspects, limited. In this instance it should find that the Town's subdivision process is not preempted by, or otherwise subsumed in, the site evaluation process.

Respectfully submitted this 24th day of July, 2012,

PETER C.L. ROTH
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**Certificate of Service**

I, Peter C.L. Roth, do hereby certify that I caused the foregoing to be served upon each of the parties named in the Service List of this Docket.

Dated: July 24, 2012

Peter C.L. Roth