

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

RE: Application of Antrim Wind, LLC for Certificate of site and )  
facility to construct up to 30 MW of wind electric generation in )  
the town of Antrim, Hillsborough County, New Hampshire and )  
operate the same (SEC Docket 2012-01). )

**PRE-HEARING LEGAL MEMORANDUM BY INDUSTRIAL WIND ACTION GROUP  
ADDRESSING THE COMMITTEE'S AUTHORITY TO CREATE SUBDIVIDED LOTS**

The Industrial Wind Action Group ("IWA") is grateful for the opportunity to reply to the NH Site Evaluation Committee's ('SEC' or 'Committee') request for a pre-hearing legal memorandum on whether the Committee has the authority to create subdivided lots.

**I. Background**

1. The Antrim Wind LLC ("Applicant") has requested that the Committee approve the creation of a subdivided lot so that the Applicant can transfer title of the proposed interconnection yard to Public Service Company of New Hampshire ("PSNH"). The Application asserts in his application (p.45) that PSNH requires ownership of the property in order to allow interconnection.

2. The Applicant claims that the Committee has the authority to create subdivided lots pursuant to RSA 162-H: 16, II. No explicit power to create subdivided lots is articulated under the statute.

**II. Argument**

3. According to the NH Office of Energy and Planning Board handbook entitled *The Planning Board In New Hampshire A Handbook For Local Officials* (November 2010<sup>1</sup>), the "broad purpose of subdivision control is to guide municipal development, to protect the prospective residents and neighboring owners from problems associated with poorly designed areas, and to advance the recognized purposes of the police power."

4. Pursuant to NH RSA 674:35, the power to regulate subdivisions within the boundaries of NH municipalities lies solely with local planning boards.

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<sup>1</sup> <http://www.nh.gov/oep/resourcelibrary/HandbooksAndOtherPublications.htm#HSPR>

5. Before a municipality can regulate the subdivision of land within its boundaries, state statutes require that a planning board be established, that the board be granted authority by the local legislative body to regulate subdivisions, and that the board adopt specific subdivision review regulations (RSA 674:36, I). The Town of Antrim has met all of these requirements and its planning board is fully authorized to approve subdivision applications.

6. The Applicant appears to rely on RSA 162-H:16, II and the general phrase "land use" in the statute as his basis for claiming the Committee has the power of subdivision. To test the Applicant's claim, we considered two reasonable questions: (a) Do any state statutes grant the Committee the same powers as municipal planning boards? and (b) Does RSA 162-H grant the Committee authority to supplant the powers and decisions made by other entities in the State with jurisdiction over elements of the application?

7. On the question of whether the Committee has the same powers as municipal planning boards, we looked at the provisions of RSA 162-H and the state statutes governing municipal land use boards. We could find no wording to suggest the Committee shared the same powers as planning boards in the state. The fact that the RSA 162-H:16, II asks the Committee to address all questions pertaining to "*siting, land use, air and water quality*" is not the same as the Committee assuming powers not otherwise articulated in the statute. Also, while RSA 162-H:1 cites an intent to "*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*", this wording mainly provides a concept only and in no way grants planning board powers to the Committee.

8. We then considered whether the Committee can assume the authority of other state entities who have jurisdiction over elements of the project. In this case we looked at RSA 162-H:16, I, which requires the Committee incorporate the terms and conditions of other state agencies with jurisdiction over aspects of the application. This provision prohibits the Committee from issuing any certificate if an agency with jurisdiction denies authorization for the proposed activity. The statute clearly limits the Committee's ability to overreach and assume powers outside its jurisdictional review. The power of subdivision is clearly outside of the Committee's review regardless of where, in the municipality, the subject property is located.

9. If we were to accept that the Committee has the power of subdivision, the Committee has made no effort to adopt specific subdivision review regulations under the enactment procedures of RSA 675:6. This would be a minimum requirement that must be met before the Committee can exercise its alleged subdivision powers. Absent these regulations, the Committee cannot proceed with review of the Applicant's subdivision plan.

10. The Applicant also requests in his application (p.44) that the Committee provide for the following:

...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 and decision granting a certificate of site and facility is commensurate with the approvals required by RSA 676:18, and therefore can be recorded by the Hillsborough County Register of Deeds.

11. The Applicant is well aware that RSAs 674:11, 674:37 and 676:18 each explicitly require the approval of a municipality's planning board in order to make amendments to the municipality's official map and to record amended subdivision plats with the Registry of Deeds. Even if the Committee assumed subdivision power, there are no apparent means whereby the Committee can circumvent the plain wording of these statutes.

(A) RSA 674:11 permits the local legislative body to consider amendments to the official map of the community provided the planning board approves the change. If the planning board disapproves of the change, a majority vote by the town's legal voters is needed to override the planning board's position;

(B) RSA 674:37 states that "no plat shall be filed or recorded ...until it has been approved by the planning board and such approval has been endorsed in writing on the plat in such manner as the planning board may designate." Exceptions to this requirement are provided under RSA 676:18 II and III and RSA 676:4, I(c) , however, these exceptions do not apply in Antrim Wind's case;

(C) RSA 676:18 states that "A registry of deeds who files or records a plat of subdivision without the approval of a planning board shall be guilty of a misdemeanor." Exceptions provided in paragraphs II and III of the RSA do not apply in this situation.

### III. Conclusion

12. For all of the reasons cited above, IWA asserts that NH statutes governing the Committee and municipal planning boards do not confer the power of subdivision on the Committee. In order for the Committee to act on the Applicant's request, several statutes cited herein would need to be amended, or ignored, in order for the Committee to assume this power. If the legislature intended for the Committee to fully preempt all powers of local land use boards, the necessary changes to the RSA's governing these boards would have been proposed. This was not done. If the Applicant requires a subdivision be performed on the subject property, the Committee and the State of New Hampshire would be best served by the Committee abiding by the existing statutes as written rather than imposing an assumed power not evident in the plain reading of the law(s). The Applicant is at liberty to proceed with subdivision review before the Town of Antrim's planning board. This process is no more duplicative than the Applicant seeking permits from state and federal agencies or negotiating an agreement with the Town of Antrim. In keeping with prior actions of the Committee, the Committee can address the issue in a way that is consistent with RSA 162-H:16, II by adding a condition on the certificate stating that the Applicant must receive approval by the Antrim planning board to create the subdivided lot.

IWA appreciates the opportunity to provide this brief

Dated this day of July 24, 2012

INDUSTRIAL WIND ACTION GROUP By:



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Lisa Linowes

Industrial Wind Action Group

286 Parker Hill Road  
Lyman, NH 03585  
(603) 838-6588

cc: Parties to Docket 2012-01