THE STATE OF NEW HAMPSHIRE

SITE EVALUATION COMMITTEE

Docket No. 2012 – 01

Re: Antrim Wind Energy, LLC

Post Hearing Memorandum

of the

Antrim Planning Board

NOW COMES the Intervenor, Antrim Planning Board (APB), by its undersigned designated members, and respectfully submits this as its Post Hearing Memorandum.

The Antrim Planning Board is an elected board of the Town of Antrim pursuant to RSA 673:2.

APB has not taken a position "for" or "against" the project proposed by Antrim Wind Energy. The APB has defined its role as intervenor to provide the SEC with sufficient information so that it has a clear understanding of the Antrim Master Plan, Zoning Ordinances, and Subdivision and Site Plan Review regulations. It has taken a position that the Antrim Planning Board should have jurisdiction over any subdivision that may be required pursuant to the Antrim Wind Energy LLC project.

Introduction

On January 31, 2012, Antrim Wind Energy, LLC (Applicant) filed an Application for a

Certificate of Site and Facility (Application). The Applicant petitions the Site Evaluation Committee (Committee) for a Certificate of Site and Facility (Certificate) in order to construct and operate a renewable energy facility in the Town of Antrim, Hillsborough County, consisting of not more than 10 wind turbines each having a nameplate capacity of not more than 3 megawatts (MW) for a total nameplate capacity of30 MW (Facility). The Vice-Chair of the Committee accepted the Application as administratively complete on March 5, 2012, and a Subcommittee was appointed to review the Application as provided in RSA 162-H:6-a, III and RSA 162-H:4, V (Subcommittee).

This post hearing brief articulates the recommendations of the Antrim Planning Board intervenor in order to assist the Committee in its charge to ensure that the Application is fully vetted pursuant to RSA 162:H and most particularly by the criteria required in RSA 162-H:16.

In RSA 162-H:16, the statutory standard by which the SEC must make judgment as to whether a project should be certificated or not is as follows[1]:

> "IV. The site evaluation committee, after having considered available alternatives and fully reviewed the environmental impact of the site or route, and other relevant factors bearing on whether the objectives of this chapter would be best served by the issuance of the certificate, must find that the site and facility:

[1] NH Revised Statutes Annotated 162-H:16

(a) Applicant has adequate financial, technical, and managerial capability to assure construction and operation of the facility in continuing compliance with the terms and conditions of the certificate.

(b) Will not unduly interfere with the orderly development of the region with due consideration having been given to the views of municipal and regional planning commissions and municipal governing bodies.

(c) Will not have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety."

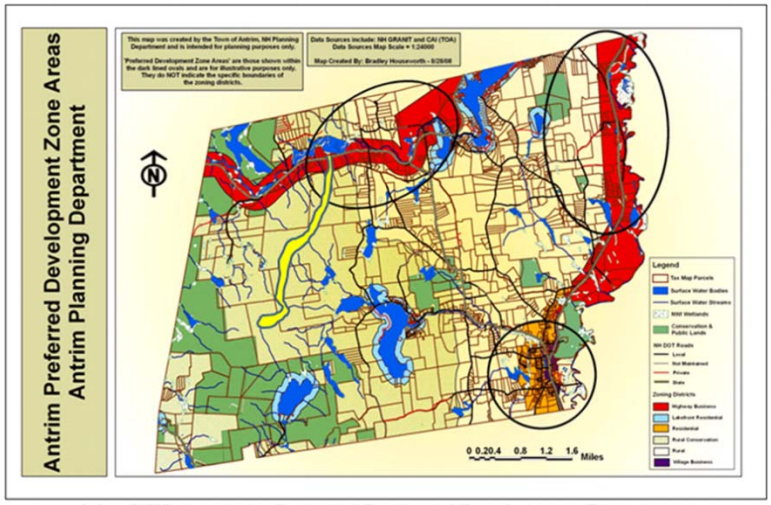
The Antrim Planning Board will address only RSA162-H:16 (b) in this memorandum. The APB has three main points to make relative to this portion of the SEC certification standard:

1. The Town of Antrim has a complete and thorough Master Plan, zoning ordinance and subdivision and site plan review regulation that should be taken into account in the decision of the SEC in this docket.

In pre-filed testimony of Planning Board members Charles Levesque and Martha Pinello (APB exhibits 9 and 14), the following information was provided:

a. The Town of Antrim has had a Planning Board since 1968. This elected planning Board and land use regulations have been in effect since 1968.

b. Antrim has a new Master Plan that was adopted in 2010 pursuant to RSA 674:4. The Master Plan says that industrial development in the area proposed for the Antrim Wind Energy proposed wind farm, should be concentrated in the area immediately along Route 9. The map below shows this graphically. The area in red along Route 9 is the Highway Business District (in the zoning ordinance).



Map VIII-1: Antrim Potential Preferred Development Zone Areas

AWE Project area

The Master Plan further states, relative to the area up the Tuttle ridge from Route 9 where the Antrim Wind project is being proposed:

"The bulk of the undeveloped land in Antrim is in the western portion of the town. This area is already subject to substantial conservation ownership or restrictive easements, and has few roads. The constraints on future development in this area arise from steep slopes, lack of infrastructure, and preservation of wetlands and wildlife habitats.

i. Large areas of the rural land in Antrim are unsuited for high intensity uses such as homes, roads, and commercial buildings. Many of these areas have remained

undeveloped due to their economic limitations but contribute to the quality of life enjoyed by the citizens of Antrim as open space.

ii. Open Space Conservation Plan for Antrim (see Appendix 2): This plan identifies priority areas for conservation and recommends the use of conservation easements to permanently protect these areas. The major areas identified in the plan cover much of the part of the town west of Gregg Lake from the Hillsborough and Windsor town lines south to the Hancock town line."

c. Except for the first approximately 1,100 feet of access road from Route 9 that also includes the proposed substation, the Antrim Wind proposed project, including all of the wind towers, is within the Rural Conservation district of the Antrim Zoning Ordinance. As per RSA 674:16 and 675:2-5, the Antrim Zoning Ordinances were adopted by the voters of Antrim. Since enactment in 1974, the Zoning Ordinance has been amended twenty times. The Rural Conservation zoning district does not allow development of the kind proposed by Antrim Wind. In order to proceed with such development, a variance would have to be granted by the Zoning Board of Adjustment.

A Large Scale Wind Ordinance was developed by the Planning Board and put before the voters on November 8, 2011 and again on March 13, 2012 that would have allowed a wind farm such as that proposed by Antrim Wind Energy as a permitted use within the Rural Conservation zoning district. Voters failed to pass the ordinance each time. As a result, the Rural Conservation zoning district does

not allow this kind of development without first receiving a variance through the Zoning Board of Adjustment.

d. The Antrim Subdivision and Site Plan Review Regulations have a stated purpose as follows:

"A. The purpose of the Subdivision and Site Plan Regulations is to provide for:

1. The harmonious and aesthetically pleasing development of the Town of Antrim and its environs.

2. The proper arrangement and coordination of streets within subdivisions in relation to other existing or planned streets or with other features of the Town of Antrim.

3. Suitably located streets of sufficient width to accommodate existing and prospective traffic.

4. Open space of adequate size and proportions to allow for sufficient light and air.

5. Access for firefighting apparatus to buildings.

B. Further, these regulations provide against such scattered or premature subdivision of land or development as would involve danger or injury to health, safety or prosperity by reason of:

1. The lack of water supply or protection of groundwater quality.

2. Inadequate drainage or flooding of neighboring properties.

3. Inadequate roads, school facilities, fire protection, or other public services.

4. Excessive expenditure of public funds for the supply of such services.

5. Undesirable and preventable elements of pollution such as noise, smoke, soot, particulates, or any other discharge into the environment which might prove harmful to persons, structures, or property."

The Antrim Subdivision and Site Plan Review Regulations were originally adopted in 1968 and amended sixteen times since then. The current Regulations were adopted by the Planning Board after public hearing pursuant to RSA 674 in 2008. The Regulations have requirements for certain development projects such as the proposed Antrim Wind Energy project, should the project meet the requirements of the zoning ordinance. If it does, the application for subdivision and/or site plan review would be required according to the Regulations.

2. The Antrim Planning Board should retain subdivision authority relative to the Antrim Wind Energy project.

Through a Memorandum of Law filed on behalf of the Antrim Planning Board by Attorney Bernard Waugh (APB exhibit 8), the Planning Board argues that it should retain subdivision authority should the Antrim Wind Energy project require a subdivision according to the Antrim Subdivision Regulations. Atty. Waugh's Memorandum included the following:

" 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 .

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."

For these reasons, the Antrim Planning Board should retain jurisdiction over the subdivision issue should the SEC certificate the Antrim Wind Energy project.

3. The SEC has not received adequate evidence relative to the regional nature and effects of the proposed Antrim Wind Energy, LLC wind farm.

RSA 162-H:16 says, in part, that the SEC must make a decision to certificate or not based on the following criteria (as well as two others):

"(b) Will not unduly interfere with the orderly development of the region with due consideration having been given to the views of municipal and regional planning commissions and municipal governing bodies."

The record shows minimal evidence to allow the SEC to make a judgment on the issue of whether the proposed project will "…not unduly interfere with the orderly development of the region…". The applicant's proof on this issue was vacant or minimal. No other evidence was provided by a regional planning commission or other expert entity on the topic. South West Regional Planning Commission is one of nine regional planning commissions in New Hampshire established under RSA 36. This regional office covers a 35-town area in Cheshire, western Hillsborough, and Sullivan Counties, including Antrim. It mission is *"To work in partnership with the communities of the Southwest Region to promote sound decision-making for the conservation and effective management of natural, cultural and economic resources."* www.swrpc.org. This Commission was absent from these proceedings.

Applicant's witness Jack Kenworthy alluded to issues of development in the region in his pre-filed testimony (AWE Exhbit 1 Vol 1.02 Kenworthy Prefiled Testimony, page 14 at 7-9 "…I conclude that the Project is consistent with these views as they relate to the orderly development of the region." See Complete page12 at 4 tp page 14 at 9).
and his testimony was unconvincing.

Matthew Magnusson, witness for the applicant taking the place of Ross Gittell and assuming his testimony, is a graduate student assistant of Dr. Gittell and has less than five

years' experience in this field of economic development when he co-authored this report. He has an unrelated under-graduate degree in kinesiology (AWE exhibit 9 4th supplement 30 and 31 Magnusson reported on employment related the construction and operation of the wind facility and the PILOT income that were challenged by intervenors on cross-examination. He did not address other regional impacts such as change in land use and the associated impacts. Magnusson submitted a single uncited document relating to regional planning. (AWE Exhibit 9 4th supplement appendix 16). The exhibit is an excerpt of a 204 page regional document prepared and published by South West Regional Planning Commission entitled *Comprehensive Economic Development for Southwestern New Hampshire* (2007) (http://www.swrpc.org/files/data/library/general/CEDS%202007%20Update_Jun_28_07_Final.pdf. It is a five page excerpt of the *Economic Conclusion* section.

Wind energy is not mentioned in this document. The document does mention four projects for Antrim. These projects are:

- Goodell Plant redevelopment
- Great Brook River Walk
- Downtown water flow management
- Assisted living facility

As a result of the lack of record on the issue of regional development issues, we believe that the SEC lacks the evidence to make a decision on certification of the project based on the requirements of RSA 162-H:16, (IV), (b).

Conclusion

For the reasons aforesaid, the undersigned respectfully submits that the foregoing accurately and concisely describes the Master Plan, Zoning Ordinances and Subdivision and Site Plan Review regulations of the Town of Antrim; argues decisively why the Antrim Planning Board should retain jurisdiction over subdivision if required by the Antrim Wind Energy project should it be certificated by the SEC; and that the SEC lacks the evidence on regional development effects of the proposed project to rule on certification of this project.

Respectfully submitted,

Charles Levesque & Martha Pinello
Antrim Planning Board
Town of Antrim
PO Box 517
66 Main Street
Antrim, NH 03440

Dated: January 14, 2013

Certificate of Service

We hereby certify that we served the foregoing Post Hearing Memorandum by e-mail on all parties identified on the current Service List this 14th day of January, 2013.

Charles A. Levesque Martha E. Pinello