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Please respond to the Portsmouth office

July 17, 2015

Via Hand Delivery and Electronic Mail

Jane Murray
Site Evaluation Committee
NH Department of Environmental Services
29 Hazen Drive
PO Box 95
Concord, NH 03302-0095

Re: Docket No. 2014-05
Petition of Antrim Wind Energy

Dear Ms. Murray:

Enclosed please find an original and 10 copies of *Post-hearing Memorandum in Support of Jurisdiction.*

If you have any questions, please contact me.

Very truly yours,

Justin C. Richardson
jrichardson@uptonhatfield.com

JCR/sem
Enclosure(s)
cc: Service List (w/ enclosure)(via Electronic Mail)

BEFORE THE STATE OF NEW HAMPSHIRE

SITE EVALUATION COMMITTEE

Petitions of Antrim Wind, LLC and the Town of Antrim

NHSEC No. 2014-05

POST-HEARING MEMORANDUM IN SUPPORT OF JURISDICTION

NOW COMES the Town of Antrim, by and through Upton & Hatfield, LLP, and offers this *Post-Hearing Memorandum in Support of Jurisdiction* as follows:

I. SUMMARY

Antrim explained in its June 24, 2015 *Memorandum of Law in Support of Jurisdiction*, that there are two issues before the Committee:

(1) Whether Antrim Wind, LLC has "merely resubmit[ted] substantially the same application" or "submitted a new proposal in an effort to meet the [Committee's] concerns"; and

(2) Whether the Antrim Wind project is subject to jurisdiction consistent with the findings and purposes set forth in RSA 162-H:1.

Antrim also explained that judicial estoppel precludes a finding that changes proposed by Antrim Wind, LLC are not material, as the Committee already determined that similar changes would be subject to *de novo* review in a new application.

i. Antrim Wind has Made Material Changes to its Project

On the first question, the evidence and the law are clear: Antrim Wind has made material changes to its project to address the reasons for denial of the prior application. Under the *Fisher v. Dover* rule, changes in a second application are considered material if they are intended to

address the reasons for denial in the prior decision and create a "reasonable possibility" that the Committee would approve a revised proposal.[1]

In this case, the Committee determined that its prior "decision is not a determination that a wind facility should never be constructed in the Town of Antrim or on the Tuttle Hill/Willard Mountain ridgeline. The decision is based solely on the information provided regarding the specific Facility presented in this docket. A different facility may be adequately suited to the region." In response to this decision, Antrim Wind removed Turbine 10, the highest and most prominent, as well as reduced the height of Turbine 9. It made numerous other changes to reduce visual impacts as well as increase the mitigation of visual impacts. The Committee could also require other changes during its review of the revised project.[2] Antrim is entitled to have its application considered because the material changes it has made as well as others the Committee might require create a "reasonable possibility" of a different outcome.

ii. The Project is Subject to Review by the Committee

On the second question, all of the facts and conclusions supporting jurisdiction and review by the Committee remain present today: Antrim has no wind energy standards for the project in its Zoning Ordinance nor in its site plan regulations. The project is a prohibited use in the rural conservation district, despite the fact that a majority of Antrim residents and the Board of Selectmen support the project. Three attempts by the Planning Board to adopt a wind energy ordinance have failed. Antrim has no legal standards, no technical expertise, and no legal authority to regulate the project's impacts to wildlife, noise or aesthetics or other aspects of the project. It is true that Antrim has "institutions" such as a Planning Board and a Zoning Board of

[1] *See*, Section III, below.
[2] RSA 162-H:16, VII ("A certificate of site and facility may contain such reasonable terms and conditions as the committee deems necessary.").

Adjustment. However, without an ordinance, regulations, legal authority, or expertise, it is entirely uncertain how review could be accomplished. Any decision to approve or deny the project would result in multiple appeals with no guarantee that any of the findings and purposes set forth in RSA 162-H:1 would be protected.

Opponents of the project advocate for the Committee to decline jurisdiction for a very simple reason: in the absence of a wind energy ordinance, the Antrim Wind project is a prohibited use. This means that uncertainty, delays and legal challenges would likely prevent the project from even being considered. This is as clear a case for jurisdiction as can be made under RSA 162-H:1.

II. MATERIAL CHANGES TO THE ANTRIM WIND PROJECT

Antrim Wind has made numerous material changes to its project in response to and in reliance on the Committee's prior decisions that such changes would be subject to *de novo* review. Antrim Wind eliminated Turbine 10, the highest and the most prominent turbine in its prior application with the greatest visibility at Willard Pond and at other locations. Antrim Wind also reduced the height of Turbine 9 to bring the tower and the nacelle below the tree line. Antrim Wind now proposes to use Siemen Turbines which will produce more renewable energy from each turbine, thereby providing greater renewable energy benefits per turbine, while reducing the size of the project.

Antrim Wind has also increased the mitigation of visual impacts to include, for example, protection of 908 acres of contiguous conservation land; protection of additional $100,000 in conservation lands to be acquired by the New England Forestry Foundation in the project area; and $40,000 for improvements at Gregg Lake such as its boat launch, picnic and/or bathroom

facilities, or other facilities. These improvements can be used to repair and/or replace existing facilities that are in poor condition.

David Raphael and Jack Kenworthy explained how these changes modified the project's visual impacts in a manner that is *both* material and substantial. Mr. Raphael offered the following examples based on his Visual Impact Assessment:

- "The area with potential visibility of the project within the 10-mile radius has been reduced by 12%. The change in context and nature of view is more dramatic, particularly in sensitive areas such as Willard Pond."[3]
- "Turbine 10, the closest (1.33 miles away) and most dominant ... has been removed."[4]
- "Turbine 9's height has been reduced so much so that the hub now sits below the treeline, virtually eliminating its visual presence at these locations."[5]
- "There will also no longer be visibility from Center Pond in Stoddard, Spoonwood Pond in Nelson, or Nubanusit Lake in Hancock with the removal of turbine 10 and the reduction in height of turbine 9."[6]
- "In fact, visibility in the lower west quadrant of the 10-mile radius has been essentially eliminated with these changes in layout. This means locations of higher scenic significance that are found here, such as Dublin Lake or Beech Hill, will have no visibility of the project."[7]

Antrim Wind made these and other material changes to its project in an effort to address the reasons for the Committee's denial of the prior application. Both Jean Vissering and Counsel

[3] David Raphael Testimony, Page 4.
[4] David Raphael Testimony, Page 4.
[5] David Raphael Testimony, Page 4.
[6] David Raphael Testimony, Page 5.
[7] David Raphael Testimony, Page 5.

for the Public argue that the changes are not substantial because Antrim Wind has not made all of the changes recommend by Jean Vissering in the prior application. However, the Committee specifically rejected requiring that all of Jean Vissering's recommendations be implemented. It limited its decision to the specific facts and specific record in that proceeding. Antrim Wind now proposes a different project and is entitled to have that project reviewed based on the record and the evidence to be presented.

III. ANTRIM WIND HAS MET ITS BURDEN OF PROOF

Antrim explained in its *Memorandum of Law in Support of Jurisdiction* on June 24, 2015, that the *Fisher v. Dover* rules allows a second application to be heard when an applicant makes changes to a project that are material. No party has demonstrated that the *Fisher v. Dover* rule does not apply. The Supreme Court has applied it to state agency proceedings in three published opinions.[8] The only question concerns how it applies to this case.

The *Fisher v. Dover* rule is based on the principle that an applicant has a legal right to submit an application and have it considered. This is true of RSA 162-H.[9] The rule merely precludes an applicant from resubmitting the same application twice. *See Morgenstern v. Rye*, 147 N.H. 558, 566 (2002) ("the plaintiff did not merely resubmit substantially the same application ... but, at the town's invitation, submitted a new proposal in an effort to meet the town's concerns."). To have a second application considered, an applicant must make changes to the project that are "material". This does not require proof that the changes are substantial or

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[8] *Appeal of Nottingham*, 153 N.H. 539 (2006); *Appeal of Parkland Medical Center*, 158 N.H. 67 (2008); *Appeal of Seabrook*, 163 N.H. 635 (2012).

[9] *See e.g.* RSA 162-H:7, III ("Upon filing of an application, the committee shall expeditiously conduct a preliminary review to ascertain if the application contains sufficient information to carry out the purposes of this chapter. If the application does not contain such sufficient information, the committee shall, in writing, expeditiously notify the applicant of that fact and specify what information the applicant must supply.").

that a different result would be reached. Antrim Wind is only required to show a "reasonable possibility — not absolute certainty — of a different outcome". *Brandt Dev. Co. v. City of Somersworth*, 162 N.H. 553, 560 (2011).

Even small changes are considered material when they are intended to address the reasons a board or agency denied a prior application. This is because a 'material' change does not have to be a substantial one, it only has to be significant enough so as to create a "reasonable possibility — not absolute certainty — of a different outcome". *Brandt, supra.* In the 35 years since *Fisher v. Dover*, 120 N.H. 187 (1980), the Supreme Court has applied the rule eight times and *has never found that changes made in response to a decision denying a project were not material.* The following summary illustrates this point:

1. In *Morgenstern v. Rye*, 147 N.H. 558, 566 (2002), an applicant for single family house submitted a "new driveway design that allowed for more natural absorption of rainfall [and] a new . . . footprint design which no longer required a retaining wall". There were "no [other] changes in the neighborhood or upon the plaintiff's property between the first and second applications". The Court found that the changes were material because they were proposed "in an effort to meet the town's concerns" in denying the prior application.
2. In *Appeal of Town of Nottingham (N.H. Dep't of Envtl. Servs.)*, 153 N.H. 539, 566 (2006), "USA Springs ... supplemented its prior [application] in response to comments made by DES in denying the prior application." The only change appears to be that "USA Springs did submit supplemental analysis" and "revised its analyses and submitted an addendum to its application [which merely] [...] corrected the analyses for the effects of precipitation." *Id.*, 153 N.H. at 557-558. The Court held that: "It was therefore not "substantially the same application."" *Id.*, 153 N.H. 566. Counsel for the Public

argument that David Raphael cannot supplement Antrim Wind's prior application appears to conflict with this holding. In fact, Antrim Wind has both made material changes to its project and supplemented analysis to reflect those material changes.

3. In the *Appeal of Town of Seabrook*, 163 N.H. 635, 640 (2012), the Seabrook Nuclear Power Plant submitted an application for pollution control tax exemptions which "was largely duplicative of the prior application." However, the Court found that "[t]here have been material changes since the prior application and the statute itself has been modified." *Id.*, 163 N.H. at 655.[10]

4. *Appeal of Parkland Med. Ctr.*, 158 N.H. 67, 71 (2008), concerned an application for a certificate of need known as an "NSR petition." The Court observed that "the only change in the NSR petition was the ownership structure." *Id.* The Court held that restructuring ownership was a "material change in circumstances" which allowed consideration of the application. *Id.*, 158 N.H. at 72.

5. In *Hill-Grant Living Trust v. Kearsarge Lighting Precinct*, 159 N.H. 529, 536 (2009), the first application sought approval to construct a tower "anywhere on the lot". The Board denied the application but suggested that "if the applicant resubmits with a certain elevation, the Board may grant a variance." *Id.* The Court held that the *Fisher v. Dover* rule "does not preclude consideration of a subsequent variance application **explicitly or implicitly** invited by the ZBA and modified to address its concerns." (emphasis added). In this case, the Committee explicitly and implicitly invited a second application in its decision on the merits.

[10] In this case, as counsel for the Committee observed during closing arguments, both RSA 162-H:1 and RSA 162-H:16 have been modified, in addition to the material changes that Antrim Wind has proposed.

6. In *Brandt Dev. Co. v. City of Somersworth*, 162 N.H. 553, 556 (2011) the applicant sought in 2009 "essentially the same relief as the 1994 application." The Court concluded that: "doctrinal changes, taking place in the fifteen-year period between Brandt's applications, create a **reasonable possibility — not absolute certainty — of a different outcome**" *Id.*, 162 N.H. at 560 (emphasis added).

7. In *Tidd v. Town of Alton*, 148 N.H. 424, 426 (2002), the Court assumed that a revised application which reduced 136 camp site to "100 campsites, [and] expanded the buffer zones and redesigned the park's interior roads" could be considered.

8. *Shepherd v. Westmoreland*, 130 N.H. 542, 545 (1988) involved a prior application that had been appealed to superior court and subject to *res judicata*. The Court cited *Fisher v. Dover* and observed that *res judicata* does not preclude a second application: "[s]hould the plaintiff approach the board with different proposals for the use of her land or should there be a material change in circumstances affecting her application or a change in the zoning laws, the denial of her previous requests would not bar her subsequent application, and it would merit consideration by the board." *Id.* Counsel for the public incorrectly argues otherwise.

IV. COUNSEL FOR THE PUBLIC MISREADS THE *FISHER v. DOVER* RULE AND THE BURDEN OF PROOF RULE IN ITS CASE

Counsel for the Public argues, based on the testimony of Jean Vissering, that the changes to the project are not "substantial" – because Antrim Wind has not addressed all seven of her recommendations or that the proposed changes are not sufficient to cause her or the Committee to reach a different conclusion. However, Jean Vissering did not conduct a visual impact analysis of the proposed changes. She offered the same opinion without evaluating the reduction in visual impacts by removal of Turbine 10, the highest and most prominent turbine, or the

lowering of Turbine 9. In fact, she admitted on cross examination that she never updated her analysis to consider resources within a 10-mile project radius. She confessed that angle of view, scale, dominance, and other criteria had been reduced or even eliminated at nearby locations.

Antrim Wind's burden is only to show that the changes are material, *i.e.* intended to address the Committee's reasons for denying the prior application, and that a "reasonable possibility" exists that the Committee may reach a different conclusion. Antrim Wind does not need to demonstrate that it satisfied all of her recommendations, or substantially all of them; it only needs to show that it has made material changes. These changes can include supplemental analysis. *Appeal of Nottingham, supra.*

V. COMMITTEE JURISDICTION IS REQUIRED CONSISTENT WITH THE FINDINGS AND PURPOSES SET FORTH IN RSA 162-H:1

A. The Reasons for the Committee's Prior Determination Remain

This Committee determined on August 10, 2011 that Antrim Wind, LLC's project requires a certificate because: "the Town of Antrim does not have an ordinance or any other rules or regulations specifically designed to address the construction and operation of the renewable energy facility";[11] because "the Project ... would have to receive variances allowing the construction of the facility of this type and magnitude in the Antrim's Rural Conservation District";[12] and because "the present ordinances are not designed to address the issues raised by construction of a renewable energy facility of the scale proposed and, therefore, if applied, would not adequately address the issues of the impact of the renewable energy facility on the region in general and on the Town".[13] The Committee also found that due to lawsuits related to the project, "Committee jurisdiction is the superior option for the purpose of avoiding undue delay

[11] August 10, 2011 Order, Page 23.
[12] August 10, 2011 Order, Page 23.
[13] August 10, 2011 Order, Pages 23-24.

in the construction of needed facilities, providing for full and timely consideration of environmental consequences and assuring that all environmental, economic and technical issues are [resolved] in an integrated fashion."[14]

All of these findings remain true today. Despite public support for the project, three attempts to adopt a wind ordinance have failed. Antrim has no legal standards for the project, and no legal authority to regulate the project's impacts to wildlife, noise or aesthetics or other aspects of the project. According to the Planning Board's own testimony, it "does not have the technical expertise or resources to address a project of this magnitude" and, because of divided views over the Antrim Wind, LLC project, the Planning Board feels that "if the SEC asserts jurisdiction the process will be more impartial".

Opponents of the project ask the Committee to decline jurisdiction for a very simple reason: in the absence of a wind energy ordinance making the project an allowed use and establishing standards for review, it is entirely uncertain how review could be accomplished. Any decision to approve or deny the project would result in multiple appeals. The uncertainty, delays and legal challenges would likely prevent the project from being proposed or considered. None of the findings and purposes set forth in RSA 162-H:1 would be protected. This is as clear a case for jurisdiction as can be made under RSA 162-H:1.

B. Antrim's "Institutions" Lack Legal Authority to Review the Project

Counsel for the Public and opponents of the project argue that Antrim has "institutions" such as a Planning Board and a Zoning Board of Adjustment, which they assert to be capable of *reviewing* the project. Both the Planning Board and the Board of Selectmen disagreed.

[14] August 10, 2011 Order, Page 26.

The Antrim Wind project is a prohibited use in the Town's Rural Conservation District. This means that the "planning board has no power or authority to grant an exception to or a variance from the terms of the ordinance." *Cesere v. Windham*, 121 N.H. 522, 523 (1981); *Beck v. Auburn*, 121 N.H. 996, 998 (1981); *Morin v. Somersworth*, 131 N.H. 253, 257 (1988) (planning board properly denied a site plan that "does not comply with the express terms of the zoning ordinance").

The absence of standards to protect wildlife, noise or aesthetics in the Antrim Zoning Ordinance means that these important values would be unregulated by the Planning Board. This should be a major concern to the Committee. As Antrim explained in its June 24, 2015 *Memorandum of Law in Support of Jurisdiction,* it cannot apply standards to the project that do not exist, or review the project on a "case by case" or *ad hoc* basis. See RSA 674:16 & 17 and authorities cited in the Town's Memorandum.[15] If Antrim desires to regulate matters such as the height of Antrim Wind's project (i.e. "buildings and other structures") or its location (i.e. land to be "used for business, industrial, residential, or other purposes") – it must do so within its Zoning Ordinance. Any decision by the Antrim Planning Board that applied (or failed to apply)

[15] The Town's "power to zone property to promote the health, safety, and general welfare of the community is delegated to it by the State, and the municipality must, therefore, exercise this power in conformance with the enabling legislation." *Britton v. Chester*, 134 N.H. 434, 441 (N.H. 1991); *see also Eddy Plaza Assocs. v. Concord*, 122 N.H. 416, 420 (1982) ("the Concord Planning Board cannot continue to exercise site-plan review authority over large-scale developments until it adopts specific regulations...."); *Lemm Dev. Corp. v. Bartlett*, 133 N.H. 618, 622-623 (1990) ("...the planning board's subdivision regulations do not allow it to exercise the kind of control it would apparently like to have over Lemm's condominium development. To have this kind of control, the planning board must promulgate site plan review regulations."); *Smith v. Wolfeboro*, 136 N.H. 337, 344 (N.H. 1992) ("the board may not deny subdivision approval on an *ad hoc* basis because of vague concerns."); *Derry Senior Dev., LLC v. Derry*, 157 N.H. 441, 447-448 (2008) ("the local planning board must adopt specific site review regulations before exercising authority.").

standards in the absence of a Zoning Ordinance would be subject to attack on appeal. This is precisely the situation that RSA 162-H:1 asks the Committee to avoid.

C. Site Plan Regulations Cannot Be Used as a Back Door-Zoning Ordinance

Lisa Linowes of the Wind Action Group argued that Antrim could adopt standards in its site plan regulations to regulate the project. This is untrue. New Hampshire law is clear that: "Site plan review ... is limited. It "does not give the planning board the authority to deny a particular use simply because it does not feel that the proposed use is an appropriate use of the land. Whether the use is appropriate is a zoning question."". *Summa Humma Enters., LLC v. Tilton*, 151 N.H. 75, 78 (2004) *citing Loughlin, New Hampshire Practice, Land Use Planning and Zoning* § 30.09.

Loughlin has further explained that: "[i]f the planning board could deny uses it thought to be inappropriate, there would be no point in having zoning, for it would afford no protection to a landowner." *Id.*; *see also Derry Senior Dev., LLC v. Derry*, 157 N.H. 441, 451 (2008) (planning board "may not deny approval on an *ad hoc* basis because of vague concerns"). Of course, not "every detail relating to the actions of a planning board must be spelled out in its regulations." *New Eng. Brickmaster v. Salem*, 133 N.H. 655, 664 (1990). However, Antrim has no standards governing the project at all. The Planning Board cannot weigh, balance or even consider impacts or benefits of the project. The Town's ordinance provides no framework for doing so, contrary to the findings and purposes set forth in RSA 162-H:1.

E. A Variance is Uncertain and Would Not Accomplish the Findings and Purposes Set Forth in RSA 162-H:1

Antrim Wind's project would require a variance from the Antrim Board of Adjustment. The Antrim Selectmen testified that it is unknown how the Antrim Zoning Board would review the project. In fact, multiple variances would likely be required. The project requires a "use

variance" from Article IX (B)(1) because it is not a permitted use in the Rural Conservation District, which limits uses to single family dwelling, a public or private school, a kennel, a farm, a stable or riding academy, or other permitted use.[16] The project would also require a variance from Article IX (C)(8) because the height of the proposed towers are greater than 35 feet.[17] It is unknown what other variances might be required.

The five criteria for issuance of a variance are set forth in RSA 674:33, I which required that: (1) the variance "not be contrary to the public interest"; (2) the variance be consistent with the "spirit of the ordinance"; (3) the variance do "substantial justice"; (4) the "values of surrounding properties are not diminished"; and (5) denial of the variance would result in "unnecessary hardship". These criteria are not a meaningful substitute for the findings and purposes set forth in RSA 162-H:1. It appears that no wind project in New Hampshire has ever been approved through the variance process. The application of the five criteria by a volunteer planning board is entirely uncertain. It would likely require multiple appeals to the Superior and Supreme Courts. Review by the Committee is required to promote the findings and purposes set forth in RSA 162-H:1.

VI. CONCLUSION

For the reasons set forth herein, the Town of Antrim requests that the Committee determine that the Antrim Wind, LLC project require a certificate "consistent with the findings and purposes set forth in RSA 162-H:1."

[16] See Antrim Zoning Ordinance, Exhibit BOS-2, Page 60.
[17] See Antrim Zoning Ordinance, Exhibit BOS-2, Page 61.

Respectfully submitted,

Town of Antrim

By Its Counsel,

UPTON & HATFIELD, LLP

Date: July 17, 2015 By: _____

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CERTIFICATION

I hereby certify that a copy of the foregoing was this day forwarded to all parties in this proceeding by electronic mail.

_____
Justin C. Richardson