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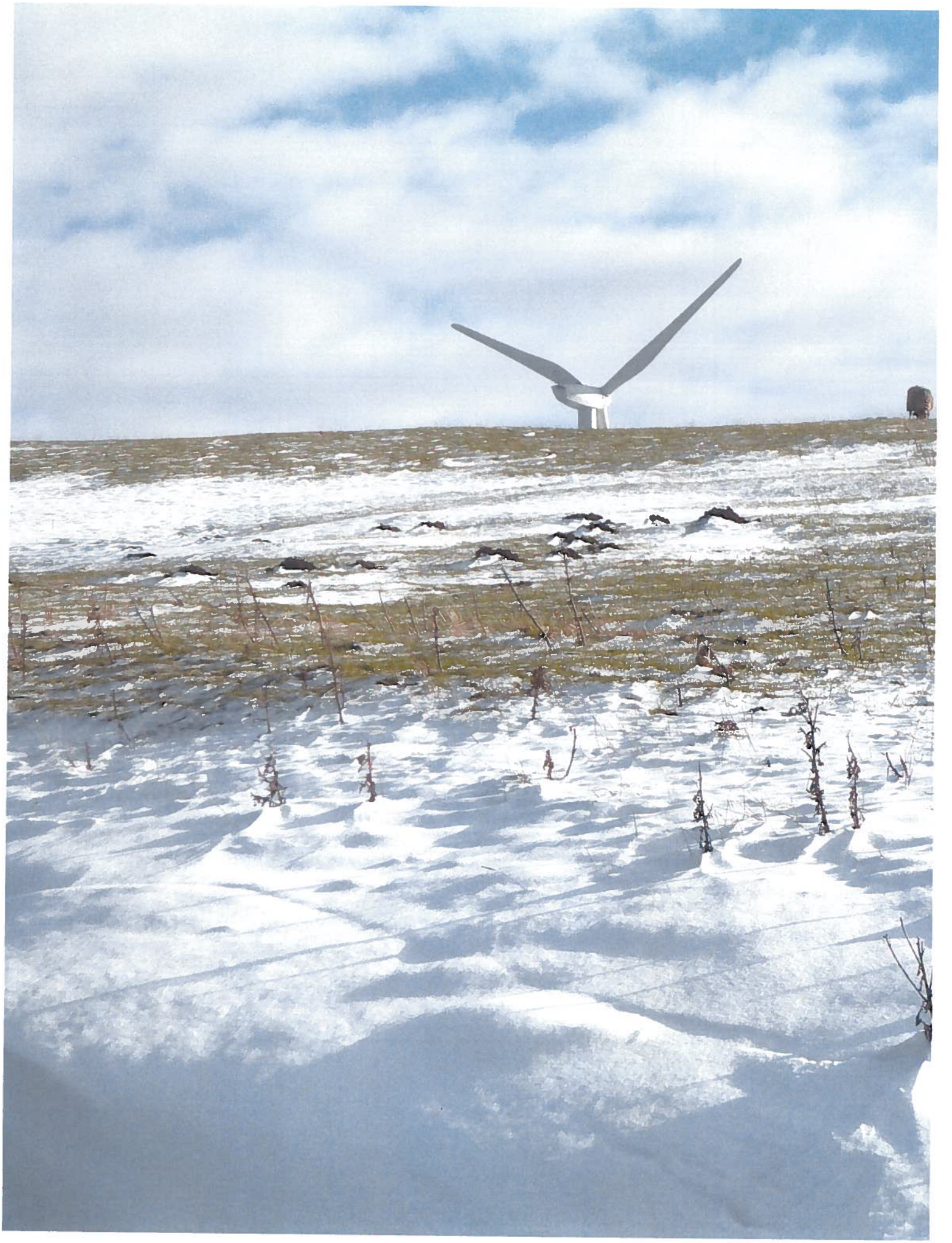
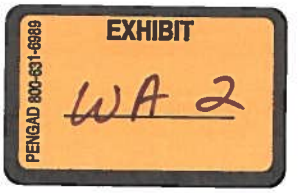




AGREEMENT BETWEEN TOWN OF ANTRIM NEW HAMPSHIRE AND ANTRIM WIND ENERGY LLC, DEVELOPER/OWNER OF THE ANTRIM WIND POWER

1 Definitions

1.1 "Agreement" – This agreement between the Town of Antrim, New Hampshire and Antrim Wind Energy LLC, and its successors and assigns, which shall apply from the Effective Date until the End of Useful Life of the Wind Farm

1.2 "Ambient Sound Pressure" – The sound pressure level excluded from that contributed by the operation of the Wind Farm.

1.3 "Decommissioning Funding Assurance" – An assurance provided by the Owner as more fully described in Section 14.2 in a form reasonably acceptable to the Town that guarantees completion of decommissioning activities, as provided in this Agreement.

1.4 "Effective Date" – The date of this Agreement as set forth above.

1.5 "End of Useful Life" – The point in time at which the Wind Farm, or an individual Wind Turbine as the case may be, has not generated electricity for a continuous period of twenty-four months for reasons other than the wind regime, maintenance or repair, facility upgrade or repowering.

1.6 "Non-Participating Landowner" – Any landowner in the Town of Antrim, other than a Participating Landowner.

1.7 "Owner" – Antrim Wind Energy LLC, its successors and assigns.

1.8 "Occupied Building" – A permanent structure used as a year-round residence, school, hospital, church, public library or other building used for public gathering that is occupied or in use as of the Effective Date.

1.9 "Participating Landowner" – Any landowner having entered into an agreement with the Owner for lease of real property or the granting of easements for access, entry or conveyance of the other real property rights related to the Wind Farm.

1.10 "Project Site" – Property with rights as conveyed to Owner by lease, easement or other agreement with a Participating Landowner that includes all access roads, and other ancillary facilities required for construction and operation of the Wind Farm.

1.11 "Town" – Town of Antrim, New Hampshire

1.12 "Turbine Height" – The distance from the surface of the tower foundation to the tip of the uppermost blade when in a vertical position.

1.13 "Wind Turbine" – A wind energy conversion system that converts kinetic wind energy into electricity, comprised primarily of a tower, a nacelle housing the generator, and a 3-blade rotor.

1.14 "Wind Farm" – The wind powered project being developed in the Town of Antrim by Owner, including but not limited to up to 10 Wind Turbines, cable, accessory buildings and structures including substations, permanent and temporary meteorological towers, electric infrastructure, access roads, and cables and other appurtenant structures and facilities that comprise such wind power project.

2 General Provisions

2.1 Enforceability. This Agreement shall apply to and be binding and enforceable on all successors and assigns of the Owner.

2.2 Applicability to Owner. This Agreement shall apply to the Owner only to the extent of Owner's rights and responsibilities related to the Wind Farm and Project Site as conferred to Owner by Participating Landowner agreements.

2.3 Recording.

2.3.1 At the Town's request, the Owner shall submit to the Town evidence of all agreements between the Owner and Participating Landowner, which may take the form of memoranda recorded with the Hillsborough County Registry of Deeds.

2.3.2 This Agreement shall be recorded at the Hillsborough County Registry of Deeds.

2.4 Invalidity. The invalidity of any section, portion, or paragraph of this Agreement will not affect any other section, portion, or paragraph in this Agreement.

2.5 Limitation on Turbines. This Agreement relates to the installation and operation of the Wind Farm. The Wind Turbines used in the Wind Farm shall be consistent with the size and configuration as approved by the New Hampshire Site Evaluation Committee (NHSEC); provided, however, that in no event shall the overall Turbine Height of any Wind Turbine used in the Wind Farm exceed 500 feet. Communications or other equipment attached to the Wind Turbines shall be limited to that which is incidental or necessary for the safe and efficient construction, operation, maintenance, and interconnection of the Wind Farm.

2.6 On-Site Burning. The Owner will obtain a permit from the Town of Antrim, and comply with all state requirements before Owner or its agents perform any on-site burning.

2.7 Warnings.

2.7.1 A clearly visible warning sign concerning voltage must be placed on all of the Wind Farm's aboveground electrical collection facilities, switching or interconnection facilities, and substations.

2.7.2 Visible, reflective, colored objects, such as flags, reflectors, or tape shall be placed on the anchor points of the Wind Farm's guy wires, if any, and along the guy wires up to a height of ten feet from the ground.

2.7.3 Clearly visible warning signs concerning safety risks related to winter or storm conditions shall be placed on access roads to the Wind Farm no less than 750 feet from each Wind Turbine tower base and on informal roads and trails in the vicinity of the Project at no less than 500 feet from each Wind Turbine tower base.

2.8 Access. The Town shall have access to all gated entrances to the Project Site for the purpose of emergency response. The Owner shall provide to the Town any keys, combination codes, and/or remote control devices necessary to open such gates. Such keys or access devices may not be provided by the Town to anyone other than members of the Board of Selectman, Police Department, Fire Chief, EMS or Highway Department while engaged in official duties. The Owner shall provide access to the Project Site, Wind Turbines or other facilities upon reasonable request by the Town for the purpose of building or safety inspections under the Town ordinances. The Owner shall provide access for emergency response purposes pursuant to the protocols provided under Section 7 of this Agreement. The Owner shall coordinate agreements with responding town emergency services and ensure access for those responder departments. Building, occupancy or other permits or approvals required by Town regulations and ordinances are not required for any of the site plans, subdivisions, facilities, buildings, roads or other structures certificated by the New Hampshire Site Evaluation Committee.

2.9 Liability Insurance. Upon the closing of the construction financing for the Wind Farm, the Owner shall maintain a current general liability policy covering body injury and property damage with limits of at least $10 million in the aggregate which may be covered as a part of an umbrella or blanket policy. Certificates verifying such insurance coverage shall be made available to the Town upon request.

2.10 Indemnification. The Owner specifically and expressly agrees to indemnify, defend, and hold harmless the Town and its officers, elected officials, employees and agents (hereinafter collectively "Indemnitees") against and from any and all claims, demands, suits, losses, costs and damages of every kind and description, including reasonable attorneys' fees and/or litigation expenses, brought or made against or incurred by any of the Indemnitees resulting from or arising out of any negligence or wrongful acts of the Owner, its employees, agents, representatives or subcontractors of any tier, their employees, agents or representatives in connection with the Wind Farm. The indemnity obligations under this Article shall include without limitation:

2.10.1 Loss of or damage to any property of the Indemnitees or, to the extent that loss of or damage to property of Owner, results in a third party claim against the Town, loss of or damage to any property of Owner;

2.10.2 Bodily or personal injury to, or death of any person(s), including without limitation employees of the Town, or of the Owner or its subcontractors of any tier.

2.10.3 The Owner's indemnity obligation under this Article shall not extend to any liability caused by the negligence or willful misconduct of any of the Indemnitees, or third parties outside the Owner's control.

2.11 Reopener Clause. Upon agreement of both parties to this agreement, this agreement or portions thereof may be revised or amended.

3 Wind Turbine Equipment and Facilities

3.1 Visual Appearance.

3.1.1 Wind Turbines shall be painted and lighted in accordance with Federal Aviation Administration (FAA) regulations. Wind Turbines shall not be artificially lighted, except to the extent required by the Federal Aviation Administration or any other applicable authority that regulates air safety. Lights shall be shielded to the greatest extent possible from viewers on the ground.

3.1.2 Wind Turbines shall not display advertising, except for reasonable identification of the turbine manufacturer and/or Owner.

3.2 Controls and Brakes. All Wind Turbines shall be equipped with a redundant braking system. This includes both aerodynamic over-speed controls (including variable pitch, tip, and other similar systems) and mechanical brakes. Mechanical brakes shall be operated in a fail-safe mode. Stall regulation shall not be considered a sufficient braking system for over-speed protection.

3.3 Electrical Components. All electrical components of the Wind Farm shall conform to relevant and applicable local, state, and national codes, and relevant and applicable international standards.

3.4 Power Lines. On-site distribution power lines between Wind Turbines shall, to the maximum extent practicable, be placed underground.

4 Project Site Security

4.1 Wind Turbines exteriors shall not be climbable up to fifteen (15) feet above ground surfaces.

4.2 All access doors to Wind Turbines and electrical equipment shall be locked, fenced, or both, as appropriate, to prevent entry by non-authorized persons.

4.3 Entrances to Project Site shall be gated, and locked during non-working hours. If the Owner identifies problems with unauthorized access, the Owner shall work to implement additional security measures.

5 Public Information, Communications and Complaints

5.1 Public Inquiries and Complaints. During construction and operation of the Wind Farm, and continuing through completion of decommissioning of the Wind Farm, the Owner shall identify an individual(s), including phone number, email address, and mailing address, posted at the Town Hall, who will be available for the public to contact with inquiries and complaints. The Owner shall make reasonable efforts to respond to and address the public's inquiries and complaints. This process shall not preclude the Town from acting on a complaint.

5.2 Signs. Signs shall be reasonably sized and limited to those necessary to identify the Wind Farm and provide warnings or liability information, construction information, or identification of private property. There will be no signs placed in the public right of way without the prior approval of the Town. After the completion of construction, signs visible from public roads shall be unlit and be no larger than twelve square feet, unless otherwise required by applicable permits or as otherwise approved by the Town.

6 Reports to the Town of Antrim

6.1 Incident Reports. The Owner shall provide the following to the Chairman of the Board of Selectmen or the Chairman's designee as soon as practicable, but not later than thirty days after an incident:

6.1.1 Copies of all reports of environmental incidents or industrial accidents that require a report to U.S. EPA, New Hampshire Department of Environmental Services, OSHA or another federal or state government agency.

6.2 Periodic Reports. The Owner shall submit, on an annual basis starting one year after the commencement of commercial operation of the Wind Farm, a report to the Board of Selectmen of the Town of Antrim, providing, at a minimum, the following information:

6.2.1 If applicable, status of any additional construction activities, including schedule for completion;

6.2.2 Details on any calls for emergency, police or fire assistance during the prior year;

6.2.3 Location of all on-site fire suppression equipment; and

6.2.4 Identity of hazardous materials, including volumes and locations, as reported to state or federal agencies.

6.2.5 Summary of any complaints received from Town of Antrim residents, and the current status or resolution of such complaints or issues.

7 Emergency Response

7.1 Upon request, the Owner shall cooperate with the Town's emergency services and any emergency services that may be called upon to deal with a fire or other emergency at the Wind Farm through a mutual aid agreement, to develop and coordinate implementation of an emergency response plan for the Wind Farm. The Owner shall provide and maintain protocols for direct notification of emergency response personnel designated by the Town, including provisions for access to the Project Site, Wind Turbines or other facilities within 30 minutes of an alarm or other request for emergency response, and provisions notifying the Town of contact information for personnel available at every hour of the day. The Owner shall coordinate with other jurisdictions as necessary on emergency response provisions.

7.2 The Owner shall cooperate with the Town's emergency services to determine the need for the purchase of any equipment required to provide an adequate response to an emergency at the Wind Farm that would not otherwise need to be purchased by the Town. If agreed between the Town and Owner, Owner shall purchase any specialized equipment for storage at the Project Site. The Town and Owner shall review together on an annual basis the equipment requirements for emergency response at the Wind Farm.

7.3 The Owner shall maintain fire alarm systems, sensor systems and fire suppression equipment customarily installed in all Wind Turbines and related facilities.

7.4 If an emergency response event related to the Wind Farm creates an extraordinary expense (i.e. expenses beyond what the Town would normally incur in responding to an emergency event for a business located in the Town) for the Town, Owner shall reimburse the Town for actual expenses incurred by the Town.

8 Roads

8.1 Public Roads. In the event that the Owner wishes to utilize Town of Antrim roads for construction or operation of the Wind Farm for oversize or overweight vehicles, and/or use during posted weight limit time periods, then the Owner shall:

8.1.1 Identify and notify the Town of Antrim of all local public roads to be used within the Town to transport equipment and parts for construction, operation or maintenance of the Wind Farm.

8.1.2 Hire a qualified professional engineer, as mutually agreed to with the Town, to document local road conditions prior to construction and as soon as possible after construction is completed (but no later than 30 days after such date) or as weather permits.

8.1.3 Promptly repair, at the Owner's expense, any local road damage caused directly by the Owner or its contractors at any time.

8.1.4 Reimburse the Town for reasonable costs associated with special police details, if required to direct or monitor traffic within the Town limits during construction of the Wind Farm.

8.2 Wind Farm Access Roads

8.2.1 The Owner shall construct and maintain roads at the Wind Farm that allows for year-round access to each Wind Turbine at a level that permits passage and turnaround of emergency response vehicles.

8.2.2 Any use of Town of Antrim public ways that is beyond what is necessary to service the Wind Farm or that is beyond the scope of Participating Landowner agreement(s) shall be subject to approvals under relevant Town ordinances or regulation, or state or federal laws.

9 Construction Period Requirements

9.1 Site Plan. Prior to the commencement of construction, the Owner shall provide the Town with a copy of the final Soil Erosion and Sediment Control site plans or New Hampshire Stormwater Pollution Prevention Plan, as approved by the New Hampshire Department of Environmental Services showing the construction layout of the Wind Farm.

9.2 Construction Schedule. Upon request of the Town, prior to the commencement of construction activities at the Wind Farm, the Owner shall provide the Town with a schedule for construction activities.

9.3 Disposal of Construction Debris. Tree stumps, slash, and brush will be disposed of onsite or removed consistent with state law. Construction debris and stumps shall not be disposed of at Town facilities.

9.4 Blasting. The handling, storage, sale, transportation, and use of explosive materials shall conform to all state and federal rules and regulations. In addition:

9.4.1 At least ten days before blasting commences, the Owner shall brief Town officials on the blasting plan. The briefing shall include the necessity for blasting and the safeguards that will be in place to ensure that building foundations, wells or other structures will not be damaged by the blasting.

9.4.2 In accordance with the rules of the State of New Hampshire, the Owner shall notify the Town police and fire chiefs before blasting commences. Any changes to the schedule for blasting will be reported immediately to the Town police and fire chiefs.

9.4.3 A copy of the appropriate Insurance Policy and Blasting License will be provided to the Town.

9.5 Storm Water Pollution Control. The Owner shall obtain a New Hampshire Site-Specific Permit and conform to all of its requirements including the Storm Water Pollution Prevention Plan and requirements for inspections as included or referenced therein. The Owner shall provide the Town with a copy of all state and federal stormwater, wetlands, and water quality permits.

9.6 Design Safety Certification. The design of the Wind Farm shall conform to applicable industry standards, including those of the American National Standards Institute. If requested by the Town, the Owner shall submit certificates of design compliance obtained by the equipment manufacturers from Underwriters Laboratories, Det Norske Veritas, Germanshcer Llloyd Wind Energies or other similar certifying organizations.

9.7 Construction Vehicles

9.7.1 Vehicles used for construction of the Wind Farm shall only use Town roads mutually agreed upon by the Owner and the Town. Staging or idling vehicles shall not be permitted on public roads. The Owner shall notify the Town at least 24 hours before any construction vehicle with a gross vehicle weight greater than 88,000 pounds is scheduled to use a Town road. Acceptance by the Town of vehicles exceeding this weight is not a waiver of the Owner's obligation under Section 8.1.3 of this Agreement to repair all damage to Town roadways caused by the Owner or its contractors.

9.7.2 Construction vehicles will not travel on Town roads before 6:00 am or after 7:00 pm, Monday through Saturday, unless prior approval is obtained from the Town. Construction vehicles will not travel on Town roads on Sunday, unless prior approval is obtained from the Town.

9.7.3 Construction will only be conducted between 6:00 am and 7:00 pm, Monday through Friday, and between 7:00 am and 7:00 pm on Saturdays unless prior approval is obtained from the Town. Construction will not be conducted on Sundays, unless prior approval is obtained from the Town.

9.7.4 The start-up and idling of trucks and equipment will conform to all applicable Department of Transportation regulations. In addition, the start-up and idling of trucks and equipment will only be conducted between 5:30 am and 7:00 pm, Monday through Friday and between 6:30 am and 7:00 pm on Saturday.

9.7.5 Notwithstanding anything in this Agreement to the contrary, upon mutual agreement between the Town and Owner, over-sized vehicles delivering equipment and supplies may travel on Town roads between the hours of 7:00pm and 6:00am and on Sundays so that the timing of such over-sized deliveries will minimize potential disruptions to area roads.

10 Operating Period Requirements

10.1 Spill Protection. The Owner shall take reasonable and prudent steps to prevent spills of hazardous substances used during the construction and operation of the Wind Farm. This includes, without limitation, oil and oil-based products, gasoline, and other hazardous substances from construction related vehicles and machinery, permanently stored oil, and oil used for operation of permanent equipment. Owner shall provide the Town with a copy of the Spill

Prevention, Control and Countermeasure (SPCC) for the Wind Farm as required by state or federal agencies.

10.2 Pesticides and Herbicides. The Owner shall not use herbicides or pesticides for maintaining clearances around the Wind Turbines or for any other maintenance at the Wind Farm.

11 Noise Restrictions

11.1 Residential Noise Restrictions. Sound from the Wind Farm during Operations at the exterior facades of homes shall not exceed 50 dBA or 5 dBA above ambient, whichever is greater during daytime and 45 dBA or 5 dBA above ambient, whichever is greater, at night.

11.2 Pre-Construction Sound Modeling. Upon request of the Town, the Owner shall provide a full noise study prepared by a qualified professional, which demonstrates that the Wind Farm will meet the requirements of this Agreement and any conditions imposed by the Site Evaluation Committee in a Certificate of Site and Facility.

11.3 Post-Construction Noise Measurements. Within one year of the commencement of commercial operations of the Wind Farm, the Owner shall retain an independent qualified acoustics engineer to take sound pressure level measurements in accordance with the most current version of ANSI S12.18. The measurements shall be taken at sensitive receptor locations as mutually identified by the Owner and Town. The periods of the noise measurements shall include, as a minimum, daytime, winter and summer seasons and nighttime. All sound pressure levels shall be measured with a sound meter that meets or exceeds the most current version of ANSI S1.4 specifications for a Type II sound meter. The Owner shall provide the final report of the acoustics engineer to the Town within thirty (30) days of its receipt by the Owner.

12 Setbacks

12.1 Setback From Occupied Buildings. The setback distance between a Wind Turbine and a Non-Participating Landowner's existing Occupied Building shall be not less than 2,200 feet. The setback distance shall be measured in a straight line from the center of the Wind Turbine base to the nearest point on the foundation of the Occupied Building.

12.2 Setback From Property Lines. The setback distance between a Wind Turbine and Non-Participating Landowner's property line shall be not less than 1.1 times the Turbine Height. The setback distance shall be measured in a straight line from the nearest point on the property line to the center of the Wind Turbine base.

12.3 Setback From Public Roads. All Wind Turbines shall be setback from the nearest public road a distance of not less than 1.5 times the Turbine Height as measured from the right-of-way line of the nearest public road to the center of the Wind Turbine base.

13 Waiver of Restrictions

13.1 Waiver of Noise Restrictions. A Participating Landowner or Non-Participating Landowner may waive the noise provisions of Section 11 of this Agreement by signing a waiver of their rights, or by signing an agreement that contains provisions providing for a waiver of their rights. The written waiver shall state that the consent is granted for the Wind Farm to not comply with the sound limits set forth in this Agreement.

13.2 Waiver of Setback Requirements. A Participating Landowner or Non-Participating Landowner may waive the setback provisions of Section 12 of this Agreement by signing a waiver of their rights, or by signing an agreement that contains provisions providing for a waiver of their rights. Such a waiver shall include a statement that consent is granted for the Owner to not be in compliance with the requirements set forth in this Agreement. Upon application, the Town may waive the setback requirement for public roads for good cause.

13.3 Recording. A memorandum summarizing a waiver or agreement containing a waiver pursuant to Section 13.1 or 13.2 of this Agreement shall be recorded in the Registry of Deeds for Hillsborough County, New Hampshire. The memorandum shall describe the properties benefited and burdened and advise all subsequent purchasers of the burdened property of the basic terms of the waiver or agreement, including time duration. A copy of any such recorded agreement shall be provided to the Town.

14 Decommissioning

14.1 Scope of Decommissioning Activities.

14.1.1 The Owner shall submit a detailed estimate of both the costs associated with site-specific decommissioning activities and the salvage value of the decommissioned materials from the site to the Town before construction of the Wind Farm commences. The estimates shall be prepared by a qualified third party consultant, reasonably satisfactory to the Town, with experience in wind farm decommissioning and salvage value estimates. These estimates shall be updated and submitted to the Town every three years thereafter and in each instance shall be performed by a qualified third party consultant reasonably acceptable to the Town. The consultant shall produce, as part of the scope of services, a "Site Specific Decommissioning Estimate" that shall

be the cost of decommissioning activities, minus the recoverable salvage value of the decommissioned materials. The plan and estimate shall include the cost of removing the foundations down to eighteen (18) inches below grade.

14.1.2 The Owner shall, at its expense, complete decommissioning of the Wind Farm or individual Wind Turbines, pursuant to Section 14.1.3 of this Agreement, within twenty-four (24) months after the End of Useful Life of the Wind Farm or individual Wind Turbines, as the case may be, as defined in Section 1.5. For the avoidance of doubt, in no instance shall End of Useful Life for an individual Wind Turbine trigger decommissioning requirements for the entire Wind Farm.

14.1.3 The Owner shall provide a decommissioning plan to the Town no less than three months before decommissioning is to begin. The decommissioning plan shall provide a detailed description of all Wind Farm equipment, facilities or appurtenances proposed to be removed, the process for removal, and the post-removal site conditions. The Town will consider the remaining useful life of any improvement before requiring its removal as part of decommissioning. Approval of the Town, not to be unreasonably withheld, conditioned or delayed, must be received before decommissioning can begin.

14.2 Decommissioning Funding Assurance:

14.2.1 The Owner shall provide a Decommissioning Funding Assurance for the complete decommissioning of the Wind Farm in a form reasonably acceptable to the Town. The Wind Farm will be presumed to be at the End of Useful Life if no electricity is generated from the Wind Farm for a continuous period of twenty-four (24) months, and as defined in Section 1.5.

14.2.2 Before commencement of construction of the Wind Farm, the Owner shall provide Decommissioning Funding Assurance in an amount equal to the greater of the Site-specific Decommissioning Estimate plus twenty-five percent (25%) or $200,000. The Owner shall adjust the amount of Decommissioning Funding Assurance to reflect the updated decommissioning costs and salvage value after each update of the decommissioning estimate, in accordance with Section 14.1.1.

14.2.3 Decommissioning Funding Assurance in the amount described in Section 14.2.2 shall be provided by posting a decommissioning bond, letter of credit, or other financial mechanism that provides for an irrevocable guarantee to cover the reasonably anticipated costs of complying with Owner's decommissioning obligations. Any decommissioning bond, letter of credit or other financial mechanism

must be issued or made by an entity having and maintaining a minimum credit rating of "BBB" from Standard and Poor's, or "Baa2" from Moody's, each as defined on the Effective Date, or their commercial equivalent.

14.2.4 Funds expended from the Decommissioning Funding Assurance shall only be used for expenses associated with the cost of decommissioning the Wind Farm.

14.2.5 If the Owner fails to complete decommissioning within the period prescribed by this Agreement, the Town may, at its sole discretion, require the expenditure of decommissioning funds from the Decommissioning Funding Assurance on such measures as reasonably necessary to complete decommissioning. In such an event, where the Owner has failed to complete the required decommissioning obligations under this Agreement and the Town expends the funds from the Decommissioning Funding Assurance to effect the decommissioning requirements, the Town shall also have the right to receive the salvage value available from the decommissioned materials in an amount sufficient to reimburse the Town for any out of pocket expenses incurred for performing decommissioning that were in excess of the otherwise available decommissioning funds (e.g. to be "made whole"). Any remaining salvage value for the decommissioned materials shall be paid to the Owner.

14.3 Transfer of Decommissioning Responsibility

14.3.1 Consistent with Section 2.1 of this Agreement, the provisions of Section 14 of this Agreement shall apply to and be binding and enforceable on all successors and assigns of the Owner.

14.3.2 The Owner shall ensure that any successors or assigns of the Wind Farm shall agree to be bound by this Agreement and shall provide the Town with written confirmation from any successors or assigns stating that they agree to be bound to this Agreement.

15 Environmental Standards

15.1 Wildlife Protection. Prior to commencing construction, Owner shall provide the Town with copies of all protocols and plans for post-construction monitoring and impact mitigation related to wildlife that are contained in any permit condition or as a condition of the Certificate of Site and Facility issued by the New Hampshire Site Evaluation Committee.

15.2 Environmentally Sensitive Areas. The Wind Farm shall be constructed and operated in such a manner as to comply with all applicable environmental

permits and conditions associated with a Certificate of Site and Facility issued by the New Hampshire Site Evaluation Committee.

15.3 Erosion Control. The Wind Farm shall be designed constructed and maintained in accordance with accepted erosion and sediment control methods as required by the New Hampshire Department of Environmental Services (NHDES).

15.4 Hazardous Wastes. The Owner agrees to comply with all state and federal regulations applicable to the use and disposal of hazardous wastes involved in or generated by the Wind Farm during construction, operation, maintenance or decommissioning.

16 Support for the Project

16.1 The Town and Owner agree that they will propose to the New Hampshire Site Evaluation Committee that the terms and conditions of this Agreement be incorporated as conditions to any Certificate of Site and Facility issued by the SEC for the Project. The Town further agrees that it shall support the Project during the SEC process.

[signatures appear on the following page]

The parties agree the terms of this Agreement are effective as of the date first above written, regardless of the date of execution by either party.

TOWN OF ANTRIM

_____
Chairman, Board of Selectmen

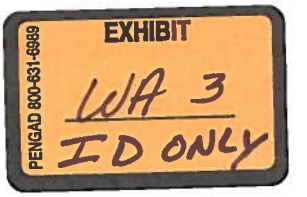
_____
Selectman

_____
Selectman

ANTRIM WIND ENERGY LLC

_____
Print Name: Jack Kenworthy
Title: Executive Officer

_____
Print Name: John Soininen
Title: Executive Officer



Antrim Zoning Ordinance votes on Large-Scale Wind Ordinances

Vote #1 November 8, 2011 ordinance submitted by Planning Board 309 yes 501 no

Vote #2 March 13, 2012 ordinance submitted by Planning Board 244 yes 350 no

Vote #3 March 11, 2014 ordinance submitted by citizen petition 278 yes 390 no

Additionally, at the March 12, 2013 Town Meeting, Antrim voters approved a change to the zoning ordinance removing the words "Public Utility" from the ordinance. This was the suggestion of Town Counsel after the ZBA Court case. 426 yes 317 no

ZONING ORDINANCE BALLOT – NOVEMBER 8, 2011

Answer the questions below by marking a cross (x) in the square of your choice.

To see if the Town will vote to amend the Zoning Ordinance as proposed by the Planning Board.

Article #1: Are you in favor of the adoption of Amendment #1 as proposed by the Planning Board for the Antrim Zoning Ordinance as follows:

To adopt a Large Scale Wind Energy Facility Ordinance, the purpose and intent of which is to:

1. Establish a process for the Planning Board to issue Conditional Use Permits, in addition to Site Plan approval, for Large Scale Wind Energy Facilities (as defined in the ordinance) that would be allowed to be located anywhere in town;
2. Specify particular standards that address construction, public health and safety, noise, environmental issues, and visual impacts;
3. Require as part of the application various impact statements and assessments to help gauge impacts of a proposal; and
4. Establish a process and requirements, following an approval, whereby the Planning Board issues a Permit to Operate that must be renewed on a regular schedule?

309 ☐ YES 501 ☐ NO Recommended by the Planning Board

Article #2: Are you in favor of the adoption of Amendment #2 as proposed by the Planning Board for the Antrim Zoning Ordinance as follows:

To amend Article #1, if it passes, so that Section 5.0 – Applicability, will read: "Wind Energy Facilities and Meteorological Towers as defined below are allowed to be constructed or operated in any district in the Town of Antrim, except for the Rural Conservation District where the construction and operation of large scale wind facilities shall be prohibited, after the effective date of this Ordinance, subject to all applicable federal, state, and local ordinances and regulations".?

225 ☐ YES 584 ☐ NO Recommended by the Planning Board

ZONING ORDINANCE AMENDMENT BALLOT – MARCH 2012

Answer the Questions Below by Marking a Cross (X) in the square of your choice

Article 2: To vote by ballot on the following amendments to the Antrim Zoning Ordinance as proposed by the Planning Board:

Amendment #1: Are you in favor of the adoption of Amendment No. 1 as proposed by the planning board for the Town of Antrim zoning ordinance as follows:

To adopt a Large Scale Wind Energy Facility Ordinance, the purpose and intent of which is to:

- Establish a process for the Planning Board to issue Conditional Use Permits, in addition to Site Plan approval, for Large Scale Wind Energy Facilities (as defined in the ordinance) that would be allowed to be located anywhere in town;
- Specify particular standards that address construction, public health and safety, noise, environmental issues, and visual impacts;
- Require as part of the application various impact statements and assessments to help gauge impacts of a proposal; and
- Establish a process and requirements, following an approval, whereby the Planning Board issues a Permit to Operate that must be renewed on a regular schedule?

244 ☐ YES ☒ NO 350

Amendment #2: Are you in favor of the adoption of Amendment No. 2 as proposed by the planning board for the Town of Antrim zoning ordinance as follows:

Amend Article V – "Highway Business District" TO CORRECT REFERENCE under Section B, 1 **Manufactured Housing Units** (per Article XIV, Section U)

363 ☒ YES ☐ NO 199

Amendment #3: Are you in favor of the adoption of Amendment No. 3 as proposed by the planning board for the Town of Antrim zoning ordinance as follows:

Amend Article III – "Definitions" - TO CORRECT REFERENCE under Section B
Cluster Housing Development: An area of land, controlled by landowner or landowners organization developed as a single entity for a number of dwelling units in accordance with Supplemental Regulations, Article XIV-A.1 (Amended March 11, 2003)

380 ☒ YES ☐ NO 182

Amendment #4: Are you in favor of the adoption of Amendment No. 4 as proposed by the planning board for the Town of Antrim zoning ordinance as follows:

Amend Article XIV-B – "Personal Wireless Service Facility" (PWSF) CHANGE TO READ
Section 4. DISTRICT REGULATIONS, a.: Location – PWSFs proposed to be located in or on existing structures shall be permitted in all zoning districts. PWSFs shall be an allowed use in the Highway Business district, and by a Special Exception from the Zoning Board in the Rural, Rural Conservation, and Lakefront District. Ground-mounted PWSFs will not be allowed in the Residential or Village Residential Districts. In any district where ground mounted PWSFs are allowed by Special Exception no portion of the facility except roads, shall be located within 300 feet of any abutting structure.

347 ☒ YES ☐ NO 214

Amendment #5: Are you in favor of the adoption of Amendment No. 5 as proposed by the planning board for the Town of Antrim zoning ordinance as follows:

Amend Article XIV, Section 0, 7 – "Supplemental Regulations" ADD REFERENCE

ABSENTEE
OFFICIAL BALLOT
TOWN OF ANTRIM, NEW HAMPSHIRE
ZONING ORDINANCE AMENDMENT BALLOT
MARCH 12, 2013

Donna Hanson
TOWN CLERK

INSTRUCTIONS TO VOTERS

A. TO VOTE, completely fill in the OVAL to the RIGHT of your choice(s) like this: ●

ZONING AMENDMENTS

Article 2: To vote by ballot on the following amendments to the Antrim Zoning Ordinance as proposed by the Planning Board:

YES 426
NO 317

Amendment #1: Are you in favor of the adoption of Amendment No. 1 as proposed by the Planning Board for the Town of Antrim zoning ordinance as follows:

To remove all references to "Public Utility" from the zoning ordinance?

Amendment #2: Are you in favor of the adoption of Amendment No. 2 as proposed by the Planning Board for the Town of Antrim zoning ordinance as follows:

YES 575
NO 195

To amend Article XIV-B, Personal Wireless Service Facilities, Paragraph 5. Use Regulations by clarifying the application process for Ground Mounted Facilities as follows [new language is ***bold italic***; language to be removed is shown as a ~~strikethrough~~]:

Ground Mounted Facility: A ground mounted PWSF ***(cell tower)*** may be constructed ***after obtaining approval by the Planning Board and, if necessary, a*** ~~by~~ Special Exception from the Zoning Board of Adjustment as outlined in Article XIII., ~~after first obtaining approval from the Planning Board and after meeting all the provisions of this article and upon completion of a full site plan review.~~ ***All provisions of this article must be met and a full site plan review is required.***

ABSENTEE
OFFICIAL BALLOT
TOWN OF ANTRIM, NEW HAMPSHIRE
ZONING ORDINANCE AMENDMENT BALLOT
MARCH 11, 2014

Donna Hanson
TOWN CLERK

INSTRUCTIONS TO VOTERS

A. TO VOTE, completely fill in the OVAL to the RIGHT of your choice(s) like this: ●

ZONING AMENDMENTS

Article 2: To vote by ballot on the following amendments to the Antrim Zoning Ordinance as proposed by the Planning Board:

Amendment #1: Are you in favor of the adoption of Amendment No. 1 as proposed by the planning board for the Town of Antrim zoning ordinance as follows:

508 YES ●
NO ○
125

To amend the definition of Home Occupation contained in Article III, Definitions, by adding the ***bold italic language:***

HOME OCCUPATION: Any commercial activity carried on entirely within a dwelling or other structure accessory to the dwelling by the residents thereof ***and up to one non-resident employee*** and does not meet any of the criteria for a Home-Based Business listed in Article XIV Supplemental Regulations.

Explanation: The existing definition of Home Occupation does not include the allowance of a non-resident employee, however, both the criteria and parking requirements for Home Occupations include provisions for a non-resident employee. This amendment is intended to make the definition consistent with these regulating provisions.

Amendment #2: Are you in favor of the adoption of Amendment No. 2 as proposed by the planning board for the Town of Antrim zoning ordinance as follows:

525 YES ●
NO ○
104

To amend Article XIV, O. Home Occupations, by adding the following statement:

O. Home Occupations. (Amended March 11, 2008) ***Home Occupations are permitted in all districts subject to the following:***

Explanation: This amendment is simply to make clear where Home Occupations are allowed.

Amendment #3: Are you in favor of the adoption of Amendment No. 3 as proposed by the planning board for the Town of Antrim zoning ordinance as follows:

423 YES ●
NO ○
204

To amend Article VIII – Lakefront Residential District, by removing Home Occupations and Home-Based Businesses from the list of permitted uses.

Explanation: Since these uses are addressed elsewhere in the ordinance, it is redundant to have them listed in this District.

Amendment #4: Are you in favor of the adoption of Amendment No. 4 as proposed by the planning board for the Town of Antrim zoning ordinance as follows:

469 YES ●
NO ○
156

To amend Article VIII – Lakefront Residential District, by inserting the minimum lot frontage of 200 feet.

Explanation: This amendment is to correct an omission that left the lot frontage out of the district requirements.

Amendment #5: Are you in favor of the adoption of Amendment No. 5 as submitted by petition for the Town of Antrim Zoning Ordinance which would provide for the development of Wind Farms in the Rural Conservation District and the Highway Business District and establish specific development standards, including standards on proper construction, public health and safety, noise, environmental and visual impacts, and require operational agreements with the Town?

278 YES ○
NO ●
390

The Planning Board does not approve the petitioned amendment.

Explanation: This is an 11-page amendment to the Zoning Ordinance.

Linowes Prefiled Testimony

1) Please state your name and address for the record.

My name is Lisa Linowes, and my address is 286 Parker Hill Road, Lyman, NH 03585.

2) Please state your current employment and the position you hold.

I serve as Executive Director of the Wind Action Group (Windaction.org) a New Hampshire corporation formed in 2006.

3) Please describe your experience and general responsibilities.

I am responsible for tracking wind energy development worldwide with specific focus on the public policies driving industrial-scale wind energy development and the potential impacts on the natural environment, communities, and regional grid systems. I advise public and private entities on siting issues relative to wind energy development. I am a principal and regular contributor to MasterResource.org, a blog dedicated to analysis and commentary about energy markets and public policy. I served as the technical advisor of the award-winning documentary, *Windfall*, produced and directed by Laura Israel. *Windfall* tells the story of how residents in a small community in upstate New York responded upon learning that a utility-scale wind energy facility might be situated in their town.

I have testified before Congress[1] on the issue of tax subsidy programs for renewable energy and have been invited to speak on the topic of energy policy and wind energy at numerous venues including the Environmental Markets Association regional meeting, the Northeast and Midwest chapters of the Energy Bar Association, the ISO-NE Regional System Plan meeting.

[1] Lisa Linowes, *Testimony before the Committee on Science, Space, and Technology*, April 19, 2012, http://science.house.gov/sites/republicans.science.house.gov/files/documents/hearings/HHRG-112-SY21-WState-LLinowes-20120419.pdf

4) Having read the testimony filed by Antrim Wind Energy, LLC ("AWE") do you think the project plan, as amended, is sufficiently different from the original application reviewed by the NH Site Evaluation Committee ("SEC" or "Committee") such that a new review of the facts could arrive at a different outcome?

I read the testimonies filed by Mr. Jack Kenworthy and Mr. David Raphael. The project is essentially the same as the plan considered by the Committee under Docket 2012-01. Mr. Kenworthy's testimony, in particular, overstates the effect of the project changes in the new plan, and has chosen to narrowly construe the findings of the Committee from 2013.

5) Please explain.

The Committee's March 13, 2015[2] order makes clear that the focus of testimony in this proceeding should be on the "physical differences between the proposed Facility and the previously proposed facility and any difference in impacts between the two proposals." My testimony explores four key elements of the application in determining whether the proposed project is sufficiently different to warrant a new review by the Committee. These are: (a) Project layout, (b) Aesthetics, (c) Noise and (d) Pilot and Other Mitigation.

a) Project Layout

First I confirmed through the Federal Aviation Administration website that the locations for the remaining nine turbines have not changed. The below table shows the latitude and longitude of the original 10 turbines as well as the turbine locations for the amended plan. The turbine shown in red was removed in the 2014 configuration. The remaining turbine locations are identical but with

[2] http://www.nhsec.nh.gov/projects/2014-05/documents/150313order.pdf

different heights. Docket 2012-01 listed the turbines as having a maximum height from foundation to blade tip of "not more than 495 feet" but the reported size of the turbines was 492-feet.

Year	FAA Case Number	State	Latitude	Longitude	Site Elevation	Structure Height
2011	2011-WTE-11264-OE	NH	43° 03' 51.34" N	72° 00' 22.29" W	1743	495
2011	2011-WTE-11265-OE	NH	43° 04' 03.41" N	72° 00' 28.14" W	1431	495
2011	2011-WTE-11266-OE	NH	43° 03' 41.26" N	72° 00' 32.62" W	1758	495
2011	2011-WTE-11267-OE	NH	43° 03' 31.43" N	72° 00' 59.25" W	1682	495
2011	2011-WTE-11268-OE	NH	43° 03' 23.84" N	72° 01' 10.20" W	1726	495
2011	2011-WTE-11269-OE	NH	43° 03' 09.66" N	72° 01' 11.94" W	1516	495
2011	2011-WTE-11270-OE	NH	43° 02' 54.23" N	72° 01' 17.79" W	1676	495
2011	2011-WTE-11271-OE	NH	43° 02' 43.77" N	72° 01' 16.79" W	1700	495
2011	2011-WTE-11272-OE	NH	43° 02' 35.31" N	72° 01' 26.37" W	1646	495
2011	2011-WTE-11273-OE	NH	43° 02' 28.84" N	72° 01' 40.43" W	1896	495
2014	2014-WTE-5439-OE	NH	43° 04' 03.41" N	72° 00' 28.14" W	1431	489
2014	2014-WTE-5440-OE	NH	43° 03' 51.34" N	72° 00' 22.29" W	1743	489
2014	2014-WTE-5441-OE	NH	43° 03' 41.26" N	72° 00' 32.62" W	1758	489
2014	2014-WTE-5442-OE	NH	43° 03' 31.43" N	72° 00' 59.25" W	1682	489
2014	2014-WTE-5443-OE	NH	43° 03' 23.84" N	72° 01' 10.20" W	1726	489
2014	2014-WTE-5444-OE	NH	43° 03' 09.66" N	72° 01' 11.94" W	1504	489
2014	2014-WTE-5445-OE	NH	43° 02' 54.23" N	72° 01' 17.79" W	1676	489
2014	2014-WTE-5446-OE	NH	43° 02' 43.77" N	72° 01' 16.79" W	1700	489
2014	2014-WTE-5447-OE	NH	43° 02' 35.31" N	72° 01' 26.37" W	1667	447

Source: https://oeaaa.faa.gov/oeaaa/external/searchAction.jsp?action=showSearchArchivesForm

Since AWE has not provided any additional information on the road layout, substation or transmission route, we are assuming they have not changed from the prior application.

While outside the scope of this proceeding, I note that on March 31, 2015, the FAA issued **Notices of Presumed Hazard** ("NPH") on 7 of AWE's 9 proposed turbines, Case numbers 2014-WTE-5439-OE and 2014-WTE-5444-OE were the only turbines found to produce no hazard to air navigation. Appendix C attached includes one of the 7 NPHs issued by the FAA.

b) Aesthetics

The main changes to the project pertain to aesthetics. AWE argues that by eliminating turbine #10, reducing the overall height of turbines #1-8 by 38 inches (492 feet to 488.8 feet, a 0.6% change) and lowering turbine #9 so the nacelle is outside the field of view from some locations on Willard Pond, it has overcome the primary objections raised by the Committee and others in from the prior docket

Testimony by both Mr. Kenworthy and Dr. Raphael single out the adverse effect on views from Willard Pond and the DePierrefeu Wildlife Sanctuary but the visual impact concerns raised in the prior docket extend beyond the immediate area. The SEC rejected the Antrim Wind Energy project because of unreasonable visual impacts on the region and not just New Hampshire Audubon's Willard Pond Wildlife Sanctuary. In fact, the impacts were found to be far more extensive than those on any one property. The surrounding region, including neighboring towns within sight of the turbines, represented the context within which the project was evaluated.

The turbines, even at 489-feet in height, would still be the tallest in the state, and taller than any operating wind turbines in New England. Erected on a ridgeline, the turbines would loom very large compared to the mountains in the Monadnock Region which are more modest in height. The Site Evaluation Committee's deliberations underscored this point multiple times *(See Transcript of Deliberations on February 7, 2013 at pp. 22-23, pp 34 1-9, pp 37 10-18)*

The Committee also considered different configurations involving shorter or fewer turbines during its deliberations. Chairman Ignatius stated, and others agreed, that removing one turbine would not be enough to mitigate for the enormous scale of the project. *(See Transcript of Deliberations on February 7, 2013 at pp. 24 15-21),*

The Committee, in its April 25, 2013 Decision and Order denying certification stated that "the height of each turbine would be between 25% and 35% of the elevation of the ridgeline where it will be located." This statement is still true in the amended plan.[3] *(See Committee Order April 25, 2013 at 49)*

Relative to Tuttle Hill, which has a vertical rise of 650-feet from the valley floor, the proposed turbines 1-8 would represent another 75% rise on the landscape and a 69% rise for turbine #9. (*See Carey Block prefiled direct testimony, July 31, 2012 at 8)* The visual impact of the towers in this setting would be as overwhelming as they were found to be in the prior application.

Dr. Raphael argues that reducing the height of turbine #9 by 10% (from 492 to 447 feet) virtually eliminates its visual presence from most locations at Willard Pond and the DePierrefeu Wildlife Sanctuary. *(Raphael prefiled testimony at 4)* This is obviously not true. While the nacelle may be just below the tree line from some views, turbine #9's blades, which are animated as they spin on the ridge, will be entirely visible. Spinning at roughly 15 revolutions per minute, viewers could see 45-instances of a blade passing by the 12-o'clock position every minute. When the turbines are stopped, the rotor assembly is generally positioned with one blade upright.

In this docket, Dr. Raphael argues that eliminating one turbine and slightly altering the height of others will have a significant easing affect on the visual impact of the project. However, in a proceeding before the Vermont Public Service Board he claimed similar actions would have no impact on the resulting view. On behalf of Green Mountain Power and the Kingdom Community

[3] Dr Raphael wrongly asserts in his testimony that "no turbine sits at an elevation higher than 1750 feet" (pp4 at 13). In fact, at least one turbine is sited above 1750 feet in elevation. See FAA elevations in the table provided on page 2 of this testimony.

Wind proposal, Dr Raphael responded as follows when challenged by Jean Vissering about eliminating three of the proposed 21 turbines, a 14% reduction *(Appendix A attached at 13)*:

> I do not believe that Ms. Vissering's proposal to remove three turbines will substantially change or mitigate the Project's visual presence. It will still be observed as a linear array of turbines along the Lowell Mountain Ridge.

On whether the heights of the turbines could be reduced to lessen the visual impact his response was similar:

> I do not believe that reduction of turbine height or relocation to the west would have a meaningful impact on aesthetics, within what I understand are the constraints associated with the size and location of the turbines.

The turbines at the Kingdom Community Wind facility stand 443 feet to the blade tip. The height reduction under consideration was 23 feet, well above the *38-inch* reduction proposed for turbines 1-8. *(Appendix A attached at 7)*

In his same testimony in Vermont, Dr. Raphael admits having to update his visualization renderings due to a discrepancy in the turbine pad elevations causing them to be off by as much as 24-feet. While this is not germane to the AWE proposal, his statement that height adjustments up to 24-feet "would be difficult to detect visually in the simulations" is important. If turbine height changes of that size are not easily detectable in rendering a visualization assessment, it is difficult to see how a 38-*inch* change in turbine height could result in a meaningful change in impacts. *(Appendix A attached at 18)*

c) Noise

Mr. Kenworthy states that Epsilon Associates will be preparing an updated Sound Level Assessment report to show that the sound levels produced by the Siemens SWT-3.2-113 turbines will be lower than those of the Acciona turbines. While it will be useful to see Epsilon's updated

report, it is unlikely that the sound levels for the Siemens turbines will notably differ. The manufacturer's sound power level for the Siemens SWT-3.2-113 turbine is 107.5 dbA[4] with an uncertainty factor of +/- 1 dBA. For the Acciona is essentially the same at 107.4 dbA with a =/- 1 dbA uncertainty factor. In general, the longer the blades and slower the rotation speed the more likely there will be periods of high noise that is audible (i.e. more opportunities for blade swish).[5]

The Committee ultimately established a not-to-exceed noise limit for the previous Antrim Wind facility of 40 dbA at nighttime or 5 dBA above ambient, whichever is greater. According to AWE's predictive modeling for the Acciona turbine, the highest sound level at any receptor would be 41 dBA. This level would exceed the permit conditions if built. *(See Committee Order April 25, 2013 at 66)* If the Siemens model is quieter, it would only be within 1-2 dBA, a difference that would go undetected by nearby residents. But it may result in the project operating closer to the permit conditions set by the Committee. It would be a stretch to argue that the new turbines would result in a material reduction in noise impacts.

d) Pilot and Other Mitigations

Mr. Kenworthy's testimony also cites annual tax payments under the Payment in Lieu of Taxes ("PILOT") agreement as well as increased mitigation measures as further reason for considering the amended proposal to be significantly different from the prior application.

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[4] See http://mn.gov/commerce/energyfacilities/documents/33153/_Revised_%20Site%20Permit%20Application.pdf, pp 16

[5] Infrasound would be produced by both turbines at levels sufficient to produce sensations. With regard to infrasound levels, a one or two dbA change will not help because the energy is in the frequency range where the A-weighted scale is not useful.

According to Mr. Kenworthy, the project will pay the highest per megawatt payment of other PILOTS in New Hampshire for wind facilities. This fact is already in the record for Docket 2012-01 and was already considered by the Committee. Dr. Ross Gittell's prefiled direct testimony specifies annual tax payments to the Town of Antrim in the amount of $11,250 per megawatt for the first year and escalating thereafter at 2.25% per year during the 20 year operating term of the project. *(See Gittell prefiled direct testimony, January 4, 2013 at 4)* AWE's annual payment scheme exceeds those for Granite Reliable Wind and Groton Wind which pay $5,000 per megawatt and $11,000 per megawatt respectively. A PILOT agreement was not negotiated for the Lempster Wind facility.

Regarding the expanded conservation plan, Mr. Kenworthy describes an additional 100 acres of conserved land around turbines 5, 6, 7 and 8, a 1-time payment of $40,000 to the Town of Antrim to be applied to the Gregg Lake Recreational Area and a single $100,000 payment to the New England Forestry Foundation for the acquisition of new conservation lands in the general region of the Project.

Appendix B attached shows the proposed conservation lands submitted to the Committee under Docket 2012-01 and the amended map that includes the added 100 acres[6]. In 2013, AWE stated in the record that the added 100-acres would encompass turbines 3, 4, 5 and 6. Without a current map depicting the conservation land, we cannot be certain what land Mr. Kenworthy is referring to.

[6] AWE's post-hearing brief, footnote 3 states "The Application at pages 10-11 discusses the Project's initial plans to conserve 685 acres; the documents appended to this brief reflect AWE's recent success in conserving an additional 123 acres, including the land surrounding turbines 9 and 10. Addendum to Post Hearing Brief. http://www.nhsec.nh.gov/projects/2012-01/documents/130114applicant.pdf

In any event, Ms. Vissering's testimony and report made clear that the only way to mitigate the visual impacts was with all of her recommendations, which included removing two turbines and making all the rest significantly smaller. *(See Objection of Counsel for the Public to applicant's motion for rehearing and motion to reopen record, Docket 2012-01, June 13, 2013, at 17)* Adding the additional payment to the New England Forestry Foundation, which is the only mitigation component not presented in 2013, does not address the ongoing visual impacts of the project.

6) Are there any further comments you would like to make at this time?

Yes. Mr. Kenworthy's testimony appears to suggest that the objections cited by the Committee when it denied AWE's motion to reopen the record in 2013, somehow justify the claim that the amended project is substantially different from the one previously reviewed. If this is his claim, he is misconstruing the Committee's deliberations on that matter.

The Committee's statements were more about the nature of the information AWE tried to bring forward in its plea to be heard. Re-opening the record is generally reserved for "exceptional circumstances" and the party seeking to be heard bears a heavy burden. *(See Objection of Counsel for the Public to applicant's motion for rehearing and motion to reopen record, Docket 2012-01, June 13, 2013, at 16*) The new information cited by AWE at the time, including the $40,000 payment to the Town of Antrim and the 100-acre conservation parcel, were well within the ability of AWE to bring forward prior to the Committee issuing its decision to deny certification. At no time during its deliberations did the Committee consider that its statements were laying the foundation for this current proceeding. Rather, the Committee was focused on disposing of the question before it at that moment on whether to grant a re-opening of the record based on the

amendments proposed by AWE. Reading any more into the discussion by the Committee would be inappropriate.

7) Does this complete your pre-filed testimony?

Yes.

windAction

The WindAction Group (www.windAction.org)

Facts, analysis, exposure to industrial wind energy's real impacts

OCT
31
2014

Editorial

Vote NO on Big Wind

Lisa Linowes - October 31, 2014

Taxes & Subsidies *USA*

The debate is no longer about the fear of change or aesthetics. It's about preserving the health, safety, and welfare of communities from developers hell-bent on sticking turbines on every free acre with transmission access no matter who's in the way. More than twelve active lawsuits are pending against wind projects in as many states, and more are sure to follow.

U.S. voters are unhappy with the direction of the country. The big ticket issues — ISIS, Ebola, the sluggish economy — are dominating the national dialogue and will sway votes.

But for many thousands of Americans, next week's election is deeply personal. For them it's their best opportunity to drive back the spread of industrial-scale wind power that's plowing through quiet communities and destroying families. *On November 4th, they will be checking the box next to those candidates who promise to permanently end the wind production tax credit (PTC).*

The Changing Debate

Since 2005, the wind industry has pumped millions into aggressive campaigns aimed at convincing the public that wind energy is efficient, safe, and cheap. Corporations, flush with taxpayer handouts, moved into communities with peaches-and-cream tales of how wind will clean the air, stabilize our weather, raise the wealth of the locals, and maybe buy a new fire truck. They staged open houses and pushed industry funded reports showing how turbines are quieter than the wind, have no effect on property values, and will lower energy prices.

Residents who asked questions were tagged as tea-party disrupters, Koch-brother sympathizers, or just poor souls who wished they had land to lease for a turbine. Others were reminded that state mandates for renewable energy made opposing project plans futile.

But nearly ten years later, the pain of 62,000 megawatts of installed wind has reached a tipping point.

The debate is no longer about the fear of change or aesthetics. It's about preserving the health, safety, and welfare of communities from developers hell-bent on sticking turbines on every free acre with transmission access no matter who's in the way. More than twelve active lawsuits are pending against wind projects in as many states and more are sure to follow.

Generating Tax Credits not Energy

rob pforzheimer +

@robpforzheimer

↑ 795 Upvotes

Comments 173 Discussions Recommends Followers 1 Following 1

↑ 795 Upvotes

Sutton, VT

Joined Nov 8, 2009

FREQUENTED COMMUNITIES

- Bangor Daily News
- Ellsworth American
- Vermont Public Radio
- The Hill
- VentureBeat

4/30/2015

Discussion on **Bangor Daily News** · 97 comments

Boston energy firm submits bid to buy Rockland City Hall property

rob pforzheimer · 3 days ago

Why does this article fail to mention that The Cape Wind project is not happening? Cape Wind will not be renting the unfinished New Bedford Port, has no power purchase agreements, no funding and no more Governor to promote it.

↑ ↓ ViewView in discussion

Discussion on **Ellsworth American** · 3 comments

Orland Planning Board trying to clarify goals of wind ordinance review

rob pforzheimer · 16 days ago

Strengthen your ordinance and don't let these Eolian trustafarian grifters ruin your town and your neighboring towns with their loud, bird and bat killing, useless, 500 foot industrial wind turbines. They haven't built any projects anywhere. Don't let Orland be their first.

↑ ↓ ViewView in discussion

Discussion on **WAMC** · 19 comments

Massachusetts Issues Consent Order On Hoosac Wind Project

rob pforzheimer → **Larry_Lorusso** · 2 months ago

The 16 turbines, transformers, and sub station in Sheffield, VT contain a total of 13,760 gallons of oil that requires periodic changing. They also contain hundreds of gallons of hydraulic fluids and anti freeze.
Noise complaints and health issues are being ignored by gov't.

↑ ↓ ViewView in discussion

Discussion on **MNN** · 3 comments

Discussion on **The Hill** · 17 comments

The state of the wind industry is strong

rob pforzheimer · 3 months ago

If the wind industry is so "strong" why do they need, the PTC, mandates requiring it's use, permits to kill birds and bats, and bogus "studies" that lie about noise,and environmental destruction, loss of property values, etc. Being number 1 in wind is nothing to brag about. It's really being number 1 in stupid.

7 ↑ ↓ ViewView in discussion

Discussion on **The Hill** · 4689 comments

McConnell to allow climate change amendment on Keystone bill

rob pforzheimer · 4 months ago

After this vote, the senate will vote on whether Santa Claus, the Easter bunny and the tooth fairy are real.

↑ ↓ ViewView in discussion

Discussion on **Ellsworth American** · 41 comments

Temporary wind power ban on Orland ballot

rob pforzheimer · 4 months ago

John Soininen is one of the Eolian wannabe wind developers desperate to get a project built anywhere. Below is a letter his mother wrote to the Rutland VT Herald in 2005 when the Sheffield project was proposed near her home in Sutton.
I guess she's changed her mind again now that her son wants to be a wind developer.

http://www.rutlandherald.com/a...
Wind proponent changes her mind
October 09,2005

October is one of the most beautiful months of the year. Some would argue that it is the most beautiful month of the year in Vermont. I find it curiously ironic that our governor would name it Wind Energy Month.

Discussion on Bangor Daily News · 7 comments

Developers try again to erect wind turbines atop Mount Waldo

rob pforzheimer → Guest · 8 months ago

Speaking of Mummy:
John Soininen is one of the wannabe Eolian wind developers desperate to build a wind project

Below is a letter his mother wrote to the Rutland Herald in 2005 when the First Wind Sheffield project was proposed near her home in Sutton.

I guess she's changed her mind again now that her son dreams of being a wind developer.

http://www.rutlandherald.com/a...
Wind proponent changes her mind
October 09,2005

October is one of the most beautiful months of the year. Some would argue that it is the most beautiful month of the year in Vermont. I find it curiously ironic that our governor would name it Wind Energy Month.

Originally a proponent of wind energy — as I am a proponent of renewal energy — I am now totally opposed. I have seen the wind farms in California and in Denmark. Those turbines are atop towers that are significantly shorter than the 400-foot ones proposed for our area. The area along Interstate 10 on the way to Palm Springs is a barren wasteland (at least in the view of a Vermonter). The hundreds of small wind turbines are nestled in the valley between two (beautiful) mountain ranges. They spin gracefully — mostly in the same direction — and are seen only by persons speeding along the highway as there are no residents within their sightline.

Conversely, I have to say that, in my opinion, the turbines, albeit small, are a blight on the beautiful, lush, green Danish landscape. In Sweden, I have only seen single towers on industrial complexes built to supplement electrical needs.

More than 30 years ago, Sen. George Aiken declared our corner of the state the Northeast Kingdom. The name stuck for obvious reasons. Locally and afar, one can see and understand the Northeast Kingdom sticker on cars. The Northeast Kingdom is a special place.

Yes, the Northeast Kingdom is a federally designated impoverished area. A major contributor to the economy of the area is tourism, but we do not attract the shop-until-you-drop, set. We are the home to and destination of those seeking the beauty, solitude and abundant wildlife of the area. Be we residents or visitors, we respect and honor the

land. We are typically conservative in our use of energy. We work to "leave no trace" when we walk, hunt or snowmobile in the woods.

The Northeast Kingdom is a target for gigantic wind towers — not quaint picturesque windmills seen on the postcards one finds in the Netherlands. Four acres have to be clear-cut and blasted to accommodate each tower. The towers, their gigantic blades, flickering lights and shadows and whining turbines will rise high above our ridgelines.

A condition for my original support of wind energy was that the electricity generated stay in our (immediate) area. In Vermont, it is the (powerful) PSB that makes the ultimate decision. A significant consideration in its go/no-go decision is its benefit to the people of the state. We are only a small portion of the state — population-wise. Why should we have to sacrifice to supply electricity for those not very much interested in conserving?

Maybe we should think about a 51st state: the Northeast Kingdom.

Alice H. Soininen

Sutton

↑ ↓ ViewView in discussion

rob pforzheimer • 8 months ago

Having failed in VT and NH, the Eolian wannabe wind developers are desperate to build a project. I hope the folks in Frankfort vote them out AGAIN. How many strikes do these jerks get?
They linger like a bad smell.

5 ↑ ↓ ViewView in discussion

Discussion on **Bangor Daily News** • 36 comments

Monday, Sept. 1, 2014: Wind ordinance, bear baiting, LePage

rob pforzheimer • 8 months ago

The three Eolian wannabee wind developers linger like a bad smell everywhere they go and fail.

4 ↑ ↓ ViewView in discussion

Discussion on London Free Press · 195 comments

First, mega-turbines . . . now, giant poles | Local | News

rob pforzheimer · 2 years ago

NextEra is a foreign, private, for profit generator. Are they considered a public utility with the right to municipal rights of way, or the ability to enforce eminent domain???

4 ↑ ↓ ViewView in discussion

rob pforzheimer ↗ **micheal martin** · 2 years ago

Who needs a neutral body? Common sense should be enough to see that not many people will want to invest in property or live near loud, strobe lit turbines or transmission lines.

If wood poles are used, people should be aware that they are treated with toxic PCP (creosote) which contains even more toxic dioxin. This is toxic if ingested, breathed or touched, and will find it's way into any nearby water supplies.

8 ↑ ↓ ViewView in discussion

Discussion on Vermont Public Radio · 4 comments

Grid Issues Lead To Smaller NEK Wind Project

rob pforzheimer · 2 years ago

What part of the grid is constrained don't these Seneca Mtn Wind/Eolian wannabe wind developers seem to grasp? There is no room for more generation from the northeast kingdom. There's no transmission line in place and these private, for profit, generators do not have the right of eminent domain that a utility would have to take people's land. Direct cash payments, or bribes, to residents and taxpayers of the UTG are of questionable legality.
If SMW is no longer considering a project in Brighton and Newark, why don't they withdraw their application to put met towers in these ecologically sensitive areas?

2 ↑ ↓ ViewView in discussion

Discussion on **Bangor Daily News** · 160 comments

LePage seeks plan to help Mainers heat homes

rob pforzheimer · 3 years ago

TruthinMaine has a good idea. Getting all the money wasted on useless wind projects would buy a lot of heating oil.
First Wind has to date gotten $240 million in DOE 1603 grants and will be getting another $39 million for Rollins and that much again for Sheffield in VT. Oh and another $120 million in DOE 1705 loan guarantees.
Iberdrola, owner of CMP, has received grants for wind totaling over a billion dollars.
Corporate welfare for useless, unneeded projects, that kill wildlife and destroy wildlife and human habitat is criminal and corrupt.

2 ↑ ↓ ViewView in discussion

Discussion on **Bangor Daily News** · 81 comments

Frankfort residents pass strict wind ordinance

rob pforzheimer · 3 years ago

Strange that some "natives" complain about outsider, "flatlanders", but are willing to embrace wind developer wannabe carpetbaggers from Eolian who are outsider flatlanders that will give them a little money.

16 ↑ ↓ ViewView in discussion

rob pforzheimer · 3 years ago

Good to see people waking up to this scam. These flimflam artists aren't welcome in VT either.

27 ↑ ↓ ViewView in discussion

Discussion on Bangor Daily News · 83 comments

Frankfort wind developers: Mount Waldo right site

rob pforzheimer · 3 years ago

The BDN should be charging these clowns for this advertorial "Special to the BDN"

Do they really expect people to believe any of these bogus claims?
'best locations, energy
security, combat climate change and the other environmental
degradation, a prosperous, more healthful future. early, frequent community
engagement, protects the public health safety and welfare, substantial clean energy and
economic development benefits, always open to reasonable regulations. and we stand by
our commitments.'

Below is an excerpt from an article in the Caledonian Record on Nov 14. Does this sound like frequent community engagement?

Lyndonville Electric Department Manger Ken Mason said, "There are
people now looking at another wind farm north of Lyndonville ... a
project in the 60 to 70 megawatt range, and they're talking to us now to
try to use our system to get it onto the VELCO system ... these guys
are around, there's always someone calling you up and saying, 'Hey, have
I got a deal for you.'"
When asked for details, Mason said, "They
have asked me not to use their name until they are ready to announce
themselves. I told them that I'd have to mention their visit when it
comes to future potential power supply for full disclosure and they
understood that. They're supposed to contact me again soon after talking
to VELCO and I will ask them then if they have a problem with the world
knowing."
http://sn104w.snt104.mail.live...

It's known, here in VT, that the developer of this project, surrounded by state land, in Brighton & Ferdinand, VT, is non other than these wind developer wannabes, Eolian wind.

Vote them out.

14 ↑ ↓ ViewView in discussion

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THOMAS MORGENSTERN v. TOWN OF RYE

No. 99-527

SUPREME COURT OF NEW HAMPSHIRE

147 N.H. 558; 794 A.2d 782; 2002 N.H. LEXIS 26

September 19, 2001, Argued
April 15, 2002, Opinion Issued

PRIOR HISTORY: **[***1]** *Morgenstern v. Town of Rye, 2001 N.H. LEXIS 220 (N.H. Dec. 21, 2001).*

DISPOSITION: Vacated and remanded.

COUNSEL: Gottesman and Hollis, P.A., of Nashua (Anna Barbara Hantz and Morgan A. Hollis on the brief, and Mr. Hollis orally), for the plaintiff.

Michael L. Donovan, of Concord, by brief and orally, for the defendant.

Devine, Millimet & Branch, P.A., of Manchester (Daniel E. Will on the brief) and New England Legal Foundation, of Boston, Massachusetts (Michael E. Malamut on the brief), for New England Legal Foundation, as amicus curiae.

JUDGES: BRODERICK, J., sat for oral argument but did not take part in the final vote; NADEAU, DALIANIS and DUGGAN, JJ., concurred.

OPINION BY: Brock

OPINION

[784]** **[*559]** Brock, C.J. The plaintiff, Thomas Morgenstern, appeals orders of the Superior Court (*Murphy*, J.) declaring section 601 of the Rye Zoning Ordinance valid on its face and as applied to his property. The plaintiff also appeals the court's order upholding the Town of Rye Zoning Board of Adjustment's (ZBA) decision not to hear his revised application for approval to build a house on his lot. The defendant, Town of Rye (town), **[***2]** cross-appeals, arguing that the plaintiff's action should have been dismissed because the plaintiff failed to timely appeal adverse decisions of the ZBA. We vacate and remand.

In September 1992, the plaintiff purchased land in Rye for $ 20,000. Estimates were made that anywhere between twenty-seven and eighty percent of the parcel consisted of wetlands. The plaintiff's lot is part of the Myrica-By-The-Sea residential subdivision plan that had been approved by the town in 1967 and recorded in the registry. At that time, the plaintiff's lot complied with the town's minimum square footage and frontage requirements for residential property. By 1971, all of the roads in the development had been accepted by the town at town meeting. By 1975, all but four of the twenty lots had either been developed or received building permits. In 1975, the town increased the required lot size and frontage, so that the current requirement for the plaintiff's lot is 44,000 square feet with 150 feet of frontage. Thus, the plaintiff's lot was rendered nonconforming as to minimum size and frontage.

In 1993, the plaintiff applied for a variance to build a single-family dwelling on the uplands portion of his

[*3]** lot pursuant to section 601 of the town's zoning ordinance. Section 601, which governs construction on nonconforming lots and was adopted in 1985, provides:

> **[**785]**
>
> **[*560]** In any district in which single family or two family dwellings are permitted, a dwelling and customary accessory buildings may be erected, as a variance obtained pursuant to Article VII, on any lot which was a lot of record on the effective date of this Ordinance, earlier variations thereof, or future amendments thereto, even though such lot fails to meet the district requirements for area or frontage or depth.

The ZBA held a hearing on the variance, and, based upon the five criteria for approving a variance, voted unanimously to deny the application. The plaintiff neither requested a rehearing nor appealed the decision. Instead, in December 1994, the plaintiff applied for a building permit rather than a variance, asserting that no variance was required because the parcel was a grandfathered nonconforming lot.

The building inspector denied the plaintiff's application on the grounds that a use variance pursuant to section 601 was required and had been denied. The plaintiff appealed the building inspector's decision, **[***4]** which was upheld by the ZBA in 1995. Although the plaintiff filed a timely request for rehearing, he did not appeal the subsequent denial of the request for rehearing. Instead, in January 1997, he filed a petition for a declaratory judgment in superior court asserting that section 601 was unconstitutional on its face and as applied to his property.

The town moved to dismiss the petition based upon the plaintiff's failure to appeal the denial of his 1995 administrative appeal to the ZBA. The superior court denied the motion to dismiss. The town then moved for partial summary judgment. The superior court ruled that the variance requirement of section 601 was not unconstitutional on its face, but left open the issue of whether it violated due process as applied to the plaintiff's property.

In 1998, while the declaratory judgment action was pending, the plaintiff filed a second variance application. The ZBA refused to consider it on the grounds that there was no material change from the first application. The plaintiff appealed to the superior court, where the action was consolidated with the declaratory judgment action. Following a bench trial, the superior court held that section 601 **[***5]** was not unconstitutional as applied to the plaintiff's property, and that the ZBA's decision not to consider the second application for a variance was reasonable.

On appeal to this court, the plaintiff argues that section 601 is unconstitutional on its face and as applied, and that the superior court erred when it upheld the ZBA's decision that: (1) the resubmitted plan was not materially different from the prior plan; and (2) no future application for a single family dwelling would ever be sufficiently materially different **[*561]** as to warrant ZBA review. The town cross-appeals, arguing that the plaintiff's failure to appeal the 1993 and 1995 ZBA decisions bars his petition for declaratory judgment because it arises from the same factual transactions as the 1993 and 1995 decisions.

We will affirm the trial court's factual findings unless they are unsupported by the evidence, *see Carrier v. McLlarky, 141 N.H. 738, 740, 693 A.2d 76 (1997)*, and will affirm the trial court's legal rulings unless they are erroneous as a matter of law. *See Fleet Bank-N.H. v. Chain Const. Corp., 138 N.H. 136, 139, 635 A.2d 1348 (1993)*.

We address first the town's argument that **[***6]** because the plaintiff failed to appeal the ZBA's 1993 and 1995

decisions pursuant to *RSA 677:4*, the decisions are final decisions, and his constitutional claims are barred by the doctrine of res judicata.

[786]** A party may appeal an adverse zoning action by way of a statutory appeal, declaratory judgment, or an equitable proceeding. *Caspersen v. Town of Lyme, 139 N.H. 637, 640, 661 A.2d 759 (1995)*. A facial challenge to a zoning ordinance may be initiated by way of a statutory appeal or declaratory judgment. *Id.* A challenge to a zoning ordinance as applied to a particular property may be initiated by way of a statutory appeal, declaratory judgment or equitable proceeding. *Id.* A plaintiff who chooses to initiate a declaratory judgment action to challenge the validity of a zoning ordinance may do so after the expiration of the appeal period in *RSA 677:4*. *See Blue Jay Realty Trust v. City of Franklin, 132 N.H. 502, 509, 567 A.2d 188 (1989)*.

In support of a contrary rule, the town cites *Shepherd v. Town of Westmoreland, 130 N.H. 542, 543 A.2d 922 (1988)*, and *Town of Auburn v. McEvoy, 131 N.H. 383, 553 A.2d 317 (1988)*. **[***7]** Both cases are distinguishable from the case at bar. *Shepherd* involved the res judicata effect of a superior court decision in an appeal from the ZBA. *Shepherd, 130 N.H. at 543*. There we held that the plaintiff should have raised constitutional and inverse condemnation claims when she appealed the ZBA's decision to the superior court. *Id. at 545*. Thus, where an applicant directly appeals from the zoning decision to superior court, the doctrine of res judicata requires that all claims that could be raised, be raised therein, or be barred. In the present case, because the plaintiff did not appeal the 1993 and 1995 decisions of the ZBA, its constitutional attack on the ordinance is not barred by res judicata.

McEvoy specifically left open the question of whether a planning board decision should be accorded res judicata status. *McEvoy, 131 N.H. at 385*. That question was answered a year later in *Blue Jay Realty*, where we reasoned that because a collateral attack raises questions of law suited to **[*562]** judicial rather than administrative treatment, collateral attacks on zoning enactments are not foreclosed by a failure to directly **[***8]** appeal a decision of the application of the challenged ordinance to a particular piece of property. *Blue Jay Realty, 132 N.H. at 509-10*.

Having concluded that the plaintiff's claims are not barred by res judicata, we now consider the plaintiff's argument that the variance requirement contained in section 601 is unconstitutional on its face. Zoning ordinances are presumed to be valid, and the challengers bear the burden of proving them unlawful. *See Town of Nottingham v. Harvey, 120 N.H. 889, 892, 424 A.2d 1125 (1980)*. A zoning ordinance will not be declared unconstitutional absent proof that its provisions are arbitrary and unreasonable and have no substantial relationship to the health, safety, morals or general welfare of the community. *See Buskey v. Town of Hanover, 133 N.H. 318, 323, 577 A.2d 406 (1990)*.

Generally speaking, a property owner has no right to the continued existence of any particular zoning classification of his property, because all property is held in subordination to the police power of the municipality. *R.A. Vachon & Son, Inc. v. City of Concord, 112 N.H. 107, 110, 289 A.2d 646 (1972)*. Special **[***9]** problems arise, however, when zoning regulations increase frontage and area requirements and landowners are left with substandard lots. Strict and literal enforcement of stringent regulations regarding lot size would make some such lots useless to their owners and to the community, and would destroy the value of such lots, making strict application of the ordinance confiscatory. *Id. at 113*; 2 R. Anderson, *American Law of Zoning* § 9.66, at 320 (4th ed. 1996). To avoid this **[**787]** result, some ordinances provide relief for the owner of a legally recorded lot rendered substandard by the ordinance by way of a savings clause exempting such lots from the ordinance's area and frontage requirements. *See, e.g., Town*

of Seabrook v. Tra-Sea Corp., 119 N.H. 937, 939, 410 A.2d 240 (1979); Vachon, 112 N.H. at 112.

While section 601 does not exempt substandard lots of record from the application of the zoning ordinance, it does allow owners of such lots to apply for a variance to build on the lot. The variance process ensures, among other things, that application of the ordinance's area and frontage requirements to a particular piece of property **[***10]** will not result in an unconstitutional taking. *See Bouley v. Nashua, 106 N.H. 79, 84, 205 A.2d 38 (1964).* Accordingly, we agree with the trial court that "although the variance requirement of Section 601 may have a unique constitutional impact on a property owner of a nonconforming lot in a previously approved and **[*563]** substantially constructed subdivision, that does not make Section 601 unconstitutional *on its face*." (Emphasis added.)

The plaintiff next argues that the ordinance is unconstitutional as applied to his property because he had a vested right to develop the lot in conformance with the zoning ordinance in effect at the time the subdivision was recorded. The plaintiff asserts that the superior court misconstrued: (1) *RSA 674:39* (1996) when it held that the statute, enacted in 1975, was not retroactive to a subdivision plan of record in 1967; and (2) the vested rights doctrine when it held that the vested rights belonged only to the original developer and the successor developer, not to the lot itself.

As we have noted, property owners generally have no vested right to be free from zoning restrictions that forbid prospective uses. **[***11]** *See Vachon, 112 N.H. at 110.* Thus, owners of lots which are smaller than, but predate, current lot size requirements are not necessarily exempt from the ordinance provisions regulating lot size. The plaintiff argues, however, that the application of section 601 to his approved lot of record violates his statutory right to complete construction on his lot in accordance with the original approved plan. *See RSA 674:39.* The plaintiff's statutory vested rights argument is based, not on the four-year exemption provided in the statute, but on the language, "once substantial completion of the improvements as shown on the plat have occurred in compliance with the approved plat, or the terms of said approval or unless otherwise stipulated by the planning board, the rights of the owner or the owner's successor in interest shall vest and no subsequent changes in subdivision regulations or zoning ordinances shall operate to affect such improvements." *RSA 674:39.*

The record in the Senate on the bill adding this language to the statute in 1977 indicates that the legislature did not intend to give owners any more or any less protection **[***12]** under these statutory vested rights than that provided by common law. *See N.H.S. Jour.* 2685-86 (1977). Therefore, our analysis regarding the existence of any statutory vested right is coextensive with the analysis regarding the existence of common law vested rights, and we need not consider whether the statute applies retroactively.

As a matter of New Hampshire common law, an owner who, relying in good faith on the absence of any regulation, has done substantial construction on property or who has incurred substantial liabilities relating to property, or both, acquires a vested right to complete the project in spite of the subsequent adoption of **[**788]** an ordinance prohibiting the use. *See Piper v. Meredith, 110 N.H. 291, 299, 266 A.2d 103 (1970).* Thus, the developer of a subdivision approved under a prior zoning ordinance that has undergone substantial construction under the approved plan acquires a vested right to complete the project in accordance with the original **[*564]** subdivision despite the subsequent adoption of a contrary ordinance. *Henry and Murphy, Inc. v. Town of Allenstown, 120 N.H. 910, 912-13, 424 A.2d 1132 (1980).* This right may run to the **[***13]** developer's successors in interest. *Id. at 913.*

The plaintiff in *Henry and Murphy* purchased a tract of land with the intention of subdividing and developing it as a residential area. *Id. at 911*. In 1968, the plaintiff recorded a subdivision plan subdividing the property into fifty house lots of approximately 10,000 square feet, and began to build one-family and multi-family homes on the property. *Id.* In 1970, the town adopted a zoning ordinance requiring lots like those in the plaintiff's subdivision to have a minimum lot area of 40,000 square feet. *Id.* By June of 1978, the plaintiff had developed and sold thirty-four of the lots in the subdivision and had constructed the water and sewer systems necessary for those lots. *Id. at 912*. Only sixteen lots remained undeveloped. *Id.* When the plaintiff contracted to sell the sixteen remaining lots, it sought, but was denied, approval of the subdivision plan on the grounds that the undeveloped lots did not meet the area lot requirement of the town zoning ordinance. *Id.*

On appeal, the plaintiff argued that it had acquired a vested right to develop the entire subdivision **[***14]** by reason of its having completed approximately seventy percent of the improvements shown on the original subdivision plan in good faith reliance upon the town's approval of that plan between 1968 and 1975. *Id.* We agreed, stating, "It would be unfair and unreasonable to say, at this time, that the plaintiff and its successors in interest may not develop the remaining lots in conformity with the distinct character of the developed portion of the subdivision in which they are located." *Id. at 913*.

In determining whether the plaintiff in the instant case had a vested right to build on the property without obtaining a variance, the trial court considered whether the plaintiff, not the developer, incurred substantial construction costs or substantial liabilities. This was error. The trial court's analysis should have focused, instead, on: (1) whether the original developer, like the developer in *Henry and Murphy*, had acquired a vested right to build on the lot; and, if so, (2) whether that vested right transferred to the plaintiff, as a successor in interest.

We conclude that the superior court also erred when it ruled that there was no material change between **[***15]** the plaintiff's 1995 and 1998 applications and premature for it to find that the plaintiff would never be entitled to build a single family home on the property. Throughout the litigation in this case, the town has taken the position that **[*565]** it denied the plaintiff's request for a variance because of concerns about the particular proposed structure's impact on the wetlands. Yet, when the plaintiff submitted a new application in 1998 that allegedly addressed these concerns, the ZBA declined to hear the application on the merits because it concluded that the application did not differ materially from the 1995 application. The superior court affirmed the 1998 denial, and indicated that no single family dwelling on the uplands portion of the lot would ever qualify as materially different.

[789]** On appeal, the superior court's decision will be upheld unless it is not supported by the evidence or is legally erroneous. *Peabody v. Town of Windham, 142 N.H. 488, 492, 703 A.2d 886 (1997)*. For its part, the superior court shall not set aside or vacate the ZBA's decision "except for errors of law, unless the court is persuaded by the balance of the probabilities, on the evidence before **[***16]** it, that said order or decision is unreasonable." *RSA 677:6* (1996). To the extent the ZBA made findings upon questions of fact properly before the court, those findings are deemed *prima facie* lawful and reasonable. *Id.*

In upholding the ZBA's decision that the plaintiff's 1998 application was not materially different in nature and degree from the 1995 variance application, the superior court relied upon our decision in *Fisher v. City of Dover, 120 N.H. 187, 412 A.2d 1024 (1980)*. The defendant in *Fisher*, desiring to convert a house into a multi-family apartment complex, applied for and obtained a use

variance from the ZBA. *Id. at 188.* The plaintiff challenged the grant of the variance in superior court, and on remand from the superior court, the ZBA denied the variance application. *Id.* The defendant then filed a second application for a variance, which it conceded was substantially the same as the previous application. *Id.* The ZBA granted the variance, and the superior court upheld the decision. *Id.* On appeal, we held that the ZBA erred as a matter of law "when it approved the defendant's second application [***17] for a variance without first finding either that a material change of circumstances affecting the merits of the application had occurred or that the second application was for a use that materially differed in nature and degree from the use previously applied for and denied by the board." *Id. at 191.*

In upholding the ZBA's refusal to consider the plaintiff's 1998 application on the merits, the superior court in the present case stated:

> The evidence and testimony revealed that the second application, with its supporting documentation, asserted several differences. The changes included a new driveway design that allowed for more natural absorption of rainfall into the ground and a new . . . footprint design which no longer required a retaining wall to [*566] protect the wetlands. The plaintiff apparently considers the engineering studies and variations on the building structure to be material changes. However, there were no changes in the neighborhood or upon the plaintiff's property between the first and second applications which would constitute a material change in circumstances affecting the merits of the application. Therefore the decision of the ZBA cannot be [***18] said to be unreasonable. Furthermore, the evidence and testimony revealed that both applications were for the same use-a single family home on the uplands portion of the property. Therefore, the Court finds and rules that the second application was not for a use that differed from its predecessor, nor were there material changes affecting the merits of the application.

It is clear from the superior court's order that it concluded that it was unnecessary to consider whether engineering studies and the variations on the building structure constituted material changes to the plaintiff's application. Given the nature of the plaintiff's initial application and the ZBA's reasons for denying the variance, this was error.

The plaintiff applied for a variance pursuant to section 601 to construct a house on his lot. The ZBA minutes and the ZBA chairman's superior court testimony reflect [**790] that when the ZBA denied the plaintiff's applications in 1993 and 1995, it was primarily concerned about the proposed structure's impact on the wetlands, the drainage impact and overcrowding. The minutes from the 1993 and 1995 ZBA hearings do not suggest that the ZBA would never grant a variance to construct [***19] a house on the plaintiff's lot. Indeed, in its pleadings submitted to the superior court, the town essentially invited the plaintiff to file a new variance application, stating, "The applicant has provided no evidence that a smaller house and/or a house that did not require filling wetlands could not be built on the lot, thereby addressing the [ZBA's] concern." It was in response to this invitation that the plaintiff submitted the 1998 variance application. Unlike the defendant in *Fisher v. Dover*, the plaintiff did not merely resubmit substantially the same application for a variance, but, at the town's invitation, submitted a new proposal in an effort to meet the town's concerns.

[*567] In light of the errors identified above, we vacate the decision of the superior court and remand for further proceedings consistent with this opinion.

Vacated and remanded.

BRODERICK, J., sat for oral argument but did not take part in the final vote; NADEAU, DALIANIS and DUGGAN, JJ., concurred.

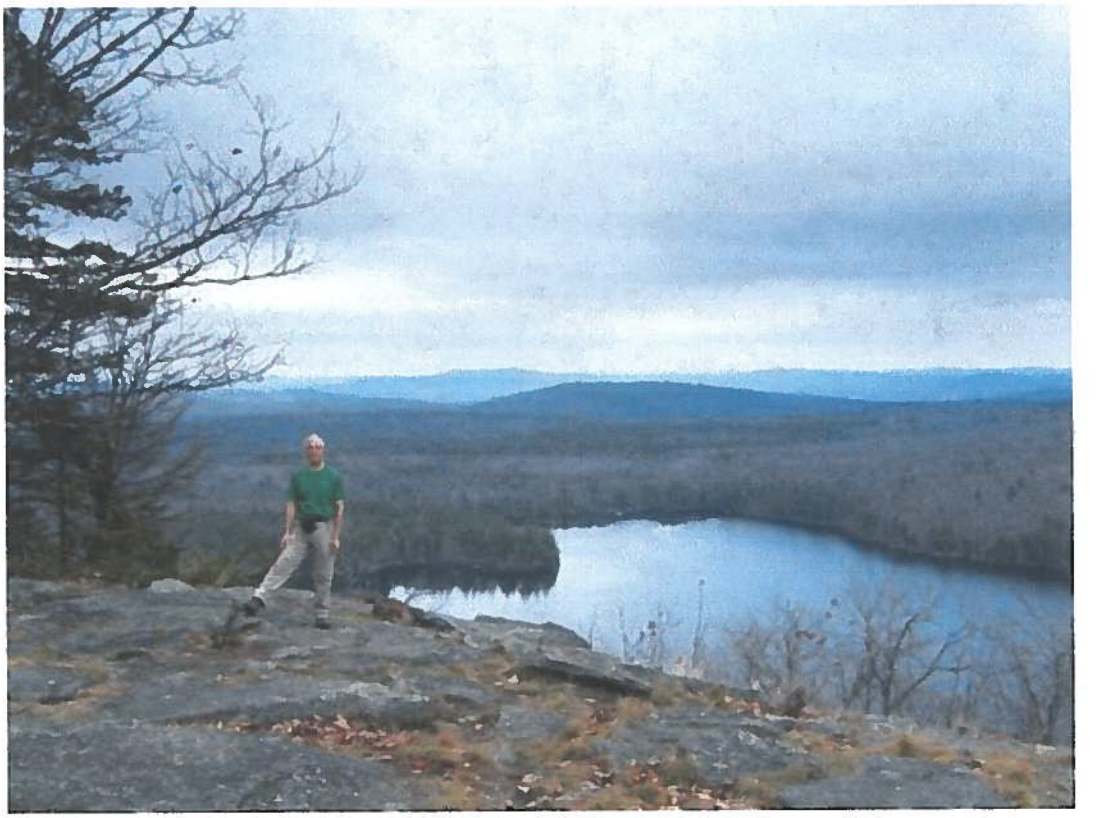

Photo by Gwen Mikailov

Fred poses at the near-summit vista overlooking Willard Pond. This would be a great viewpoint on a prettier day.