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May 21, 2018

HAND DELIVERED
Eileen A. Fox, Clerk of Court
New Hampshire Supreme Court
One Charles Doe Drive
Concord, NH 03301

Re: Appeal of Mary Allen & a.; & Appeal of Fred Ward
Case No. 2017-0313

Dear Clerk Fox:

Please find enclosed an original and seven (7) copies of Appellants' Motion for Reconsideration.

I hereby certify that copies of the foregoing have this day been forwarded to all counsel and parties of record, and the NH Site Evaluation Committee.

Very truly yours,
DONAHUE, TUCKER & CIANDELLA, PLLC

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EAM:jlh
Enclosures
cc: Clients
Distribution List
NH Site Evaluation Committee

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2017 TERM
SPRING SESSION

APPEAL OF MARY ALLEN & a.; & APPEAL OF FRED WARD

NO. 2017-0313

APPELLANTS' MOTION FOR RECONSIDERATION

NOW COME Mary Allen, Bruce and Barbara Berwick, Richard Block, Robert Cleland, Kenneth Henninger, Jill Fish, Annie Law, Janice Longgood, Mark and Brenda Schaefer, Geoffrey Jones on behalf of the Stoddard Conservation Commission, and Lisa Linowes on behalf of the Windaction Group, (collectively "the Appellants" or "Petitioners"), by and through their attorneys, Donahue, Tucker, & Ciandella, PLLC, and hereby move this Court to reconsider this Court's May 11, 2018 decision ("Decision"). In support thereof, the Appellants state as follows:

I. INTRODUCTION AND BRIEF PROCEDURAL HISTORY

This case is an appeal from the Site Evaluation Committee's ("SEC") Decision and Order Granting Application for Certificate of Site and Facility ("SEC's Decision") in SEC Docket No. 2015-02 ("Antrim II"). The Appellants argued, in part, that the SEC's Decision was unlawful and unreasonable because the SEC's decision in SEC Docket No. 2012-1 ("Antrim I"), denying AWE's prior Application for Certificate of Site and Facility ("2012 Application") precluded the SEC from approving the 2015 Application under the doctrine set forth in Fisher v. Dover, 120 N.H. 187 (1980) ("Fisher Doctrine"). Specifically, the Appellants argued that the SEC erred in finding that the 2015 Application was invited because the SEC stated to the contrary in a docket that addressed AWE's Petition for Jurisdiction Over a Renewable Energy Facility

("Jurisdictional Docket"). Appendix to Brief of the Petitioners at 236.[1] The Appellants also argued that the SEC erred in finding that a 2015 amendment to the SEC's administrative rules precluded application of the Fisher Doctrine because said change in the law would not have altered the SEC's findings in Antrim I. The Appellants further argued that the SEC erred in finding that the 2015 Application was materially different from the 2012 Application because the SEC erroneously considered changes to AWE's off-site mitigation plan in the 2015 Application.

On May 11, 2018, this Court affirmed the SEC's Decision, holding that the Appellants had not demonstrated that the SEC's Decision was unreasonable. Decision at *6-8. Addressing the Appellants' arguments regarding off-site mitigation, the Court noted that the SEC previously suggested in Antrim I that the elimination of two turbines may "substantially mitigate the unreasonable adverse effect on aesthetic" and that because the 2015 Application had been modified and reduced in size, it "was not unreasonable for the subcommittee to find that the 'additional measures offered by [AWE] sufficiently mitigate, minimize and avoid impacts of the project on aesthetics." Decision at *7. The Court rejected the Appellants' argument regarding the change in the law, ruling that that the Appellants have not demonstrated that the SEC in Antrim I "considered or applied . . . each of the factors to the degree now delineated in the regulations." Decision at *7. Lastly, the Court rejected the Appellants' invitation argument, stating that whether an application was invited is but one factor to consider under the Fisher Doctrine and need not be addressed in light of the SEC's finding of materiality. Decision at *8.

II. STANDARD OF REVIEW AND APPLICABLE LAW

This Court may grant reconsideration by demonstration that the Court has "overlooked or misapprehended" the law or the facts. N.H. Sup. Ct. R. 22.

[1] All citations to the certified record shall be as follows: Vol. __, Bk. __ at __. All citations to the Appendix to the Brief of the Petitioners shall be as follows: Appd'x. at __.

The Fisher Doctrine states that a prior denial of an application for land use approval will be binding upon successive applications unless, (a) there is a material change in the proposed use of the land or (b) there are material changes in the circumstances affecting the merits of the application. See Brandt Dev. Co. v. City of Somersworth, 162 N.H. 553, 557 (2011). "An applicant . . . bears the burden of demonstrating that a subsequent application materially differs in nature and degree from its predecessor." CBDA Dev. v. Town of Thornton, 168 N.H. 715, 724 (2016) (quotation omitted). "Before accepting a subsequent application . . . a board must be satisfied that the subsequent application has been modified so as to meaningfully resolve the board's initial concerns." Id. at 725. "When a board has identified fundamental issues with an application, those issues must be addressed before the board—as well as the interested community members—should be required to invest additional time and resources into considering the merits of the application." Id.

III. DISCUSSION

This Court should grant this Motion for Reconsideration because the Court overlooked and/or misapprehended the facts and the law in addressing the Appellants' Fisher Doctrine arguments. See N.H. Sup. Ct. R. 22. The Court overlooked and/or misapprehended the facts and the law because: (1) the Court misapprehended the weight that the SEC placed on AWE's off-site mitigation plan, a consideration which was improper under the Fisher Doctrine; (2) the Court overlooked that, while there was a change in the law, it was AWE's burden to demonstrate to the SEC that the change in the law would have altered the SEC's conclusion in Antrim I and further overlooked that the SEC did not analyze or determine whether said change in the law would have altered the SEC's conclusion in Antrim I; and (3) the Court overlooked the substantial weight that the SEC placed on the erroneous conclusion that the 2015 Application was invited by the

SEC in Antrim I and, as such, the Court should have addressed the Appellants' invitation argument. Because the SEC's rulings are predicated upon incomplete applications of law, erroneous conclusions, and improper considerations, this Court should grant this Motion for Reconsideration, reverse the SEC's decision, and remand this matter back to the SEC for proceedings consistent with the Appellants' arguments.

First, this Court should grant reconsideration because the Court misapprehended the weight that the SEC placed on AWE's off-site mitigation plan, a consideration which was improper for the SEC under the Fisher Doctrine. Here, the Court stated that the SEC in Antrim I suggested that the elimination of two turbines may "substantially mitigate the unreasonable adverse effect on aesthetic" and that because the 2015 Application had been modified and reduced in size, it "was not unreasonable for the subcommittee to find that the 'additional measures offered by [AWE] sufficiently mitigate, minimize and avoid impacts of the project on aesthetics." Decision at *7. The Court's statement misapprehends or overlooks the facts in several respects. For one, the Court overlooked that the 2015 Application did not follow the SEC's suggestion to eliminate two turbines: the 2015 Application only eliminated one turbine — nine turbines will remain in the same locations as proposed in the 2012 Application with eight turbines being .6% shorter and the ninth being 9.3% shorter. Vol. II, Bk. 7 at 7130, 7138-40.

More importantly, however, is that the Court's Decision does not address the Appellants' arguments as to the propriety of the SEC's consideration of off-site mitigation for the purposes of aesthetics. AWE had the burden to demonstrate that the 2015 Application "materially differed in nature and degree" from the 2012 Application. See CBDA Dev., 168 N.H. at 724. The SEC was required to find that the changes to the 2015 Application had "been modified so as to meaningfully resolve" the SEC's initial concerns in Antrim I. Id. at 725. In Antrim I, the SEC

expressed significant concerns as to the profound and moderate qualitative, aesthetic impacts that the Project would have on numerous scenic resources. Appd'x. at 290-91. The SEC in Antrim I rejected AWE's argument that off-site mitigation could be considered with regard to aesthetic impacts. Appd'x. at 290-91. If off-site mitigation was not an appropriate consideration to address aesthetic impacts in Antrim I, then additional off-site mitigation could not have been a consideration as to whether the 2015 Application meaningfully resolved the Antrim I SEC's concerns regarding aesthetic impacts. See CBDA Dev., 168 N.H. at 724.

Further, off-site mitigation cannot be separated from the Antrim II SEC's conclusion that the Project would not have adverse aesthetic effects on scenic resources, as the Antrim II SEC's decisions and deliberations reflect that off-site mitigation was a prominent consideration in determining whether the 2015 Application was precluded under the Fisher Doctrine. For example, during the SEC's deliberations on the 2015 Application, Member Weathersby noted that the "changes of the 100 acres . . . [and] the money for the [Forestry Foundation]" constitute changes precluding the Fisher Doctrine. Vol. II, Bk. 6 at 5963-64. In the SEC's decision granting the 2015 Application, the dedication of 100 additional acres is the first fact identified by the SEC as to why the 2015 Application differs from the 2012 Application and for why the Fisher Doctrine does not apply. Vol. II, Bk. 7 at 7170-71. During the SEC's deliberations on Counsel for the Public ("CFP") and the Appellants' motions for rehearing, both Members Clifford and Scott identified the conservation easements and the different mitigation measures as a basis to reject arguments regarding the Fisher Doctrine. Vol. II, Bk. 7 at 7521; see also Vol. II, Bk. 7 at 7628. In short, while other changes to the Project were noted in the SEC's Decisions in Antrim II, off-site mitigation played a prominent role in the SEC's Fisher Doctrine analysis. Excluding AWE's off-site mitigation package, the 2015 Application only proposed a 3.2 foot

reduction (0.6%) for turbines one through eight and a 45.8 foot reduction (9.3%) for turbine nine; when situated atop a 1,500+ foot ridge, these changes are imperceptible. See Vol. II, Bk. 7 at 7135-38. Because the SEC's consideration of off-site mitigation was improper and would not have been considered by the Antrim I SEC with regard to aesthetics, this Court should grant reconsideration and should reverse and remand the matter back to the SEC to determine whether the 2015 Application is precluded under the Fisher Doctrine without consideration of AWE's off-site mitigation plan.

Second, this Court should grant reconsideration because the Court overlooked that, although there was a change in the SEC's administrative rules, nowhere in the SEC's deliberations or decisions did the SEC analyze specifically how those changes would have altered the SEC's aesthetics determination in Antrim I. See Brandt, 162 N.H. at 559-60. This Court stated that the SEC amended its administrative rules to "provide specific criteria for the subcommittee to consider when assessing whether there is an unreasonable adverse effect on aesthetics," which led to more detailed analyses from AWE' witnesses.[2] The Court further stated the SEC's finding that the change in the rules "provided fixed targets in the form of substantive limitations on impacts to be met in any new application." As stated in Brandt, a change in the law may give rise to a change in circumstances under Fisher if that change creates a possibility of a different outcome from the prior denial. See Brandt, 162 N.H. at 559-60. Therefore, AWE had the burden to prove, and the SEC had to find that the change in the SEC's administrative

[2] The Court further overlooks that the change in the rules did not require a more detailed analysis from AWE's witnesses with regard to aesthetics. The change in the SEC's rules occurred after the filing of the 2015 Application and, in response, AWE's expert provided supplemental testimony to address the rule change. The supplemental analysis is less than a page and a half long, did not involve substantially new analysis, and only provided additional photosimulations (many of which did not comply with the amended rules). See Vol. I, Bk. 5 at 3496-97. Moreover, the Court overlooks that new expert testimony cannot constitute a change in circumstance sufficient to preclude the application of Fisher. See Fisher, 120 N.H. at 191.

rules in 2015 would have created a possibility of a different outcome from the SEC's denial in Antrim I. See Brandt, 162 N.H. at 559-60; CBDA, 168 N.H. at 724.

Here, the SEC's analysis was entirely deficient as to whether, if at all, the change in the SEC's administrative rules would have created a possibility of a different outcome in Antrim I. There is simply no analysis in the SEC's deliberations or the SEC's decisions as to how the change in the SEC's administrative rules would have created a different outcome in Antrim I. Rather, the SEC stated, in conclusory fashion, that the change "altered the situation for the Applicant and provided 'fixed targets' in the form of substantive limitations on impacts to be met in any new application." Vol. II, Bk. 7 at 7629-7630. While the Court highlighted the SEC's statement as to "fixed targets" as demonstration that the SEC acted lawfully and reasonably, see Decision at *7, the Court overlooks that the SEC made the "fixed targets" statement in reference to the substantive limitations applicable to noise operation standards and shadow flicker. Vol. II, Bk. 7 at 7629 ("The administrative rules also set substantive limits for operational noise emitted from a wind energy facility . . . and for shadow flicker"). There are no "fixed targets" in Rule 301.14 regarding aesthetics, and such statements by the SEC highlight the deficiency of the SEC's analysis. See N.H. CODE OF ADMIN. R. ANN. Site 301.14. The Antrim I SEC denied the 2012 Application on the basis of aesthetics, and, yet, the Antrim II SEC considered changes in the rules applicable to sound and shadow flicker to bypass Fisher. Vol. II, Bk. 7 at 7629. The SEC treated a change in the law as a starting and a stopping point and did not take the next step of analyzing how that change in the law could have impacted the SEC's conclusion as to aesthetics in the Antrim I decision. See Brandt, 162 N.H. at 559-60.

To address the Court's determination that the Appellants "have not demonstrated that the Antrim I subcommittee considered or applied to the Antrim I application each of the factors to

the degree now delineated by the regulations," see Decision at *7, the Court misapprehends the state of the law. It is AWE, and not the Appellants, that had the burden of demonstrating to the SEC that the Fisher Doctrine did not preclude the 2015 Application. CBDA Dev., 168 N.H. at 724 (stating that applicant "bears the burden of demonstrating that a subsequent application materially differs in nature and degree from its predecessor"). As part of that burden, AWE (and not the Appellants) had to demonstrate, and the SEC had to find, that the factors now reflected in the SEC's administrative rules were not applied in Antrim I to the degree now required by those rules. See Brandt, 162 N.H. at 559-60. However, the SEC did not perform that analysis.

In short, the Court should grant reconsideration because the Court overlooked the deficiencies of the SEC's analysis and misapprehended the context of the SEC's statements with regard to the change in the law. The Court should grant reconsideration, reverse the SEC's decision, and remand the matter back to the SEC to determine whether the change in the SEC's administrative rules created the possibility of a different outcome in Antrim I. Id.; see also Cohen v. Henniker, 134 N.H. 425, 429 (1991) (remanding matter to planning board when necessary finding was not made); see also Appeal of Laconia, 147 N.H. 495, 496-97 (2002).

Third, the Court should grant reconsideration because the Court misapprehended the weight that the Antrim II SEC placed on the finding that the 2015 Application was invited by Antrim I SEC. Here, the Antrim II SEC found that the Antrim I SEC's refusal to allow AWE to amend the 2012 Application was "akin to an invitation." Vol. II, Bk. 7 at 7628-29. However, the SEC in the 2014 Jurisdictional Docket, in addressing arguments that the 2015 Application was invited, said that "nothing in the decision denying the [2012 Application] or in the order denying rehearing can reasonably be construed as an invitation to file a subsequent application" and that "[t]he 2012 subcommittee did not invite a re-filed application." Appd'x at 236.

The Court did not address the merits of the Appellants' argument that the SEC acted unlawfully and unreasonably in finding that the 2015 Application was invited, stating that invitation is but one consideration under the Fisher Doctrine and, in light of other findings of the SEC related to the Fisher Doctrine, the Court need not address the issue of invitation. Decision at *8. In doing so, the Court overlooked the weight that the SEC placed on the finding that the 2015 Application was invited. In fact, Member Scott, as the first speaker on the Fisher Doctrine, stated at the outset that he found the SEC's refusal in Antrim I as "compelling" as to the materiality of the changes reflected in the 2015 Application. Vol. I, Bk. 6 at 5961. Members Boisvert and Forbes joined in Member Scott's sentiment. Vol. I, Bk. 6 at 5962. Member Weathersby further stated that the SEC in Antrim I "really did invite submission of the new application." Vol. I, Bk. 6 at 5964. The SEC's Decision devotes a significant portion of the SEC's Fisher Doctrine analysis to the issue of "invitation." Vol. I, Bk. 7 at 7170. In the SEC's Orders on Motions for Rehearing, the SEC again relied upon the SEC's statements in Antrim I in support for the finding that the 2015 Application was invited. Vol. I, Bk. 7 at 7629. The issue of invitation was a matter that the SEC gave considerable weight. The Court in declining to address the issue of invitation on the basis that the finding was not essential to the SEC's rulings overlooks the considerable weight that the SEC placed on that finding. If that finding was incorrect, as the Appellants argue, the SEC should have the opportunity to address whether the SEC's findings with regard to the Fisher Doctrine would have changed in light of that correction.

IV. CONCLUSION

The Appellants respectfully request that this Court reconsider its May 11, 2018 Decision. The Court's Decision overlooks and/or misapprehends that the SEC's Decision was predicated upon improper considerations, incomplete analyses, and a demonstrably erroneous interpretation

of a prior SEC decision. The SEC's considerations of off-site mitigation and the SEC's findings of "invitation" are inextricably intertwined with the SEC's findings that the 2015 Application was not precluded under the Fisher Doctrine, and it cannot be said that the SEC would have ruled in the manner it did had it not been for those considerations. Moreover, the SEC's analysis with regard to the change to the SEC's administrative rules is incomplete and fails to consider a critical step under Brandt: whether that change creates a possibility that the SEC in Antrim I would have ruled differently. The SEC should be afforded the opportunity of revisiting its Fisher Doctrine analysis with the above-referenced errors corrected.

WHEREFORE, the Appellants respectfully request that this Honorable Court:

A. Grant this Motion for Reconsideration;

B. Reverse the SEC's Decision; and

C. Grant such further relief as may be just and equitable.

Respectfully submitted,
The Appellants
By their attorneys:
DONAHUE, TUCKER & CIANDELLA, PLLC

Dated: May 21, 2018

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Reconsideration has been mailed this 21st day of May 2018, via U.S. first-class mail, postage prepaid, to all counsel and/or parties of record, the New Hampshire Site Evaluation Commission, and the Attorney General's Office.

Eric A. Maher, Esq.