

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7628

Joint Petition of Green Mountain Power Corporation,)
Vermont Electric Cooperative, Inc., and Vermont)
Electric Power Company, Inc. for a certificate of public)
good, pursuant to 30 V.S.A. Section 248, to construct up)
to a 63 MW wind electric generation facility and)
associated facilities on Lowell Mountain in Lowell,)
Vermont, and the installation or upgrade of)
approximately 16.9 miles of transmission line and)
associated substations in Lowell, Westfield and Jay,)
Vermont)

Order entered: 8/17/2012

ORDER RE ADJOINING LANDOWNER NOISE COMPENSATION PLAN

INTRODUCTION

On May 31, 2011, the Public Service Board ("Board") issued an Order (the "Order") and Certificate of Public Good ("CPG") in this docket approving, subject to certain conditions, the construction and operation of the proposed wind electric generating facility (the "Project"). Among other things, the Order required the Petitioners to make a number of post-certification compliance filings. Condition 42 of the Order and CPG required the Petitioners to file a plan for providing compensation to adjoining landowners in the event noise levels from the Project would preclude otherwise allowable residential development on adjoining parcels.

On July 16, 2012, Green Mountain Power Corporation ("GMP") filed its proposed Adjoining Landowner Noise Compensation Plan (the "Proposed Plan") for Board review and approval. For the reasons discussed below, we decline to approve the Proposed Plan and direct GMP to file for Board review and approval a revised plan that more appropriately addresses the intent of Condition 42.

GMP'S PROPOSED PLAN

GMP's Proposed Plan imposes a number of requirements on adjoining landowners before they can qualify for compensation, proposes a mechanism for determining the amount of compensation due to a qualifying landowner, and requires a compensated landowner to convey a perpetual easement to GMP prohibiting residential development and allowing GMP to exceed the noise standards imposed on project operation by the Board on the impacted parcel.¹

Under the Proposed Plan, an adjoining landowner must first demonstrate ownership of a parcel of land or a subdividable portion of land adjoining the project site since May 31, 2011 ("Parcel").²

The owner of a Parcel must then demonstrate that the land can be developed for residential use. Such a demonstration must include, at a minimum:

- a. A specific site plan showing the location of actual or proposed Parcel boundaries, number and locations of proposed residential unit(s), and associated infrastructure including, but not limited to, drives, water, septic, and stormwater infrastructure ("Proposed Residence").
- b. A demonstration that sufficient land area with suitable soils exists to allow for the construction of a subsurface disposal system fully compliant with the Vermont Department of Environmental Conservation ("VT DEC") Wastewater System and Potable Water Supply Rules (EPR Chapter 1, Effective Date: September 20, 2007) or that it is technically feasible to connect to an existing municipal or community wastewater treatment and disposal system with sufficient capacity to serve the Proposed Residence.
- c. A demonstration that there would be a reasonable likelihood of obtaining a sufficient quantity of potable water supply in accordance with EPR Chapter 1 to meet the needs of the Proposed Residence.
- d. A demonstration that the Parcel complies with all appropriate municipal zoning and subdivision requirements for the Proposed Residence.
- e. A demonstration that, if required, there would be a reasonable likelihood of securing an Act 250 permit for the Proposed Residence.

1. Proposed Plan, generally.

2. Proposed Plan at 1. If GMP intended the Proposed Plan to provide compensation only to landowners of adjacent properties purchased before the Project was approved, clarifying language would be advisable on this point.

- f. A demonstration that there would be a reasonable likelihood of securing all other required local, state and federal permits for the Proposed Residence.
- g. A demonstration that the adjoining landowner has the ability to finance the construction of the Proposed Residence.³

Under the Proposed Plan, if an adjoining landowner can meet the requirements for demonstrating the possibility of residential development on a Parcel, the landowner must then demonstrate that the area in which a proposed residence would be located will experience sound levels from the project in excess of the Board-imposed noise standards. This demonstration must be accomplished utilizing sound measuring methods consistent with the methods employed in the Board-approved sound monitoring plan for the project. The adjoining landowner must also demonstrate that project-related noise is the sole reason preventing residential development on the Parcel, and that the proposed development could not reasonably be relocated or reconfigured in a way that would eliminate the excess noise impacts at the proposed residence.⁴

Assuming an adjoining landowner can meet the Proposed Plan requirements described above, the Proposed Plan then provides for a compensation amount to be calculated based on the difference between the appraised value of the Parcel, assuming that a proposed residence is constructed in accordance with the information provided by the landowner and that project-related sound levels did not exceed the Board-imposed standard at the location of the Proposed Residence, and the appraised value of the Parcel assuming the highest and best use of the Parcel without the Proposed Residence.⁵ Appraisers performing this work would be selected from the Vermont State pre-qualified appraisers list.⁶ Compensation would be provided no later than 90 days after all Proposed Plan requirements have been met.⁷

3. Proposed Plan at 1-2.

4. Proposed Plan at 2.

5. The Proposed Plan would use the Vermont Agency of Transportation appraisal requirements as described in chapters four and five of the Right-of-Way Manual approved by the Federal Highway Administration and dated June, 29, 2006.

6. Proposed Plan at 2-3.

7. Proposed Plan at 3. In the event of a dispute over compliance with the Proposed Plan's requirements, payment would be due within 90 days of resolution of the dispute. *Id.*

Prior to receiving compensation, the Proposed Plan requires a qualifying adjoining landowner to execute and deliver to GMP an easement deed in recordable form, together with such other instruments necessary to transfer an interest in real property, to prohibit development on a Parcel of any structure that may be used or occupied for residential purposes, temporary or long term. The easement would also convey the perpetual right, easement and privilege to generate and maintain noise that is audible on and over the Parcel at levels in excess of 45 dBA, and release any claims relating to such noise occurring prior to the date of the easement deed. The easement deed would be in standard Vermont warranty deed form.⁸

Lastly, GMP's Proposed Plan envisions that all disputes arising under the Proposed Plan would be resolved by the Board.⁹

PARTIES' COMMENTS

Comments on the Proposed Plan were filed by Don and Shirley Nelson, Kevin McGrath and Dyer-Dunn, Inc. ("DDI").

The Nelsons object to Board approval of the Proposed Plan because they believe the Proposed Plan places a burden on adjoining landowners that more appropriately belongs on GMP since it is GMP's responsibility to prove that noise from the project would not have an undue adverse impact.¹⁰ The Nelsons criticize the Proposed Plan because they assert that complying with its details would require them to spend thousands of dollars to prove that their property could be developed but for noise from the turbines. The Nelsons recommend that, if the Board agrees with GMP's Proposed Plan, that it direct GMP to place at least \$30,000 into escrow for them to use to hire the professionals needed to make the demonstration required by the Proposed Plan. The Nelsons also object to the requirement in the Proposed Plan that adjoining landowners demonstrate the ability to finance construction of a residence because residential lots may be sold without any landowner involvement in development. The Nelsons further object to the requirement that a proposed development be relocated or reconfigured to avoid the noise-

8. Proposed Plan at 3.

9. Proposed Plan at 3.

10. Nelson Comments at 1.

prohibitive impacts from the project if at all possible as beyond the scope of Condition 42. The Nelsons also object to GMP obtaining the right to violate the Board-imposed noise standards on the entirety of their property in exchange for compensation, and to the requirement that they make the required showings now, when they have not yet developed a plan for their property.¹¹

Mr. McGrath states that he owns 70 acres on Farm Road and last year completed construction of his new home on land that abuts the project site. Mr. McGrath represents that it has always been his intention to subdivide portions of his land so that his siblings and their families could construct homes there when they chose to do so. Mr. McGrath does not believe it is appropriate for him to now have to submit a detailed plan to GMP regarding possible future development in order to receive compensation. Mr. McGrath also objects to his having to pay the expense of proving that GMP's project will prevent the development of his land, especially since GMP has: (1) signed leases with other abutters that contain hold harmless provisions for a number of project effects, including noise; and (2) already purchased the neighboring Day residence at \$30,000 above assessed value. In short, Mr. McGrath believes GMP, through these actions, has acknowledged the negative effects of project-related sound on adjoining property so he should not have to spend thousands of dollars to prove the existence of those same negative effects.¹²

DDI states that it has owned a 274-acre adjoining parcel for over 20 years, and that much of the parcel is suitable and desirable for residential home development but for project sound levels in excess of the applicable standards. According to DDI, the parcel was once the site of homes served by a network of roads and farming operations and that this assertion is readily supported by physical evidence and the Lowell Town Land and Quadrennial Appraisal records.¹³

DDI objects to the requirements for a detailed site plan and advance septic testing. According to DDI, meeting these requirements would cost many thousands of dollars, the expenditure of which would only be justified after assurance that development was feasible. Further, DDI objects to the limitation to sub-surface or municipal/community wastewater

11. Nelson Comments at 1-3.

12. McGrath Comments at 1-2.

13. DDI Comments at 1.

systems because Vermont regulations allow for a wider variety of wastewater systems (e.g., mound) where slope and soil are inadequate for a subsurface system. DDI objects to the requirement that a landowner demonstrate the ability to finance a proposed development because land can be subdivided and marketed as building lots without any involvement in the actual construction by the landowner doing the subdividing and selling.¹⁴

DDI believes that the requirement that landowners demonstrate that noise levels would violate the applicable standards at the development site requires consultation with qualified advisors as to whether it is fair and reasonable, and that this may require an evidentiary hearing.¹⁵

DDI objects to the requirement that it attempt to relocate or reconfigure developments before receiving compensation. DDI contends that each subdivided parcel would be unique with its own value, and that any parcel rendered unsuitable for development by the project should be subject to compensation. DDI also objects to the mechanism proposed by GMP for determining the amount of compensation because it would improperly limit landowner claims, and to the perpetuity requirement of the negative easement that would be executed and delivered to GMP in exchange for compensation. Lastly, DDI objects to having its rights restricted by requiring disputes under the Proposed Plan to be resolved by the Board.¹⁶

DDI suggests extending the comment deadline for further study by the parties until September 19, 2012.¹⁷

GMP REPLY COMMENTS

On August 13, 2012, GMP filed comments in response to the comments filed by the Nelsons, Mr. McGrath and DDI. In its response, GMP makes a number of changes to the Proposed Plan based on the comments of these other parties. Specifically, GMP proposes to eliminate the restriction to subsurface wastewater systems for residential development on adjoining parcels, delete the requirement that a landowner demonstrate the capability to finance

14. DDI Comments at 1-2.

15. DDI Comments at 3.

16. DDI Comments at 3-4.

17. DDI Comments at 4.

construction on the Parcel, and to limit the term of the required easement to a term ending after decommissioning of the Project or any successor renewable project subject to noise standards at least as restrictive as that imposed on the Project.¹⁸ GMP also clarifies that an adjoining landowner is not required to make a showing under the requirements of the Proposed Plan until such time as the landowner actually seeks compensation from GMP, and any required easement would apply only to that portion of a Parcel that is experiencing prohibited project-related noise levels.¹⁹ Lastly, GMP states that it will revise the requirement that a development be relocated or reconfigured in a manner that would avoid the development-prohibitive sound levels if possible, so that it would instead require the use of reasonable construction practices if they would resolve noise level violations at the development site.²⁰

With respect to the other positions advanced by the commenting parties, GMP contends that they should be rejected, and that the remaining terms of its Proposed Plan are consistent with Condition 42.²¹

DISCUSSION

Condition 42 of the Order and CPG states:

The Petitioners, prior to operation of the project, shall propose a plan for Board approval to provide some form of compensation to adjoining landowners who can demonstrate that residential development of their land which otherwise could have occurred, can no longer happen solely because project-related sound levels at new residences on those parcels or subdividable portions thereof would exceed 45 dBA (exterior)(Leq)(1 hr) or 30 dBA (interior bedrooms)(Leq)(1 hr).

We decline to approve GMP's Proposed Plan because it is not consistent with the intent of Condition 42.

18. GMP Reply Comments at 2-3.

19. GMP Reply Comments at 2-3. We note that, had GMP not proposed to eliminate the requirements related to subsurface wastewater systems, construction financing, and easements in perpetuity, we were prepared to direct their deletion from the Plan. We also note that GMP's clarifications regarding the scope of encumbrance and the timing of landowner action under the Proposed Plan are consistent with our understanding of the Proposed Plan.

20. GMP Reply Comments at 2.

21. GMP Reply Comments, generally.

We imposed Condition 42 in order to provide a reasonable process for compensating adjoining landowners for lost potential residential development opportunities as a result of project-related noise impacts above the Board-imposed noise standard. GMP's Proposed Plan would require an adjoining landowner to show not just the potential ability to site residential structures on lands adjoining the project, but to produce a detailed site plan for a proposed development complete with the results of wastewater system analysis,²² to demonstrate the reasonable likelihood that there will be a sufficient potable water supply, and the likely ability to obtain any necessary permits. In sum, GMP's Proposed Plan would require adjoining landowners to effectively initiate the development process in order to qualify for compensation. This is not the intent behind Condition 42.

Condition 42 envisions a less detailed, less complex and less costly process to compensate adjoining landowners for potential development opportunities lost as a result of project-related noise in excess of the mandated noise standard. Accordingly, the proper point of comparison for compensation purposes is the value of the land as it exists today, if the potential for development is established, versus the value of the land with the potential for development removed by virtue of project sound levels. This valuation approach renders many of GMP's proposed requirements unnecessary because the initial value of the land would reflect the amount of effort or investment already made by the landowner for a potential development. For example, a parcel that is depicted on a site plan and that has undergone wastewater testing and received any necessary approvals for a septic design will be more valuable to a potential buyer than a parcel that has not been through those processes, and accordingly, the landowner would be entitled to greater compensation for the loss of development opportunities. On the other hand, a parcel that has not been through any initial review and analysis would present greater uncertainty to a potential buyer and the value of the land for development purposes would be less, resulting in lower compensation to the landowner if potential development opportunities were lost.

We conclude that a demonstration that an adjoining parcel is zoned for residential development, and that there are no apparent obstacles that would prevent such development –

22. As noted above, GMP has revised its Proposed Plan to eliminate the restriction to subsurface wastewater systems, as well as the requirement that the landowner demonstrate the ability to finance construction.

such as overly steep slopes, lack of proper access, or an apparent inability to obtain an applicable permit – should be sufficient to qualify for compensation. With respect to the initial point of comparison for valuation purposes, a landowner may choose to rely on the current assessed value reflected in the town's grand list to determine a per-acre value. If a parcel is located in an area zoned for residential development, the grand list should reflect the highest and best use of that parcel, including the potential for residential development. Adjoining landowners should also retain the option of seeking an independent appraisal, at their own expense, if they disagree with the town's assessed value, in particular where some pre-development work has already been undertaken that would increase the value of the parcel's development potential.

We are also concerned by GMP's proposal that an adjoining landowner demonstrate the existence of excessive noise levels on an adjoining parcel utilizing methods approved in the noise monitoring plan. GMP's own noise expert has testified as to the accuracy of the modeling that he performed and produced maps showing sound level contour lines surrounding the project site. GMP, when it files its revised proposal, should explain why adjoining landowners should not be allowed to rely on these maps in demonstrating where excessive noise levels will occur on their property.

In developing its revised proposal, GMP should also reconsider the newly-modified requirement regarding reasonable construction practices in light of our determination that a specific development proposal is not required for a landowner to qualify for compensation, keeping in mind that there exists both an exterior and interior noise standard, both of which must be met.²³

Lastly, when it files its revised Proposed Plan, GMP should provide its reasoning, with supporting legal authority, for disputes under its proposal to be resolved exclusively by the Board.

23. We recognize that each situation may be unique. For example, an area might be zoned for a required minimum lot size, and only a fraction of that minimum lot size would experience prohibited project-related sound levels. GMP's revised proposal should be flexible enough to account for such unique situations without imposing unreasonable requirements on the landowner, such as combining lots that meet minimum lot size requirements simply to create a larger lot with a site for development outside of an area that would experience impermissible sound levels.

CONCLUSION

For the foregoing reasons, we decline to approve GMP's proposed Adjoining Landowner Noise Compensation Plan as revised by its filing of August 13, 2012. Instead, GMP shall, prior to operation of the project, file a revised proposal consistent with the intent of Condition 42 as described above.

So ORDERED.

Dated at Montpelier, Vermont, this 17th day of August, 2012.

<u>s/James Volz</u>	)	
	)	PUBLIC SERVICE
	)	
<u>s/David C. Coen</u>	)	BOARD
	)	
	)	OF VERMONT
<u>s/John D. Burke</u>	)	

OFFICE OF THE CLERK

FILED: August 17, 2012

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.