

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7867

Application of Seneca Mountain Wind, LLC, for)
authority, pursuant to 30 V.S.A. §§ 246 and 248, to)
install four temporary meteorological stations, two)
in the Town of Brighton, Vermont, and one each in)
the towns of Ferdinand and Newark, Vermont)

Order entered: 11/15/2012

ORDER RE: NEWARK MOTION TO DISMISS

I. INTRODUCTION AND PROCEDURAL HISTORY

On October 23, 2012, the Town of Newark ("Newark") filed with the Public Service Board ("Board") a Motion to Dismiss or, in the alternative, Motion to Deem the Application Incomplete and Stay the Proceedings Due to Seneca's Third Failure to Notify All Abutters ("Motion"). In its Motion, Newark asks the Hearing Officer to dismiss Seneca Mountain Wind, LLC's ("SMW") application to install four temporary meteorological stations ("Met towers"), two in the Town of Brighton, Vermont, and one each in the towns of Ferdinand and Newark, Vermont ("Project") based on SMW's deliberate failure to accurately represent the Project property by omitting certain leased parcels and easements from its application, and for failing to provide notice to all adjoining landowners to the Project property as identified in its initial application. In the alternative, Newark asks that the Hearing Officer deem SMW's application incomplete, stay the proceedings, require SMW to engage an independent third party to verify the accuracy and completeness of the lists of abutting landowners, and require SMW to provide due notice to all abutting landowners. In addition, Newark requests that the Board and/or the Hearing Officer declare that the Town of Newark's Town Plan, as revised on September 17, 2012, is applicable to the Project in this Docket. Further, Newark requests that the Hearing Officer reconsider expanding the scope of issues to be considered during the evidentiary proceedings in this Docket.

On October 24, 2012, the Deputy Clerk of the Board issued a memorandum giving parties until November 2, 2012, to file responses to the Motion.

On October 30, 2012, Newark Neighbors United ("NNU") filed a response to Newark's Motion.

On October 31, 2012, Shirley and Robert Elder ("Elders") filed a response to Newark's Motion. In addition, the Elders' October 31 letter asserts that the Project property includes conservation lands subject to restrictions that disallow the Project.

On November 2, 2012, responses to the Motion were filed by SMW, Noreen Hession, Mark Whitworth, and the Department of Public Service ("DPS" or "Department").

No other comments regarding the Motion were received.

For the reasons explained below, in today's Order I deny Newark's Motion.

II. POSITIONS OF THE PARTIES

Newark

Newark contends that SMW deliberately failed to identify all leasehold interests held by SMW that comprise Project property. Newark points out that SMW's original application, filed April 12, 2012, listed Scott and Sarah Williams as landowners whose land adjoins the Project parcel ("Williams Parcel").¹ Pursuant to the *Third Procedural Order*,² on August 24, 2012, SMW filed a Revised Adjoiners Map and Revised Adjoiners List which continued to list the Williams as adjoining property owners, but now indicating co-ownership of the Williams Parcel among the Williams, Daniel Ouimette, and Hawk Rock Holdings, LLC. However, Newark states that the Williams Parcel was leased by SMW effective May 1, 2012.³ Newark asserts that the addition of the Williams Parcel to the leases held by SMW requires that additional notices be sent to the landowners of parcels adjoining the boundaries of the Williams Parcel. According to Newark, there are at least two such property owners; the Webber Family Trust and Jeanette

1. Newark Motion at 4; exhs. 1 & 2 (all references to exhibits are those attached to the Motion).

2. Docket 7867, *Third Procedural Order Re: Notice Requirements, Stay of Docket, and Motion for Intervention*, dated 8/15/12 ("*Third Procedural Order*").

3. Newark Motion at 5; exh. 4.

Villeneuve.⁴ Newark notes that SMW never provided notice of the new leasehold interests to the Board or parties, nor did SMW seek to amend its application to reflect the changes.⁵ Newark contends that, pursuant to the *Third Procedural Order*, the Williams Parcel should have been depicted as part of the Project parcel in SMW's August 24 Revised Adjoiners Map, and because SMW failed to do so the application should either be dismissed or declared incomplete while proper notice is given to the two property owners identified by Newark.⁶

Newark also asserts that SMW failed to properly notify all adjoining landowners to the Project property as described in the original application. Specifically, Newark contends that SMW failed to provide notice to the owners of one adjoining parcel in the Town of Newark ("Leuiken Parcel") and one adjoining parcel in the Town of Brighton ("Gowdy Parcel").⁷ Newark contends that, taken together, a Town of Newark Property Tax Bill and the Revised Adjoiners Map filed by SMW show the ownership, location and adjoining nature of the Leuiken Parcel.⁸ Newark further contends that, taken together, a Town of Brighton Tax Map and Property Tax Bill show the ownership, location and adjoining nature of the Gowdy Parcel.⁹ Neither of the owners of these two parcels, concludes Newark, were provided notice by SMW based on SMW's Revised Adjoiners List.¹⁰ Newark asserts that because of SMW's failure to provide notice to the owners of these two parcels, SMW's application should either be dismissed or declared incomplete while proper notice is given to these two property owners.¹¹

NNU

NNU joins in the Motion and requests that the Board grant the relief sought by Newark.¹²

4. Newark Motion at 8; exhs. 7 & 8.

5. Newark Motion at 8.

6. Newark Motion at 8.

7. Newark Motion at 8–9.

8. Newark Motion at 8–9; exhs. 9 & 10.

9. Newark Motion at 9; exh. 11.

10. Newark Motion at 9; exh. 3.

11. Newark Motion at 8.

12. NNU Comments.

Elders

The Elders also join in the Motion. In addition to their support of Newark's Motion, the Elders contend that the application should be dismissed because the property leased by SMW includes lands subject to conservation restrictions that would disallow the proposed Project.¹³

Mark Whitworth

Mr. Whitworth supports the Newark Motion and requests that the Board reject SMW's application and deny SMW the opportunity to supplement its filings.¹⁴ Specifically, Mr. Whitworth contends that SMW's failure to include the Williams Parcel as part of the Project property when SMW filed its Revised Adjoiners Map violated the *Third Procedural Order*, which determined in part, that the leasehold interests held by SMW defined the extent of the Project property.¹⁵ Mr. Whitworth also agrees with Newark that SMW failed to notify all landowners with land that adjoins the Project property as identified in the initial filing of April 12, 2012.¹⁶ Lastly, Mr. Whitworth contends that the application itself is flawed and inadequate, and that SMW should not be allowed another opportunity to correct these shortcomings.¹⁷

Noreen Hession

Ms. Hession states that she supports Newark's Motion to either dismiss the application or deem it incomplete and stay this proceeding. Ms. Hession also support's Newark's request that the Board or Hearing Officer rule that the Newark Town Plan, as revised on September 17, 2012 (the "Plan"), is applicable to this proceeding. Ms. Hession also requests that the Hearing Officer reconsider whether the proposed Project would have an undue, adverse impact under the orderly development and aesthetics criteria of 30 V.S.A. §§ 248(b)(1) and (5), respectively.¹⁸ Lastly,

13. Elder Comments.

14. Whitworth Comments at 1.

15. Whitworth Comments at 1–2.

16. Whitworth Comments at 2–3.

17. Whitworth Comments at 3–5. Mr. Whitworth's comments on the adequacy of SMW's application have already been considered in determining the scope of issues to be considered during the evidentiary proceedings.

18. Hession Comments at 1.

Ms. Hession asserts that there is no basis to believe that SMW has acted in good faith where SMW has been unable to provide proper notice to all adjoining landowners after three attempts at doing so. Ms. Hession urges the Board to reject the application to send a message to developers that multiple incomplete applications will not be tolerated.¹⁹

Department

Not having had an opportunity to review SMW's response to the Motion prior to filing its comments, the Department submitted limited comments on Newark's Motion. The Department states that SMW bears the burden to demonstrate that it has satisfied its obligation to provide adequate notice to all adjoining landowners as required by the *Section 246 Standards Order*²⁰ and the *Third Procedural Order*. However, since the Department had not yet reviewed SMW's response, the Department is unable to comment on whether SMW has met its notice obligations.²¹ The Department does state that SMW's lease of the Williams Parcel is "highly relevant" to the notice requirements in this proceeding given the mandate of the *Third Procedural Order*. If the Board concludes that SMW has not provided notice to some or all of the landowners identified in Newark's Motion, the Department recommends that the application be deemed incomplete, but that SMW be allowed an opportunity to cure any defect.²²

SMW

SMW asserts that the Motion should be denied because it has made good faith efforts to notify all adjoining landowners and has therefore complied with the notice requirements for this proceeding. SMW states that even if the Hearing Officer determines additional notice is required, that the proceedings should continue with any additional non-noticed adjoining landowners being provided an opportunity to intervene.²³

19. Hession Comments at 1–2.

20. *Order establishing standards and procedures for issuance of a certificate of public good for a temporary meteorological station pursuant to 30 V.S.A. § 246* dated 3/9/10 ("*Section 246 Standards Order*").

21. Department Comments at 1.

22. Department Comments at 2.

23. SMW Opposition at 1.

SMW first contends that the landowners whose parcels adjoin the Williams Parcel are not entitled to notice in this proceeding. SMW states that the Williams Parcel, leased after SMW submitted its application on April 12, 2012, is contractually and physically separate from the previously-leased parcels which SMW plans to utilize for construction of the MET towers and ingress and egress to and from the MET tower sites. This, SMW asserts, places the Williams Parcel outside the scope of the requirements of the *Third Procedural Order*.²⁴ SMW further contends that Newark's Motion, if granted, would create an opportunity for a project opponent to argue that an applicant had a notice deficiency every time a lease was signed subsequent to an application being filed, regardless of when it was signed or whether the subject property was related to a project or not.²⁵

Second, SMW contends that it utilized good faith efforts to notify all adjoining property owners as required by PSB Rule 5.402. With respect to the Leuiken Parcel, SMW states that Newark does not have an official property tax map and it is not possible to determine with complete certainty every parcel of land that adjoins the Project property relying only on Newark's Grand List.²⁶ Instead, SMW relied upon information obtained from the Newark Town Clerk and asserts that the Town Clerk never identified the Leuiken Parcel as an adjoining parcel.²⁷ Because SMW utilized the information that was available to it to identify adjoining landowners, SMW argues that its efforts should be deemed to have been in good faith, the notice requirements applicable to the proposed Project should be deemed to have been met, and Newark's Motion should be denied.²⁸

With respect to the Gowdy Parcel, SMW again asserts that it used good faith efforts to notify all adjoining landowners by utilizing an electronic "shape-file" combined with a Northeastern Vermont Development Association ("NVDA") map, and comparing the parcel data from the NVDA map to a corresponding list of property owners obtained from the Brighton

24. SMW Opposition at 4–5.

25. SMW Opposition at 5.

26. SMW Opposition at 7.

27. SMW Opposition at 7.

28. SMW Opposition at 8.

Town Clerk.²⁹ According to SMW, the NVDA map had not been updated to show that the Gowdy parcel had been created by subdivision from a larger parcel owned by Joseph and Pamela Arborio, meaning the Arborios received notice while Mr. Gowdy did not.³⁰ SMW also notes that Mr. Gowdy is the son of Pamela Arborio, that the Arborios and Mr. Gowdy utilize the same mailing address, and that the notice materials were in fact sent to that shared mailing address.³¹ SMW contends that Newark's Motion should be denied because SMW engaged in good faith efforts to identify all adjoining landowners, and because proper notice was in fact sent to Mr. Gowdy's mailing address.³²

Lastly, SMW notes that, with respect to the Leuiken and Gowdy Parcels, Newark is raising the notice issue nearly seven months after SMW filed its initial application, and that these particular notice issues did not arise as a result of the *Third Procedural Order*. SMW asserts that allowing notice issues to be raised indefinitely in MET tower proceedings runs counter to the legislative mandate of Section 246 that such proceedings be completed in a relatively short timeframe.³³

III. DISCUSSION

For the reasons discussed below, I am denying Newark's Motion.

A. Adjoiners to the Williams Parcel

Newark's Motion is denied with respect to owners of property that adjoin the so-called Williams Parcel because the Williams Parcel does not fall within the requirements established in the *Third Procedural Order*.

29. SMW Opposition at 9.

30. SMW Opposition at 9–10.

31. SMW Opposition at 9; exhs. 4–6.

32. SMW Opposition at 10.

33. SMW Opposition at 10. SMW asserts that, if the Hearing Officer decides that notice must be given to the owners of the Leuiken and Gowdy Parcels, that the timing requirements for those notices be waived given the extensive outreach that has occurred regarding the proposed Project. SMW Opposition at 11.

In the *Third Procedural Order*, I determined that SMW's application was incomplete because SMW failed to provide proper notice to all landowners of record owning property adjoining the properties leased by SMW on August 1, 2011, and April 1, 2012.³⁴ I explained:

For the purpose of this docket, it is not controlling that Mr. Ouimette and HRH each owned several distinct legal parcels with separate chains of title. Rather, the key factor here is that Seneca leased several of Mr. Ouimette's properties under one lease and several of HRH's parcels under another lease.³⁵ It is the leasehold interests held by Seneca that define the boundaries of the project property.³⁶

Newark's argument that the *Third Procedural Order* extends the notice requirement to any property leased by SMW, regardless of whether that property is used for development of the proposed Project or not, is misplaced.³⁷ In the *Third Procedural Order*, I deemed the application incomplete and required that copies of the application be served on landowners that adjoined certain properties leased from Daniel Ouimette and Hawk Rock Holdings, LLC ("HRH") because the boundaries of those parcels, as defined by the leases, encompassed the various elements of the proposed Project, including the Met towers themselves and the access routes to and from the tower sites. Accordingly, I determined it was the leasehold interests held by SMW that defined the boundaries of the Project property, not the individual parcels that made up the leases on which Project infrastructure happened to be located.

The Williams Parcel does not fit this description. The Williams Parcel is separate and legally distinct from the parcels described in SMW's application.³⁸ There is no project infrastructure proposed to be located within the leased boundaries of the Williams Parcel, and SMW has indicated that all aspects of its original proposal remain the same, including the roads that will be used to access the tower sites. In short, the Williams Parcel, the boundary of which is defined by the lease, is not being utilized to develop, maintain or operate any aspect of the proposed Project. The fact that the terms recited in the Memorandum of Lease between SMW

34. Docket 7867, Order of 8/15/12 at 4. It bears noting that the Third Procedural Order identified specific leases, and did not apply to any and all leaseholds that SMW might have in the vicinity.

35. SMW's MET Tower Application at Attachments A1–A3.

36. Docket 7867, Order of 8/15/12 at 5–6.

37. Similar arguments made by other parties regarding the Williams Parcel are rejected for the same reasons.

38. See SMW's MET tower application at Attachments A1–A3.

and the Williams³⁹ are in many respects the same as those set forth in the Memoranda of Lease between SMW and HRH and SMW and Mr. Ouimette is not dispositive. The leases described in the various memoranda appear to encompass property rights that go beyond the installation and operation of temporary MET towers, and one cannot therefore conclude based on their similarity that the Williams Parcel is part of the Project property. To the contrary, the fact that the lease for the Williams Parcel is separate from the earlier leases and does not describe land on which any Project infrastructure is proposed to be located, compels the opposite conclusion. Newark's Motion as it relates to the Williams Parcel is therefore denied.

B. The Leuiken and Gowdy Parcels

Newark's Motion is also denied with respect to the Leuiken and Gowdy Parcels because SMW has substantially complied with the notice requirements established in the *Section 246 Standards Order*.

The *Section 246 Standards Order* states that when an application is filed under Section 246, Board staff will review the application for completeness. The standard for that review is whether the applicant has substantially complied with the application requirements set forth in the *Section 246 Standards Order*.⁴⁰

In the instant case, SMW has provided copies of its application, as required by the *Section 246 Standards Order* and the *Third Procedural Order*, to a total of 70 different entities or persons, each of which was provided an opportunity to submit comments, request a hearing, and seek to intervene.⁴¹ Newark's Motion raises the likelihood of one adjoining property owner, the owner of the Gowdy Parcel, not receiving notice, and the possibility of two other adjoining property owners, the owners of the Leuiken Parcel, not receiving notice. Given the circumstances, I conclude that SMW has substantially complied with the application requirements set forth in the *Section 246 Standards Order* and Newark's Motion is therefore denied.

39. Exh. 4 to Newark Motion.

40. *Section 246 Standards Order* at 7.

41. See exh. 3 to Newark Motion.

I am, however, directing SMW to immediately provide copies of its application, as well as a copy of this Order, to the owners of both the Gowdy and Leuiken Parcels, and to certify to the Board in writing when this has been done. The owners of the Leuiken and Gowdy Parcels will be afforded a 30-day period to file comments on the application and a motion to intervene. However, given that I have concluded that SMW has substantially complied with the application requirements of the *Section 246 Standards Order*, I see no compelling reason at this time to make any modifications to the current schedule.

C. Additional Issues

In addition to the basic requests for relief in Newark's Motion, Newark and a number of other parties have requested that a determination be made with regard to the applicability of the Plan, and that the scope of issues to be considered during the evidentiary proceedings be expanded to include orderly development and aesthetics.⁴²

In a companion Order issued of even date herewith, I determined that the Plan, as revised September 17, 2012, does not apply to this proceeding. Accordingly, I decline to expand the scope of issues that have been previously identified for consideration in the evidentiary proceedings.⁴³

Lastly, the Elders contend that the application should be dismissed because the lands leased by SMW from Daniel Ouimette and HRH include lands that are subject to conservation restrictions that prohibit the proposed Project. Because the *Third Procedural Order* defines the extent of the Project property based on those leases, the Elders contend that those conservation restrictions apply to the entirety of the leased parcels.⁴⁴

The Elders have misinterpreted the extent of the requirements in the *Third Procedural Order*. The leasehold interests held by SMW define the boundaries of the Project property for the purpose of giving notice. This does not operate to extend restrictions on specific underlying parcels to other parcels included in the lease that are themselves not expressly subject to those restrictions. Accordingly, the Elders' argument provides no basis for dismissal of the application.

42. Newark Motion at 10; Hession Comments at 1.

43. See e.g., Docket 7867, Order of 6/29/12 at 11–12.

44. Elder Comments at 1.

SO ORDERED.

Dated at Montpelier, Vermont, this 15th day of November, 2012.

s/Bridgette Remington
Bridgette Remington, Esq.
Hearing Officer

OFFICE OF THE CLERK

FILED: November 15, 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)