

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: APPLICABILITY OF NEWARK'S TOWN PLAN

I. INTRODUCTION AND PROCEDURAL HISTORY

On April 12, 2012, Seneca Mountain Wind, LLC ("SMW") filed an application with the Vermont Public Service Board ("Board"), pursuant to 30 V.S.A. §§ 246 and 248, 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 (the "Project").

On April 18, 2012, after SMW corrected an error with providing adjoining landowners adequate notice, the application was considered complete.¹

On August 15, 2012, I issued an Order titled *Third Procedural Order Re: Notice Requirements, Stay of Docket, and Motion for Intervention* ("Third Procedural Order"). In the *Third Procedural Order*, I determined that SMW's application was incomplete because it had not properly notified all landowners of record whose property adjoined the parcel on which its proposed Project would be located.² Consequently, I vacated the existing procedural schedule

1. See *Memorandum Re: Updated Adjoining Landowners List*, issued by the Clerk of the Board on 5/7/12 (finding SMW's application complete as of April 18, 2012); letter of April 30, 2012, from Andrew N. Raubvogel, Esq., on behalf of SMW, to Susan Hudson, Clerk of the Board (confirming that Ken and Joan Gammell received notice of SMW's application as of April 18, 2012); *Memorandum Re: Notice to Updated Adjoining Landowners List*, issued by the Clerk of the Board on 4/25/12 (requesting comments regarding notice); letter of April 19, 2012, from Andrew N. Raubvogel, Esq., on behalf of SMW, to Susan Hudson, Clerk of the Board (updating the adjoining landowners map).

2. Docket 7867, Order of 8/15/12 at 6.

and stayed proceedings in this docket so that this notice defect could be corrected.³ The *Third Procedural Order* also stated that "[p]rior to adopting a new schedule for this docket, all adjoining landowners receiving notice as a result of this Order, shall be provided with thirty days, from the date notice is received, to file comments and motions to intervene"⁴

On August 23, 2012, as directed by the *Third Procedural Order*, SMW corrected the notice defect.

On September 20, 2012, I issued a *Scheduling Order*, lifting the stay of this proceeding effective September 24, 2012, the date of the deadline for comments and motions to intervene from any landowners first receiving notice as a result of the *Third Procedural Order*.

On October 1, 2012, the Vermont Department of Public Service ("Department" or "DPS") and the Town of Newark ("Newark") each filed comments on a number of pending motions to intervene. Both the DPS's and Newark's comments included references to revisions to the Newark Town Plan, in place at the time SMW filed its application in April ("Existing Town Plan"). Newark's filing also specifically requested that the Board consider the amended Town Plan, dated September 17, 2012 ("September 17 Plan"),⁵ in this docket.

On October 2, 2012, the Clerk of the Board issued a memorandum requesting that the parties provide legal memoranda on the applicability or non-applicability of the September 17 Plan revisions in this docket.

On October 17, 2012, SMW, Newark, and the Department each filed a separate legal memorandum on the applicability of the September 17 Plan.⁶

3. Docket 7867, Order of 8/15/12 at 6.

4. Docket 7867, Order of 8/15/12 at 6-7.

5. The amended Town Plan, as filed with the Board on October 1, 2012, is dated September 17. I note here that Newark, in its *Legal Memorandum on the Applicability of Newark's Amended Town Plan* ("Newark Memorandum") at 3, states that the amendments to the Town Plan were adopted by the Newark Selectboard on September 19, 2012. However, at this time, no other party has filed a dated copy of the amended Town Plan and, thus, I will consider the amended Town Plan effective as of September 17. See *Memorandum of DPS Regarding the Applicability of the Revisions to the Newark Town Plan to this Proceeding* ("DPS Memorandum") at 3 (stating that the amended plan took effect on September 17, 2012) and *Memorandum of SMW on the Applicability of Revisions to the Town of Newark Town Plan* ("SMW Memorandum") at 2 (same).

6. On October 15, 2012, the Town of Brighton Planning Commission ("Brighton") filed an e-mail in support of Newark's September 17 Plan, but did not properly file the response with the Board in hard copy or circulate the filing to the Parties. Therefore, I have not considered Brighton's submission in deciding whether the September 17 Plan is applicable in this docket.

In this Order, I conclude that the September 17 Plan is not applicable in this docket and that the Existing Town Plan applies.

II. POSITIONS OF THE PARTIES

Newark

Newark asserts that the amended September 17 Plan is the operative document governing review of SMW's application because the application was not complete until thirty days after notice was provided to the newly identified adjoining landowners in accordance with the *Third Procedural Order*.⁷ According to Newark, the application was not complete until September 24, at the earliest, and, therefore, the September 17 Plan should apply.⁸ Further, Newark represents that it enacted the relevant amendments to clarify protective provisions of the Existing Town Plan and to "specifically oppose commercial and industrial development at elevations greater than 1,700 feet and commercial and industrial structures greater than 125 feet in height as inappropriate and inconsistent with Newark's visions and goals."⁹ Based on Newark's assertion that the September 17 Plan is applicable in this proceeding, Newark requests that the Board expand the scope of the evidentiary proceedings to include orderly development and aesthetics.¹⁰

Department

The Department also asserts that the September 17 Plan is controlling in this docket. According to the Department, SMW's application was not properly completed until September 24, 2012, when the stay of the proceedings was lifted.¹¹ The Department also states that Newark revised the Existing Town Plan to clarify "sentiments already espoused in the pre-amendment version."¹² Based on the Department's assessment that the amendments merely

7. Newark Memorandum at 1–3.

8. Newark Memorandum at 4–5.

9. Newark Memorandum at 3–4.

10. The request to expand the scope of these proceedings will not be addressed in this Order, but will be addressed in the *Order re Newark Motion to Dismiss*, to be issued in this docket on the same day as this Order.

11. DPS Memorandum at 9.

12. DPS Memorandum at 5.

clarified the Existing Town Plan, the Department asserts that the Board should give the September 17 Plan due consideration in this proceeding.¹³

SMW

SMW asserts that the September 17 Plan is not applicable in this proceeding. According to SMW, it submitted a proper application before the September 17 Plan was enacted and, therefore, SMW vested its rights in the Existing Town Plan, effective on April 18, when SMW's application was first deemed complete, or, in the alternative, on August 23, when SMW corrected the notice defect identified in the *Third Procedural Order*.¹⁴

III. DISCUSSION

For the reasons discussed below, I conclude that SMW's application was complete as of August 23 and that, as such, the amendments to the Existing Town Plan, enacted on September 17, are not applicable in this docket.

First, with regard to when SMW's application was deemed complete, the Board's *Section 246 Standards Order* established a procedure for evaluating "Complete Applications," as detailed below:

Upon receiving an application under Section 246, Board staff will review the application for completeness. If the application does not substantially comply with the application requirements set forth herein, the Clerk of the Board will inform the applicant of the deficiencies. If an application is deemed incomplete, the Board may require the applicant to provide copies of the revised application to all parties entitled to receipt of the original application for additional comment. Upon submission of all information necessary to address the deficiencies, the Clerk of the Board shall notify the applicant that the filing is complete.¹⁵

In accordance with this procedure, when SMW's application was deemed incomplete on August 15, I required SMW to:

(a) provide written notice and a copy of its [application] to all landowners of record of property adjoining the property which SMW leased from Mr. Ouimette

13. DPS Memorandum at 6–9. *See also* footnote 10.

14. SMW Memorandum.

15. *Section 246 Standards Order* at 7.

and HRH, as detailed in Attachments A1 through A3 of SMW's [application] that did not previously receive proper notice; and (b) prove compliance with the notice requirements, as clarified in this Order, by submitting a revised Adjoiners Map delineating the property boundaries of all the leased properties with the adjoining properties labeled by each landowner's name and filing a revised list of adjoiners who received notice of SMW's application.¹⁶

On August 23, SMW addressed the deficiencies identified in the *Third Procedural Order* by:

(a) providing the newly identified adjoining landowners with written notice, a copy of its application, and the three principal procedural Orders in this docket;¹⁷ and (b) submitting to the Board a revised Adjoiners Map and list of adjoiners who received the required notice and documents.¹⁸ Then, as required by the Board's *Section 246 Standards Order* and directed by the *Third Procedural Order*, all newly identified adjoining landowners were provided with thirty days, from the date they received notice, to file comments and motions to intervene with the Board.¹⁹

Both Newark and the Department assert that SMW's application was not complete until thirty days after the newly identified adjoiners received actual notice rather than at the time the notice deficiency was cured in accordance with the *Third Procedural Order*.²⁰ However, the *Third Procedural Order* did not require that SMW provide the newly identified adjoiners with notice thirty days before filing proof of compliance with the Board, as required when an applicant first files a Section 246 application with the Board.²¹ The purpose of requiring such pre-application notice is to allow the applicant time to address concerns raised by those receiving

16. *Third Procedural Order* at 6–7.

17. I also required that SMW's written notice, in addition to complying with the notice requirements of the Board's *Section 246 Standards Order* and the application, include a copy of the June 29 *Procedural Order*, the July 30 *Second Procedural Order*, and the *Third Procedural Order* for the newly identified landowners' review.

18. *Third Procedural Order* at 6–7.

19. *Section 246 Standards Order*, Order of 3/9/10 at 8; *Third Procedural Order* at 7; *Scheduling Order* of 9/20/12 at 2.

20. DPS Memorandum 9 and Newark Memorandum 1–3.

21. The Board's *Section 246 Standards Order* requires that "[t]he applicant must provide written notice, at least 30 days in advance of filing a Section 246 application, to . . . the landowners of record of property, pursuant to the current municipal grand list, adjoining the property on which the project will be located." *Section 246 Standards Order*, Order of 3/9/10 at 6; see *Application for a Certificate of Public Good for Temporary Meteorological Stations, Pursuant to 30 V.S.A. §§ 246 and 248 at General Instructions* ("MET Tower Application") (requiring the same).

the notice *prior* to the applicant filing an application with the Board with the intent to expedite the review process.²² Thus, SMW was not required to provide such pre-application notice because it had already filed its application with the Board on April 12 and the opportunity to expedite the review process by addressing issues prior to an application being filed had passed.²³ Therefore, in accordance with the *Section 246 Standards Order*, the newly identified adjoiners were provided with thirty days to file comments and motions to intervene with the Board from August 23, the date the application was considered complete.²⁴

With regard to which Town Plan applies in this docket, the Vermont Supreme Court held that an applicant's rights vest in an existing regulation at the time a proper application is filed.²⁵ In this docket, SMW asserts that it filed a "proper" application as of April 12, 2012. Given that SMW's application was considered complete as of August 23, 2012, before the September 17 Plan was enacted, the determination regarding whether SMW filed a "proper" application as of April 12 or August 23 is not necessary. Based on the Supreme Court's precedent in *Smith*, and the fact that SMW cured the notice deficiencies identified in the *Third Procedural Order* as of August 23, SMW's rights vested in the Existing Town Plan when SMW's application became complete as of August 23 and, thus, the September 17 Plan is not applicable in this docket. For this reason, there is no need to address Newark's and the DPS's arguments related to the revisions reflected in the September 17 Plan as being merely clarifications of Newark's intentions as expressed in the Existing Town Plan.

In conclusion, SMW's application will be reviewed under the Existing Town Plan and the September 17 Plan will be deemed inapplicable to this proceeding.

22. *Section 246 Standards Order*, Order of 3/9/10 at 3 (emphasis added).

23. In addition, given the highly public nature of this docket; that the Board held a Public Hearing regarding SMW's application in Newark on July 17, 2012, which was noticed in two local newspapers and attended by more than 100 people; and given that two of the newly identified adjoiners filed requests with the Board for intervention prior to the issuance of the Third Procedural Order, it is likely that the newly identified adjoiners had an awareness of the Project well before they ever received actual notice from SMW.

24. *Third Procedural Order* at 6–7; see MET Tower Application at General Instructions (requiring comments and/or request for hearing with the Board be filed within 30 days of receipt of the application); *Section 246 Standards Order* at 8 (requiring the same).

25. *Smith v. Winhall Planning Commission*, 140 Vt. 178, 181-83 (1981); see also *In re Ross*, 151 Vt. 54, 58 (1989) (finding that applicants have a vested right in a town plan after submitting a "complete" application).

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)