

**LEGAL AND REGULATORY NOTES, NOVEMBER 2015**

**Town Plan deemed insufficient for the Public Service Board process**

In August, the Caledonia Superior Court ruled that the Town of Newark’s municipal plan was not sufficiently detailed with regard to the siting of power generating plants and transmission facilities regulated under 30 V.S.A. § 248 within the town. That statute requires that developers obtain a “certificate of public good” from the Public Service Board (PSB) before beginning site preparation or construction of electric transmission facilities, electric generation facilities, and certain gas pipelines within the state. Before a certificate of public good is issued, the PSB must take into consideration the provisions of the municipal plan of the municipality where the development will be located. Specifically, the PSB must find that an in-state facility “will not unduly interfere with the orderly development of the region with due consideration having been given to the recommendations of the municipal and regional planning commissions, the recommendations of the municipal legislative bodies, and the land conservation measures contained in the plan of any affected municipality.” 30 V.S.A. § 248(b)(1).

In *Hawk Rock Holdings, LLC v. The Town of Newark, Vermont* (Docket No. 267-10-12 Cacv), four amendments to the Newark Town Plan were at issue. The amendments had been adopted in reaction to a potential wind development project in Newark that was subject to the PSB process. The court ultimately ruled that the amended 2012 Newark Town Plan was defective because it failed to comply with provisions of the Municipal and Regional Planning and Development Act (Title 24, Chapter 117 of the Vermont Statutes Annotated).

Hawk Rock Holdings, LLC, a landowner in Newark, claimed the town plan was defective because it failed to address how it complied with any of the state’s general planning goals or what factors were considered in determining that any detrimental impact of hosting a wind energy project outweighed the benefits. They argued that the town plan’s amendments had altered the designation of land, thereby triggering the application of 24 V.S.A. § 4384(c)(1)-(4), and the town failed to comply with heightened reporting obligations required by statute. The landowner further asserted that the 2012 town plan did not contain a land use map, as required in 24 V.S.A. § 4382(a)(2), and that it violated the statutory prohibition on municipal regulation of public power generating plants, transmission facilities, and renewable energy devices under Title 24, Chapter 117. The court was persuaded by some, but not all, of the landowner’s arguments.

The court determined that, although the 2012 town plan map had not been updated to address the plan’s new amendments, the map was still sufficient under 24 V.S.A. § 4382(a)(2) because the plan contained a general description of the lands within the town, referenced present and prospective land uses, and clearly articulated the specific plans and goals for the areas in town designated as being of “special value.” The landowner also failed to persuade the court that the 2012 town plan violated the provisions of law that prohibit municipal regulation of public power generating power plants, transmission facilities, and renewable energy devices regulated under

30 V.S.A. § 248. The court concluded that plan’s provisions addressing such development had no clear regulatory effect under Title 24, Chapter 117.

On the other hand, the court agreed with the landowner that the town had “neither strictly nor substantially complied” with statutory requirements for amending a plan because the report that accompanied the plan was “simply inadequate.” Statute requires that such a report address “the efficient use of energy and the development of renewable energy resources.” 24 V.S.A. §§ 4384(c), 4202. The Newark Town Plan specifically stated that industrial wind turbines “are inconsistent with the town’s vision and goals” but it did not otherwise address energy issues. The court was displeased that the report consisted of “less than ten sentences, two of which conclusorily state that the revised town plan is ‘consistent with the goals’ established under 24 V.S.A. § 4302, as well as with the town plans of surrounding towns and the Regional Plan.”

The Town of Newark tried to argue that it had sufficiently addressed statutory goals regarding energy by convening more than 20 public meetings, reviewing various studies and manuals, consulting with experts, and discussing the consequences of the proposed amendments. The court found that “none of these efforts, or the results thereof, apart from reference to public meetings,” were reflected in the report or other documents submitted by the parties. Thus, the court concluded the town’s submission was not so much a “report” as “bare allegations.” The court concluded the report was devoid of any analysis regarding “the efficient use of energy and the development of renewable energy resources.” Because the plan specifically objected to industrial wind turbines, the court found even greater reason to include an analysis of the situation. “Given that issues such as wind turbine siting are often both political and emotional in nature, it is particularly important to see the principled evaluation of the Planning Commission laid out.”

The court was also persuaded by the landowner’s argument that the town was obliged to address specific factors regarding the alteration of land designation. According to 24 V.S.A. § 4384(c), if proposed amendments to a town plan alter the designation of any land, the report should consider the impact on the surrounding area with regard to land use, traffic, the long-term cost or benefit to a town on the municipal tax base, and the need for public facilities and the availability and amount of vacant land. 24 V.S.A. § 4384(c)(1)-(5). The town argued that there was no need to address those considerations since the amendments did not alter the designation of land in town. The court disagreed and ruled the town plan amendments did alter the designation of land because it specifically named Hawk Rock (the land where the wind project was proposed to be located) as an area of “special value.” Further, the plan set forth a specific policy that industrial-scale land development of the ridgeline, including Hawk Rock, was “inappropriate and inconsistent” with the town’s vision and goals, should be “strictly avoided,” and would be “opposed” by the town. The court found that this language was not aspirational but had mandatory thrust. The court therefore concluded that the language imposed development restrictions such that any application for permits under Act 250 would not meet the requirement of conformance with a town plan pursuant to 10 V.S.A. § 6086(a)(10). Thus the report should have addressed the factors listed in 24 V.S.A. § 4384(c)(1)-(5). Failing to do so, it was legally deficient.

The court emphasized that its ruling “is not intended to suggest that the concept opposing industrial wind power development within the 2012 Town Plan is erroneous. Rather, the law requires a more explicit examination and articulation of the facts under which town planning

declares such projects to be *persona non grata* within a town. In other words, the planning process requires more of the town than merely the declaration, ‘not in my backyard.’”

Although this case came from the Caledonia Superior Court and is not technically binding in Vermont’s other counties, towns should still see this ruling as a warning. Each of the requirements and criteria in Title 24, Chapter 117, that are applicable to drafting and amending town plans must be explicitly addressed in a town plan and/or the accompanying report. If distinct areas or features of land are specifically mentioned in a plan – as Hawk Rock was in the Newark Town Plan – that may constitute an alteration of the designation of a land area such that the additional factors noted in 24 V.S.A. § 4384(c)(1)-(5) must all be clearly addressed in the town plan.

The *Hawk Rock* decision can be found at <https://savethesenecas.files.wordpress.com/2012/11/newark-motion-to-dismiss-11-15-12.pdf>.

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