

Hawk Rock Newark, Vermont

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PSB Application of Seneca Mt. Wind, LLC for 4 “temporary” MET towers

PSB public hearing: > 50 members of public testified

- Hawk Rock – unique/special rock formation/cave & sheer cliffs
- “Vermont’s Old Man in the Mountain”
- Cave home to nesting pair of Peregrine falcons
- Scenic vistas of Newark’s ridgelines vital to tourism

Participation allowed:

- Towns of Newark and Brighton
- Citizens’ group NNU
- 2 abutting landowners Whitworth/Hession

PSB – Application of Seneca Mt. Wind, LLC

Criteria required to be “reviewed”

- Aesthetics
- Historic sites
- Air and water purity
- The natural environment
- Public health and safety
- Public investments
- Orderly development of region

Only “potentially significant” issues:

All 4 tower sites:

- Black bear food resources

Hawk Rock (Newark):

- Peregrine falcon habitat
- Rare, threatened or endangered species or natural communities

PSB – Application of Seneca Mt. Wind, LLC Orderly Development of the Region

PSB Review of Town Plans:

- All 3 Towns: generally supportive of small-scale renewable energy
- Newark TP – industrial-scale generation and transmission facilities need to be evaluated with “extreme caution”
- Brighton & Ferdinand TPs – evaluation on a case-by-case basis
- The 3 TPs do not address MET towers specifically
- The 3 TPs do not identify the project sites as subject to any specific land conservation measures

PSB – Application of Seneca Mt. Wind, LLC Aesthetics

- PSB denied request to conduct a balloon-test
- PSB refused evidence other than by Applicant
- MET towers are “temporary” and must be removed w/i 5 years
- Newark TP: Review of generation/transmission projects with “extreme caution” does not expressly bar such projects
- Newark TP: doesn’t specifically identify Hawk Rock or other resources for scenic preservation

PSB – Application of Seneca Mt. Wind, LLC Aesthetics

Quechee Test:

- Violate clear, written community standard?
- Offend the sensibilities of the average person?
- Failed to take reasonable mitigation steps?

PSB findings:

- Newark TP: doesn’t specifically identify Hawk Rock or other resources for scenic preservation
- Local opposition but unclear whether a “regional” majority
- Color, distance, no lights, temporary

2012 Newark Town Plan Amendments

- Over 20 public meetings/hearings, consulted experts, reports, studies
- June 17, 2011 – Planning Commission approved the amendments
- Report drafted (24 VSA 4384) and forwarded to Dept Hsg Comm Dev.
- September 17, 2012, Town votes 169-59 in favor of Amendments
- September 17, 2012, Selectboard adopts the Amendments
- Report sent to NVDA Regional Planning Commission which approved the Amendments

2012 Newark Town Plan Amendments Environmental Section

“... lands that the town places special value upon for scenic, wildlife, and recreational importance include:

- The ridgelines historically known as Hogback Mountain, which consists of Walker Mountain, Hawk Rock, and Packer Mountain
- The high-elevation areas along Newark Street, Abbot Hill Road, Pinnacle Road, Spruce Ridge Road, Maple Ridge Road, and Kinney Hill Road
- The town’s ponds including Newark Pond, Center Pond, Beck Pond, Sawdust Pond, and Brown Pond
- The town’s rivers and streams including the East and West Branch of the Passumpsic, Bean Brook, Sleeper Brook as well as the smaller tributaries, wetlands, and vernal pools

These natural resources provide economic, recreational, and aesthetic benefits to both residents and visitors. Development that would compromise these benefits is inappropriate and inconsistent with the town’s vision and goals.”

2012 Newark Town Plan Amendments

Sensitive Wildlife Habitat section

Newark values its ridgelines and other high elevation areas and recognizes the great importance of these areas to both resident and migratory wildlife. Therefore commercial and industrial development at elevations greater than 1700 feet should be strictly avoided. The town discourages land development including the construction of roads and extension of utilities at these elevations with the exception of activities related to non-commercial recreation, forest management, camps, and single-family residences.

2012 Newark Town Plan Amendments

Energy Section

Replace:

- . . . the town should exercise caution in considering power generation facilities and major transmission lines in the town.

With:

- . . . industrial-scale power generation and transmission facilities are inappropriate in the town. This includes . . . Industrial-scale wind turbines and their associated transmission facilities . . . Such facilities are inconsistent with the town's vision and goals.

2012 Newark Town Plan Amendments Energy Section

Replace:

- Evaluate plans to locate industrial size generation and transmission facilities in Newark with extreme caution.

With:

- Oppose plans to locate industrial scale generation and transmission facilities in Newark.

2012 Newark Town Plan Amendments Commercial Section

Residents of the Northeast Kingdom view the rural character of the region, its natural resources, and its large tracts of undeveloped land as its most valuable resource and vital to an economic future that is most compatible with their lifestyles, sensibilities, and preferences . . . The Town of Newark regards large-scale industrial development as inappropriate within the town . . . In addition, Newark regards commercial or industrial structures that exceed 125 feet in height as inappropriate and inconsistent with the town's vision and goals.

Hawk Rock Holdings, LLC v. The Town of Newark, VT

Docket No. 267-10-12 Cacv

Hawk Rock Holdings, LLC v. Town of Newark Landowner's Claims

- 2012 Amendments don't conform to the statutory requirements
- Report prepared pursuant to 24 VSA 4384(c) does not include the required analysis
- Report doesn't comply with state general planning goals or specify what factors were considered in determining detrimental impacts vs. benefits
- Amendments altered the designation of land, and the report failed to satisfy the heightened reporting requirements of 24 VSA 4384(c)(1)-(4)
- Amendments do not contain an updated land use map 24 VSA 4382(a)(2)
- Amendments violate the statutory prohibition on municipal regulation of public power generating plants/transmission facilities pursuant to 24 VSA 4413(b) and (g).

Hawk Rock Holdings, LLC v. Town of Newark The Court's Decision

- Written report was inadequate – makes conclusory statements that the town plan is consistent with the goals under 24 VSA 4302
- Does not specify the amendments under consideration and “the extent to which” they would lead to substantial progress towards attainment of the goals of 24 VSA 4384(c)
- Does not specify which goals are at issue and is devoid of analysis
- Given that wind turbine issues are both political and emotional in nature, “it is particularly important to see the principled evaluation of the Planning Commission laid out.”

Hawk Rock Holdings, LLC v. Town of Newark The Court's Decision

- Amendments altered the designation of land b/c specifically named Hawk Rock as an area of “special value” and set forth a specific policy that industrial-scale land development of the ridgeline including Hawk Rock is “inappropriate and inconsistent” with the town’s vision and goals, should be “strictly avoided” and will be “opposed” by the town
- Court found the TP language was not aspirational but had a “mandatory” thrust
- Based on such specificity, court concluded that the language restricts specific land development activities so that any application for permits under Act 250 would not meet the requirement of conformance with a town plan pursuant to 10 VSA 6086(a)(10) (“Criterion 10”)
- Thus, the report failed to satisfy the heightened reporting requirements of 24 VSA 4384(c)(1)-(4) which is required when changing the designation of land

Hawk Rock Holdings, LLC v. Town of Newark The Court's Decision

The Land Use Map

- 2012 Town Plan land use map while not updated was found to be sufficient under 24 VSA 4382(a)(2) because the 2012 TP does contain a general description of the lands within the town, references present and prospective land uses, and clearly articulates the specific plans and goals for the areas of “special value” so designated in the amendments at issue.

Hawk Rock Holdings, LLC v. Town of Newark The Court's Decision

- Amendments did NOT circumvent statutory limitations on regulation of public power generating plants/transmission facilities regulated under 30 VSA 248
- Court distinguished PSB applications under 30 VSA 248 saying that the PSB need only give “due consideration” to the recommendations of the municipal and regional planning commissions, and “will not unduly interfere with the orderly development of the region”
- “In contrast with the stringent requirements under Act 250, the [PSB] is not obligated to deny a permit if it is not ‘in conformance’ with a town plan.”

Town of Newark – Lessons to be Learned

Clear written community standard

- Clearly identify specific resources by name if you want to protect them

Reporting on Town Plan

- Must “encapsulate opposition to such projects within a town plan”
- The law requires an explicit examination and articulation of the facts under which town planning declares such project to be *persona non grata* within a town
- Planning process requires more than merely declaring “not in my backyard”

Town of Newark – Lessons to be Learned

“The Court emphasizes that this ruling is not intended to suggest that the concept [of] opposing industrial wind power development within the 2012 Town Plan is erroneous.”