

Wind turbine siting, property rights and local control

July 31, 2014 - Owners Developers & Managers

A recently issued decision by the Massachusetts Appeals Court (the court) in a case involving the siting of a wind turbine (the turbine) on conservation land, may provide guidance for future installations. The decision, *GPH Cohasset, LLC, & another v. Trustees of Reservation & others (Golden)*, was issued June 25.

The case pits the local special permit and site plan review processes, in Cohasset under the jurisdiction of the local planning board (the board), a proposed turbine to be sited on conservation land controlled by the trustees of the reservation (the trustees), and Golden, owner of an adjacent parcel used as a nursing home situated within 400' of the proposed Turbine. In the decision, the court lays out all the "Not in My Back Yard" (NIMBY) issues raised by Golden including: noise, shade flicker, site control, public safety, and the criteria used by the local board in its approval of site plan review and the issuance of a special permit.

The two major issues raised by Golden concerned: (1) whether the defendants satisfied their burden of proof to issue and obtain the special permit and site plan review; and (2) whether the turbine will create environmental and public safety concerns.

Golden claimed that the decision of the board failed to comply with the requirement to make "sufficient factual findings to demonstrate the project complies with the zoning by-laws." The judge found that the board conditioned its approval on "numerous [37] conditions to ensure compliance with the bylaw," including on-going monitoring.

The other major issue raised by Golden concerned the environmental and safety impact of the turbine. A feasibility study (the Study) had been prepared by the trustees to address the environmental impact of the turbine, which provided the basis for evaluating: shadow flicker, ambient noise level, site control, and public safety. The Study showed that ambient noise levels would not exceed the levels set by the Massachusetts Department of Environmental Protection, at 10 decibel (dBA) above ambient. With regard to shadow flicker, the court stated that while there are "no federal, state or local regulations governing maximum acceptable levels..., the generally accepted industry practice limits....[are] no more than 30 hours per year," which the study showed the turbine could meet. Golden's charge of public safety concerns, e.g. potential ice throw, blade throw, turbine collapse, and fire, were, according to the court, "adequately addressed" by the board's conditions of approval.

We note that this case was the result of an appeal by Golden of an earlier land court decision, which ruled against Golden. In that case, Golden also questioned the "authority" of the trustees to use the land which had conservation restrictions on it for permanent structures such as turbines. The land court dispensed with that by ruling that given amendments to its charter, the trustees had the ability to "hold land to serve the public interest and to educate the public with regard to historic and natural land stewardship" and that the use of such land "to reduce the carbon footprint and educate visitors"

was consistent with the Trustees' charter and authorizing legislation.

The permitting process and court battles took nearly four years from the time the initial application (October 2010) was filed with Cohasset to the court's recent decision. That is a long incubation period with huge financial costs expended to get to the point where renewable energy can be generated and begin to reduce the carbon footprint. Perhaps decisions such as Golden will enable others to get to the endpoint more quickly.

Susan Bernstein is an attorney at law, Needham, Mass

New England Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540