

TO: CAMDEN PLANNING BOARD
FROM: BILL KELLY
RE: CAMDEN – WIND POWER REGULATION
DATE: JANUARY 24, 2011

At a Planning Board meeting of January 19, 2011 I was asked to address the following general topics. If the Planning Board needs any more detail or additional research by me, please let me know.

Home rule authority regarding wind power regulation

There is currently no federal or Maine statute that directly preempts municipal home rule authority in the area of wind power regulation. However, there are some federal and state review requirements that may overlap with review under a municipal ordinance. For instance, FAA regulations require approval of all towers over 200 feet, and the U.S. Fish and Wildlife service might require review of a project that stands to impact endangered birds or wildlife. At the state level, Maine DEP review would be required under the Site Location of Development law if the project is considered to be a “development of state and regional significance that may substantially affect the environment.” 38 M.R.S.A. § 483-A. This includes projects comprising more than 20 acres, as well as those with a total improved area exceeding 3 acres. 38 M.R.S.A. § 482. Further review might also be required under the Natural Resources Protection Act if the development will involve protected areas.

Although state agency review might apply to certain developments under the laws discussed above, there is nothing in these laws that would prevent a town from requiring parallel review at the local level under a similar or different set of standards. In fact, legislation enacted in 2008 to expedite state agency review of wind energy projects specifically provides that it “is not intended to limit a municipality's authority to regulate wind energy development.” P.L. 2008, ch. 661.

Under the current state review regime, grid-scale wind energy projects (meaning those that qualify as “developments of state and regional significance”) are fully reviewed and their performance enforced by the DEP under the Site Location of Development Law, with expedited review standards under 35-A M.R.S.A. ch. 34-A. Smaller-scale projects (meaning those that produce energy for sale back to the grid, but that don't qualify as grid-scale) must only obtain from DEP a certificate that the project will comply with noise, shadow flicker and setback requirements. 35-A M.R.S.A. § 3456. Once the certificate is obtained, DEP has no further enforcement role; however, municipalities may choose to enforce these performance standards during and following construction of the facility. There is no state regulation of wind energy developments that do not sell energy back to the grid (for instance, backyard wind turbines). This is why many Maine municipalities have chosen to enact ordinances that only address these types of smaller-scale developments.

Town-wide prohibition of wind turbines

There are certain types of land use activities that cannot be prohibited throughout a town. These include wireless communication towers, per the federal Telecommunications Act, certain treatment facilities (e.g. methadone clinics), per the Americans with Disabilities Act, and land uses that carry First Amendment or other constitutional considerations (e.g. adult bookstores; residential uses). However, there is no legal reason why wind turbines, as an industrial use, could not be banned throughout town. Various courts have agreed that there is no constitutional prohibition against banning a particular commercial or industrial use throughout a town, as long as there is a valid public policy

basis supporting the ban. See *Gernatt Asphalt Products, Inc. v. Town of Sardinia*, 664 N.E. 2d 1226, 1235 (Ct. App. N.Y. 1996) (upholding a town-wide ban on mining activities). "It is therefore well established that a city [of limited size] is not obligated to make provision for the location and operation within its city limits of any and all known industries regardless of other considerations, provided its actions are not arbitrary, unreasonable or not done fraudulently and are done to insure maximum protection of the several conflicting private interests and minimum detriment to the community and to safeguard public health, safety, comfort and general welfare." *Snow v. City of Garden Grove*, 188 Cal. App. 2d 496, 502 (1961). By this logic, the Town could exclude wind turbines, as well as other industrial uses that would be seen as detrimental to the Town's scenic qualities, such as offal processing plants or oil refineries, as extreme examples.

In Camden's case, scenic beauty and tourism are obviously very important interests to protect. To the extent that large wind turbines would detract from the Town's natural beauty, a court would be unlikely to rule as invalid any ordinance preventing such turbines throughout town. However, it may be more difficult to make such a case for small, backyard-style turbines, particularly as these become more commonly used to generate power for residences. It may be less controversial to apply strict siting regulations to these small turbines, rather than banning them entirely.

Effect of current zoning standards on wind developments

Camden's current Zoning Ordinance already contains provisions that would prohibit many wind turbines. Performance standards applicable to high-elevation areas (those over 500' from sea level) prohibit land uses other than residential, agricultural, forest management and non-intensive recreational uses. Zoning Ordinance, Article X(1)(2). This would exclude commercial wind turbine developments from the elevations that would be most desirable for such a project. It would not exclude wind turbines as "accessory" structures to uses that are otherwise allowed at these elevations, although the applicable performance standards would limit the locations in which such accessory wind turbines could be placed. However, in my opinion, a commercial wind turbine could not be considered an accessory structure to anything as it is a primary structure (and use) in and of itself. Smaller turbines for residential energy uses could however be accessory structures.

Other existing zone-specific standards significantly restrict the ability to locate a wind turbine in town. To the extent that a wind development would be a primary industrial use, it would be prohibited in any district where such industrial uses are prohibited. Furthermore, since a wind turbine would qualify as a "structure" under the ordinance, it would have to meet any applicable height limitations, which are no more than 50' in any district, and 30 to 40' in most. Even in those districts where wind turbines might be allowed as an industrial use, or as an accessory to a permitted residential or commercial use, the height restriction would frequently prevent their location. Most backyard turbines are at least 35' tall, and industrial turbines are significantly taller.

Conclusion

There is perhaps good reason to address the full scope of wind turbine projects in a new ordinance so as to address the full range of turbine sizes and uses (commercial vs. residential; connected to the grid/net billing; etc.). There is no rush to address the 1.5 megawatt or larger commercial turbine projects as it appears that existing height and elevation performance standards effectively prohibit those projects at this time. However, if the Town wishes to affirmatively prohibit commercial wind turbines from particular high elevation locations, it should do so with a "purpose" section that clarifies the fact finding rationale for such a total prohibition. Such a prohibition could be incorporated into a more

general Wind Turbine Ordinance. I make no suggestion one way or the other, I merely wish to address options based on the comments I heard.