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Hodgson Russ LLP
ATTORNEYS

March 22, 2016

Via Email and U.S. First Class Mail

James A. Muscato, II
Young Sommer LLC
Executive Woods, Five Palisades Drive
Albany, New York 12205

Dear Mr. Muscato:

Re: *Application of Cassadaga Wind LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 to Construct a 126 MW Wind Energy Project*

As you know, this firm represents the Towns of Arkwright, Charlotte, and Cherry Creek in connection with the above-referenced matter. Following our discussion on March 11, 2016, I write to respond to Seth Wilmore's February 23, 2016 letter wherein he identified Cassadaga Wind LLC's ("Cassadaga Wind") preliminary interpretation as to whether provisions of the Towns' local laws are procedural or substantive.

As a first matter, please refer to the Towns' prior comments on the Public Scoping Statement. Specifically, the Towns are of the opinion that their right to regulate roadways derives from the state constitution and state law and are therefore not preempted by Article 10. Thus, they will not be addressed below, but we raise them to be clear that the Towns' position has not changed.

Below are the Towns' responses to Cassadaga Wind's designation of certain provisions of the Towns' local laws as procedural.

Town of Arkwright

1. "Permits Required for Wind Overlay District and Special Use Permit pursuant to Article VI A, Wind Energy Facilities § 653(A)-(H), which includes the application requirements for Wind Energy Facilities Creation of Wind Overlay Zone § 656(B)-(C)." Section 653(A) is not merely a procedural requirement. It provides that "[n]o Wind Energy Facility shall be constructed, reconstructed, modified, or operated in the Town of Arkwright except in compliance with this Article." To the extent this applies to the application for permits, the Town agrees that it is procedural. However, this section also mandates compliance with substantive requirements of the law. Section 653(B), the Wind Overlay Zone requirement, is a substantive use restriction. The Town Agrees that § 653(C) and (D) are of a procedural nature. Section 653(E) is a substantive requirement, noting that the law applies to the entirety of the Town.

The Town agrees that § 653(F), (G), and (H) are of a procedural nature. Section 656 is a substantive requirement, as Wind Energy Facilities are only permitted in a Wind Overlay Zone. This represents a zoning use restriction.

2. "Application for Wind Energy Conversion Systems § 657(A)(1)-(20)." The Town agrees that these provisions are procedural. However, the substantive requirements for information are applicable and should be included within Cassadaga Wind's application.

3. "Application Review Process § 658(A)-(J)." The Town agrees that these provisions are procedural.

4. "Noise and Setback Easements § 663(A)(1)-(3)." The Town disagrees that these provisions are entirely procedural. This section provides that if a substantive setback requirement is not met, a waiver will be granted by the Town Board under certain circumstances (*e.g.*, written consent or an easement from the affected property owner to be a project participant). While the waiver application would be procedural, the substantive requirement to obtain such consent to achieve compliance with a setback requirement is applicable.

5. "Creation of Wind Overlay Zones and Issuances of Special Use Permits § 664(A)-(D)." The applications for a special use permit and for a rezoning are procedural. However, as set forth above, the Wind Overlay Zone requirement is a substantive use restriction.

6. "Fees § 671(A)-(D)." The Town agrees that § 671(A), (B) and (D) are of a procedural nature. However, § 671(C) is a substantive provision preserving the Town's ability to enter into a host community agreement.

7. "Enforcement; Penalties and remedies for violation § 673(A)-(C)." The Town disagrees that these provisions are procedural. The substantive requirements of the Town's law are applicable to the project unless a waiver is granted by the Siting Board. Nothing in Article 10 preempts the Town's enforcement authority over the substantive requirements that remain applicable to the project. In addition, Section 268 of the New York Town Law provides a right of enforcement of substantive requirements of local zoning laws that has not been preempted by Article 10.

8. "Use of Town Rights of Way – Local Law No. 1 of 2015 regulating and creating a permitting system of use and cuts and openings in and under Town rights of way." The entirety of this local law is not procedural. There are several substantive requirements. However, the Town would agree that the permitting provisions in this local law are of a procedural nature.

9. "Permit Revocation § 667(A)-(C)." The Town does not agree that these provisions are procedural; rather, they deal with enforcement. However, since no permit will be issued by the Town, this section is likely inapplicable.

Town of Charlotte

1. "Permits and Rezoning Required under Article VI, § 618(B)(1)-(8) of the Town of Charlotte Zoning Law which includes the application requirements for Wind Energy Facilities." The requirement of a Wind Energy Overlay District is a substantive requirement because it is a use restriction. Section 618(I)(B)(1) provides that the substantive requirements set forth in the law are applicable to Wind Energy Facilities. Section 618(I)(B)(6) provides that the law applies to the entirety of the Town of Charlotte, a substantive requirement. The Town agrees that the remainder of § 618(I)(B) are procedural requirements.

2. "Wind Overlay District Rules § 618(D)(2)-(3)." The applications for a special use permit and for a rezoning are procedural. However, as set forth above, the Wind Overlay Zone requirement is a substantive use restriction.

3. "Applications for Wind Energy Conversion System and Wind Overlay District § 618(E)(1)(a)-(E)(1)(t)." The Town agrees that these provisions are procedural. However, the substantive requirements for information are applicable and should be included within Cassadaga Wind's application.

4. "Application Review Process § 618(F)(1)-(10)." The Town agrees that these provisions are procedural.

5. "Noise, Height and Setback Easements; Variances § 618(K)(1)(a)-(c)." The Town disagrees that these provisions are entirely procedural. This section provides that if a substantive setback requirement is not met, a waiver will be granted by the Zoning Board of Appeals under certain circumstances (e.g., written consent or an easement from the affected property owner to be a project participant). While the waiver application would be procedural, the substantive requirement to obtain such consent to achieve compliance with a setback requirement is applicable.

6. "Creation of Wind Overlay Districts and Issuance of Special Use Permits § 618(L)(1)-(4)." The applications for a special use permit and for a rezoning are procedural. However, as set forth above, the Wind Overlay Zone requirement is a substantive use restriction.

7. "Permit Revocation § 618(O)(1)-(3)." The Town does not agree that these provisions are procedural; rather, they deal with enforcement. However, since no permit will be issued by the Town, this section is likely inapplicable.

Town of Cherry Creek

1. "Permits and Rezoning Required Article VI, Local Law 2 of 2011 § 5(A)-(H) which includes the application requirements for Wind Energy Facilities." Section 5(A) is a substantive requirement, requiring compliance with the entirety of the law. Section 5(B)'s requirement of a Wind Overlay District is a substantive requirement as it is a use restriction. Section 5(F) is a substantive requirement requiring compliance with the entirety of the local law. The Town agrees that the remainder of Section 5 are procedural provisions.

2. "Applications for Wind Energy Conversion Systems and Wind Overlay District § 8(A)(1)-(20)." The Town agrees that these provisions are procedural. However, the substantive requirements for information are applicable and should be included within Cassadaga Wind's application.

3. "Application Review Process § 9(A)-(J)." The Town agrees that these provisions are procedural.

4. "Noise and Setback Easements; Variances § 14(A)(1)-(3)." The Town disagrees that these provisions are entirely procedural. This section provides that if a substantive setback requirement is not met, a waiver will be granted by the Town Board under certain circumstances (e.g., written consent or an easement from the affected property owner to be a project participant). While the waiver application would be procedural, the substantive requirement to obtain such consent to achieve compliance with a setback requirement is applicable.

5. "Creation of Wind Overlay District and Issuance of Special Permits § 15(A)-(D)." The applications for a special use permit and for a rezoning are procedural. However, as set forth above, the Wind Overlay Zone requirement is a substantive use restriction.

6. "Fees § 28(A)-(D)." The Town agrees that § 28(A), (B) and (D) are of a procedural nature. However, § 28(C) is a substantive provision preserving the Town's ability to enter into a host community agreement.

7. "Enforcement; Penalties and remedies for violations § 30(A)-(C)." The Town disagrees that these provisions are procedural. The substantive requirements of the Town's law are applicable to the project unless a waiver is granted by the Siting Board. Nothing in Article 10 preempts the Town's enforcement authority over the substantive requirements that remain applicable to the project. In addition, Section 268 of the New York Town Law provides a right of enforcement of substantive requirements of local zoning laws that has not been preempted by Article 10.

8. "Permit Revocation § 18(A)-(C)." The Town does not agree that these provisions are procedural; rather, they deal with enforcement. However, since no permit will be issued by the Town, this section is likely inapplicable.

Mr. Wilmore also notes in his letter that Cassadaga Wind has compiled a long listing of requirements of a substantive nature that it intends to comply with. In addition to the items the Towns noted as substantive above, the Towns' responses to Cassadaga Wind's listing of substantive requirements are set forth below.

Town of Arkwright

1. "Creation of Wind Overlay Zones § 656(A) of the Town of Arkwright Zoning Law, wind Overlay Districts may only be created in the Agricultural-Residential (AR1) District and the T-Transitional Use Zone." The Town agrees that this is a substantive requirement.

2. "Standards for WECS § 659(A)(1)-(17)." The Town agrees that these provisions are substantive requirements.

3. "Required Safety Measures § 660(A)-(G)." The Town agrees that these provisions are substantive requirements.

4. "Traffic Routes § 661(A)-(C)." The Town agrees that these provisions are substantive requirements.

5. "Setbacks for Wind Energy Conversion Systems § 662(A)-(E)." The Town agrees that these provisions are substantive requirements.

6. The following sections are also substantive requirements: § 655, § 665(C), § 666, § 670(A), and § 673.

Town of Charlotte

1. "Wind Overlay District Rules – Pursuant to Article VI, § 618(D)(1) of the Town of Charlotte Zoning Law, wind Overlay Districts may only be created in the Agricultural-Residential (AR1) District." The Town agrees that this is a substantive requirement.

2. "Standards for WECS § 618(G)(1)(a)-(s)." The Town agrees that these provisions are substantive requirements.

3. "Required Safety Measures § 618(H)(1)-(7)." The Town agrees that these provisions are substantive requirements.

4. "Traffic Routes § 618(I)(1)-(3)." The Town agrees that these provisions are substantive requirements.

5. "Setbacks for Wind Energy Conversion Systems § 618(J)(1)-(6)." The Town agrees that these provisions are substantive requirements.

6. The following sections are also substantive requirements: § 618(I)(C), § 618(I)(K), § 618(I)(M), § 618(I)(N), § 618(II)(A), (C), § 618(IV)(C). In addition, the provisions of the Town's zoning law providing for enforcement are applicable substantive requirements.

Town of Cherry Creek

1. "Wind Overlay District Rules – Pursuant to Article VII, Local Law 2 of 2011 § 7(A) of the Town of Cherry Creek Zoning Law, wind Overlay District may only be created in the Agricultural-Residential District III." The Town agrees that this is a substantive requirement.

2. "Standards for WECS § 10(A)(1)-(17)." The Town agrees that these provisions are substantive requirements.

3. "Required Safety Measures § 11(A)-(F)." The Town agrees that these provisions are substantive requirements. An additional substantive requirement is set forth in § 11(A)(G).

4. "Traffic Routes § 12(A)-(C)." The Town agrees that these provisions are substantive requirements.

5. "Setbacks for Wind Energy Conversion Systems § 13(A)-(F)." The Town agrees that these provisions are substantive requirements.

6. The following sections are also substantive requirements: § 6, §16, § 17, § 21, § 28(C), § 30.

In addition to the listing of substantive and procedural requirements required in 16 N.Y.C.R.R. § 1001.31(a) and (d), it appears that the applicant needs to address 16 N.Y.C.R.R. § 1001.31(c). This section requires the identification of the entity to "review and approve the building plans, inspect the construction work, and certify compliance with the New York State Uniform Fire Prevention and Building Code . . . ." In the event that Cassadaga Wind would like the Towns to conduct this review, please let me know so that the required arrangements can be made.

Hodgson Russ LLP ATTORNEYS

The Towns appreciate your willingness to work with us to identify all requirements of a procedural and substantive nature and look forward to your response to the above. Please feel free to call me with any questions.

Sincerely,

Charles W. Malcomb

CWM/say

cc: Daniel A. Spitzer, Esq. (via email)
William F. Duncanson, Jr., Esq. (via email)
Dana A. Lundberg, Esq. (via email)
Kenneth Bochmann, Town Supervisor, Town of Charlotte (via email)
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