



**KOPELMAN AND PAIGE, P.C.**  
*The Leader in Municipal Law*

101 Arch Street  
Boston, MA 02110  
T: 617.556.0007  
F: 617.654.1735  
www.k-plaw.com

March 1, 2010

**Elizabeth A. Lane**  
elane@k-plaw.com

Mr. Paul Sieloff  
Town Administrator  
Wellfleet Town Hall  
300 Main Street  
Wellfleet, MA 02667

Re: Wind Turbine Project

Dear Mr. Sieloff:

You have requested an opinion concerning two questions: (1) whether a 1.65 MW wind turbine facility proposed to be located on Town-owned land may be authorized by special permit, and (2) whether the fact that the site proposed for the facility is within the boundaries of the Cape Cod National Seashore (“CCNS”) limits the ability of the Town to obtain such a special permit. For reasons more fully explained below, it is my opinion that §6.25 of the Zoning Bylaw defines the proposed facility as a “Utility-Scale Wind Facility” and expressly provides for the grant of special permits for “utility-scale” wind energy facilities located on Town-owned land. It is my further opinion that neither the legislation that created the CCNS, nor its implementing Regulations allow the Secretary of the Interior or any other entity to challenge issuance of such a special permit on the basis of asserted conflict with the federal legislation that created the Cape Cod National Seashore, hereinafter referred to as “the CCNS Act.”

As I have been informed, the Town is considering the construction of a 1.65 MW wind turbine on Town-owned land located within the boundaries of the CCNS and the Town’s National Seashore Park (“NSP”) Zoning District. The current proposal is for the Town to construct the wind turbine using municipal funds, with the entire electrical output of the wind turbine to be sold to NSTAR at the applicable published tariff rate. The revenue from the sale of the electricity will be deposited in the Town’s General Fund and will be thereafter available by appropriation to pay for the following costs: (1) the debt service on the bonds issued for construction of the wind turbine, (2) the charges by NSTAR for electricity supplied to municipally-owned facilities, and (3) a yearly fee for maintenance of the wind turbine. Thereafter, the net proceeds from the sale of the power generated by the facility will be used to fund the annual operating budget of the Town.

1. Zoning Applicable to the Proposed Facility: §6.25

The Zoning Bylaw’s Table of Use Regulations, at §5.3.4, provides that a special permit for a Municipal Wind Turbine may be granted within the NSP District, with reference by footnote to §6.25 and §8.4.2 of the Bylaw. Section 8.4.2 is the section that provides generally for the grant of special permits, and provides that, as a general matter, the special permit granting authority

Mr. Paul Sieloff  
Town Administrator  
March 1, 2010  
Page 2

("SPGS") is the Zoning Board of Appeals, with noted exceptions for permits where the Bylaw designates the Planning Board as the SPGA. Section 6.25 is entitled "Municipal Wind Turbines," and defines "Utility Scale Wind Facility" as "A wind facility with a rated capacity of 100KW or more and where the primary use of the facility is electrical generation to be provided into the electrical grid."

The Town's proposed facility is planned to exceed the 100 KW capacity threshold standard for a Utility-Scale Wind Turbine, and the described intent is to direct the entire output of the facility into the electrical grid, via NSTAR. For that reason, the facility proposed by the Town fits squarely within the definition of Utility-Scale Wind Turbine, in my opinion. One result of this fact is that the Bylaw designates the Planning Board as the SPGA for such facilities. It appears that for facilities of lesser capacity, the Zoning Board of Appeals is the SPGA.

Some question has been raised as to the relevance of factors such as the method of financing the construction of the proposed facility. In my opinion, it is the Town's Zoning By-law alone which controls the availability of a special permit. For that reason, it is my further opinion that considerations not made relevant by the Zoning By-law, such as the available forms of funding for construction of a municipal wind turbine, or the planned use of revenue from its operation, are irrelevant as a matter of zoning analysis, and are not properly to be considered by the SPGA in evaluating the application pursuant to §6.25 for a special permit for any wind turbine or wind facility.

In addition, it is my opinion that it is not necessary for the Town to own the wind generating equipment in order for a special permit to issues pursuant to § 6.25. As stated in the introductory paragraph of that section, entitled "Purposes," "The purpose of this by-law is to allow by Special Permit utility scale wind facilities on municipally owned land and to provide for standards for the placement of design, construction, monitoring, upkeep, modification and removal of wind facilities . . . [emphasis added] Note that the requirement of municipal participation is only that the land be owned by the Town, not that the facility or equipment be either owned or operated by the town.

## 2. Cape Cod National Seashore

In my opinion, there is nothing in the CCNS Act, 16 USCA §§ 459b – 459b-8, (the "Act"), its Regulations, 36 CFR 27, (the "Regulations") or policies, such as the "Use Guidelines" developed by the National Park Service ("NSP") for the CCNS that prohibits the Town from constructing and operating a municipal wind turbine within the boundaries of the CCNS. As will be further explained below, it is also my opinion that §6.25 and other provisions of the Town's Zoning Bylaw adopted after the creation of the National Seashore District are in full force and effect, regardless of absence of notice to the Secretary of the Interior of their enactment. Further, even if such notice was required as a matter of law, and was not provided, it is my opinion that the absence of such notice does not

Mr. Paul Sieloff  
Town Administrator  
March 1, 2010  
Page 3

invalidate any zoning amendment, nor give rise to a cause of action or standing on the part of the Secretary of the Interior to sue to challenge a special permit granted pursuant to §6.25 or other section of the Zoning Bylaw.

As you are aware, the CCNS Act is promulgated as 16 United States Code Annotated (“USCA”) at §§ 459b – 459b-8, (the “Act”), and its Regulations are found at 36 Code of Federal Regulations (“CFR”) FR 27, (the “Regulations”) or policies. In my opinion, the wind turbine project, and its authorizing special permit created by §6.25 of the Bylaw, do not conflict with any standard set forth in the Act or its Regulations. Furthermore, as the “Use Guidelines” are not part of the Act or its Regulations or otherwise mandated by federal law, they do not have the force of law and may be deemed to be advisory only.

As background, the following is a brief summary of the Act and its Regulations. In August of 1961, the United States Congress created the Cape Cod National Seashore by enacting the Cape Cod National Seashore Act. The Act gave the Secretary of the Interior authority to purchase, acquire by gift or condemn land within the Seashore. Notably, the Act provided that, as to publically owned land, the powers to purchase or acquire by condemnation might be exercised only with the assent of the Commonwealth or the municipality. 16 USCA §459b-1(a)

In order to provide some protection from the threat of condemnation to owners of private property who held “improved property” within the CCNS, the Act suspended the Secretary’s condemnation power for one year from the effective date of the Act. The stated purpose of this delay was to provide each of the towns in which properties lay with the time necessary to enact a zoning by-law, to be approved by the Secretary of the Interior as conforming to the Regulations promulgated by the Secretary to implement the purposes of the Act. The Act provides that, once the Secretary has approved a particular town’s zoning by-law, the one-year condemnation suspension period applicable to private property is further suspended with respect to all “improved property” during “...all time when such towns shall have in force and applicable ...a duly adopted, valid zoning by-law approved by the Secretary in accordance with the [Act].” 16 USCA §459b-4. The Regulations concerning the approval of a town’s zoning by-law were to be issued by the Secretary of the Interior “as soon as practicable after August 7, 1961” and published as an addition to the Code of Federal Regulations (“CFR”) in the Federal Register.

The Regulations were issued by the U.S. Department of the Interior in 1961 and were published in the Federal Register as the “Cape Cod National Seashore; Zoning Standards,” 36 CFR 27. The Regulations provide at 36 CFR 27.1(b) (2), that approval by the Secretary of municipal zoning bylaws, or subsequent amendments, requires that they “conform to the standards herein set forth relating to preservation and development of the seashore in accordance with the purposes of the said Act.” [emphasis added]. There is no provision within the Act or the Regulations that invalidates local zoning for any reason, or provides the Secretary of the Interior or the Secretary’s agent or

Mr. Paul Sieloff  
Town Administrator  
March 1, 2010  
Page 4

designee with the authority to sue in any court to invalidate either zoning or a permit issued pursuant to any zoning bylaw.

The requirements imposed by the Regulations on local zoning bylaws are expressly limited and may be summarized as follows:

36 CFR 27.2: No commercial or industrial districts may be established within the Cape Cod National Seashore.

36 CFR 27.3(c)(1): No moving, alteration, or enlargement of existing one-family residential dwellings or structures shall be permitted unless specified dimensional minimums are met (50-foot setback from all streets, 25-foot setback from abutters properties); certain exceptions are also set forth in this Regulation.

36 CFR 27.3(d): Appropriate restrictions or prohibitions to be enacted in municipal bylaws concerning burning of cover, cutting of timber, filling of land, removal of soil, loam; sand or gravel and dumping, storage or piling of refuse and other unsightly objects or other uses which would detract from the natural or traditional seashore scene.

36 CFR 27.3(e): No commercial or industrial ventures may be established within the Seashore District.

36 CFR 27.4(b): Bylaws adopted pursuant to these standards shall contain provisions that give notice to applicants for variances and exceptions that, under the Act, the Secretary of the Interior is authorized to withdraw the suspension of his authority to acquire by condemnation "improved property" that is made the subject of a variance or exception.

Information provided to me indicates that the Town adopted, at a Special Town Meeting held on October 1966, Zoning By-law amendments to meet the requirements of the Act and its Regulations. These Zoning By-law amendments were approved by the Secretary of the Interior in March, 1967. It is my understanding that, since the time of the Secretary's approval, the Town has not given the Secretary formal notice of any further zoning amendments which arguably affect land within the Seashore District. It is also my understanding that, since the Secretary's approval, there have been no changes to the Town's Zoning By-law amendments which were enacted in 1966 specifically to meet the standards set forth in the Regulations.

Mr. Paul Sieloff  
Town Administrator  
March 1, 2010  
Page 5

It is my opinion that, 36 CFR 27.1 (b) (2) of the Regulations quoted above requires only notice to the Secretary “of any amendments to the approved zoning bylaws that affect the Seashore District” [emphasis added] and that the “approved zoning bylaws” referred to in the Regulations are only those enacted by the Town specifically to meet the Regulations’ standards. For that reason, it is my opinion that the Town has not failed to give the Secretary any notice required by the Act or Regulations relative to zoning amendment made following the initial adoption of the Seashore District zoning required by the Regulations.

A further consideration is what remedy, if any, would lie for the Town’s failure to have given required notice to the Secretary. Assuming, for the purpose of argument only, that one or more zoning amendments adopted by the Town following the initial establishment of the NSP District in 1966 were subject to the requirement of notice to the Secretary, I am aware of no law that provides standing for the Secretary or the Superintendent of the NPS, on his behalf, to challenge the validity of any by-law, or to challenge the validity of a permit issued pursuant to the by-law. It is my opinion, therefore, that the Secretary’s remedy for violations of the Act or its Regulations is limited exclusively to the right to exercise the power of condemnation of private property.

A New York federal court decision involving another federal seashore district act, the Fire Island Act, which is federal legislation substantially similar to the CCNS Act, lends support to this opinion, The Second Circuit Court of Appeals, in its decision in Biderman v. Morton, 497 F.2d 1141 (2<sup>nd</sup> Cir. 1974), refused to grant a request for an injunction brought by property owners seeking to enjoin municipalities in the Fire Island Seashore district from amending bylaws and/or granting permits. The property owners alleged that municipalities in the Fire Island Seashore district were granting permits for residential construction in violation of the Fire Island Act. In denying the request for an injunction, the Court held at pages 1148-1149 of the decision that the validity of local by-laws remains solely an issue of state law and is not dependent on the approval of the by-laws by the Secretary of the Interior:

But, as we have attempted to make clear, the federal government does not have what we characterize as ‘go-ahead’ power over zoning decisions of Seashore municipalities. The validity – the operative effect – of the local zoning ordinances, variances, and amendments does not depend on the prior approval of the Secretary of the Interior. He is authorized merely to acquire by condemnation ‘improved property’ not zoned in an appropriate manner.... We simply cannot, by granting injunctive relief, arm the Secretary with ‘go-ahead’ power when Congress, in the Seashore Act, saw fit not to do so. Id. at 1148-1149.


**KOPELMAN AND PAIGE, P.C.**

Mr. Paul Sieloff  
Town Administrator  
March 1, 2010  
Page 6

It is my opinion that, based upon the similarity of the two federal acts in question, the holding of Biderman decision as to the limited powers of the Secretary of the Interior in the case of the Fire Island Act indicates that the Secretary has no standing to challenge either a zoning bylaw or any permit issued thereunder on the basis of asserted conflict with the CCNS Act. It is my further opinion that the sole remedy available to the Secretary for failure of a municipality within the NSP to have enacted proper zoning to meet the standards of the Act is to terminate the suspension of the power to condemn privately owned land within the National Seashore Park. Consequently, in my opinion, should a special permit for the construction and operation of a wind turbine on Town-owned land within the CCNS district issue, and should the Secretary or the Superintendent, on his behalf, choose to challenge the permit, such a challenge would be subject to dismissal by the court for lack of standing .

Please feel free to contact me should you have any questions.

Very truly yours,

  
Elizabeth A. Lane

EAL/sjm  
cc: Board of Selectmen

394590/WELL/9999