

STATE OF MAINE
CUMBERLAND, ss

BUSINESS AND CONSUMER COURT
Location: Portland
Docket No.: BCD-AP-12-010



PETER BECKFORD and JULIE)
BECKFORD,)
)
Petitioners,)
)
v.)
)
TOWN OF CLIFTON,)
)
Respondent,)
)
and)
)
PISGAH MOUNTAIN, LLC)
)
Intervenor)
)

DECISION AND ORDER AFTER REMAND

This case is again before the court, following remand to the Town of Clifton Planning Board (Planning Board) for further consideration of Intervenor Pisgah Mountain, LLC's (Pisgah) site plan application to construct and operate a wind energy project in Clifton.

For the reasons, set forth below, the court grants the appeal of Peter and Julie Beckford and vacates the approval of Pisgah's industrial wind energy project.

Background

This court's May 8, 2013, Decision and Order summarized the pertinent aspects of Pisgah's proposed project and the procedural path of Pisgah's application for approval pursuant to the Town of Clifton Land Use Ordinance (CLUO), culminating in the appeal of Peter and Julie Beckford (the Beckfords) pursuant to M.R. Civ. P. 80B to this court. The May 8, 2013, Decision and Order is hereby incorporated by reference in the present order.

In the May 8, 2013 Order, the court affirmed the Planning Board's approval of Pisgah's project in some respects, but remanded the matter to the Planning Board for consideration of two issues: "(a) whether the proposed height of the turbine structures meets the height standards of the CLUO; and (b) whether the applicant has demonstrated compliance with the sound standards of the CLUO." *Beckford v. Town of Clifton*, BCD-AP-12-10, at 26 (Bus. & Consumer Ct. May 8, 2013). To facilitate further review and avoid delay, the court limited the Planning Board's reconsideration of those issues to the existing evidentiary record, but permitted the Board to entertain argument, based on the existing record, from the parties. *Id.* at 27. The Planning Board held a meeting and heard argument from the parties on July 18, 2013, and held workshops on August 13 and 14, 2013. After the second workshop, the Planning Board issued additional findings that have been submitted to the court, along with briefs from the parties regarding the additional findings. The court heard oral argument November 6, 2013, and took the case under advisement.

Analysis

The applicable standard of review and other aspects of the legal framework that governs the analysis are set forth in the May 8, 2013, Decision and Order in this case, and need not be restated here.

A. *Height of the Turbine Structures*

Because this order sets aside the Town's approval of Pisgah's project on other grounds, the turbine height issue need not be discussed in detail. However, assuming, but not deciding, that the CLUO height standard is valid as applied to Pisgah's proposed turbine structures,¹ the

¹ Despite the detailed standards of Article 14 of the CLUO for wind energy projects such as the one proposed by Pisgah, including the requirement of a visual impact study of a proposed project's effects on the ridgeline and scenic views (R. 1830-31), the CLUO has no height standards for wind turbines specifically. Instead, wind turbines are subject to the CLUO's generic standard applicable to all "unoccupied structures with height exceeding 35 feet." (R. 1794.) The CLUO provides simply that such

court deems the Planning Board's additional findings sufficient to support the Planning Board's decision to approve the height of the structures.

B. *The Planning Board's Decision to Waive Submittal of Iso-Contour Maps Depicting Pre-Construction Sound Levels as Part of the Applicant's Pre-Construction Sound Study*

The court's Decision and Order remanding the matter with respect to the sound requirements of the CLUO encompassed several issues relating to the sound standards and submittal requirements of the CLUO, all of which the Planning Board purported to address in its additional findings.

The only sound issue that needs to be discussed in detail here relates to the clear CLUO requirement that an application for approval of a wind energy facility incorporate what the CLUO refers to as a "pre-construction sound study." The stated purposes of the pre-construction sound study are "first, to establish a consistent and scientifically sound procedure for evaluating existing background levels of audible and low frequency sound; and, second, to determine whether the proposed wind energy facility will meet the [sound limits of the CLUO]." (R. 1839.)

The pre-construction sound study is to include specific components, including iso-contour maps. (*See* R.1831-32 (sound standards); R. 1840-41 (iso-contour maps required as part of the pre-construction sound study).) The CLUO is specific in requiring that the pre-construction sound study include iso-contour maps showing calculated levels of both "pre-construction background sound" and "post-construction sound." (R. 1841.) The plain purpose of requiring the pre-construction sound study to include projections of pre- and post-

structures "will be subject to height restrictions as determined by the [Planning B]oard to be appropriate and necessary for the proposed use." (R. 1794.)

The absence of detailed guidelines or even a list of factors to be considered for wind turbines hundreds of feet tall does raise a question as to whether the generic "appropriate and necessary" standard is a sufficient limitation on the Planning Board's discretion. *See Wakelin v. Town of Yarmouth*, 523 A.2d 575, 577 (Me. 1987). *But cf. Town of Baldwin v. Carter*, 2000 ME 106, ¶¶ 12-14, 794 A.2d 62.

construction sound levels is to enable the projected sound impact of the proposed facility to be assessed in light of the CLUO sound limits.

Pisgah's pre-construction sound study did not include iso-contour maps depicting pre-construction background sound levels. (R. 448-49, 764.) It did include iso-contour maps depicting projected post-construction sound levels. (R. 795-802.) In its initial decision, the Planning Board approved Pisgah's application without explaining how the application could be approved in the absence of the required iso-contour maps depicting pre-construction background sound levels. The court's remand included a request that the Planning Board consider whether Pisgah could be granted approval without submitting iso-contour maps with its pre-construction sound study.

The court's May 8, 2013, Decision and Order noted that no waiver of the pre-construction iso-contour map requirement had been granted, and it also questioned whether a waiver even could be granted. The court assumed and expected that the Planning Board would review the waiver provision of the CLUO, and then decide whether a waiver could, and should be granted.

In response, the Planning Board in its additional findings granted a waiver of the iso-contour map requirement. Specifically, the Planning Board found:

In the Record at 0139, the Planning Board's recollection is that the request was made to not perform a sound study at all prior to development of the project. The Planning Board intended for the developer to produce post-construction iso-contour maps. In the Record at 01153, the Planning Board voted that the applicant submit 8 iso-contour maps for the 4 seasons. The intent was for the applicant to produce post-construction iso-contour maps. Had the Planning Board intended to have the applicant submit pre-ambient iso-contour maps, the request would have been for 16 maps. *See Record at 01841, paragraphs 6 and 7.*

Pre-construction background sound iso-contour maps were discussed exhaustively by the Planning Board. Town consultant Hessler indicated that it would be impossible to produce such a map. *Record at 1161.*

The iso-contour map of predicted post-construction sound is based on specific sources. A map of ambient sound contours would literally change every second, and is not useful for determining compliance with the CLUO.

Based on competent engineering and scientific authority, the requirement was impossible to produce, and, since the information was not required to determine compliance with the standards of the ordinance, the Planning Board waives the requirement for pre-construction background sound iso-contour maps under Article 6, Section 3(H), p. 6-8 of the CLUO (*Record at 01715*).

(Town of Clifton Planning Board Additional Findings 4, § 5.)

Because the Planning Board's Additional Findings do not quote from the CLUO waiver provision or recite the standards for waiver, it is not clear whether, before granting a waiver, the Planning Board ever considered the underlying basic question of whether the cited Article 6, Section 3(H), p. 6-8 of the CLUO even authorizes a waiver of the requirement of iso-contour maps depicting pre-construction background sound levels. In any case, the court must now address that question.

Initially, it must be said that iso-contour maps are much more than a "technical submittal requirement" of the CLUO. In defining the requirements of the sound study that must be submitted as part of the application for approval of a wind energy facility, the CLUO provides that "[a]t a minimum, the study shall include the following information, and meet the following requirements" and then lists the required elements in twelve numbered paragraphs. (R. 1840 (emphasis added).) The importance of iso-contour maps is implied in the fact that five of the 12 required elements of the pre-construction sound study—those at paragraph 6 through 10 of the list—pertain to iso-contour maps. (R. 1840-41.)

The iso-contour maps serve a unique and specific purpose. The CLUO at Article 14, SPS 8.0, section G(1) provides that the sound limits it imposes "are to apply *everywhere* within four thousand feet (4,000 feet) of any wind turbine," and also "*everywhere* at a distance four thousand (4,000 feet) and over of any wind turbine." (R. 1831-32 (emphasis added).) However,

sound measurements obviously cannot be taken “everywhere,” and instead are taken at “Measurement Points” located pursuant to the detailed sound study requirements set forth in the Appendix to Article 14 (SPS 8.0). (R. 1837.) The means by which pre-construction and post-construction sound levels are depicted at points “everywhere” around the proposed facility, based on extrapolations from the sound measurements taken, is through the iso-contour maps. The iso-contour maps required to be submitted as part of the sound study must “extend to a minimum of 1.5 miles beyond the perimeter of the project boundary, and may be extended to a distance of more than 1.5 miles at the discretion of the Planning Board.” (R. 1841.)

The CLUO provides that a wind energy facility’s audible post-construction sound levels at a distance of 4,000 feet or more from a turbine cannot “exceed pre-construction sound levels by more than 10dBA.” (R. 1832.) Thus, it is only by comparing the iso-contour maps depicting pre-construction background levels with the maps depicting projected post-construction sound levels that it is possible to determine whether the proposed facility will comply with this sound limit “everywhere” between 4000 feet and the 1.5 mile radius required to be shown on the maps.

The record is replete with tables depicting measured background levels at specific receiver or measurement points, (R. 448 *et seq.*), but this court has not been pointed to, or itself been able to locate, any map or table or anything else in the record that graphically depicts pre-construction background sound levels “everywhere” within a radius of 1.5 miles of the project site, in the manner that the missing iso-contour maps would have done. In other words, the CLUO requirement of iso-contour maps depicting pre-construction background sound levels is no *de minimis* “technical submittal requirement”, but instead is essential to enabling the Planning Board to fulfill its responsibility of determining whether the proposed project will comply with the sound limits of the CLUO beyond 4,000 feet from any turbine.

With that context established, the analysis turns to whether the CLUO authorizes the Planning Board to waive the requirement that the applicant's sound study include iso-contour maps depicting pre-construction background sound levels.

A planning board's authority to waive requirements of an ordinance is defined and limited by the waiver provisions of the ordinance. See *Bodack v. Town of Ogunquit*, 2006 ME 127, ¶¶ 14-15, 909 A.2d 620; *York v. Town of Ogunquit*, 2001 ME 53, ¶ 10, 769 A.2d 172; *Jarrett v. Town of Limington*, 571 A.2d 814, 814-15 (Me. 1990).

The waiver provision of the CLUO appears at Article 6, section 3(H), page 6-8 of the CLUO (R. 1715) and reads as follows:

H. Waivers of Submission Requirements

In cases where development or expansion *will not significantly change the nature or intensity of the use or exterior dimensions of any existing structure*, or where a proposed use is deemed by the Planning Board to *have no discernable impact on adjoining property or the environment or public infrastructure*, the Planning Board may waive the review procedure and all or portions of the submission requirements in order that the project may be expedited if the information is not required to determine compliance with the standards of this Ordinance.

(R. 1715 (emphasis added).)

On its face, the waiver provision does not apply to Pisgah's application at all. It plainly applies only to two categories of applications, both involving *de minimis* impact, and its stated purpose is to expedite such applications. One such category involves applications for projects that, if approved, would not significantly change the use or dimensions of an existing structure. The other category involves applications for projects that would have "no discernable impact" on adjoining property or the environment. Pisgah's application does not relate to an existing structure. Pisgah's proposed project cannot reasonably be deemed to have "no discernable impact," nor has the Planning Board made any such finding. Therefore, Pisgah's application

does not fit within either category of applications as to which the CLUO authorizes a waiver of submission requirements.

The Town and Pisgah contend nonetheless that the iso-contour map requirement can be waived because it is a submission requirement, not a standard, citing *York v. Town of Ogunquit*, 2001 ME 53, 769 A.2d 172; *Perkins v. Town of Ogunquit*, 1998 ME 42, 709 A.2d 106; and *Fitanides v. City of Saco*, 684 A.2d 421 (Me. 1996), cases in which the Law Court has held that a planning board cannot waive zoning ordinance standards but can waive the submission requirements of an ordinance. (See Resp.'s Br. 26-27.) This contention misses the point. The point is that, regardless of whether the waiver is of a standard or a submission, a planning board's authority to waive is defined by the terms of the applicable ordinance. Planning boards do not have inherent waiver authority. Cf. *Desjardins v. Town of Greene*, 2002 WL 31546079, at *4 (Me. Super. Oct. 17 2002) (Gorman, J.) ("The Board [of Appeals] cannot simply waive a time limit imposed by the Ordinance because it has spent some time reviewing the case.")

In the case of submission requirements as well as standards, a planning board's authority to waive an ordinance requirement is limited to what the ordinance allows.² For example, in the *Fitanides* opinion cited by the Town and Pisgah, the Law Court upheld the planning board's waiver of a submission requirement because the ordinance at issue specifically authorized the board to waive submission requirements. 684 A.2d at 423. On the other hand, in *Jarrett v. Town of Limington*, the Law Court held that the waiver provisions of the applicable ordinance did not permit the planning board to waive a submission requirement requiring the applicant to provide a test or an affidavit regarding water quality. 571 A.2d at 815. The

² The *Perkins* and *York* decisions are largely irrelevant to this analysis—each involved a planning board's purported but invalid waiver of a zoning standard. Rather, the point here is simply that a planning board's authority is limited by the terms of the ordinance. The Law Court made that point, in upholding the waivers of subdivision standards (but not the waiver of a zoning standard) in *York*, by noting that waiver of subdivision standards was permitted by the terms of the applicable ordinance. 2001 ME 53, ¶10 n.9, 769 A.2d 172.

governing principle was the same in both cases: a planning board's authority to waive a submission requirement of the applicable ordinance is defined by the ordinance itself.

Thus, even though the iso-contour map requirement is a submission requirement and not a standard, it still cannot be waived by the Planning Board unless the CLUO authorizes the Planning Board to do so. As noted above, the CLUO waiver provision applies only to applications for projects involving no significant impact, and therefore cannot be construed to apply to Pisgah's wind energy facility proposal.³ Even if the CLUO is construed, as Pisgah and the Town suggest it should be, to excuse *de minimis* "technical" omissions, the emphasis that the CLUO places upon iso-contour maps precludes any argument that iso-contour maps showing pre-construction background sound levels can be dispensed with on that basis.

In a further effort to excuse the omission of the required maps, the Town and Pisgah argue that it is impossible to produce the iso-contour maps depicting pre-construction sound levels that the CLUO specifically requires. If this is indeed the case, the answer is for the Town to consider revising that part of the Ordinance, not for the Planning Board to dispense with it.

Based on the clear, non-waivable requirement of the CLUO that the applicant for approval of a wind energy facility must submit iso-contour maps depicting pre-construction sound levels as part of the application, Pisgah's admitted failure to submit any such maps means that its application should not have been approved. The CLUO says repeatedly that it is the applicant's burden to demonstrate compliance with the CLUO standards, including the sound standards that apply "everywhere" beyond a 4,000-foot radius, by submitting what CLUO requires (R. 1821, 1831, 1839), and Pisgah has not met its burden.

³ The parties disagree about whether a waiver was requested in writing, as the waiver provision requires, and about whether the Planning Board ever said it wanted to see pre-construction iso-contour maps as opposed to post-construction maps. The court's conclusion that the CLUO does not give the Planning Board authority to waive any iso-contour maps that the CLUO states must be provided as part of the sound study renders these issues moot.

C. *Other Sound Issues*

In light of the foregoing conclusion, the other sound issues that were the subject of remand do not require extended discussion. As Pisgah and the Town contend, where the record contains conflicting evidence—as it does on the issues of calculating the tonal penalty and whether or not the materials submitted by Pisgah can be deemed narratives—the Planning Board is entitled to credit the evidence that it did. One issue deserves further discussion, however.

There is an issue as to whether Pisgah’s sound study applied appropriate ground absorption factors in calculating pre- and post-construction low frequency sound impacts. The Planning Board’s additional findings note that Pisgah’s low-frequency sound analysis uses what the Board calls a “worst case” ground absorption factor of zero—that associated with flat surfaces such as parking lots and water bodies—instead of the higher factors associated with the wooded terrain that actually surrounds the project site. The Beckfords make the logical argument that the sound calculations should utilize the higher ground absorption factors actually associated with the wooded terrain between the turbines and most if not all of the receiver points. At oral argument, Pisgah’s representative appeared to concede that, if the higher ground absorption factors associated with the terrain around the proposed facility were used, the results would *not comply* with the CLUO’s low-frequency sound standards.

In the court’s view, Pisgah and the Planning Board misapply the “worst-case” requirement of the CLUO. The CLUO requirement that the determination of post-construction sound values “should assume worst-case conditions” (R. 1840) refers to the weather factors, primarily as wind speed, that are specifically mentioned in that section. It does not mean the sound study should ignore the terrain over which the measured sounds would actually travel from the turbines to the measurement point. If the calculated sound impacts of

the project would exceed either the maximum or the 10dBA differential using any ground absorption factor from 0.0 upward, that is the worst-case scenario the CLUO contemplates. This point actually reinforces the importance of iso-contour maps, which would depict calculated sound impacts at various contour intervals, using the ground absorption factors associated with the terrain that lies between the turbine and each contour.

In the court's view, the worst-case scenario presented by Pisgah and seemingly accepted by the Clifton Planning Board is actually a best-case scenario. The Beckfords make a persuasive argument that, had Pisgah's sound study projected the proposed facility's low-frequency sound impacts at various locations, including but not limited to measurement points, using the ground absorption factors associated with the actual tree cover and terrain at those locations rather than a zero absorption factor, the sound study would not have demonstrated compliance with the CLUO low frequency sound standards.

D. Issue of Bias

Finally, as to the Beckfords' claim that the Planning Board was biased, the court agrees with the Town and Pisgah that, notwithstanding the Planning Board's evident willingness to overlook, excuse and/or waive shortcomings in Pisgah's application, the record does not show actual bias on the part of any Board member.

Conclusion

For the reasons set forth above, the court concludes that the Town through its Planning Board has not properly applied the requirements of the Clifton Land Use Ordinance to Pisgah's application for a wind energy facility, and therefore that the approval and permits issued to Pisgah's project must be set aside. This outcome does nothing more than hold the Town of Clifton, through its Planning Board, to follow the requirements of the Land Use Ordinance that the Town has chosen to enact, as it relates to industrial wind energy projects.

IT IS HEREBY ORDERED:

1. The appeal of Peter and Julie Beckford is sustained and hereby granted.
2. The approval and permits granted by the Town of Clifton, through its Planning Board, to Intervenor Pisgah Mountain, LLC's proposed industrial wind energy project are hereby vacated and declared to be of no further effect or validity.
3. Judgment is hereby awarded to Petitioners Peter and Julie Beckford against the Defendant Town of Clifton and Intervenor Pisgah Mountain, LLC, with costs (not including attorney fees) against Pisgah.

Pursuant to M.R. Civ. P. 79(a), the clerk is hereby directed to incorporate this order into the docket by reference.

Date: December 10, 2013



A. M. Horton, Justice
Maine Business & Consumer Court

Entered on the Docket: 12/11/13
Copies sent via Mail Electronically