

Conflict arises when there is a dispute between two or more landowners over incompatible land uses. When aesthetics and noise are involved (particularly during the evening when most people sleep and do not want to be disturbed), this increases the level of anxiety and potential for conflict.

The American Wind Energy Association (AWEA) defines and adverse visual impact as ¹⁷ AWEA explains that introduction of visual contrast to the existing scene, based on differences in form, line, color,

Even though a potential project meets regulatory criteria, this does not limit the ability of bringing a civil action to prohibit any continued interference with the use and enjoyment of the subservient landowner. This may or may not include the Town as a potential defendant. We believe it is incumbent upon the Town to pass a bylaw that affords the ability of landowner to potentially use a wind turbine to generate electricity for their home and/or business use, *provided it does not cause any type of interference with neighboring property owners use and enjoyment of their property.*

Section 11: Complaint forms, how to manage subsequent problems if they arise

Complaints and lawsuits over wind turbines are on the rise world-wide. To the extent these complaints and lawsuits represent the fears and concerns of members of the community in which a wind turbine is sited, we need to be sure that any bylaw passed will assess the risks to people and property and work to minimize conflict.

In the event a conflict arises by and between landowners regarding the use of a wind turbine, or for that matter any use in which conflict arises, those that object must feel their interests are being protected equally to the one that is creating a potential problem. Many neighbors feel conflicted when faced with a decision whether or not to voice an objection to a use that is having an adverse impact in fear of retaliation or conflict with a neighbor.

Currently a landowner wishing to lodge a complaint concerning potential illegal land use requires complaints be made to the zoning enforcement officer. Alleged violations of Board of Health regulations require complaints be made to the local board of health or the State Board of Health. We believe a confidential on-line complaint form should be made available to anyone that wants to lodge a complaint for zoning or health code violations. The Town of Fairhaven, Massachusetts has an excellent complaint form that goes directly to the Board of Health for wind

¹⁷ Wind Energy Association Wind Energy Siting Handbook, 5-27 (2008).

¹⁸ Joseph Haupt, ³A Right to Wind/Promoting Wind Energy by Limiting the Possibility of Nuisance Litigation, *Journal of Energy & Environmental Law*, 256, Summer 2012.

turbine impacts. We believe at a minimum this type of system should be set up for anonymous reports of complaints related to potential zoning violations not just for wind turbines.¹⁹

Section 12: Litigation that has arisen with premises-use turbines. Outcomes?

As previously indicated, even though a wind turbine could meet regulatory criteria, it still could have an adverse impact on a neighbor resulting in litigation for a nuisance claim. The following decision from a New Jersey Court in 1959 sets forth in detail the issues that are present in potential locations for turbines in the Town of Shelburne.

“The noise produced is offensive because of its character, volume and duration. It is a sound which is not only distinctive, but one which is louder than others and is more or less constant. Its intrusive quality is heightened because of the locality. The neighborhood is quiet and residential. It is well separated, not only from commercial sounds, but from the heavier residential traffic as well. Plaintiffs specifically chose the area because of the qualities and the proximity to the ocean. Sounds which are natural to this area—the sea, the shore birds, the ocean breeze — are soothing and welcome. The noise of the windmill, which would be unwelcome in most neighborhoods, is particularly alien here.”²⁰

Nuisance litigation over wind turbines is developing law. Nuisance claims can be brought in Massachusetts (MGL Chapter 243). Nuisance is a “nontrespassory invasion of another’s interest in the private use and enjoyment of land.”²¹ The reasonableness of a particular land use is highly fact specific involving many factors including the benefits and harms of the use.²²

Even in a conservative state like Nevada nuisance litigation has been successful against a wind turbine on private land. In this case the wind turbine was for the benefit of a single property; therefore, the Court determined there was no overriding public good that trumped a neighbor’s right to be free of disturbance.²³

Shelburne has adopted a “premises use” requirement for any wind turbine. This actually enhances the potential success for a civil action claim of nuisance in that there is no overriding public good that has to be weighed against the neighbor’s interests of being free from unreasonable interference.

Although many municipalities we surveyed reported no complaints with smaller wind turbines (less than 110’), Ancram, New York provides an ideal case study of small wind turbine

¹⁹ See http://fairhaven-ma.gov/pages/FairhavenMA_Health/complaintform.

²⁰ See *Rose v. Chaikin*, 453 A. 2nd 1378, 1382 (N.J. Super. Ct. Ch. Div. 1982).

²¹ *Restatement (Second) of Torts*, Sect 821.

²² *Id*, Sect. 826, 828.

²³ <http://www.nevadajudiciary.us/images/advanceopinions/129nevadvonpno9.pdf>

installations gone terribly wrong. We urge the Planning Board to review the support materials in this regard. This small town, like Shelburne, wanted to do the right thing allowing alternative forms of energy to be included in their town. The turbine sales person and the property owners assured town officials there would be no adverse effects from the wind turbines. Soon after installation, the representations were found to be fictitious. Currently the town and neighbors are involved in litigation concerning these turbines.

The studies referred to in Section 2 of this Report and the other information and evidence we have reviewed, leads us to conclude that representations made by small wind turbine manufacturers should be questioned. This word of caution is not only directed to a special permit granting authority, but also any person or business who is contemplating acquiring a small wind turbine. We believe a “buyer beware” and no tolerance policy of adverse effects from turbine installations should be adhered to in any premises use bylaw.

Section 13: Recommendations:

The Wind Advisory Committee has voted to provide the following recommendations to the Town of Shelburne Planning Board and to the residents of Shelburne as we consider a new Premises Use Wind Turbine Bylaw:

Height Limit: The Wind Advisory Committee recommends that any premises-use turbine does not exceed 120 feet from grade to the tip of the blade.

Capacity: The Wind Advisory Committee recommends that the output of nameplate capacity be limited to 10 KW for residential and 30 KW for agricultural/business use.

Excess: In order to comply with the intent that the output be primarily for premises use, the Wind Advisory Committee recommends that the rated name capacity be restricted to the smallest unit available to cover the intended premises use.

Noise: The Wind Advisory Committee recommends that the noise limit of any wind turbine shall not exceed 5 dB above ambient at any lot line and the nearest inhabited residence. The ambient level shall be established by the applicant prior to the submission of an application by a protocol to be determined.

Flicker: The Wind Advisory Committee recommends that the By-law shall not allow any flicker affecting occupied buildings.

Aesthetics: The Wind Advisory Committee recommends to the Planning Board that they take visual impacts and property values considerations into account in the permitting process.

Setback: The Wind Advisory Committee recommends that the setback be double the height of the blade tip from any roadway, structure, or property line.

Certification: The Wind Advisory Committee recommends that any premises-use wind turbine must be an approved turbine on the list certified by the Small Wind Certification Council or other certification agency as approved by the State of Massachusetts.

One turbine per premise: The Wind Advisory Committee recommends that only one turbine be allowed per premises.

Conclusion:

Because the wind industry is changing and every location has unique characteristics, any by-law regulating installation and use of a wind turbine must allow for the circumstances of each particular case, yet require sufficient information to make an informed decision whether the rights of all parties are protected. The issues to be considered have been set out in this document according to the best information available at this time. It is clear that even setting limits on size in height or output and setbacks in specific distances may not adequately meet that goal. However, there is a need for some limits as a starting point to eliminate applications that cannot succeed. While the proposals in this report provide guidelines in this respect, ultimately a decision of whether a specific proposal may go forward must rest with the permitting authority based on interpretation of all of the factors involved. It is hoped that this report gives a better understanding of what is involved in permitting an application for a wind turbine.

Respectfully Submitted:

Town of Shelburne Wind Advisory Committee to the Planning Board

Kevin D. Parsons, Esq. Member/Chairman

Judith Truesdell, Member/Clerk

Michael Parry, Member

Raymond S. Hartman, Member

Thomas Webler, Member

John Wheeler, Member/Planning Board Representative

Lowell LaPorte, Member/ZBA Representative

Robert Jaros, MD, Member

Eugene Butler, Member