

MEMORANDUM

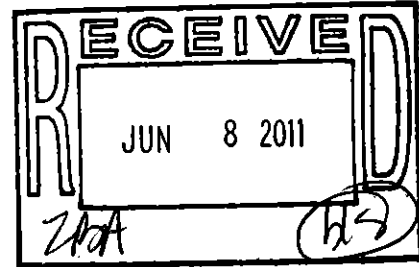
TO: Wareham Board of Appeals
John Charbonneau, Wareham Town Planner

FROM: Jonathan Witten, Esq.

DATE: June 7, 2011

RE: Beaufort Windpower/ Bog Wind's application for special permits pursuant to Section 580 of the Wareham Zoning Bylaw

COPY: Richard Bowen, Esq., Town Counsel



The Board of Appeals and Mr. Charbonneau have requested my opinion as to the status of Beaufort Windpower/ Bog Wind's application for special permits pursuant to Section 580 of the Wareham Zoning Bylaw, in light of Town Meeting's action repealing this Bylaw on May 23, 2011.

In the absence of the Wind Energy Facilities Bylaw, there is no provision in the Wareham Zoning Bylaw for the construction of the facilities proposed by Beaufort Windpower/ Bog Wind. It is anticipated that the Applicant will assert that because it had filed an application for a special permit for construction of a wind power facility prior to Town Meeting vote, it has certain vested rights with respect to such application. Specifically, the Applicant is likely to contend that the Board of Appeals must proceed with public hearing on the application – currently continued by agreement of the parties – and that special permits may be granted by the Board for construction of such facilities.

Contrary to this anticipated assertion, the Applicant has no vested rights arising from the special permit applications, which were filed in 2010. While G.L. c. 40A, s. 6 provides vested rights with respect to zoning relief under certain circumstances; the facts of this case do not fall within any of the particular circumstances enumerated in the statute. Accordingly, the Applicant has no vested rights under G.L. c. 40A, s. 6, and is not entitled to further proceedings on its application.

For example, G.L. c. 40A, s. 6 provides that a zoning change does not apply to a structure or use for which a building or special permit has been issued – and is literally in the hand of the applicant – prior to the first advertisement for the zoning change. See G.L. c. 40A, s. 6, para. 1. The Applicant in this case did not have a special permit or building permit “in hand” at the time of Town Meeting's repeal of the Wind Power Bylaw. Accordingly it is not entitled to this protection.

G.L. c. 40A, s. 6 further protects from zoning change land that is the subject of a definitive plan, or a preliminary plan followed within seven months by a definitive plan, where such

plan has been submitted to the Planning Board for approval under the subdivision control law, and where written notice of such submission has been given to the Town Clerk. See G.L. c. 40A, s. 6, para. 5. (If approved and endorsed, a "zoning freeze" of eight years is provided by the statute). Upon information and belief, the Applicant in this case had not submitted to the Wareham Planning Board and Town Clerk any such definitive plan, or preliminary plan followed within seven months by a definitive plan, at the time of Town Meeting repeal of the Wind Energy Facilities Bylaw. Accordingly, it is not entitled to this protection.

Further, G.L. c. 40A, s. 6 protects from zoning change land that is the subject of an "Approval Not Required" (ANR), where such plan has been submitted to the Planning Board pursuant to G.L. c. 41, s. 81P, and where written notice of such submission has been given to the Town Clerk. See G.L. c. 40A, s.6, para. 6. (If endorsed as "Approval Not Required", a zoning "use" freeze of three years is provided by statute). Upon information and belief, the Applicant in this case had not submitted an ANR plan to the Planning Board or Town Clerk at the time of the Town Meeting repeal of the Wind Energy Facilities Bylaw, and accordingly it is not entitled to this protection.

Where: (1) G.L. c. 40A; (2) the Wareham Zoning Bylaw (see Section 1310 et seq.) and (3) any other law, does not provide the Applicant with protection from Town Meeting's May 2011 repeal of the Wind Energy Facilities Bylaw, the Board has no authority to grant the requested special permits for construction of the "Bog Wind" project. Simply put, absent the plan filings noted above, the special permit applications before the Board of Appeals are not vested—protected—from Town Meeting's recent repeal of Section 580 of the Zoning Bylaw.

Consistent with the discussion noted above, it is my opinion that the Board of Appeals request the applicant to demonstrate proof that an Approval Not Required, preliminary or definitive plan had been filed with the Town pursuant to statute and the Wareham Zoning Bylaw. Absent such a demonstration of clear proof, I advise the Board of Appeals to request the applicant to withdraw the application for the "Bog Wind" project. Absent the applicant's voluntary withdrawal of the "Bog Wind" applications for special permits, as revised, it is my opinion that the Board of Appeals has no choice but to close the public hearing and thereafter, vote to deny the application for lack of subject matter jurisdiction, notwithstanding and not limited to other factors that the Board may wish to consider and include in its decision.

Please let me know if you have any questions or would like clarification in this matter.

Thank you.