To: Bill Dunkel

From: Nicholas Low

Re: Additional Planning and Zoning Questions

Date: November 14, 2018

Cc: Gerald Tarrant

After receiving the memo we sent you on November 7, 2018 re: Windham Town Planning – Solar and Wind power, you emailed me on November 13, 2018 with additional questions. This memo addresses those questions.

**Whether there is any ambiguity in the term “ridgeline”**

If you do not want the PUC and Court to interpret ridgelines to mean all land above 2,000 feet—and it seems you do not—we recommend that you define “ridgelines” more clearly.

While you are correct that “ridgeline” commonly refers to the tops of mountains, from a legal perspective failing to define this term could leave it open to different interpretations.

If a permit related to ridgelines is appealed to the Environmental Court or a utility is applying for a CPG at the PUC, the Court and the PUC will attempt to identify the most objective, unambiguous way to define “ridgeline” as set out in the Zoning Regulations (in the Court) and the Town Plan and Enhanced Energy Plan (at the PUC).

Based on the language quoted below, I believe there is a strong chance the Court would conclude that the Zoning Regulations define ridgelines as all land above 2,000 feet.

Zoning Regulations

* Section 209(10): “Development on ridgelines, defined as land above 2,000 feet elevation: a) All development, including roads, structures (except camps as defined herein), utilities, and wireless broadcast telecommunications facilities are prohibited.”
* Section 207: “all uses and structures shall be prohibited in the following locations . . . Development on Windham’s ridgelines (defined as above elevation 2,000 feet)”
* Section 201.5: “ridgelines (defined in the Town Plan as elevations at or above 2,000 feet)”
* Resource Protection Area Overlay I map, page 11 (shows “Ridgelines above 2,000 feet”).
* Resource Protection Area Overlay I map, page 11 (showing “ridgelines above 2000 ft” in green).

The language from the Town Plan and Enhanced Energy Plan quoted below is slightly more ambiguous than the Zoning Regulations, but I also believe there is a good chance the PUC would read the term “ridgeline” in these documents to also apply to all land above 2,000 feet. This conclusion is based partly on the language alone, which appears to link ridgelines to land above 2,000 feet. In addition, under the law an ambiguous town plan term can be clarified by referring to the zoning regulations. See In re Molgano, 163 Vt. 25, 30 (1994). As noted above, the Zoning Regulations here appear to define all land above 2,000 feet as ridgeline.

Town Plan

* Policy 1, Action 1, page 72: “Prominent ridgelines above 2,000 feet elevation shall be left in their natural condition, free from all development, including roads, building structures, utilities, wireless broadcast telecommunications facilities, and industrial wind turbines (except camps as provided for in Chapter IX Land Use.)”

Enhanced Energy Plan

* Policy 3.1(4): “Prominent ridgelines above 2000 feet elevation shall be left in their natural condition, free from all development.”
* Policy 4.7: “Discourage any renewable energy generation facilities in areas identified as unsuitable by the Town of Windham . . . Fragile natural areas including ridgelines over 2,000 ft. elevation”
* Policy 4.12: Prominent ridgelines above 2,000 feet elevation shall be left in their natural condition, free from all development, including roads, building structures, utilities, wireless broadcast telecommunications facilities, and industrial wind turbines (except camps as provided for in Chapter IX Land Use.) The town prohibits any commercial or industrial operations on its ridgelines other than forestry and will not support any commercial or industrial activity that exceeds the capacity of its public infrastructure including emergency response assets.

At best, there is some ambiguity to the term “ridgeline” in these documents. For example, if “ridgeline” does not include all land above 2,000 feet, does it include the uppermost point—the peak—and then extend some number of vertical feet down from there? If so, how far down does the ridgeline extend? If it does not extend down, then prohibiting development on a “ridgeline” only protects the absolute peak from development, which seems illogical. Likewise, if there are two peaks, and a ridge between them, is that entire area part of the “ridgeline”? Or does a ridge at some point decrease sufficiently in elevation to become a valley?

As long as there is some ambiguity, there is a chance the Court or the PUC will interpret “ridgelines” in these documents differently from how the Planning Commission intended. That would mean that development the Planning Commission wants to allow could be prevented, or development the Planning Commission does not want to allow could be permitted.

The remedy to this is to come up with a definition of “ridgeline” that is unambiguous, clear, and objective.

One way to do this is to define ridgelines as all land above a certain elevation. I understand, however, that this may not have the desired effect in Windham, because the Planning Commission wants to define some land above 2,000 feet as ridgeline, but other land above that elevation as not ridgeline.

An alternative method of defining “ridgeline” that would be more precise would be to create a map that clearly delineates ridgelines on which all development is prohibited. The provisions in the Town Plan, Enhanced Energy Plan, and Zoning Regulations can then explicitly refer to this map when they state that development on ridgelines is prohibited. The key for the Resource Protection Area Overlay I map, on page 11 of the Zoning Regulations, would also have to be clarified – for example, by identifying areas in green as “areas above 2,000 feet” as opposed to “Ridgelines above 2,000 feet.”

As explained in our November 7, 2018 memo, you will need to explain and justify the reason that ridgelines need to be protected. This justification and explanation should specifically relate to the ultimate delineation of ridgelines.

**Prominent Ridgelines**

 I agree that the term “prominent ridgelines” suggests that some ridgelines are not prominent, and therefore less important. If anything, this again creates some ambiguity. It would therefore make sense to take out the qualifier “prominent” from the Town Plan and Enhanced Energy Plan (I don’t see the term used in the Zoning Regulations), and simply refer to “ridgelines.” It may also be worth altering or removing the map on Page 93 of the Town Plan that refers to “prominent ridgelines.”

**100-foot Height Restriction**

You note that in the Town Plan, Policy 1, Action Point 5, page 72 states that “no structure shall exceed 100 feet high.” The Zoning Regulations, Section 505, however, state “Maximum turbine height is 120 feet; maximum blade length is 20 feet.”

 While these conflict, they do not cancel each other out. As explained in the earlier memo, the Town Plan 100-foot limit would apply in PUC proceedings, while the 120-foot limit in the Zoning Regulations would apply to zoning permits.

That said, zoning regulations should be in conformance with the municipal plan. 24 V.S.A. § 4311. It would make sense to revise either the Town Plan, or the Zoning Regulations, to have a uniform height standard.

**Whether this requires a public hearing by the Planning Commission and then a second public hearing by the Selectboard**

 To amend Policy 1, Action Point 5 in the Town Plan, the Planning Commission would have to hold a public hearing, 24 V.S.A. § 4384(d), and the Selectboard would then have to hold at least one public hearing, 24 V.S.A. § 4385(a).

Likewise, to amend the Zoning Regulations the Planning Commission would have to hold at least one public hearing, 24 V.S.A. § 4441(d), and the Selectboard would also have to hold at least one public hearing, 24 V.S.A. § 4442(a).

These hearings are likewise required for other amendments to the Zoning Regulations or Town Plan. While this process can be cumbersome and time consuming, it is worth putting in the work at the planning stage to avoid the risk of the regulations or plans later being interpreted in a way that the Planning Commission did not intend.