STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. SUPERIOR COURT
NORTHERN DISTRICT

Gordon Allen, Mary Allen, Charles Levesque,

Jancie Longgood and Matha Pinello

v.

Town of Antrim Board of Selectmen

Docket No. 2012-CV 00655

ORDER ON PETITION FOR DECLARATORY JUDGEMENT

The petitioners, Gordon Allen, Mary Allen, Charles Levesque, Janice Longgood and Martha Pinello, seek to void a Payment in Lieu of Tax ("PILOT") Agreement entered into between the respondent, Town of Antrim Board of Selectmen (the "Board"), and Antrim Wind Energy LLC ("Antrim Wind"), under the Right-to-Know law, RSA 91-A. The respondent objects, contending that the Right-to-Know law does not apply to negotiations and meetings concerning the Board and PILOT Agreements. The court held a hearing on April 10, 2013, during which former Antrim Selectman Eric Tenney ("Tenney"), Antrim Administrative Assistant Galen Stearns ("Stearns") and petitioner Mary Allen testified. After consideration of the pleadings, arguments, testimony, exhibits and applicable law, the court finds and rules as follows.

Background

The Right-to-Know violations for which the petitioners complain arise out of negotiations between the Board and Antrim Wind regarding the construction of a wind facility in Antrim, New Hampshire. Specifically, Antrim Wind and the Board entered into

non-public, noticed and unnoticed meetings during which a PILOT Agreement was discussed. On June 20, 2012, the Board held a public hearing and approved the PILOT Agreement. The Board does not dispute that numerous noticed and unnoticed, nonpublic meetings were held with Antrim Wind concerning the PILOT Agreement.

For example, Galen Stearns, Antrim's Town Administrator during the PILOT Agreement, testified that based on the advice of town counsel, he believed the PILOT Agreement meetings were not subject to the requirements of the Right-to-Know law. Stearns believed that, under the aegis of the attorney-client privilege, unnoticed, nonpublic meetings were permissible as long as town counsel was present. Stearns also believed that he was only required to issue notice of non-public PILOT Agreement meetings when town counsel was not present.

As a result, Stearns testified that he posted notice of a non-public March 7, 2011, Board meeting with Antrim Wind under exemption RSA 91-A:3 II, a & d.[1] However,

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[1] RSA 91-A:3, II states in pertinent part:

> Only the following matters shall be considered or acted upon in nonpublic session:
>
> (a) The dismissal, promotion, or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against him or her, unless the employee affected (1) has a right to a meeting and (2) requests that the meeting be open, in which case the request shall be granted.
>
> . . .
>
> (c) Matters which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of the public body itself, unless such person requests an open meeting. This exemption shall extend to any application for assistance or tax abatement or waiver of a fee, fine, or other levy, if based on inability to pay or poverty of the applicant.
>
> . . .
>
> (d) Consideration of the acquisition, sale, or lease of real or personal property which, if discussed in public, would likely benefit a party or parties whose interests are adverse to those of the general community.

Tenney, a Selectman during the PILOT Agreement negotiations, testified that the March 7, 2011 meeting did not fall under exemption RSA 91-A:3, II, a & d. Rather, this exemption applied to an unrelated issue at the meeting, in which the town was considering purchasing an easement.

Stearns further testified that the non-public August 24, 2011, meeting concerning Antrim Wind was posted because town counsel was not present. Stearns testified that this August 24, 2011, meeting with Antrim Wind was posted as a non-public meeting under exemption RSA 91-A:3, II, c because he believed this provision was applicable as it involved taxation. However, Stearns agreed with the petitioners' counsel that the PILOT Agreement did not involve Antrim Wind's inability to pay taxes under RSA 91-A:3, II, c.

Tenney testified that the August 24, 2011, probably did not meet RSA 91-A:3, II, c's requirements but based on town counsel's advice the Board believed the PILOT Agreement negotiations could be conducted in non-public meetings. Generally at these non-public meetings, Tenney testified, the Board received a "broad outline" of what Antrim Wind thought the value of the project would be, including general terms, but not including balance sheets or profit and loss statements. Tenney further testified that the information received at the non-public meetings was used in formulating the final PILOT Agreement.

According to Stearns, in addition to the March 7, 2011, and August 24, 2011, meetings, the Board held four other unnoticed, non-public meetings concerning the PILOT Agreement on June 21, 2011; October 25, 2011; February 15, 2012 and May 9, 2012 because town counsel was present. At these meetings Antrim Wind was also

present. Stearns also testified that there were meetings attended by him, Selectmen Webber and Antrim Wind concerning the decommissioning of the project and cost of construction.

At the hearing, town counsel represented to the court that it was his advice upon which the town relied in holding the PILOT Agreement meetings with Antrim Wind in nonpublic sessions.

Analysis

The petitioners allege that the noticed and unnoticed, nonpublic meetings between the Board and Antrim Wind constitute a violation of RSA 91-A, New Hampshire's Right-to-Know law. As a result of this purported violation, the petitioners seek an order from this court invalidating the PILOT Agreement, assessing attorney's fees and costs and requiring the Board to receive remedial training on the Right-to-Know law. The respondent objects and contends that RSA 72:74 allows for non-public meetings when the Board is considering a PILOT Agreement.

1. Right-to-Know Violation

The Board must comply with the requirements of the Right-to-Know law. See RSA 91-A:1-a; Carter v. City of Nashua, 113 N.H. 407, 414 (2001). Accordingly, all Board meetings must be open to the public and recorded unless an exemption applies. RSA 72:74 provides in pertinent part that "[t]he owner of a renewable generation facility and the governing body of the municipality in which the facility is located may, after a duly noticed public hearing, enter into a voluntary agreement to make a payment in lieu of taxes."

The interpretation of a statute is a matter of law. Goodreault v. Kleeman, 158 N.H. 236, 252 (2009). The court will consider the statute as a whole and construe the language in accordance with its plain and ordinary meaning. Id. If the statute's

language is plain and unambiguous, the court need not look beyond it for further indication of legislative intent, and will not consider what the legislature might have said or add language that the legislature did not see fit to include. Id. at 253. By contrast, if the statute is ambiguous, the court will look to the legislative history to aid its analysis. Id.

"Our goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme." Id. (quotation omitted). In light of the statutory purpose of "ensur[ing] the greatest possible public access to . . . records of public bodies, and their accountability to the people," RSA 91-A:1 (2001), the provisions in the Right-to-Know law favoring disclosure will be construed broadly while the provisions citing exemptions will be construed narrowly. Lamy v. N.H. Pub. Utils. Comm'n, 152 N.H. 106, 108 (2005).

Nothing in RSA 91-A:3, II or RSA 72:74 exempts PILOT Agreements from the Right-to-know law. Contrary to the respondent's contention, the plain language of RSA 72:74 supports this conclusion. Furthermore, as the respondent concedes, none of the exemptions in RSA 91-A:3, apply to the respondents. Thus, the court finds the respondent violated the Right-to-Know law by entering into non-public meetings with Antrim Wind for the PILOT Agreement on the numerous occasions detailed above.

2. Remedies

The Right-to-Know law, if violated, provides for three possible remedies: (1) an award of reasonable costs and attorney's fees, RSA 91-A:8, I; (2) an order voiding action taken by a public body or agency, if the circumstances justify such invalidation, RSA 91-A:8, II; and (3) an injunction, RSA 91-A:8, III. The petitioners seek to have the

PILOT Agreement invalidated, request attorney's fees and costs and for the court to order the respondent to seek remedial training on the Right-to-Know Law.

The court GRANTS the petitioners' request to void the PILOT Agreement. As discussed above, the Board conducted numerous noticed and unnoticed, non-public meetings while negotiating the PILOT Agreement. These meetings contravened the fundamental purpose of the Right-to-Know law's goal of transparent and open government. Accordingly, the court finds voiding the Agreement is warranted to redress the Right-to-Know violations. See Lambert v. Belknap County Convention, 157 N.H. 375, 382 (2008).

However, the court DENIES the petitioners' request to assess attorney's fees and costs against the respondent. RSA 91-A:8, I expressly states that in order to asses attorney's fees and costs, the court must first find that "the public body, public agency, or person knew or should have known that the conduct engaged in was in violation of this chapter . . . ." Here, Stearns and Tenney testified that they believed the hearings did not have to be public based on the advice of town counsel. Moreover, at the hearing, town counsel agreed that it was his advice regarding RSA 72:74 upon which the town relied. See Voelbel v. Town of Bridgewater, 140 N.H. 446, 448 (1995) (overturning award of attorney's fees when selectmen acted in good faith, relied on town counsel's advice and the Right-to-Know violation was not obvious, deliberate or willful). Accordingly, the court finds the Board did not knowingly engage in the Right-to-Know violation and therefore DENIES the petitioners' request for attorney's fees and costs.

The court also DENIES the petitioners' request to order the respondent to receive remedial training on the Right-to-Know law. As explained above, the selectmen

relied on town counsel's advice regarding application of the Right-to-Know law. Tenney and Stearns both demonstrated an awareness of the Right-to-Know law's requirements and exemptions during their testimony. Thus, the court finds that remedial training is unnecessary because the town's error resulted from its reliance on town counsel's incorrect advice.

SO ORDERED.

May 20, 2013

David A. Garfunkel
Presiding Justice