

To: Watauga County Planning Board Members
From: Andrea N. Capua, Esq., di Santi Watson Capua & Wilson
Re: Legal Memorandum
Date: May 15, 2006

Facts: Watauga County is known to be an area with an abundant wind resource. As a result, there has been recent efforts by its citizens to promote the use of wind turbines as a source of alternative energy. A legitimate question has been raised as to whether a landowner wishing to erect a single wind turbine on his or her property could do so legally, without the need to obtain a county building permit.

In the wake of growing issues related to energy and the future of oil, local authorities are encouraged to take their own initiative to make way for renewable energy policies. The Watauga County Board of Commissioners has voted to support the use of single wind turbines. It is, therefore, considering enacting an ordinance as an attempt to address issues which may arise from their use.

Issue: Whether wind turbines (“windmills”) are exempt from the North Carolina Mountain Ridge Protection Act (the “Ridge Law”).

Conclusion: Windmills are exempt from the North Carolina Mountain Ridge Protection Act. This memo is limited to a brief legal analysis of single wind turbines. It does not address legal rights to the use of wind turbines which are part of a large wind farm.

I. General History of the Ridge Law

In July 1983 the North Carolina General Assembly enacted the Mountain Ridge Protection Act (the “Ridge Law”). The legislature stated both aesthetic and non-aesthetic purposes being primarily to protect structures from high winds and destruction by fire, to protect against the effects of water erosion, and to preserve the natural beauty of the mountains.

The Ridge Law provided three options for counties to regulate the construction of tall buildings or structures on protected mountain ridges: (1) accept statutory imposed construction height restrictions on mountain ridges (N.C. Gen. Stat. §113A-209); (2) adopt their own restrictions (N.C. Gen. Stat. §113A-208); or (3) opt out of having any restrictions (N.C. Gen. Stat. §113A-214). Watauga County chose to accept the statutory imposed restrictions as outlined in §113A-209 of the Ridge Law.

II. Relevant Definitions Within the Ridge Law

The Ridge Law specifically includes the following definitions:

“Protected mountain ridges” are defined as “all mountain ridges whose elevation is 3,000

feet and whose elevation is 500 or more feet above the elevation of an adjacent valley floor.” (N.C. Gen. Stat. §113A-206 (6)).

“Tall buildings or structures” are defined to include “any building, structure or unit within a multiunit building with a vertical height of more than 40 feet measured from the top of the foundation of said building, structure or unit and the uppermost point of said building, structure or unit... and no such building structure or unit shall protrude at its uppermost point above the crest of the ridge by more than 35 feet,” (N.C. Gen Stat. §113A-206 (3)).

The definition of tall buildings or structures specifically excludes “**structures of a relatively slender nature** and minor vertical projections of a parent building, including chimneys, flagpoles, flues, spires, steeples, belfries, cupolas, antennas, poles, wires, **or windmills.**” (emphasis added). (N.C. Gen. Stat. §113A-206(3)(b)).

III. Interpretation of the Ridge Law

Interpretations of the exclusions contained within the definition of “tall buildings or structures” have varied and have been viewed three ways: (1) windmills are exempt only if they are relatively slender in nature and are minor vertical projections of a parent building; (2) windmills are exempt because they are naturally slender; and (3) windmills are exempt, period.

There exists no case law to date interpreting the Ridge Law. After a recent inquiry by Watauga County Planning and Inspections Director, Joe Furman, the North Carolina Attorney General has declined to take a position at this point. Therefore, it is left up to the individual county to interpret and apply the law and the following factors should be considered by Watauga County.

First, it is well known that from 1979 until 1983, a Mod-I wind turbine was located on Howard’s Knob, a prominent 4000’ peak rising just north of Boone. Because of the timing of the Ridge Law, there is support for the third interpretation, being that windmills were specifically excluded from the definition of tall buildings or structures to avoid de-legitimizing the Howard’s Knob project. (Watauga County Planning Board member Tom Foxx, who was a planner at the Division of Community Assistance at that time, and who was also involved with the drafting of the statute, confirmed this.)

A second factor to consider is simply looking at the Webster’s Dictionary definition of “slender,” which is “small or slight in width in proportion to height or length.” Whether a windmill is “relatively slender in nature” is subjective. However, objectively, it would be hard to argue otherwise.

IV. Conclusion

Taking into consideration the history of the Ridge Law, its stated purposes, and the simple language of the statute, it is my opinion that windmills were intended to be exempt. Therefore, it remains up to Watauga County whether to be silent as to their use, or whether to

enact an ordinance promoting windmills and taking the opportunity to address anticipated issues which may arise as a result of their use.