

Highland to choose wind policy

BY ANNE ADAMS • STAFF WRITER

MONTEREY — Highland County is going to have to make a decision on whether commercial wind facilities will be welcome here. According to county attorney Melissa Dowd, what Highland needs is a policy decision.

Highland New Wind Development LLC presented its plans for a 20-turbine facility generating 39 megawatts to officials last month, and last Thursday, planning commission members met with county supervisors to talk about what do next.

HNWD has made two different requests: One for an amendment to the zoning ordinance's limit of 35 feet for structure height, and the other for a conditional use permit to construct and operate a wind energy generating plant on Allegheny Mountain.

Highland County Planning Commission held an initial review of both requests last month, tabling any further action until last week's meeting and an on-site visit.

Dowd told planners and supervisors Thursday the zoning ordinance simply had no language to specifically address industrial wind plants. She said she had researched the matter by pulling together as much information as possible to present a "strategy" for analyzing what the county could do with the requests. "I made a real effort not to approach this with any pro or con," she said.

A zoning amendment

In explaining the request for a zoning change on the height limit, Dowd said based on how HNWD's attorney had interpreted the county ordinance, the language in it was "as clear as mud." She put the question to county officials: Do they want fresh language that clearly states Highland County policy with regard to commercial wind turbines in general, or wind turbines over 200 feet in height? And should that language be presented at the planning commission's required public hearing, along with HNWD's proposed language?

In addition, she asked, should the height requirement issue be resolved by both boards before the conditional use permit is considered? If county policy is that the ordinance does not address wind turbines at all and therefore they are not permitted anywhere in the county, it doesn't make sense to spend time on the permit application, she said.

"I have studied the words of Section 701.01-3 long and hard and I come up with a

minimum of four plausible interpretations," she said. Those include:

1. Wind turbines cannot be considered because they are not mentioned specifically by name in the zoning ordinance, so they are bound by the 35-foot limit, which can only be increased with the approval of the board of zoning appeals after a public hearing.

2. Wind turbines can be considered towers, because at least part of them is a tower, and towers are exempt from the ordinance except when they are over 200 feet, when they need FAA approval. So, FAA approval is all that is required of church spires, water towers, silo barns, towers, etc., if they are over 200 feet. No amendment or variance is necessary regarding the height issue.

3. Everything over 200 feet is not exempt and requires both FAA approval as well as approval by the BZA, and must meet the over 35 feet requirements of the ordinance.

4. Wind turbines are not mentioned specifically in the ordinance and are not the same things as towers (what the drafters probably had in mind were communication towers, she said) and therefore, are not permitted anywhere, by conditional use or otherwise.

"Given the ambiguity of the words, I recommend that the planning commission and the board and the council consider amending the ordinance so that Highland County's policy on commercial wind turbines and their height is stated clearly," she said.

In a written presentation, Dowd presented four options for the county to consider:

1. HNWD has provided a choice in its application, which would exempt commercial wind turbines from height requirements so long as county and FAA approval had been obtained. "In a fax received this afternoon from the applicant's attorney, the applicant suggests that one of the versions of interpreting (the ordinance) might be that an amendment is not necessary after all, and if the county follows that interpretation, then ignore its request for an amendment," Dowd wrote.

2. The county could state that church spires, belfries, cupolas, monuments, water towers, etc. — and commercial wind turbines — are exempt up to 200 feet. Any of these structures over 200 feet will require BZA and FAA approval.

3. The county could state that all of those structures are exempt up to 200 feet, and anything over 200 feet requires only FAA approval.

4. And the county could say the height of

any wind turbine over 35 feet must be approved by the BZA, in addition to a conditional use permit, if one is required by the zoning district.

Actions by governing bodies, she said, get a presumption of validity. "This application has the potential to be far-reaching and you can be very restrictive with the language, or you can open the door wide open," she said.

The only thing that was clear, according to Highland's ordinance, was that HNWD needed FAA approval to build anything over 200 feet tall. The turbines, including the "propeller" blade at the top, are proposed at a height of 400 feet. Dowd said it seemed from her reading of the ordinance that an amendment for height is not a "use" decision and would therefore require approval from the Highland County Board of Zoning Appeals.

Dowd said as the county's attorney she could "defend" four different interpretations of the ordinance, so she recommended the county first determine its policy. "If the two boards determine they want the most restrictive language that would prohibit wind turbines, they should decide that first," she said.

Dowd wrote, "In my legal opinion, the existing language can be interpreted so many ways that the issue becomes a policy issue instead of a legal interpretation. The county should decide what it wants the language to say. Because the applicant has proposed new language, one can presume that the applicant interpreted those words in such a way that they needed to be rewritten to permit what he is asking for. At least that was a safe assumption until this afternoon, when the applicant's counsel suggested a different interpretation of the ordinance section. Therefore, I believe it is fair for the county and the town to decide what the height policy should be related to wind turbines, since the issue may arise again with another application. A clear policy choice is legally defensible. Ambiguous language is much harder to defend."

What HNWD's attorneys said in that document was they believed wind turbines "clearly fall within (a) dictionary definition of "tower," since turbines are higher than their diameter and high relative to their surroundings. Therefore, they said, the turbines were exempt from the height requirement except for the fact that they are taller than 200 feet. Towers higher than 200 feet require FAA approval, which HNWD says it already has. "If the county agrees with this reading of its ordinance, and so indicates in writing, then the requested

amendment ... is unnecessary and may be pulled off the table.”

HNWD counsel wrote that if the zoning ordinance amendment is necessary, “we strongly contend that the approval of the Town of Monterey is not necessary,” saying their reading of the ordinance found many instances when approval was needed by the county or the town, as applicable. “Clearly, it was intended that either jurisdiction, acting alone, has the authority to adopt amendments.”

After her presentation, Dowd told officials she would be glad to draft some language so when the planning commission holds a public hearing on the zoning amendment application, it has something to go by.

Planner Lisa Kodger asked Dowd whether she had considered the importance of setbacks in the application.

Dowd explained that in the proffers to the county offered by HNWD, she believed the company would meet setback requirements.

Supervisor Jerry Rexrode agreed with Dowd on the ordinance. “I don’t think wind turbines were ever envisioned (when the ordinance was written) ... this is new,” he said. He also agreed on the importance of sufficient setback requirements, saying there is a chance one of the turbines could fall and damage another property. “I don’t think I’d want anything less,” he said.

Dowd stressed, “It would be fairest to the community and the applicant to state a policy, than choose among various interpretations (of the ordinance) ... You can choose to continue to have control over it. You are charged with land use decisions that are in the public’s best interest. Your choices are to either go with their interpretation or draft alternative interpretations,” she said, again offering to draft something for officials to review. “Tell me what you want as a policy.” Planners and supervisors have to consider the language offered by HNWD since it has already applied, “but you can change the language,” she said. “Your opinion of what the proper wording ought to be should also be considered.”

“I’d like to see what you’d draft,” Rexrode said.

“Do you want to exempt turbines between 35 feet and 200 feet, or all turbines looked at by the BZA?” Dowd said.

Kodger asked whether planners could “tweak” what HNWD had proposed.

“Yes,” Dowd replied. “You can look at language from them, and mine, and then set the policy.”

Officials agreed to let Dowd draft some interpretations for policy over the next 10 days. “And the public can comment on it at your public hearing,” she said.

Conditional use permit

On the request for a conditional use permit, Dowd said she did a lot of research as well. “I attended two information forums (one held by the county, the other by the chamber of commerce), saved all The Recorder articles, and other information, in order to find how can we easily get to this without the minutiae and detail, in making a good land use decision.”

Dowd explained there are specific criteria officials must consider when presented with a conditional use permit request, and the zoning ordinance clearly focuses on the impact of granting a conditional use permit on the immediate area, the neighborhood. “The applicant believes there is no neighborhood,” she said, “but I respectfully disagree.” She said they must consider things like traffic, property values, and what else exists around the property.

She emphasized the need to balance the rights of property owners. “Does one man have the power to dictate what the rest of a neighborhood is going to look at, or the rest of the property values?” She asked, “What do we want to know about these proposed wind turbines so a decision can be made that balances the rights of one individual to use his land as he chooses and the rights of the citizens of the neighborhood and the county? A good land use decision does not consider ‘not in my back-ground’ as a valid basis for making a decision. Instead, a good land use decision balances the rights of an individual along with the rights of others, based on definite criteria.”

Dowd cited the county’s comprehensive plan for guidance and pointed to what she called two “very strong” statements:

1. “Beauty and aesthetics including preservation of our historic character and natural resources will be principles we apply in determining land use policies.”

2. “The preservation and protection of the county’s unique natural resources has become a long-term goal of local citizens.”

Dowd’s written presentation outlined questions the county should ask in order to make a good decision. They included questions about HNWD’s business: “Who are the members? How can new members be added? Will it ultimately be owned by Florida Power & Light or another large utility? Can local folks invest in it? Are we positive that any successors will be bound by any conditions placed on the original company? Is it bonded or will we get a letter of credit that is transferrable to the successors? Will HNWD continue if federal production tax credits don’t materialize? How likely is that?”

Dowd said HNWD should be able to an-

swer those questions, and suggested consulting Congressman Bob Goodlatte about federal tax credits.

She pointed out that though the applicant said it had FAA approval, she didn’t see any evidence of that included with the application. She said it occurred to her that both the U.S. Air Force, which uses a military training route in the area where planes fly as low as 500 feet, and the Green Bank Observatory in West Virginia, might have an opinion about the project. “If this will negatively impact the work at Green Bank, this may be a wasted exercise,” she wrote.

Her questions about view sheds included: Should the applicant be allowed to change the location after approval of a permit? Can the applicant change the location within a certain number of feet after the approval? Dowd wondered whether the applicant should be required to complete a visual impact study and provide the board with a computer-generated simulation of the impact on the view shed. “Given the topography and the current proposal for sitings, will Pendleton Goodall really be able to see it from his front porch? Will they be able to be seen from Monterey Mountain, U.S. 250, etc.?” Also, she asked, “Has the applicant presented an exterior lighting plan? Can any computer simulation include a night view so the projection range of the exterior lights can be estimated?”

The environmental issues, Dowd said, can still be addressed, though she felt requiring HNWD to undergo state and federal reviews within a year’s time would be impossible. “But you can ask for any level you want (as a condition) if that’s important to you,” she said. “It’s a great theory,” she said, referring to Central Shenandoah Planning District Commission’s recommendation that all state and federal reviews be completed first. “But I don’t think we can fit that within a 12-month time frame. Under your time constraints, I don’t think you can get there. You can’t get these agencies to tell you what to do because they don’t know.”

She outlined questions regarding environmental issues, including whether there were proposed erosion and sediment control plans, or storm water run-off projections. As for which level of environmental assessment, if any, she pointed to the Endangered Species Act, the Migratory Bird Treaty Act, the National Environmental Policy Act, and the Bald and Golden Eagle Protection Act. “We know that USDA has identified the Virginia northern flying squirrel, the Indiana bat, the Virginia big-eared bat, and the bald eagle as species that may occur within the project area. Must the applicant complete some kind of environmental assessment in order to deter-

mine the impact on the neighborhood?"

Dowd also pointed to concerns about noise, saying though the CSPDC found no clear problems with noise, the video of a couple in Pennsylvania said it was a big problem for them. "Do we want a guarantee?" Dowd asked. She also asked whether emergency services communications might be affected. "Should we make the applicant provide proof that the ambient noise level at the McBride property lines will remain unchanged?" she wrote. "Must the applicant prove there will be no interference with cell phones, TVs, etc., in the neighborhood?"

On property values, Dowd said, "There's no way to get a handle on it." Some have said the turbines would have a detrimental effect on neighbors' values; some say they don't. "There are no hard facts to prove it," Dowd said, suggesting asking someone at Virginia Tech to come up with criteria to determine whether or not turbines affect property values in the neighborhood.

"The applicant has already asked for a waiver of the six-month requirement to put the conditional use permit in use. Although Highland reviews conditional use permits each year to determine compliance with the original (permit), should the overall duration of the requested (permit) be extended to the life of the wind turbines?" she wrote. "They will need a long-term promise, but how long? The life of the project?"

HNWD also said it would restrict its project to the current 39 kv power line already running across the property. "But the applicant also said they may need to be upgraded. What does that mean?" Dowd said. "I don't know what that means."

As for maintenance and removal HNWD said it would maintain the turbines in good working order. "Does that include the out-buildings, towers, etc.?" Dowd asked. "What about bonding or letter of credit to deal with removal or replacement when a turbine has no life left? Should we define periods of no activity and their lengths?"

Also, she asked whether HNWD will be restricted to a certain number of turbines. "Will any change at all in the project mean another conditional use permit?"

Dowd told officials, "I encourage each one of you to think about these things and decide, how important is this to me? Rate them on a scale of 1 to 5," she said. "There is information out there to help you ... You need to decide, what are the critical issues?"

Supervisor Robin Sullenberger added, "We all need to be thinking about what are the priority items," and invited the public to make further suggestions. "The public would be welcome to present those."

"We're the guinea pig," said planner Jacob Hevener. "That's what it's all about."

Rexrode added, "It's about good land use planning, suitability for things with the natural character of the land. It's the responsibility of the community to decide which areas are appropriate for development."

Kodger said she had concerns about the planning commission having enough time to make an informed decision. Dowd reminded planners they could extend any of the time limits with approval from HNWD.

"If (the permit) were denied, (HNWD) couldn't come back for 12 months, and more information could be gathered," Kodger said.

Planning commission chairman David Johnston said planners would rather not hold a public hearing on the permit. He said for the amendment, planners only have 60 days. "If we meet the 23rd and have to set a date for a public hearing, then if we change the language and hold a hearing, that will be the same night."

"You will have finished your duties, then," Dowd said. "And the board of supervisors will have one year ... If you identify your concerns, the applicant's going to want to give you that (more time). It's in their best interest."

Hevener said he had visited a commercial wind project in Pennsylvania and "I couldn't see anything wrong with the situation." He said the project generated tourism and there was "no noise whatsoever." He cited "all this objection" to the proposal and noted he would not be able to see them from his home in Hightown, but he couldn't see anything wrong with the turbines. "I'm not saying how I'm going to vote," he cautioned.

Planners and supervisors set a date to tour the HNWD property on Allegheny Mountain, plus the properties of nearby landowners Tom Brody and Pendleton Goodall. A tour of all three places has been scheduled for Tuesday, Sept. 21, leaving Monterey at 2 p.m.

Dowd said this week that after last Thursday's meeting, legal representatives for HNWD asked whether the company could simply ask for a variance on height that accompanied its request for a permit, thereby eliminating the extra step of approval through the board of zoning appeals. Dowd told The Recorder cutting out that step would leave control in the hands of supervisors and she didn't really have a problem with that, but wasn't sure it fit with how Highland has historically handled such applications. "How you use land has usually gone to the planning commission and supervisors for review," she said. "Area, height, setbacks, those physical details, usually go in the direction of a variance reviewed by the board of zoning appeals. We have to ask, is there a theoretical difference?"

The planners' next meeting will be held Thursday, Sept. 23, at which time they are likely to set a date for a public hearing on the amendment request and consider draft language from Dowd. Planners have until Oct. 25 to make a recommendation to supervisors on both requests. If they do not do so, the requests are considered approved by the commission.

Ultimately, Dowd said Tuesday, "The planning commission and supervisors, whether they like it or not, are being forced to deal with this directly ... Because of the approach the county took it seems the county is going to seriously consider this (project). Everybody had this big, black cloud; they knew it was a big, emotional issue. No one really knew how to take a big bite out of it and that's what I was trying to help them with."

Kodger said this week she felt Dowd's presentation and recommendations were helpful to the planning commission. "I thought it was really good. It gives a little direction to all the members of the planning commission, to see things put in that way gives us alternatives."

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