

Supreme Court to hear wind cases

BY ANNE ADAMS • STAFF WRITER

RICHMOND — After more than a year of legal battles over Highland New Wind Development's proposed wind energy utility, the Virginia Supreme Court has decided to hear two cases appealing Highland County's decisions in the permitting process.

And to the surprise of those suing the county, the court decided to forgo its usual panel process for taking cases, which had been scheduled for Tuesday. Attorneys expected to argue before three judges, which is the customary procedure the Supreme Court uses to determine which cases it will hear. But last Friday, lawyers involved were notified the panel review would not be necessary; the court had decided to take the cases without oral arguments.

Highland citizens suing the county are represented by attorney David Bailey, who was prepared to use an allotted 10 minutes before the panel to convince judges the cases should get a full Supreme Court hearing.

Bailey was surprised by the court's decision to eliminate that step. "Such summary grants are rare," he said this week. "Clearly the court is willing to address some important zoning issues which have not been decided before."

HNWD plans to erect up to 22 wind energy turbines standing 400 feet high on the county's tallest ridge, Allegheny Mountain. If built, it would be the first industrial wind power facility in Virginia.

Residents and landowners opposed to the project filed suits in May and August 2005 after county supervisors changed the height ordinance and approved a permit for the utility. Those cases had been combined by the lower court. In April 2006, a third lawsuit was filed against county officials alleging the planning commission was not given proper authority to conduct a review of the project and compare it to the comprehensive plan. The county prevailed in court at the local level when Judge Paul Sheridan ruled in favor of the local government's decision, saying he could not find the board of supervisors had illegally issued HNWD's permit. By August, Sheridan ruled in the county's favor again on the planning commission review lawsuit.

Bailey appealed all Sheridan's decisions to the Supreme Court.

The high court's granting "certiorari" in the two cases being appealed happens only about 10 percent or less of the cases before them,

and most of those are criminal cases where constitutional rights are involved, Bailey explained. Of those, he said, "it is very rare to grant cert without any argument of counsel before a cert panel. Clearly, this means that the court believes that there are substantive issues to be decided in these cases."

Of cases the Supreme Court elects to hear, the reversal rate on decisions is about 50 percent, Bailey said. "There is no way to know which way the court is leaning, but the odds are for reversal in a situation developing like this."

Through this spring, the court will receive briefs from both sides, and a full hearing may be scheduled for the June 4-8 session, and a decision rendered in mid-September. The briefing schedule takes 79 days, Bailey said. If it's not scheduled in June, the next court session is Sept. 10-14. After a decision, 30 days must pass before it becomes final, Bailey added.

The timing of the litigation process may be affected by legislation pending in the General Assembly. One bill now before the House has a direct effect on the lawsuit. It was proposed by Sen. Frank Wagner (R-Virginia Beach), and essentially would change the way a planning commission's review relates to an approval by supervisors on utility projects (see related story). "It's absolute classic special interest legislation," Bailey said.

In one of the cases, Highland citizens are challenging the timing of Highland's planning commission review of HNWD's proposal. Planners, by law, had to take a look at the project and determine whether it was in "substantial accord" with Highland's comprehensive plan before the county issued a permit. But supervisors granted HNWD a conditional use permit before planners reviewed the plans. The board had made the review a condition of the permit. When planners finally reviewed the proposal, about 10 months after the permit was approved, they determined the utility would be in accordance with the land use plan.

Wagner's bill proposes to make it legal for a planners' review of utility projects to happen after approval by a local governing body. If it passes, the new law would be in effect July 1. Under that scenario, HNWD could submit another application for a permit if the Supreme Court does not overturn the county's decision.

Bailey said he did not expect the court to take the pending legislation into consideration, as it would more likely only consider argu-

ments about the case on the laws in place at the time the permit was approved.

"It's bad legislation in intent, purpose, and substance ... It's exactly what we're suing for," Bailey said. "It makes the whole planning commission irrelevant."

Highland supervisors declined to allow county attorney Melissa Dowd to comment on the cases this week. "We have been informed of this decision, but have not had an opportunity to discuss the implications with counsel," said board of supervisors' chairman Robin Sullenberger Tuesday. "It would be inappropriate to offer any response prior to that discussion."

Bill could affect wind project

BY ANNE ADAMS • STAFF WRITER

RICHMOND — Legislation introduced in this session of the General Assembly could affect the ultimate outcome of the evolving controversial proposal to erect the state's first industrial wind energy utility in Highland County — and those opposed to the project are crying foul.

Sen. Frank Wagner (R-Virginia Beach) brought the bill (SB 1351) before the Senate last week and is its only patron. In its amended form, it proposes to change state law regarding planning commission reviews of utilities. It basically says a local governing body could authorize building a utility before a planning commission reviews it to determine whether it's in "substantial accord" with a local comprehensive plan. Current law states the planners' review must come first.

The order of the review lies at the heart of the lawsuit pending before the Supreme Court — Highland citizens are challenging the county's approval of a permit for Highland New Wind Development's wind power facility, which happened before the project was reviewed by Highland planners.

The bill was introduced Jan. 16, referred to the Senate committee on commerce and labor, revised, and approved in committee with substitute language Feb. 5. The revised bill passed the Senate, 26-11, on Feb. 6. Three senators abstained, including Mark D. Obenshain (R-Harrisonburg), whose law firm represents HNWD owner H.T. "Mac" McBride and his family.

Sen. Emmett Hanger, who represents Highland County,

voted in favor of the bill.

Feb. 8, the bill was sent to the House, and referred to the committee on counties, cities and towns. It is expected to be reviewed Wednesday.

Attorney David Bailey, who represents Highland citizens suing the county on the matter, said he believes even if the bill passes, the Supreme Court would render its decision on the case based on what the law said at the time Highland officials granted HNWD's permit.

However, if Highland citizens win their case, and the bill passes into law July 1, HNWD could reapply for a local conditional use permit again under the new law.

Highland supervisors approved HNWD's permit with several conditions attached, one of which stipulated Highland's planners find the project in accordance with the comprehensive plan. Planners determined the project was in accord, but those bringing suit argue that review should have taken place before permit approval, not afterward, by state law.

Highlanders opposed to the way the permit was approved also object to Wagner's bill, saying it undermines the intent of the planners' finding, which should guide supervisors in reviewing such projects. This bill would effectively eliminate planners' input, they argue.

Bailey calls the proposal "bad legislation," and aimed at this particular situation. He has consistently argued that consistency with the comprehensive plan in any locality is an essential part of land use planning.

Wagner did not return calls from The Recorder this week.

\$200,000 in legal fees spent by county

MONTEREY — Since 2004, Highland County has forked over more than \$200,000 related to Highland New Wind Development's project plans here. Most of has been spent on defending supervisors' decisions. According to county administrator Roberta Lambert, those amounts are:

- \$61,133 paid to county attorney Melissa Dowd, from August 2004 through January 2007.
- \$142,087 paid to Gentry, Locke, Rakes & Moore for the services of attorney Greg Haley, who was hired in 2005 to assist Dowd. This amount is the total paid to the Roanoke-based firm from June 2005 through January of this year.

The total spent to date is \$203,220. This year, the county will continue to spend on its defense, as the Supreme Court has chosen to hear appeals in the cases. As the county begins budget planning, Lambert said an initial estimate recommendation for legal fees "will be based on the expenditures over the past three years with the estimate adjusted as needed during the budget process prior to adoption of a proposed budget."

— Anne Adams