

May 7, 2007

**Via FedEx and
Via Fax: (814) 443-2255**

James Cascio, Esquire
Solicitor, Windber Area Authority
Fike, Cascio & Boose
124 North Center Avenue
P.O. Box 431
Somerset PA 15501-0431

Re: Windber Area Authority/Berwind Corporation
Shaffer Mountain Wind and Gamesa Energy Industrial Wind Farm

Dear Mr. Cascio:

Our Firm represents Tamara and John J. Buchan, Jr., owners of roughly 460 acres of property in Napier Township, Bedford County, Karin and John Sedewar, owners of roughly 105 acres of property in Shade Township, Somerset County, and Napier Township, Bedford County, and Randy Ritchey, owner of property on Gravity Hill Road, Napier Township, Bedford County. Parts of our clients' properties are within the Windber Area Authority watershed.

As you know, Gamesa Energy and Shaffer Mountain Wind plan to build an industrial wind farm in the Windber Area Authority's watershed. This industrial development proposes 33 wind turbines, 17 miles of roads and transmission lines, and even a concrete manufacturing plant. Once the Authority was provided with complete information showing the full magnitude of the proposed development, its Board properly voted against the project.

We understand that Berwind Corporation, one of the landowners to benefit from the industrial wind farm, asserts that it is **entitled** to the Authority's approval under Section 4 of the Memorandum of Agreement between Berwind Corporation and the Authority dated December 29, 1989. We read Section 4 differently. Given the fact that the Authority is the protector of the public water supply for 10,000 people, the Authority must take all actions necessary to guard against any development that would degrade the water supply.

Section 4 says as much: "Authority agrees that Berwind, its successors and assigns, shall have the right to develop the Watersheds not conveyed by the First Deed, the Second Deed or the Third Deed, **provided, however, that such development does not materially degrade Authority's water supply.**" (Emphasis added.) We read this

Windber Area Authority
May 7, 2007
Page 2

proviso as a condition, that is, if the Authority has grounds to believe that the proposed wind farm development will materially degrade the water supply, then Berwind is simply not entitled to proceed with the proposed development. We read this clause as giving the Authority the right to veto, in the public interest, any development that will materially degrade the water supply.

Berwind will probably rely on the following sentence in Section 4: "Authority shall, within forty-five (45) days of any such notice [from Berwind], furnish its outright or qualified approval of the development proposed in such notice." We would expect Berwind to argue that the mandatory term "shall" requires the Authority to approve any development Berwind proposes, subject only to the Authority's right to impose conditions. In our opinion, this would make no sense. Such a reading would require the Authority to approve a development in the Watershed, even if the development would cause a material degradation of the water supply. This interpretation would elevate Berwind's rights as a developer over the Authority's obligation to protect the public water supply. This reading would only give the Authority the right to impose conditions. We believe it is more logical to read the subject sentence (about approval) as subordinate to the proviso quoted above, that is, absolutely no development that will materially degrade the water supply may be permitted. Only as to those developments that are permitted, i.e., those that will not materially degrade the water supply, must the Authority give either an unqualified or qualified approval.

As you know, the Pennsylvania Municipality Authorities Act, 53 Pa. C.S.A. §§5601 et seq., grants the Authority broad powers. Section 5607(d)(17) gives the Authority power "To do all acts and things necessary or convenient for the promotion of its business and the general welfare of the authority to carry out the powers granted to it by this chapter or other law...." The Act grants the Authority wide discretion in determining how to conduct its business. Helmerich Drive-It-Yourself, Inc. v. Erie Mun. Airport Authority, 612 A.2d 562, appeal granted 584 A.2d 323, affirmed 608 A.2d 495. Denying of an industrial development that threatens the water supply would seem to be well within the Authority's proper exercise of discretion. Indeed, the Authority's failure to maintain the quality of its water supply could invite enforcement action by the Department of Environmental Protection under the Pennsylvania Safe Drinking Water Act, 35 P.S. §§721.1, et seq.

We understand that when Gamesa originally described its plans to the Authority, the Authority imposed conditions recommended by Mr. James Casselberry. Through no fault of his own, Mr. Casselberry recommended these conditions without having complete information about this industrial development. Mr. Casselberry was not aware of the full scope of the roads, stream crossings, culverts, trenching, permanent diversion channels, excavation, sedimentation structures, and water retention facilities proposed for construction in the Authority's watershed at the time he made his recommendations.

Windber Area Authority
May 7, 2007
Page 3

Under the circumstances, we believe the Authority would be warranted in withdrawing those conditions and simply revoking approval to the extent it anticipates that the development will cause a material degradation of the water supply.

In the alternative, we believe the Authority and Mr. Casselberry would be warranted in imposing additional conditions now that the Authority has information that was not disclosed at the outset. In the event of a disagreement as to whether the developer ultimately satisfies the conditions, the last sentence of Section 4 of the Memorandum of Agreement provides for arbitration.

Thank you for considering our views on this important matter.

Very truly yours,


Bradley S. Tupi

cc: Tamara and John J. Buchan, Jr.
Karin and John Sedewar
Mr. Randy Ritchey