

**One Community's Experience with Wind Development:
An Interview with Richard J. Graham, Esq.
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as told to Katherine Daniels of the
New York Planning Federation**

Introduction

The new Maple Ridge project on the Tug Hill Plateau is the largest wind farm on the east coast, involving Lewis County and the Towns of Martinsburg, Harrisburg, Lowville and Watson. As a key negotiator in reviewing, assessing, and finally seeing the project through to completion, attorney Richard Graham here offers his insights, experience and thoughts about lessons learned in the process.

Q1: How was the community first approached by the wind developer?

A1: Bill Moore of Flat Rock Windpower, LLC, began meeting with local officials and school districts in the summer of 1999, proposing the development of 67 wind turbines and a transmission line on property to be leased from local landowners.

Q2: What kind of financial compensation was offered?

*A2: Landowners – mostly farmers – were offered between \$5,000 and \$10,000 for each tower. A payment of \$5,000 per megawatt or about \$7,500 per tower was offered to the local governments as a **PAYMENT** in lieu of taxes, to be divided by each of the three taxing jurisdictions – town, school district and county. Although each tower is valued at approximately \$1.8 million, NY Real Property Tax Law S. 487 exempts wind and solar energy systems from real property taxes for up to 15 years, provided that taxing jurisdictions do not opt out of this provision.*

Q3: What was the initial reaction of the community to the proposed project?

A3: There was little public reaction to the proposed project. Initially, local officials were reluctant, partly because local counsel did not believe that a contract to make such a gift was enforceable. County officials then approached State representatives to request legislation to amend the law to allow for enforceable payment in lieu of tax agreements. The law was successfully amended in 2002. In 2006, this change was extended to continue to apply until 2011. As a result, communities across the State can now be assured of being able to enforce payment in lieu of tax agreements for wind towers.

But even after the change in the tax law, local officials still felt that the compensation offered by the developer was low, compared to what otherwise would have been payable at the full assessed value of each tower. Additionally, the relative distribution between the school district, town and county became a point of heated debate because of the small dollars involved.

Q4: What changed the municipalities' perspective?

A4: The then-County Planning Director took an additional step and encouraged the developer to explore the benefits of placing the wind farm in an Empire Zone. This would allow the developer to pay full property taxes to the taxing jurisdictions and in turn be reimbursed 100% by the State. Special counsel was retained in 2002 to advise the County on amending the Empire Zone to include the proposed towers and to certify Flat Rock Windpower, LLC as a Qualified Empire Zone Enterprise. This was the first time that a wind farm had been placed in an Empire Zone in New York.

As a result of these efforts, we were able to negotiate a PILOT (payment in lieu of tax) agreement whereby Flat Rock will make annual payments of up to \$46,000 per tower (to be divided among the taxing jurisdictions). At full build out, the municipalities anticipate receiving approximately \$8 million per year in PILOT payments. Once the prospect of receiving these kinds of revenues became apparent, any internal political debates evaporated. The \$5,000 per MW payment amount remains as a "fallback" amount only in the event that the law is changed and EZ benefits are no longer available.

With passage of the Clean Energy Enterprise legislation (Session Laws, Chap. 109, 2006), New York has legislatively established a statewide mechanism to encourage renewable energy development. Under the legislation, a clean energy enterprise is deemed to be in an Empire Zone so long as 80% of its property in New York State is dedicated to the research or development of renewable energy. It is no longer necessary for such entities to go through a local designation process. The Empire Zone application process will be handled directly with the Commissioner of Economic Development.

In Lewis County's case, the Empire Zone boundaries were amended three times in order to accommodate the developer's evolving plans for this project. Each amendment required a local law to be adopted by the County, along with concurring resolutions from each of the towns. This entire process has now been eliminated.

Q5: It sounds like the County was a key participant in the process.

A5: The County really picked up the ball from the beginning and played a major role in getting the project off the ground. It was the County's initiative that got the Real Property Tax Law changed and succeeded in enlarging the Empire Zones to include the wind farm. I was particularly impressed by the pro-active steps taken by our County Planning Department. My hat's off to them.

Q6: Did you have any difficulty in coordinating the participation of the various jurisdictions involved?

A6: In a project of this size, coordination is essential. The County initiated several joint meetings with all the involved municipalities and their legal counsel, which were always a challenge, as there were a variety of viewpoints.

Q7: Despite the inherent challenges of such meetings, did you see any benefits arise from the coordinated efforts?

A7: Yes, most definitely. First of all, the community needs to decide early on whether or not it wants the project. The County took the lead and local officials decided to accept the project. The sooner you can agree conceptually that, yes, this is something we want to do, the easier it will be to work out the finer points. Secondly, in a project of this scale that covers several towns, it is important to develop a common approach to resolving the legal issues. For example, all of the communities wanted a road maintenance agreement to protect their infrastructure. By coordinating our efforts, we were able to approach the issue with a united front that eventually benefited all parties. Similarly, each town conditioned its permitting for the project upon execution of the PILOT Agreement as well as the Road Maintenance Agreement.

Q8: You mentioned a road maintenance agreement. Why was this such an important issue to the communities?

A8: We knew that existing highways were in no condition to support the massive equipment needed to transport tower components or the heavy use required to deliver concrete and gravel for access roads and foundations. So the towns and the County asked for a road maintenance and reconstruction agreement to make Flat Rock responsible to 1) designate the routes to be taken during the construction phase, 2) rebuild the designated roads where necessary to meet anticipated use by heavy equipment and 3) repair any damage to affected roads after construction was completed. All road work, including materials, was subject to the respective highway superintendent's approval. The work by Flat Rock was guaranteed for a year and carries a \$1.5 million performance bond as security.

The Road Maintenance Agreement also contained provisions for decommissioning the wind turbines. Instead of securing the decommissioning by a performance bond for each tower, the developer agreed to make an annual payment - based on an independent engineering assessment - against the depreciated salvage value of the tower, to go into a fund for the eventual removal of the tower. The salvage value of the towers generally equals or exceeds the cost of removal.

Q9: What sort of environmental review was performed?

A9: The developer prepared a full Draft Environmental Impact Statement (DEIS), as the project was a type I action with the potential for significant environmental impact. Because of the multiple jurisdictions involved, a coordinated review was worked out whereby the Town of Martinsburg was selected as lead agency, subject to receiving comments from the public hearings conducted in the other towns.

Q10: What was public reaction to the DEIS at the local public hearings?

A10: Unlike the attention wind farms are drawing today, the Town of Lowville initially received no objections from the public and I am told the Towns of Martinsburg and Harrisburg received no objections as well. The questions raised by the public concerned project management, such as how roads and traffic are to be

handled, rather than outright opposition to the project. The permits have been amended twice since then, and it wasn't until the most recent amendment that we had two individuals, one of whom resided outside the Town of Lowville, raise any objection to the wind farm on purported environmental grounds.

Q11: I understand that in 2003, the developer proposed to expand the project.

A11: Yes, the developer proposed to add 119 towers for a total of 186 towers and also proposed to use a 1.65 MW turbine rather than the originally-planned 1.5 MW turbine. The increased electrical production necessitated extending the transmission line, which impacted two additional school districts. The Empire Zone boundary was amended to include new areas and the PILOT agreement was expanded to include the new taxing jurisdictions.

Q11: Did the towns impose any other conditions on the project or require mitigation?

A11: The only other conditions imposed were those the NY DEC requested. In addition, the developer has agreed to use the project as a model for future developments and is working on a joint project with DEC to monitor bird mortality. The developer has also volunteered to renovate the historic Town of Martinsburg town hall.

Q12: Did the towns seek or receive assistance in reviewing the application?

A12: Other than the County's participation and the three towns use of counsel, they did not. The towns relied on, and were satisfied with, the involvement of various government agencies, including the NY DEC, U.S. Fish and Wildlife Service and NY State Historic Preservation Office, that made input on environmental and safety issues a part of the SEQR process.

Q13: Did any of the towns have existing regulations in place pertaining to the approval of wind energy facilities?

A13: No, none of them did. The developer waited for the towns to change their land use regulations to allow wind energy facilities. Lowville adopted its zoning law for wind power generating facilities in 2002.

Q14: What types of review processes were used to permit the wind farm?

A14: All three towns now use a special use permit and site plan review process for wind energy facilities. These processes require the execution and delivery of the PILOT and Road Maintenance Agreements as conditions for issuance of the permit. The project review standards are fairly simple and straight-forward. The setback for wind towers in Lowville, for instance, is 250 feet from any property boundary. This setback reflects the anticipated 225-foot height of the 1.5 MW towers as originally proposed, although the towers that have actually gone in are 260 feet high, plus the 130-foot blade. Still, the developer generally sites the towers back much further from property lines (or other structures, for that matter) than stated in the local law. Keep in mind that at the time we developed the setback standards, we didn't have information on the potential issues regarding the flicker effect.

Q15: Tell me about the construction phase of the project.

A15: Prior to construction, the developer rebuilt designated roads, as agreed, to meet anticipated new use levels. A system of gravel access roads was built. Construction of the towers began in the spring of 2005. In that year there were 840 transports of tower components and 4,200 truckloads of concrete and gravel delivered to the project site.

As construction proceeded, our local building inspectors wanted to inspect the ongoing work, but the developer objected. When we learned that wind towers are not covered by the NYS Uniform Fire and Building Code, we negotiated an inspection agreement with the developer in lieu of traditional building code inspections. We learned that the developer requires a certificate of completion signed by each contractor (foundation, tower construction and electrical) at the completion of each stage in construction, verifying that the work meets all engineering design and/or manufacturer's criteria. We asked and the developer agreed to countersign the certificates and provide them to our building codes personnel. Our agreement states that these certificates constitute a warranty and representation that the towers are completed according to design specifications. In our view, this agreement provides protection to the communities that goes beyond mere building code compliance. Should one of the towers have a structural failure, we may now contractually reach the owner and each contractor potentially responsible. We get double protection. And it's working just great – everybody is happy. The building inspectors don't have half the work they would have had.

After construction of the towers began, several of the towers needed to be relocated due to wet soils. In addition, one landowner reneged on the lease agreement, and a new lease agreement with another landowner was signed. These changes resulted in a third amendment to the Empire Zone boundary and a net increase of nine towers for a total proposed 195 towers.

Q16: Have there been any complaints since the towers have gone up?

A16: None, at least publicly, though there has been a little private grumbling. One landowner asked that two towers on his property be moved to accommodate a potential camp he would like to develop. Unfortunately, once the engineering is completed to locate a tower, it is quite difficult to go back and rework a given location. As noted earlier, we had one farmer from a neighboring town object to wind farms in general, and another farmer who objected to the potential negative impacts of wind farms on the environment, including the "flicker effect" he sees on his favorite fishing hole. A few residents who still receive their TV signals via antennas have experienced difficulty receiving a signal. The developer has responded by providing satellite dishes in those instances. These are the only complaints that I have been aware of.

Q17: Did the developer offer any other inducements to the towns?

A17: In our case, we've had several positive experiences with the developer in what I call "good faith" issues. These are instances where the developer has agreed to extend its good faith towards the communities. For example, from the very outset, Flat Rock agreed to pay all legal fees incurred by the municipalities, not only in the review of permitting issues, but also in any of the contracting issues that arose. Flat Rock absorbed the entire cost of the special counsel hired to perform the Empire Zone work. The developer has also agreed to fund the cost of a financial advisor to assist the towns with managing the increased revenues, and has offered to construct a visitors' center to attract tourism. Finally, the developer has agreed to make impact payments to nearby neighboring landowners. For example, the developer has agreed to make impact payments to the nearest neighbors to some of the towers totaling \$25,000 per year. Flat Rock has also made \$100,000 in property settlement payments, including the purchase of a residence.

Q18: What are the lessons learned for the communities involved?

A18: Try to understand the economics of wind energy generation from the developers' perspective so your municipality will be in a better negotiating position when you talk about a compensation package. Now that Empire Zone benefits are widely available to encourage the development of renewable energy, it behooves local officials to try to understand the overall dynamics that drive wind developments. These projects require huge infusions of capital. Thus, we find that "Wall Street" investors and economic forces outside the local arena are the ones who shape the business plans for these projects. I encourage local municipalities considering this type of development to take a long hard look at the incentives being offered by the developer and try to make the deal that makes the best sense economically for your community.

Q19: What additional information or assistance would have been helpful to the towns during the process?

A19: NYSERDA has a Wind Energy Toolkit as well as other resources – I find these to be helpful. Some of the recommendations in the Toolkit may have resulted in a smaller project, had we seen and followed them. There wasn't as much information available at the time. But we're happy with the project as it's being developed.

Q20: Are there any other comments you'd like to add?

A20: This has been a good experience for us. Hopefully, being the first New York locality to undertake a wind farm of this scale will prove to be beneficial to our local communities as well as others, in the years to come.

Note: By December, 2005, 120 of Maple Ridge's 195 towers had been erected and began producing electricity. Also constructed were three meteorological towers, a buried and aboveground 34.5 kV electrical collection system, and two electrical substations (in Martinsburg and Watson). Construction was suspended over the winter and resumed in May of 2006. This year (2006), construction activities will include the erection of the final 75 towers, a 230 kV 10.5 mile overhead electric transmission line and

environmental restoration of disturbed areas (soil grading and reseeded) of all towers and transmission line sites.