To Be Argued By:
John W. Dax
Time Requested: 15 minutes

Appellate Division Docket No. OP 20-01405

NEW YORK SUPREME COURT
APPELLATE DIVISION – FOURTH DEPARTMENT

COALITION OF CONCERNED CITIZENS
AND DENNIS GAFFIN, as its President

Petitioner,

- against –

NEW YORK STATE BOARD ON ELECTRIC GENERATION SITING AND THE ENVIRONMENT, ALLE-CATT WIND ENERGY LLC,

Respondents.

BRIEF OF RESPONDENT ALLE-CATT WIND ENERGY LLC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

ADMINISTRATIVE CASES

LOCAL LAWS

CONSTITUTIONAL PROVISIONS

INTRODUCTION

Appellant, Coalition of Concerned Citizens and Dennis Gaffin, as its President, brought this proceeding pursuant to Public Service Law (PSL) 170.Respondent Alle-Catt Wind Energy LLC (ACWE) by its attorneys, The Dax Law Firm, P.C. and Barclay Damon, LLP, submits this Brief in response to the Brief of Appellants Coalition of Concerned Citizens and Dennis Gaffin, as its President (Coalition), and in support of Respondent Board on Electric Generation and the Environment's (Board) Order *Granting Certificate of Environmental Compatibility and Public Need, with Conditions* (*Certificate Order*) (R.399-1) and *Order on Rehearing* (R.419-1) under review in this proceeding. The scope of the Court's review is prescribed in PSL 170(2).

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Question. Is the Board's decision to grant ACWE a Certificate of Environmental Compatibility and Public Need a rational decision, based on substantial evidence and matters of administrative notice, and within its delegated scope of authority?

   Answer. Yes.

2. Question. Did the Board correctly determine that the Town of Freedom's 2019 wind energy law was the applicable local law in effect during the review proceeding?

Answer. Yes.

3. Question. Did the Board violate First Amendment rights of the Farmersville Amish Community?

4. Answer. No.

COUNTER STATEMENT OF MATERIAL FACTS

Appellant Coalition's preliminary statement of material facts is a polemical summation of its disagreement with the energy policy of the State as reflected in the Board's *Order on Rehearing* and *Order Granting Certificate of Environmental Compatibility and Public Need, with Conditions*. Rather than identifying any material facts in dispute, the Coalition argues with the Board regarding the future of the State's electric system and State energy policy, in apparent expectation that this Court might substitute the Coalition's views for those of the Board on matters the Legislature has delegated exclusively to the Board.

The Coalition makes the following misstatements:

1. "[T]he state electric system is unable to advance [the State's greenhouse gas reduction] goals without substantial infrastructure changes. The ability of the State and the private sector to make these changes during the lifetime of this project is speculative" (Coalition Br. at 1). The Coalition makes this assertion without any evidentiary support. The Board properly rejected it, based in part, on recent statutory enactments.

2. The Coalition asserts that the Board's decision to grant the Certificate was made "without regard to how [the Project] operates during 29 of its expected 30 years" and "whether important long-established local environmental and community values should be disregarded in the process" (Coalition Br. at 2). Those assertions are points of argument, not statements of material fact. The Board acknowledged that, as part of the interconnected New York State electric system, how the Project's output will be used depends in part on future transmission developments, some of which are underway, but did not show a lack of regard for future operations. Nor did the Board disregard "local environmental and community values" which, as reflected in local comprehensive land use plans and land use laws, were thoroughly examined by ACWE in its Application; were the subject of testimony and briefs; and were found to be supportive of the Project.

3. The Coalition asserts as fact that the Board disregarded "First Amendment rights of an Old Order Amish settlement in Farmersville" (Coalition Br. at 2). This is false. The Board in fact explained in its *Certificate Order* and *Order on Rehearing* that its decision did not burden or interfere with the religious practices of the Amish community in Farmersville.

ARGUMENT

I. RESPONSE TO POINTS II AND IV. THE BOARD PROPERLY DETERMINED THAT THE PROJECT'S BENEFITS OUTWEIGH ITS UNAVOIDABLE ADVERSE IMPACTS WHICH WILL BE MINIMIZED TO THE MAXIMUM EXTENT PRACTICABLE.

In Points II and IV, the Coalition argues that the Project's environmental benefits are only speculative and are outweighed by local opposition and adverse impacts on community character. Upon those premises, the Coalition asks the Court to annul the *Certificate Order*.

A. The Board's Public Need Finding is not Based on Speculation.

As required by PSL §§ 168(3)(a) and 168(4)(e), the Board determined that the Project will be a "beneficial addition to or substitution for the electric generation capacity of the state" and is consistent "with the energy policies and long-range energy planning objectives and strategies contained in the most recent state energy plan" (R. 399-1 at 81-84). The Coalition argues that the record does not support those findings but does not challenge the Siting Board's observation that the Project will generate electricity without burning fossil fuels and will result in a reduction in the emission of air pollutants including greenhouse gases (R.399-1 at 82; R.358-1 at 16-17). The electric system modeling evidence, which the Coalition also does not challenge, shows that in its first year of operation, the electricity produced by the Project will displace fossil-fuel generated electricity resulting in a statewide reduction of fossil fuel emissions, including greenhouse gases (*id.*).

The Coalition's argument rests on an assertion that because the record does not include electric system modeling results for the entire life of the Project, demonstrating how its electricity production will be used within New York's power grid for its entire expected thirty-year useful life, the Board does not have a sufficient basis for making the required findings (Coalition Br. at 63-64). A "full project life" modeling requirement is not found in the PSL or the regulations governing an applicant's responsibility to introduce information into the record. That is understandable because a requirement to model thirty years of Project operation in a system as complex as the New York power grid would require speculating to such a degree about such a wide range of future conditions as to render the results of little use. Such modeling would require making assumptions about, *inter alia*, the level of demand for electricity; which of the system's existing generators will no longer be in service; what new generators will be permitted and put into operation; and what new transmission lines will be put into service (R.399-1 at 84).

The Coalition's expert claimed that the reduction in carbon emissions resulting from the Project's operation in its first year, as modeled by ACWE and independently by New York State Department of Public Service, would decline over time "because there [will be] less and less carbon to displace over time" (Coalition Br. at 52). This claim is premised on an implicit, but unsupported, assumption that other renewable energy resources will be permitted and built (thereby reducing

carbon from electricity generation) but no other changes in the system will take place over the life of the Project. The Coalition cites the undisputed fact that, as presently configured, the New York transmission system is constrained in its capability to transmit carbon free energy produced in upstate New York to electricity users in downstate New York who currently must rely on fossil-fueled electricity supplies (*id.* at 52-53). The Coalition's argument is wholly speculative and preposterous: it posits that additional carbon-free electricity sources will continue become operational only to face a static transmission capability unable to move that electricity to market and that the transmission system will remain static for the life of the Project. The Coalition's speculation is not based on any evidence. The Board, citing the testimony of ACWE's expert witness, noted the "dynamic and evolving nature of the transmission system and the NYISO's processes for addressing transmission needs and proposals for meeting them" (R399-1 at 84). The Coalition simply ignores statutes that were adopted in 2019 and 2020 to implement the State's energy policy goal of producing 100% of the electricity used in New York State from carbon-free sources by 2040. The *Climate Leadership and Community Protection Act of 2019* (Laws of 2019, ch. 106) established aggressive goals for the State to reduce and then eliminate the use of fossil fuels in the production of electricity. The *Accelerated Renewable Energy Growth and Community Benefit Act of 2020* (Laws of 2020, ch. 58) directed the New York State Public Service

Commission (PSC), the Chair of which also chairs the Siting Board, and the New York Power Authority to identify additions to the New York transmission system needed to "facilitate timely achievement of the CLCPA targets" (id. §7[2]); and directed the PSC to expedite the process for permitting new transmission lines to transmit renewable electricity to downstate markets (*id.* § 9). As the Board observed, "the recently enacted Accelerated Renewable Energy Growth and Community Protection Act, ... includes measures to expedite transmission upgrades." *Certificate Order* (R.399-1 at 84). The Coalition's argument against the Board's PSL § 168(3)(a) finding reduces to an assertion that, until the transmission constraints currently keeping electricity produced by upstate generators bottled have been physically alleviated, no new upstate generating facilities should be approved. The Board rejected this irrational assertion (R.399-1 at 83-84), and the Coalition has failed to demonstrate that the Board's rejection is arbitrary or irrational.

B. The Board's Public Interest Determination Reflects a Rational Balancing of Project Impacts and Benefits Supported by Substantial Evidence.

PSL § 168(4) prescribes the matters the Siting Board must consider in reaching the mandatory findings of Section 168(3), including that:

> the adverse environmental effects of the construction and operation of the facility will be minimized or avoided to the maximum extent practicable.

(PSL § 168[3][c]). The areas of potential environmental effect that must be reviewed are identified in PSL § 168(2)(a)-(d). For each of those areas the examiners recommended that the Siting Board find that the permit conditions they recommended would result in any adverse impacts being avoided or minimized to the maximum extent practicable: R.358-1 at 23 (environmental effects on plant communities), at 24 (invasive species), at 30 (impacts to forest land), at 33-34 (impacts to agricultural land), at 39 (groundwater quality and quantity and drinking water supplies), at 44 (streams), at 51-52 (wetlands), at 57 (wildlife other than bald eagles), at 71-72 (bat species), at 83 (bald eagles), at 99 (upland sandpiper), at 116 (noise impacts on an environmental justice area), at 117 (oil and gas infrastructure), at 119-120 (health and safety), at 122-123 (shadow flicker), at 135-140 (visual impacts including impacts on cultural, historic and scenic resources), at 161 (socio economics); and at 164 (property values). The Board adopted those recommendations (R.399-1 at 4 and 11), making changes in only a few areas, namely noise, seismic evaluation, and compliance with local laws. For each impact listed by the Coalition (Coalition Br. at 10-11) the Board concluded that any adverse impact would be minimized or mitigated to the maximum extent practicable, the statutory standard.

The Coalition nevertheless argues that the Board failed to fully consider the Project's impact on community character as required by PSL § 168[4][g]. The Coalition's argument is falsely premised.

Community character is defined in 16 NYCRR 1001.4(p):

> ... community character includes defining features and interactions of the natural, built and social environment, and how those features are used and appreciated in the community.

The Application describes the Project Area as a "rural portion of New York State that primarily is characterized by agricultural, residential and forest land" (R.169-6 at 4-10). The Coalition points to no evidence that remotely suggests that, for land parcels not under lease for Project purposes, the Project would interfere with the ways in which the "agricultural, residential and forest land" is currently used. To the contrary, the record amply demonstrates that, after construction is completed, even the lands under lease for the installation of wind turbines, underground cables and access roads can be returned to their prior uses (R.86-28 at 4-8, 4-9).

The Board rejected the Coalition's claim:

> the Siting Board did consider the impacts on community character inasmuch as it adopted the Recommended Decision's findings on cultural, historic and recreational resources for the Project Area...

(R. 419-1 at 18). The Board also considered Project impacts on community character as required by PSL § 164(4)(f) by examining visual impacts, socioeconomic impacts

and impacts on cultural, historic, and recreational resources in the Project Area (R.358-1 at 135-140). The Board also adopted special requirements to insulate the area's State Forests from potential impacts (R.399-1 at 11-18). The Board concluded that, by adhering to the certificate conditions recommended by the examiners, the Project will not alter the ways in which the land is used to an extent that the community could no longer use and appreciate the natural, built, and social environments (R. 419-1 at 18).

Members of the public opposed to the Project raised a range of perceived threats to community character as noted in the Coalition's Brief. These comments are primarily directed to the Project's visual impacts and impacts on the natural environment, but also include a concern about increased traffic and a fear that the Amish will leave (Coalition Br. at 18-26). The Board and the examiners assessed these alleged impacts closely and reached the determinations required by the statute. These concerns were addressed in the review process and either were found non-existent or that the imposed conditions would result in any potential adverse impacts being avoided, minimized, or mitigated. The Coalition simply disagrees with the Board's determination and wants the Court to substitute the Coalition's conclusions for those of the Board, without demonstrating that the Board's conclusion is affected by an error of law, lacks substantial evidence, or is arbitrary or capricious.

Large scale wind projects are not new to rural New York State. A visit to any of the State's wind farms located in rural areas reveals that their rural, forested, and agricultural character remains intact. If wind farms had adversely impacted community character the evidence would be close at hand and obvious. They have not.

The Coalition also alleges that the definition of community character provided in 16 NYCRR § 1001.4(p) is unclear and that as a result deference is owed to the host municipalities' definition. As a matter of legal interpretation, the Coalition offers no support for this assertion. As a matter of evidence, this argument ignores that, in the Application, ACWE reviewed the planning documents of the host communities as well as their zoning laws, documents in which communities define community character, none of which prohibit wind farms. In fact, contrary to the Coalition's arguments, the Cattaraugus County comprehensive plan promotes further wind energy development:

> (1) Energy Goals
> ...
> 2. Increase renewable energy generation in the region, including technologies listed in the NYS Renewable Portfolio Standard. Applications would include solar water heating, photovoltaic, landfill gas, wind, biomass, hydroelectric, fuel cells, anaerobic digestions, tidal energy, wave energy, ocean thermal, ethanol, methanol, biodiesel, and fuel cells using renewable fuel, and geothermal.

(R.299-3 at 12). The Coalition's reliance on a letter written by a Cattaraugus County Planning Board member (R.214-6) as refutation (Coalition Br. at 12-13) is unpersuasive given the plain language of the plan itself.

The Coalition also misleadingly refers to a letter by the State Historic Preservation Office (SHPO), which was sent by SHPO in its role of advising ACWE and the Siting Board concerning whether steps would be required to mitigate unavoidable impacts to cultural resources. The SHPO letter was not offered as a SHPO recommendation against granting a certificate to ACWE based on an opinion about the Project's impact on community character within the meaning of PSL § 164 (4)(g). The SHPO letter concludes with:

> At this point in time we have concluded our evaluation of eligible resources and the potential impacts to those resources associated with this project. We believe it is a reasonable next step to progress to the development of appropriate mitigation to offset the visual impacts associated with this undertaking. The recently submitted survey report included a section relating to generic project mitigation options. This information is consistent with previous guidance provided by the NYSHPO and should serve as a reasonable template for ongoing Section 106 consultation relating to this undertaking.
>
> Depending upon the number of affected resources, we generally recommend a mitigation fund of between $1,500 to $2,000 per turbine unit or megawatt, whichever is greater, as a starting point for the consultation.

(R.218-19). The SHPO letter offers a recommendation on what should be required to undergird a finding that unavoidable impacts on historic and cultural resources will be mitigated to the greatest extent practicable.

The Coalition also relies on the opposition to the Project reflected in resolutions adopted by two host and neighboring towns, ignoring that the Siting Board has sole authority to make the public interest determination, on a statewide basis, whether to grant a certificate authorizing the Project.

The case law the Coalition cites is inapt. The Coalition relies on *In re Concerned Homeowners of Rosebank*, 2001 NY Slip Op 40096(U) WL 940258 (Sup Ct Richmond Cty) for *dictum* that siting an electric generating facility in close proximity to residential property will affect its "value and enjoyment" (Coalition Br. at 25-26). The Coalition neglects to inform the Court that: (i) the case concerns the construction of a natural gas fired power plant on Staten Island within 400 feet of a residence (2001 WL 940258 at 5), and (ii) that, nevertheless, the court there upheld the decision to issue a negative declaration under the State Environmental Quality Review Act (*id.* at 13).

The Coalition also cites *PPM Atlantic Renewables v. Fayette County Hearing Board* for the *dictum* that distinguishing between landowners who have leased their property to the wind developer and those who have not was in error. The Coalition again neglects to provide critical information to this Court: the lower court had

improperly modified the condition imposed by the zoning board ("the trial court cites no authority that allows a court to waive a validly attached condition on this basis" [*i.e.,* that the landowners are participants] *id.* at 27). Here in contrast, the relevant local laws include setbacks from property lines of participating landowners that differ from setbacks from property lines of non-participating landowners, a fact the Coalition neglects to describe.

II. RESPONSE TO POINT I. THE SITING BOARD CORRECTLY APPLIED TOWN OF FREEDOM LOCAL LAW #1 OF 2019, THE LAW IN EFFECT WHEN THE RECORD CLOSED.

ACWE's Application, submitted on December 18, 2018, included a copy of the Town of Freedom LL #1 of 2018, *Amending the Town of Freedom Wind Energy Facilities Law* (Freedom LL#1 of 2018), as required by 16 NYCRR § 1001.31(a) (R.86-3). The local law exhibit was updated three times (R.134-5, R.169-17, and R. 277-5). The second revision, filed on July 31, 2019, includes a copy of Freedom LL #1 of 2019 (R.169-22), which is identical to Freedom LL#1 of 2018.

A group of residents operating under the name Freedom United challenged the Town's enactment of Freedom LL#1 of 2018. On October 21, 2019, Justice Parker of State Supreme Court, Cattaraugus County, granted their petition and declared the 2018 law invalid. While that petition was pending, the Town of Freedom enacted LL #1 of 2019. Justice Parker's decision annulled the 2018 law and declared in *dictum* that LL #3 of 2007 "remains in effect", but reached no

decision concerning the newly enacted LL #1 of 2019 (R.352-2 at 8-9). On March 5, 2020, during oral argument in a related matter, Justice Parker made clear that his October 21, 2019 *Decision and Judgment* did not nullify LL #1 of 2019 and that LL #1 of 2019 was, and had been, in effect since its enactment. Justice Parker made clear that neither as of October 21, 2019, the date of his first *Decision and Judgment*, nor at any subsequent time, did his *Decision and Judgment* result in the 2007 law being put into effect. At the March 5, 2020 hearing, he clarified the seemingly contrary dictum in the October 21, 2019, *Decision and Judgment:*

> By operation of the 2018 law, it revoked the 2007 law. And by invalidating the 2018 law, that reinstated the 2007 law, in the Court's opinion – but only on the issue of the 2018 law of the Town. The 2019 law was never, ever in contention. And therefore, my decision should not in any way be used as evidence or a determination as to the validity of that law.

(R.369-3, Appendix B at 7).

A copy of the transcript of the March 5, 2020 hearing is Appendix B to ACWE's April 1, 2020 Brief on Exceptions (*id.*). Justice Parker subsequently appended the March 5, 2020 transcript to his April 30, 2020 *Decision and Order.* The Coalition appended the April 30, 2020 *Decision and Order* to its brief here, but, oddly, without the transcript. The Coalition's argument that the Siting Board "overruled" the Supreme Court, Cattaraugus County's decision is disproven by that

court's April 30, 2020 *Decision and Order* which includes the transcript of the March 5, 2020 oral argument.

The Coalition does not challenge the fact that in the Article 10 proceeding, the Town of Freedom sought enforcement of Freedom LL#1 of 2019 (*see* PSL § 164[1][j]) and observed that Justice Parker had never ruled on the validity of the LL #1 of 2019, which therefore remained the applicable law (R.352-2 at 8-9). Thus, as of the close of the evidentiary record on December 5, 2019, the Board correctly determined that the law the Town sought to enforce pursuant to PSL § 166(1)(j) was Freedom LL#1 of 2019.

III. RESPONSE TO POINT III. THE GRANT OF THE CERTIFICATE TO ACWE DOES NOT VIOLATE THE RELIGIOUS LIBERTIES OF THE AMISH COMMUNITY.

The Coalition argues that the Siting Board violated the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment with respect to the Amish residences located on properties that neighbor parcels on which Project components will be located pursuant to leases. The Coalition argues that in granting the certificate to ACWE without imposing special setback requirements applicable only to the property lines of Amish-owned parcels the Board violated rights of the Amish property owners and Amish residents guaranteed by the First Amendment to the United States Constitution. The Coalition has an apparent difficulty articulating the alleged violation, referring to it variously

as a refusal to "exempt the Amish from the siting" of the Project (Coalition Br. at 26) and as disregarding "an Amish settlement's request for a religious hardship" (*id.* at 3). The Board did neither. Rather, the Board applied the property line setbacks required by the applicable law uniformly and declined to impose special requirements on ACWE to promote (allegedly) the practices of one religion. Moreover, there was no evidence that the siting of the Project will impose any hardship on any Amish residents, only the opinion of a non-Amish academic witness sponsored by non-Amish residents opposed to the Project. The Coalition's arguments are incorrect on several grounds.

A. The Coalition Does Not Have Standing to Assert Constitutional Claims on Behalf of the Farmersville Amish

Critically, the Coalition does not have standing to assert statutory or constitutional arguments on behalf of the Farmersville Amish. The Coalition does not, in fact, represent the Farmersville Amish (R.339-2 at 1542:23 - 1545:17). The Supreme Court has limited the extent to which a party has standing to assert the rights of another. A party may assert a claim on behalf of a third party "only where (1) the third parties have suffered an injury in fact; (2) the plaintiff has a close relation to the third parties such that the plaintiff will effectively represent the third parties' interest, and (3) the third parties are hindered in their ability to protect their own interests" (*De Jesus-Keolamphu v. Village of Pelham Manor*, 999 F Supp 556,

567 [SDNY 1998][internal citations and references omitted]). As a general prudential rule, a party "may not claim standing to vindicate the constitutional or statutory rights of third parties" (*id.* [internal references omitted]).

The Siting Board correctly found that the Coalition does not have standing to represent the Farmersville Amish, holding that,

> In this case there has been no proven "injury in fact," there is no proven close relationship between the Amish community and the Town [of Farmersville] or CCC, and the [Farmersville] Amish community could readily have defended its interests in this proceeding.

(R.419-1 at 13 [footnote omitted]) (*see Beechy v. Central Michigan Dist. Health Dept*, 475 F Supp 2d 671 (ED Mich. 2007), *aff'd* 274 Fed Appx 481 2008 WL 1820816 (6th Cir 2008) (holding that Amish did not state or imply that installation of 750-gallon septic tank violated their Ordnung, contravened their faith, or interfered with the practice of their religion).

The Coalition does not meet any of the Supreme Court's requirements to assert standing on behalf of the Farmersville Amish. There is no proof of an "injury in fact" suffered by the Farmersville Amish because of the Project.

B. The Board Did Not Violate the First Amendment with Respect to the Farmersville Amish

The Coalition insists that the mere location of the ACWE project near the Farmersville Amish infringes upon their religious liberties. The Coalition makes the outlandish claim that the mere existence of the Project in the vicinity of Farmersville

Amish, though located and built in compliance with the Farmersville Wind Energy Law of 2019 (Farmersville LL#3 of 2019) on private property lawfully leased or acquired by ACWE, will violate the rights of the Amish. The Coalition even posits that the Amish are entitled to have land, free of wind project components, available for purchase to expand their community (Coalition Br. at 27-30). The Coalition attempts to cast this "imperative" in terms of a right to the exercise of religious freedom, arguing that, by allegedly limiting the availability of land, suitable for Amish tastes, for future purchase, the Board's decision violates the Farmersville Amish's right to free exercise of their religion. The Coalition also argues that the decision of the Siting Board is subject to strict scrutiny because a system of "individualized exemptions" has been created, but not applied to the Farmersville Amish. These arguments fail scrutiny.

C. The Coalition Has Failed to Establish that the Board's Refusal to Treat Amish Residences as Churches Violates the Free Exercise Clause.

The Supreme Court has made clear that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)" (*Employment Div. v. Smith*, 494 US 872, 880 [1990] [internal citations omitted]). "The critical distinction is thus between a neutral, generally applicable law that happens to bear on religiously motivated

action, and a regulation that restricts certain conduct because it is religiously motivated" (*Rector, Wardens, & Members of Vestry of St. Bartholomew's Church v. New York*, 914 F2d 348, 354 [2d Cir 1990] [internal references omitted]). "The central question in identifying an unconstitutional burden is whether the claimant has been denied the ability to practice his religion or coerced in the nature of those practices" (*id.* at 355). In the facts relevant here the question avoided by the Coalition is whether allowing a wind farm developer to install its project in compliance with all applicable laws can in any respect be found to be a burden on other residents' free exercise of religion rights.

The Coalition's argument that strict scrutiny is applicable to the actions of the Board is unavailing. The Free Exercise Clause protects "an individual's private right to religious belief and the performance of (or abstention from) physical acts that constitute the free exercise of religion, including assembling with others for worship service" (*Aguadath Israel of Am. v. Cuomo,* 983 F3d 620, 631 [2d Cir. 2020] [internal citations and references omitted]). The Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability... such a neutral and generally applicable policy is subject only to rational-basis review." (*id.*) (internal citations and references omitted). "Rational basis review applies when a neutral and generally applicable policy incidentally burdens religion..." (*id.* at 632).

The basis for the Coalition's insistence on the application of "strict scrutiny" is the testimony of its academic witness, Steven M. Nolt. He spent two days visiting a handful of Farmersville Amish families (R.339-2 at 1518:10-11). As the Board noted, "the record in this proceeding does not demonstrate whether or how the Siting Board's interpretation of the local law impairs in any way the exercise of the Amish community's religious exercise and practices pursuant to the Constitution..." (R.419-1 at 13). The Board observed that:

> In the end, whether the Amish community in Farmersville may oppose the Project and what impacts the Project may have on their religious activities are matters of speculation in the absence of testimony from the community members themselves. CCC witness Dr. Steven Nolt's testimony speculates on possible reasons, but his testimony that the noise and sight of the turbines would disrupt the community's religious practices was speculative, hearsay and unpersuasive, and wholly fails to explain how a 1,500-foot setback would be a disruption to religious practices but a 2,200-foot setback would be reasonable and appropriate. In the absence of persuasive evidence of whether and how a 1,500-foot setback would disrupt the Amish community's religious practices, the constitutional . . . claims must fail.

(*Id.* at 14 [footnotes omitted]).

In the present case, there is no law being applied to the Farmersville Amish in any respect, and certainly none that in any way restricts or supports any religious activity. Rather, the Board has declined to designate the residences of the Farmersville Amish as "churches" for purposes of the Town of Farmersville's 2019

Wind Law (*see* Farmersville LL#3 of 2019 Wind Law Art. 1 § 6). In no way does this determination restrict or impair the Farmersville Amish from use of their homes for worship services, marriages, funerals, or any other type of religiously motivated gathering. All this determination means is that the residences of the Farmersville Amish are entitled to the same setback requirements as the residences of every other person in the Town of Farmersville.

Tellingly, the Coalition makes no argument that any other residence of any other individual of any other faith should receive similar treatment. The reason the Coalition seeks to have the residences of the Farmersville Amish designated as "churches" is purely to make the siting of the Project as planned more difficult and expensive, in the hope that ACWE might drop its plans altogether. The Coalition's argument is completely pretextual.

The relief the Coalition seeks, purportedly on behalf of an Amish community, is to convey a special benefit on the Amish community by limiting the rights of their non-Amish neighbors to use their property in a lawful manner permitted under town land use laws, *i.e.,* leasing it and granting easement rights in it to ACWE. This matter is closely analogous to *Bowen v. Roy* 476 US 693 (1986). In *Bowen*, the appellee sought to enjoin federal and state agencies from requiring federal and state welfare agencies to use a social security number assigned to the appellees' daughter to process food stamps and welfare benefits, based on appellees' arguments that the

use of the social security number violated their religious convictions. The Supreme Court vacated the injunction, because the use of the social security number did not impair the appellees' free exercise of religion. The Supreme Court noted that:

> Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family. The Free Exercise Clause cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. Just as the Government may not insist that appellees engage in any set form of religious observance, so appellees may not demand that the Government join in their chosen religious practices by refraining from using a number to identify their daughter.

(*Bowen v. Roy*, 476 US 693, 699-700 [1986][emphasis in original]).

The Board's interpretation of the Farmersville LL#3 of 2019 – that Amish-owned residences are residences and not churches – is a facially neutral determination that is generally applicable. The Board has not designated *any* residence near the ACWE project as a "church". The Board found that it would have been "unreasonable to interpret the term 'church' to include what is in essence a full-time residence" on the basis of occasional services being conducted at individual residences (R. 399-1, at 76). The Board also observed that the effort to label Amish homes as churches, "was a litigation position with no historical application prior to this case" (*id.* at 76) which provides additional support for concluding that the homes

of the Farmersville Amish are "residences" rather than "churches" within the meaning of the Farmersville LL#3 of 2019.

The record contains no evidence that members of the Farmersville Amish community sought to have their properties, or any other buildings for that matter, declared a "church" or "place of worship" for purposes of the Town's zoning law. Nor has any party, including the Coalition, claimed that the primary use of any Amish-owned residential property is other than as a residence. *See, Matter of Mount Tremper Lutheran Camp v. Board of Assessors of Town of Shandaken*, 70 AD2d 984, 986 (3d Dept 1979) (denying tax exempt status where religious use was not exclusive or primary use.). In fact, the record demonstrates that, with respect to the Farmersville Amish, "There are no church buildings, worship services are hosted by households in their homes" (R. 339-2 at 1523:10-11).

If the Siting Board were to determine that the Farmersville Amish residences are churches, the Siting Board would likely be violating the Establishment Clause of the First Amendment by promoting the religion of the Farmersville Amish over that of any other individual in a non-Amish residence (*see, e.g., Bollenbach*, 659 F Supp 1450 at 1459 [SD NY 1987]["... the state must take care not to accommodate to the point where it is engaged in the impermissible activity of lending direct support to a religious organization."]).

D. The Board Did Not Create or Apply Any Individualized Exceptions

The Coalition argues that Article 10 creates a system of individualized exceptions which requires that Siting Board decisions allegedly affecting religious freedom be subject to strict scrutiny (Coalition Br. at 37). The Coalition claims: "The Siting Board's refusal to exempt the Farmersville Amish settlement from Certificate conditions that apply elsewhere in the Alle-Catt project area is therefore subject to strict scrutiny" (*id.* at 38). The Coalition does not identify any certificate conditions implicated by this claim nor does it identify any exemptions requested by members of the Farmersville Amish. The claim is difficult to fathom. The Board's decision does not deny any exemption (or anything else of benefit) to the Amish that it grants to others. To the contrary, if the Board had adopted the Coalition's arguments the effect would be to create a system of individualized exceptions in violation of the First Amendment. Similarly, if the Board had denied ACWE a certificate based on the Coalition's argument that granting it would violate the religious freedom of the Farmersville Amish, the Board would have run afoul of the Establishment Clause.

The cases discussing individualized exceptions largely center on individuals seeking, but being denied, government benefits due to religious convictions in situations in which individualized exceptions were made for other reasons. *See, e.g.*, *Sherbert v. Verner*, 374 US 398 (1963) (holding that appellant who declined to work on Saturdays because her religion forbade it was entitled to unemployment benefits);

Black Hawk v. Pennsylvania, 225 F Supp 2d 465 (MD Pa 2002) (holding that First Amendment rights of a Native American holy man were violated when the Pennsylvania Game Commission declined to grant him an exemption from a permit fee requirement where individualized, secular exemptions were allowed).

Article 10 is a generally applicable statute that prescribes the procedures and substantive requirements that must be met to secure a permit to build a major electric generating facility. The statute regulates those seeking to build and operate a major electric generating facility. It does not regulate, either by granting or denying individualized exceptions or by any other means, members of the public or neighboring property owners. The "individualized exception" concept is simply inapposite.

IV. CONCLUSION

For the reasons explained herein the Coalition's Petition should be denied.

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