To Be Argued By:
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Appellate Division Docket No. OP 20-01406

NEW YORK SUPREME COURT

APPELLATE DIVISION – FOURTH DEPARTMENT

TOWN OF FARMERSVILLE

Petitioner,

– against –

NEW YORK STATE BOARD ON ELECTRIC GENERATION SITING AND THE ENVIRONMENT, ALLE-CATT WIND ENERGY LLC, STATE OF NEW YORK, JOHN DOE CORPORATIONS AND JOHN DOES,

Respondents.

BRIEF OF RESPONDENT ALLE-CATT WIND ENERGY LLC

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INTRODUCTION

Appellant, Town of Farmersville, brought this proceeding pursuant to Public Service Law (PSL) 170. The scope of the Court's review is prescribed in PSL 170 (2). 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 Appellant Town of Farmersville's (Farmersville) brief and in support of Respondent Board on Electric Generation Siting and the Environment's (Board) *Order Granting Certificate of Environmental Compatibility and Public Need, with Conditions* (R.399-1) and *Order on Rehearing* (R.419-1) under review in this proceeding.

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Question. Did the Board err in applying the Farmersville Local Laws in effect during the review proceeding rather than reopening the record to apply newly enacted local laws?

   Answer. The Board correctly answered no.

2. Question. Did the Board purport to waive Farmersville's Local Laws No. 1 and 4 of 2020?

   Answer. No; the Board correctly determined that those laws were not a matter of the record compiled by the hearing examiners when the record was closed and therefore waiver was not an issue.

3. Question. Did the Board abuse its discretion by declining to reopen the evidentiary record to consider local laws enacted after the record was closed?

Answer. The Board correctly answered no.

4. Question. Was the Board bound to employ Farmersville's *post hoc* definition given to the word "church" as used in the Farmersville zoning law?

Answer. The Board correctly answered no.

COUNTER STATEMENT OF MATERIAL FACTS

In a lengthy narrative not pertinent to the legal issues before the Court, Appellant Farmersville traces the history of its wind energy zoning law enactments. It is sufficient to observe that the evidentiary record in the proceeding below closed on December 5, 2019. After that, in January 2020, the Farmersville Town Board, including new members elected in the November 2019 election, convened and adopted new laws. Because the new laws were adopted too late to be included in the evidentiary record, they were not considered, either for enforcement or waiver, by the examiners or the Board.

Although not germane to its appeal, Farmersville's brief includes a misleading statement that the New York State Attorney General fined ACWE for alleged violations of the Attorney General's wind developer code of conduct. (Farmersville Br. at 6). The *Code of Conduct for Wind Farm Development* is a voluntary agreement by which Invenergy, ACWE's parent, agreed: (i) to not knowingly

provide a financial benefit to a municipal officer or a relative (as defined) unless the officer agrees to recuse him or herself from any official duties in connection with a wind project; (ii) to publicly disclose the names of municipal officers and relatives with any financial interest in a pending project; and (iii) to verify that it has conducted training for its employees and notified municipalities concerning code of conduct requirements.

The Attorney General's office fined Invenergy for violations of the code concerning the wording of its leases, the requirement to promptly keep its public disclosures posted and up-to-date, and the requirement to notify town attorneys when town officers or their relatives had executed leases. In its notice of violation, the Attorney General observed that Invenergy had acknowledged the violations and documented "the steps taken to achieve compliance" by enhancing its record-keeping and notification processes. The code of conduct violations were resolved in April of 2019 and have no bearing on the legal issues concerning the scope of Board authority raised by Farmersville's challenge.

ARGUMENT

I. RESPONSE TO POINTS I AND III.

A. The Board's Obligation to Ensure Compliance With, or To Override, Local Laws is Limited to Local Laws Included in the Record Made Before the Examiners.

Public Service Law (PSL) Section 168 requires that a Board decision to grant a certificate must be grounded on enumerated determinations including "that the facility is designed to operate in compliance with applicable state and local laws" except for any local laws the Board determines to be unreasonably restrictive (PSL § 168.3[e]). The qualifying word "applicable" is defined within that provision as those laws "concerning, among other matters, the environment, public health and safety" and, by inference, those "relating to the interconnection to and use of water, electric, sewer, telecommunications, fuel and steam lines in public rights-of-way." Section 168(1) provides the temporal boundary of the Board's obligation:

> The board shall make the final decision on an application under this article for a certificate or amendment thereof, *upon the record made before the presiding examiner*… [Emphasis added]

Accordingly, local laws that are "applicable" are those that not only concern the topics listed in Section 168.3(e) but also have been included in the record made before the presiding examiner, and therefore were in effect during the evidentiary review process. By definition, they do not include laws enacted *after* that process is complete. Farmersville's challenge is premised on its flawed presumption that the

Board's obligation arising from PSL § 168.3(e) includes a continuing obligation to reopen the record to consider local laws enacted after "the record made before the presiding examiner" has been closed (PSL § 168.1).

The identification of applicable local laws begins even prior to the filing of an application. First, the implementing regulations require would-be applicants to include in their preliminary scoping statements (PSS) a list and description of applicable local laws (16 NYCRR 1000.5[l][5]). Parties participating in the pre-application scoping process, including municipalities, can review the PSS and determine whether the PSS identifies all applicable laws. Second, before preparing an application, the regulations direct applicants to consult with municipal officials to determine if all laws applicable to construction or operation of the planned facility have been correctly identified (16 NYCRR 1001.31). The application must identify all such laws, separated into those laws establishing permitting procedures (*id*., 1001.31[a]), which are explicitly preempted (PSL § 172), and those providing substantive requirements, with respect to which the Board must either enforce compliance or override (*id.,* 1001.31[d]). Copies of the application must be served on all municipalities in which the proposed facility is proposed to be located (PSL 164.2[a][i]; 16 NYCRR 1000.6[a][3]). Such municipalities are automatically made parties to the certification proceeding (PSL § 166.1[j]) and are entitled, collectively, to one-half of the intervenor funds deposited by the applicant with the Department

of Public Service. Those funds are available to defray costs the municipalities incur to review the application and participate in the proceeding (PSL § 164.6). Farmersville does not dispute that the proceeding below complied in all respects with these procedures.

Article 10 allocates responsibilities with respect to local laws to both the Board and municipalities: the Board is required to provide municipalities with an "opportunity to present evidence in support of [local] ordinance, law, resolution, regulation or other local action issued thereunder" (PSL § 168.3[e]), while municipalities

> seeking to enforce any local ordinance, law, resolution or other action or regulation otherwise applicable *shall present* evidence in support thereof *or shall be barred* from the enforcement thereof;

(PSL § 166(1)[j]; *emphasis added*). These interrelated statutory provisions disclose that the Board's local law compliance obligations are evidence-based, *i.e.*, local laws are presented as evidence and included in the evidentiary record on which the Board's decision must be based. Whether the project under review complies with them is examined in hearings conducted by the examiners and reported to the Board in their recommended decision.

Farmersville asks the Court to rule that, notwithstanding the extensive rules requiring applicants to identify applicable local laws and to demonstrate compliance or request waivers on an evidentiary record within a review process subject to a

twelve-month deadline, the Board must disrupt the process at the thirteenth hour to consider and apply local laws newly enacted *after* the evidentiary record has been closed. Contrary to Farmersville's request, the statute clearly confirms that the Legislature intended the Board's obligation regarding compliance with local laws to end with its obligation to base its decision "upon the record made before the presiding examiners." But that is the intention Farmersville urges the Court to ignore, in claiming that the Board is required to reopen the record to consider local laws enacted after the record made before the presiding examiners has closed and to extend the twelve-month deadline imposed by the statute.

The relief Farmersville seeks would require that the Court add a gloss to Article 10 directly at odds with the Legislature's intent in its adoption. Article 10 was enacted in 2011 in part to "provide regulatory certainty for developers" (NYS Assembly Mem in Support, Bill Jacket, L 2011, ch 388 at 27). The Assembly Memorandum in Support observes that Article 10 "would provide greater certainty to the regulated community by providing a time-certain review process." (*id*. at 11). Article 10 and its predecessor siting statutes were enacted to create a siting process that is predictable and expeditious to avoid "delays in the construction of new facilities caused by multiple requirements for approvals and permits from a host of governmental agencies" (Governor's Approval Mem [of PSL Article VIII] L 1972, ch 385; *see also* L 1972, ch 385, § 1). Siting new electric infrastructure was made a

State responsibility in part to "provide a unified procedure for resolving all questions relating to the location of major utility facilities" (Governor's Approval Mem [of PSL Article VIII] Bill Jacket, L 1970, ch 272).

Farmersville's assertion that the Board is obligated to reopen the record and extend the Board's decision deadline runs counter to the legislative intention. Farmersville would put its parochial, anti-wind energy interest ahead of the State's articulated interest in advancing the construction of needed infrastructure with a "time-certain review process" that provides "regulatory certainty for developers." Having complied with the extensive regulations governing the preparation of the preliminary scoping statement and the application, having consulted with municipal officials to ensure all applicable local requirements have been identified, and having presented evidence in the evidentiary hearings, an applicant should not face the disruption, delay, and uncertainty that Farmersville's argument would impose. The result would be directly contrary to the one-stop, unified procedure intended and adopted by the Legislature.

B. The Board Did Not Abuse its Discretion in Declining to Reopen the Record.

Farmersville argues alternatively that, even if a decision to apply laws enacted after the evidentiary record made before the examiners has closed lies within Board discretion, here the Board nevertheless abused that discretion. Farmersville argues that ACWE did not offer any evidence of harm resulting from an extension of the

deadline (Farmersville Br. at 39) and that there was no evidence to support the Board's conclusion that extending the decision deadline would be detrimental to the Project. These arguments are off point. Article 10 is intended to be a one-stop siting process. There is no support in the statute or regulations for Farmersville's claim that ACWE was obligated to provide evidence to retain its statutory right to a time-certain process and to regulatory certainty. The Siting Board correctly concluded that a "determination to reopen the record and extend the time period lies within the Siting Board's discretion" (R.419-1 at 7). PSL § 165[4][a] makes that clear:

> the board may extend the deadline in extraordinary circumstances by no more than six months in order to give consideration to specific issues necessary to develop an adequate record…

Extensions of the deadline are a limited exception to the twelve-month timetable. A party seeking exercise of the Board's limited discretion has the obligation to demonstrate extraordinary circumstances. ACWE had no obligation to demonstrate harm to the Project resulting from an extension. Nevertheless, the Board correctly observed that the deadline extension requested by Farmersville would harm ACWE, by forcing delay and creating uncertainty that Article 10 has assured ACWE it would not have to face. Likewise, the Board's conclusion that reopening the record to examine a subsequent change in local law would not have ended the possibility that further changes would be adopted was also rational. A decision to extend the deadline to accommodate Farmersville would defeat the purpose of Article 10 − to

create a "one-stop," "unified" and "expeditious" permitting proceeding − and would instead allow a single municipality to disrupt the proceeding and generate uncertainty.

The Board acted within its delegated authority when it ruled that the passage of two local laws by Farmersville after the close of the record in this proceeding did not mandate an extension of the proceedings, and that reopening the record would create an unreasonable burden upon ACWE. The decision was not arbitrary, capricious, lacking support, or in violation of the Public Service Law.

Through all previous iterations of New York's major electric generating facility siting law, courts have consistently acknowledged the comprehensive and exclusive jurisdiction of the Board over all matters relating to the issuance of a certificate and the siting of major electric generating facilities (*see*, *Matter of City of New York v. TransGas Energy Servs. Corp*., 34 AD3d 466, 469 [2006] [analyzing pre-emption issues]; *Consolidated Edison Co. of N.Y. v. Town of Red Hook*, 60 NY2d 99, 106 [1983]). PSL § 166(1)(j) affirms that municipalities seeking to enforce "any local ordinance, law, resolution or other action or regulation otherwise applicable" must do so through the Board. Here, Farmersville actively participated in these proceedings from their beginning, completing two revisions to its local laws addressing wind energy facilities *before* the close of the evidentiary record. The decision to not re-open the record to consider whether to apply or override new laws

enacted *after* the close of the record was well within the discretion of the Board, based on facts that are not in dispute, and well explained in both the *Certificate Order* (R.399-1 at 75-76) and the *Order on Rehearing* (R.419-1 at 7). Accordingly, the inquiry of this Court could end here.

Nevertheless, an examination of Farmersville's added challenges to the obvious propriety of the Board's actions finds them wanting: its suggestion that Article 10's delegation of authority to apply or override local laws is unconstitutional and its characterization of the Board's decision not to reopen the record as an effort to "ignore a local law enacted late in a proceeding" (Farmersville Br. at 20). The Board did not "ignore" the actions of the Town. Instead, it considered the nature of the record reopening requested by Farmersville and concluded that opening the record would cause substantial damage to a Project that had been under consideration for years. In doing so, the Board acted in harmony with the long-established rule that: "laws are not to be construed as applying to cases which arise before their passage…when to disregard it would impose an unexpected liability that if known might have caused those concerned to avoid it" (*Aetna Cas. & Sur. Co. v. Lighty*, 3 Conn. App. 697, 703–04, 491 A2d 1118, 1123 [Conn App Ct 1985] [citing, *People ex rel. D.W. Griffith, Inc. v. Loughman*, 249 NY 369, 379 [1928]; *Lewellyn v. Frick*, 268 US 238, 252, 45 S Ct 487 [488, 69 L Ed 934] [1925]). Because there is no dispute that "the record made before the presiding examiner" was closed before

the passage of the two *post hoc* Farmersville laws, there can be no dispute that the Siting Board's actions were consistent with New York law and that the timing of a law's enactment is inherent in determining its applicability.

II. RESPONSE TO POINT II. FARMERSVILLE LOCAL LAWS ARE PRE-EMPTED BY ARTICLE 10.

The doctrine of preemption concerns the primacy of the State to choose how best to achieve a state-wide benefit for all its citizens. That is why, "even in the absence of an express conflict, a local law which regulates subject matter in a field which has been preempted by State legislation is deemed inconsistent with the State's transcendent interest and is thus invalid" (*Ba Mar v. County of Rockland*, 164 AD2d 605, 612 [1991], *appeal dismissed*, *lv denied* 78 NY2d 877 [1991]) (quoting *Albany Area Bldrs. Assn. v. Town of Guilderland*, 74 NY2d 372, 377 [1989]). Farmersville asks this Court to ignore this aspect of the preemption doctrine by claiming that an absence of an express or implied conflict in the specific language of its late-arriving local laws is sufficient to eviscerate the State's comprehensive siting law, regardless of the surrounding circumstances (Farmersville Brief at 30-32). But the Legislature's delegation to the Board is not constrained by narrow questions of wording; it instead encompasses a complete effort "to control determinations regarding the proposed siting of major [] electric generating facilities within the State" (*Matter of City of New York v. TransGas Energy Servs. Corp*., 34

AD3d 466, 469 [2006][citing L 1972, ch 385, § 1]) and to provide "for a time-certain review process by a multi-agency board capable of granting all necessary permits while incorporating meaningful input from those impacted by the facility" (Div of Budget Mem, Bill Jacket, L 2011, ch 388). The Court should reject this artificially narrow interpretation of the preemption doctrine.

Contrary to Farmersville's assertions otherwise, the plain language of Article 10 makes clear that the Legislature intended to occupy the entire field of power plant siting, to such a degree that substantive local laws passed after the close of the record made before the examiners are made applicable only upon the limited discretion of the Board. Preemptive intent may be express or discerned "from the nature of the subject matter being regulated and the purpose and scope of the State legislative scheme" (*Vatore v. Commissioner of Consumer Affairs of City of N.Y.*, 83 NY2d 645, 650, [1994]; citing, *Albany Area Bldrs. Assn. v. Town of Guilderland*, 74 NY2d 372, 377 [1989]; *Consolidated Edison Co. of N.Y. v. Town of Red Hook*, 60 NY2d 99, 105 [1983]. Intent may also be "inferred from a declaration of State policy by the Legislature or from the legislative enactment of a comprehensive and detailed regulatory scheme in a particular area" (*ILC Data Device Corp. v. County of Suffolk*, 182 AD2d 293, 301 [1992], *appeal dismissed* 81 NY2d 952 [1993], quoting *New York State Club Assn. v. City of New York*, 69 NY2d 211, 217 [1986], *affd*. 487 US 1 [1988]. PSL § 172(a) makes explicit the Legislature's intent to establish a

comprehensive scheme and pre-empt local regulations that would frustrate that scheme, providing in relevant part that:

> Notwithstanding any other provision of law, no [] municipality or any agency thereof may, *except as expressly authorized under this article by the board*, require any approval, consent, permit, certificate or other condition for the construction or operation of a major electric generating facility with respect to which an application for a certificate hereunder *has been filed*, including pursuant to paragraph (e) of subdivision three of section one hundred sixty-eight of this article, … ; provided, however, that in the case of a municipality or an agency thereof, such municipality has received notice of the filing of the application therefor.

PSL § 172(1) (emphasis added). Accordingly, the statutory language strips from the municipality all power to impose "other conditions" upon an applicant, except as authorized by the Board. The facts on record demonstrate that Farmersville received timely notice and fully participated in the evidentiary hearing and beyond, but then sought to impose "other conditions" upon ACWE after the evidentiary hearing had closed. Such actions are in violation of the legislative scheme. Accordingly, the Board acted well within its delegated authority when it declined to apply the Farmersville local laws and resolutions "because they were passed too late to be considered in this proceeding" (R.399-1 at p. 82).

Farmersville's opinion that "the legislative scheme" requires the Board to either apply or waive substantive local laws is incorrect. The legislative scheme created by Article 10 does not grant to Farmersville the authority to impose

obligations on the Siting Board to re-open the record or extend the administrative hearing. Nor does it re-establish Farmersville's authority to impose additional conditions on ACWE after the Board has acted. Instead, Article 10 empowers the Board to resolve all questions regarding the applicability and enforcement of local law. To infer differently is in direct conflict with PSL §166(1)(j), which provides in relevant part that:

> any municipality entitled to be a party herein and seeking to enforce any local ordinance, law, resolution or other action or regulation otherwise applicable shall present evidence in support thereof or shall be barred from the enforcement thereof;

(*id.*). Accordingly, Article 10 placed explicit restrictions upon local municipalities wishing to enforce any local ordinance. Under the express terms of the PSL, the Board was under no obligation to entertain local laws which were not passed before the close of the evidentiary hearing.

III. RESPONSE TO POINT IV.

A. The Board Acted Within Its Authority In Rejecting Farmersville's Ad Hoc Construction of Its Setback Requirement For Churches.

Farmersville asserts that the Board exceeded its jurisdiction by disagreeing with Farmersville's interpretation of its local law, under which Amish residences would qualify for the greater setback afforded to churches. Farmersville ignores the role of the Board, which was granted exclusive authority to make all decisions affecting the siting of major generating facilities, including whether a proposed

facility's design complies with applicable local laws. In exercising its authority, the Board does not act as a local municipality's agent or alter ego and is not bound to enforce a town's interpretation of its zoning ordinance that is irrational or unreasonable. By authorizing the Board to determine whether an applicant's project "is designed to operate in compliance with applicable state and local laws and regulations issued thereunder" (PSL § 168[3][e]), the Legislature authorized the Board to determine what those laws mean and require. Without authority to construe the meaning of a local law, it would be impossible for the Board to make a finding under PSL § 168(3)(e). Article 10 delegates to the Board specific authority to conduct hearings and make determinations regarding not only the applicability of local laws, but also to resolve in a single proceeding all manner of questions relating to compliance with such laws (PSL §§168(3)(e); 172). Inherent in the power to waive local laws, must be the power to interpret them. This quasi-judicial function of the Board has been recognized as an essential element to preserve the state's interest in preventing unreasonable delay, and to counteracting the natural tendency of some local governments to oppose siting facilities in their communities. (*See*, *Matter of Nash Metalware Co., Inc. v. Council of City of New York*, 14 Misc 3d 1211(A) [Sup Ct 2006][Unpublished Opinion][explaining that previous Article X of the PSL was designed to prevent local governments, "which in a spirit of NIMBY [Not In My Back Yard], often act to prevent adequate power supplies to be available

for the citizens of the State or force power plants to be located where they may incur unnecessary additional costs to the rate paying public."]). This purpose was to be achieved by the "removal from other courts and State and local agencies of all jurisdiction to consider issues properly before the Board or which may, on appeal from the Board, be before the Appellate Division" (*id*.; *accord Koch v. Dyson*, 85 AD2d 346, 370 [1982][recognizing that the Siting Board was an "umbrella agency" that must perform functions previously assigned to other bodies.]). Accordingly, the Board has ample authority to reject Farmersville's interpretation of its own law when it determines (as it did here) that its interpretation is not supported by the plain language of the statute.

No deference was required to be given to the Town's interpretation. Like any adjudicatory body required to interpret a statute or provision of law, the Board was obligated to discern and effectuate the will of the drafters (*see*, *Patrolmen's Benevolent Assn. of City of N.Y. v. City of New York*, 41 NY2d 205, 208 [1976](["It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature."]). This includes looking to the text of the law, "which is the clearest indicator of legislative intent" (*Matter of New York County Lawyers' Assn. v. Bloomberg*, 19 NY3d 712, 721 [2012][internal quotation marks omitted]). When, as here, the language is clear and unambiguous, the Board is obligated to give effect to its plain meaning (*State of New York v. Patricia II*., 6 NY3d 160, 162

[2006]; *see Matter of Anonymous v. Molik*, 32 NY3d 30, 37 [2018]). As wholly explained in the *Certificate Order*, the Farmersville local laws did not define the term "church" as specifically including Amish residences (R.399-1 at 75). Nor did Farmersville present any evidence that the law was intended, when drafted, to ensure that every Amish home in Farmersville would be treated as a church for purposes of applying setback distances for wind turbines, despite the fact that ACWE's application was already under review at the time the law was passed. As a result, the Board was well within its authority to interpret the plain language of the term "church" and conclude that it was unreasonable to interpret the term to include what is in fact a full-time residence.

The Board did not ignore the evidence presented by Dr. Nolt regarding Amish residences and the general practices of Amish families to hold religious services in their homes. The Board simply did not adopt his opinion that the Project sited in compliance with the Town's setback requirements would interfere with the Amish residents' use of their property. Nor was ACWE required to dispute Dr. Nolt's evidence, because the operative question before the Board was not, as Farmersville suggests, whether Farmersville might draft a law that recognized all Amish residences as churches, but rather, whether the Town in fact wrote such a law. The answer, which is well supported by the record, is "No."

As explained by the Board, it would have been "unreasonable to interpret the term 'church' to include what is in essence a full-time residence" based on occasional services being conducted at individual residences (R.399-1 at 76). This conclusion is based on the specific facts of this case and must be afforded substantial deference (*see*, *Cole v. Town of Esopus*, 55 Misc 3d 382, 389 [Sup Ct, Albany County 2016] [citing cases]). The record contains no evidence that members of the Farmersville Amish community sought to have their properties, or any buildings, declared a "church" or "place of worship" for purposes of Farmersville's zoning law. Nor has any party, including Farmersville, claimed that the primary use of a residence owned or occupied by a member of the Amish community is other than as a residence (*see*, *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, "There are no church buildings [and] worship services are hosted by households in their homes" (R.339-2 at 1523:10-11).

There is no evidence that it was Farmersville's intent to include Amish residences within the term "church" when the law was first enacted in 2019. There is also no evidence of any previous treatment by Farmersville of Amish residences as churches. As the Board stated, the evidence in the record clearly shows that the

effort to label Amish homes as churches "was a litigation position with no historical application prior to this case" (*id).*

Farmersville's interpretation is also not "entitled to unquestioning judicial deference, since the ultimate responsibility of interpreting the law is with the court" (*see Matter of Town of New Castle v. Kaufmann*, 72 NY2d 684, 687 [1988][citing *Matter of Exxon Corp. v. Board of Stds. & Appeals of City of N.Y.*, 128 AD2d 289, 296 [1st Dept 1987]; *see also*, *Matter of Mandel v. Nusbaum*, 138 AD2d 597, 598 [2d Dept 1988]). The Board is well within its authority to reject a town's interpretation of its own law when the interpretation of such law is central to the Board's finding required under PSL § 168(3)(e).

The Board's conclusion that the 2,200-foot set-back requirement for churches is not applicable to Amish residences is consistent with the plain reading of Local Law No. 3 of 2019 of the Town of Farmersville (Farmersville LL#3 of 2019) and well-settled tenets of statutory construction (*see Matter of Oefelein v. Town of Thompson Planning Bd.*, 9 AD3d 556, 558 [3d Dept 2004]). Section 6 of Farmersville LL#3 of 2019 defines "residence" as:

> any dwelling suitable for habitation existing in the Town of Farmersville on the date an application is received… but shall not include buildings such as hunting camps, hotels, hospitals, motels, dormitories, sanitariums, nursing homes, schools or other buildings used for educational purposes…

(R.277-4). Because the Farmersville law does not include churches within the definition of "residence" and does not separately define "church," "churches" must fall within the category of "buildings such as [*inter alia*] schools, hospitals, and nursing facilities," which are specifically excluded from the definition of a "residence" (see Farmersville LL#3 of 2019 §§6 and 13E[5]). Farmersville's interpretation of its zoning law that the Amish residences should be treated as "churches" conflicts with Farmersville LL#3 of 2019. Accordingly, the Board's conclusion is neither arbitrary, capricious, nor without basis in the record.

Farmersville relies on several cases to assert that its interpretation of its own laws is entitled to deference. However, that deference should only be afforded when a town's interpretation ". . . is not irrational, unreasonable, or contrary to governing language" (25 NY Jur 2d Counties, Etc. § 367). The cases cited by Farmersville are inapposite to the present facts and circumstances. *Matter of Troy Sand & Gravel Co. v. Town of Sand Lake* concerns a challenge to a local law revising zoning districts in a municipality (185 AD3d 1306 [3d Dept 2020]). In *Matter of Committee to Protect Overlook, Inc. v. Town of Woodstock Zoning Bd. of Appeals*, a non-profit sought to overturn a local zoning board's determination that a monastery was a permitted use within the zoning law, and further sought to overturn a height variance granted to the monastery (24 AD3d 1103 [3d Dept 2005]). Neither of these cases

discusses the review of an interpretation of a town law by the Board, nor was there any issue concerning whether the town's interpretation was unreasonable.

The Board properly found that Farmersville's interpretation of the Farmersville LL#3 of 2019 is unreasonable, and Farmersville has failed to demonstrate how the Board exceeded its statutory authority in so concluding.

B. The Board's Refusal to Impose Greater Setbacks on Project Components Located in the Vicinity of Amish Residences Does Not Violate the First Amendment and Is Well Within the Board's Authority.

Farmersville argues that, without regard to the interpretation to be given the definition of "residence" and "church", the Board has an obligation under the First Amendment to impose more stringent setbacks to protect the religious practices of the Farmersville Amish (Farmersville Br. at 52-55). This argument conflates to an argument that, in setting standards imposed on ACWE, the Board is required to facilitate the religious practices of the Amish by imposing a burden on ACWE that ACWE is not otherwise obligated to bear, *i.e.,* by restricting the lawful use of property rights ACWE has secured. The argument is flawed because: (i) its premise is based not on evidence offered by a member of the Amish community but wholly on conjecture offered by Farmersville's co-Respondent's Amish expert, and (ii) because it would require that the Board violate the Establishment Clause of the First Amendment.

1. Farmersville Does Not Have Standing to Assert Constitutional Claims on Behalf of the Farmersville Amish

Farmersville does not have standing to assert statutory or constitutional arguments on behalf of the Farmersville Amish. 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*.).

The Siting Board correctly found that Farmersville 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 Town [of Farmersville] or the Coalition, and the [Farmersville] Amish could readily have defended its interests in this proceeding" (R.419-1 at 13) (*see Beechy v. Cent. 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).

Farmersville 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. Moreover, the Coalition's arguments sound squarely in the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. These are rights under the Constitution, and Farmersville does not have standing to assert these rights on behalf of the Farmersville Amish.

2. The Board's decision not to impose special restrictions on ACWE does not interfere with the Amish community's right to practice its religion.

Despite Farmersville's focus on the right of the Amish to practice their religion, that issue was not before the Siting Board and is not before this Court for review. The record includes only the view of Dr. Nolt that Amish residents will be unable to practice their in-home services, but zero evidence that the visibility or audibility of wind turbines would actually or even likely interfere. The Board was within its adjudicatory power to evaluate and accept or reject the sufficiency of Dr. Nolt's opinion testimony.

If the Board were to determine that the Farmersville Amish residences should be accorded the treatment given to churches, the Board would likely be violating the Establishment Clause of the First Amendment for promoting the religion of the Farmersville Amish over that of any other individual in a non-Farmersville 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."]). The relief Farmersville seeks, assertedly 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.

IV. CONCLUSION

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

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