FOR IMMEDIATE RELEASE
November 14, 2008

Citizens annul Centerville wind law

A local law regulating wind farms in the Town of Centerville was annulled Friday by a Rochester appeals court. The Appellate Division of the New York State Supreme Court overturned wind turbine regulations adopted in 2006 because the town failed to comply with the State Environmental Quality Review Act.

According to Gary Abraham, attorney for Concerned Citizens of Centerville, "The court recognized that local laws that affect the whole town are likely to require an environmental impact statement, something that was not done here."

In November, 2006, the Centerville town board opened the door to Noble Environmental Power by adopting regulations establishing a 1,000-foot setback from homes for industrial wind turbines, and limiting noise levels to 50 decibels. "That noise level is like living with a full-sized refrigerator in your bedroom, but the town decided it did not need to consider the impact of that until Noble submitted a wind farm application–the court today said that was illegal," according to Abraham.

Dennis Gaffin, an anthropology professor and head of the concerned citizens group, said, "We told the town such noise levels would change life here dramatically but they said there was no need to consider that issue because a Noble would address it later."

Another member of the group, Jeff Tutuska, expressed concerns about noise and visual impacts. "I would have two or more of these giant wind turbines close to my home, what would it be worth then?"

Sixty-seven wind turbines have gone up in the Town of Eagle, neighboring Centerville to the north, and Noble has approached the Town of Farmersville to the south seeking approval of another sixty-seven. "Nobody cares when intrusive projects like this are located on county borders," according to Gaffin. The three projects in Eagle, Centerville and Farmersville cross borders in Wyoming, Allegany and Cattaraugus counties. "Nobody respects the sense of place people have in communities when you live on the margins," Gaffin says.

According to Abraham, "More and more people are calling into question whether the small amount of electricity these projects produce justifies the level of disturbance wind projects create. "Now, at least, towns will have to take a hard look at the way they regulate these projects."

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SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1104

CA 08-00282

PRESENT: SMITH, J.P., LUNN, FAHEY, AND PERADOTTO, JJ.

CENTERVILLE'S CONCERNED CITIZENS,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN BOARD OF TOWN OF CENTERVILLE,
DEFENDANT-RESPONDENT.

GARY A. ABRAHAM, ALLEGANY, FOR PLAINTIFF-APPELLANT.

HODGSON RUSS LLP, BUFFALO (DANIEL A. SPITZER OF COUNSEL), AND RICHARDSON AND PULLEN, P.C., FILLMORE, FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Allegany County (Michael L. Nenno, A.J.), entered May 9, 2007 in a declaratory judgment action. The judgment dismissed the complaint (denominated petition and complaint).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the complaint is reinstated and judgment is granted in favor of plaintiff as follows:

> It is ADJUDGED and DECLARED that Local Law No. 1 (2006) of the Town of Centerville is invalid.

Memorandum: Plaintiff commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking to annul Town of Centerville Local Law No. 1 of 2006 (Local Law) based on, inter alia, the alleged failure of defendant to comply with the procedural and substantive requirements of ECL article 8 (State Environmental Quality Review Act [SEQRA]) in enacting the Local Law. We note at the outset that this is properly only a declaratory judgment action. "The gravamen of the plaintiff's challenge here is . . . that the local law itself is an invalid legislative enactment . . .[, and i]t is well established that an article 78 proceeding is not the proper vehicle to test the validity of a legislative enactment" (*Kamhi v Town of Yorktown*, 141 AD2d 607, 608, *affd* 74 NY2d 423). We agree with plaintiff, however, that Supreme Court erred in dismissing the complaint (improperly denominated petition and complaint) and instead should have granted judgment in favor of plaintiff declaring that the Local Law is invalid.

Defendant declared itself the lead agency for the proposed Local Law under SEQRA, concluded that this was an "Unlisted action" (6 NYCRR 617.6 [a] [3]), and prepared a "Short Environmental Assessment Form" (short EAF) used for such actions (*see* 6 NYCRR 617.20, Appendix C). The short EAF contained a negative declaration of environmental significance and, based upon that declaration, no environmental impact statement was prepared (*see* ECL 8-0109 [4]; 6 NYCRR 617.7 [a] [2]).

It is well settled that SEQRA applies to the "adoption of . . . local laws . . . that may affect the environment" (6 NYCRR 617.2 [b] [3]; *see* ECL 8-0105 [4]; *State of New York v Town of Horicon*, 46 AD3d 1287, 1288). In addition, "[t]he mandate that agencies implement SEQRA's procedural mechanisms to the 'fullest extent possible' reflects the Legislature's view that the substance of SEQRA cannot be achieved without its procedure, and that departures from SEQRA's procedural mechanisms thwart the purposes of the statute. Thus it is clear that strict, not substantial, compliance is required" (*Matter of King v Saratoga County Bd. of Supervisors*, 89 NY2d 341, 347).

We agree with plaintiff that defendant failed to comply with the procedural requirements of SEQRA and, "where a lead agency has failed to comply with SEQRA's mandates, the negative declaration must be nullified" (*Matter of New York City Coalition to End Lead Poisoning v Vallone*, 100 NY2d 337, 348). The use of a short EAF is permitted only in the event that the proposed action, here, the enactment of the Local Law, is properly classified as an Unlisted action (*see* 6 NYCRR 617.6 [a] [3]). Unlisted actions are defined as those actions not identified as either Type I or Type II actions (*see* 6 NYCRR 617.2 [ak]), and Type I actions include "the adoption of changes in the allowable uses within any zoning district, affecting 25 or more acres of the district" (6 NYCRR 617.4 [b] [2]). The action at issue herein would change the allowable use within the entire Town and thus is properly classified as a Type I action (*see generally Matter of Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668, 689-690; *Patterson Materials Corp. v Town of Pawling*, 264 AD2d 510, *lv denied* 95 NY2d 754). "For Type I actions, a full EAF . . . must be used to determine the significance of such actions" (6 NYCRR 617.6 [a] [2]). Thus, "[w]e agree with [plaintiff] that the failure of [defendant] to complete . . . the full EAF nullifies its SEQRA negative declaration" (*Matter of Citizens Against Sprawl-Mart v Planning Bd. of City of Niagara Falls*, 8 AD3d 1052, 1053).

In light of our determination, we have not considered plaintiff's remaining contentions.

Entered: November 14, 2008

JoAnn M. Wahl
Clerk of the Court