To be Argued by: John C. Graham
15 minutes requested

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FOURTH DEPARTMENT

In the Matter of COALITION OF CONCERNED CITIZENS AND DENNIS GAFFIN, as its President, Petitioners, – against – NEW YORK STATE BOARD ON ELECTRIC GENERATION SITING AND THE ENVIRONMENT, and ALLE-CATT WIND ENERGY LLC, Respondents.	Docket No. OP 20-01405

BRIEF OF RESPONDENT NEW YORK STATE BOARD ON ELECTRIC GENERATION SITING AND THE ENVIRONMENT

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PRELIMINARY STATEMENT

In this original special proceeding pursuant to Public Service Law (PSL) § 170, Petitioners Coalition of Concerned Citizens and Dennis Gaffin as its President (together, Coalition) seek judicial review of a Certificate of Environmental Compatibility and Public Need (Certificate) granted on June 3, 2020 by Respondent New York State Board on Electric Generation Siting and the Environment (Siting Board) to Respondent Alle-Catt Wind Energy LLC (Alle-Catt) to build and operate a wind-powered electric generation facility. That facility will consist of up to 116 wind turbines to be located on leased private lands within the Town of Arcade, Wyoming County; the Towns of Centerville and Rushford, Allegany County; and the Towns of Farmersville and Freedom, Cattaraugus County, New York.[1]

The Siting Board is a special purpose State entity created by the Legislature. Through PSL Article 10 (PSL §§ 160-173), the Legislature delegated to the Siting Board exclusive authority within the State over the siting and construction of electric generating facilities capable of

[1] A description of Alle-Catt's proposed facility can be found in the Siting Board hearing examiners' February 27, 2020 Recommended Decision, Record Document (R.) 358-1 at pages 2-3.

generating 25,000 kilowatts or more of electric power. The Siting Board granted Bluestone's Certificate after a robust evidentiary process that complied with the rigorous procedures mandated by Article 10. That statute prescribes an expedited "one-stop" process which overrides and replaces other State and local permits that otherwise would have been required. It also authorizes the Siting Board to supersede local substantive requirements (*e.g.*, building and design codes) that would apply to electric generating facilities within the statute's purview. Under the Article 10 process, the Siting Board has one year to issue a decision on a completed Certificate application.

The Coalition argues four points in its brief, pertaining to: (1) local laws of the Town of Freedom; (2) community character impacts; (3) First Amendment free exercise rights of the Swartzentruber Amish in the Town of Farmersville; and (4) electric system capacity benefits of the Alle-Catt project. As a threshold matter, it lacks organizational standing to raise its third and fourth argument points before this Court because neither of those claims are germane to the Coalition's stated organizational purpose.

As for the Coalition's first point, the facts do not support its claim that a 2007 local wind energy siting law of the Town of Freedom, rather than a 2019 local law that expressly superseded it, applies to the Alle-Catt project. Contrary to the Coalition's contention, Cattaraugus County Supreme Court did not invalidate the 2019 law.

As for its second point, the Siting Board gave due consideration to community character and fulfilled its duty to do so under Article 10. It acknowledged that the project would affect community character and imposed conditions to minimize those impacts to the maximum extent practicable. Moreover, Article 10 does not require that a certificate order include the cost/benefit analysis that the Coalition demands.

As for the Coalition's First Amendment constitutional claim, not only does the Coalition lack standing to pursue a free exercise clause claim, but it also failed to preserve that claim for judicial review. Siting Board procedural rules preclude consideration of arguments not raised in briefs on exceptions to the examiners' recommended decision, and that prohibition carries through to judicial review. In any event, the Coalition fails to state a First Amendment claim because the Siting

Board did not directly prohibit any Amish religious practice or require the Amish to behave in a manner contrary to their religious beliefs.

Finally, the Coalition also failed to preserve its challenge to the Siting Board's finding that the project would be a beneficial addition to the State's electric system capacity because it did not raise that argument on rehearing. In any event, as the Siting Board correctly recognized, the Coalition's claim essentially amounts to a disagreement with State energy policy, and also seeks to have this Court substitute its judgment for the Siting Board's expertise. The Coalition's claim that the project's benefits will be diminished by future renewable energy projects, moreover, is simply illogical.

QUESTIONS PRESENTED

1. Do Petitioners have standing to raise their First Amendment and electric system capacity arguments?

Answer: No.

2. Did the Siting Board correctly apply a 2019 local wind energy siting law of the Town of Freedom?

Answer: Yes.

3. Did the Siting Board give due consideration to community character?

Answer: Yes.

4. Did the Siting Board violate the First Amendment of the United States Constitution with respect to religious practices of the Swartzentruber Amish community?

Answer: No.

5. Did the Siting Board properly reject Petitioner's counsel's claim that Swartzentruber residences constitute "churches" for the purposes of its local wind energy siting law?

Answer: Yes.

6. Was the Siting Board's finding that the Alle-Catt facility would be a beneficial addition to the State's electric system capacity supported by substantial evidence?

Answer: Yes.

STATEMENT OF FACTS

Legal framework

Over the last 50 years, the New York State Legislature has enacted several statutes, codified in the Public Service Law, providing for State review, control, and approval of proposed electric generation facilities.

Historical background

Article 10 is the most recent version of a State electric generation siting statute by which the Legislature has vested authority to grant all necessary permits for the construction and operation of electric generating facilities in one single entity – the Siting Board. The statute's initial predecessor was enacted in 1972 as PSL Article VIII. L 1972, ch 385. In that enactment, the Legislature found:

> that there is a need for the state to control determinations regarding the proposed siting of major steam electric generating facilities within the state and to cooperate with other states, regions and countries in order to serve the public interest in creating and preserving a proper environment and in having an adequate supply of electric power, all within the context of the policy objectives heretofore set forth …

Id. § 1. Governor Nelson A. Rockefeller, moreover, in his statement in support of Article VIII, stated:

> This bill creates a State Board on Electric Generation Siting and the Environment enabling the State to further the production of needed increased electrical power while fully protecting the State's natural environment. This board will replace the current uncoordinated welter of approvals, procedures and agencies that have virtually paralyzed the construction of needed new power plants.
>
> * * *
>
> The Board will consist of the Chairman of the Public Service Commission, the Commissioners of Environmental Conservation, Health and Commerce and an appointed member residing in the area in which the plant is primarily proposed to be located. This composition will assure a balanced weighing of the many factors relevant to siting determinations.

1972 McKinney's Session Laws of NY at 3391.

That original version of Article VIII expired on January 1, 1979. L 1972, ch 385, § 8. A nearly identical version became effective August 4, 1978. L 1978, ch 708, § 2. It was amended by L 1983, ch 721 and expired January 1, 1989. L 1983, ch 721, § 2.

In 1992, three years after Article VIII expired, the Legislature enacted Article X of the PSL to reinstate Siting Board control over

electric generation siting. Governor Mario M. Cuomo's memorandum in support of Article X stated:

> With the expiration of Article VIII of the Public Service Law, the construction of major generating facilities again became subject to numerous licensing and permitting on the State and local government levels. [This] bill provides a State siting process that will enable comprehensive review of the benefits and impacts anticipated from proposed facilities without unreasonable delay.

1992 McKinney's Session Laws of NY at 2898. That memorandum described Article X as a "one-stop process for the siting of major electric generating facilities." *Id.* Article X was broader in scope than Article VIII, as it was not limited to steam electric generating facilities. It applied to any electric generating facility with a generating capacity of 80,000 kilowatts or more. L 1992, ch 519, § 6 (former PSL § 160(2)). That statute expired on January 1, 2003 by its own terms.

The current Article 10 became effective August 4, 2011. L 2011, ch 388, § 12. Again, the Legislature stated its intent to provide "a simplified regulatory process to site new power plants." 2011 McKinney's Session Laws of NY at 2029 (Sponsor's Memorandum). The Sponsor's Memorandum pointed to several new features of the statute – specifically:

- Streamlining the regulatory process for the siting of energy sources 25 megawatts or larger;
- Providing for enhanced community input;
- Providing for additional environmental justice studies;
- Requiring facilities to meet all applicable air emission requirements;
- Granting as-of-right participation to municipalities, individual residents and not-for-profit organizations; and
- Expanding the amount of money available to local interested parties who wish to participate but lack sufficient funds.

Id. Notably, the legislative memo indicates that the vehicle for incorporating local concerns is through enhancing the ability of municipalities and local residents to participate in the Siting Board proceeding. *Id.*

Procedure under Article 10

The Siting Board is a state regulatory entity within the New York State Department of Public Service (Department). PSL § 160(4). It is comprised of the chair of the Department, the commissioner of the Department of Environmental Conservation, the commissioner of the Department of Health, the chair of the New York State Energy Research and Development Authority, the commissioner of the Department of Economic Development, and, for each project, two residents of the municipality where the project is proposed to be located.

Id. Site preparation for, or construction of, an electric generating facility subject to Article 10 may not be commenced without a certificate of environmental compatibility and public need issued by the Siting Board. PSL §§ 162(1), 160(5).

PSL Article 10 provides for advance notice and outreach to local municipalities. Before a project applicant can file a formal application with the Siting Board, it must serve a preliminary scoping statement on, *inter alia*, the chief executive officer of each municipality where any portion of the project is proposed to be located and a library serving the district of each State legislator where any portion of the project is proposed to be located. PSL §§ 163(2), 164(2); 16 NYCRR § 1000.5. It must also provide notice to residents of those municipalities. *Id.* That scoping statement must include, among other things, a description of the proposed facility and its environmental setting, potential environmental and health impacts, and proposed studies to evaluate those impacts. PSL § 163(1). For wind energy facilities, those studies must also examine potential impacts to bat and avian species. PSL § 163(1)(c).

PSL Article 10 also seeks to provide an opportunity for participation. By providing for (i) pre-application scoping and communications (*e.g.,* PSL § 163(2),(3)), (ii) a determination informing interested persons when the Siting Board found the application complete (*e.g.,* PSL § 165(1)), and (iii) an administrative hearing process (*e.g.,* PSL § 165(3)), the Legislature provided participants in an Article 10 siting proceeding an opportunity to test, support, or challenge other parties' contentions and previously-exchanged exhibits in an orderly manner.

Evidentiary hearings on the application must be held in accordance with PSL §§ 165 and 167. The hearing examiners presiding over the hearings are chosen from the Department of Public Service and the Department of Environmental Conservation. PSL § 161(3). The examiners must set forth their conclusions and recommendations in a recommended decision. PSL § 167(1)(a).

Within twelve months from the date that the application is deemed complete, the Siting Board must render a final decision on the record developed by the hearing examiners and any briefs on exceptions to the examiners' recommended decision. PSL §§ 165(4)(a), 168(1).

Article 10 requires the Siting Board to incorporate into its decision various findings including:

- the nature of probable environmental impacts, PSL § 168(2);
- that the facility is a beneficial addition to or substitution for the electric generation capacity of the state, PSL § 168(3)(a);
- that the facility will serve the public interest, PSL § 168(3)(b);
- that the adverse environmental impacts will be minimized or avoided to the maximum extent practicable; PSL § 168(3)(c);
- if a significant disproportionate adverse environmental impact would affect the community where the facility is located, then the avoidance or mitigation measures must be verifiable, PSL § 168(3)(d); and
- that the facility is designed to comply with applicable state and local laws, except that the Siting Board may waive compliance with local laws upon making certain findings, PSL § 168(3)(e).

In making those findings, the Siting Board must consider:

- the state of available technology, PSL § 168(4)(a);
- the nature and economics of reasonable alternatives, PSL § 168(4)(b);
- environmental impacts found under § 168(2), PSL § 168(4)(c);
- impacts of related facilities, PSL § 168(4)(d);
- the facility's consistency with the energy policies and long-range planning objectives of the most recent State Energy Plan, PSL § 168(4)(e);
- impact on community character, PSL § 168(4)(f); and
- other social, economic, visual, environmental or other conditions that the Siting Board deems relevant, PSL § 168(4)(g).

In the proceeding below, the Siting Board issued its decision on June 3, 2020.

Article 10 makes a petition for rehearing before the Siting Board a prerequisite to seeking judicial review of the decision. PSL § 170(1). Petitioners filed a petition for rehearing on July 3, 2020. R. 408-3. The Siting Board issued its decision on rehearing on September 25, 2020. R. 419-1.

Petitioners commenced this original special proceeding pursuant to PSL § 170 by filing a notice of petition and petition with this Court on or about October 26, 2020.

Other relevant facts specifically pertaining to Petitioners' claims are set forth in the corresponding Argument points below.

STANDARD OF REVIEW

The Siting Board's interpretation of the procedural and substantive requirements of Article 10 is entitled to judicial deference. When reviewing the Siting Board's interpretation of Article 10, the Court must "engage in a realistic appraisal of the particular situation to determine whether the administrative action reasonably promotes or transgresses the pronounced legislative judgment." *Matter of UPROSE*

v. Power Auth. of the State of N.Y., 285 A.D.2d 603, 606 (2d Dep't 2001) (internal citations omitted).

"Substantial evidence is 'a minimal standard' that requires 'less than proof by a preponderance of the evidence' … and 'demands only that a given inference is reasonable and plausible, not necessarily the most probable.' Although there may be 'substantial evidence on both sides of an issue disputed before an agency,' under the substantial evidence standard, reviewing courts do not weigh the conflicting evidence or decide if they find the evidence convincing; 'instead, when a rational basis for the conclusion adopted by the agency is found, the judicial function is exhausted.'" *Matter of National Fuel Gas Distrib. Corp. v. Public Serv. Commn.*, 169 A.D.3d 1334, 1335 (3d Dep't 2019) (internal citations omitted).

ARGUMENT

POINT I.

THE COALITION LACKS STANDING TO ARGUE CERTAIN OF ITS CLAIMS

The Coalition's stated organizational purpose bears no relation to concerns about the State's electrical generating capacity (the Third Cause of Action set forth in its petition), electric rates (Ninth Cause of

Action), the State Energy Plan (Eleventh Cause of Action) or religious exercise rights (Twelfth Cause of Action). Therefore, it lacks associational standing to prosecute any of those claims.

An organization lacks standing to maintain a claim on behalf of its members unless (1) some or all of its members have suffered an actual injury-in-fact; (2) the interests which the organization seeks to protect in the litigation are germane to its purposes; (3) it is proper for the organization to act as the representative of those whose rights it is asserting; and (4) neither the claim nor the relief requested requires the participation of individual members. *Matter of Dental Socy. of State of N.Y. v. Carey*, 61 N.Y.2d 330, 333-34 (1984).

The Coalition fails the second of those criteria. Regardless of whether it may satisfy the other criteria, it is not a proper party to assert the four above-mentioned causes of action. An organizational litigant must be one whose interests are germane to the claims it asserts, so as to ensure that it has a concrete interest in prosecuting those claims. *Rudder v. Pataki*, 93 N.Y.2d 273, 278-79 (1999).

In the proceedings before the Siting Board, the Coalition was asked to provide a statement of the nature of the interests that it represents. It responded that:

> Coalition members own real property in an [sic] around the Town of Centerville, and are permanent and seasonal residents. The members are interested in avoiding and minimizing adverse impacts of the project proposal on the character of the community, and a balanced assessment of the potential beneficial impacts of the proposed Project. Adverse impacts include effects of the project on natural resources, and impacts on noise and health. Beneficial impacts include emissions reduction. Concern is also directed to cumulative impacts in light of operating utility-scale wind energy projects in the nearby towns of Eagle, Orangeville and Sheldon, and a proposed wind energy project in the nearby town of Barre.

R. 148-9 at Page RFIF-2.

As can be seen from its statement, the Coalition's interests are focused entirely around local environmental and community character impacts. Consequently, statewide generation capacity, electric rates, compliance with the State Energy Plan and religious freedom are not germane to its interests as an organization. It therefore lacks organizational standing to prosecute its third, ninth, eleventh and twelfth causes of action and the claims it asserts in Points III and IV of

its brief. Because the Coalition lacks standing to pursue those claims, the Court should dismiss the claims and arguments. *Rudder*, 93 N.Y.2d at 278-79.

POINT II.

THE SITING BOARD CORRECTLY HELD THAT LOCAL LAW #1-2019 OF THE TOWN OF FREEDOM WAS IN EFFECT AT THE CLOSE OF THE EVIDENTIARY HEARING

Using Supreme Court decision language lifted out of context, Petitioners have crafted a narrative that ignores key details. By carefully piecing those out-of-context statements together, they make it appear that Cattaraugus County Supreme Court determined that a 2007 local law of the Town of Freedom was in effect for the purposes of the Siting Board proceeding and Alle-Catt's application. A full recitation of the relevant facts, however, reveals that Local Law #1-2019: (1) was duly enacted by the Town of Freedom Town Board *after* the Article 78 proceeding challenging a 2018 law had been commenced; (2) superseded the 2007 law; (3) had not been brought before Cattaraugus County Supreme Court for review of its validity; and thus (4) had not been invalidated by that court at the time the Siting Board determined that Local Law #1-2019 was in effect.

The following is a timeline of relevant events:

- August 20, 2018 – The Town of Freedom enacted Local Law #1-2018. That law was a wind energy siting ordinance which superseded the Town's 2007 ordinance covering the same subject matter.
- December 13, 2018 (on or about) – Freedom United, a local citizens' group, commenced a hybrid Article 78 and declaratory judgment proceeding to challenge the validity of Local Law #1-2018. *Matter of Freedom United v. Town of Freedom Town Bd.*, Index No. 87572 (Sup. Ct. Cattaraugus County). Freedom United only alleged that the local law's adoption was procedurally defective; it did not assert any substantive claims. *Id.*, Decision and Judgment at 2 (October 21, 2019). R. 283-1 at 27 of 58.
- January 14, 2019 – The Town of Freedom adopted Local Law #1-2019. That law was identical to Local Law #1-2018. Apparently because of Freedom United's Article 78 procedural challenge to Local Law #1-2018, the Town Board's minutes, at pages 2-3, recite that it was "repassing the same law passed August 20, 2018, in

order to cover all bases."

http://www.freedomny.org/pdfs/minutes/2019/MX-M3050_20191019_104151.pdf. For the Court's convenience, a copy of those minutes is annexed hereto as Addendum A.

- January 22, 2019 – The Town of Freedom filed Local Law #1-2019 with the Secretary of State. R. 169-22 at 116 of 169. For the Court's convenience, a copy of the Town's filing is annexed hereto as Addendum B.
- October 21, 2019 – Supreme Court annulled Local Law #1-2018 due to procedural defects in the Town's 2018 adoption of that law . It thus determined that the 2007 law remained in effect. The court, however, recognized that Local Law #1-2019 had been enacted while the Article 78 was pending, but the court did not address the validity of that 2019 law. R. 283-1 at 26-34 of 58.
- December 5, 2019 – In the Article 10 proceeding below, the evidentiary record before the hearing examiners was closed. R. 399-1 at 77. This was the point in time at which the Siting Board deemed all applicable local laws to have been in effect for the purposes of Article 10.

- January 31, 2020 – Alle-Catt commenced an Article 78 challenge against the Town of Freedom's January 6, 2020 resolution purporting to invalidate Local Law #1-2019. *Alle-Catt Wind Energy LLC v. Town of Freedom*, Index No. 89035 (Sup. Ct. Cattaraugus County).
- March 5, 2020 – Supreme Court held a hearing in the *Alle-Catt Wind* matter. Justice Terrence M. Parker, who had also heard the *Freedom United* matter, presided in *Alle-Catt Wind*. The issue presented was whether Justice Parker, in *Freedom United*, had first invalidated Local Law #1-2019 before the Town of Freedom had purported to do so in January 2020. For the Court's convenience, a transcript of that hearing is appended hereto as Addendum C. In that hearing, it was pointed out that, after the Town of Freedom adopted Local Law #1-2019, Freedom United was offered the opportunity to amend its petition to address that law. Freedom United declined. Addendum C at 4. Regarding Local Law #1-2019, Justice Parker consequently stated:

> 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 … What is the relation between the 2007 and the 2019 laws is an issue that has not yet been determined.

Addendum C at 7, 9.

- April 30, 2020 – Supreme Court, in *Freedom United*, issued an order confirming that, among other things, the validity of Local Law #1-2019 was not part of the court's October 21, 2019 decision. R. 387-1.

Three things are clear, then. First, as Supreme Court rendered no determination on the validity of Local Law #1-2019, it cannot be said to have invalidated that law. Second, Local Law #1-2019 expressly superseded the 2007 law. Third, Local Law #1-2019 was the most recent validly-enacted law in force at the time the Siting Board evidentiary record closed.

Consequently, the Siting Board correctly held that "the 2019 law was in effect up until the time the record closed, and that this law has not been vacated by any court." R. 399-1 at 78.

POINT III.

THE SITING BOARD GAVE DUE CONSIDERATION TO COMMUNITY CHARACTER

In Point II of its brief, the Coalition states that PSL § 168(4)(f) requires the Siting Board to consider community character. P. Br. at 11. It is not apparent, however, whether the Coalition is even attempting to argue that the Siting Board violated that statutory provision. Most of Point II consists of a litany of non-objective local and community comments expressing their views in opposition to the project; the remainder refers to county and municipal planning documents. This only demonstrates that, unsurprisingly, some community members are opposed to the project. But to the extent the Coalition is arguing that the Siting Board failed to consider community character, none of those comments or documents prove any such failure.

As evident from PSL Article 10, community character is only one of several factors that the Siting Board must consider. Its determination of how much weight to accord that factor in making its findings is entitled to judicial deference. *Matter of Abrams v. Public Serv. Commn.*, 67 N.Y.2d 205, 212 (1986); *Matter of Eastern Niagara*

Project Power Alliance v. Dep't of Envtl. Conservation, 42 A.D.3d 857, 861 (3d Dep't 2007).

Contrary to the Coalition's claim, the Siting Board did indeed consider public comments and found that the project would likely create adverse impacts upon cultural, historic, and recreational resources. Consequently, in accordance with PSL § 168(3)(c), it imposed conditions that would minimize those impacts to the maximum extent practicable. The impacts and conditions are described in narrative form in the RD, R. 358-1 at 135-140, which the Siting Board adopted in the Certificate Order as part of its decision, R. 399-1 at 89. The Siting Board explicitly set forth those conditions in Appendix A to the Certificate Order.

Specifically, in the RD the examiners (and by adoption, the Siting Board) considered materials submitted by Alle-Catt, the State Historic Preservation Office (SHPO), the Coalition, the Towns of Franklinville, Machias, and Yorkshire, and Department staff. R. 358-1 at 135-140. The general concern among those parties was, as SHPO stated, that "the turbines will alter the rural community setting that serves as the backdrop for the architectural, cultural and scenic tourism heritage of the involved communities." *Id.* at 138. But the examiners properly

credited evidence that existing wind turbines are already visible in 31 percent of the visual impact study area, which incorporated a 10-mile radius around Alle-Catt's project. *Id.* at 136.

While the examiners did not discount the Coalition's position that the project would impact community character, they found that Department staff's recommended certificate conditions would minimize those impacts to the maximum extent practicable. *Id.* at 139. Those conditions include relocating two turbines, requiring offset measures such as restoring historic municipal buildings and renovating historic cemeteries, and reducing nighttime aviation warning lighting by using aircraft detection lighting systems. *Id.* at 139-140. Notably, in the proceeding below, the Coalition did not contest the adequacy of these mitigation measures.

In the title of Point II (but nowhere in the body of that point), Petitioners make a conclusory claim that the Siting Board declined to balance the project's benefits against adverse local impacts. They do not point to anything in Article 10, however, that requires the Siting Board to perform that balance. The statute only requires that the Siting Board make certain findings, PSL § 168(3), and consider certain

factors in making those findings, PSL § 168(4). None of those findings or factors include the balance that Petitioners insist upon.

POINT IV.

THE COALITION FAILED TO PRESERVE ITS FIRST AMENDMENT CLAIM FOR JUDICIAL REVIEW; IN ANY EVENT, THAT CLAIM FAILS

As demonstrated in Point I above, the Coalition lacks associational standing to prosecute its Twelfth Cause of Action, which is a religious freedom claim under the First Amendment to the United States Constitution on behalf of the Swartzentruber Amish. Even if it had standing, however, the Coalition is barred from raising that claim because it was not preserved for judicial review.

Although the Coalition raised the First Amendment argument on rehearing before the Siting Board, it is nevertheless barred from employing it as a basis for judicial review. Article 10 precludes parties from raising arguments for the first time on rehearing. The Commission's administrative procedural regulations, applicable to the Siting Board via 16 NYCRR § 1000.3, expressly state that when a party has failed to raise an issue in its brief on exceptions to the examiners' recommended decision, the party is precluded from raising that issue on

rehearing. 16 NYCRR § 4.10(d)(2). In other words, "the regulatory requirement that a party take exception to the recommended decision [is] a prerequisite to raising arguments on rehearing." *Matter of Citizens for Hudson Val. v. New York State Bd. on Elec. Generation Siting & Envt.*, 281 A.D.2d 89, 94 (3d Dep't 2001). As the Siting Board recognized, the Coalition did not raise its First Amendment argument at any time prior to rehearing. R. 419-1 at 12). Because the Coalition could have raised this issue on exception to the RD, but did not, judicial review is precluded. *New York Inst. of Legal Research v. New York State Bd. on Elec. Generation Siting and the Envt.*, 295 A.D.2d 517 (2d Dep't 2002).

In any event, the Coalition's claim – which concerns the placement of only 6 of the project's 116 turbines – fails to state a cause of action under the Free Exercise Clause of the First Amendment. That amendment states, in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

US Const Amend I. The key word is "prohibiting," as demonstrated below.

The cases Petitioners cite do not support their claim. Each of those cases pertain either to (1) governmental actions directly prohibiting religious activities or requiring persons to act contrary to their own religious beliefs or (2) denials of governmental benefits because of religious adherence. *See Agudath Israel of America v. Cuomo*, 983 F.3d 620 (2d Cir. 2020) (order limiting attendance at houses of worship); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (ordinance prohibiting church from performing ritual animal sacrifices on their own property); *Rader v. Johnson*, 924 F. Supp. 1540 (D. Neb. 1996) (university rule requiring freshmen to live in campus residence halls); *Black Hawk v. Pennsylvania*, 225 F. Supp. 2d 465 (M.D. Pa. 2002) (denial of permit to keep black bears on plaintiff's own property); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1299 (10th Cir. 2004) (ejecting student who refused to utter obscenities during classroom acting exercises); *Keeler v. Mayor & City Council of Cumberland*, 940 F. Supp. 879 (D. Md. 1996) (denial of permit to demolish and rebuild church on church-owned property); *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707 (1981) (denial of unemployment benefits because of adherence to

religious principles); *Bowen v. Roy*, 476 U.S. 693 (1986) (requiring plaintiff to obtain Social Security number as a condition of receiving welfare benefits); *Fowler v. State of R. I.*, 345 U.S. 67 (1953) (ordinance precluding religious meetings in public park). By contrast, none of these cases support Petitioners' position that the Free Exercise Clause imposes limits on governmental regulation or approval of activities being conducted *by third parties* that happen to impact the practices of religious adherents.

Indeed, the United States Supreme Court has held exactly the opposite of that which Petitioners assert. In *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439 (1988), the Court held that even where it is undisputed that governmental action involving the use of lands adjacent to (and used by) religious adherents will have devastating impacts upon their religious practices, it does not follow that such action violates the Free Exercise Clause. In that case, members of three Native American tribes objected to the government's permitting of timber harvesting and construction of a road upon National Forest property adjacent to their lands. The tribes had been using that property for religious purposes. Similar to that which

Petitioners allege herein, the tribe members claimed that "successful [religious] use of the [area] is dependent upon and facilitated by certain qualities of the physical environment, the most important of which are privacy, silence and an undisturbed natural setting." *Id.* at 442. They further claimed that constructing the proposed road "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples." *Id.*

Even accepting those allegations as true, the Court nevertheless held that the government's action did not violate the Free Exercise Clause. Having analyzed a sampling of the same cases Petitioners cite in their brief to this Court, the Supreme Court acknowledged that "indirect coercion or penalties on the free exercise of religion are subject to scrutiny under the First Amendment." *Id.* at 450. It distinguished, however, those cases from *non-coercive* governmental actions – *i.e.*, actions that do not direct or prohibit the religious adherent's own behavior. As the Court stated:

> [Strict scrutiny of coercion or penalties] does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting

> contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions. The crucial word in the constitutional text is "prohibit." For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from government.
>
> Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a government action on a religious objector's spiritual development. The Government does not dispute, and we have no reason to doubt, that the logging and road-building projects at issue in this case could have devastating effects on traditional Indian religious practices …
>
> Even if we assume that we should accept the Ninth Circuit's prediction, according to which the G-O road will 'virtually destroy the … Indians' ability to practice their religion,' the Constitution simply does not provide a principle that could justify upholding respondents' legal claims. However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires … The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion.

Id. at 451-52. The Free Exercise Clause, therefore, was not intended to be used as a cudgel to force the government to exact concessions from third parties solely to benefit religious adherents.

What is relevant, then, is whether Petitioners have alleged that the Siting Board's approval of the Alle-Catt project would directly regulate the Swartzentrubers' behavior or that it would completely prohibit them from engaging in religious activities. They have not. They only allege that the operation of wind turbines would cause the Swartentrubers someannoyance. Like the permits at issue in *Lyng*, then, the project's alleged impacts on religion would be, at most, incidental.

Indeed, the record demonstrates that the turbines could not seriously inhibit the Swartzentrubers' ability to practice their religion. Only six turbines are proposed to be located within 2,200 feet of their external property boundaries. It is undisputed that the community consists of twenty-two residences. R. 399-1 at 6. Petitioners alleged, however, that only four Swartzentruber properties would have turbines within 2,200 feet of the peripheral boundary lines of their property boundaries.[2] R. 408-3 at 20 n.55. Thus, eighteen properties would remain beyond the 2,200-foot margin. Even assuming that the turbines

[2] No party provided information regarding the locations of *residences* with respect to the proposed turbines – only property boundaries.

would render four of their properties unavailable for religious services, which they do not, eighteen other properties would remain available – and neither the Swartzentrubers nor their representatives testified that their religion requires *each and every* residence to be available for such services.

The Siting Board correctly observed, moreover, that nothing in the record showed that a 1,500-foot (500 yards) setback for turbines would interfere with the Swartzentrubers' religious practices, but a 2,200-foot setback would not. In their brief to this Court, Petitioners now appear to argue that any turbines located anywhere near the Amish would disrupt their religious practices. But the remedy Petitioners seek is only to enforce the 2,200-foot church property line setback contained in the Farmersville code. In the proceeding below, Petitioners did not even attempt to demonstrate how moving turbines a maximum of 700 feet farther away from some of the Swartzentruber properties would eliminate the purported impacts. In any event, as the Siting Board observed, nothing at all in the record definitively establishes that a turbine located at any distance from Swartzentruber properties would impair their religious activities. R. 419-1 at 12-13.

Finally, the Siting Board properly found that each Swartzentruber residence could not be properly construed as a "church" for the purpose of Farmersville Local Law #3 of 2019. Absent a special definition of "church" – which the Farmersville law does not contain – that term must be construed in accordance with its ordinary and accepted meaning. McKinney's Statutes § 94. The word "church" customarily means a structure whose primary purpose is public worship. Moreover, the courts of this State have held that for the purposes of zoning, the finding of a religious use must be based upon the primary use of the property in question. *Matter of Yeshiva & Mesitva Toras Chaim v. Rose*, 136 A.D.2d 710, 711 (2d Dep't 1988); *Bright Horizon House v. Zoning Bd. of Appeals of Town of Henrietta*, 121 Misc.2d 703, 710-11 (Sup. Ct. Monroe County 1983). Nothing in the record demonstrates that the primary use of Swartzentruber properties is anything other than residential and agricultural. Petitioners do not dispute the Siting Board's finding that formal religious services are held in each home only once every ten months. R. 399-1 at 76 & n.171; P. Br. at 46. Their attempt to increase that frequency by characterizing weddings and

funerals as religious uses (P. Br. at 42, 46) is unavailing because those activities need not be, and often are not, conducted in churches.[3]

Likewise, Petitioners' argument that the Siting Board improperly overruled Farmersville's interpretation of the term "church" is makeweight. The Siting Board correctly recognized that Farmersville had never actually rendered an interpretation of that term. R. 399-1 at 76. Rather, that interpretation was, and is, merely a litigation position expressed by Farmersville's outside counsel and Petitioners. *Id.*

Consequently, Petitioners have not stated a plausible Free Exercise claim. Even if they had, the facts do not support such a claim.

POINT V.

THE SITING BOARD RATIONALLY FOUND THAT THE PROJECT WOULD BE A BENEFICIAL ADDITION TO THE STATE'S ELECTRIC GENERATION CAPACITY

The Coalition, in its Third Cause of Action, claims that the Siting Board's orders are noncompliant with PSL § 168(3)(a). That statutory provision requires the Siting Board to find that "the facility is a beneficial addition to or substitution for the electric generation capacity

[3] Indeed, religious wedding ceremonies are frequently conducted in non-church venues (*e.g.*, banquet halls and parks) and religious funerals are often conducted in secular funeral homes. It cannot be seriously argued that such ceremonies transform those venues into "churches."

of the state." *Id.* As demonstrated in Point I above, the Coalition lacks organizational standing to assert that cause of action. In any event, its arguments lack merit.

As a threshold matter, however, this Court cannot consider several of the grounds that the Coalition set forth in its petition (but did not argue in its brief). Its arguments pertaining to capacity factor, carbon sequestration and substitution were not preserved for judicial review. Article 10 expressly states that "[n]o objection that has not been urged by the party in his or her application for rehearing before the board shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." PSL § 170(1). Because the Coalition did not raise those arguments in its rehearing petition, R. 408-3, and has not shown any extraordinary circumstances warranting excuse of that failure, the Court cannot consider them. *Id.*; *Inst. of Legal Research*, 295 A.D.2d at 518.

In its brief, the Coalition essentially makes two arguments. The first is that bottlenecks in the State's electric transmission grid will trap Alle-Catt's output upstate (where they allege it is not needed) and,

therefore, will not significantly reduce greenhouse gas emissions. The second is that the climate benefits of Alle-Catt project will be diminished over time by the addition of other renewable energy projects. To support its arguments, it relies entirely upon its own expert's testimony presented in the proceeding below.

The Siting Board, as the expert administrative agency regarding electric generation siting, is entitled to choose between competing factual inferences and arguments, *Matter of Grenadier Realty Corp. v. Public Serv. Commn.*, 218 A.D.3d 883, 885 (3d Dep't 1995); *Matter of Central Hudson Gas & Elec. Corp. v. Public Serv. Commn.*, 108 A.D.2d 266, 269-70 (3d Dep't 1985), and is entitled to judicial deference as to its weighing of conflicting evidence, *Matter of Lefkowitz v. Public Serv. Commn.*, 77 A.D.3d 1043, 1045 (3d Dep't 2010). Its conclusions should not be disturbed even where a different conclusion could be reached with the same evidence. *Matter of Clapes v. Tax Appeals Trib.*, 34 A.D.3d 1092, 1094 (3d Dep't 2006). Its acceptance of conclusions presented by parties other than Petitioners in the proceeding below, therefore, was not arbitrary. *Matter of Medical Malpractice Ins. Assn. v. Supt. of Ins.*, 72 N.Y.2d 753, 763-64 (1988).

As the record demonstrates, other parties' expert testimony conflicts with that of Petitioners' expert. Alle-Catt provided a study showing that the project would reduce emissions from the State's overall electric grid by 2.3% for sulfur dioxide, 6.7% for nitrous oxides, and 1.2% for carbon dioxide. R. 358-1 at 16-17. Department Staff experts used a different model but arrived at substantially similar results. *Id*. at 17. Based on these record materials, it was reasonable for the Siting Board to find that the facility will be a beneficial addition to the State's electric generating capacity in accordance with PSL § 168(3)(a).

Regarding the Coalition's transmission constraint argument, the Siting Board correctly recognized that the argument's logical extension is that all growth of renewable electric generation throughout New York should be halted until the transmission constraints are relieved. R. 419-1 at 16-17. The Siting Board rationally rejected that argument for two reasons. First, the Coalition places the cart before the horse. As the Siting Board recognized, the siting and size of generation facilities are essential inputs into the planning of upgrades to the transmission system, not vice-versa. *Id.* at 17. Second, the Coalition's position

directly contravenes the State's energy policy. The latest State Energy Plan, the Climate Leadership and Community Protection Act (L 2019, ch 106), the Accelerated Renewable Energy Growth and Community Protection Act (L 2020, ch 58, pt JJJ), and the Commission's Clean Energy Standard (Commission Case 15-E-0302, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Order Adopting a Clean Energy Standard (August 1, 2016)) each emphasize the importance of expediting the deployment of renewable electric generation in New York. As the Siting Board is required to consider the project's consistency with State energy policies, including the most recent State Energy Plan, PSL § 168(4)(e), it lawfully determined that the project will beneficially add to the State's portfolio of energy resources.

The Coalition also accuses the Siting Board of merely speculating that the transmission constraints will be relieved in due course. This accusation is baseless because, as the Siting Board correctly observed, initiatives to enhance the State's transmission grid are and have been underway. In fact, they are coming to fruition. On February 11, 2021, the Public Service Commission approved a 54.5-mile transmission line

running from Rensselaer County to Dutchess County, which will enhance the flow of renewable energy from upstate to downstate New York.

https://www3.dps.ny.gov/pscweb/WebFileRoom.nsf/ArticlesByCategory/0C1586B3A1F4664D8525867900755AFC/$File/gov_announces%20nys%20psc%20approval%20major%20transmission%20project%20renss%20co%20-%20dutchess%20co_021121%20.pdf?OpenElement. In its press release, the Commission also announced several other actions to alleviate transmission bottlenecks throughout the State. *Id.* On May 14, 2020, the Commission had also commenced a proceeding to identify transmission projects that need to be completed expeditiously to help achieve the State's greenhouse gas reduction goals, and to refer those projects to the New York Power Authority for construction. Commission Case 20-E-0197, *Proceeding on Motion of the Commission to Implement Transmission Planning Pursuant to the Accelerated Renewable Energy Growth and Community Benefit Act*, Order on Transmission Planning (May 14, 2020). The Coalition, on the other hand, merely speculates that transmission upgrades will *not* be completed in timely fashion.

The Coalition's second argument, that the Siting Board should have analyzed more than one year's worth of decarbonization benefits because the addition of future renewable energy projects could substantially reduce those benefits, is unavailing. As the Siting Board correctly held, nothing in Article 10 or its implementing regulations require the Board to conduct multi-year analyses in order to find that "the facility is a beneficial addition to or substitution for the electric generation capacity of the state." R. 419-1 at 16; PSL § 168(3)(a); *UPROSE*, 285 A.D.2d at 606. The argument, moreover, is simply illogical. It is akin to arguing that the emission reduction benefits of one electric car are reduced by a second electric car, and even more by a third car, and so on. The reality, of course, is quite the opposite. The benefits are cumulative. The more renewable energy, the greater the overall benefit. If the Coalition's argument were accepted every time a renewable energy plant was to be proposed, then none would ever be built. No one would benefit from that. Thus, the Coalition's demand for multi-year analyses of the power grid was, and is, pointless.

CONCLUSION

For all of the foregoing reasons, this Court should dismiss the Coalition's petition in its entirety, deny all of the relief requested therein, and grant to the Siting Board such other and further relief as it deems just and reasonable.

Dated: Albany, New York
March 30, 2021

Respectfully Submitted,

ROBERT ROSENTHAL
General Counsel

By: _____

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PRINTING SPECIFICATIONS STATEMENT
Pursuant to 22 NYCRR 1250.8(j)

The foregoing brief was prepared on a computer using Microsoft Word 16, with the body of the brief printed in double-spaced 14-point Century Schoolbook font, a serifed, proportionally space typeface, except that quotations more than two lines long are single-spaced, and the footnotes are printed in single-spaced 12-point Century Schoolbook font.

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of signature blocks and pages including the table of contents, table of citations, proof of service, certificate of compliance, or any addendum authorized pursuant to 22 NYCRR 1250.8(k), is 7488, as calculated by Microsoft word 2016.

ADDENDUM A

Town of Freedom
Regular Board Meeting Minutes
Monday, January 14, 2019

Board Members Present: Ron Ashworth, John Hill, Ann Marie Dixon
and Supervisor Randy Lester

Others Officials: Justice Gary Chamberlain, and Legislator Joseph Boberg

Others: 13
****

Meeting called to order at 7:01 pm by Supervisor Randy Lester.

I. PLEDGE TO THE FLAG: Led By Supervisor Randy Lester

II. REVIEW OF MINUTES:

A) Town Board Meeting – December 17, 2018
A motion was made by Ann Marie Dixon to accept the Meeting Minutes as submitted.
Motion seconded by Ron Ashworth

Roll Call: Ayes-4 Ron Ashworth, John Hill, Ann Marie Dixon
and Supervisor Randy Lester

B) Special Year-End Board Meeting – December 28, 2018.
A motion was made by Ann Marie Dixon to accept the Meeting Minutes as submitted.
Motion was seconded by Ron Ashworth

Roll Call: Ayes-3 Ron Ashworth, Ann Marie Dixon, and Supervisor Randy Lester
Abstain-1 John Hill

C) Town Board Meeting –Organizational Meeting – January 7, 2019
A motion was made by Ann Marie Dixon to accept the Meeting Minutes as submitted.
Seconded by Ron Ashworth.

Roll Call: Ayes-4 Ron Ashworth, John Hill, Ann Marie Dixon,
and Supervisor Randy Lester

III.

TOWN OF FREEDOM

RESOLUTION # 2-2019 January 14, 2019

A Resolution Transferring Funds

The Town Board of the Town of Freedom, pursuant to Town Law Section 112, Paragraph 1 wishes to:

Transfer funds from:
Building Savings Account in the amount of $3,000.00

To:
A1620.4 (Building Contractual) to cover the cost incurred of having a tree removed from the village green (Town of Freedom owned property).

Motion by: Ron Ashworth, Seconded by Ann Marie Dixon

Roll call:

Espostio-Craft: Absent

Ashworth: Aye

Hill: Aye

Dixon: Aye

Lester: Aye

Clerk: Mary M Kellett Date: 01/14/19

IV. OLD BUSINESS:

A). Vote on Local Law 1-2019. Public Hearing was held in March 2018. Law was presented to the Cattaraugus County Planning Board on August 21, 2018, along with the Full Environmental Assessment Forms (EAF) Parts 1, 2, and 3, as well as the Negative Declaration adopted by the Town Board. The County Planning Board confirmed receipt of these materials and, as the

County Planning Board has taken no further action, we are repassing the same law passed August 20, 2018, in order to cover all bases.

A Motion was made by Ann Marie Dixon and seconded by Ron Ashworth.

Roll call:
Esposito-Craft: Absent
Ron Ashworth: Aye
John Hill: No
Ann Marie Dixon: Aye
Supervisor Randy Lester: Aye

B) Audit Declaration and Petty Cash and Annual Audit for:

A. TAX COLLECTOR - $200.00
B. TOWN CLERK - $100.00
C. JUSTICE - $150.00 {submitted at the January 7, 2019 Organization meeting}
D. JUSTICE - $150.00 {submitted at January 7, 2019 Organization meeting}
E. HIGHWAY SUPT. - $200.00 {submitted at the January 7, 2019 Organization Meeting}
F. BUILDING INSPECTOR – 2018 printout of all permits and petty cash
G. Supervisor - $0 petty cash, Supervisor's Books

A motion was made by Ron Ashworth to accept the annual audit of the records as presented. Motion was seconded by Ann Marie Dixon.

Roll call: Ayes-3 Ron Ashworth, Ann Marie Dixon, and Supervisor Randy Lester
Abstain-1 John Hill

C. Ken Ziccarelli from Gernatt's thanked the Board for letting them come and speak. Also from Gernatt's was Rich Pecnik, and Brian Schmitt. The gentlemen brought a map up to show the Town Broad the location of the area to be mined. It would border line the Town of Freedom Pit. Once they have completed mining they said it would be able to go back to agriculture. Councilmen John Hill asked how deep will this go? Gernatt said that it would match the floor grade they have now and would go about 300ft. Councilwomen Ann Marie Dixon is concerned about the water table? Gernatt said they will not go below water table. They also stated that this has no impact on water. Ann Marie Dixon then asked if the Fox Family is leasing this? Gernatt said we are doing a trade off for materials and acreage. Ann Marie Dixon asked if the Fox family would have to get a permit to have a part of their land mined? Councilmen Ron Ashworth also asked how

would Gernatt's permit cover mining on their property? Gernatt said the Fox family would have to sign on as a land owner on Gernatt's permit. Gernatt's would also be responsible for all terms and conditions. Also about 5.6 Acres would be used for this.

A motion was made by Ann Marie Dixon to table this Proposal till February 14th 2019 to schedule a work session with the Planning Board and Fox Family. Seconded by: Ron Ashworth

Roll Call: Ayes-4 Ron Ashworth, John Hill, Ann Marie Dixon, and Supervisor Randy Lester

V. NEW BUSINESS:

A. Legislator Joseph Boberg gave some County updates. He said the County passed the Budget at 1.5, for the Town of Freedom. Also in the current year many Assessors are retiring and the County has been slowly building up a volunteer Assessor group that Towns can join. What this will do is keep everyone assessment up to date. This program is totally voluntary. The Town of Freedom is up 100% compared to other towns that are not. The Town of Freedom has stayed at 100% sense the reassessment. Councilwomen Ann Marie Dixon asked would this cost the Town if we decided to joined this? Joe said what the Town is paying the Assessor right now is how much it would cost. If the Town chooses this program in the future the county would keep the assessment up and the Town of Freedom would not have to go through a reveal.

Joe also discussed about Roads and Bridge projects for this year. The slide on County road 21 is to be fixed, its being bid out. The bridge over Elton Creek is being replaced in 2019. Councilman John Hill asked if the road will be closed? Joe said yes but they are trying to work it out to where traffic can go through a corner of the Gravel Pit. Joe said that as far as paving projects by the County. County RD 21 will be paved.

B. Highway Superintendent Jim Haggerty wants to get bids for a new Ten Wheeler and new plow equipment. Councilmen John Hill asked how old is the oldest Truck? Councilmen Ron Ashworth said it's a 2009. Ron also said he has no problem with getting bids but he would like them to be opened at the March meeting.

A Motion was made by Ron Ashworth to have Highway Superintendent Jim Haggerty put bids out for a new Ten Wheeler to be opened at March 18 2019 meeting. Seconded by John Hill.

Roll Call: Ayes-4 Ron Ashworth, John Hill, Ann Marie Dixon,
and Supervisor Randy Lester

C. The Town Highway Department Employees are wondering if the Town Board is not having a board meeting on Martin Luther King Day, and Presidents Day then why should they work. Councilman John Hill stated that the Board always reschedules the meetings, it's not like we are not working less.
Highway Superintendent Jim Haggerty is looking into having Election Day off, he has looked into it and other Highway Departments have this day off. John Hill thinks this is a good idea for them to be off Election Day. Councilmen Ron Ashworth agrees that they should have Election Day off. Ron also was going to check with Jim and have him bring information to the February Meeting.

A motion was made by John Hill to let the Highway Department have Election Day off, and Martin Luther King Day and Presidents Day will be like it always has been they will work on them days. Seconded by Ron Ashworth

Roll Call: Ayes- 4 Ron Ashworth, John Hill, Ann Marie Dixon,
and Supervisor Randy Lester

D. Invenergy will be having an open house at the Freedom Town Hall Wednesday January 30th 2019 from 5:30pm-7:30pm. They will be here to share information about the Wind Project. Valessa from Invenergy said Post cards were sent out to everyone.

E. Request bids for summer lawn mowing. Supervisor Randy Lester said that he talked to Jim Haggerty. Jim knows of someone who is interested; he owns his own lawn mowing service. Councilman Ron Ashworth asked if Jim Haggerty would be over seeing them. Councilman John Hill also has the same question, he stated would they be reporting to Jim Haggerty or to the Town Board. John feels it's a grey area because it's not really Highway. He feels it's an outside bid then they would report to the Town Board. John also asked if this would be bid for hourly or for summer? Randy said this would be for the summer, from May 1st and it would be weekly. Ron asked if they will have their own equipment. Randy said yes they would use their own equipment.

A motion was made by Ann Marie Dixon for bids for summer lawn mowing. Seconded by John Hill.

Roll Call: Ayes-4 Ron Ashworth, John Hill, Ann Marie Dixon,
and Supervisor Randy Lester

VI. Supervisor Randy Lester is asking the Board what changes they may want for the Town of Freedom in the next three years to make a better Town. Councilmen John Hill said he feels a Community Center would be a good idea, instead of having activities in a truck barn. Both Councilmen Ron Ashworth and Councilwomen Ann Marie Dixon agree on the Community Center. Also Ann Marie Dixon said to improve the park building. She would like to see a kitchen in the building and more room added. Randy also included the citizens of Freedom on this discussion, no one responded from the floor.

VII. ITEMS FROM THE FLOOR:

Supervisor Randy Lester introduced Judy Hanes from the Arcade Herald as the new reporter.

Richard Lange- Commented that the town paper is the Arcade Herald for the town to send out notices in that paper. Also he made a point that the Gentlemen from Gernatt's should have talked not just to the town board but to the public as well because he could not hear or understand what they were talking about.

Stephanie Milks- How did the wind law get to the State? She wanted to know how the Town Board did not know that the Law had been filed with the state and the letter was filed in the Town Clerks office. Stephanie read the letter she had obtained from the Town Clerks office to the Town Board. Charles Malcomb attorney with Hodgson & Russ explained to everyone that State Law Governs the procedure of municipalities use to adopts local laws, specifically section 20 governs you have to have a public hearing, and so on. One of the requirements is that you file the local law with the Department of State. He explains the letter is letting the Town know that the law was filed with Secretary of State as required by State Law. Stephanie wants to know why the Town board was unaware of this law being filed with the State when the Town Board has been saying it was with the county. Chuck stated that she conflating to separate legal requirements one is that you refer materials to the county under general municipal law 239M. Stephanie asked is the Wind Law effective as of right now and Chuck said that is correct. Stephanie asked the why the Town board not aware of this is? Councilwomen Ann Marie Dixon stated it's a procedure, she was not aware of the letter, but when the board votes on this it becomes a law and then it's a procedure with the State of New York. Stephanie is also wondering why the law is sitting at the County if it's already filed with the State? Ann Marie Dixon answered that the County, State and Local Town all have a part in this. Stephanie asked if the Wind Law was official now that it has gone to the State. Ann Marie Dixon said official when the Town Board Voted on it.

Supervisor Randy Lester wanted to let everyone know that Local Law 1-2019 the Windmill Law is identical to Local Law 1-2018.

Councilmen Ron Ashworth asked Joe Boberg if he could give any information as far as where the Windmill Law is with the Legislators. Joe said a few months ago there was a resolution to recommend the IDA not to approve a pilot program. Windmills are mostly a Town Issue.

VIII. REPORTS & COMMUNICATIONS:

A) Assessors –Councilmen Ron Ashworth wanted to make the Senior Citizens aware of the Enhance Star program for anyone over 65 and if they are eligible to contact the Assessor.
B) Building Committee –
C) Building Inspector – Report Submitted.
D) Highway Superintendent –
E) Clerk/Collector – Report Submitted
F) Constable –
G) DCO –
H) Highway Committee –
I) Justices –
J) Parks & Recreation –
K) Planning Board – Report Submitted
L) Supervisor –Report Submitted at Year End Meeting.
M) Other Town Officials –

A motion to accept the reports & communications as submitted was made by Ron Ashworth. Seconded by John Hill

Roll call: Ayes-4 Ron Ashworth, John Hill, Ann Marie Dixon, and Supervisor Randy Lester

IX. APPROVAL OF VOUCHERS:

General 5 to # 39, Amt. $ 35,324.89 Yrly Amt. $64,041.84.

Motion made by Ann Marie Dixon to accept the General vouchers as submitted. Seconded by Ron Ashworth.

Roll call: Ayes- 4 Ron Ashworth, John Hill, Ann Marie Dixon and Supervisor Randy Lester

Highway 3 to 14, Amt. $20,164.25 Yrly Amt. $39,604.30

Motion made by Ron Ashworth to accept the Highway vouchers as submitted. Seconded by Ann Marie Dixon.

Roll call: Ayes-4 Ron Ashworth, John Hill, Ann Marie Dixon, and Supervisor Randy Lester

Supervisor Randy Lester read a handmade card from the Senior Citizen Group to the Town Board thanking them for the support the Town Board gives them.

X. ADJOURNMENT:

Ron Ashworth made the motion to adjourn the meeting at 8:03 p. m. Seconded by Ann Marie Dixon.

Roll call: Ayes-4 Ron Ashworth, John Hill, Ann Marie Dixon, and Supervisor Randy Lester

Respectfully Submitted,

Mindy M Holland
Town Clerk
1/23/2019

ADDENDUM B

New York State Department of State
Division of Corporations, State Records and Uniform Commercial Code
One Commerce Plaza, 99 Washington Avenue
Albany, NY 12231-0001
www.dos.ny.gov

Local Law Filing

(Use this form to file a local law with the Secretary of State.)

Text of law should be given as amended. Do not include matter being eliminated and do not use italics or underlining to indicate new matter.

☐ **County** ☐ **City** ☒ **Town** ☐ **Village**
(Select one:)

of Freedom

FILED
STATE RECORDS
JAN 22 2019
DEPARTMENT OF STATE

Local Law No. 1 **of the year 20**19

A local law A Local Law Regulating Wind Energy Facilities Within the Town of Freedom
(Insert Title)

Be it enacted by the Town Board **of the**
(Name of Legislative Body)

☐ **County** ☐ **City** ☒ **Town** ☐ **Village**
(Select one:)

of Freedom **as follows:**

See attached sheets

(If additional space is needed, attach pages the same size as this sheet, and number each.)

(Complete the certification in the paragraph that applies to the filing of this local law and strike out that which is not applicable.)

1. (Final adoption by local legislative body only.)

I hereby certify that the local law annexed hereto, designated as local law No. 1 of 20 19 of the ~~(County)(City)~~(Town)~~(Village)~~ of Freedom was duly passed by the Town Board on January 14 20 19, in accordance with the applicable provisions of law.

(Name of Legislative Body)

2. (Passage by local legislative body with approval, no disapproval or repassage after disapproval by the Elective Chief Executive Officer*.)

I hereby certify that the local law annexed hereto, designated as local law No. _____ of 20_____ of the (County)(City)(Town)(Village) of _____ was duly passed by the _____ on _____ 20_____, and was (approved)(not approved)

(Name of Legislative Body)

(repassed after disapproval) by the _____ and was deemed duly adopted

(Elective Chief Executive Officer)*

on _____ 20[ ][ ], in accordance w ith the applicable provisions of law.

3. (Final adoption by referendum.)

I hereby certify that the local law annexed hereto, designated as local law No. _____ of 20_____ of the (County)(City)(Town)(Village) of _____ was duly passed by the _____ on _____ 20_____, and was (approved)(not approved)

(Name of Legislative Body)

(repassed after disapproval) by the _____ on _____ 20_____.

(Elective Chief Executive Officer)*

Such local law was submitted to the people by reason of a (mandatory)(permissive) referendum, and received the affirmative vote of a majority of the qualified electors voting thereon at the (general)(special)(annual) election held on _____ 20_____, in accordance with the applicable provisions of law.

4. (Subject to permissive referendum and final adoption because no valid petition was filed requesting referendum.)

I hereby certify that the local law annexed hereto, designated as local law No. _____ of 20_____ of the (County)(City)(Town)(Village) of _____ was duly passed by the _____ on _____ 20_____, and was (approved)(not approved)

(Name of Legislative Body)

(repassed after disapproval) by the _____ on _____ 20_____. Such local law was subject to permissive referendum and no valid petition requesting such referendum was filed as of _____ 20_____, in accordance with the applicable provisions of law.

*Elective Chief Executive Officer means or includes the chief executive officer of a county elected on a county-wide basis or, if there be none, the chairperson of the county legislative body, the mayor of a city or village, or the supervisor of a town where such officer is vested with the power to approve or veto local laws or ordinances.

5. (City local law concerning Charter revision proposed by petition.)
I hereby certify that the local law annexed hereto, designated as local law No. _____ of 20____ of the City of _____ having been submitted to referendum pursuant to the provisions of section (36)(37) of the Municipal Home Rule Law, and having received the affirmative vote of a majority of the qualified electors of such city voting thereon at the (special)(general) election held on _____ 20____, became operative.

6. (County local law concerning adoption of Charter.)
I hereby certify that the local law annexed hereto, designated as local law No. _____ of 20____ of the County of _____State of New York, having been submitted to the electors at the General Election of November _____ 20____, pursuant to subdivisions 5 and 7 of section 33 of the Municipal Home Rule Law, and having received the affirmative vote of a majority of the qualified electors of the cities of said county as a unit and a majority of the qualified electors of the towns of said county considered as a unit voting at said general election, became operative.

(If any other authorized form of final adoption has been followed, please provide an appropriate certification.)
I further certify that I have compared the preceding local law with the original on file in this office and that the same is a correct transcript therefrom and of the whole of such original local law, and was finally adopted in the manner indicated in paragraph 1 above.

Mindy M Koller
Clerk of the county legislative body, City, Town or Village Clerk or officer designated by local legislative body

Date: 1-14-19

(Seal)

TOWN OF FREEDOM, NEW YORK
LOCAL LAW 1 OF 2019
A LOCAL LAW REGULATING WIND ENERGY FACILITIES WITHIN THE TOWN OF FREEDOM

Article 1

WIND ENERGY FACILITIES

§ 1. Title.

This Local Law may be cited as the "Wind Energy Facility Law of the Town of Freedom, New York."

§ 2. Purpose.

The Town Board of the Town of Freedom adopted this Local Law to promote the effective and efficient use of the Town's wind energy resource through Wind Energy Conversion Systems ("WECS"), and to regulate the placement of such systems so that the public health, safety, and welfare will not be jeopardized. The Town Board, following a thorough review by the Town Planning Board, finds that the current Local Law 3-2007 requires certain changes to reflect the changes in wind energy conversion systems technologies. The Town of Freedom is supportive of responsible green energy development and to promote the health, welfare and safety of the citizenry of the Town of Freedom and to encourage economic development and opportunities Local Law 3-2007 must be updated to reflect changing circumstances and technology developments that have taken place since 2007.

§ 3. Authority.

The Town Board of the Town of Freedom enacts this Local Law under the authority granted by:

1. Article IX of the New York State Constitution, § 2(c)(6) and (10).
2. New York Statute of Local Governments, § 10(1) and (7).
3. New York Municipal Home Rule Law, § 10(1)(i) and (ii) and § 10(1)(a)(6), (11), (12), and (14).
4. New York Town Law § 130(1)(Building Code), (3)(Electrical Code), (5)(Fire Prevention), (7)(Use of streets and highways), (7-a)(Location of Driveways), (11)(Peace, good order and safety), (15)(Promotion of public welfare), (15-a)(Excavated Lands), (16)(Unsafe buildings), (19)(Trespass), and (25)(Building lines).

5. New York Town Law § 64(17-a)(protection of aesthetic interests) and (23)(General powers).

§ 4. Findings.

A. The Town Board of the Town of Freedom finds and declares that:

1. Wind energy is an abundant, renewable, and nonpolluting energy resource of the Town and its conversion to electricity may reduce dependence on nonrenewable energy sources and decrease the air and water pollution that results from the use of conventional energy sources.

2. The generation of electricity from properly sited wind turbines, including small systems, can be cost effective, and in many cases existing power distribution systems may be used to transmit electricity from wind-generating stations to utilities or other users, or energy consumption at that location can be reduced.

3. Regulation of the siting and installation of wind turbines is necessary for the purpose of protecting the health, safety, and welfare of neighboring property owners and the general public.

4. Wind Energy Facilities represent significant potential aesthetic impacts because of their large size, lighting, and shadow flicker effects, if not properly sited.

5. If not properly regulated, installation of Wind Energy Facilities can create drainage problems through erosion and lack of sediment control for facility and access road sites, and harm farmlands through improper construction methods.

6. Wind Energy Facilities may present a risk to bird and bat populations if not properly sited.

7. If not properly sited, Wind Energy Facilities may present risks to the property values of adjoining property owners.

8. Wind Energy Facilities may be significant sources of noise, which, if unregulated, can negatively impact adjoining properties.

9. Without proper planning, construction of Wind Energy Facilities can create traffic problems and damage local roads.

10. If improperly sited, Wind Energy Facilities can interfere with various types of communications.

§ 5. Permits Required; Transfer; Modifications.

A. No Wind Energy Facility shall be constructed, reconstructed, modified, or operated in the Town of Freedom except in compliance with this Local Law.

B. No WECS shall be constructed, reconstructed, modified, or operated in the Town of Freedom except with a Wind Energy Facility Permit approved pursuant to this Local Law.

C. No Wind Measurement Tower shall be constructed, reconstructed, modified, or operated in the Town of Freedom except pursuant to a Wind Energy Facility Permit issued pursuant to this Local Law.

D. No Small Wind Energy Conversion System shall be constructed, reconstructed, modified, or operated in the Town of Freedom except pursuant to a Wind Energy Permit issued pursuant to this Local Law.

E. This Local Law shall apply to all areas of the Town of Freedom.

F. Exemptions. No permit or other approval shall be required under this Chapter for WECS utilized solely for agricultural operations in a state or county agricultural district, as long as the facility is set back at least one and a half times its Total Height from a property line, and does not exceed 120 feet in height. Towers over 120 feet in Total Height utilized solely for agricultural operations in a state or county agricultural district shall apply for a wind energy permit in accordance with Article II of this Local law, but shall not require a height variance. Prior to the construction of a WECS under this exemption, the property owner or a designated agent shall submit a sketch plan or building permit application to the Town to demonstrate compliance with the setback requirements.

G. Transfer. No transfer of any Wind Energy Facility or Wind Energy Permit, nor sale of the entity owning such facility including the sale of more than 30% of the stock of such entity (not counting sales of shares on a public exchange), will occur without prior approval of the Town, which approval shall be granted upon written acceptance of the transferee of the obligations of the transferor under this Section, and the transferee's demonstration, in the sole discretion of the Town Board, that it can meet the technical and financial obligations of the transferor. No transfer shall eliminate the liability of the transferor nor of any other party under this Section unless the entire interest of the transferor in all facilities in the Town is transferred and there are no outstanding obligations or violations.

H. Notwithstanding the requirements of this Section, replacement in kind or modification of a Wind Energy Facility may occur without Town Board approval when (1) there will be no increase in Total Height; (2) no change in the location of the WECS; (3) no additional lighting or

change in facility color; (4) no increase in noise produced by the WECS, and (5) the WECS is not currently in violation of any permit condition or provision of this Local Law.

§ 6. Definitions.

As used in this Local Law, the following terms shall have the meanings indicated:

AGRICULTURAL OR FARM OPERATIONS — means the land and on-farm buildings, equipment, manure processing and handling facilities, and practices which contribute to the production, preparation, and marketing of crops, livestock, and livestock products as a commercial enterprise, including a "commercial horse boarding operation" as defined in subdivision thirteen of New York Agriculture and Markets Law § 301 and "timber processing," as defined in subdivision fourteen of New York Agriculture and Markets Law § 301. Such farm operation may consist of one or more parcels of owned or rented land, which parcels may be contiguous or noncontiguous to each other.

EAF — Environmental Assessment Form used in the implementation of the SEQRA as that term is defined in Part 617 of Title 6 of the New York Codes, Rules and Regulations.

RESIDENCE — means any dwelling suitable for habitation existing in the Town of Freedom on the date an application is received. A residence may be part of a multi-dwelling or multipurpose building, but shall not include buildings such as hunting camps, hotels, hospitals, motels, dormitories, sanitariums, nursing homes, schools or other buildings used for educational purposes, or correctional institutions.

SEQRA — the New York State Environmental Quality Review Act and its implementing regulations in Title 6 of the New York Codes, Rules and Regulations, Part 617.

SOUND PRESSURE LEVEL — means the level which is equaled or exceeded a stated percentage of time. An L_{10} - 50 dBA indicates that in any hour of the day 50 dBA can be equaled or exceeded only 10% of the time, or for 6 minutes. The measurement of the sound pressure level can be done according to the International Standard for Acoustic Noise Measurement Techniques for Wind Generators (IEC 61400-11), or other accepted procedures.

SITE — The parcel(s) of land where a Wind Energy Facility is to be placed. The Site can be publicly or privately owned by an individual or a group of individuals controlling single or adjacent properties. Where multiple lots are in joint ownership, the combined lots shall be considered as one for purposes of applying setback requirements. Any property which has a Wind Energy Facility or has entered an agreement for said Facility or a setback agreement shall not be considered off-site.

SMALL WIND ENERGY CONVERSION SYSTEM ("Small WECS") — A wind energy conversion system consisting of a wind turbine, a tower, and associated control or conversion electronics, which has a rated capacity of not more than 100 kW and which is intended to primarily reduce consumption of utility power at that location.

TOTAL HEIGHT — The height of the tower and the furthest vertical extension of the WECS.

WIND ENERGY CONVERSION SYSTEM ("WECS") — A machine that converts the kinetic energy in the wind into a usable form (commonly known as a "wind turbine" or "windmill").

WIND ENERGY FACILITY —A development project, consisting of an integrated system of Wind Energy Conversion Systems or Small Wind Energy Conversion Systems, including Wind Measurement Towers, and all associated Wind Energy Related Infrastructure.

WIND ENERGY RELATED INFRASTRUCTURE – the components of a Wind Energy Facility, excluding WECS and Wind Measurement Towers, that are necessary or convenient for the construction or operation of the Wind Energy Facility, including electric collection lines, substations, interconnection lines, switchyards, access roads, communication facilities, operation and maintenance buildings and facilities, and laydown yards and concrete batch plants.

WIND MEASUREMENT TOWER — a tower used for the measurement of meteorological data such as temperature, wind speed, and wind direction.

WIND ENERGY PERMIT — A permit granted pursuant to this Local Law granting the holder the right to construct, maintain, and operate a Wind Energy Facility.

§ 7. Applicability.

A. The requirements of this Local Law shall apply to all Wind Energy Facilities proposed, operated, modified, or constructed after the effective date of this Local Law.

B. Wind Energy Facilities for which a required permit has been properly issued and upon which construction has commenced prior to the effective date of this Local Law, shall not be required to meet the requirements of this Local Law; provided, however, that:

1. Any such preexisting Wind Energy Facility which does not provide energy for a continuous period of 12 months shall meet the requirements of this Local Law prior to recommencing production of energy.

2. No modification or alteration to an existing Wind Energy Facility shall be allowed without full compliance with this Local Law.

3. Any Wind Measurement Tower existing on the effective date of this Local Law shall be removed no later than 24 months after said effective date, unless a Wind Energy Permit for said Wind Energy Facility is renewed or obtained through written application and payment of the appropriate fee.

Article II
Wind Energy Conversion Systems

§ 8. Applications For Wind Energy Permits For Wind Energy Facilities.

A. An application for a Wind Energy Permit for Wind Energy Facility shall include the following, presented in the following order:

1. Name, address, and telephone number of the applicant. If the applicant is represented by an agent, the application shall include the name, address, and telephone number of the agent as well as an original signature of the applicant authorizing the representation.

2. Name, address, and telephone number of the owners of properties on which the Wind Energy Facility will be located. If the property owner is not the applicant, the application shall include a letter or other written permission signed by the property owner (i) confirming that the property owner is familiar with the proposed application and (ii) authorizing the submission of the application.

3. Address, or other property identification, of each proposed WECS location, including Tax Map section, block, and lot number.

4. A description of the project, including the number and maximum rated capacity of each WECS.

5. A plot plan prepared by a licensed surveyor or engineer drawn in sufficient detail to clearly describe the following:

(a) Property lines and physical dimensions of the Site.

(b) Location, approximate dimensions and types of major existing structures and uses on the Site, public roads, and adjoining properties within the setback distances specified in Section 13.E of the boundaries of the proposed WECS Site.

(c) Location and elevation of each proposed WECS.

(d) Location of all above ground utility lines on the Site or within one radius of the Total Height of the WECS, transformers, power lines, interconnection point with transmission lines, and other ancillary facilities or structures.

(e) Location and size of structures above 35 feet within the setback distances specified in Section 13.E of the proposed WECS. For purposes of this requirement, electrical transmission and distribution lines, antennas and slender or open lattice towers are not considered structures.

(f) To demonstrate compliance with the setback requirements of this Local Law, circles drawn around each proposed tower location equal to the setback distances specified in Section 13.E. (i)

(g) Location of the nearest residential structure located off the Site, and the distance from the proposed WECS.

(h) All proposed facilities, including access roads, electrical lines, substations, storage or maintenance units, and fencing.

6. Vertical drawing of the WECS showing Total Height, turbine dimensions, tower and turbine colors, ladders, distance between ground and lowest point of any blade, location of climbing pegs, and access doors. One drawing may be submitted for each WECS of the same type and Total Height.

7. Landscaping Plan depicting existing vegetation and describing any areas to be cleared and the specimens proposed to be added, identified by species and size of specimen at installation and their locations.

8. Lighting Plan showing any FAA-required lighting and other proposed lighting. The application should include a copy of the determination by the Federal Aviation Administration to establish required markings and/or lights for the structure, but if such determination is not available at the time of the application, no building permit for any lighted facility may be issued until such determination is submitted.

9. List of property owners, with their mailing addresses, within 500 feet of the boundaries of the proposed Site. The applicant may delay submitting this list until the Town Board calls for a public hearing on the application.

10. Decommissioning Plan: The applicant shall submit a decommissioning plan, which shall include: 1) the anticipated life of the WECS; 2) the estimated decommissioning costs in current dollars; 3) how said estimate was determined; 4) the method of ensuring that funds will be available for decommissioning and restoration; (5) the method, such as by annual

re-estimate by a licensed engineer, that the decommissioning cost will be kept current; and 6) the manner in which the WECS will be decommissioned and the Site restored, which shall include removal of all structures and debris to a depth of three feet, restoration of the soil, and restoration of vegetation (consistent and compatible with surrounding vegetation), less any fencing or residual minor improvements requested by the landowner.

11. Complaint Resolution: The application will include a complaint resolution process to address complaints from nearby residents. The process may use an independent mediator or arbitrator and shall include a time limit for acting on a complaint. The applicant shall make every reasonable effort to resolve any complaint.

12. An application shall include information relating to the construction/installation of the wind energy conversion facility as follows:

(a) A construction schedule describing expected commencement and completion dates; and

(b) A description of the anticipated routes to be used by construction and delivery vehicles and the gross weights and heights of those loaded vehicles.

13. Completed Part 1 of the Full Environmental Assessment Form.

14. Applications for Wind Energy Permits for Wind Measurement Towers subject to this Local Law may be jointly submitted with the Wind Energy Facility application.

15. For each proposed WECS, include make, model, picture, and manufacturers' specifications, including noise decibels data. Include Manufacturers' Material Safety Data Sheet documentation for the type and quantity of all materials used in the operation of all equipment including, but not limited to, all lubricants and coolants.

16. If the applicant agrees in writing in the application that the proposed WECS may have a significant adverse impact on the environment, the Town Board may issue a positive declaration of environmental significance.

17. If a positive declaration of environmental significance is determined by the SEQRA lead agency, the following information shall be included in the Draft Environmental Impact Statement ("DEIS") prepared for a Wind Energy Facility. Otherwise, the following studies shall be submitted with the application:

a. Shadow Flicker: The applicant shall conduct a study on potential shadow flicker. The study shall identify locations where shadow flicker may be caused by the WECSs and the expected durations of the flicker at these locations. The study shall identify areas where

shadow flicker may interfere with residences and describe measures that shall be taken to eliminate or mitigate the problems.

b. Visual Impact: Applications shall include a visual impact study of the proposed WECS as installed, which may include a computerized photographic simulation, demonstrating any visual impacts from strategic vantage points. Color photographs of the proposed Site from at least two locations accurately depicting the existing conditions shall be included. The visual analysis shall also indicate the color treatment of the system's components and any visual screening incorporated into the project that is intended to lessen the system's visual prominence.

c. A fire protection and emergency response plan, created in consultation with the fire department(s) having jurisdiction over the proposed Site.

d. Noise Analysis: a noise analysis by a competent acoustical consultant documenting the noise levels associated with the proposed WECS. The study shall document noise levels at property lines and at the nearest residence not on the Site (if access to the nearest residence is not available, the Town Board may modify this requirement). The noise analysis shall include low frequency noise.

e. Property value analysis prepared by a licensed appraiser in accordance with industry standards, regarding the potential impact on values of properties neighboring WECS Sites.

f. An assessment of potential electromagnetic interference with microwave, radio, television, personal communication systems, and other wireless communication.

18. The applicant shall, prior to the receipt of a building permit, demonstrate that the proposed facility meets the system reliability requirements of the New York Independent System Operator, or provide proof that it has executed an Interconnection Agreement with the New York Independent System Operator and/or the applicable Transmission Owner.

19. A statement, signed under penalties of perjury, that the information contained in the application is true and accurate.

§ 9. Application Review Process.

A. Applicants may request a pre-application meeting with the Town Board or with any consultants retained by the Town Board for application review. Meetings with the Town Board shall be conducted in accordance with the Open Meetings Law.

B. Eight copies of the application shall be submitted to the Town Clerk. Payment of all application fees shall be made at the time of application submission. If any waivers are requested, waiver application fees shall be paid at the time of the receipt of the application.

C. Town staff or Town designated consultants shall, within 30 days of receipt, or such longer time if agreed to by the applicant, determine if all information required under this Article is included in the application. Unless the Town Board waives any application requirement, no application shall be considered until deemed complete.

D. If the application is deemed incomplete, the Town Board or its designated reviewer shall provide the applicant with a written statement listing the missing information. No refund of application fees shall be made, but no additional fees shall be required upon submittal of the additional information unless the number of WECSs proposed is increased.

E. Upon submission of a complete application, including the grant of any application waiver by the Town Board, the Town Clerk shall transmit the application to the Town Board.

F. The Town Board shall hold at least one public hearing on the application. Notice shall be given by first class mail to property owners within 500 feet of the boundaries of the proposed WECSs, and published in the Town's official newspaper, no less than ten nor more than 20 days before any hearing, but, where any hearing is adjourned by the Town Board to hear additional comments, no further publication or mailing shall be required. The applicant shall prepare and mail the Notice of Public Hearing prepared by the Town, and shall submit an affidavit of service. The assessment roll of the Town shall be used to determine mailing addresses.

G. The public hearing may be combined with public hearings on any Environmental Impact Statement or requested waivers.

H. Notice of the project shall also be given to the Cattaraugus County Planning Board, if required by General Municipal Law §§ 239-l and 239-m.

I. SEQRA review. Applications for WECS are deemed Type I projects under SEQRA. The Town may conduct its SEQRA review in conjunction with other agencies, in which case the records of review by said communities shall be part of the record of the Town's proceedings.

J. The Town may require an escrow agreement for the engineering and legal review of the applications and any environmental impact statements before commencing its review. At the completion of the SEQRA review process, if a positive declaration of environmental significance has been issued and an environmental impact statement prepared, the Town shall issue a Statement of Findings, which Statement may also serve as the Town's decision on the applications.

K. Upon receipt of the recommendation of the County Planning Board (where applicable), the holding of the public hearing, and the completion of the SEQRA process, the Town Board may approve, approve with conditions, or deny the applications, in accordance with the standards in this Article.

§ 10. Standards for Wind Energy Facilities and WECS.

A. The following standards shall apply, unless specifically waived by the Town Board as part of a Wind Energy Permit.

1. All power transmission lines from the tower to any building or other structure shall be located underground to the maximum extent practicable.

2. No television, radio, or other communication antennas may be affixed or otherwise made part of any WECS, except pursuant to the Town Code. Applications may be jointly submitted for WECS and telecommunications facilities.

3. No advertising signs are allowed on any WECS, including fencing and support structures. Nothing in this provision shall prohibit identification information or safety notifications.

4. Lighting of tower. No tower shall be lit except to comply with FAA requirements and for safety/security needs at the tower entrance. Minimum security lighting for ground level facilities shall be allowed as approved on the Wind Energy Facility development plan.

5. All applicants shall use measures to reduce the visual impact of WECSs to the extent possible. WECSs shall use tubular towers. All structures in a project shall be finished in a single color or a camouflage scheme. WECSs within a Wind Energy Facility shall be constructed using wind turbines whose appearance, with respect to one another, is similar within and throughout the Project. No lettering, company insignia, or advertising, shall be on any part of the tower, hub, or blades, except for tower identifier numbers near the tower base and safety signage.

6. Guy wires shall not be used for wind turbines.

7. No WECS shall be installed in any location where its proximity with existing fixed broadcast, retransmission, or reception antenna for radio, television, or wireless phone or other personal communication systems would materially degrade signal transmission or reception without mitigation. No WECS shall be installed in any location along the major axis of an existing microwave communications link where its operation is likely to produce electromagnetic interference in the link's operation. If it is determined that a WECS is causing material electromagnetic interference, the operator shall take the necessary corrective action to

eliminate this interference including relocation or removal of the facilities, or resolution of the issue with the affected parties. Failure to remedy material electromagnetic interference is grounds for modifying the Wind Energy Permit the specific WECS or WECSs causing the interference.

8. All solid waste and hazardous waste and construction debris shall be removed from the Site and managed in a manner consistent with all appropriate rules and regulations.

9. Land protected by conservation easements shall be avoided when practicable.

10. WECSs shall be located in a manner that minimizes significant negative impacts on rare animal species in the vicinity, particularly bird and bat species.

11. Storm-water run-off and erosion control shall be managed in a manner consistent with all applicable state and Federal laws and regulations.

12. The maximum Total Height of any WECS shall be 600 feet.

13. Construction of the WECS shall be limited to the daylight hours, except for certain activities that require calmer wind conditions than may be expected during the day.

14. The standards for restoration and preservation of farm land of the New York State Department of Agriculture and Markets' "Guidelines for Agricultural Mitigation for Windpower Projects" shall be followed.

§ 11. Required Safety Measures.

A. Each WECS shall be equipped with both manual and automatic controls to limit the rotational speed of the rotor blade so it does not exceed the design limits of the rotor.

B. Deleted.

C. Appropriate warning signs shall be posted, visible in all directions upon approaching the tower, warning of electrical shock or high voltage and containing emergency local contact information. The Town Board may require additional signs based on safety needs.

D. No climbing pegs or tower ladders shall be located closer than 12 feet to the ground level at the base of the structure for freestanding single pole or guyed towers.

E. The minimum distance between the ground and any part of the rotor or blade system shall be 20 feet.

F. WECSs shall be designed to prevent unauthorized external access to electrical and mechanical components and shall have access doors that are kept securely locked at all times.

§ 12. Traffic Routes.

A. Construction of WECSs poses potential risks because of the large-size construction vehicles and their impact on traffic safety and their physical impact on local roads. Construction and delivery vehicles for WECSs and/or associated facilities shall use traffic routes established as part of the application review process. Factors in establishing such corridors shall include (1) minimizing traffic impacts from construction and delivery vehicles; (2) minimizing WECS related traffic during times of school bus activity; (3) minimizing wear and tear on local roads; and (4) minimizing impacts on local business operations. Wind Energy Permit conditions may limit WECS-related traffic to specified routes, and include a plan for disseminating traffic route information to the public.

B. The applicant is responsible for remediation of damaged roads during and upon completion of the installation or maintenance of a Wind Energy Facility. A public improvement bond shall be posted prior to the start of construction of a Wind Energy Facility in an amount, determined by the Town Board, sufficient to compensate the Town for any damage to local roads.

§ 13. Setbacks For Wind Energy Conversion Systems.

A. The statistical sound pressure level generated by a WECS shall not exceed L_{10} - 50 dBA measured at the nearest residence located off the Site. Sites can include more than one piece of property and the requirement shall apply to the combined properties. If the ambient sound pressure level exceeds 50 dBA, the standard shall be ambient dBA plus five dBA. Independent certification shall be provided before and after construction demonstrating compliance with this requirement.

B. In the event audible noise due to Wind Energy Facility operations contains a steady pure tone, such as a whine, screech, or hum, the standards for audible noise set forth in § 15(A) shall be reduced by five dBA. A pure tone is defined to exist if the 1/3 octave band sound pressure level in the band, including the tone, exceeds the arithmetic average of the sound pressure levels of the two contiguous 1/3 octave bands by five dBA for center frequencies of 500 Hz and above, by eight dBA for center frequencies between 160 Hz and 400 Hz, or by 15 dBA for center frequencies less than or equal to 125 Hz.

C. In the event the ambient noise level (exclusive of the development in question) exceeds the applicable standard given above, the applicable standard shall be adjusted so as to equal the ambient noise level. The ambient noise level shall be expressed in terms of the highest whole number sound pressure level in dBA, which is exceeded for more than five minutes per hour.

Ambient noise levels shall be measured at the exterior of potentially affected existing residences. Ambient noise level measurement techniques shall employ all practical means of reducing the effect of wind generated noise at the microphone. Ambient noise level measurements may be performed when wind velocities at the proposed project Site are sufficient to allow wind turbine operation, provided that the wind velocity does not exceed 30 mph at the ambient noise measurement location.

D. Any noise level falling between two whole decibels shall be the lower of the two.

E. Each WECS shall be setback as follows, as measured from the center of the WECS:

1. 1.1 x tip height, or more, from the nearest Site boundary property line.

2. 1.1 x tip height, or more, from the right of way of public roads.

3. 1,200 feet or more from the nearest off-Site residence, measured from the exterior of such residence.

4. 1.1 x tip height, or more, from any structure visited daily by one or more people (e.g., dairy barns) or any above-ground utilities, unless waived by the utility companies.

5. 1,200 feet or more from the property line of any school, church, hospital, or nursing facility.

6. Wind energy conversion facilities shall be located in a manner consistent with all applicable state and Federal wetlands laws and regulations.

§ 14. Noise and Setback Easements.

A. In the event a Wind Energy Facility does not meet a setback requirement or exceeds noise or other criteria established in this Local Law as it existed at the time the Wind Energy Permit is granted, a waiver will be granted from such requirement by the Town Board in the following circumstances:

1. Written consent from the affected property owners has been obtained stating that they are aware of the Wind Energy Facility and the noise and/or setback limitations imposed by this Local Law, and that consent is granted to (1) allow noise levels to exceed the maximum limits otherwise allowed or (2) allow setbacks less than required; and

2. In order to advise all subsequent owners of the burdened property, the consent, in the form required for an easement, has been recorded in the County Clerk's Office describing the

benefited and burdened properties. Such easements shall be permanent and they may not be revoked without the consent of the Town Board, which consent shall be granted upon either the completion of the decommissioning of the benefited WECS in accordance with this Article, or the acquisition of the burdened parcel by the owner of the benefited parcel or the WECS.

B. Waivers granted under this Section differ from waiver requests under Article V of this Local Law in that no Article V waiver is required if a waiver is given under this Section, and an Article V waiver must be sought rather than a waiver under this Section if the adjoining property owner will not grant an easement pursuant to this Section.

§ 15. Issuance Of Wind Energy Permits.

A. Upon completion of the review process, the Town Board shall, upon consideration of the standards in this Local Law and the record of the SEQRA review, issue a written decision with the reasons for approval, conditions of approval, or disapproval fully stated.

B. If approved, the Town Board will direct the Town Clerk to issue a Wind Energy Permit upon satisfaction of all conditions for said Permit, and direct the building inspector to issue a building permit, upon compliance with the Uniform Fire Prevention and Building Code and the other pre-construction conditions of this Local Law.

C. The decision of the Town Board shall be filed within five days in the office of the Town Clerk and a copy mailed to the applicant by first class mail.

D. If any approved Wind Energy Facility is not substantially commenced within two years of issuance of the Wind Energy Permit, the Wind Energy Permit shall expire, unless renewed by the Town Board after payment of a renewal fee equal to the original application fee.

§ 16. Abatement.

A. If any WECS remains non-functional or inoperative for a continuous period of one year, the applicant agrees that, without any further action by the Town Board, the applicant shall remove said system at its own expense. Removal of the system shall include at least the entire above ground structure, including, without limitation, transmission equipment and fencing, from the property. This provision shall not apply if the applicant demonstrates to the Town that it has been making good faith efforts to restore the WECS to an operable condition, but nothing in this provision shall limit the Town's ability to order a remedial action plan after public hearing.

B. Non-function or lack of operation may be proven by reports to the Public Service Commission, NYSERDA, New York Independent System Operator, or by lack of income generation. The applicant shall make available (subject to a non-disclosure agreement) to the Town Board all reports to and from the purchaser of energy from the Wind Energy Facility, if

requested, necessary to prove the Wind Energy Facility is functioning, which reports may be redacted as necessary to protect proprietary information.

C. Decommissioning Bond or Fund. The applicant, or successors, shall continuously maintain a fund or bond payable to the Town, in a form approved by the Town for the removal of non-functional towers and appurtenant facilities, in an amount to be determined by the Town, for the period of the life of the facility. This fund may consist of a letter of credit from a State of New York licensed financial institution. All costs of the financial security shall be borne by the applicant. All decommissioning bond requirements shall be fully funded before a building permit is issued. The Town may enter into an agreement to maintain security for a multiple-jurisdiction project without further action by the Town Board

§ 17. Limitations On Approvals; Easements On Town Property.

A. Nothing in this Local Law shall be deemed to give any applicant the right to cut down surrounding trees and vegetation on any property to reduce turbulence and increase wind flow to the Wind Energy Facility. Nothing in this Local Law shall be deemed a guarantee against any future construction or Town approvals of future construction that may in any way impact the wind flow to any Wind Energy Facility. It shall be the sole responsibility of the Facility operator or owner to acquire any necessary wind flow or turbulence easements, or rights to remove vegetation.

B. Pursuant to the powers granted to the Town to manage its own property, the Town may enter into noise, setback, or wind flow easements on such terms as the Town Board deems appropriate, as long as said agreements are not otherwise prohibited by state or local law.

§ 18. Permit Revocation.

A. Testing fund. A Wind Energy Permit shall contain a requirement that the applicant fund periodic noise testing by a qualified independent third-party acoustical measurement consultant, which may be required as often as bi-annually, or more frequently upon request of the Town Board in response to complaints by neighbors. The scope of the noise testing shall be to demonstrate compliance with the terms and conditions of the Wind Energy Permit and this Local Law and shall also include an evaluation of any complaints received by the Town. The applicant shall have 90 days after written notice from the Town Board, to cure any deficiency. An extension of the 90 day period may be considered by the Town Board, but the total period may not exceed 180 days.

B. Operation. A WECS shall be maintained in operational condition at all times, subject to reasonable maintenance and repair outages. Operational condition includes meeting all noise requirements and other permit conditions. Should a WECS become inoperable, or should any

part of the WECS be damaged, or should a WECS violate a permit condition, the owner or operator shall remedy the situation within 90 days after written notice from the Town Board. The applicant shall have 90 days after written notice from the Town Board, to cure any deficiency. An extension of the 90 day period may be considered by the Town Board, but the total period may not exceed 180 days.

C. Notwithstanding any other abatement provision under this Local Law, and consistent with § 19(A) and § 21(B), if the WECS is not repaired or made operational or brought into permit compliance after said notice, the Town may, after a public meeting at which the operator or owner shall be given opportunity to be heard and present evidence, including a plan to come into compliance, (1) order either remedial action within a particular timeframe or (2) order modification of the Wind Energy Permit so as to eliminate the unrepaired WECS and require the removal of the WECS within 90 days. If the WECS is not removed, the Town Board shall have the right to use the security posted as part of the Decommission Plan to remove the WECS.

Article III
Wind Measurement Towers

§ 19. Wind Site Assessment.

The Town Board acknowledges that prior to construction of a Wind Energy Facility, a wind site assessment is conducted to determine the wind speeds and the feasibility of using particular Sites. Installation of Wind Measurement Towers, also known as anemometer ("Met") towers, shall be permitted on the issuance of a Wind Energy Permit in accordance with this Article.

§ 20. Applications For Wind Measurement Towers.

A. An application for a Wind Measurement Tower shall include:

1. Name, address, and telephone number of the applicant. If the applicant is represented by an agent, the application shall include the name, address, and telephone number of the agent as well as an original signature of the applicant authorizing the representation.

2. Name, address, and telephone number of the property owner. If the property owner is not the applicant, the application shall include a letter or other written permission signed by the property owner (i) confirming that the property owner is familiar with the proposed applications and (ii) authorizing the submission of the application.

3. Address of each proposed tower location, including Tax Map section, block, and lot number.

4. Proposed Development Plan and Map.

5. Decommissioning Plan, including a security bond for removal.

§ 21. Standards For Wind Measurement Towers.

A. The distance between a Wind Measurement Tower and the property line shall be at least one and a half times the Total Height of the tower. Sites can include more than one piece of property and the requirement shall apply to the combined properties. Exceptions for neighboring property are also allowed with the consent of those property owners.

B. Wind Energy Permits for Wind Measurement Towers may be issued for a period of up to two years. Permits shall be renewable upon application to the Town Board in accordance with the procedure of this Article.

Article IV
Small Wind Energy Conversion Systems

§ 22. Purpose and Intent.

The purpose of this Article is to provide standards for small wind energy conversion systems designed for home, farm, and small commercial use on the same parcel, and that are primarily used to reduce consumption of utility power at that location. The intent of this Article is to encourage the development of small wind energy systems and to protect the public health, safety, and community welfare.

§ 23. Applications.

A. Applications for Small WECS Wind Energy permits shall include:

1. Name, address, and telephone number of the applicant. If the applicant will be represented by an agent, the name, address, and telephone number of the agent as well as an original signature of the applicant authorizing the agent to represent the applicant.

2. Name, address, and telephone number of the property owner. If the property owner is not the applicant, the application shall include a letter or other written permission signed by the property owner (i) confirming that the property owner is familiar with the proposed applications and (ii) authorizing the submission of the application.

3. Address of each proposed tower location, including Tax Map section, block, and lot number.

4. Evidence that the proposed tower height does not exceed the height recommended by the manufacturer or distributor of the system.

5. A line drawing of the electrical components of the system in sufficient detail to allow for a determination that the manner of installation conforms to the Uniform Fire Prevention and Building Code.

6. Sufficient information demonstrating that the system will be used primarily to reduce consumption of electricity at that location.

7. Written evidence that the electric utility service provider that serves the proposed Site has been informed of the applicant's intent to install an interconnected customer-owned electricity generator, unless the applicant does not plan, and so states so in the application, to connect the system to the electricity grid.

8. A visual analysis of the Small WECS as installed, which may include a computerized photographic simulation, demonstrating the visual impacts from nearby strategic vantage points. The visual analysis shall also indicate the color treatment of the system's components and any visual screening incorporated into the project that is intended to lessen the system's visual prominence.

§ 24. Development Standards.

All small wind energy systems shall comply with the following standards. Additionally, such systems shall also comply with all the requirements established by other sections of this Article that are not in conflict with the requirements contained in this section.

A. A system shall be located on a lot a minimum of one acre in size, however, this requirement can be met by multiple owners submitting a joint application.

B. Only one small wind energy system tower per legal lot shall be allowed, unless there are multiple applicants, in which their joint lots shall be treated as one lot for purposes of this Article.

C. Small Wind energy systems shall be used primarily to reduce the on-site consumption of electricity.

D. Tower heights may be allowed as follows:

1. 65 feet or less on parcels between one and two acres.

2. 120 feet or less on parcels of two or more acres.

3. The allowed height shall be reduced if necessary to comply with all applicable Federal Aviation Requirements, including Subpart B (commencing with Section 77.11) of Part 77 of Title 14 of the Code of Federal Regulations regarding installations close to airports.

E. The maximum turbine power output is limited to 100 kW.

F. The system's tower and blades shall be painted a non-reflective, unobtrusive color that blends the system and its components into the surrounding landscape to the greatest extent possible and incorporate non-reflective surfaces to minimize any visual disruption.

G. The system shall be designed and located in such a manner to minimize adverse visual impacts from public viewing areas.

H. Exterior lighting on any structure associated with the system shall not be allowed except that which is specifically required by the Federal Aviation Administration.

I. All on-site electrical wires associated with the system shall be installed underground except for "tie- ins" to a public utility company and public utility company transmission poles, towers, and lines. This standard may be modified by the decision-maker if the project terrain is determined to be unsuitable due to reasons of excessive grading, biological impacts, or similar factors.

J. The system shall be operated such that no disruptive electromagnetic interference is caused. If it has been demonstrated that a system is causing harmful interference, the system operator shall promptly mitigate the harmful interference or cease operation of the system.

K. Signs shall be posted, visible from all directions, on the tower at a height of five feet warning of electrical shock or high voltage and harm from revolving machinery, and giving a local contact number in case of emergency. No brand names, logo, or advertising shall be placed or painted on the tower, rotor, generator, or tail vane where it would be visible from the ground, except that a system or tower's manufacturer's logo may be displayed on a system generator housing in an unobtrusive manner.

L. Towers shall be constructed to provide one of the following means of access control, or other appropriate method of access:

1. Tower-climbing apparatus located no closer than 12 feet from the ground.

2. A locked anti-climb device installed on the tower.

3. A locked, protective fence at least six feet in height that encloses the tower.

M. Anchor points for any guy wires for a system tower shall be located within the property that the system is located on and not on or across any above-ground electric transmission or distribution lines. The point of attachment for the guy wires shall be enclosed by a fence six feet high or sheathed in bright orange or yellow covering from three to eight feet above the ground.

N. Construction of on-site access roadways shall be minimized. Temporary access roads utilized for initial installation shall be re-graded and re-vegetated to the pre-existing natural condition after completion of installation.

O. To prevent harmful wind turbulence from existing structures, the minimum height of the lowest part of any horizontal axis wind turbine blade shall be at least 30 feet above the highest structure or tree within a 250 foot radius. Modification of this standard may be made when the applicant demonstrates that a lower height will not jeopardize the safety of the wind turbine structure.

P. All small wind energy system tower structures shall be designed and constructed to be in compliance with pertinent provisions of the Uniform Fire Prevention and Building Code.

Q. All small wind energy systems shall be equipped with manual and automatic over-speed controls. The conformance of rotor and over-speed control design and fabrication with good engineering practices shall be certified by the manufacturer.

§ 25. Standards.

A Small Wind Energy System shall comply with the following standards:

A. Setback requirements. A Small WECS shall not be located closer to a property line than one and a half times the Total Height of the facility.

B. Noise. Except during short-term events including utility outages and severe wind storms, a Small WECS shall be designed, installed, and operated so that noise generated by the system shall not exceed the 50 decibels (dBA), as measured at the closest neighboring inhabited dwelling.

§ 26. Abandonment of Use.

A. Small WECS which is not used for 12 successive months shall be deemed abandoned and shall be dismantled and removed from the property at the expense of the property owner. Failure to abide by and faithfully comply with this section or with any and all conditions that may be

attached to the granting of any building permit shall constitute grounds for the revocation of the permit by the Town.

B. All Small WECS shall be maintained in good condition and in accordance with all requirements of this section.

Article V
Waivers

§ 27. Waivers.

A. The Town Board may, after a public hearing (which may be combined with other public hearings on Wind Energy Facilities, so long as the waiver request is detailed in the public notice), grant a waiver from the strict application of the provisions of this Local Law if, in the opinion of the Town Board, the grant of said waiver is in the best interests of the Town. The Town Board may consider as reasonable factors in evaluating the request, which may include, when applicable, the impact of the waiver on the neighborhood, including the potential detriment to nearby properties, the benefit to the applicant, feasible alternatives, and the scope of the request. Waivers so granted run with the land, and Wind Energy Facilities granted a waiver are deemed to be in compliance with the relevant provision of this local law.

B. The Town Board may attach such conditions as it deems appropriate to waiver approvals as it deems necessary to minimize the impact of the waiver.

Article VI
Miscellaneous

§ 28. Fees.

A. Non-refundable Application Fees shall be as follows:

1. WECS Wind Energy Permit: $300 per megawatt of rated maximum capacity.

2. Wind Measurement Towers Wind Energy Permit: $200 per tower.

3. Small WECS Wind Energy Permit: $150 per WECS.

4. Wind Measurement Tower Wind Energy Permit renewals: $50 per Wind Measurement Tower.

5. Waiver Application Fee $100 per tower site.

B. Building Permits. Building permits are required for each Wind Energy Facility. The Town believes the review of building and electrical permits for Wind Energy Facilities other than Small WECS requires specific expertise for those facilities. Accordingly, the permit fees for such facilities shall be $300 per permit request for administrative costs, plus the amount charged to the Town by the outside consultant hired by the Town to review the plans and inspect the work. In the alternative, the Town and the applicant may enter into an agreement for an inspection and/or certification procedure for these unique facilities. In such case, the Town and the applicant will agree to a fee arrangement and escrow agreement to pay for the costs of the review of the plans, certifications or conduct inspections as agreed by the parties.

C. Nothing in this Local Law shall be read as limiting the ability of the Town to enter into Host Community agreements with any applicant to compensate the town for expenses or impacts on the community. The Town shall require any applicant to enter into an escrow agreement to pay the engineering and legal costs of any application review, including the review required by SEQRA.

§ 29. Tax Exemption.

The Town hereby exercises its right to opt out of the Tax Exemption provisions of Real Property Tax Law § 487, pursuant to the authority granted by paragraph 8 of that law.

§ 30. Enforcement; Penalties and Remedies For Violations.

A. The Town Board shall appoint such Town staff or outside consultants as it sees fit to enforce this Local Law.

B. Any person owning, controlling, or managing any building, structure or land who shall undertake a wind energy conversion facility or wind monitoring tower in violation of this Article, or in noncompliance with the terms and conditions of any permit issued pursuant to this Article, or any order of the enforcement officer, and any person who shall assist in so doing, shall be guilty of an offense and subject to a fine of not more than $350 or to imprisonment for a period of not more than fifteen days, or subject to both such fine and imprisonment for a first offense; for a second offense (both within a period of five years), a fine not less than $350 nor more than $700, or imprisonment not to exceed six months, or both; and for a third or more offense (all of which occurred within five years), a fine not less than $700 nor more than $1,000, or imprisonment not to exceed six months, or both. Every such person shall be deemed guilty of a separate offense for each week such violation shall continue. The Town may institute a civil proceeding to collect civil penalties in the amounts set forth herein for each violation and each week said violation continues shall be deemed a separate violation.

C. In case of any violation or threatened violation of any of the provisions of this local law, including the terms and conditions imposed by any permit issued pursuant to this local law, in addition to other remedies and penalties provided here, the Town may institute any appropriate

action or proceeding to prevent such unlawful erection, structural alteration, reconstruction, moving and/or use, and to restrain, correct, or abate such violation, to prevent the illegal act.

Section 2: Severability

Should any provision of this Local Law be declared by the courts to be unconstitutional or invalid, such decision shall not affect the validity of this Local Law as a whole or any part thereof other than the part so decided to be unconstitutional or invalid.

Section 3 Repealer; Effect On Other Laws.

All resolutions, ordinances, and local laws, including Local Law 3-2007, or parts thereof in conflict herewith or which in any manner, in the absence of this Local Law, would address or apply to the approval, construction, operation, or decommissioning of Wind Energy Facilities are superseded by this Local Law.

Section 4: Effective Date

This Local Law shall be effective upon its filing with the Secretary of State in accordance with the Municipal Home Rule Law.

ADDENDUM C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF CATTARAUGUS
- X

ALLE-CATT WIND ENERGY LLC and NATHAN WHITEHEAD,

Petitioners-Plaintiffs,

-against- INDEX NO. 89035

TOWN BOARD OF THE TOWN OF FREEDOM, NEW YORK, TOWN OF FREEDOM, NEW YORK, and GEOFFREY MILKS,

Respondents-Defendants.

- X

Cattaraugus County Courthouse
303 Court Street
Little Valley, New York 14755
March 5, 2020

B E F O R E:

Honorable Terrence M. Parker
Acting Supreme Court Justice

A P P E A R A N C E S :

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BY: AARON M. SAYKIN, ESQ.
CHARLES W. MALCOMB, ESQ.
Attorneys for the Petitioners-Plaintiffs

SHANE & FIRKEL, PC
757 East State Street
Olean, New York 14760
BY: ERIC M. FIRKEL, ESQ.
Attorney for the Respondents-Defendants

THE COURT: This is the matter in Cattaraugus County Supreme Court of Alle-Catt Wind Energy LLC and Nathan Whitehead, as Petitioners, against the Town Board of Freedom and Geoffrey Milks, as Respondents.

If Counsel would note their appearances for the record, please.

MR. SAYKIN: Sure. Your Honor, Aaron Saykin and Charles Malcomb, from the firm Hodgson Russ, on behalf of the Petitioners Alle-Catt Wind Energy and Nathan Whitehead.

MR. FIRKEL: And Judge, I'm Eric Firkel, appearing on behalf of the Town of Freedom and Geoffrey Milks.

THE COURT: Okay. Mr. Malcomb or Mr. Saykin, whichever one wants to argue?

MR. SAYKIN: Thank you. And good morning, Your Honor.

THE COURT: Good morning.

MR. SAYKIN: We're here -- Alle-Catt Wind Energy and Mr. Whitehead are here to challenge a January 6, 2020 resolution.

That resolution declared two things which I think are of critical importance to this matter. Number 1, it declared that Local Law Number 1 of 2019, which is the Town of Freedom's wind law, is, quote, "Void and of

no legal effect." And it also declared that the Town's 2007 wind law is, quote, "In effect." And it based those declarations on the Court's prior decision in Freedom United, claiming that the Court had previously invalidated Local Law 1 of 2019.

Just two points here today: The first is that it's really impossible to determine the validity of the resolution that we're challenging -- the January 6, 2020 resolution -- without first having a declaration regarding whether the Court previously invalidated the 2019 Local Law.

THE COURT: Why don't we address that one issue first. If you would like to just address what is the current status of the 2019 law relative to the previous decision issued by this Court?

MR. SAYKIN: Sure.

THE COURT: Because I know what I meant by my decision. But if you want to tell me what you think is the situation, and Mr. Firkel wants to put on the record what he believes the Town's position is, I can clarify that very quickly.

MR. SAYKIN: Sure. Thank you, Your Honor. And I appreciate that.

And maybe to just give a little bit of background, there's obviously been a dispute, a

significant dispute, over what the extent of the Court's prior ruling was. And in fact, the Town has, on multiple occasions, gone to the Article 10 siting board, saying, "Look. This decision invalidated the 2019 Local Law."

And it's our belief and our argument -- and I believe we are correct -- the Court will ultimately decide that the 2019 law was never invalidated in that decision, because it was never before the Court.

And we base that on a few things. Number 1, and I think most obviously, as we cited in the petition, in that case, the Court had given counsel for the petitioner an opportunity, really invited him, to amend, because subsequent action had taken place since he filed that petition -- that subsequent action, being the adoption of a new 2019 law. And by letter to the Court, the counsel for the petitioners declined and said, "We are not amending the suit."

And it is Black Letter Law in New York -- and I think the Gershowitz case is directly on point -- which is a court couldn't rule on the validity of a local law that's not -- or any kind of an enactment that actually hasn't been challenged, that isn't before it. And frankly, that was one of the reasons why Alle-Catt Wind Energy never saw the need to intervene in that matter, because nobody had actually challenged the law that was

in place. And --

THE COURT: Okay. Let me stop you right there.

Mr. Firkel, what's the Town's position on that?

MR. FIRKEL: The Town's position on that, Judge, is that the -- your opinion unambiguously stated at the end that Local Law 1 of 2007 was in effect.

At the time the Court made its decision, the Court was aware of the 2019 Local Law and its passage and its deficiencies, that it was void as a matter of law. The bottom line is the Court was aware of that, the Court took that into note. They took note of it during its decision and unambiguously stated that the 2007 Local Law was the one that was in effect.

And if the Court had overlooked or made a mistake, the proper remedy would have been for one of the parties to file a motion to reargue under CPLR 2221. They initially did that. The Town filed through Mr. McAuley. But that was withdrawn. The case was also appealed to the appellate division, and that too was --

THE COURT: I'm familiar with all of the mechanics of that case, because obviously I was involved in that.

MR. FIRKEL: Yeah. Just cutting to the quick, then, Judge, there was a time to file the motion to reargue. It was withdrawn; it was abandoned. That time

has long since passed. The Court could have amended its order on its own motion during the pendency of the case. However, with the dismissal at the Court of Appeals, that case is no longer pending. And here, we have a third party attempting to pigeonhole through a ruling on a resolution to get the Court to modify its prior order.

And Judge, I would submit that the New York State law, the CPLR, just does not permit them to get the Court to amend its prior order, which unambiguously stated that Local Law 1 of 2007 is the current law in the Town of Freedom.

THE COURT: Well, let me just clarify something for both counsel regarding the situation from the Court's perspective.

As both of you know -- and at least a reference was made to it -- during the original application that was brought by Citizens [sic] United challenging the wind law, after the petition was filed, and very early on in the proceedings, the Town did then pass what now is known, I guess, as Local Law Number 1 of 2019.

I specifically, at the following appearance, on the record asked Mr. Abraham if they intended to amend their pleadings to include the new law, so that that was before the Court. He declined. And I believe that was also done in writing, that they declined to amend the

pleadings.

And so petitioner in this case is correct, that the 2019 law was never before the Court for determination. I will grant you, that at one paragraph observation was made of the alleged flaws in the 2019 law, but was never reached for decision by this Court because it was not before the Court.

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.

Certainly, my observations as to the flaws in its enactment, you know, may telegraph the Court's thoughts regarding that. However, that was never decided by this Court. And therefore, that issue is now clarified.

So if you want to move to the other issues, either, you know, Mr. Saykin or Mr. Malcomb, regarding the resolution, we can cross those bridges.

MR. SAYKIN: Thank you, Your Honor. Given the Court's clarification on that, I think that this is actually now very straightforward.

THE COURT: I would think so.

MR. SAYKIN: Mr. Firkel acknowledged, you know, in his response, which I appreciate, that obviously a local law can not be voided by resolution. And so if the 2019 law had not been previously voided by the Court, certainly the Town Board could not do it by mere resolution under the doctrine of legislative equivalency. And actually, I don't think there's a dispute there -- in which case, we do believe that the resolution should be annulled in that respect.

There was a secondary issue we had related with respect to the conflict of interest. However, to the extent the doctrine of legislative equivalency would annul the resolution, I acknowledge that could potentially moot the secondary issue. We had asked for a declaration because we are concerned about potential future votes, but, you know, we would simply refer to our --

THE COURT: And that's borrowing trouble, as my grandmother used to say, and we don't have that before the Court at this point. So let's stick to whether or not the resolution effectively revoked the Law Number 1 of 2019, which you indicate there's a consensus that it can't. Is that correct, Mr. Firkel?

MR. FIRKEL: Yeah. That is correct, Your

Honor. A resolution cannot repeal a local law. But we argue that if you looked at the text of the resolution, it did not do any action. It merely stated the board's position. It was a declaratory -- it was a memorializing resolution, much akin to the resolutions that towns and counties pass, that the Safe Act is bad or that --

THE COURT: And I understand your position regarding that. But apparently, at least from what's alleged in the papers, the Town has taken the opinion that that resolution revoked the Local Law of 2019 -- at least it's represented that to other entities.

MR. FIRKEL: What the Town does is the Town indicates that the law is void ab initio; it's void on its face, because it wasn't passed with the proper procedures. And it references the decision that states that Local Law 1 of 2007 is in full force and effect.

THE COURT: Well, that was the Local Law. That, again, was only the interpretation as to the effect of the 2018 law. By the 2018 law being void, the provisions of the 2018 law which invalidated or repealed the 2007 law are therefore void. So the 2007 law remains in place.

What is the relation between the 2007 and the 2019 laws is an issue that has not yet been determined.

MR. FIRKEL: Then, Judge, I think it would be

possible for you to reach a ruling on this without amending or doing anything to your prior decision.

We submit that it was merely a memorializing resolution that had no effect. Because it had no effect, the Court -- I mean, it had no effect, so the Court's decision would also have no effect going forward.

But insofar as the Court determines that the Town Board was either repealing a local law with a resolution or acting as a judge and repealing the local law by referencing the decision, we agree that the Town -- local laws cannot be repealed by resolution. It's a place for either a new local law or a court determination. The Town Board can't do either one of those.

THE COURT: Right.

MR. FIRKEL: So we would -- you know, insofar as the Court believes that that's what we did there, I guess we would have to --

THE COURT: You would concede that the --

MR. FIRKEL: Yeah, yeah. We would concede --

THE COURT: -- Court could annul that action; as far as that resolution actually affecting any validity or invalidity of the Local Law of 2019, that resolution is toothless.

MR. FIRKEL: It is absolutely toothless. It's

merely a statement of the new board's position. The new board is -- you know, has its political positions. All that was was a statement --

THE COURT: I'm not getting into the politics.

MR. FIRKEL: Yeah, yeah, yeah. But it's --

THE COURT: I understand that. Because if you start raising the politics, then we have to reach the conflict of interest issues. Do you really want to address those?

MR. FIRKEL: Well, I mean, we could --

THE COURT: I mean, do we really want to open that can of worms right now, Mr. Firkel?

MR. FIRKEL: Well, Judge, I don't believe it's very much of a can of worms. But that being said, if we were to reach that, I believe at a minimum, some discovery would be required. We would have to do some fact finding to determine what the actual state of affairs is.

But Judge, no. I'd rather not do that. But the point I was getting to is that resolution was merely a statement of the board's position. It took no action, it did not say, "Resolved: The Town Board hereby repeals Local Law 1 of 2019." It did not say that. It was merely a statement of purpose. It was absolutely a memorializing resolution that stated the board's

position, and that's all it is.

THE COURT: Well, if you're, you know, pushing that there is any validity at all to that resolution for the purposes of the Town, you're almost forcing the issue of the conflict of interest. And I would much rather make the determination, which is the Court's determination, that to the extent that that resolution has any effect or can be used to demonstrate any effect on the validity of the Local Law of 2019, it's invalid. And that is based on the doctrine of legislative equivalency. Because if the Town Board intends to make any statement of position regarding the Town as to the Local Law of 2019, it needs to be addressed in the proper forum, which would be a new local law.

I really hesitate to get into the conflict of interest, because I think that is an issue that should be of concern. But as counsel for petitioner in this case has indicated, my rulings on the initial issues would render that moot at this point, and I'm not going to address that formally as part of the decision.

And so if the petitioner would like to submit an order indicating that the validity or invalidity of the Local Law Number 1 of 2019 was specifically not part of the Court's prior decision, and that the 2020 resolution of the Town regarding the Local Law Number 1

of 2019 is annulled for all purposes regarding whether that law is valid or invalid. If you want to submit that order on notice, I'll sign it.

And I decline to address the issue of conflict of interest at this point.

MR. SAYKIN: Thank you, Your Honor.

MR. MALCOMB: Thank you, Your Honor.

MR. FIRKEL: Thank you, Judge.

* * *

Certified to be a true and accurate transcript.

Charis L Mazanec DATED: 3/6/2020

Charis L. Mazanec
Official Court Reporter