

STATE OF NEW YORK
SUPREME COURT: COUNTY OF CATTARAUGUS

2013 FEB 28 A 10: 21

ALLEGANY WIND LLC.,

Petitioner,

CATTARAUGUS COUNTY CLERK

V.

DECISION

Index No. 80852

PLANNING BOARD OF THE
TOWN OF ALLEGANY, NEW YORK,

Respondent,

This is an Article 78 proceeding brought by petition of Allegany Wind LLC (hereinafter Allegany) asking the Court to (a) override a decision of Allegany Town Planning Board (hereinafter Planning Board) which granted it an extension of 90 days from the termination date of a pending appeal in the Fourth Department (the appeal was dismissed by appellate court order on September 6, 2012) and refused Allegany 's request for a one year extension; to (b) find that the pending litigation created a tolling of existing time requirements; to © overturn the Planning Board's decision that the property of one Ted Gordon was a "sensitive receptor" thus located within prohibited distance set forth in the zoning ordinance, and finally, to (d) compel the Planning Board to waive a SDEIS (supplemental draft environmental impact statement) for approval of substitute turbines for the Nordex N100 turbine previously approved by it.

Initially, it must be pointed out that the Court is aware of a companion action brought by Allegany against the Town of Allegany which is presently pending in this Court and which, in some instances, seeks relief similar to that sought herein. To the extent any ruling of

this Court made hereinafter impacts the issues in that case, it is unintended, but may nevertheless become dispositive of matters pending in that case.

A summary of the facts as understood by the court seems to be in order. As the parties are aware, this court has previously decided issues in this controversial matter. In rendering its prior determination it was privy to volumes of material presented to the court at that time. It is clear that after extensive and exhausting efforts by both parties the Town of Allegany granted a special use permit to petitioner for the construction of 29 wind turbines. That occurred on July 11, 2011. Petitioner was given one (1) year to begin the project(a condition lawfully imposed by the Town by virtue of Town Law Sec. 274-b(4) and 274-a(4)). On September 30, 2011 an Article 78 proceeding was commenced against petitioner, and others, seeking to overturn the Town's grant of a special use permit and ultimately this court, by memorandum decision, dismissed that petition in its entirety. This decision and resultant order was appealed to the Appellate Division, Fourth Department on December 5, 2011. The appeal was never perfected and was ultimately dismissed by the Appellate Division on September 6, 2012. Meanwhile, petitioner, concerned that its time was growing short, contacted Planning Board attorneys regarding an extension of time and on July 9, 2102 the Planning Board granted petitioners a first extension running for 90 days after completion of the appeal then pending, or one year, whichever occurred first. Since the appeal was terminated by court order on September 6th this court calculates that the extension, thus granted, expired on December 5th, 2012. It appears Petitioner made no effort to expedite the appeal process and, in fact, objected to the Planning Board's involvement in an attempt to petition the Appellate Court to discontinue the appeal.(Ironically, with the consent of appellant). Furthermore, petitioner has now notified the

Planning Board that it intends to change the turbines to a new updated model not previously considered by the Board, and by this petition asks the court to order the Planning Board to accept the change without additional environmental review. It is argued by petitioner that it was clearly indicated at the time of the original application that such a modification might occur given the rapid change in new technologies and that it is only a minor alteration not needing any further review.

It seems appropriate that the issue of "tolling" of the time for construction should be first considered since resolution of that matter could make discussion of most other matters unnecessary. Petitioner strongly urges upon this court that it should extend the time limitations granted in the special use permit because of the litigation brought by the CCCC (Concerned Citizens of Cattaraugus County, a group of environmental activists) and its subsequent appeal. It claims that its financing, strategic planning and related start-up issues were impeded by the pending litigation and they were thereby "crippled" to undertake the project until that was concluded.

Examination of the law reveals little in the way of authority to allow this Court to toll the time period for construction granted by the respondent for commencement of this project. Tolling itself implies a disability in plaintiff which by law extends statutory time requirements (see, CPLR §208). While it appears there was within petitioner's grasp the ability to obtain court relief by applying for a temporary restraining order or a stay(see, CPLR Art. 63 et.seq. and CPLR §5518 et. seq.) it chose not to do so until this present application. It allowed the appeal to run without opposition (see above), it made no effort to finalize financing (which certainly seems could have been done contingent on the outcome of the litigation), it never applied for a building

permit, until January 25, 2013 more than two (2) months after commencing this proceeding (which this court notes seems to be a seriously questionable requirement in any event) and it failed to finalize any arrangements with local municipalities for access to roadways to the construction site(It should be noted that issues relating to petitioner's non-payment of escrow funds pursuant to the agreement and its involvement with local municipalities over road access to the building site have not been considered by the court). All of this when it was aware that the clock was ticking, and, as importantly, when it knew that since the appeal was taken two members of the CCCC were elected as town councilmen and were certainly not sympathetic to the cause of petitioner(see, companion action presently pending and annexed to Daniel Spitzer's Esq. affirmation as exhibit H). Petitioner points out the sizeable expenditures it has incurred to date, but, given those circumstances, fails to otherwise account for its contumacious conduct. There is no apparent authority for this court to toll the time limit imposed by the respondent when the permit was originally granted and, accordingly, that request is denied.

Petitioner next asks the court to overturn the respondent's determination to grant only a 90 day extension from the date of termination of the appeal arguing that such a grant is an abuse of discretion and is arbitrary. They had requested a one-year extension. The minutes of the Planning Board meeting of July 11, 2012 show clearly that much deliberation was given to this request and legal advice was provided to the members by attorney Spitzer(exhibit 16 of certified record of proceedings). Since this was a first request by petitioner, and was more ministerial than discretionary, the Court finds it odd (and most likely politically motivated) that the respondent chose to grant only a 90 day extension from the completion of litigation. It appears it might have been an abuse of discretion under all circumstances then existing. However, once a determination

was made, petitioner was faced with a statutory time limitation to challenge that determination and did not do so. Town Law §274-a(11) and §274-b(9) specifically authorize a court challenge under Article 78 of the CPLR to any planning board determination but such challenge must occur within 30 days of filing the Board's determination, which in this case was August 12, 2012 (The planning board's minutes were filed with the clerk on July 13, 2012). Since the petitioner failed to meet that required time limit the request to overturn the Board's declaration it cannot be considered and the petition as to that claim is dismissed. Even if the application for review was timely, this Court's prior ruling concerning its right to substitute its judgment for that of a municipal body binds us here, (see, Exhibit A annexed to Order and Judgment in *CCCC and Boser v. Town of Allegany Planning Board, et.al.* filed with the Clerk on November 23, 2011).

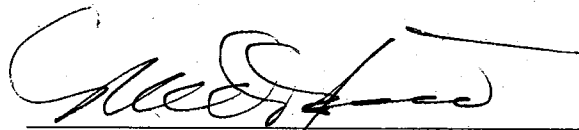
With regard to the issue of Ted Gordon's property, the court is concerned that his claim as a "sensitive receptor" was considered by the respondent without notice to petitioner or without any formal proceedings of the respondent. While it is true that the court did not rule on the substantive issue in its' memorandum decision issued in November 2011, it appears that more detailed information on his status is needed to make a proper determination that he qualifies as a sensitive receptor. (i.e., What is the distance of his house from the proposed tower? Is it a permanent residence? What is the legality of his occupancy? Does he plan to stay, and if so, under what terms?) There is no record before this court that any substantive inquiry was made. Moreover, it now appears that Ted Gordon is a necessary party, and as such, must be impleaded. (See, CPLR§1001(a); *Matter of Lezette v. Bd. of Ed. Of Hudson City School District* 35 NY2d 272 at 278). There is no question that any decision as to his status would effect his rights (see, *Matter of Boston Culinary Group, Inc. V. NYS Olympic Regional Dev. Auth.* 18

AD3d 1103 at 1104, 3rd dept. 2005). In addition, petitioner has failed to exhaust its administrative remedy by appealing any adverse finding of the respondent to the Zoning Board of Appeals (ZBA) as required by Town Law § 267-b(1). This court simply has no authority to review the actions of the respondent where petitioner has failed to exhaust its administrative remedy (see, *Charest v. Morrison* 48 Ad3d 1178 at 1179, 4th dept 2008).

Severely weakened by its own inaction, petitioner seeks to have the court rectify its transgressions by attacking the conduct of respondent. Unfortunately, in each instance where issues have been raised, petitioner has failed to demonstrate it is entitled to the relief requested, either because of procedural and/or substantive failures. Thus, this court concludes that the petition lacks merit and must be dismissed.

It should be noted that the attorneys submitted on this matter, but because the court had questions for counsel regarding their submissions, a letter outlining the court's concerns was sent to both counsel on January 30, 2013 and responses were received on or about February 9, 2013. The answers provided by both counsel were considered by the court.

ORDERED



Hon. Michael L. Nenno, ASCJ

Dated: February 25, 2013