

STATE OF NEW YORK
SUPREME COURT COUNTY OF CATTARAUGUS

ALLEGANY WIND LLC,

Petitioner,

NOTICE OF PETITION

-against-

Index No.:

PLANNING BOARD OF THE TOWN OF
ALLEGANY, NEW YORK,

Respondent.

TO: THE ABOVE-NAMED RESPONDENT

PLEASE TAKE NOTICE, that upon the annexed Petition, verified on the 13th day of November, 2012, the exhibits annexed thereto, and the Appendix of Exhibits, dated November 13, 2012, the undersigned will make an application to this Court at the Cattaraugus County Courthouse, 303 Court Street, Little Valley, New York 14755 on the ____ day of December, 2012 at ____ o'clock in the forenoon, or as soon thereafter as counsel may be heard, for an order and judgment:

- (A) annulling the Resolution of the Respondent Planning Board, dated October 15, 2012, which denied the application of Petitioner Allegany Wind, LLC (the "Company") for a one year extension of the Special Use Permit and Site Plan approval (collectively, the "Permits") granted by the Planning Board on July 11, 2011 with respect to a 29 turbine wind energy generating facility (the "Project") in the Town of Allegany, New York; and
- (B) compelling the Planning Board to grant a one year extension of the Permits;
- (C) declaring, pursuant to CPLR § 3001, that all deadlines with respect to the Permits for the Project were tolled while the case entitled *Concerned Citizens of*

Cattaraugus County, Inc. v. Town Board of the Town of Allegany, et al. (Index No. 2011-79455) was pending;

- (D) annulling that part of the Resolution of the Planning Board, dated October 15, 2012, which determined that the cabin owned or occupied by Theodore Gordon is a “sensitive receptor” requiring further study and/or requiring protection under the set back provisions of the Zoning Ordinance II;
- (E) annulling that part of the Resolution, dated October 15, 2012, which requires the Company to prepare an SDEIS in order to obtain approval to substitute turbines manufactured by other turbine manufacturers for the approved, Nordex N100 turbines; and
- (F) granting Petitioner such other and further relief, including a temporary restraining order or stay, as this Court deems just and proper.

PLEASE TAKE FURTHER NOTICE, that Cattaraugus County is designated as the venue of this proceeding on the basis that it is the County in which the Planning Board of the Town of Allegany, New York is located.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR § 7804(c) and (e), Respondent must serve the verified answer, supporting affidavits, if any, and the certified record at least five (5) days before the above return date of the Petition-Complaint.

DATED: November 13, 2012

By:

YOUNG/SOMMER, LLC

J. Michael Naughton, Esq.
Attorneys for Petitioner
Executive Woods
Five Palisades Drive
Albany, New York 12205
(518) 438-9907 Ext. 244 (Tele)

STATE OF NEW YORK
SUPREME COURT COUNTY OF CATTARAUGUS

ALLEGANY WIND LLC,

Petitioner,

PETITION

Index No.:

-against-

PLANNING BOARD OF THE TOWN OF
ALLEGANY, NEW YORK,

Respondent.

Petitioner Allegany Wind, LLC, by its attorneys, Young/Sommer LLC, for its Petition, alleges as follows:

I. INTRODUCTION AND BACKGROUND

1. In this Article 78 proceeding, Petitioner Allegany Wind, LLC (the “Company”) is challenging the decision of the Planning Board of the Town of Allegany to deny the Company’s request for an extension of the Special Use Permit and Site Plan approval (collectively, the “Permits”) for a 29 turbine wind energy generating facility in the Town of Allegany, New York (the “Project”).

2. The Permits were issued by the Planning Board in July, 2011, but the Permits were immediately challenged by a citizens group, “Concerned Citizens of Cattaragus County, Inc.,” in a proceeding entitled *Concerned Citizens of Cattaragus County, Inc. v. Town Board of the Town of Allegany, et al.* (Index No. 2011-79455) (the “Action” or “Concerned Citizens litigation”). The Action sought an order and judgment annulling the Permits.

3. This Court (Hon. Michael L. Nenno, presiding) dismissed the Petition in an Order and Judgment, dated November 15, 2011. (See Exhibit 1)

4. The Concerned Citizens group, however, immediately filed an appeal. (See Exhibit 2)

5. While the Concerned Citizens litigation was pending, the Company did not commence construction of the Project due, primarily, to the risk of proceeding with such a substantial investment in infrastructure in the face of a lawsuit which sought to annul the Permits.

6. Under the Zoning Ordinance of the Town of Allegany, the Permits are valid for a period of one year from the date the Permits were issued and filed.

7. By operation of law and equitable principles, the expiration period is tolled during the period the Concerned Citizens lawsuit was pending.

8. Nevertheless, out of an abundance of caution, the Company timely requested that the Planning Board grant an extension of the Permit deadline to ensure that the Company could proceed with construction. (See Exhibit 3)

9. On June 11, 2012, the Planning Board granted the Company's request for an extension of the permits for a period of one year or ninety (90) days following the conclusion of the Concerned Citizens litigation, whichever was earlier. (See Exhibit 4)

10. The June, 2011 extension proved inadequate. The Appellate Division issued an Order on September 6, 2012 (see Exhibit 5) dismissing the Concerned Citizens' appeal. The court's order triggered the Planning Board's ninety (90) day provision.

11. As a result, the Permits are scheduled to expire on or about December 10, 2012—if the tolling period is excluded.

12. On September 28, 2012, the Company filed a second application with the Planning Board to extend the Permits for one year. (See Exhibit 6)

13. On or about October 18, 2012, the Chairman of the Planning Board sent the Company a letter, dated October 18, 2012 notifying the Company that its request for an extension of the Permits was *denied*. (See Exhibit 7)

II. RELIEF SOUGHT

A. First Cause of Action

14. The Company submits that the Planning Board's decision to deny the extension of the Permits was arbitrary and capricious, an abuse of discretion, and contrary to law. The Company is seeking in this proceeding a judicial determination: (A) annulling the Planning Board's decision, and (B) compelling the Planning Board to grant the extension.

B. Second Cause of Action

15. In the alternative, the Company is seeking a declaratory judgment that the expiration deadline for the Permits was tolled while the Concerned Citizen Action was pending (including appeals).

C. Third Cause of Action

16. In addition, this proceeding seeks to annul that part of the Planning Board's Resolution, dated October 15, 2012, which determined that a cabin owned or occupied by Theodore Gordon (the "Gordon residence") is a "residence" which is within 2,500' of one of the Project turbines, and the residence constitutes a "sensitive receptor" requiring additional SEQRA review. The relevance of this determination, and the consequences for the Company, are explained below. The Company submits that the Planning Board's determination is arbitrary and capricious.

D. Fourth Cause of Action

17. Finally, this Petition challenges the Planning Board's determination that the Company's request for approval to install turbines manufactured by another manufacturer requires the preparation of a Supplemental Environmental Impact Statement ("SEIS"). Due to market conditions and economics, the Company requested the Planning Board's approval to substitute turbines manufactured by other companies. The information provided by the Company demonstrated that the proposed substitution turbines have all the same essential characteristics as the Nordex N100 turbines, which were approved by the Board. Accordingly, the preparation of an SEIS is unnecessary, and that part of the Planning Board's Resolution, dated October 15, 2012 which requires the preparation of an SEIS is arbitrary and capricious.

III. PARTIES

18. Petitioner Allegany Wind, LLC (the "Company") is a limited liability company duly organized and existing under the laws of the State of New York and has its offices at 24 West 40th Street, 12th Floor, New York, New York.

19. Upon information and belief, the Planning Board of the Town of Allegany, New York (the "Planning Board") is a duly organized planning board under the laws of the State of New York and has its office at Town Hall, 52 West Main Street, Allegany, New York.

IV. JURISDICTION AND VENUE

20. The Court has jurisdiction over the Respondent Planning Board pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") and pursuant to CPLR § 301.

21. Venue in Cattaraugus County is proper because the Town of Allegany is located in Cattaraugus County, New York.

V. PRIOR PROCEEDINGS

A. The Approval Process

22. This action arises out of the Company's plan to develop a 29 turbine wind energy generating facility in the Town of Allegany (the "Project").

23. The Planning Board issued approvals and permits for the Project on July 11, 2011.

24. The Planning Board's Decision followed a three (3) year review process.

25. The Planning Board ultimately determined that the Project would be compatible with the Town and its land use laws and ordinances.

26. The Planning Board's environmental review process included a multi-volume Draft Environmental Impact Statement ("DEIS"), multiple public hearings, and the preparation and completion of a Final Environmental Impact Statement ("FEIS"), which contained responses to the comments and technical reports.

27. At the end of the process, the Planning Board: (A) issued a Statement of Findings under the State Environmental Quality Review Act ("SEQRA") and (B) granted the Permits on July 11, 2011.

28. Copies of the Planning Board's SEQRA Findings Statement and Resolutions granting the Permits are annexed to the Appendix of Exhibits that accompanies this Petition (the "Appendix").

29. The SEQRA review process, engineering and environmental investigation for the Project cost the Company approximately four million dollars (\$4,000,000.00).

30. As part of this cost, the Company reimbursed the Planning Board for all costs incurred by: (A) the Town's independent environmental consultant, and (B) the attorney the Planning

Board retained to assist the Planning Board with its review of the Project. Those costs total approximately \$650,000.00.¹

31. Based on the conclusions in the Statement of Findings, the Planning Board issued a Special Use Permit and Site Plan approval for the Project on July 11, 2011.

32. The Planning Board's Special Use Permit and Site Plan approval provide that the permits are "contingent upon and shall not be effective until approval by the Town Board of a Wind Energy Overlay District for the project."

33. The contingency contained in the Permits required that the Company take certain actions *after* the Permits were issued to secure zoning approval from the Town Board for the Project. Ultimately, the Town Board agreed to amend its Zoning Ordinance to create a Wind Energy Overlay District for the Project site upon the Company entering into a Host Community Agreement with the Town.

34. On August 29, 2011, the Town Board issued a SEQRA Findings Statement and adopted a Wind Energy Overlay District for the Project.

35. Similar to the conclusions of the Planning Board, the resolutions adopted by the Town Board in August, 2011 recognized that the Project: (A) is consistent with Town's planning objectives, (B) is compatible with the Town, and (C) would avoid or minimize potential adverse environmental impacts from the Project to the maximum extent practicable.

36. The Company also entered into: (A) a Host Community Agreement with the Town, and (B) an Escrow Agreement regarding certain payments under the Host Community Agreement.

¹ This figure includes litigation costs. The Company reimbursed the Town for all attorneys' fees and legal costs the Planning Board incurred in defending the Town's decision to issue the Permits. The Planning Board retained the firm of Hodgson, Russ to defend the Concerned Citizens litigation. The litigation costs alone exceeded \$150,000.

B. The Concerned Citizens Lawsuit

37. Subsequent to the Town Board's August 29, 2011 decision to create a Wind Overlay District for the Project, the Concerned Citizens commenced a lawsuit. (A copy of the Verified Petition [without exhibits] is annexed to the Appendix.)

38. The Action challenged: (A) the Planning Board's SEQRA Findings, Special Use Permit and Site Plan approval, and (B) the Town Board's approval of the Wind Overlay District.

39. The Petition in the Action, entitled *Concerned Citizens of Cattaraugus County v. Town Board of the Town of Allegany, et. al.*, was filed on September 28, 2011.

40. The Planning Board vigorously defended its decision to grant the Permits.

41. On November 10, 2011, the Supreme Court, Cattaraugus County issued a Decision denying the relief requested in the Petition and upholding the actions of: (A) the Planning Board, and (B) the Town Board.

42. On November 15, 2011, the Supreme Court issued an Order and Judgment, dismissing the Petition in the Concerned Citizens Action.

43. Notice of Entry of the Order and Judgment dismissing the Petition was served by the Planning Board's attorney on November 23, 2012.

44. On December 5, 2011, the Concerned Citizens appealed the Order and Judgment.

45. Approximately ten months later, the Appellate Division, Fourth Department issued an Order, dated September 6, 2012 dismissing the appeal.

46. Notice of Entry of the Order, dated September 6, 2012 was served by the Planning Board's attorney on September 13, 2012.

C. The Lawsuit Tolled The Expiration Period

47. The practical effect of the Concerned Citizens litigation was to delay commencement of Project development until the claims were finally resolved.

48. Construction of the Project was delayed due, among other things, to the risks of proceeding with construction without knowing that the Project Permits would be upheld by the courts.

49. Once the lawsuit was filed, the Project financing was also affected. Lenders are generally unwilling to finance a project when the permits are subject to litigation seeking to annul the permits. Financing the construction of the Project was impracticable while the appeal was pending.

50. These are the practical realities of development which were, or should have been, understood by the Planning Board.

D. Escrow Agreement Funded

51. Despite the risks associated with the Concerned Citizens lawsuit, the Company funded the Escrow Agreement while litigation was pending.

52. On December 7, 2011, the Company deposited \$500,000.00 with an escrow agent agreed to by the parties.

53. Those funds are still on deposit as of the date of this Petition.

VI. APPLICATION FOR EXTENSION OF PERMITS

54. Before the Concerned Citizens appeal was dismissed, the Company timely applied for an extension of the Permits.

A. June, 2012 Request for Extension

55. By letter, dated June 5, 2012, the Company applied to the Planning Board for a one (1) year extension of the Permits.

56. The Company informed the Planning Board that it was not proposing Project modifications as part of the extension application.

B. Interim Extension

57. On June 13, 2012, the Planning Board granted an extension of the Permits, but the Planning Board's resolution was subject to a contingency, which provided that the one year extension was subject to a shorter, ninety (90) day, period if the Concerned Citizens litigation was concluded.

C. Contingency Triggered

58. On September 6, 2012, the Appellate Division, Fourth Department issued an order dismissing the appeal.

59. According to the Planning Board's Resolution, dated June 11, 2012, the Company had only ninety (90) days from the "conclusion" of the Concerned Citizens litigation in which to commence construction.

60. On September 13, 2012, the Planning Board's attorney served Notice of Entry of the Order, which marked the "conclusion" of the Concerned Citizens litigation. This triggered the contingency and the ninety (90) day extension period.

D. September, 2012 Request for Extension

61. On September 28, 2012, the Company timely submitted an application to the Planning Board for an extension of the Permits.

62. At the time the September 28, 2012 application for an extension was submitted, the Planning Board was considering a request regarding a potential substitution of an alternate turbine for the Project.

E. Request for Turbine Substitution

63. On August 3, 2012, the Company notified the Planning Board that the Company was considering the use of alternate turbines in the place of the approved Nordex N100 turbine model. (A copy of the letter-application, dated August 3, 2012 regarding the alternate turbine request is annexed as **Exhibit 8** to the Petition.

64. The August 3, 2012 letter-application: (A) explained the reasons for the Company's request for permission to make a turbine substitution, and (B) emphasized that no final determination had been made by the Company.

65. The August 3, 2012 letter-application made it clear that the Company was exploring whether the turbine substitution was an *option*.

66. The Permits were issued with the express recognition that the substitution of the turbine manufacturers was a distinct possibility. The DEIS accepted by the Planning Board stated:

Market availability of wind turbines could dictate the use of an alternate turbine from the proposed Nordex N100 (2.5 MW) machine. Any turbine ultimately selected will be of similar technology, size, appearance, operating characteristics, and approximate generating capacity.

[DEIS, § 2.1; see **Exhibit 8**]

67. On August 13, 2012, the Planning Board adopted a Resolution requesting additional information regarding the turbines under consideration. (A copy of the Planning Board's Resolution, dated August 13, 2012 is annexed as **Exhibit 9** to this Petition.)

F. October 15, 2012 Resolution Denying Extension

68. On October 15, 2012, the Planning Board held a meeting to consider, among other things, the Company's request for an extension of the Permits.

69. At the Planning Board meeting, the Company stated that the Company had *not* made any determination of whether a turbine substitution would be made, and emphasized that the August 3, 2012 letter-request was intended to determine whether a turbine substitution was an option.

70. On October 15, 2012, the Planning Board adopted a Resolution, which provides, among other things, that the Company's "request for an extension of the special use permit and site plan approval for the Project" is denied.

71. The Planning Board's Chairman sent the Company a letter dated October 18, 2012, notifying the Company of its Decision.²

AS AND FOR A FIRST CAUSE OF ACTION

72. Petitioner repeats and realleges each and every allegation set forth in paragraphs 1 through 71 of the Petition, as if fully set forth herein.

73. Sections 8.05(e) and 9.07(e) of the Town of Allegany Zoning Ordinance II grant the Planning Board the authority to extend a special use permit and site plan approval. (Copies of the relevant pages of the Zoning Ordinance II are annexed to the Appendix.)

74. The Company timely requested an extension of the Permits on September 28, 2012.

² The Planning Board's letter, dated October 18, 2012 states that the Planning Board's action was taken on October 17 [sic], 2012. That is a typographical error. The meeting was held on October 15, 2012, and the Resolution reflects the October 15, 2012 date.

75. An extension of a permit is, essentially, a ministerial act. (*See generally 420 Tenants Corp. v EBM Long Beach, LLC*, 41 AD3d 641, 643 [2d Dept 2007]; *Matter of New York Life Ins. Co. v Galvin*, 35 NY2d 52, 60 [1974].)

76. The Planning Board denied the Company's request for an extension of the permits.

77. If the decision to grant an extension was not ministerial, the Planning Board's decision to deny the permit was an abuse of discretion.

78. The Company has invested approximately \$4 million and over three (3) years to obtain the Permits.

79. The Company made a reasonable request to the Planning Board for a one (1) year extension of the Permits.

80. The litigation commenced by the Concerned Citizens group effectively prohibited the Company from proceeding with construction of the Project until the lawsuit was concluded.

81. When the Concerned Citizens commenced litigation to annul the Permits, the Company paid all attorneys' fees and litigation costs incurred by the Planning Board in defending the Board's decision to issue the Permits.

82. The Planning Board vigorously defended its decision to issue the Permits. (A copy of the Town's Verified Answer to the Petition is annexed to the Appendix of Exhibits.)

83. In addition to filing a Verified Answer, the Planning Board and its counsel submitted the following affidavits in opposition to the Petition:

A. Affidavit of Carol Horowitz, Town Planner [Appendix, Exhibit 6]

- B. Affidavit of Gerald E. Dzurof, Code Enforcement Officer [Appendix, Exhibit 7]; and
- C. Affidavit of David M. Britton, P.E., Professional Engineer retained by the Planning Board [Appendix, Exhibit 8].

84. The Planning Board's SEQRA findings statement also explained the Planning Board's rationale for its decision, and the reasons why the Project was consistent with the Town's Zoning Ordinance and land use laws.

85. During the brief time that has elapsed since the Planning Board made its decision to grant the Permits, and the Planning Board's vigorous defense of its decision in October, 2011, there has been no significant change in circumstance that would justify the Planning Board's October, 2012 denial of the Company's reasonable request for an extension of the Permits.

86. The decision to deny the request for an extension was arbitrary and capricious and an abuse of discretion.

87. Basic principles of equity and fairness dictate that after the Company expended over \$4 million to obtain the Permits and defend the litigation challenging the Planning Board's actions, the Planning Board was required to grant the Company a one year extension in which to build the Project.

88. Upon information and belief, the Planning Board's Resolution, dated October 15, 2012 may have been influenced by the bad faith of other Town officials with respect to the Project. The conduct of the Town Board of the Town of Allegany with respect to the Company's efforts to build the Project is detailed in the Complaint filed in the case entitled *Allegany Wind, LLC v. Town*

of *Allegany Town Board* (Index No.: 80729), which is pending in Supreme Court of the State of New York. If so, the Planning Board's decision was the product of bad faith.

89. By reason of the foregoing, the Court should: (A) annul the Planning Board's Resolution denying the request for a one (1) year extension of the Permits, and (B) compel the Planning Board to grant the extension.

AS AND FOR A SECOND CAUSE OF ACTION

90. Petitioner repeats and realleges each and every allegation set forth in paragraphs 1 through 89 of the Petition, as if fully set forth herein.

91. The Permits were tolled while the Concerned Citizens litigation was pending, and, therefore, the Permits will not expire until on or about October 10, 2013.

92. The Concerned Citizens litigation was commenced on September 28, 2011.

93. The Concerned Citizens litigation was pending until September 6, 2012, when the Appellate Division, Fourth Department issued an Order dismissing the petitioners' appeal.

94. The effective date of the Permits was tolled from September 28, 2011 until September 6, 2012.

95. The tolling period spanned a period of eleven (11) months and five (5) days, or a total of 344 days.

96. Since the permits were issued on July 11, 2011, the Permits are in effect until June 19, 2013.

97. The calculation for the tolling period/effective date of the Permits is: 365 days + 344 days = 709 days from July 11, 2011.

98. When the ninety (90) day extension period is included with the tolling period, the Permits shall remain in effect until on or about October 10, 2013.

99. Pursuant to CPLR §3001, the Company is seeking a judgment declaring the rights and obligations of parties with respect to the Permits.

100. There is a justiciable controversy concerning the parties' rights and obligations under the Permits.

101. By reason of the foregoing, the Company is entitled to a declaratory judgment granting the relief set forth in the "Wherefore" clause of this Petition.

AS AND FOR A THIRD CAUSE OF ACTION

102. Petitioner repeats and realleges each and every allegation in paragraphs 1 through 101 of the Petition, as if fully set forth herein.

103. The Petition filed in the Concerned Citizens Action alleged that a "residence" owned or occupied by Ted Gordon was within approximately 1,900 feet of one of the Project turbine locations, and the Planning Board's SEQRA review of the Project failed to take into account that the Gordon "residence" is, allegedly, a "sensitive receptor" under the Town's wind energy law, Zoning Ordinance II § 5.25. (Appendix, Exhibit 2, Petition ¶¶ 71, 85)

104. The Concerned Citizens group filed an Affidavit of Ted Gordon, dated September 28, 2011 in support of the Petition. In the Affidavit, Mr. Gordon alleged that his residence at 180 Chipmunk Road in Allegany, New York (the "Gordon residence") was "approximately 1,900 feet from Turbine 18E" (Gordon Aff. ¶ 3), and that Mr. Gordon brought this to the attention of the Planning Board Member John Hare prior to the Planning Board's vote on July 11, 2011 regarding the Project. (Appendix, Exhibit 8, Gordon Aff. ¶¶ 12-13)

105. Mr. Gordon alleged that Mr. Hare raised the issue at the Planning Board meeting that “preceded the board’s July 11, 2011 vote....” (Id. ¶ 14)

106. The Planning Board’s Answer denied that Mr. Gordon’s residence was a “sensitive receptor” requiring special consideration under the Town’s Zoning Ordinance II. (Appendix, Exhibit 3 [Answer] ¶¶ 71, 85)

107. In addition, the Town submitted an Affidavit refuting Mr. Gordon’s statements that his “residence” is a “sensitive receptor under Section 5.25 of the Town’s Zoning Ordinance.” (See Appendix, Exhibit 5 [Dzuroff Affidavit]). The Town’s Code Enforcement Officer stated, under oath, that the Gordon residence is an “illegal structure” not subject to the “sensitive receptor” provisions of the Town’s Zoning Ordinance. (Id. ¶¶ 3-5, 9)

108. Mr. Gordon filed a “Supplemental Affidavit” in response to Mr. Dzuroff’s Affidavit, and argued that his residence at 180 Chipmunk Road was “legal.” (Appendix, Exhibit 9 [Gordon Supplemental Affidavit])

109. The Memorandum of Law filed on behalf of the Planning Board informed the Court that the Gordon residence is an illegal structure which does not qualify as a “sensitive receptor” or require consideration under the set back requirements of the Zoning Ordinance. (Appendix, Exhibit 7 [Excerpts of Memorandum of Law filed on behalf of Planning Board])

110. The Decision of the Supreme Court (Hon. Michael Nenno, presiding) demonstrates that the allegations of Mr. Gordon and the Concerned Citizens regarding the Gordon residence were considered and rejected. (**Exhibit 1** [Decision] pp. 7-8).

111. Upon information and belief, the question of whether the Gordon “residence” was a legal residence entitled to treatment as a “sensitive receptor” is now res judicata.

112. Upon information and belief, the doctrines of judicial estoppel, estoppel against inconsistent positions, and collateral estoppel preclude the Planning Board from reversing its position on this issue.

113. Nevertheless, in its Resolution, dated October 15, 2012, the Planning Board determined that the Gordon residence is a “sensitive receptor” within 2,500’ of a turbine, and, “as a result, a portion of the Project may not be in compliance with all applicable local laws and ordinances, and the prior approvals.” (See Exhibit 7, p. 3 ¶ 3)

114. The Planning Board found that “this new information represents a change in conditions and circumstances that must be reviewed prior to any grant of an extension.” (Id. ¶ 3)

115. This aspect of the Planning Board’s Resolution is arbitrary and capricious and an abuse of discretion.

116. The doctrine of estoppel against inconsistent positions precludes the Planning Board from reversing itself on this issue.

117. The doctrine of collateral estoppel also precludes the Planning Board from reversing course on this issue. The Planning Board denied Mr. Gordon’s allegations in the prior lawsuit, and prevailed in its defense of the Planning Board’s Decision to grant the Permits.

118. These doctrines prevent the Planning Board from denying an extension of the Permits on the basis of alleged “sensitive receptors” not studied in the Planning Board’s three (3) year review of the Project.

119. There are no changed circumstances; the Gordon “residence” has always been in the same location; it has not moved.

120. The Planning Board's decision to require the Company to conduct additional investigation of the Gordon residence as a "sensitive receptor" is arbitrary and capricious and an abuse of discretion.

121. By reason of the foregoing, the Planning Board's October 15, 2012 Resolution should be annulled.

122. By reason of the foregoing, the Company is entitled to the relief requested in the "Wherefore" clause of this Petition.

AS AND FOR A FOURTH CAUSE OF ACTION

123. Petitioner repeats and realleges each and every allegation in paragraphs 1 through 122 of the Petition, as if fully set forth herein.

124. By letter, dated August 3, 2012, the Company sought the Planning Board's permission to use a substitute turbine model for the turbines specified in the Permits, the Nordex N100 model.

125. The letter, dated August 3, 2012 made it clear that no final decision had been made with respect to the selection of a turbine model, and the Company was exploring its options.

126. The letter, dated August 3, 2012 (see Exhibit 8) included a chart summarizing the turbine models then under consideration. On September 10, 2012, the Company's consultant provided the Planning Board additional information regarding the proposed, substitute turbines. (See Exhibit 10)

127. The chart below summarizes the turbine models the Company is considering to use in the place of the Nordex N100 turbine model and provides a comparison to the N100 model:

| Manufacturer | Model | Rated Power (MW) | Hub Height | Rotor Diameter | Tip Height (m) | Tip Height (feet) | Max Lwa Radius (dB) |
|--------------|--------|------------------|------------|----------------|----------------|-------------------|---------------------|
| Nordex | N100 | 2.5 | 100 | 100 | 150 | 492.1 | 106 |
| Nordex | N117 | 2.4 | 91 | 117 | 149.5 | 490.5 | 105 |
| Siemens | SWT113 | 3.0 | 94 | 113 | 150.5 | 493.8 | 106 |

128. The DEIS and FEIS for the Project evaluated the potential impacts associated with the Nordex N100 (2.5 MW) turbine model.

129. The Nordex N100 turbine includes a three-blade upwind rotor with a diameter of 100 meters (328 feet), mounted on a 100-meter (328 foot) tubular steel tower (total maximum height of 492.1 feet).

130. A total of 29 N100 turbines have been approved for the Project.

131. The information provided by the Company's consultant demonstrated that the turbine models currently under consideration for the Project are of similar size, appearance, and operating characteristics (including sound impacts) as the Nordex N100 turbine model approved by the Planning Board for the Project.

132. The Company thereafter provided detailed information for each of the turbine models under consideration to assist the Planning Board in its assessment. The information demonstrated that the substitute models had the same, or less, sound impacts as the Nordex N100 model.

133. Nevertheless, the Planning Board determined that the Company's request for approval to install turbines manufactured by another manufacturer requires the preparation of a Supplemental Environmental Impact Statement ("SEIS").

134. The Planning Board had no information to make a reasoned determination that the environmental impacts of the proposed turbine models under consideration would have any impacts that were significantly different than the impacts of the Nordex N100 model.

135. To the contrary, the information provided by the Company demonstrated that the proposed substitution turbines have all the same essential characteristics as the Nordex N100 turbines.

136. Accordingly, the preparation of an SEIS is unnecessary, and that part of the Planning Board's Resolution, dated October 15, 2012 which requires the preparation of an SEIS is arbitrary and capricious.

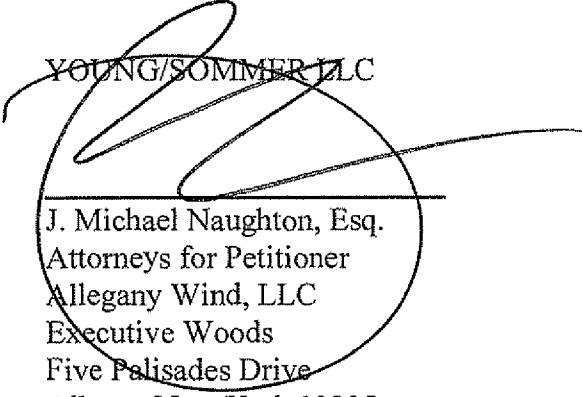
WHEREFORE, Petitioner demands judgment against the Respondent as follows:

- (A) annulling the Resolution of the Respondent Planning Board, dated October 15, 2012, which denied the application of Petitioner Allegany Wind, LLC for a one year extension of the Special Use Permit and Site Plan approval (collectively, the "Permits") granted by the Planning Board on July 11, 2011 with respect to a 29 turbine wind energy generating facility (the "Project") in the Town of Allegany, New York; and
- (B) compelling the Planning Board to grant a one year extension of the Permits;
- (C) declaring, pursuant to CPLR § 3001, in the alternative that (i) all deadlines with respect to the Permits for the Project were tolled while the case entitled *Concerned Citizens of Cattaraugus County, Inc. v. Town Board of the Town of Allegany, et al.* (Index No. 2011-79455) was pending, and (ii) the Permits are not scheduled to expire until October 10, 2013;

- (D) annulling that part of the Resolution of the Planning Board, dated October 15, 2012, which determined that the cabin owned or occupied by Theodore Gordon is a “sensitive receptor” requiring further study under the set back provisions of the Zoning Ordinance II;
- (E) annulling that part of the Resolution, dated October 15, 2012, which requires the Company to prepare an SEIS in order to obtain approval to substitute turbines manufactured by other turbine manufacturers for the approved, Nordex N100 turbines; and
- (F) granting Petitioner such other and further relief as to the Court may seem just and proper, including a temporary restraining order or stay while this action-proceeding is pending.

DATED: November 13, 2012
Albany, New York

By:


~~YOUNG/SOMMER LLC~~
J. Michael Naughton, Esq.
Attorneys for Petitioner
Allegany Wind, LLC
Executive Woods
Five Palisades Drive
Albany, New York 12205
(518) 438-9907
(518) 438-9914 (Fax)

VERIFICATION

STATE OF NEW YORK

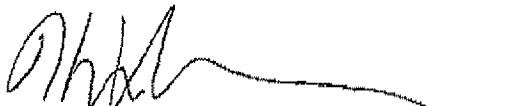
)

)ss.:

COUNTY OF ~~NEW YORK~~
Monroe

)

Kevin Sheen, being duly sworn, deposes and says that he is a member and the duly authorized representative of Allegany Wind, LLC, the Petitioner in the within action; that he has read the foregoing Notice of Petition and Petition; that he knows the contents thereof and that the same are true to his own knowledge, except as to matters therein stated as to be alleged upon information and belief, and as to those matters, he believes them to be true.



KEVIN SHEEN

Sworn to before me this
13 day of November, 2012



Notary Public

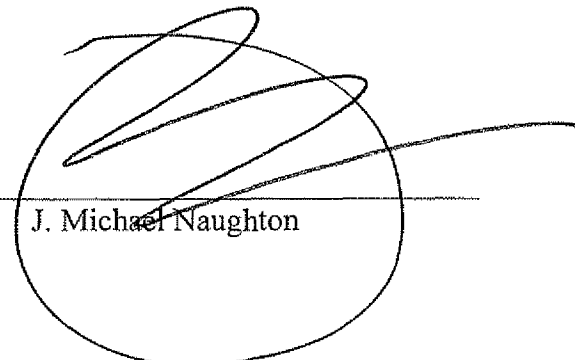
ANNE M. SAEVA
Notary Public in the State of New York
Monroe County
#01SA4977251
Commission Expires January 28, 2015

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

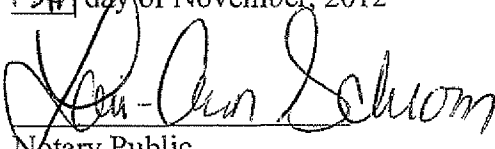
J. Michael Naughton, being duly sworn, deposes and says:

I am a member of the firm of Young/Sommer LLC, attorneys for Petitioner Allegany Wind LLC in this action; that I have read the attached Petition, know the contents thereof, and that the same are true to the best of my knowledge, except those matters stated to be alleged upon information and belief, and as to those matters, I believe them to be true; that the grounds and sources of my belief are written documents and reports in my file of this matter, interviews with past and present employees of the Allegany Wind LLC, as well as my investigation of this matter. I make this verification because Petitioner does not reside in or maintain an office in the county where your deponent's office is located.



J. Michael Naughton

Sworn to before me this
13th day of November, 2012



Notary Public

LORI-ANN SCHROM
Notary Public, State of New York
Qualified in Albany County
No. 5060306
Commission Expires May 20, 2014

INDEX OF EXHIBITS TO PETITION

| <u>EXHIBIT</u> | <u>DESCRIPTION</u> |
|-----------------------|---|
| 1 | Order and Judgment, dated November 15, 2011, with Notice of Entry, dated November 23, 2011 |
| 2 | Notice of Appeal, dated December 5, 2011 |
| 3 | Request for Extension of Permits, dated April 3, 2012 |
| 4 | Letter-Decision, dated June 11, 2012 and Resolution of Planning Board granting extension of Permits |
| 5 | Order, dated September 6, 2012 of Appellate Division, Fourth Department, with Notice of Entry |
| 6 | Request for Extension of Permits, dated September 28, 2012 |
| 7 | Letter-Decision, dated October 18, 2012 and Resolution of Planning Board denying request for extension of Permits |
| 8 | Letter, dated August 3, 2012 from EDR regarding potential substitution of turbine manufacturers |
| 9 | Resolution, dated August 13, 2012 regarding potential turbine substitution |
| 10 | Letter, dated September 10, 2012 from EDR regarding alternate turbine models |

EXHIBIT 1

STATE OF NEW YORK
SUPREME COURT : COUNTY OF CATTARAUGUS

CONCERNED CITIZENS OF CATTARAUGUS COUNTY,
INC., and KATHY BOSER,

Petitioners,

Index No.: 2011-79455
Hon. Michael Nenno

For a Judgment Pursuant to Article 78 of the Civil Practice Law
and Rules

—against—

THE TOWN OF ALLEGANY PLANNING BOARD, THE
TOWN OF ALLEGANY TOWN BOARD, THE TOWN OF
ALLEGANY ZONING BOARD OF APPEALS, THE
TOWN OF ALLEGANY CODE ENFORCEMENT
OFFICER, and ALLEGANY WIND, LLC,

Respondents.

NOTICE OF ENTRY

The attached Order and Judgment was granted by the Hon. Michael Nenno,
A.J.S.C. on November 15, 2011, and entered in the Office of the Clerk of the County of
Cattaraugus on November 23, 2011.

Dated: November 23, 2011
Buffalo, New York

HODGSON RUSS LLP

*Attorneys for the Town of Allegany Town Board,
Planning Board, Zoning Board of Appeals, and
Code Enforcement Officer*

By: 

Daniel A. Spitzer, Esq.
Charles W. Malcomb, Esq.

The Guaranty Building
140 Pearl Street, Suite 100
Buffalo, NY 14202-4040
(716) 856-4000

TO: **MUSCATO & SHATKIN LLP**

Attorneys for Petitioners

Richard Stanton, Esq.

434 Delaware Ave.

Buffalo, New York 14202

(716) 842-0550

YOUNG/SOMMER, LLC

Attorneys for Respondent Allegany Wind, LLC

J. Michael Naughton, Esq.

Executive Woods

5 Palisades Drive

Albany, New York 12205

(518) 438-9907 ext. 244

STATE OF NEW YORK
SUPREME COURT COUNTY OF CATTARAUGUS

CONCERNED CITIZENS OF CATTARAUGUS
COUNTY, INC., and KATHY BOSER,

2011 NOV 23 : P 1:56

CATTARAUGUS COUNTY CLERK

Petitioners,

For a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules

-against-

THE TOWN OF ALLEGANY PLANNING BOARD,
THE TOWN OF ALLEGANY TOWN BOARD,
THE TOWN OF ALLEGANY ZONING BOARD OF
APPEALS, THE TOWN OF ALLEGANY CODE
ENFORCEMENT OFFICER, and ALLEGANY WIND,
LLC,

Respondents.

**ORDER AND
JUDGMENT**

Index No.: 79455

Hon. Michael L. Nenno

Petitioners having commenced this Article 78 proceeding by Verified Petition, dated September 26, 2011, and Petitioners having demanded an order and judgment annulling the permits and approvals granted to Allegany Wind, LLC by the Town of Allegany Planning Board and the Town of Allegany Town Board for a wind energy project. The Court having considered the following papers in support of the Petition:

1. Notice of Petition, dated September 30, 2011 [filed on October 4, 2011];
2. Verified Petition, dated September 26, 2011 [filed on September 28, 2011];
3. Affidavit of Richard R. James, dated September 26, 2011 (with exhibits annexed thereto);
4. Affidavit of Ted Gordon, dated September 28, 2011 (with exhibits annexed thereto);
5. Affidavit of Kathleen Boser Premo, dated September 28, 2011 (with exhibit annexed thereto);

6. Affidavit of Ray Mosman, dated September 28, 2011;
7. Affidavit of James C. Severtson, dated September 27, 2011 (with exhibits annexed thereto);
8. Affidavit of Daniel Mohr, dated September 28, 2011 (with exhibits annexed thereto); and

The Court having considered the following papers in opposition to the Petition:

9. Answer, dated October 26, 2011 on behalf of The Town Board, the Planning Board, the Zoning Board of Appeals, and the Code Enforcement Officer of the Town of Allegany (collectively, the "Town Respondents");
10. Certified Record of Proceedings, dated October 25, 2011 (Volumes 1-15);
11. Affidavit of Carol Horowitz, sworn to October 26, 2011 (with exhibits annexed thereto);
12. Affidavit of Gerard E. Dzuroff, sworn to October 26, 2011;
13. Affidavit of David M. Britton, PE, sworn to October 26, 2011 (with exhibit annexed thereto);
14. Answer, dated October 25, 2011 on behalf of Allegany Wind, LLC;
15. Affidavit of Kevin Sheen, sworn to October 24, 2011 (with exhibits annexed thereto); and
16. Affidavit of David M. Hessler, P.E., sworn to October 24, 2011 (with exhibit annexed thereto);

The Court having considered the reply papers submitted on behalf of the Petitioners, which included the following:

17. Supplemental Affidavit of Ted Gordon, sworn to November 1, 2011 (with exhibit annexed thereto).

The Court having heard oral argument on November 4, 2011, and, after due deliberation, the Court issued a Decision on November 10, 2011, a copy of which is attached as **Exhibit A**.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that the Petition shall be, and hereby is, dismissed in its entirety with prejudice for the reasons set forth in the annexed Decision.

Dated: November 15, 2011
Olean, New York

GRANTED

November 15, 2011

Verna Dry
COURT CLERK



Hon. Michael L. Nemo, A.J.S.C.

EXHIBIT A

copy

**STATE OF NEW YORK
SUPREME COURT: COUNTY OF CATTARAUGUS**

**CONCERNED CITIZENS OF CATTARAUGUS
COUNTY, INC, and KATHY BOSER,**
Petitioners,

V.

**DECISION
Index No. 79455**

**THE TOWN OF ALLEGANY PLANNING BOARD,
THE TOWN OF ALLEGANY TOWN BOARD,
THE TOWN OF ALLEGANY ZONING BOARD OF
APPEALS, THE TOWN OF ALLEGANY CODE
ENFORCEMENT OFFICER, and ALLEGANY
WIND, LLC,**

Respondents,

Petitioners are a resident of Allegany, NY and a non-profit corporation of "concerned citizens" residing in the immediate area of a proposed wind farm to be constructed in a rural neighborhood known as "Chipmonk" in the Township of Allegany, Cattaraugus County, New York. In this Article 78 proceeding, they challenge the approval of the Town Board which accepted the planning board's recommendation for construction of a 29 unit windmill farm. The petitioners herein request that the Court grant a permanent injunction barring construction, and override the Town's determination to permit the project on the grounds that the lead agency(planning board) acted beyond the scope of its authority(lacked jurisdiction) in recommending approval of the application and also to nullify its Site Plan approval and the SEQRA findings, or in the alternative, temporarily

enjoin the respondents from moving ahead with the project until they complete a revised noise assessment,(or comparable testing) to analyze the impacts of low level noise generated by the turbines. Respondents reply that to enjoin the project would be economically disastrous due to State and Federal subsidy grants and certain timing requirements which, if delayed, would effectively abolish the project. They further allege that petitioners are beyond the time period allowed for them to challenge the SEQRA approval, but ,in any event , they claim that the Town agencies acted in accord with the State and Local laws and ordinances in arriving at their determinations.

The facts are these. Respondent Allegany Wind, LLC began investigating this proposed project in 2005 and did studies on the land for over 2 years to determine the feasibility of the site for location of a wind farm. In August of 2008 it filed with the Town its application for approval, at which time the Town designated its planning board to act as lead agency in connection with conducting the appropriate oversight and environmental reviews. After 3 years of studies, public hearings, input from literally hundreds of individuals, expert reports(both pro and contra) the planning board in July 2011 approved the construction of a 29 turbine wind energy project in the town. So substantial was this effort that the record of all the proceedings, studies, analyses, commentaries and testimony comprises more than 7600 pages of materials for this Court to review.

Initially, it must be pointed out that an Article 78 proceeding can take many forms and frequently an examination of the record is necessary to see which aspect of this special proceeding is applicable, given the fact that this statute is derived from the old common law writs of Mandamus, Prohibition, Injunction, Certiorari and related remedies. Here the Court determines that the proceeding before it is in the nature of Mandamus to review (see McKinney's commentaries to CPLR 7801) and, as such, is a review of an administrative decision, rather than a review of a judicial or quasi-judicial determination. Thus, the agency had no need to afford the parties a full-fledged hearing and it could rely not only on evidence provided to it, but on facts obtained by it on its own investigation (see *Bar Corp.-v- State Liq.Auth* 24 NY2d 174; *Rochester Colony, Inc. -v- Hostetter*, 19AD2d 250, 4th dept.1963). Nevertheless, it is apparent that the lead agency gave every opportunity to the community to participate in the process, and indeed, the opponents had multiple opportunities to be heard. In addition, they submitted detailed professional treatises on the subject of wind farms and turbine disturbances, particularly as it related to noise interference for those in proximity to the turbines.

Petitioners now come before this court asking it to review the actions of the town and its administrative agencies(i.e. planning board, zoning board of appeals) with respect to their administrative determinations in this matter. The standard of

review in these proceedings is whether the agency's determination was arbitrary or capricious, was made in violation of a lawful procedure or was effected by an error of law(see, Scherbyn -v- Wayne-Finger Lakes Bd. Of Co-Op Educational Services, 77NY2d 753; Jackson -v- NYS Urban Dev. Corp. 67 NY2d 400). What is required in these matters is a "hard look" at the evidence and a reasoned response by the agency. (See, Akpan -v- Koch 75 NY2d 561; Sun Co. Inc.(R&M) -v- City of Syracuse IDA 209 AD 2d 51, 4th dept. 1995). This Court cannot, and will not, substitute its judgment for that of the respondents, particularly in light of the massive effort put forth by them in reaching the determination to permit the project. Our appellate courts have been emphatic in their admonitions that a court's function is not to substitute its judgment or resolve disparity in information presented to the agency. Evaluation of the evidence is the sole responsibility of the municipal body(see,Albany-Greene Sanitation, Inc. -v- Town of New Baltimore Zoning Bd. of Appeals 263 AD 2d 644, 3rd dept. 1999)

Petitioners challenge the jurisdiction of the planning board to finalize the determination to grant the application of respondent Allegany Wind LLC. They charge, among other claims, that the Town Board failed to require ANSI(American National Standards Institute) requirements of the lead agency when it adopted the amendment to its Zoning Law (See, Sec 5.25 of the Town Ordinance). They further claim that the lead agency failed to recognize the property of Ted Gordon,

a member of petitioner CCCC, Inc. when it permitted location of a tower within 2500' of his residence, in violation of the requirements of their own zoning law passed expressly for this project. In reply, respondents claim that ANSI standards are only a guideline and the Town Board has broad discretion to impose a variety of requirements, and they argue that, in any event, the standards they ultimately required were far more stringent than those that have been upheld and recognized by our courts in other municipalities across this State. They further claim that Ted Gordon's property is not a residence within the meaning of the distance requirements, because he never obtained a certificate of occupancy, does not have his residence listed on the tax rolls(his property is designated as "vacant land"), and has no registered right of way or easement from a public highway to his property. Additionally, they allege he executed an agreement with the respondent's representative in August 2011 agreeing to permit a wind tower but leaving the amount to be paid for further negotiation. Respondents argue that such conduct estops him from claiming a violation of the distance requirement sought to be used as a jurisdictional defect to defeat the project.

There is, however, another significant aspect to this case that has been raised by the respondents. It involves the question of timeliness of petitioner's objections to the SEQRA findings by the lead agency. On July 11, 2011 the planning board issued its "Statement of Findings and Decision" and by resolution

issued a special use permit and approved re-zoning of the property. These were filed with the Town Clerk on July 14, 2011. On September 12, 2011 Gary Abraham, Esq. on behalf of the petitioner CCCC, Inc appealed this decision to the town Zoning Board of Appeals (hereinafter ZBA). On September 21, 2011 the Allegany town attorney wrote to Mr. Abraham advising that the ZBA had no authority to hear such an appeal and correctly cited Sec. 274-a of the Town Law, and related statutes, as well as provisions of the town zoning ordinance relating to such appeals while also advising him of the authority set out in *Viscio -v- Town of Wright* 42 AD 2d 728. Thereafter, on October 4, 2011, this proceeding was commenced by CCCC, Inc. as one of the petitioners alleging substantially the same grievances set out in that "appeal". That appeal clearly should have been brought by petition to the Supreme Court in an Article 78 proceeding. Since that law also requires an appeal to be brought within 30 days, this proceeding is untimely and must be dismissed.(see, Town Law Secs:274-a (11) and 274-b(9); Matter of McNeil -v- Town Bd. of Town of Ithaca 260 Ad 2d 829, 3rd dept. 1999).

Likewise this Court rejects petitioner's argument that respondents lacked jurisdiction to authorize this project. In February 2011 the respondent Town Board adopted Section 5.25, of the Allegany Town Zoning Law entitled "Commercial Wind Energy Conversion Systems" (WECS), governing the creation and regulation of wind energy projects. In its regulations outlining the application

process, it specifically provided for SEQRA review. It appears that this challenge is not really one about jurisdiction, but rather an indictment of the decision of the lead agency for their approval of the SEQRA application. Again, even if this court had found some basis to ignore the limitations statute, there is no showing in the record before the court that the lead agency violated their rules or the law, nor were their acts arbitrary and capricious in reaching their final approval. This court is bound to give great deference to the planning board's interpretation of the ordinance. (See, Matter of North Country Citizens for Responsible Growth, Inc. - v- Town of Potsdam 39 AD3d 1098, 3rd dept.,2007).

Lastly, the petitioners strongly urge that the property of Ted Gordon is a residence within the meaning of the ordinance and, as such, is within the restricted area for placement of a wind turbine since it is less than 2500' from one to be constructed. Respondents claim that his residence is illegal and as such does not qualify to be designated as a residence and hence, a sensitive receptor. What troubles this court about Mr. Gordon's position is that none of his complaints were presented to the lead agency. It is only now, in this proceeding, that he comes forth as member of CCCC, Inc to challenge the distance requirement of the law. Without discussing the merits of his status as a "resident", this evidence was not available to the agency during its deliberations and is outside the record to be reviewed by the Court. As we have stated above, this Court is charged with review

of the respondents activities and not burdened with the responsibility to pass on evidence or determine the merits of respondent's application. (See, Forjone -v- Bove 280 AD2d 98 4th dept. 2001; Kaufmann's Carousel -v- City of Syracuse Indus. Agency, 301 AD 2d 292, 4th dept. 2002). To determine this issue , now presented for the first time, would accomplish what this court has stated it will not do. Documents submitted for the first time are simply of no probative value.(see, City of Saratoga Springs -v- Zoning Bd. Of Appeals of Town of Wilton 279 AD2d 756, 3rd dept. 2001).

While other issues are presented to the Court in the petition, they are deemed moot in light of the court's findings herein, and accordingly will not be considered in this opinion.

Petition Dismissed. Submit order accordingly.

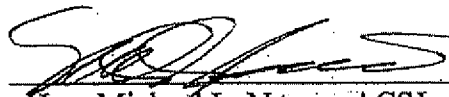

Hon. Michael L. Nenno, ACSJ

EXHIBIT 2

STATE OF NEW YORK
SUPREME COURT: COUNTY OF CATTARAUGUS

Concerned Citizens of Cattaraugus, and
Kathy Boser,

NOTICE OF APPEAL

Petitioners,

Index No. 2011-79455

For a Judgment Pursuant to Article 78 of the
Civil Practice Laws and Rules

Against


THE TOWN OF ALLEGANY PLANNING BOARD,
THE TOWN OF ALLEGANY TOWN BOARD,
THE TOWN OF ALLEGANY ZONING BOARD OF APPEALS
THE TOWN OF ALLEGANY CODE ENFORCEMENT OFFICER, and
ALLEGANY WIND, LLC

Respondents.

Please take notice that the Petitioners, the Concerned Citizens of Cattaraugus County, and Kathy Boser, appeal to the Appellate Division of the New York State Supreme Court for the Fourth Judicial Department from the Order and Judgment of the Honorable Michael L. Nenno, AJCS, entered in this action in the office of the Clerk of the Cattaraugus County Court, on November 23rd, 2011, which dismissed the Petitioners Article 78 Petition against the above named Respondents, and from every part thereof.

Dated: Buffalo, New York

December 5th, 2011



Richard E. Stanton, Esq.
Of Counsel to
Muscato & Shatkin,
434 Delaware Ave
Buffalo, New York 14202
(716) 842-0550

TO: The Clerk of Cattaraugus County
Attn Verna Dry, Chief Clerk
303 Court Street
Little Valley, New York 14755

J. Michael Naughton, Esq.
Young / Sommer, LLC
Attorneys for Respondent
Allegany Wind, LLC
Executive Woods
Five Palisades Drive
Albany, NY 12205

Daniel A. Spitzer, Esq.
Hodgson Russ, LLP
Attorneys for Respondents
Allegany Planning Board,
Allegany Town Board
Allegany Zoning Board of
Allegany Code Enforcement Officer
140 Pearl Street
Buffalo NY, 14202

EXHIBIT 3

Young / Sommer LLC

YOUNG SOMMER WARD RITZENBERG BAKER & MOORE LLC

JEFFREY S. BAKER
DAVID C. BRENNAN
MICHAEL J. MOORE
JAMES A. MUSCATO II
J. MICHAEL NAUGHTON
ROBERT A. PANASCI
KENNETH S. RITZENBERG
DEAN S. SOMMER
DOUGLAS H. WARD
KEVIN M. YOUNG

JOSEPH F. CASTIGLIONE
LAUREN L. HUNT
ALLYSON M. PHILLIPS
KRISTIN LAVIOLETTE PRATT
JESSE S. SOMMER

COUNSELORS AT LAW

EXECUTIVE WOODS, FIVE PALISADES DRIVE, ALBANY, NY 12205
Phone: 518-438-9907 • Fax: 518-438-9914

Saratoga Office:
Phone: 518-580-0163 / 518-580-0943

www.youngsommer.com

OF COUNSEL

SUE H.R. ADLER
MICHAEL E. CUSACK
SONYA K. DEL PERAL
CRYSTAL A. DOOLITY
ELIZABETH M. MORSS
STEPHEN C. PRUDENTE
KRISTIN CARTER ROWE
LAWRENCE R. SCHILLINGER

PARALEGALS

ALLYSSA A. TILLSON
AMY S. YOUNG

Writer's Telephone Extension: 243
jmuscato@youngsommer.com

April 3, 2012

Via Facsimile & First Class Mail

Fax No. 716-373-4522

Town of Allegany Planning Board
Town Hall
52 West Main Street
Allegany, New York 14706

**Re: Request for Extension of Special Use Permit and Site Plan approvals for
Allegany Wind Farm pursuant to Section 8.05(E) and Section 9.05(E) of the
Town of Allegany Zoning Ordinance II**

Dear Board Members:

Allegany Wind, LLC, hereby requests an extension of the Special Use Permit and Site Plan approvals for the Allegany Wind Farm pursuant to Section 8.05(E) and Section 9.05(E) of the Town of Allegany Zoning Ordinance II. As you know the Planning Board granted a Special Use Permit and Site Plan approval for the wind farm project on July 11, 2011. Consistent with the provisions of the Zoning Ordinance, the Special Use Permit and Site Plan Approval state that if work has not commenced within one year of approval, Allegany Wind may seek an extension from the Planning Board.

Immediately following the issuance of the approvals, opponents of the wind farm project commenced litigation against the Town and Allegany Wind in Cattaraugus County Supreme Court. The litigation prevented construction of the project from moving forward at that time. Although the Town and Allegany Wind prevailed in the lawsuit at Supreme Court, the Petitioners have appealed the decision and the appeal is still pending before the Appellate Division Fourth Department. For various reasons, including financing, the Company is unable to proceed with the project until the litigation is finally resolved.

Moreover, as you know, the Town Board had considered imposing a moratorium on wind project development while it reviewed its zoning law in light of recent State power plant siting legislation. Apparently the Board has determined not to proceed with the Moratorium. However, during this consideration period the Company had committed to not seeking building permits for the project until the Town had the opportunity to review the zoning law.

As a result of the above circumstances, the Company will not be in a position to commence construction of the Project in the coming building season. Many of the project components have long purchase and delivery lead times. Similarly, construction crews and contracts must be in place well in advance of actual development.

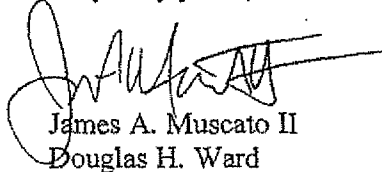
In light of the above, the Company requests an extension of the Special Use Permit and Site Plan approvals for an additional year. The one (1) year extension will provide time for the Company to make the final commitments to prepare for commencement of construction after the appeal is decided.

This application is consistent with the Zoning Ordinance, (See Section 8.05(E) and Section 9.05(E)), which authorizes the Planning Board to grant extensions of time for special use permits and site plan approvals. Under these general provisions we respectfully submit that the extension is warranted in this case in light of the litigation delay and the Town Board review outlined above as well as the fact that there have been no changes in circumstances regarding the Project (See Salkin, New York Law of Zoning Practice, §29:34, pg 29-63)(citations omitted).

We also note that the requirements for issuing extensions are minimal. The grant of an extension is considered a ministerial act which does not trigger SEQRA or other notice or hearing requirements. (420 Tenants Corp v EBM Long Beach, LLC 41 AD3d 641, 643 [2nd Dept. 2007] citing Matter of New York Life Ins. Co v Galvin 35 NY2d 52, 60 [1974]).

Accordingly the Applicant respectfully requests that pursuant to the Zoning Ordinance, the Planning Board agree to extend the Special Use Permit and Site Plan approval for one year, to July 11, 2013.

Very truly yours,



James A. Muscato II
Douglas H. Ward

cc: Jerry Dzuroff, Town of Allegany Code Enforcement Officer (via mail & facsimile)
Daniel Spitzer, Esq., Special Counsel to Planning Board (via mail & facsimile)
Carol Horowitz, AICP, Town Planner (via mail & facsimile)

EXHIBIT 4

John E. Hare, Supervisor
David Koebelin, Councilman
David O'Dell, Councilman
Jim Hitchcock, Councilman
Ed Allen, Councilman
Mary M. Peck, Town Clerk



Wendy A. Tuttle, Town Attorney
Rodney F. Gleason, Highway Supt.
Carolyn Hemphill, Comptroller
Mary M. Peck, Receiver of Taxes
Robin Pearl-Lamphier, Assessor
Gerard E. Dzuroff, C.E.O

June 13, 2012

VIA US MAIL AND E-MAIL

James A. Muscato II, Esq.
Young / Sommer LLC
5 Palisades Drive
Albany, NY 12205

Dear Mr. Muscato:

As you are aware, at their meeting of June 11, 2012, the Town of Allegany Planning Board approved your request, on behalf of Allegany Wind LLC, for an extension of the site plan and special use permit approvals for the Allegany Wind Power Project. Enclosed for your records is a copy of the Board's resolution, which includes the term of the extension.

Please feel free to contact me if you have any questions.

Sincerely yours,

Carol Horowitz, AICP
Town Planner

cc via email:

Kevin Sheen, Allegany Wind LLC
Mary Peck, Town Clerk
John E. Hare, Supervisor
Jerry Dzuroff, CEO
Daniel Spitzer, Esq.

Town Hall
Phone: 716-373-0120

• 52 West Main Street •

Allegany, NY 14706

Fax: 716-373-4522

John E. Hare, Supervisor
David Koebelin, Councilman
David O'Dell, Councilman
Jim Hitchcock, Councilman
Ed Allen, Councilman
Mary M. Peck, Town Clerk



Wendy A. Tuttle, Town Attorney
Rodney F. Gleason, Highway Supt
Carolyn Hemphill, Comptroller
Mary M. Peck, Receiver of Taxes
Robin Pearl-Lamphier, Assessor
Gerard E. Dzuroff, C.E.O

CC: FILE
TJ CLERK
EVER POWER

JUN 13 2012

TOWN OF ALLEGANY PLANNING BOARD RECEIVED

Resolution Granting Allegany Wind, LLC's Application for an Extension of its Special Use Permit and Site Plan Approval

WHEREAS, Allegany Wind, LLC (the "Applicant") applied to the Town of Allegany Planning Board (the "Planning Board") for a special use permit and site plan approval to undertake the development of wind energy facilities in the Town of Allegany, New York (the "Project"); and

WHEREAS, the Planning Board, acting as lead agency pursuant to the State Environmental Quality Review Act ("SEQRA"), completed the environmental review of the Project, and issued a Statement of Findings and Decision on July 11, 2011, granting the Applicant's special use permit application, and approving the site plan; and

WHEREAS, the Applicant has not yet commenced construction in furtherance of the special use permit and site plan approvals; and

WHEREAS, the Applicant has submitted a request to the Planning Board for an extension of the special use permit and site plan approvals for the Project, pursuant to Sections 8.05(e) and 9.05(e) Town of Allegany Zoning Ordinance II;

NOW THEREFORE BE IT RESOLVED, by the Town of Allegany Planning Board as follows:

Town Hall
Phone: 716-373-0120

• 52 West Main Street

• Allegany, NY 14706

Fax: 716-373-4522

1. The Planning Board hereby extends the Applicant's special use permit and site plan approval for the Project until the earlier of: (i) one year from the date this Resolution is adopted, or (ii) ninety days following the conclusion of the current litigation over the Project.
2. For purposes of paragraph 1, current litigation means the Article 78 proceeding commenced in Cattaraugus County entitled *Concerned Citizens of Cattaraugus County et al. v. Town of Allegany et al.*, Index No. 2011-79455.
3. For purposes of paragraph 1, conclusion includes, but is not limited to (i) voluntary withdrawal of the appeal by the petitioners/appellants; (ii) failure of the petitioners/appellants to perfect their appeal within nine (9) months of filing and service of the notice of appeal; (iii) a final determination of the Appellate Division, Fourth Department that is not timely appealed pursuant to the CPLR; (iv) petitioners/appellants have been denied leave to appeal to the Court of Appeals by the Appellate Division, Fourth Department and have not timely sought leave of the Court of Appeals; (v) petitioners have been denied leave to appeal to the Court of Appeals by the Court of Appeals; and (vi) a final determination by the Court of Appeals.

PASSED AND ADOPTED BY THE TOWN OF ALLEGANY PLANNING BOARD

ON THE 11th DAY OF JUNE, 2012.

(2)

Resolution Granting Allegany Wind, LLC's Application for an Extension of its Special Use Permit and Site Plan Approval

EXHIBIT 5

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION FOR THE FOURTH JUDICIAL DEPARTMENT

In the Matter of Concerned Citizens of Cattaraugus
County, and Kathy Boser,

Petitioners/Appellants

Notice of Entry

Docket No. 12 -01471

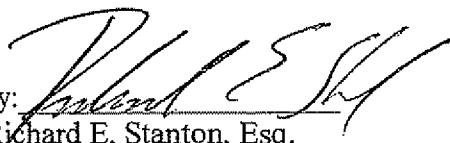
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THE TOWN OF ALLEGANY PLANNING BOARD,
THE TOWN OF ALLEGANY TOWN BOARD,
THE TOWN OF ALLEGANY ZONING BOARD OF APPEALS
THE TOWN OF ALLEGANY CODE ENFORCEMENT OFFICER, and
ALLEGANY WIND, LLC

Respondents/Respondents

Please Take Notice, that the attached Order dismissing the above captioned matter was
duly entered by the Clerk of the Court of the Appellate Division for the Fourth Judicial
Department of the Supreme Court of the State of New York on the 6th day of September, 2012.

Dated: September 13, 2012
Buffalo, New York

By: 
Richard E. Stanton, Esq.
Attorney for Petitioners/Appellants
Concerned Citizens of Cattaraugus
County, and Kathy Boser
415 Franklin Street
Buffalo, NY 14202

To: J Michael Naughton
Daniel A. Spitzer, Esq

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

DOCKET NO. CA 12-01471

PRESENT: SCUDDER, P. J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

IN THE MATTER OF CONCERNED CITIZENS OF CATTARAUGUS COUNTY,
INC. AND KATHY BOSER, PETITIONERS-APPELLANTS,

V

TOWN OF ALLEGANY PLANNING BOARD,
TOWN OF ALLEGANY TOWN BOARD,
TOWN OF ALLEGANY ZONING BOARD OF APPEALS, TOWN OF ALLEGANY
CODE ENFORCEMENT OFFICER, AND ALLEGANY WIND, LLC,
RESPONDENTS-RESPONDENTS.

Appellants having moved to dismiss their appeal taken herein from an order and judgment of the Supreme Court entered in the Office of the Clerk of the County of Cattaraugus on November 23, 2011,

Now, upon reading and filing the affirmations of Richard E. Stanton, Esq., dated August 16, 2012, and August 24, 2012, the notice of motion with proof of service thereof, and the affirmation of James A. Muscato, II, Esq., dated August 23, 2012, and due deliberation having been had thereon,

It is hereby ORDERED that the motion is dismissed on the ground that the appeal is deemed abandoned and dismissed (*see* 22 NYCRR 1000.12 [b]).

Entered: September 6, 2012

FRANCES E. CAFARELL, Clerk

Supreme Court
APPELLATE DIVISION
Fourth Judicial Department
Clerk's Office, Rochester, N.Y.

I, FRANCES E. CAFARELL, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.



IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this **SEP 06 2012**

Frances E. Cafarell

Clerk

EXHIBIT 6

Young / Sommer LLC

YOUNG SOMMER WARD RITZENBERG BAKER & MOORE LLC

JEFFREY S. BAKER
DAVID C. BRENNAN
MICHAEL J. MOORE
JAMES A. MUSCATO II
J. MICHAEL NAUGHTON
ROBERT A. PANASCI
KENNETH S. RITZENBERG
DEAN S. SOMMER
DOUGLAS H. WARD
KEVIN M. YOUNG

JOSEPH F. CASTIGLIONE
LAUREN L. HUNT
ALLYSON M. PHILLIPS
KRISTIN LAVIOLETTE PRATT

COUNSELORS AT LAW

EXECUTIVE WOODS, FIVE PALISADES DRIVE, ALBANY, NY 12205
Phone: 518-438-9907 • Fax: 518-438-9914

Saratoga Office:
Phone: 518-580-0163 / 518-580-0943

www.youngsommer.com

OF COUNSEL
SUE H.R. ADLER
MICHAEL E. CUSACK
SONYA K. DEL PERAL
ELIZABETH M. MORSS
STEPHEN C. PRUDENTE
KRISTIN CARTER ROWE
LAWRENCE R. SCHILLINGER

PARALEGALS
FAITH A. MCEWAN
ALLYSSA A. TILLSON
AMYS. YOUNG

Writer's Telephone Extension: 243
jmuscato@youngsommer.com

September 28, 2012

Town of Allegany Planning Board
Town Hall
52 West Main Street
Allegany, New York 14706

**Re: Request for Extension of Special Use Permit and Site Plan approvals for
Allegany Wind Farm pursuant to Section 8.05(E) and Section 9.05(E) of the
Town of Allegany Zoning Ordinance II**

Dear Board Members:

Allegany Wind, LLC, hereby requests an extension of the Special Use Permit and Site Plan approvals for the Allegany Wind Farm pursuant to Section 8.05(E) and Section 9.05(E) of the Town of Allegany Zoning Ordinance II. The Planning Board previously granted Allegany Wind, LLC an extension on June 11, 2012. The Planning Board agreed to extend the date for commencement of construction "90 days following the conclusion of the [CCCC] litigation". It is our understanding that the Planning Board is likely to calculate this date as on or about December 10, 2012.

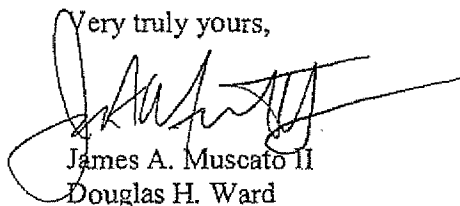
As the Planning Board is aware, Allegany Wind, LLC has requested confirmation from the Planning Board that the potential selection of an alternate turbine for the Project does not require any further modification or amendment to the existing approvals. Allegany Wind, LLC submitted this request to the Planning Board on August 3, 2012. On August 13, 2012, the Planning Board issued a resolution requesting additional information from Allegany Wind, LLC. Allegany Wind, LLC provided this information to the Planning Board on September 10, 2012. We understand that the Planning Board's consultants' are continuing their review of these materials.

Allegany Wind, LLC has previously submitted that the turbine change was necessitated by a number of factors, including changes in turbine technology and the current economic conditions. Assuming the Planning Board confirms that the proposed alternate turbines are similar to the turbine approved in the permits and that no additional approvals are needed to move forward, it is unlikely that this will occur with enough time to allow Allegany Wind, LLC to commence construction prior to the December timeframe. As such, Allegany Wind, LLC respectfully requests a one year extension of time.

This application is consistent with the Zoning Ordinance, (See Section 8.05(E) and Section 9.05(E)), which authorizes the Planning Board to grant extensions of time for special use permits and site plan approvals. Under these general provisions we respectfully submit that the extension is warranted in this case in light of the Planning Board's pending review of the alternate turbine selection. (See Salkin, New York Law of Zoning Practice, §29:34, pg 29-63)(citations omitted). The Planning Board's consideration of this request does not necessitate a "re-review" of potential impacts associated with the Project (In the Matter of Stewart Park and Reserve Coalition v. New York State Department of Transportation, 77 N.Y.2d 970 [1991]). For all of the reasons previously submitted by Allegany Wind, LLC, the application should be granted. Moreover, even if the Planning Board were to determine the need for Allegany Wind, LLC to seek a modification or amendment of its permits to accommodate the new turbine selection, the permits should be extended to provide the Company the time to make the necessary submissions to amend the permits.

Lastly, as we've noted previously, the requirements for issuing extensions are minimal. The grant of an extension is considered a ministerial act which does not trigger SEQRA or other notice or hearing requirements. (420 Tenants Corp v EBM Long Beach, LLC 41 AD3d 641, 643 [2nd Dept. 2007] citing Matter of New York Life Ins. Co v Galvin 35 NY2d 52, 60 [1974]). In this case, nothing has changed which would necessitate further review by the Planning Board.

Accordingly the Applicant respectfully requests that pursuant to the Zoning Ordinance, the Planning Board agree to extend the Special Use Permit and Site Plan approval for one year.

Very truly yours,

James A. Muscato II
Douglas H. Ward

cc: Jerry Dzuroff, Town of Allegany Code Enforcement Officer
Daniel Spitzer, Esq., Special Counsel to Planning Board
Carol Horowitz, AICP, Town Planner

EXHIBIT 7

John E. Hare, Supervisor
David Koebelin, Councilman
David O'Dell, Councilman
Jim Hitchcock, Councilman
Ed Allen, Councilman
Mary M. Peck, Town Clerk



Wendy A. Tuttle, Town Attorney
Rodney F. Gleason, Highway Supt.
Carolyn Hemphill, Comptroller
Mary M. Peck, Receiver of Taxes
Robin Pearl-Lamphier, Assessor
Gerard E. Dzuroff, C.E.O

October 18, 2012

OCT 22 2012

Kevin Sheen
Sr. Director of Development
EverPower
24 West 40th Street, 12th Floor
New York, NY 10018

RE: Request for extension of Permit *and*
Request for modification of turbine models

Dear Mr. Sheen:

As you are aware, on October 17, 2012 the Town of Allegany Planning Board declined to further extend your Special Use Permit and Site Plan approvals. Regarding your request for modification of the turbine models, the Planning Board requested that additional information be presented in the form of a Supplemental Environmental Impact Statement. Copies of the Board's resolutions on these matters are enclosed for your records. If you have any questions, please contact Daniel Spitzer, the Town's Special Counsel.

Sincerely yours,



Frank DeFiore
Chair, Planning Board

Encl: Resolution requiring SEIS
Resolution denying extension request

cc: Daniel Spitzer, Esq.
Doug Ward, Esq.
Ben Brazell, EDR
David Britton, CRA
Carol Horowitz, Town Planner

TOWN OF ALLEGANY PLANNING BOARD

Resolution Denying Allegany Wind, LLC's Application for an Extension of its Special Use Permit and Site Plan Approval

WHEREAS, Allegany Wind, LLC (the "Applicant") applied to the Town of Allegany Planning Board (the "Planning Board") for a special use permit and site plan approval to undertake the development of wind energy facilities in the Town of Allegany, New York (the "Project"); and

WHEREAS, the Planning Board, acting as lead agency pursuant to the State Environmental Quality Review Act ("SEQRA"), completed the environmental review of the Project, and issued a Statement of Findings and Decision on July 11, 2011, granting the Applicant's special use permit application, and approving the site plan; and

WHEREAS, the Applicant has not yet requested a building permit nor commenced construction in furtherance of the special use permit and site plan approvals; and

WHEREAS, on April 3, 2012, the Applicant submitted a request to the Planning Board for an extension of the special use permit and site plan approvals for the Project, pursuant to Sections 8.05(e) and 9.05(e) Town of Allegany Zoning Ordinance II (the "First Extension Request"); and

WHEREAS, the Applicant cited pending litigation as the reason why the extension was necessary; and

WHEREAS, in correspondence dated June 5, 2012, counsel for the Applicant assured the Planning Board that there had been "no changes to the Project that was reviewed and approved by the Planning Board in July 2011"; and

WHEREAS, on June 11, 2012, the Planning Board granted the Applicant's extension request until the earlier of (1) one year from June 11, 2012, or (2) ninety days following the conclusion of the current litigation over the Project; and

WHEREAS, the litigation over the Project has concluded; therefore, on September 28, 2012, the Applicant has sought another extension request from the Planning Board (the "Second Extension Request"); and

WHEREAS, the Second Extension Request differs from the First Extension Request, in that the Applicant has notified that Planning Board that it intends to use alternate turbine models from those that were part of the Planning Board's initial review of the Project; and

WHEREAS, since the Planning Board conducted its initial review of the Project, it has been made aware of a residence that was previously overlooked by the Applicant and additional information as provided by the U.S. Fish and Wildlife service and, as a result, some aspects of the Project may not be in compliance with Zoning Ordinance II and some of the findings of the Planning Board may not be accurate; and

NOW THEREFORE BE IT RESOLVED, by the Town of Allegany Planning Board as follows:

1. The Planning Board hereby denies the Applicant's request for an extension of the special use permit and site plan approval for the Project.
2. The Planning Board finds that the Applicant's Second Extension Request is not ministerial in nature because of proposed changes to the Project.

The Planning Board conducted its initial review of the Project based upon the turbine models proposed by the Applicant. The change in turbine models represents a change in conditions since the initial approvals were granted, and this change must be evaluated by the Planning Board.

3. Since the conclusion of the Planning Board's initial review, it became aware of the existence of Theodore Gordon's residence, which is located within the Project area, and is within 2,500 feet of at least one turbine. Mr. Gordon's residence is, therefore, a "sensitive receptor" pursuant to Zoning Ordinance II. As a result, a portion of the Project may not be in compliance with all applicable local laws and ordinances, and the prior approvals. Additionally, material in support of the modification submitted by the Applicant indicates at least one turbine and possibly more are not in compliance with the prior approvals. The Planning Board finds that this new information represents a change in conditions and circumstances that must be reviewed prior to any grant of an extension.
4. Nothing in this Resolution shall be deemed as requiring the Applicant to submit any information in support of a revised request for a Special Use Permit and Site Plan Approval other than material related to the changes in the Project. The Planning Board will conduct its review of the proposed modifications concurrently with its obligations under SEQRA, should the Applicant seek to proceed further.
5. This Resolution shall take effect immediately.

Passed and adopted by the Town of Allegany Planning Board on the 15th day of
October, 2012.

TOWN OF ALLEGANY PLANNING BOARD

RESOLUTION REQUIRING A SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT DUE TO CHANGES PROPOSED FOR THE PROJECT AND NEWLY DISCOVERED INFORMATION

WHEREAS, Allegany Wind, LLC (the "Applicant") applied to the Town of Allegany Planning Board (the "Planning Board") for a special use permit and site plan approval to undertake the development of wind energy facilities in the Town of Allegany, New York (the "Project"); and

WHEREAS, the Planning Board, acting as lead agency pursuant to the State Environmental Quality Review Act ("SEQRA"), issued a Positive Declaration of Environmental Significance for the Project and directed the Applicant to prepare a Draft Environmental Impact Statement ("DEIS"); and

WHEREAS, the Planning Board, after review of the DEIS, accepted the DEIS as complete, established and held a public comment period, set and held a public hearing, filed and circulated the Notice of Completion, and filed the DEIS with the appropriate parties pursuant to SEQRA; and

WHEREAS, following the public comment period on the DEIS, the Planning Board, with its consultants and experts, prepared a Final Environmental Impact Statement ("FEIS"), which was issued; and

WHEREAS, the Planning Board completed the environmental review of the Project by issuing a Statement of Findings and Decision on July 11, 2011, granting the Applicant's special use permit application, and approving the site plan; and

WHEREAS, the Applicant has not yet requested a building permit or commenced construction in furtherance of the special use permit and site plan approvals; and

WHEREAS, the Applicant has submitted a notification to the Planning Board that it intends to use alternate turbine models from those that were part of the Planning Board's initial review of the Project; and

WHEREAS, since the initial approvals, the Planning Board has been presented with newly discovered information: that a residence (Theodore Gordon) is located within 2,500 feet of at least one turbine, and that said residence is a "sensitive receptor" under the Town Zoning Ordinance II; and

WHEREAS, since the initial approvals, the Planning Board has been presented with new information from the U.S. Fish and Wildlife Service regarding the activities of endangered species in the project vicinity; and

WHEREAS, the information provided by the Applicant in response to the Planning Board's request indicates at least one turbine does not comply with the Town ordinances and the prior approvals; and

WHEREAS, pursuant to SEQRA, the Planning Board must determine whether a Supplemental Environmental Impact Statement ("SEIS") is required for the Project, resulting from any proposed changes for the Project, newly discovered information, or changes in circumstances related to the Project; and

WHEREAS, the Planning Board requested additional information from the Applicant to determine whether an SEIS will be required, but the Applicant failed to provide all the information requested;

NOW THEREFORE BE IT RESOLVED, by the Town of Allegany Planning Board as follows:

1. The Planning Board hereby determines that a SEIS is required based upon the changes proposed for the Project, and newly discovered information.
2. The Planning Board finds that the following areas require further study
 - a) Noise impacts at Theodore Gordon's residence
 - b) Impacts on endangered species in accordance with the issues raised by the U.S. Fish and Wildlife Service
 - c) Shadow Flicker impacts from the wider blades
 - d) Noise impacts from the newly proposed turbine models, with the applicant to submit studies in accordance with the Board's August 13, 2012 resolution.
3. This resolution shall be effective immediately.

Passed and adopted by the Town of Allegany Planning Board on the 15th day of October, 2012.

EXHIBIT 8



August 3, 2012

Carol Horowitz
Town of Allegany Town Hall
52 West Main St.
Allegany, NY 14706

RE: Allegany Wind Power Project
Notification of Potential Turbine Change
edr Project No. 06059

Dear Ms. Horowitz:

As was contemplated during the SEQRA review, Allegany Wind LLC (Project Sponsor) is considering use of alternate turbine models for the Allegany Wind Power Project (the Project). The Project Sponsor would like to update the Planning Board on the status of the Project and discuss the turbines under consideration at the next Planning Board meeting. We respectfully request to be added to the agenda for the meeting.

The chart below summarizes the turbine models the Company is considering along with a comparison to the previously identified Nordex N100 turbine.

| Manufacturer | Model | Rated Power (MW) | Hub Height | Rotor Diameter | Tip Height (m) | Tip Height (feet) Radius | Max Lwa (dB) |
|--------------|--------|------------------|------------|----------------|----------------|--------------------------|--------------|
| Nordex | N117 | 2.4 | 91 | 117 | 149.5 | 490.5 | 105 |
| Siemens | SWT113 | 2.3 | 94 | 113 | 150.5 | 493.8 | 105.4 |
| Siemens | SWT108 | 2.3 | 97.4 | 108 | 151.4 | 496.7 | 107 |
| Samsung | S120 | 2.3/2.7 | 90 | 120 | 150 | 492.1 | 106 |

The Project's DEIS and FEIS evaluate the potential impacts associated with the Nordex N100 (2.5 MW) turbine model. This turbine includes a three-blade upwind rotor with a diameter of 100 meters (328 feet), mounted on a 100-meter (328 foot) tubular steel tower (total maximum height of 492.1 feet). Through the SEQRA and Special Use Permit and Site Plan review process, a total of 29 N100 turbines have been approved, and no turbine relocations/movements are being considered. However, as stated in Section 2.1 of the DEIS, "...market availability

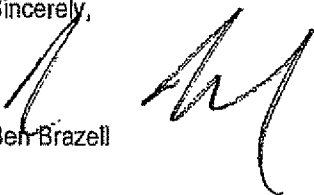
August 3, 2012
Carol Horowitz
Page 2

of wind turbines could dictate the use of an alternate turbine from the proposed Nordex N100 (2.5 MW) machine. Any turbine ultimately selected will be of similar technology, size, appearance, operating characteristics, and approximate generating capacity."

As the chart above shows, the turbines currently under consideration were chosen because they are of similar size, appearance and operating characteristics as the Nordex N100 turbine. The Project Sponsor will be submitting a detailed assessment of each of these turbines and a comparison with the N100 in the near future.

We appreciate your attention to this matter and look forward to speaking with you at the next Planning Board meeting.

Sincerely,



Ben Brazell

EXHIBIT 9

John E. Hare, Supervisor
David Koebelin, Councilman
David O'Dell, Councilman
Jim Hitchcock, Councilman
Ed Allen, Councilman
Mary M. Peck, Town Clerk



Wendy A. Tuttle, Town Attorney
Rodney F. Gleason, Highway Sup
Carolyn Hemphill, Comptroller
Mary M. Peck, Receiver of Taxes
Robin Pearl-Lamphier, Assessor
Gerard E. Dzuroff, C.E.O

August 14, 2012

Ben Brazell
EDR Companies
217 Montgomery Street, Suite 1000
Syracuse, NY 13202

RE: Allegany Wind Power Project: Notification of Potential Turbine Change

Dear Mr. Brazell:

As you are aware, in response to your letter of August 3, 2012, informing the Planning Board that Allegany Wind LLC, the Project Sponsor, is considering use of turbine models other than that approved in the Board's Special Use Permit and Site Plan approval, last night the Planning Board requested that you provide additional information for each turbine model under consideration. A copy of the Board's resolution, which details the information requested, is enclosed.

If you have any questions regarding this matter, please contact Carol Horowitz, Town Planner, at 716-373-2289.

Sincerely,


Frank DeFiore
Chair, Planning Board

Enclosure: Resolution, August 13, 2012

cc with Enclosure:
Daniel Spitzer, Esq.
Douglas Ward, Esq.
Kevin Sheen, EverPower
John Hare, Supervisor
Carol Horowitz, Town Planner

Town Hall
Phone: 716-373-0120

• 52 West Main Street •

Allegany, NY 14706

Fax: 716-373-4521

TOWN OF ALLEGANY PLANNING BOARD

RESOLUTION REQUESTING FURTHER INFORMATION FROM ALLEGANY WIND, LLC REGARDING NOTIFICATION OF POTENTIAL TURBINE CHANGE

WHEREAS, Allegany Wind, LLC (the "Applicant") applied to the Town of Allegany Planning Board (the "Planning Board") for a special use permit and site plan approval to undertake the development of wind energy facilities in the Town of Allegany, New York (the "Project"); and

WHEREAS, the Planning Board, acting as lead agency pursuant to the State Environmental Quality Review Act ("SEQRA"), issued a Positive Declaration of Environmental Significance for the Project and directed the Applicant to prepare a Draft Environmental Impact Statement ("DEIS"); and

WHEREAS, the Planning Board, after review of the DEIS, accepted the DEIS as complete, established and held a public comment period, set and held a public hearing, filed and circulated the Notice of Completion, and filed the DEIS with the appropriate parties pursuant to SEQRA; and

WHEREAS, following the public comment period on the DEIS, the Planning Board, with its consultants and experts, prepared a Final Environmental Impact Statement ("FEIS"), which was issued; and

WHEREAS, the Planning Board completed the environmental review of the Project by issuing a Statement of Findings and Decision on July 11, 2011, granting the Applicant's special use permit application, and approving the site plan; and

WHEREAS, the Applicant has not yet commenced construction in furtherance of the special use permit and site plan approvals; and

WHEREAS, the Applicant has submitted a notification of potential turbine change to the Planning Board with respect to the Project; and

WHEREAS, pursuant to SEQRA, the Planning Board must determine whether a Supplemental Environmental Impact Statement ("SEIS") is required for the Project, resulting from any proposed changes for the Project, newly discovered information, or changes in circumstances related to the Project; and

WHEREAS, the Planning Board requires additional information from the Applicant to determine whether an SEIS will be required;

NOW THEREFORE BE IT RESOLVED, by the Town of Allegany Planning Board as follows:

1. The Planning Board hereby requests the following information with respect to each of the proposed turbines listed in EDR's August 3, 2012 letter, for the purpose of determining whether an SEIS is required:
 - a. Specific information on the type, size, height, rotor material, rated power output, performance, safety, and noise characteristics of each commercial wind turbine model, tower, and electrical transmission equipment as required by Section 5.25 (B)(3)(e) of the Town Zoning Ordinance.

b. Noise Analysis as required by Section 5.25 (B)(3)(h) of the Town Zoning Ordinance.

c. Shadow Flicker Analysis and Report as required by Section 5.25 (B)(3)(l) of the Town Zoning Ordinance.

d. Visual Impact Assessment as required by Section 5.25 (B)(3)(g) of the Town Zoning Ordinance, using the same viewpoints as were used in the DEIS/FEIS.

e. Photographs and/or detailed drawings of each wind turbine model, including the tower and foundation as required by Section 5.25 (B)(3)(f) of the Town Zoning Ordinance.

f. A comparison of the microwave paths as they are affected by the changed turbine's rotor widths.

g. A study of potential marginal impacts to birds and bats pursuant to Section 5.25(B)(3)(m) of the Town Zoning Ordinance.

Passed and adopted by the Town of Allegany Planning Board on the 13th day of August, 2012.

EXHIBIT 10



September 10, 2012

Frank DeFiore
Chair, Planning Board
Town of Allegany
52 West Main Street
Allegany, New York 14706

RE: Allegany Wind Farm LLC
edr Project No. 06059

Dear Mr. DeFiore:

In relation to previous correspondence related to alternate turbine models for the Allegany Wind Power Project (Project) and in response to the Planning Board's Resolution Requesting Further Information, dated August 13, 2012, we are pleased to submit the following additional information. Please be aware that at this time Allegany Wind LLC has determined there are two alternate turbines available for the Project being considered. Under both scenarios, all turbine locations remain the same as previously reviewed and approved (through issuance of the SEQRA Statement of Findings and Decision, and Special Use Permit and Site Plan Approval on July 11, 2011). Scenario 1 proposes a combination of the previously reviewed and approved Nordex N100 on a 100 meter tower and the new Nordex N117 on 91 meter tower. Scenario 1 would include 11 Nordex N100 turbines and 18 Nordex N117 for the total of 29 turbines (total number permitted by the Planning Board in the July 11, 2011 approval). Scenario 2 proposes use of 26 Siemens S113 turbines (three turbines less than the total number approved on July 11, 2011). These two turbine scenarios are outlined and graphically depicted in the Table and Figures provided in Attachment I.

As you will see in the chart below, the details and characteristics of the proposed turbine models (N117 and S113) are very similar to the turbines reviewed and approved by the Planning Board during the previous Special Permit, Site Plan and SEQRA review for the Project. The analyses contained in this submission show that the two alternate turbine scenarios will not represent a material change to the existing Project. Also, there will be no additional or different SEQRA impacts than identified in the original SEQRA Findings Statement. In fact, if anything, the potential impacts will be reduced due to the use of shorter turbines in scenario 1 and fewer turbines in scenario 2. As you may recall the original Permit and SEQRA analysis anticipated this sort of turbine substitution. Section 2.1 of the DEIS stated that "market availability of wind turbines could dictate the use of an alternate turbine from the proposed Nordex N1002.5 machine. Any turbine ultimately selected will be of similar technology, size, appearance, operating characteristics and generating capacity." Since the turbines under consideration are similar (in terms of characteristics and impacts) to the approved N100, the Planning Board is not required to issue an amended or modified special permit or site plan or substantively modify its previous SEQRA Findings

[217 Montgomery Street, Suite 1000, Syracuse, New York 13202
P. 315.471.0688 :: F. 315.471.1061 :: www.edrcompanies.com]

[N 43° 02' 56", W 76° 08' 56"]

September 10, 2012
Frank DeFiore
Chair, Planning Board
Page 2

In regard to these two scenarios, the following information is discussed herein and/or attached hereto:

- a. Specific information on the alternate turbine models under consideration.
- b. An updated sound analysis, and comparison to the sound characteristics of the Project as approved on July 11, 2011.
- c. An updated shadow flicker analysis, and comparison to the shadow flicker results from the Project as approved on July 11, 2011.
- d. Updated visual analysis, using the same viewpoints as were used in the DEIS/FEIS, and comparison to the visibility of the Project as approved on July 11, 2011.
- e. Photographs/drawings of each turbine model under consideration.
- f. An updated microwave path analysis, and comparison to the microwave path analysis for the Project as approved on July 11, 2011.
- g. A discussion of potential impacts to birds and bats as compared to the Project as approved on July 11, 2011.

The Company respectfully requests that the Planning Board confirm that the proposed turbine substitution will not require the Planning Board to substantively modify its previous decision, and therefore no further action is necessary on the part of the Planning Board.

DISCUSSION

As explained below and in the associated attachments, these two alternate turbine scenarios represent immaterial changes as the alternate turbines are similar to the turbines reviewed and approved in the original Project approval.

a. Specific Information on the Alternate Turbine Models Under Consideration

As indicated above and in Attachment I, Scenario 1 proposes use of both the Nordex N100 and the Nordex N117 turbines, while Scenario 2 proposes use of the Siemens S113 turbine. Specifications for each of these turbines are summarized as follows:

Table 1. Turbine Specifications

| Manufacturer | Model | Rated Power (MW) | Hub Height | Rotor Diameter | Tip Height | Tip Height | Max Sound Power Level (dB) |
|--------------|--------|------------------|------------|----------------|------------|---------------|----------------------------|
| | | | | | (m) | (feet) Radius | |
| Nordex | N100 | 2.5 | 100 | 100 | 150 | 492.1 | 106 |
| Nordex | N117 | 2.4 | 91 | 117 | 149.5 | 490.5 | 105 |
| Siemens | SWT113 | 3.0 | 94 | 113 | 150.5 | 493.8 | 106 |

Please note the Nordex N100, as outlined in Table 1 above, represents the turbine model/characteristics associated with the July 11, 2011 approval, and therefore establishes the basis for comparison. The tallest turbine under consideration (Siemens SWT113) is only 1.7 feet taller than the Nordex N100, while the shortest turbine under consideration (Nordex N117) is only 1.6 feet shorter than the Nordex N100. These differences in height are immaterial from an environmental impact perspective and would not necessitate an amendment to the existing approvals.

The Project approved on July 11, 2011 contemplated the use of 29 Nordex N100 turbines, each with a rated power capacity of 2.5 MW, for a Project total of 72.5 MW. As a result of the proposed turbine scenarios discussed above, Scenario 1 would have a Project rated capacity of 70.7 MW and Scenario 2 would have a project rated capacity of 78 MW. These differences in Project rated capacity are will not have any impact on the Project approvals.

b. Updated Sound Analysis

The original sound assessment for the Project approved on July 11, 2012 was prepared by Hessler Associates Inc. (Hessler) and assessed two different turbine scenarios. The original assessment used the N100 as the "worst-case" sound scenario. A Project sound level of 40 dBA was established in the original assessment as being the nominal sound impact threshold, or the point where the Project sound level would result in a 5 dBA increase over the existing background level. Hessler prepared updated sound contour plots based on the two scenarios discussed above, which are provided in Attachment II. These plots show that sound emissions would decrease if either of these scenarios are used. Manufacturer sound test data indicate that the sound power level associated with the Nordex N117 and the Siemens SWT113 is equivalent to or 1 dBA lower than the 106 dBA rating of the Nordex N100. Therefore, in comparison to the Project as approved on July 11, 2011, these plots show that the nominal impact threshold would decrease if either scenario were implemented.

c. Shadow Flicker Analysis

Consistent with the analysis presented in the DEIS, an updated assessment of the phenomenon known as "shadow flicker" was conducted by edr. Shadow flicker is the alternating change in light intensity or shadows created by the moving turbine blades when back-lit by the sun. These flickering shadows may be perceived by some as annoying when cast on nearby residences; however, as with the analysis presented in the DEIS, due also to the alternate turbines' low blade pass frequency, shadow flicker is not anticipated to have any adverse health effects (e.g., trigger epileptic seizures). In addition, turbine setback distances required by the Town Zoning Ordinance (2,500 feet from residences) continue to largely reduce the potential for impact from shadow flicker. At this distance of greater than five times the maximum turbine height under consideration, blockage of the sun disk and shadow intensity/contrast are significantly reduced.

With respect to regulatory thresholds, no national, state, county, or local standards exist for allowable frequency or duration of shadow flicker from wind turbines at the proposed Facility site. In general, quantified limits on shadow flicker are uncommon in the United States as studies have not shown it to be a significant issue (USDOE, 2008; NRC, 2007). However, standards developed by some states and countries provide guidance in this regard. The Ohio Power Siting Board has used 30 annual hours of shadow flicker as a threshold of acceptability in reviewing and approving commercial wind power projects (OPSB, 2008, 2009a, 2009b, 2009c, 2009d). International guidelines from Europe have suggested 30 hours of shadow flicker per year as the threshold of significant impact, or the point at which shadow flicker is commonly perceived as an annoyance (DECC, 2011). Additionally, guidelines for wind power development in the State of Victoria, Australia specify that shadow flicker may not exceed 30 hours per year at any dwelling in the surrounding area (Sustainable Energy Authority Victoria, 2009). There are no receptors that are predicted to exceed that threshold. In fact, as with the analysis presented in the DEIS, there are no receptors predicted to exceed 15 hours of shadow flicker per year. See Attachment III for additional information.

d. Visual Analysis

To evaluate the visual impact of alternate turbine models under consideration, all of the previously prepared visual simulations of the proposed Project were revised to show the two alternate turbine scenarios (see Attachment IV). Comparing the revised simulations with each other, and with the original simulations prepared during the Project's SEQRA review process, reveals that Project visibility and appearance are essentially unchanged. Although turbine dimensions change slightly, and three fewer turbines are present in the layout using the Siemens SWT-113, simulations from each viewpoint appear almost identical. Minor differences in tower height and/or rotor diameter are essentially unnoticeable. Consequently, conclusions presented in the Project's DEIS and FEIS regarding Project visibility and visual impact (which were the basis of the July 11, 2011 approvals), remain valid for any of the turbine models under consideration. See Attachment IV for additional detail.

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e. Photographs and/or Detailed Drawings

Consistent with the materials originally provided to the Planning Board for the N100 turbine, the details regarding the turbines is attached in the brochures in Attachment V. The alternate turbines do not pose any changes to the characterization of potential impacts on public safety set forth in the Section 3.10 of the DEIS.

f. Microwave Paths

The original microwave path assessment was prepared by Comsearch, which indicated that the Project as approved on July 11, 2011 would not impact existing microwave path communications. Comsearch recently conducted an updated analysis to identify all existing microwave paths within and adjacent to the Project area, and to take into account the maximum rotor diameter of 117 meters. The updated Comsearch report is provided in Attachment VI. As indicated in this report, there is no potential for conflict with any identified microwave paths.

g. Impacts to Birds and Bats

The alternate turbine models under consideration have tower heights and/or rotor diameters that are largely unchanged compared to those evaluated during the SEQRA review process. This original evaluation/approval, consistent with standard methodology in this regard, predicted mortality risk by multiplying the number of turbines proposed by the range of mortality (number of birds or bats per turbine) documented at operating wind projects in comparable settings. Consistent with this original analysis and approval, the fact that none of the alternatives increase the total number of turbines, and that the alternative using the Siemens turbines actually has three fewer turbines, indicates that collision mortality estimates presented during the SEQRA review process remain valid, and if anything, may actually over-estimate potential bird and bat mortality for the substitute turbine scenarios..

CONCLUSION

As demonstrated above, the two alternate turbines under consideration are similar to the turbine reviewed and approved by the Planning Board in the original Project approvals. As such, there is no need for an amendment or modification to the existing approvals. Moreover, the alternate turbines will not result in any change in environmental impacts as compared to the potential impacts reviewed by the Planning Board in the original SEQRA analysis; and in some instances will reduce such impacts.

Sincerely,



Ben Brazell

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Attachments:

Attachment I – Alternate Turbine Scenarios
Attachment II – Updated Sound Analysis
Attachment III – Updated Shadow Flicker Analysis
Attachment IV – Updated Visual Analysis
Attachment V – Turbine Information
Attachment VI – Updated Microwave Analysis