SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WYOMING

CLEAR SKIES OVER ORANGEVILLE
Petitioner,
-vs-

TOWN BOARD OF THE
TOWN OF ORANGEVILLE, and
SUSAN MAY, HANS BOXLER, JR., JAMES HERMAN, ANDREW FLINT, and TOM SCHABLOSKI, in their capacities as town board members,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION

Index No. 42273

Hon. Patrick H. NeMoyer

Submitted with this Reply Brief on behalf of Petitioners:

Affidavit of NANCY KARASIEWICZ, dated March 16, 2010.

Affidavit of STEVEN MOULTRUP, dated March 18, 2010.

Attorney Affirmation of GARY A. ABRAHAM, dated March 18, 2010.

This Reply Brief follows in outline Respondent's Memorandum of Law in Opposition to the Petition.

I. FACTUAL BACKGROUND

In 2004-2006 the Town of Orangeville Town Board decided to explore the prospect of inviting wind farm development into the town, adopting moratoria on wind farm development until a local law governing wind projects could be recommended by the town's Planning Board. Petition, Dickinson Aff. ¶¶ 9-14; R. Exs. 4, 5. In the last half of 2006, up to March 2007, the Planning Board decided to incorporate wind project

regulations into a comprehensive new zoning law, and Invenergy worked with the board to draft the wind project provisions of the local law. *Id.* ¶¶ 16-20.

Also in March 2007 Respondents Hans Boxler, Jr., Thomas Schlabloski and David Flint obtained direct or indirect interests in land contracts with Invenergy Wind Development, LLC ("Invenergy"), (Karasiewicz Aff.; Moultrup Aff. ¶¶ 8-18), which was developing a wind farm in the adjacent Town of Sheldon. *See further below*. On February 28, 2008, Respondent James Herman's brother-in-law obtained an interest in Invenergy's wind development efforts by purchase of land previously burdened with a lease agreement with Invenergy. *Id.*, Ex. A.; Moultrup Aff. ¶¶ 14-15. Thus, by early 2008 at least four members of the Orangeville Town Board had interests in Invenergy's land developments plans, or their family members had such interests (i.e., Respondents Hans Boxler, Jr., Thomas Schlabloski, James Herman and David Flint).

The Planning Board referred a new zoning law to the Town Board on September 13, 2007, based on the nearby Town of Gainesville's zoning law, into which was inserted the proposed wind project regulations. Petition, Dickinson Aff. ¶ 21.

Invenergy began obtaining land use agreements to develop the Stony Creek Wind Farm as early as 2003. Invenergy Motion to Intervene, Ahlstrom Aff. ¶ 13 (March 10, 2010). On October 12, 2007, Invenergy applied to the New York Independent System Operator ("NYISO") for permission for the "Stony Creek Wind Farm" in Orangeville to connect to the regional electrical grid. R. Ex. 33, comment 56, Attachment at 2. By this

time Planning Board member Darryl Dickinson, based on his regular attendance at weekly board work sessions to develop the new zoning law, concluded that the board's recommended siting and performance standards for wind projects were being developed to accommodate Invenergy's project plan. Petition, Dickinson Aff. ¶ 25. *See also* May 7, 2009 Comment Letter 88, R. Ex. 33 (Invenergy's project in Orangeville was "proposed some two years ago").

In January 2008 Invenergy displayed a project map for the Stony Creek Wind Farm showing specific wind turbine locations in the Orangeville Town Hall. Moultrup Aff.¶ 6. On April 25, 2008, Invenergy submitted to the Town suggestions for proposed regulations governing wind projects. Subsequently the Town Board developed a proposed Comprehensive Plan inviting wind project development into the town for the first time, and adopted the plan in December 2008. R. Ex. 6.

In December 2008 Invenergy distributed throughout the town a "Stony Creek Wind Farm Newsletter."

CSOO member Steve Moultrup was among several residents who raised concerns about wind project development in the town, urging at a Town Board meeting on February 12, 2008 that the board consider identifying specific areas of the town where such development would and would not be appropriate. Petition, Dickinson Aff. ¶¶ 30-31.[1] At that meeting the Town Board resolved to hire a planning consultant, (*cf.* R. Exs.

[1] According to the meeting minutes, (*see below*), this meeting was held on February 12, 2009, so Mr. Dickinson's recollection of February 14 probably refers to the February 12 meeting.

12, 13; Respondent's Mem. of Law in Opp. to the Petition, at 2 (the board "hired an expert municipal planner, Drew Reilly")),who was first introduced to the board at its April 9, 2009 meeting. R. Exs. 13 and 24 at 5. But a week after the February 12 meeting, at a special meeting the Town Board met and resolved to refer the matter to the Wyoming County Planning Board in compliance with General Municipal Law Section 239-m, and to schedule a public hearing on May 7, 2009. R. Ex. 16. The referral was made ten days later, on February 25, by submitting a draft rezoning law and Part 1 of an Environmental Assessment Form ("EAF"). R. Exs. 18, 20.

The Wyoming County Planning Board never took official action on the Town Board's referral, initially requesting EAF Parts 2 and 3 to complete the referral, (R. Exs. 23, 26, 29), then rescinding the request and requesting a safety manual for the wind turbine model commonly used in the County, as the county Planning Board was familiar with three approved and operating wind farms in the County, in Sheldon, Wethersfield and Eagle where this model was installed. *Cf.* R. Ex. 31. No safety manual was submitted by the Town Board, nor is there anything in the record to indicate the board submitted any other supporting information for its proposed rezoning.

Even if the Town Board's deficient referral to the Wyoming County Planning Board could be considered "complete" for purposes of General Municipal Law Section 239-m, the extensive modifications to the April 2009 draft rezoning recommended by the planning agency triggered the requirement to obtain a supermajority vote to approve the

rezoning, since the Town Board rejected almost all of the planning agency's recommendations. *See* R. Exs. 47, 48. However, the Town board failed to obtain a supermajority vote (i.e., 4 votes) because at least two members had prohibited conflicts of interest, or the clear appearance of such conflicts under the circumstances such that they were required to recuse themselves.

Nevertheless, without obtaining alternate members, and with only one member recusing himself from the vote, on September 23, 2009, the Orangeville Town Board voted 4-0 to approve comprehensive rezoning of the town, including for the first time a permitting scheme for approval of utility-scale wind energy facilities. *Cf.* Answer ¶ 136. This action followed a public hearing in May 2009, the hearing record remained open until June 11, (R. Ex. 38),[2] and the board received voluminous comments on the rezoning project. AR Exs. 33, 37, 38. Among about 100 written comments received, 51 were in the nature of identical cards signed by supporters of the rezoning, all of them specifically in support of Section 1116 of the rezoning regulating and for the first time allowing the siting of utility-scale wind turbines or "wind farms." AR Ex. 33, Items 1-51.[3] Almost all

[2] The undersigned was unaware of the date the board resolved to close the hearing record until the certified record in this case was provided. In phone calls and letters to the town's attorney I repeatedly asked when a decision to close the hearing record would be made. *See e.g.*, AR Ex. 37. However, the town's attorney never notified me about the June 11 Town Board resolution. As a result, I submitted Supplement #3 to CSOO's comments to the town's attorney by letter on September 22, 2009, attached hereto.

[3] Written comments are assembled but not indexed as Exhibit 33, which comprises Volume 2 of 4 of the certified record, and are generally numbered by hand-written notation in the top right corner of the first page of each comment.

the comments received from the public addressed Section 1116. *Id.* "Noise and health effects related to noise [generated by wind turbines] were the comments most received." AR Ex. 49 at 4.

II. THE TOWN BOARD VIOLATED SEQRA

A. The Town Board failed to comply with SEQRA's procedures requiring it to provide an adequate basis for its EAF.

SEQRA requires a lead agency to prepare, or cause to be prepared a detailed analysis of actions that may have a significant impact on the environment called an environmental impact statement ("EIS"). 6 NYCRR § 617.7(b)(4). As a preliminary step, an agency is required to prepare an environmental assessment in order to determine whether a proposed action may significantly affect the environment, using the Environmental Assessment Form ("EAF") prescribed in the SEQRA regulations. 6 NYCRR §§ 617.2(m), 617.6(a)(2), 617.7(b)(2), 617.20. *Cf.* AR Exs. 18, 53.

If by completing the detailed questions in the EAF the agency concludes that there is no significant effect from the proposed project or action, the agency may issue a finding to that effect, termed a Negative Declaration of environmental significance, in lieu of preparing an EIS. 6 NYCRR § 617.2(y). An agency can only determine that an EIS is not necessary if it can demonstrate "either that there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant." 6

NYCRR § 617.7(a)(2).[4]

If an agency decides not to prepare an EIS, it must supply a convincing statement of reasons to explain why the potential impacts of its action are insignificant. 6 NYCRR §§ 617.7(b)(4), 617.12(a)(2)(i). The statement of reasons is crucial to determining whether the agency took a hard look at the potential environmental impact of a project. In this case, because the record is devoid of technical studies, or evidence of consultation with any acoustic engineer or specialized environmental experts on which the Town Board relied, the completed EAF is the only basis for the board's findings that all identified important environment impacts of rezoning in 2009 are insignificant. *Cf.* R. Ex. 33, Comment 84 (urging board to consult "a qualified acoustic engineer to do an analysis relative to current environmental noise in Orangeville" to assist in determining appropriate "limits on increase in noise").

The leading treatise on SEQRA compliance describes the purpose and mechanics of the EAF as follows:

> The form is not an end unto itself. Using the form in a mechanical way, without careful thought, can lead to frustration and error, and may even result in an improper or inadequate determination of significance that may be overturned by a court. The questions in Part 2 are designed to make the reviewer sensitive to the potential environmental effects (ranging from small to large) of a wide variety of activities. This general form can never substitute for a lead agency's deliberate and dispassionate evaluation of the

[4] A Generic EIS pursuant to 6 NYCRR § 617.10 is also an option, as discussed in CSOO's comment letter, R. Ex. 33, Comment 95 at 5-6.

specifics of any given project or action. It merely serves as a vehicle to assist the lead agency in asking the right questions. What is and should remain most important is the written expression of the lead agency's reasoning in support of its determination of significance, not whether it completed a particular section of a form. . . .

If it is possible to mitigate or reduce a potentially large impact to a small or moderate one by design or other project changes, a description of the necessary mitigation measures should be provided in Part 3.

Part 3 is also used to evaluate whether any of the potentially large impacts identified in Part 2 of the full EAF are "important." The form directs that the dual issues of the magnitude of potential impacts and their relative importance should be taken into account in determining the environmental significance of the proposed action. When answering the question of importance, the lead agency is directed to consider:

- The probability of the impact occurring;
- The duration of the impact;
- Its irreversibility, including permanently lost resources of value;
- Whether the impact can or will be controlled;
- The regional consequence of the impact;
- Its potential divergence from local needs and goals;
- Whether known objections to the project relate to this impact.

M. Gerrard, ENVIRONMENTAL IMPACT REVIEW IN NEW YORK § 3.04[a][iii]-[iv] (Matthew Bender 2009).

The EAF questions generally track the impacts which may be reasonably expected to result from the proposed action with the criteria listed in 6 NYCRR §617.7. These include :

> (i) a substantial adverse change in existing air quality, ground or surface water quality or quantity, traffic or **noise levels**; a substantial increase in solid waste production; a substantial increase in potential for erosion,

flooding, leaching or drainage problems;
(ii) the removal or destruction of large quantities of vegetation or fauna; substantial interference with the movement of any resident or migratory fish or wildlife species; impacts on a significant habitat area; substantial adverse impacts on a threatened or endangered species of animal or plant, or the habitat of such a species; or other significant adverse impacts to natural resources;
(iii) the impairment of the environmental characteristics of a Critical Environmental Area as designated pursuant to subdivision 617.14(g) of this Part;
(iv) **the creation of a material conflict with a community's current plans or goals as officially approved or adopted**;
(v) the impairment of the character or quality of important historical, archeological, architectural, or **aesthetic resources** or of existing community or neighborhood character;
(vi) a major change in the use of either the quantity or type of energy;
(vii) **the creation of a hazard to human health**;
(viii) **a substantial change in the use, or intensity of use, of land** including agricultural, open space or recreational resources, or **in its capacity to support existing uses**;
(ix) the encouraging or attracting of a large number of people to a place or places for more than a few days, compared to the number of people who would come to such place absent the action;
(x) **the creation of a material demand for other actions that would result in one of the above consequences**;
(xi) changes in two or more elements of the environment, no one of which has a significant impact on the environment, but when considered together result in a substantial adverse impact on the environment; or
(xii) two or more related actions undertaken, funded or approved by an agency, none of which has or would have a significant impact on the environment, but when considered **cumulatively would meet one or more of the criteria in this subdivision**.

6 NYCRR §617.7(c)(1) (emphases added).

1. NOISE IMPACTS

The Orangeville Town Board's assessment of the significance of allowing utility-scale wind turbines to generate up to 50 dBA at town residences was flawed. As a result, its overall assessment of noise impacts throughout the board's completed EAF was similarly deficient.

In the first instance, the board left blank the question in Part 2 of the EAF it was required to answer, asking whether "[t]he proposed action will produce operating noise exceeding the local ambient noise levels for noise outside of structures." R. Ex. 53, EAF Part 2 at 18, Item 17. In the second instance, in Part 3 of the EAF, the board's statement of reasons to explain why the proposed action's impacts are insignificant, the board offers four brief discussions of the basis for its decision to retain the 50 dBA limit on noise at residences none of which, however, are sufficient to avoid the need for a more detailed analysis of the noise issue that would be provided in an EIS.

In the first section explaining why the impacts of the noise standards in the rezoning would have insignificant impacts on the town, the board acknowledged, "The development and use of land that would subsequently be permitted under the new Zoning Law has the potential to create noise . . . impacts." *Id.*, EAF Part 3 at 8. However, the board provides no more than conclusory assertions. *Id.* at 8-9 (stating, e.g., that the impacts of rezoning are rendered insignificant "by setting maximum noise standards for high impact uses").

In the second section, to explain why a 50 dBA limit on noise would have insignificant impacts, the board asserts that since the wind turbine noise standards adopted in the new zoning law are consistent with those adopted elsewhere,[5] since to permit a wind farm under the new zoning law "the applicant [must] submit a noise report," and since "acceptable forms of mitigation *can be established* for individual wind energy conversion devices/farms if the noise report indicates excessive noise impacts to nearby sensitive noise receptors," in the course of "the required SEQR analysis for any specific windmill project, significant noise impacts from these project *will be avoided or mitigated*." *Id.* at 9 (emphases added).

This explanation simply defers a hard look at potential impacts to a later stage in the development of a wind farm in the town. It also fails to offer any mitigations for 50 decibels of wind turbine noise, in violation of SEQRA's mandate to affirmatively mitigate potentially significant impacts identified in the course of environmental impact review. These two failures–impermissible deferral of environmental considerations and avoidance of the duty to mitigate identified adverse impacts–are interconnected, as discussed further the next Section below. Here, the board allowed a significant change in the acoustic environment of the town, but without offering any mitigations.

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[5] This rationale also makes reference to "New York's model ordinance for wind energy systems," but there is nothing in the record establishing that such a model ordinance has been adopted or recommended by any state agency in New York. Also, the board could have found several ordinances adopted by New York towns regulating wind turbine noise much more stringently than Section 1116, as these were discussed by several commenters. R. Ex. 33, Comments 67, 69, 88. *See also above*, footnote 2.

In the third section of its rationale for dispensing with an EIS, the board addresses low frequency sound, which was the subject of several comments and supporting information provided to the board. *Id.* at 9-10. As noted above, however, a noise standard expressed in "dbA" units, such as Section 1116's 50 dBA limit for wind turbines, is designed to protect against excessive levels of mid-frequency sounds, which are the most audible. The town's effort to defend its decision not to adopt a low frequency noise standard is not relevant to the serious concerns that were raised by the public about annoying or nuisance noise, including the prospect of chronic sleeplessness.[6]

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[6] For example, in his letter to the Town Board, CSOO's acoustic engineer clearly distinguished health risks to the auditory system (which are not an issue for wind farm development) and new medical studies "that show a link between airborne infra and low frequency sound and health risks," generally measured as "dbC," on the one hand, from nuisance effects of wind turbine noise that can be expected to significantly degrade the quality of life in rural areas:

> However, without considering the newly identified health risks, it is clear that wind turbines installed under the proposed noise and setback limits will result in severe effects to people in and around the project area from noise, particularly during the evening and at night. Noise Pollution is generally defined as unwanted or harmful noise, as from automobiles, airplanes, or industrial workplaces. More specifically it can be defined, as it is in states with Noise Pollution laws such as Illinois, as:
>
> > "the emission of sound that unreasonably interferes with the enjoyment of life or with any lawful business or activity."
>
> . . . Wind turbine noise is very noticeable in rural/undeveloped communities because the background sound level in such communities is commonly 25 dBA or lower. On properties located several miles from highways, night time ambient background sounds can be lower than 20 dBA.

R. Ex. 33, Comment 95, CSOO Attachment 1, at 3.

The final, fourth section of the board's rationale is merely conclusory, stating that based the previous parts of the EAF, "the Town Board finds that the noise and odor impacts as a result of the adoption of the Zoning Law are not expected to be significant." *Id.* at 10.

This conclusion flies in the face of well-established guidelines for assessing noise impacts. For example, the Town Board was made aware of international acoustic standards for community noise that recommend night time noise limits in urban residential areas of 35 decibels, 30 decibels in suburban areas, and 25 decibels in rural areas. R. Ex. 33, comment 95, CSOO Attachment 1 at 21.

Respondent's effort to portray the Minnesota Department of Public Health study CSOO submitted to the Town Board as supporting its action, (Respondent's Mem. of Law in Opp. to the Petition, at 12) flies in the face of the covering comments accompanying the submission. *See* R. Ex. 37. These comments make it clear to any reader that, contrary to Respondent's effort to make out an issue, CSOO has no issue with the Town Board's reluctance to credit new research into organic disease that could result from chronic exposure to low frequency wind turbine noise. *Id.* As noted in the CSOO comment letter, the real concern is that, according to the study, "[s]ound impulsiveness, low frequency noise and persistence of the noise" support a recommendation of "30 dB(A) as a limit for 'a good night's sleep' [and] . . . less than 30 dB(A) . . . for noise with predominating low frequencies." *Id.* at 2-3. CSOO made it perfectly clear in all its

submissions that its most serious concerns focus on the potential for wind turbine noise to cause sleep disturbance and health effects that result from sleep disturbance. *Id.*; R. Ex. 33, Comment 95 at 7-11. *See also id.*, Comments 53-55,[7] 57, 69, 73.

Importantly, the Town Board was familiar with guidelines issued by the New York State Department of Environmental Conservation ("DEC") entitled "Assessing and Mitigating Noise Impacts." *See* R. Ex. 33, material preceding Comment 80.[8] The guidelines are intended to assist DEC staff in evaluating noise from proposed facilities, but "also serves to identify when noise levels may cause a significant environmental impact . . ." *Id.* at 1. Accordingly, DEC's guidelines provide general recommendations to agencies for protecting against excessive noise impacts of their actions, and specific guidance on noise measurement methods and terminology. R. Ex. 33, unnumbered Comment before Comment 80 (S. Moultrup), attachment (introductory pages from DEC's guidelines).

Among the recommendations made in the DEC guidelines is the following: "In non-industrial settings the SPL [sound level] should probably not exceed ambient noise by more than 6 dB(A) at the receptor." R. Ex. 33, Comment 95, CSOO Attachment 1, at 3

[7] These comments include a technical paper presented to an acoustic professional conference co-authored by CSOO's acoustic expert based in part on review of "studies related to complaints" at operating wind farms, including several in New York, including the neighboring Wethersfield facility.

[8] This is an excerpt from the DEC guidance document attached to comments submitted to the town by Steven Moultrup that are, unfortunately, unnumbered in the certified record.

(quoting the DEC guidelines). This recommendation was referenced in several comment letters submitted to the Town Board. *See* R. Ex. 33, Comment 64 ("According to the State Department of Environmental Conservation noise policy, human beings find an increase in sound pressure between 5 to 10 decibels to be 'intrusive,' between 10 and 15 to be 'very noticeable,' and over 20 decibels to be 'very objectionable to intolerable.'"); Comment 68 (the same); Comment 95 at 7 (the same). *See also id.,* Comment 55 (paraphrasing the same).

Based on the DEC guidelines, CSOO's acoustic expert concluded as follows:

> No one in the State of New York is expected to tolerate such high levels of noise as would be permitted under the current Orangeville criteria. Even people who live in urban areas like New York City, near industrial sites, major highways, and airports have more stringent criteria for their communities. Orangeville's citizens deserve to have the character of their community preserved. It is neither reasonable nor safe to expose people to sound levels of the intensity the proposed criteria would permit at night. This goes beyond "Noise Pollution" to be unsafe, unhealthy, and would clearly be a form of torture if it was done to prisoners.

R. Ex. 33, Comment 95, CSOO Attachment 1 at 4. Section 1116 allows wind turbines to exceed 50 dbA for 10 percent of the time sound would be measured, denoted as L_{10}-50dbA, (R. Ex. 63, Art. XI, Section 1116.B.14, at pp. 44-45), and therefore "would allow sound levels of 70, 80, 90 or even 100 dBA for over one hour per night, if we assume that nighttime hours are from 8 PM until 7 AM." *Id.*

There is no indication in the record that the Town Board applied any of the established

guidelines or scientific research provided to them to assess the impact of adopting a 50 dBA noise limit in a community with existing night time sound levels that are about 25 dBA.[9] Nor is there any indication that the Town Board made any effort to determine the background sound level anywhere in Orangeville, in order to determine how much of a change in the acoustic environment would occur were a wind farm approved in compliance with Section 1116's allowance of 50 dBA at residences. *Cf.* Moultrup Aff., Attachment 1 (noise study for Sheldon wind project, indicating night time background sound level in rural areas is generally 25 dbA).

In much less consequential circumstances the Third Department Appellate Division has found a county legislature's resolutions approving a final design report ("FDR") and negative declaration for widening a road violated the rule that "[s]trict compliance with SEQRA's procedural mechanisms is mandated and anything less will result in annulment of the determination," because the county provided an insufficient basis for its EAF:

> As is relevant here, SEQRA requires the lead agency to "set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation" (6 NYCRR 617.7[b][4]). While the record reveals that respondent consulted with other agencies, held public hearings, adopted the EAF and accepted the FDR which elaborates upon the environmental concerns and adequately explains why the impacts were insufficient to warrant a positive declaration, Supreme Court correctly noted that the EAF does not include

[9] There no indication in the EAF or elsewhere in the record that the Town's environmental consultants retained or had on staff an acoustic engineer, or that they considered the published guidelines, peer-reviewed technical literature or technical papers presented at professional meetings on the acoustics of wind turbine noise provided to them. *Cf.* R. Ex. 45, at 5 (the Town Board's planner, "We believe that 45 decibel[s] is reasonable.").

any such reasoned elaboration or make reference to the FDR or any other document as the basis for its negative declaration.

Bauer v. County of Tomkins, 57 A.D.3d 1151, 1153, 870 N.Y.S.2d 131, 133 (3rd Dept. 2008) (citing King v. Saratoga County Bd. of Supervisors, 675 N.E.2d 1185, 89 N.Y.2d 341 (1996), *cf.* 653 N.E. at 1188 ("the requirement of strict compliance ... insure[s] that agencies will err on the side of meticulous care in their environmental review. Anything less than strict compliance, moreover, offers an incentive to cut corners.")). *See* Taxpayers Opposed to Floodmart, Ltd. v. City of Hornell Industrial Dev. Agency, 212 A.D.2d 958, 624 N.Y.S.2d 689 (4th Dept. 1995) (literal rather than substantial compliance with SEQRA is required). The court "conclude[d] that respondent failed to strictly comply with the requirement to set forth a reasoned elaboration of its negative declaration either in the EAF or by an express reference to other documents." 57 A.D.3d at 1153 (citing Matter of New York City Coalition to End Lead Poisoning v. Vallone, 794 N.E.2d 672, 100 N.Y.2d 337, 349-350, 763 N.Y.S.2d 530 (2003)).

Thus, in order to have meaningfully reviewed the consequences of introducing a standard making 50 dbA a permissible sound level in an area likely to have a 25 dbA existing background sound level at times when the new regulated noise source would be operating, the Town Board was obligated at a minimum to consult a technical acoustic information, review publicly available guidelines for assessing noise impacts, and refer in its EAF to technical research and findings that support the conclusion that a 50 dBA noise limit will have an insignificant impact on the environment. Its failure to do violates the

procedural and substantive requirement for environmental impact review in New York.

2. VISUAL IMPACTS

The Orangeville Town Board's assessment of the significance of allowing utility-scale wind turbines to degrade the view scape of the entire town was flawed.

Part 2 of the EAF required the Town Board to address the following questions:

IMPACT ON AESTHETIC RESOURCES

11. Will Proposed Action affect aesthetic resources? (If necessary, use the Visual EAF Addendum in Section 617.20, Appendix B.) ☐ NO ☐ YES	1 Small to Moderate Impact	2 Potential Large Impact	3 Can Impact Be Mitigated by Project Change
Examples that would apply to column 2			
• Proposed land uses, or project components obviously different from or in sharp contrast to current surrounding land use patterns, whether man-made or natural.	☐	☐	☐ Yes ☐ No
• Proposed land uses, or project components visible to users of aesthetic resources which will eliminate or significantly reduce their enjoyment of the aesthetic qualities of that resource.	☐	☐	☐ Yes ☐ No
• Project components that will result in the elimination or significant screening of scenic views known to be important to the area.	☐	☐	☐ Yes ☐ No
• Other impacts:	☐	☐	☐ Yes ☐ No

6 NYCRR § 617.20 (excerpted). As the form indicates, if the proposed action would affect aesthetic resources, the EAF invites the lead agency to complete a two-page Visual EAF, provided as an appendix to the form. The Town Board did not complete the Visual EAF even though it found in each listed area that visual impacts would be potentially large. R. Ex. 53, EAF Part 2 at 16. Instead, the board indicated it would defer a hard look at such impacts until later, when a project application for a special use permit pursuant to the new zoning law would be submitted. *Id.* (noting under "Other impacts": "The new

Zoning Law requires high impact uses to obtain a Special Use Permit and establishes provisions to limit their impact.") Thus, the board specifically elected not to consider ways to avoid or mitigate the potential visual impacts of allowing wind farms to be sited in the town.

As is the case with noise impacts, the rationales provided in Part 3 of the EAF fail to show the Town Board took a hard look at the effect siting any wind farm could have on the town. Consistent with its answers to Item 11 in Part 2, in Part 3 of the EAF the town acknowledges that development and land use that would be newly allowed under the rezoning "has the potential to impact the aesthetic resources of the Town." *Id.*, EAF Part 3, at 5. However, arbitrarily the board decided that the limit for visual impacts that would be considered in any subsequent wind project is seven miles. R. Ex. 63, Section 1116.B.11.b.iii. *Cf.* R. Ex. 23, Comment 49 (Wyoming County Planning Board, ". . . is there a defensible reason for limiting the radius to seven miles? Visual impacts from the installation of a wind farm for instance can generally be expected to affect views from greater than seven miles in some cases.").

Among the 12 areas discussed in Part 3 addressing aesthetic impacts, landscaping, screening and distance buffers required for various uses in the zoning law itself are identified as means by which aesthetic impacts will be avoided or minimized for industrial, business and "Planned Business Center District" uses. *Id.* at 6 (Item 4). However, although comments and supporting information provided to the Town Board

show that wind turbines would have a visual impact several miles away, and could include the entire town in the impact zone, no assessment of such impacts is provided.

While the zoning law's requirement that wind turbines be set back 1,350 feet from residences is identified, (*id.*, Item 8), no reasons are offered for concluding that this distance is sufficient to avoid or minimize visual impacts of wind turbines that, as acknowledged in the EAF could be 450 feet high. *Id.* Instead, as was done with noise impacts, the EAF relies on a later applicant for a special use permit to complete the Visual EAF and the Town Board's subsequent analysis of a "visual mitigation plan" supplied by the applicant. *Id.*, Item 9. However, failure to identify any basis in the EAf for concluding that visual impacts of rezoning the entire town to permit utility-scale wind energy facilities would be insignificant in the first instance violates the requirement to strictly comply with SEQRA's procedures. King v. Saratoga County Bd. of Supervisors, 675 N.E.2d 1185, 89 N.Y.2d 341; Matter of New York City Coalition to End Lead Poisoning, 794 N.E.2d 672, 100 N.Y.2d at 349-350; Taxpayers Opposed to Floodmart, 212 A.D.2d 958, 624 N.Y.S.2d 689; Bauer v. County of Tomkins, 57 A.D.3d at1153.

Finally, in the area of visual impacts, the Town Board completely disregarded an important requirement under the SEQRA regulations for determining significance of potential identified impacts, whether in conjunction with existing and operating wind farms all around Orangeville, the development of another would have significant "cumulative impacts." 6 NYCRR § 617.7(c)(2). This provision, added by DEC in 1987,

compliments the reference to cumulative impacts in Subsection (c)(1), where it appears among the list of criteria for significance. 6 NYCRR § 617.7(c)(2)(xii) (requirement to consider "two or more related actions undertaken, *funded or approved by an agency*, none of which has or would have a significant impact on the environment, but when considered cumulatively would meet one or more of the criteria in this subdivision") (emphases added).

The Court of Appeals in its landmark case Save the Pine Bush, Inc. v. City of Albany, 70 N.Y.2d 193, 518 N.Y.S.2d 943, 512 N.E.2d 526 (1987) relied on both of these provisions requiring a hard look at cumulative impacts to strike down the City of Albany's neglect of several separate development proposals on the Albany Pine Bush before reaching a decision on an individual project, even though the other proposals were not being funded or approved at the time. The court rejected the argument that the several projects were not "related," as defined in the regulations, holding instead that they were related in terms of their effect on the particular geographical area. 70 N.Y.2d at 205-06, 518 N.Y.S.2d at 948.

Here, despite comments urging the Town Board to consider the cumulative impact of adding a fourth project to the existing approved and operating wind farms in the adjacent towns of Sheldon, Wethersfield and Eagle, New York, there is no indication in the record that board did so. *Cf.* R. Ex. 33, Comment 56 (cumulative visual impacts, attaching photo of view of Sheldon wind turbines from commented's Orangeville home), Comment 71

(urging the board to look at visual impacts in light of Sheldon wind project to the west, Eagle wind project to the east).

B. The Town board impermissibly deferred a hard look at impacts.

SEQRA requires more than merely addressing or considering impacts; it imposes substantive requirements on the town board to mitigate identified impacts. N.Y. Envtl. Conserv. L. §§ 8-0109[1], [8]. Nothing in the Town Board's EAF demonstrates how visual impacts of a wind farm, compromised of 450-tall wind turbines, might be mitigated.[10] Nothing in the Town Board's EAF demonstrates how elevating the acoustic environment in the town to 50 dBA would be mitigated. Distance setbacks of 1,350 feet to a residence and 700 feet to a residential property boundary are identified, but no analysis is offered to demonstrate that such setbacks do in fact constitute effective mitigations for the unavoidable visual and noise impacts introduced into the town by the rezoning.

As noted above, CSOO's public comments (especially R. Ex. 33, Comment 95; Exs. 36-37) and many others in the record, (*id.*, Ex. 33, *passim*), raised serious concerns about the basis for the town's proposed 50 dbA sound limit. Several authorities on wind turbine noise, including an acoustic engineer experienced in assessing wind turbine noise were

[10] The Wyoming County Planning Board commented that, while a visual impact mitigation plan at a later stage in the town's wind farm development is an "excellent idea," it suggested that for purposes of rezoning the Town Board should identify affirmative mitigation such as "protecting or making improvements to the aesthetics in another part of a town beyond making cash payments." R. Ex. 23, Comment 50. The Town Board rejected the suggestion. R. Ex. 47 at 17.

put before the Town Board showing that 50 dbA would be unreasonably excessive for the community. The town board decided to defer a hard look at the potential for noise impacts until sometime in the future, when a company like Invenergy would submit an application for approval of a wind farm.

Such deferral of environmental considerations clearly violates the mandate of SEQRA "to incorporate environmental considerations into the governmental decision-making process at the earliest possible time." Eggert v. Town Board of the Town of Westfield, 217 A.D.2d 975, 977, 630 N.Y.S.2d 179, 181 (4th Dept. 1995) (citing Envtl. Conserv. L. § 8-0109[4]; 6 NYCRR § 617.1(c); Matter of Tri-County Taxpayers Assn. v. Town Board, 432 N.E.2d 592, 594, 55 N.Y.2d 41, 46 (1982)). *See also* Matter of Defreestville Area Neighborhoods Association, Inc. v. Town Board of the Town of North Greenbush, 299 A.D.2d 631, 635, 750 N.Y.S.2d 164, 168 (3rd Dept. 2002) ("earliest possible time"); Avy v. Town of Amenia, 798 N.Y.S.2d 342, 2004 N.Y.Misc.LEXIS 1333, *36 unpub. (1st Dept. 2004), aff'd 2006 N.Y.App.Div.LEXIS 2844 (2nd Dept. March 14, 2006) ("earliest possible opportunity") (quoting Matter of Neville v. Koch, 593 N.E.2d 256, 79 N.Y.2d 416, 426 (1992)); Fisher v. Giuliani, 280 A.D.2d 13, 18-19, 720 N.Y.S.2d 50, 56 (1st Dept. 2001) ("at the earliest opportunity") (quoting Neville, 79 N.Y.2d at 426). *See also* R. 33, Comment 95 at 5-7 (citing and discussing Citizens Concerned for the Harlem Valley Environment v. Town Board of the Town of Amenia, 264 A.D.2d 394, 694 N.Y.S.2d 108, 109 (2nd Dept. 1999); Defreestville Area Neighborhoods Association).

Such deferral of environmental considerations has met consistently with disapproval by New York appellate courts. *See, e.g.,* Matter of Scenic Hudson, Inc. v. Town of Fishkill Town Board, 258 A.D.2d 654, 656-657, 685 N.Y.S.2d 777, 779-780 (2nd Dept. 1999) (in a challenge to a town's SEQRA review of impacts of a gravel mine, failure to propose mitigation measures "until 'specific land uses [were] proposed on the property'" is improper segmentation; "the initial rezoning of the property . . . should be viewed as part of a comprehensive plan to facilitate the commencement of mining on the site"); Matter of Citizens Concerned for the Harlem Valley Environment v. Town Board of the Town of Amenia, 264 A.D.2d 394, 694 N.Y.S.2d 108, 109 (2nd Dept. 1999), appeal denied by 726 N.E.2d 482, 94 N.Y.2d 759 (2000) (rezoning "was an integral part of a mining proposal that would have obvious potential environmental impacts") (citing Eggert, 217 A.D.2d 975; Matter of Kirk-Astor Dr. Neighborhood Ass'n v. Town Board, 106 A.D.2d 868, 483 N.Y.S.2d 526 (4th Dept. 1984), appeal dismissed by 489 N.E.2d 760, 66 N.Y.2d 896 (1985); other citations omitted); Matter of Defreestville Area Neighborhoods Association, Inc., 299 A.D.2d at 634, 750 N.Y.S.2d at168 (a 2002 3rd Dept. decision that holds, "declar[ing] that no determination would be made on 'issues that will arise only when an actual construction project is proposed . . .' is a form of segmentation" requiring a statement of "reasons supporting segmentation").[11]

[11] "Segmentation" is discouraged but not prohibited under SEQRA's regulations, so long as the lead agency "demonstrate[s] that such review is clearly no less protective of the environment" than a full review. *See* Part 617.3(g)(1). However, cases finding impermissible segmentation when impact review is deferred, including those cited here, rely on SEQRA's

Impermissible deferral is most frequently found where a municipality seeks to rezone land at the request of a project developer. For example, in Kirk-Astor Drive Neighborhood Ass'n the Fourth Department provided the following analysis:

> The rezoning here is only one step in the process which will culminate in the final development of the property; it commits the Town Board, however, "to a definite course of future decisions" which are reasonably likely to result from and are dependent on zoning approval. Under law, consideration must be given at the earliest possible time to the impacts which "may be reasonably expected to result from the proposed action", including impacts resulting from any long-range plan of which the action under consideration is a part. Environmental review of the entire project is required before "'any significant authorization is granted for a specific proposal'". In sum, even though environmental review may be required at the time application is made for specific site plan approvals, the Town Board must identify at the rezoning stage the relevant areas of environmental concern associated with the project. It must take a "hard look" at the impacts of the specific project proposal that prompted the application for rezoning at least on a conceptual basis.

106 A.D.2d at 869, 483 N.Y.S.2d at 528 (citations omitted). *Cf.* 6 NYCRR § 617.10 (providing for compliance with the EIS requirement by means of a conceptual Generic EIS). Here, when it voted on September 23, 2009, the Town Board gave a "significant authorization" to site wind projects anywhere in the town, and to permit such projects to impose up to 50 dbA for a significant duration at the quietest times at night.

In another example, in Citizens Against Retail Sprawl v. Giza, 280 A.D.2d 234, 722 N.Y.S.2d 645 (4th Dept. 2001), the Fourth Department annulled a SEQRA negative

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underlying policy mandating a hard look at the earliest possible time in the development of an action that involves project planning, as does the action complained about here.

declaration of impacts regarding the Town of Lancaster's rezoning of 36 acres. Because the Town of Lancaster's rezoning involved alteration of more than ten acres, (6 NYCRR § 617.4(b)(6)(i)), it was a "Type I" action under SEQRA, (280 A.D.2d at 235-236, 722 N.Y.S.2d at 647), the kind of action presumed to require a full environmental impact review. *Cf.* NYCRR § 617.4(a). The Town Board in that case designated itself SEQRA lead agency and initially issued a positive declaration and received a draft EIS, and after receiving public comments challenging the adequacy of the draft EIS the board issued a negative declaration. 280 A.D.2d at 236, 722 N.Y.S.2d at 647-648.

The justification offered by the town board in Citizens Against Retail Sprawl for leaving its impact review incomplete was that a development site plan would be submitted later, at which time "any appropriate mitigation measures proposed by [the project developer] or other interested and involved persons should be reviewed . . ." 280 A.D.2d at 239, 722 N.Y.S.2d at 650 (quoting the board's supporting statement accompanying its negative declaration). The Fourth Department found the town board violated SEQRA because conditioning the town board's approval of rezoning on a later environmental review is impermissible under SEQRA. 280 A.D.2d at 239, 722 N.Y.S.2d at 649-650 (citing 6 NYCRR § 617.2(h) and Matter of Merson v. McNally, 688 N.E.2d 479, 484-485, 90 N.Y.2d 742, 752-753 (1997)).

Simply adopting regulations does not adversely affect the environment. To the extent Respondent relies on this truism, it's argument is unavailing. *See* Respondent's Mem. of

Law in Opp. to the Petition, at 9, 15-19. Here, the Town Board's noise limit exceeds the likely background sound level by 25 dbA, an increase DEC classifies as "very noticeable to intolerable." R. Ex. 33, Comment 64. CSOO's acoustic engineer commented extensively on the effect a 50 dbA sound limit would have on the community, based in part on sound measurements he took in neighboring Sheldon. *See* R. Ex. 33, Comment 95, CSOO Attachment 1. His assessment of the potential impact is essentially that at 50 dbA at night the noise of wind turbines would be very noticeable to intolerable. *Id.* Therefore, it cannot be concluded that the rezoning's "effect if anything would necessarily be beneficial rather than detrimental to the environment." Respondent's Mem. of Law in Opp. to the Petition, at 10 (quoting Niagara Recycling, Inc. v. Town Bd. of the Town of Niagara, 83 A.D.2d 335, 339, 443 N.Y.S.2d 951, 954 (4th Dept. 1981)).[12] Under these circumstances it was impermissible to defer detailed environmental impact review to a later project application review, thereby dispensing with the benefit of an EIS. Eggert, 217 A.D.2d 975; Kirk-Astor Drive Neighborhood Ass'n, 106 A.D.2d at 869; Citizens Against Retail Sprawl, 280 A.D.2d at 239.[13]

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[12] In its Mem. of Law Respondent provides repetitive and shallow characterization of Petitioner members, asserting that they simply disagreed with the result of the Town Board's action, based on subjective value judgments or biases. *E.g., id.* at 27, 30. However, if the board's action was arbitrary or obviously lacking in substantial evidence it would be unreasonable were CSOO members not to disagree with the result.

[13] Bifurcating an approval process into local legislation, requested by a project developer, and application review pursuant to the local legislation also circumvents Gen. Mun. L. § 800(2). A contract made in violation of Section 800(2) is void. Gen. Mun. L. § 804.

IV. THE TOWN BOARD VIOLATED GML SECTION 239-m

General Municipal Law Section 239-m requires that a town board considering action on a rezoning proposal provide the county planning agency with at least "thirty days after receipt of a full statement of such proposed action" within which to review the proposal and "report its recommendations to the referring body, accompanied by a statement of the reasons for such recommendations." GML § 239-m[4][b]. A "full statement of such proposed action" is specifically defined as:

> all materials required by and submitted to the referring body as an application on a proposed action, *including a completed environmental assessment form and all other materials required by such referring body in order to make its determination of significance* pursuant to the state environmental quality review act under article eight of the environmental conservation law and its implementing regulations.

GML § 239-m[1][c] (emphases added).

Wyoming County Planning Board re-tabled action on the Town Board's referral twice, the second time pending submission of a safety manual for the GE Model 1.5 SLF wind turbine, in order to determine the safe distance turbines should be set back from roads, properties and residences to avoid the risk of ice throw and turbine failure that would throw blade and other turbine parts long distances. R. Exs. 20, 23, 25, 26, 29-31.

There is nothing in the record indicating that the safety manual was provided, so as to give Wyoming County Planning Board an opportunity to review the issue. Nor is there any indication in the record that Wyoming County Planning Board in fact ever reopened its review after re-tabling action on the matter. *See* Abraham Aff.

On July 23, 2009, Mr. DiMatteo provided Part 2 of the EAF to the Wyoming County Planning Board "as a courtesy," (R. Ex. 29), but at no time did he provide Part 3 of the EAF to the board, nor did he provide any other information to the County planning agency that would otherwise have supported the Town Board's rejection of the agency's recommendations and the town's approval of Section 1116. Leaving aside the sufficiency of the Town Board's EAF Part 2, this procedure fails to comply with the requirements of General Municipal Law Section 239-m.

The Town Board's reliance on Batavia First ex. rel. Wilkes v. Town of Batavia, 26 A.D.2d 840, 811 N.Y.S.2d 236 (4th Dept. 2006) is misplaced. That case excused non-compliance with the full referral requirement of GML § 239-m because there the town board supplied its county planning agency with substantial supporting information, including technical documentation that amounted to the equivalent of the completed Parts 2 and 3 of an EAF. *Id.* The town board's error in that case was therefore harmless, and the planning agency was provided with a meaningful opportunity to have 30 days to review the basis of the board's proposed action. Nothing like that happened here, and this court has no grounds for taking up the Orangeville Town Board's invitation to excuse its deficient referral.

Under the circumstances, the record supports the conclusion that the Wyoming County Planning Board's two referral responses were provided to the Town Board in tentative draft form, and those responses did not reflect any affirmative determination by Wyoming

County Planning Board that the Town Board had provided a complete statement of the Town's proposed action. *Cf. also* Abraham Aff.

V. THE ZONING AMENDMENTS ARE INCONSISTENT WITH THE TOWN'S COMPREHENSIVE PLAN

There is nothing in the record that supports the conclusion that inviting wind farms into Orangeville will "serve the projected population of the Town of Orangeville," (R. 63 at Art. XIII, Sect. 1304(A)), because no direct electricity benefit would result from a wind farm in town. R. 33, Comment 95, at 3 ("the wind farms around Orangeville supply electricity to that part of the state energy grid known as NYISO West Region A, which includes the City of Buffalo"). Nothing in the record demonstrates the contrary.

Wind energy has yet to demonstrate, as a general matter, that it can beneficially effect dependence on foreign oil since, according to the federal government, "[i]n 2006, only about one percent of the electricity generated in the United States was produced using oil." *Id.* (citing U.S. Energy Information Administration (EIA), *Electric Power Monthly*, January 2009, Table 1.2, available at <http://www.eia.doe.gov/cneaf/electricity/epm/epm_sum.html>). *See also* Petition ¶¶ 121-122. Respondent's effort to dismiss this assertion (it "belies common sense", Respondent's Mem. of Law in Opp. to the Petition, at 28) relies on no more than a common misconception about "wind power." For example, the town has not found that

wind energy technology or any other technology is a viable option to fossil fuel, making Respondent's affirmative assertion on the point merely conclusory. *Id.*

The town's wind facility regulations are not informed by "a larger community vision," (*id.*, quoting Comprehensive Plan at § 1309(A)), because Section 1116 allows wind farms throughout the town. *See* Petition ¶¶ 112-113. For example, some landowners would receive compensation for hosting wind turbines on their land but not most. *See* R. 33, Comment 77 ("a lot of people have already signed leases with Invenergy"). The town made no findings addressing Section 1116's consistency with any such vision. *See id.*, Comment 86 (collecting information on the potential decline in property values resulting from wind project development).

As CSOO noted in its initial comment letter on the 2009 rezoning:

> The goal of the proposed Orangeville Comprehensive Plan is stated at Art. XIII, Section 1309: "Allow development of alternative energy sources to take place within the Town but direct it to those areas that are most appropriate." CSOO agrees fully with this goal. However, the proposed zoning law, Section 1116, governing industrial wind farm development, provides no guidance on "those areas that are most appropriate" for such development, as the performance standards set forth in that section apply to all areas and restrict such development to none.

R. 33, Comment 95, at 2-3. *See* Petition ¶¶ 106-109, 116-117.

Because Section 1116 of the Orangeville 2009 zoning amendments are not consistent with the town's 2007 comprehensive plan, adoption of the Section violates New York Town Law § 272-a(11) and should therefore be annulled. Petition ¶ 123.

VI. THE TOWN BOARD VIOLATED ITS OWN ETHICS CODE AND THE COMMON LAW OF IMPERMISSIBLE CONFLICTS OF INTEREST

It is well settled that a court, as a matter of common law, may take action to stop or undo legislation adopted in spite of a conflict of interest. In so doing, the court must use a case-by-case approach and examine all relevant facts and circumstances to determine whether an impermissible conflict of interest exists. *See* Matter of Byer v. Town of Poestenkill, 232 A.D.2d 851 (3d Dept. 1996); Matter of Parker v. Town of Gardiner Planning Board, 184 A.D.2d 937 (3d Dept. 1992). "It is critical that the public be assured that their officials are free to exercise their best judgment without any hint of self-interest or partiality, especially if a matter under consideration is particularly controversial." Matter of Byer, 232 A.D.2d at 852-853 (citing Matter of Zagoreous v. Conklin, 109 A.D.2d 281 (2d Dept. 1985)). Notably, however, no specific violation of a statute need be present for an impermissible conflict of interest to exist. *See* Matter of Zagoreous, 109 A.D.2d at 287; Matter of Tuxedo Conservation and Tax Payers Association v. Town Board of Town of Tuxedo, 69 A.D.2d 320 (2d Dept. 1979); Matter of Conrad v. Hindman, 122 Misc.2d 531 (Onondaga County Sup. Ct., January 17, 1984).

The New York State Office of the Attorney General has further emphasized "that public officials should avoid circumstances which compromise their ability to make impartial judgments solely in the public interest". Matter of Dowd, 1993 N.Y. Op. Atty. Gen. (Inf.) 1060, 1993 WL 255345; Matter of Geldenhuys, 1993 N.Y. Op. Atty. Gen.

(Inf.) 1001, 1993 WL 179302; Matter of Kline, 1986 N.Y. Op. Atty. Gen. (Inf.) 112, 1986 WL 223114.

The Town Board of the Town of Orangeville has also adopted its own Code of Ethics prohibiting town board members from entering into any contract or acting in any manner that conflicts with his official duties. In relevant part, the Code of Ethics states:

> (3)(e) Disclosure of interest in legislation
>
> To the extent that he knows thereof, a member of the Town Board and any officer of the Town of Orangeville whether paid or unpaid, who participates in the discussion or gives official opinion to the Town Board on any legislation before the Town Board, shall publicly disclose on the official record the nature and extent of any direct or indirect financial or other private interest he has in such legislation.
>
> (3)(f) Investments in conflict with official duties
>
> He shall not invest in or hold any investments directly or indirectly in any financial, business, commercial or other private transaction, which creates a conflict with his official duties.

R. Ex. 2 at 2.

In this case, the basis for a substantial appearance of conflicts of interest surrounding Respondents Hans Boxler, Jr., James Herman, Andrew Flint and Tom Schabloski can be clearly identified. Hans Boxler, Jr., through his farm business has a contract with Invenergy, permitting Invenergy to use land owned by the business for its wind farm in the Town of Sheldon, contiguous to the Town of Orangeville. Mr. Boxler's father also has a contract with Invenergy, permitting Invenergy to use land own by his father for its currently proposed wind farm in the Town of Orangeville.

The following facts are established by the affidavits submitted herewith, by Nancy Karasiewicz (*passim*), and Steven Moultrup (¶¶ 8-18):

James Herman's brother-in-law Dean Smith has a contract with Invenergy, permitting Invenergy to use Smith's land in the Town of Warsaw, contiguous to the Town of Orangeville.

Andrew Flint's brother James Flint has a contract with Invenergy, permitting Invenergy to use land own by his brother for its currently proposed wind farm in the Town of Orangeville.

Tom Schabloski has a contract with Invenergy, permitting Invenergy to use his land in Orangeville for Invenergy's currently proposed wind farm in the Town of Orangeville.

Hans Boxler, Jr., as a principle in his farm business, as well as his brother and father have contracts with Invenergy to use their land in Orangeville and Sheldon.

In each of these instances the named member of the Orangeville Town Board may be receiving substantial compensation from Invenergy, or a family member may be receiving such compensation from Invenergy, and the prospect of such compensation was known to each more than two years before voting on the town's new zoning law on September 23, 2009, but was not fully disclosed until recently.

On July 15, 2008, the New York State Office of the Attorney General (NYSOAG) announced "the launching of an investigation into two companies developing and

operating wind farms across New York state amid allegations of improper dealings with public officials and anti-competitive practices." NYSOAG Press Release, July 15, 2008, attached hereto. In 2009, all New York "wind developers were prodded over the summer to sign an ethics code barring gifts to public officials, a standard developed by the office of the state attorney general, Andrew Cuomo, who also created a task force to monitor development of the industry." Doreen Carvajal, *WithWind Energy, Opportunity for Corruption*, THE NEW YORK TIMES, December 14, 2009, attached hereto. By the end of the year, wind developers operating in New York provided disclosures of their dealings with town officials or their families in the six years prior to signing the agreement, and posted the disclosures on their website, as required under NYSOAG ethics code agreement. *Cf.* R. Ex. 8, at 2-3. It is from Invenergy's disclosure under the agreement that some information can be found establishing four Orangeville Town Board members' direct and indirect interests in wind energy facility development. *See* Moultrup Aff., Attachment 5. Additional information on such interests is provided in affidavits and supporting documentation recorded in the office of the Wyoming County Clerk. *See* Karasiewicz Aff., Exhibits A and B; Moultrup Aff., Attachments 6, 8 and 9.

The Invenergy NYSOAG Code of Conduct Agreement disclosures, (Moultrup Aff., Attachment 5), show that Respondent Thomas Schabloski has a lease agreement with Invenergy; Respondent Hans Boxler, Jr. has a lease agreement with Invenergy, as does his father; and Respondent Andrew Flint has an interest in a lease agreement with

Invenergy through his brother James. *Id.* at 2. Deed memoranda recorded at the office of the Wyoming County Clerk show that Respondent James Herman has an interest a land contract with Invenergy through his brother-in law. Karasiewicz Aff., Exs. A and B These deed memoranda also show the dates these interests began, all generally in March 2007. *Id.*; Moultrup Aff., Attachments 6, 8 and 9. However, the Respondents did not disclose these interests for over two years, and sometimes not at all. The first time such interests were disclosed was by a letter from Invenergy to the Town Board, arguing that since the interests of all but Respondent Thomas Schabloski were indirect, there was no basis for finding any conflict that required recusal from voting on the development of local wind energy facility regulations. AR Ex. 9.

Despite direct and indirect interests in local wind farm development dating from 2007, Respondents were actively involved in discussing, voting on, and participating in the development and proposed passage of the town's 2008 Comprehensive Plan inviting wind farm development into the town for the first time, and the 2009 rezoning.[14] The 2009 rezoning, by allowing the development and placement of wind turbines or wind farms, directly benefits Respondents Hans Boxler, Jr., James Herman, Andrew Flint and Tom Schabloski or their families in that they would likely receive rental income from the wind towers authorized by the rezoning. Accordingly, these individual Respondents or

[14] Mr. Schabloski recused himself from such discussions only after the Comprehensive Plan was voted on in December, 2008, when Invenergy provided the Town Board with its legal opinion regarding conflicts of interest. *See* R. Exs. 9, 10, 11; Resp. Br. at 35-36.

their family members had an indisputable financial interest in the outcome of a vote on 2009 rezoning.

It may be, as Respondent asserts, that "Supervisor Sue May, had no direct or indirect interest in the Stony Creek Wind Farm or any other project in surrounding areas," (Respondent's Mem. of Law in Opp. to the Petition, at 37), but this cannot be said of the other board members. It is submitted that the foregoing conflicts of interest required that four Respondents, as a matter of law, recuse themselves from discussing, voting, or taking any action on the 2009 rezoning. It is submitted that such recusal is required by Sections 3(e) and 3(f) of the Orangeville Ethics Code, enforceable through its enabling statute, General Municipal Law § 806-1(a), and is required by the extent of the financial interests at issue (*see* Matter of Byer, 232 A.D.2d at 852-853; Matter of Parker, 184 A.D.2d 938), and to assure that the individual Respondents, who are public officials, avoid a circumstance which might "compromise their ability to make impartial judgments solely in the public interest". Matter of Dowd, 1993 N.Y. Op. Atty. Gen. (Inf.) 1060, 1993 WL 255345; Matter of Geldenhuys, 1993 N.Y. Op. Atty. Gen. (Inf.) 1001, 1993 WL 179302; Matter of Kline, 1986 N.Y. Op. Atty. Gen. (Inf.) 112, 1986 WL 223114. Even where

> one Board member and the spouse of another were employees of [project developer] Cornell [University], these affiliations presented no conflict of interest under *General Municipal Law § 801* since neither individual's employment duties involved the preparation, procurement or performance of any part of the [project], nor was their remuneration directly affected by

> the project (*see, General Municipal Law § 802 [1] [b]*). Furthermore, neither of the two remaining Board members in question had any impermissible interest in Cornell's application for a zoning change; one was a graduate student whose tuition and stipend were paid by a foundation unrelated to Cornell and whose studies did not involve participation in the [project], and the other was married to a Cornell retiree whose pension benefits were similarly outside its control. And while violation of a specific section of the General Municipal Law is not critical to a finding of an improper conflict of interest (*see, Matter of Zagoreos v Conklin, 109 AD2d 281, 287)*, we are satisfied that none of these four Board members had any direct or indirect interest, pecuniary or otherwise, in the [project] such that their vote could reasonably be interpreted as potentially benefitting themselves. Given the absence of any actual conflict of interest, or the significant appearance thereof, Cornell's acknowledged failure to comply with the disclosure provisions of *General Municipal Law § 809* is not a defect requiring invalidation of the Town Board vote.

DePaolo v. Town of Ithaca, 258 A.D.2d 68, 72, 694 N.Y.S.2d 235, 239 (3rd Dept. 1999).

Based on the foregoing, a declaration must be made pursuant to CPLR 3001 that Respondents had a conflict of interest at the time of the September 23, 2009 votes on rezoning, and that four Respondent Town Board members had a duty to recuse themselves from engaging in any discussion, vote, or other action with regard to the rezoning. Further, given the failure of Respondents Han Boxler, Jr., James Herman and Andrew Flint to recuse themselves, which constitutes a failure to perform a duty enjoined upon them by law, annulment of the 2009 rezoning law is an appropriate remedy pursuant to CPLR § 7803 (1).

Town Law § 63 provides that a majority of the members of a town board must be

present to constitute a quorum for the transaction of business, and requires the affirmative vote of a majority of all members of a town board for any act, rule, resolution, or local law to be legally adopted. In this case, there were five total members of the Orangeville Town Board, and four had a prohibited appearance of a conflict of interest at the time of September 23, 2009 rezoning vote. Their direct and indirect interests in Invenergy project development tied them to actual or potential compensation worth tens of thousands of dollars. *See* Moultrup Aff., attaching Invenergy NYSOAG Code of Conduct Agreement disclosures, listing compensation amounts. This kind of common law conflict of interest requires recusal. Matter of Tuxedo Conservation and Tax Payers Association, 69 A.D.2d 320; Matter of Zagoreos, 109 A.D.2d at 287. Thus, less than a majority were authorized to vote on Section 1116 of the rezoning law, and the Town Board was unable to obtain a legal majority for the local law. Accordingly, the 2009 rezoning law must be annulled for failure to obtain a majority vote.

Because the circumstances taken as a whole, which include an ongoing NYSOAG investigation into improper dealings between local officials and wind farm companies, create a prohibited appearance of impropriety in at least four Orangeville Town Board members' dealing with wind energy developers, including Invenergy, it is submitted that the September 23, 2009 vote was improper and illegal, in that the four individual Respondents had disqualifying conflicts of interest. Due to these conflicts of interests, the individual Respondents should have recused themselves and not participated in the

vote, which recusal would have prevented a quorum of the board from acting. Under the circumstances, therefore, the September 23, 2009 vote must be annulled.

VII. CONCLUSION

For the reasons set forth above, this Court should annul the town board's September 23, 2009 negative declaration and Local Law. No. 2 of 2009 pursuant to SEQRA, and should declare the town board's September 23, 2009 vote on Local Law. No. 2 of 2009 null and void pursuant to General Municipal Law Section 239-m, Town Law Section 272-a(11), common law ethics violations, and General Municipal Law § 806 which mandates enforcement of violations the Town of Orangeville Code of Ethics, Sections 3(e) and 3(f).

DATED: March 18, 2010
Allegany, New York

_____

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ATTACHMENTS

1. Supplement #3 to CSOO's comments to the Orangeville Town Board, by letter to town's attorney on September 22, 2009.

2. New York State Office of the Attorney General, Press Release, "Attorney General Cuomo Launches Investigation Into Wind Power companies' Conduct Across Upstate New York," July 15, 2008.

3. Doreen Carvajal, *With Wind Energy, Opportunity for Corruption*, THE NEW YORK TIMES, December 14, 2009.