

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WYOMING

CLEAR SKIES OVER ORANGEVILLE

Petitioner,

v.

Index No: 42273

Justice: Hon. Patrick NeMoyer

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.

STONY CREEK ENERGY LLC, Proposed Intervenor-Respondent

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO INTERVENE**

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PRELIMINARY STATEMENT

Petitioner Clear Skies Over Orangeville seeks to prohibit the only wind farm application currently pending before Respondent Town of Orangeville Board by Stony Creek Energy LLC (“Stony Creek”). At oral argument of the preliminary injunction motion on February 5, 2010, this Court denied Respondents’ motion to join Stony Creek as a necessary party. Therefore, Stony Creek now requests the Court’s permission to intervene under CPLR §§ 1013 and 7802.

The Petition includes many “common question[s] of law or fact” that render intervention appropriate. The Petition recognizes Stony Creek’s involvement in the underlying dispute by alleging conflicts of interest, ethical violations, and improper consideration of Stony Creek’s wind energy facility application during the Town’s SEQRA review. And the Petition recognizes Stony Creek’s significant financial and property interests in this action. These interests would be destroyed if the Petition succeeds. Therefore, Stony Creek should be allowed to intervene.

BACKGROUND

On September 23, 2009, the Town of Orangeville Board adopted zoning amendments (or “rezoning”), which set noise limits and required setbacks for wind energy projects within the Town of Orangeville and paved the way for wind energy development within the Town. Pet. ¶ 2. On October 1, 2009, Stony Creek filed its “Wind Energy Facility application” with the Town Board seeking to build a wind farm consisting of 59 General Electric 1.5 XLE wind turbine generators and associated infrastructure. Affidavit of Benjamin K.

Ahlstrom, Esq., dated March 10, 2010 (“Ahlstrom Aff.”), ¶ 9. Stony Creek’s application is the only wind energy application before the Board. *Id.* ¶ 8.

Petitioner Clear Skies Over Orangeville is opposed to wind energy projects generally. Therefore, it commenced this action by filing its Petition on January 25, 2010, seeking to “annul, vacate and void Article XI, Section 1116 of the 2009 Amendments to the Town of Orangeville Zoning Law.” Pet. ¶ 1. On January 28, 2010, Petitioner also brought an Order to Show Cause seeking a preliminary injunction prohibiting the Town Board and its individual members from “accepting, considering or acting in any way upon an application for approval of a Wind Energy Facility under the Town of Orangeville 2009 zoning amendments, Article XI, Section 1116.” The Court denied the motion for a preliminary injunction following oral argument on February 5, 2010. At that time, the Court also denied Respondents’ motion to join Stony Creek as a necessary party.

As the sole applicant to build a wind farm in Orangeville, Stony Creek is a direct target of Petitioner’s action. Petitioner recognizes this by alleging common questions of law or fact against both Respondents and Stony Creek, including allegedly improper transactions with current and former town officials. Ahlstrom Aff. ¶ 16. These allegations form the basis for two entire causes of action based on purported conflicts of interest. *Id.* ¶ 17. A third cause of action seeks to invalidate the zoning amendments based on the Town Board’s alleged failure to separately consider the amendments and the wind energy project. *Id.* ¶ 18. The project that is the subject of this cause of action is the Stony Creek project. *Id.*

The Petition also recognizes Stony Creek’s significant financial and property interests in the outcome of this litigation. As early as 2003, it “began discussing use of their land for a wind farm project with local landowners in Orangeville and ultimately obtained land use agreements with dozens of landowners in town” Pet. ¶ 9. In addition to negotiating contractual agreements regarding property rights, Stony Creek has additional financial interests. *Ahlstrom Aff.* ¶¶ 11-15. It has paid an application fee of \$29,500 to the Town and committed to additional reimbursement of Town expenses for engineering and legal fees. *Id.* ¶ 15.

Not only would the Town’s entire zoning scheme and comprehensive plan be turned on their heads if Petitioner succeeds in this action, but Stony Creek’s financial and property interests will be destroyed by *de facto* rejecting Stony Creek’s application, costing it thousands of dollars in land use agreements with landowners, application fees, and reimbursed engineering and legal fees. *Id.* ¶¶ 11-15.

ARGUMENT

POINT I. COMMON QUESTIONS OF LAW OR FACT EXIST.

CPLR § 7802 allows permissive intervention for all “interested persons.”¹

Similarly, CPLR § 1013 allows the Court to allow permissive intervention of parties involved with the underlying dispute:

Upon timely motion, any person may be permitted to intervene in any action when . . . the person’s claim or defense and the main action have a common question of law or fact. In exercising its

¹ See also *Bernstein v. Feiner*, 43 A.D.3d 1161, 1162, 842 N.Y.S.2d 556, 558 (2d Dep’t 2007) (property and financial interests support permissive intervention); *Berkoski v. Board of Trustees*, 67 A.D.3d 840, 843-44, 889 N.Y.S.2d 623, 626 (2d Dep’t 2009) (permissive intervention warranted for people whose actions would be prohibited by requested injunction).

discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.

In this case, the Petition reveals several common questions of law and fact, both in its factual allegations and its causes of action. The factual allegations include that a majority of the Town Board had conflicts of interest due to improper relationships with Stony Creek. Ahlstrom Aff. ¶ 16. Two entire causes of action are devoted to Respondents' purported conflicts of interest and ethical violations cause by allegedly improper dealings with Stony Creek. *Id.* ¶ 17. A third cause of action addresses the Town Board's allegedly improper consideration of the 2009 zoning amendments separate from Stony Creek's proposed project. *Id.* ¶ 18. The defense of these claims — both factually and legally — will necessarily be common to both Stony Creek and Respondents.

In addition, Stony Creek's "real and substantial interest in the outcome of the action" renders it an appropriate party to participate fully in this litigation.² Petitioner asks this Court "to annul, vacate and void Article XI, Section 1116 of the 2009 Amendments to the Town of Orangeville Zoning Law." Pet. ¶ 1. Such an order would effectively result in a *de facto* rejection of Stony Creek's application to build the Stony Creek wind farm, destroying Stony Creek's investments — including agreements with landowners, application fees, and payment of engineering and legal fees — and setting Stony Creek back years. Ahlstrom Aff. ¶ 19-21.

² *St. Joseph's Hosp. Health Ctr. v. Dep't of Health*, 224 A.D.2d 1008, 1008, 637 N.Y.S.2d 821, 823 (4th Dep't 1996) (permissive intervention should have been allowed for hospital which would have lost payments if implementation of challenged regulation were enjoined). *See also Bernstein v. Feiner*, 43 A.D.3d 1161, 1162, 842 N.Y.S.2d 556, 558 (2d Dep't 2007) (permissive intervention allowed based on financial and property interests in Article 78 proceeding).

POINT II. THIS MOTION IS TIMELY.

CPLR § 1013 also requires that the application to intervene must be timely.

Stony Creek's motion is timely under the briefing schedule set by the Court at oral argument on February 5, 2010, which allowed motions to intervene filed by March 10, 2010. Ahlstrom Aff. ¶ 23.

POINT III. THERE WOULD BE NO DELAY OR PREJUDICE.

Stony Creek's intervention will not delay a final determination of this case, cause any alteration of the briefing schedule set by the Court, or cause prejudice to any party. To the contrary, the adjudication of this matter on the merits without Stony Creek's full participation would cause prejudice as Stony Creek was allegedly involved in the underlying factual matter and has significant property and financial interests at stake in this litigation.

CONCLUSION

For the foregoing reasons, Stony Creek respectfully requests that this Court enter an order granting its motion to intervene. Stony Creek also joins in the Memorandum of Law In Opposition To The Petition and its accompanying affidavits, which were jointly prepared with the Town Respondents and requests dismissal of the Petition on the merits, in its entirety, and with prejudice.

Dated: Buffalo, New York
March 10, 2010

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