State of New York **Supreme Court**
County of Steuben

In the Matter of the Application of Steve Trude, Individually and as President of Cohocton Wind Watch, LLC, Hollis Trude, Gary Struck, Pat Struck and James Hall,

Petitioners, **DECISION**

For a Civil Judgment Pursuant to Article 78 of the Civil Practice Laws and Rules **Index No. 95,747**

Against

THE TOWN BOARD OF THE TOWN OF COHOCTON,

Respondent.

Appearances: *Richard J. Lippes & Associates,* Buffalo (*Richard J. Lippes*, of counsel); David P. Miller, Naples, Attorneys for Petitioners

Patrick McAllister, Wayland; *Osterman & Hanna, LLP,* Albany (*Daniel A. Ruzow* of counsel) Attorneys for Town of Cohocton Town Board

This matter has come before the Court on petitioners' application for a judgment pursuant to CPLR Article 78 voiding and nullifying Local Law Number 2 of 2006 adopted by the Cohocton Town Board (Town Board). This law regulates the siting and construction of windmills and wind farms within the Town of Cohocton. Petitioners assert that the Local Law should be annulled because the Town Board failed to comply with the mandates of the New York State Environmental Quality Review Act (SEQRA) when it issued a negative declaration

finding that the Local Law would not result in any significant adverse environmental impacts. Petitioners maintain that the Town Board short circuited its analysis by failing to require a full Environmental Impact Statement and improperly segmented its review by not considering the proposed projects planned for the Town. Petitioners also claim that the Local Law is in violation of the Town's Comprehensive Plan to "maintain the predominantly rural character of Cohocton and to encourage the preservation of valuable agricultural lands".

Respondent opposes the application and claims that petitioners lack standing to bring the action, the Town Board complied with SEQRA requirements, and that Local Law No. 2 is consistent with the Town's Comprehensive Plan.

In 1970, the Town of Cohocton passed a comprehensive master plan, the stated goal of which was to maintain and preserve the rural character of the town and to retain large tracts of agricultural land in its natural state for future generations. In 2006, the Town Board enacted Local Law No. 1 which rezoned certain areas within the Town for windmill development. This law allowed windmills as a special use and restricted industrial windmill projects to the Agricultural-Residential district. It also regulated height, noise, placement, setbacks, view impacts, broadcast interference, kilowatt limit, color, structure, type, design, ice throw, tip speed, landscaping, removal, building and ground maintenance, modification, insurance, inspection and environmental contamination by oil, and lightning strikes.

As a result of proposed windmill projects submitted to the Town Planning Board after adoption of Local Law No. 1, the Town Board hired a team of consultants to review the new law as it would apply to the proposed windmill projects. The Town Board ultimately determined that Local Law No. 1 should be recodified as an amendment to the Town's Zoning Law and that additional requirements not afforded or fully articulated under Local Law No. 1 should be added. The result of this revision was the adoption of Local Law No. 2 which superceded and repealed Local Law No. 1.

Local Law No. 2 did not change the types of windmills allowed within certain zoning districts by Local Law No. 1. It did not change many of the restrictions imposed by Local Law No. 1 relating to placement, set back minimums, size, dimension and operation. Local Law No. 2 did establish new noise level limits at both property lines and residences to be maintained during siting and the life of a windmill's operation. The law also required applicants to submit additional environmental studies prior to the granting of special permits for windmill projects, established a mechanism to enforce the noise regulations and added a requirement that applicants provide guarantees to address any damage to Town roads resulting from a project.

STANDING

Standing is a threshold determination which, if raised, must be considered at the outset of any litigation to determine whether a party " . . . should be allowed

access to the courts to adjudicate the merits of a particular dispute. . . " *(Society of Plastics Indus. v. County of Suffolk,* 77 NY2d 761, 769 [1991]; *Matter of Dairylea Coop. v. Walkley*, 38 NY2d 6, 9 [1975]). It is not enough to allege that the dispute is an important public issue. Parties seeking review of the challenged action must establish that the proposed action will have a harmful effect on them different in kind or degree from that of the public at large and that petitioners' injury is within the zone of interest to be protected by the statute allegedly violated *(Matter of Gernatt Asphalt Products v. Town of Sardinia*, 87 NY2d 668, 687 [1996]; *Matter of Dairylea Coop. v. Walkley*, Id.).

Not every person or citizen has standing to sue for a SEQRA violation *(Society of Plastics Indus. v. County of Suffolk,* 77 NY2d 761, 770). As the purpose of SEQRA is to require government bodies to consider the environmental impact of a proposed action, a party must demonstrate an injury that is environmental, and not solely economic, in nature *(Matter of Mobil Oil Corp., v. Syracuse Indus. Dev. Agency*, 76 NY2d 428, 433 [1990]; *Buerger v. Town of Grafton*, 235 AD2d 984 [3rd Dept. 1997]). Allegations of general environmental concerns which are shared by all of the residents of the affected area are not enough *(Save Our Main Street Buildings v. Greene County Legislature,* 293 AD2d 907, 908 [3rd Dept. 2002]; *Buerger v. Town of Grafton,* Id. at page 985).

"A nearby property owner may have standing to challenge a proposed zoning change because aggrievement may be inferred from proximity . . . The

proximity alone permits an inference that the challenger possesses an interest different from other members of the community" *(Matter of Gernatt Asphalt Products v. Town of Sardinia*, 87 NY2d 668, 687). However, the status of neighbor does not automatically entitle a party to judicial review (*Sun-Brite Car Wash, Inc. v. Board of Zoning & Appeals of Town of N. Hemptstead*, 69 NY2d 406 [1987]). The Court must still determine whether the nearby landowners are close enough to the property affected by the law that they suffer some harm other than that suffered by the public generally (*Matter of Oates v Village of Watkins Glen*, 290 AD2d 758 [3rd Dept. 2002]).

When an organization or association seeks to bring suit on behalf of its members, it must show that there is an injury in fact and that it is a proper party to seek redress for it *(Society of Plastics Indus. v. County of Suffolk,* 77 NY2d 761, 775). Therefore, in order for a group to have standing, it must meet a three part test: first, one or more of its members must have standing; second, the group's purpose must make it an appropriate representative for the issues raised in the lawsuit; third, the claim asserted must not require participation by individual members *(Society of Plastics Indus. v. County of Suffolk,* 77 NY2d 761, 775).

Petitioner Cohocton Wind Watch LLC is a limited liability corporation whose stated purpose is to preserve "public safety, property values, economic viability, environmental integrity and quality of life for the citizens of Cohocton". At least some of the members of Cohocton Wind Watch LLC are owners of property

located within 500 to 3200 feet from land zoned for industrial windmill development and where windmill projects are currently proposed. The individual petitioners are all members of Cohocton Wind Watch LLC.

The individual petitioners have submitted sworn affidavits stating that their properties abut properties which are zoned for industrial windmills on which industrial windmills are proposed. Petitioners allege that operation of these industrial windmills in such close proximity to their properties will cause a variety of environmental injuries that will affect them directly, and not the public at large. They claim their scenic views of the countryside will be disturbed and distorted by these large windmills which will be lit every evening and will be seen from their homes. Petitioners also claim that, when the windmills are brought on-line, the noise level from operation of the windmills will intrude on the tranquil nature of their properties. Further, petitioners claim they will more likely be affected by stray electricity and ice throw from the windmill blades than the general public. Finally, they allege that there will be loss of flora and fauna, including bats and birds, as a result of windmill operation.

Many of the concerns raised by the individual petitioners were created when the Town Board adopted Local Law No. 1. Local Law No. 2 did not change the areas zoned for industrial windmills, set backs, height, design or lighting standards. Therefore, many of the injuries claimed by petitioners did not result from the passage of Local Law No. 2 but the earlier legislation. Additionally, the loss of

flora, fauna, bats and birds is not an injury suffered only by these individual plaintiffs but a generalized environmental concern (*Matter of Buerger v Town of Grafton,* 235 AD2d 984 [3rd Dept. 1997]).

Nevertheless, the individual petitioners have alleged a direct injury resulting from the passage of Local Law No. 2 which is different from the public at large. To the extent that Local Law No. 2 may result in increased noise levels for those closest to the largest windmills, the individual plaintiffs have alleged direct harm different from those who live father away. Even though Local Law No. 2 may be a law of general applicability that affects all citizens of Cohocton, the impact of the noise level standards will fall on those who live closest to the largest windmills (accord *Society of Plastics Indus. v. County of Suffolk,* 77 NY2d 761, 778-779).

Respondent argues that Local Law No. 2 actually affords greater protections from noise than Local Law No. 1 and therefore, petitioners will suffer no harm from this action. This does not insulate respondent's action from judicial review. The ultimate environmental consequences of the proposed action are not the issue. Rather, it is whether the property owners' interests in the proposed action are sufficiently affected that they have a significant interest in having the requirements of SEQRA met (accord *Matter of Har Enterprises v Town of Brookhaven,* 74 NY2d 524 [1989]).

Respondent's assertion that no injury in fact will occur to petitioners unless or until a project is actually approved is without merit. When Local Law No. 2

established acceptable noise levels for windmills, the Board committed itself to a standard which, if met, will permit construction to occur. The question of whether the Board considered the environmental impact of these standards before adopting them will not be subject to judicial review when a specific windmill project is proposed.

Based upon the above, the individual petitioners' allegations are sufficient to establish that they, as abutting land owners to lands zoned for industrial windmill development, have suffered a direct environmental injury different from that of the general public and within the zone of interest protected by SEQRA (*Matter of LaDelfa v Village of Mount Morris,* 213 AD2d 1024 [4th Dept. 1995]; *Matter of Center Square Assoc. V City of Albany,* 9 AD3d 651 [3rd Dept. 2004]). Therefore, the individual petitioners have met their burden of establishing standing to maintain the instant proceeding *(Society of Plastics Indus. v. County of Suffolk*, 77 NY2d 761,774 [1991]; *Matter of Mobil Oil Corp. v. Syracuse Indus. Dev. Agency,* 76 NY2d 428, 433 [1990]; *Matter of Sun-Brite Car Wash v. Board of Zoning & Appeals,* 69 NY2d 406, 412 [1987]; *King v. County of Monroe,* 255 AD2d 1003 [4th Dept. 1998]).

The Court is also satisfied that Cohocton Wind Watch LLC has standing to raise the claims made in this proceeding. The individual petitioners are all members of the organization. The organization's purposes include environmental and quality of life concerns which are within the zone of interests SEQRA seeks

to protect. Finally, participation by the individual members is not essential to the claims raised (accord *Matter of Center Square Association v City of Albany Board of Zoning Appeals*, 9 AD3d 651 (3rd Dept. 2004]).

SEQRA

Standing having been established, the Court next turns to petitioners' claim that the Town Board passed Local Law No. 2 without properly complying with the procedural and substantive requirements of SEQRA. Petitioners allege that the Town Board erred when it found that Local Law No. 2 would have no significant adverse impact on the environment and that it should have completed a full Environmental Impact Statement (EIS) before passing Local Law No. 2. Petitioner also asserts that the Town Board violated SEQRA when it failed to consider the impact of the proposed windmill projects as a part of its environmental review of Local Law No. 2. Respondent maintains that it fulfilled its responsibilities under SEQRA and properly issued a negative declaration without requiring an EIS. Respondent also contends that it did not have to consider the impact of the pending windmill projects before amending the zoning law.

"When reviewing a SEQRA determination, a court is limited to considering 'whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion' " (*Matter of Forman v. Trustees of State Univ. of N.Y.*, 303 AD2d 1019, 1020 [4th Dept. 2003] citing *Matter of Kaufman's Carousel v. City of Syracuse Indus. Dev.*

Agency, 301 AD2d 292, 304 [2002]). "It is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively" *(Matter of Jackson v. New York State Urban Dev. Corp.*, 67 NY2d 400, 416 [1986]). The court cannot substitute its judgment for that of the Town Board, or evaluate *de novo* the information presented (*Akpan v Koch*, 75 NY2d 561, 570 [1990]).

SEQRA was enacted to insure that before a government body acts it has considered the environmental impact of the proposed action. Government agencies are required to strictly follow the review procedure established by SEQRA to "strike a balance between social and economic goals and concerns about the environment" (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 413 [1986]). SEQRA requires that a government agency prepare a full Environmental Impact Statement before it acts, if it finds that the action "may have a significant effect on the environment" (ECL 8-0109[2]). If, after completing an environmental assessment form (EAF), the agency determines that either there will be no adverse environmental impact or the identified adverse environmental impacts will not be significant, it may issue a "negative declaration" which completes it responsibilities under SEQRA [6 NYCRR 617.7(a)].

The Town Board determined that Local Law 2 was a Type I action under SEQRA. Although an EIS is presumptively required for Type I actions, it is not a per se requirement (*Matter of Foreman v. Trustees of State Univ. of N.Y.*, 30 AD2d

1019, 1020 [4th Dept. 2003]). "Where the 'record establishes . . . that the "determination to issue a negative declaration and forego the need for an EIS was neither arbitrary and capricious nor irrational" ' that determination will not be disturbed" (*Matter of Foreman v. Trustees of State Univ. of N.Y.* Id at page 1021, citing *Matter of Iroquois Cent. School Dist. v. Zagata*, 241 AD2d 945 [4th Dept. 1997]).

In completing the EAF, the agency must consider many of the same concerns as it would in completing an EIS, including long term and short tem environmental effects. A "negative declaration is properly issued when the agenc(y) ha(s) made a thorough investigation of the problems involved and reasonably exercised [its] discretion" (*Chinese Staff & Workers Assn v City of New York*, 68 NY2d 359, 364 [1986].

The Court must look to see whether the decision makers identified the relevant areas of environmental concern, took a "hard look" at them, and made a "reasoned elaboration" of the basis for their determination *(Matter of Eadie v. Town Bd. Of Town of N. Greenbush,* 7 NY3d 306, 318 [2006] *citing Matter of Jackson v. New York State Urban Dev. Corp.,* 67 NY2d 400, 417 [1986]; *Matter of Har Enters. v. Town of Brookhaven*, 74 NY2d 524, 529 [1989]; *Matter of Valley Realty Dev. Co., Inc. v. Town of Tully,* 187 AD2d 963, 964 [4th Dept. 1992]).

An agency's obligations under SEQRA "must be viewed in light of a rule of reason" *(Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417). The

degree of detail necessary for review will vary with the circumstances and the nature of the proposal and the decision will only be annulled if "arbitrary, capricious or unsupported by substantial evidence" (*Jackson v. New York State Urban Dev. Corp.*, 67 NY2d 400,417 [1986]); (*Matter of Valley Realty Dev. Co., Inc. v. Town of Tully,* 187 AD2d 963, 964 [4th Dept. 1992]).

In analyzing the Town Board's action, it is important to note that most of the specific provisions contained in Local Law No. 2 were a recodification of the standards already enacted by the Town Board in Local Law No. 1. Local Law No. 2 did not change the zones in which windmills could be placed, set back, height or design standards. Local Law No. 2 did establish stricter noise level standards, required windmill applicants to submit an EAF or EIS as part of the permitting process and put in place enforcement procedures missing in Local Law No. 1.

After passage of Local Law No. 1, and the submission of several proposals for windmill projects, the Town Board hired a team of engineering, environmental and legal consultants to aid them in determining how to evaluate these projects and future projects. Based upon comments received from these consultants, the Board decided to consider additional changes to Local Law No. 1 before considering any of the proposed projects. The Town Board met over a six month period to review the proposed Local Law No. 2. It reviewed detailed and comprehensive information from its environmental consultants analyzing set back distances and noise standards for windmills as well as many other environmental

impacts. The Town Board held a public hearing, received an opinion letter from the New York State Insurance Department, as well as a multitude of letters from town residents. Several letters provided articles, reports and studies concerning wind-generated power and its effect on the environment as well as on residents living in close proximity to the wind mills.

The Town Board completed the EAF, an eight page supplement to the EAF and issued a negative declaration statement with a twelve page statement of findings detailing what environmental criteria it considered, the environmental concerns raised and how the Board chose to address those concerns within the provisions of Local Law No. 2. The Board then determined that, as a result of the steps taken, no adverse environmental impact would result from the law's passage.

In its findings the Board addressed each of the areas of concern raised by petitioners and more. In addressing the noise impact, the Board explained the analysis it undertook, the standards it reviewed in establishing the maximum sound levels permitted and addressed concerns raised by citizens. The Board concluded that the noise levels established by Local Law No. 2 were in keeping with the character of the Town and consistent with EPA guidelines for rural nighttime noise standards. The Board acknowledged that many other areas of concern could be impacted by windmill projects, especially industrial windmills. The Board determined that by requiring industrial windmill applicants to submit a full EIS and

residential applicants to submit a visual impact analysis, bird migration study and noise analysis in addition to the EAF required under Local Law No. 1, Local Law No. 2 assured that any adverse environmental impacts would not be significant.

Even in those areas of concern which would be subject to further review at the time of the permitting, the Board did address the concerns in a generalized way and determined no significant impact would occur. For example, the Board recognized that impacts to birds and bats could occur. It assessed the impact from residential and commercial windmills to be small, due to the small scale of the project. The Board recognized greater potential impact from industrial windmills but referenced studies indicating low mortality rates at existing windmill projects in Upstate New York. The new law requires applicants to submit an EIS as well as a bird migration study for each project. The Board determined that, with this procedural safeguard in place, there would be no substantial impact on plants and animals. A similar analysis was applied to impacts on visual/aesthetic resources, transportation, historic and archeological resources.

Given the nature of this action and circumstances surrounding its passage, including the Town Board's desire to strengthen the Town's control over windmills to an extent greater than that established by Local Law No. 1, it cannot be said that the Board acted arbitrarily.

Although petitioners seek to attack the Board's decision to allow industrial windmill development within the Town, that is not the action under review. Local

Law No. 2 did not change the permitted uses established in Local Law No. 1. Rather, Local Law No. 2 imposed additional environmental review and lower noise levels than required by Local Law No. 1. The nature of the environmental impact assessment undertaken by an agency when amending a zoning ordinance to limit a land use is different than that undertaken when reviewing a specific project, as the potential environmental impact is different (*Matter of Gernalt Asphalt Products, Inc. v Town of Sardinia,* 87 NY2d 668, 688 [1996]). The Town Board took more than a "fleeting glance" at the impact the noise levels and additional environmental review process would have and made a reasoned elaboration for their determination that there was no significant adverse environmental impact from them.

Neither did the Board engage in improper segmentation by not considering the pending projects as part of its environmental review of Local Law No. 2. Local Law No. 2 did not commit the Board to a definite course of future conduct on the pending projects and was not the first step of a larger project (cf. *Matter of Defreestville Area Neighborhood Assn. v Town Board of the Town of North Greenbush,* 299 AD2d 631 [3rd Dept. 2002]). Many of the cases cited by petitioners involved a Board decision to rezone a specific site for future development when a project was already planned or anticipated. As stated previously, Local Law No. 2 did not change the permitted uses in any of the Town's districts but established noise standards and additional requirements for the

permitting process. There is no evidence that the changes made by Local Law No. 2 were made at the request of project applicants, as a preliminary step to their projects.

After review of the record, the process utilized by the Board, the detailed analysis contained in the EAF, Supplemental EAF and Statement of Findings attached to the Negative Declaration, it is clear that the Town Board took the requisite hard look at identified environmental factors, analyzed the areas of concern and issued a reasoned written finding setting forth the basis for its determination. It cannot be said that the Board's determination was arbitrary, capricious or irrational (*Matter of Spitzer v Farrell*, 100 NY2d 186 [2003]).

COMPREHENSIVE PLAN

Petitioners claim that Local Law No. 2 violates the Town's Comprehensive Plan by allowing industrial windmills in the Town. Again, petitioners misconstrue the impact of Local Law No. 2 on the Town's Comprehensive Plan. Local Law No. 2 did not change the uses permitted under Local Law No. 1, but imposed additional limitations and environmental reviews.

The party who challenges a town's zoning decision has the burden of proving that the zoning decision is in "clear conflict" with the comprehensive plan (*Matter of Metear Enterprises LLC v Bylewski,* 38 AD3d 1356 [4th Dept. 2007]; *Bergstol v Town of Monroe,* 15 AD3d 324, 325 [2nd Dept. 2005]). The Town Board addressed the impact of Local Law No. 2 on its agricultural lands and the character

of the community in the EAF Supplement. The Town Board found that the controls implemented in Local Law No. 2 would avoid impacts to the character and growth of the community which could occur in the absence of these controls. Petitioners have failed to establish that the changes made by Local Law No. 2 conflict with the Town Plan.

Based upon the above, petitioners' application for a judgment voiding and nullifying Local Law No. 2 of 2006 is denied.

Respondent's attorney to submit judgment.

Dated: September 17, 2007.

ENTER:

Hon. Marianne Furfure
Acting Supreme Court Justice