STATE OF NEW YORK
SUPREME COURT COUNTY OF CATTARAUGUS

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

Petitioners,

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

-against-

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

Respondents.

Index No.: 79455
Hon. Michael L. Nenno

BRIEF ON BEHALF OF
<u>RESPONDENT ALLEGANY WIND, LLC</u>

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PRELIMINARY STATEMENT
AND
STATEMENT OF FACTS

This Article 78 proceeding arises out of the Town of Allegany's decision to issue approvals and permits for a wind energy generating facility—a wind farm—after a three (3) year environmental review process. The initial application was filed in August, 2008, and the Planning Board granted a special use permit and site plan approval for the project in July, 2011.

The Project

Allegany Wind, LLC (the "Applicant") proposes to construct a Wind Power Project in the Town of Allegany, New York. This project will consist of 29 wind turbines, each with a maximum (or nameplate) capacity of 2.5 megawatts (MW), resulting in a maximum anticipated generating capacity of approximately 72.5 MW. The Project will be located on leased private land totaling approximately 9,119 acres. In order to meet critical Federal and State stimulus deadlines, Allegany Wind, LLC must: (1) commence construction before December 31, 2011 and (2) have the project completed and operational by December 31, 2012. (*See* Sheen Affidavit)

The Project will provide numerous benefits to the local community and the State. The Project: (1) will provide revenues of more than $ 615,000.00 annually to local taxing jurisdictions (Town, County and School District) in the form of PILOT payments and Host Community payments; and (2) will result in over 200 construction related jobs. Once the Project is constructed, it will generate six or seven permanent, high paying jobs. The Applicant expects to spend approximately $2 million/year in the community in goods and services once the project is in operation. Finally, the Project will provide clean, renewable energy for approximately 17,000-26,500 homes per year. This will help meet New York State's policy goals for developing clean renewable energy sources in the

State while reducing key air pollutants and the State's reliance on foreign sources of energy.

Wind Energy Regulations

Before Allegany Wind, LLC's application was filed, the Town updated its zoning laws to include special laws for siting and approving Wind Energy Conversion System (WECS) projects. The Zoning Ordinance provides that wind projects are permitted uses in the Agricultural-Forestry District (A-F) of the Town subject to the issuance of a special use permit and site plan approval. The comprehensive ordinance, known as the Wind Energy Regulations, was intended to provide the planning tools needed to regulate such projects and "ensure that the development of these [WECS] facilities will have minimal impact on adjacent properties and to protect the health, safety and welfare of residents of the Town." The ordinance also recognized that such facilities are a source of "renewable and nonpolluting energy...[which] will reduce dependence on nonrenewable energy resources and decrease air and water pollution...." The Regulations state that prior to the construction of a wind facility, the applicant must apply for and obtain a special use permit and site plan approval from the Planning Board.

Application Process

The process commenced in August, 2008, when Everpower Renewables (the predecessor in interest to Allegany Wind, LLC) filed its initial application with the Code Enforcement Officer of the Town in accordance with the procedure established in the Town's Wind Energy Regulations. The application noted that the project site was entirely within the Town's A-F zoning district, which permits WECS projects. The Code Enforcement Officer then referred the application to the Planning Board of the Town of Allegany for its review. The Planning Board thereafter sent a notice to the other "involved agencies" expressing the Board's desire to act as "lead agency" for the project under

the State Environmental Quality Review Act ("SEQRA"). The lead agency is the agency primarily responsible for managing the environmental review and decision making under SEQRA for the Project.

Planning Board: "Lead Agency"

By late October, 2008, the Planning Board had been established as the lead agency for the project review. In November, 2008, the Planning Board issued a resolution, known as a positive declaration of significance, which directed the Applicant to prepare a Draft Environmental Impact Study (DEIS) for the project.

Town Hires Independent Consultants

The Planning Board then hired its own engineering firm, Conestoga-Rovers & Associates (CRA), to assist the Board members in evaluating the information and studies provided by the Applicant. The Planning Board also hired special counsel, the law firm of Hodgson Russ, to assist the Town with the technical and legal issues associated with the project review.

Wind Regulations Amended – 2010 and 2011

While Allegany Wind's application was pending, the Town decided to amend the Wind Energy Regulations. The first amendment, adopted in January, 2010, added the concept of a Wind Energy Overlay District. The Ordinance stated that the applicant for a wind project must submit a map, or plan, showing the location of the WECS facility, including the location of adjoining properties that have granted noise (or other) setbacks for a proposed project. For pending applications, the new Ordinance required that the applicant submit the overlay district map.[1] The revised Ordinance made it clear that the Planning Board continued to have principal responsibility

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1 At the time the law was adopted, Allegany Wind's application had been pending for over sixteen (16) months. Accordingly, Allegany Wind complied with the law and submitted an overlay map.

for approval of wind projects. No overlay district could be established by the Town Board until *after* the Planning Board issued a Special Use Permit and Site Plan approval for the project. Finally, the amended law expanded on the stated "purpose" of the Wind Energy Regulations, emphasizing the potential environmental impacts of such projects, including noise. Accordingly, the process for approval of a wind project remained the same, except—at the end of the process—the Town Board was delegated the responsibility of amending the zoning map to reflect that a Wind Energy Overlay District existed in the location of the approved project.

In 2011, the Town Board amended the Ordinance again in order to clarify some of the definitions including the definition of "A-weighted Sound Pressure level", "Participating Property Owner", "Non-Participating Property Owner," and "Noise Sensitive Property." The Town Board adopted this amendment on February 24, 2011.

DEIS Complete/FEIS Issued

In February, 2010, the Planning Board accepted the 1,850 page DEIS as complete, issued a notice of completion to all involved and interested agencies, and scheduled a public hearing. A public hearing was held in April, 2010, and the Planning Board received written comments thereafter. In accordance with the process established by SEQRA, the Planning Board and its consultants then prepared a Final Environmental Impact Statement (FEIS), which contained responses to the comments received, including technical reports regarding sound and other environmental impacts.

On April 27, 2011, the Planning Board issued the Final Environmental Impact Statement (FEIS) for the Allegany Wind project. This document contains responses to all the comments received by the Planning Board regarding the DEIS.

Planning Board Approves Project

In July, 2011—almost three (3) years after it commenced the process—the Planning Board approved Allegany Wind's application for 29 wind turbines and related improvements. The Board adopted a Resolution: (1) approving an 87 page Findings Statement pursuant to SEQRA, and (2) granting a Special Use Permit and Site Plan approval for the project. The administrative record demonstrated an exhaustive review of all potential environmental impacts of the project, including the sound/noise issues raised by the Petitioners. The Planning Board's FEIS and Findings Statement devotes pages to the sound issues, and the permit contains several conditions to ensure that there will be no adverse impacts associated with the construction or operation of the project.

The Planning Board's decision was filed in the Town Clerk's office on July 14, 2011. Issuance of a special use permit and site plan approval and associated SEQRA Findings are subject to a thirty (30) day statute of limitations under the New York Town Law, but no lawsuit was filed in this period by the Petitioners challenging the decision.

Town Board Establishes Overlay District

Upon the issuance of the permits, the Town Board then adopted an Ordinance establishing a Wind Energy Overlay District, the boundaries of which coincide with the 9,119 acre project location (and related easements). The Town Board's decision was rendered on August 26, 2011. The vote was 4 – 1 in favor of the project. Again, the Petitioners did not immediately file a lawsuit challenging the approvals.

Zoning Board "Appeal" Filed

Instead, the opponents of the Project waited until mid-September, 2011 before taking any legal action. Gary Abraham, Esq., a vocal opponent of Allegany Wind's project and the attorney

who represented the Concerned Citizens of Cattaraugus County, Inc. ("Citizens Group") filed an appeal with the Town's Zoning Board of Appeals ("ZBA"). Mr. Abraham's "appeal" purported to challenge the Planning Board's authority to grant permits for the project. When interviewed by the press about his unusual legal strategy, Mr. Abraham was quoted as stating that his goal was to "stall the process." (Sheen Affidavit, Exhibit A) Delay was the goal because, as Mr. Abraham noted, the Applicant must begin construction of the project in the Fall of 2011 in order "to receive federal grant money for the project." (*Id.*) Mr. Abraham had done his homework in this regard. For reasons discussed in the Sheen Affidavit, Allegany Wind must commence construction in 2011 to receive critical Federal stimulus funding and must have the Project operationl prior to December 31, 2012 in order to receive a NYSERDA grant that was approved for the project.

Because the "appeal" to the ZBA was obviously the wrong legal mechanism to challenge the permits and approvals issued by the Planning Board, the attorney for the ZBA summarily rejected the appeal. Citing the New York Town Law, the Zoning Ordinance, and *Vizcio v Town of Wright*, 32 AD2d 728, 839 NYS2d 840 [3d Dept 2007], the ZBA attorney informed Mr. Abraham that the ZBA lacked jurisdiction to consider his "appeal."

Article 78 Proceeding Filed

On September 28, 2011, the Petitioners filed this Article 78 proceeding in the Supreme Court. For the reasons that follow, the Petition should be dismissed.

Statute of Limitations Expired

In Point I of this Brief, the Applicant demonstrates that all claims set forth in the Petition are time-barred. The statute of limitations applicable to the Planning Board's issuance of the Special Use Permit and Site Plan approval expired on August 15, 2011. The thirty (30) day statute of

limitation applies to the approvals *and* the environmental review conducted pursuant to SEQRA. The issuance of the permits by the Planning Board on July 11, 2011 was the final action of the Planning Board. The Planning Board's Decision was filed in the Town Clerk's office on July 14, 2011. Consequently, the claims enumerated one (1) through eleven (11) in the Petition must be dismissed as against the Planning Board.

Point II of this Brief demonstrates that the claims against the Town Board are also time-barred. The essence or focus of the claims against the Town Board relate to the adequacy of the SEQRA review, and, in particular, the noise/sound impacts of the project. Because the lead agency's SEQRA review was completed in July, 2011, the Petitioners are attempting to revive claims that are barred by the statute of limitations. The law in this area is settled. Any effort to resurrect an environmental claim after the statute of limitations for challenging the lead agency's determination has run must fail as a matter of law.

SEQRA Claims – "Hard Look"

Assuming, for argument sake, that the claims are not time-barred, the Applicant demonstrates in Point III of this Brief that the Town took a hard look at the environmental impact of the project, and made a reasoned elaboration of the basis for its decision. The claims in the Petition focus solely on the perceived sound/noise impacts of the project. The administrative record demonstrates an exhaustive review of the issue. The Town was assisted by an independent consulting firm, CRA, and special counsel. The record shows a careful analysis of the noise studies and the reasons for the Board's findings. The Petitioners may disagree with the result reached, but that is not the test. The Planning Board's decision is judged by the "rule of reason." The extensive administrative record and findings demonstrate that the Town's decision was not arbitrary and capricious. The cases caution

that it is not the role of the courts to second-guess the lead agency's decision when it comes to evaluating environmental impacts. The cases hold that courts must defer to the board's decision-making if there is a rational basis in the record for such decision . This is especially true when the lead agency's decision was preceded by the preparation of a DEIS and an FEIS. Consequently, this Court should dismiss the Petition on the merits.

Zoning Board Claims

Point IV of this Brief demonstrates that the claims against the Planning Board and the Zoning Board of Appeals ("ZBA") must be dismissed as a matter of law. Petitioners' claims are frivolous. The Zoning Board of Appeals has no jurisdiction to hear reviews of Planning Board decisions. As the court noted in *Vizcio v Town of Wright*, 32 AD2d 728, 839 NYS2d 840 [3d Dept 2007], any challenges to the actions of the Planning Board are within the exclusive jurisdiction of the Supreme Court and must be brought pursuant to an Article 78 proceeding. Further, the Zoning Ordinance in the Town of Allegany expressly states that the Planning Board is the agency that is responsible for reviewing a wind energy project. The Wind Energy Regulations provide that WECS applications must be referred to the Planning Board; no other action may be taken until and unless the Planning Board issues a special use permit and site plan approval for the project.

Moreover, if the Petitioners wished to challenge the Planning Board's authority, the time to do so expired long ago. Allegany Wind's application for the project was filed with the Code Enforcement Officer ("CEO") in August, 2008. The CEO then referred the application to the Planning Board in accordance with the Wind Energy Regulations. If Petitioners wished to challenge the jurisdiction of the Planning Board, they needed to file an "appeal" of the CEO's decision in a timely fashion. Any challenge to the process is now barred by the statute of limitations and the

doctrine of laches.

The claim that the Planning Board's action was "ultra vires" is also frivolous. The Wind Energy Regulations were amended two times during the application process, but the responsibility for approving wind projects always remained with the Planning Board. Through all the amendments, the regulation consistently has made this clear: "The Planning Board may grant the Special Use Permit and Site Plan..." for WECS projects, and "[u]pon issuance of the Special Use Permit and Site Plan, the applicant shall obtain a building permit for each tower." (Zoning Ordinance § 5.25(L)) The fact that the Town Board was charged with the additional responsibility of amending the zoning map—after the Planning Board's approvals were granted—to include the overlay district did not change a thing. If the Petitioners wished to challenge the power and authority of the Planning Board to review and approve the project after the Zoning Ordinance was amended, they needed to file a challenge earlier. Accordingly, the second and third causes of action of the Petition should be dismissed.

The balance of this Brief addresses the Petitioners' request for preliminary injunctive relief, standing, and other issues. This Court, however, need not reach those issues. The statute of limitations defense is dispositive of all claims and, in any event, the extensive administrative record demonstrates that Petitioners cannot prevail on the merits.

ARGUMENT

POINT I

THE CLAIMS CHALLENGING THE PLANNING BOARD'S APPROVAL OF THE PROJECT ARE BARRED BY THE STATUTE OF LIMITATIONS

Petitioners' claims challenging the Planning Board's issuance of: (A) approvals for the project, and (B) SEQRA determination are time-barred by the thirty (30) day statute of limitations set forth in the Town Law.

Any challenge to the issuance of a site plan approval must be commenced within thirty (30) days of the date the decision was filed in the office of the Town Clerk. *See* NY Town Law § 274-a(11). *See also* CPLR § 217 (statute of limitations governed by any shorter limitations period established by law). The same rule applies with respect to the issuance of a special use permit. *See* NY Town Law § 274-b(9). The Lead Agency's SEQRA determination is also governed by this 30 day statute of limitation. *See Matter of Hickey v Planning Bd. of the Town of Kent,* 173 AD2d 1086, 571 NYS2d 105 [1991]; *See also,* Gerrard, *Environmental Impact Review in NY* §7.02(4)(b) (SEQRA does not have its own statute of limitations but is governed by the limitations period applicable to the related permitting or approval decision).

The statute of limitations for a claim challenging the Planning Board's action commenced running when the Planning Board's decision was filed in the Town Clerk's office. *See Matter of Essex County v Zagata*, 91 NYS2d 447, 453, 672 NYS2d 281 [1998] (agency action is final when the decision maker arrives at a definitive position on an issue). The issuance of a special use permit and site plan approval was the "final agency action triggering the statute of limitations." *Stop-The-Barge v Cahill,* 1 NY3d 218, 222-23, 771 NYS2d 40 [2003]. *See Matter of McNeill v Town Bd. of*

Town of Ithaca, 260 AD2d 829, 688 NYS2d 747 [3d Dept 1999], *lv denied,* 93 NY2d 812, 695 NYS2d 540 [1999].[2]

The record in this case demonstrates that the Planning Board granted a special use permit and site plan approval *and* issued its SEQRA Findings Statement for the project on July 11, 2011. The Planning Board's decision was filed in the Town Clerk's office on July 14, 2011. (*See* Horowitz Affidavit) Accordingly, the statute of limitations for any challenge to the Planning Board's action expired on August 15, 2011. This Article 78 proceeding was commenced on September 28, 2011. Consequently, the statute of limitations expired approximately one month prior to the date Petitioners filed the Petition. All claims against the Planning Board, therefore, are time-barred.

POINT II

THE CLAIMS CHALLENGING THE TOWN BOARD'S ADOPTION OF A ZONING LAW AMENDMENT ESTABLISHING A WIND ENERGY OVERLAY DISTRICT FOR THE PROJECT ARE BARRED BY THE STATUTE OF LIMITATIONS

A. The Law

In determining the applicable statute of limitations governing a CPLR Article 78 proceeding, courts look beyond the allegations in the petition to determine the focus of the proceeding. *See Westage Dev. Group, Inc. v White*, 149 AD2d 790, 791, 539 NYS2d 583 [3d Dept 1989] (affirming dismissal of petition as time barred). The focus of an CPLR Article 78 proceeding is the underlying decision that gave rise to the litigation. *See, e.g., Slimrod Ventures v Town Bd. of Town of Amsterdam*, 243 AD2d 944, 947, 663 NYS2d 370 [3d Dept 1997]. In *City of Saratoga Springs v*

2 *See also Lebow v Village of Lansing Planning Bd.*, 151 AD2d 865, 542 NYS2d 840 [3d Dept 1989]. *See Whiteco Metrocom Div. of Whiteco Indus., Inc. v Lambert*, 221 AD2d 750, 751, 633 NYS2d 640 [3d Dept 1995] (limitations period commences when the decision is filed).

Zoning Bd. of Appeals of Town of Wilton, 279 AD2d 756, 719 NYS2d 178 [3d Dept 2001], the Court stated:

> In order to determine what event triggered the running of the Statute of Limitations, we must first ascertain what administrative decision Petitioner is actually seeking to review, and then find the point when that decision became final and binding and thus had an impact on the Petitioner...(citations omitted)

When a petitioner challenges the adequacy of a board's SEQRA review of the environmental impacts of a project, the lead agency's SEQRA determination constitutes the "discrete and final" action commencing the Statute of Limitations provided the lead agency also issues a permit for the project. *See Matter of Stop-The-Barge v Cahill*, 1 NY3d 218, 222-23, 771 NYS2d 40 [2003]. *Compare Matter of North Country Citizens for Responsible Growth, Inc. v Town of Potsdam Planning Bd.*, 39 AD3d 1098, 1103-04, 834 NYS2d 568, 573-74 [3d Dept 2007] (explaining *Eadie*[3] decision).

In *Matter of McNeill v Town Bd. of Town of Ithaca*, 260 AD2d 829, 688 NYS2d 747 [3d Dept 1999], *lv denied*, 93 NY2d 812, 695 NYS2d 540 [1999], the court stated:

> Although Petitioners' challenge was ostensibly directed at local law No. 3, the actual basis of their claim is the alleged impropriety of the SEQRA review conducted by the Planning Board. [That] review was completed upon issuance of the negative declaration. (emphasis added)

3 The Court of Appeals decision in *Matter of Eadie v Town Bd. of Town of North Greenbush*, 7 NY3d 306, 317, 821 NYS2d 142 [2006] also supports this result. In that case, the court noted that if the SEQRA process "inflicts the injury of which petitioner complaint" the statute of limitations for a SEQRA challenge will have run notwithstanding that there is a "rezoning" decision that postdates the lead agency's SEQRA determination. The Court of Appeals explained that "when the injury complained of would not be a consequence of the rezoning, but of the SEQRA process, [then] it would make little sense either to require or to permit the person injured to await the enactment of zoning changes before bringing a proceeding." *Id.* at 317. In this case, the Citizens Group is complaining about the SEQRA process—sound impacts—not the adoption of the wind overlay district.

In this case, the Petition makes it clear that the only "substantive" issues that Petitioner is challenging relates to sound or "noise" generated by the wind turbines, and the impacts of the noise on the Town's residents. (Petition ¶ 2, 37, 83, 85, 91) Petitioners concede that noise is the *only* "substantive" claim. (Petition ¶ 7)[4] This is an issue that is an environmental concern. The environmental impacts of the project were analyzed extensively by the Planning Board as part of its SEQRA review.

The SEQRA review was concluded by the lead agency on July 11, 2011. The special use permit and site plan approval were also granted on that date. The Decision was filed on July 14, 2011 (Horowitz Affidavit), which commenced the limitations period. Because the Petitioners are challenging the adequacy of the environmental review of sound impacts associated with the operation of the wind turbines, the statute of limitations for those claims expired on August 15, 2011. The subsequent action of the Town Board creating a wind overlay district for the project site cannot resuscitate an expired statute of limitations.

B. Subsequent Decision on Action Concerning Project Cannot Revive Time-Barred Claims

This Court should be guided by the rule stated in *E.F.S. Ventures Corp. v Foster*, 71 NY2d 359, 526 NYS2d 56 [1988] and *Stewart Park & Reserve Coalition v New York State Dept. of Transp.*, 157 AD2d 1, 555 NYS2d 481 [3d Dept 1990]. Those cases hold that the issuance of a later permit, or modification of an approval, cannot be used "as a pretext for the correction of perceived problems which existed and should have been addressed" at an earlier time in the approval process. *See Schultz v State of New York*, 274 AD2d 615, 618, 710 NYS2d 702 [3d Dept 2000], *appeal*

4 The Petition alleges: "The substantive areas of the surrounding environment for which potential adverse impacts of the Project have not been adequately considered involved noise impacts...including both construction and operational noise...." (Petition ¶ 7)

denied, 96 NY2d 701, 722 NYS2d 793 [2001] (later actions cannot be used as a pretext to challenge earlier, time barred decision regarding same project). The Fourth Department follows this rule. *See, e.g., Dziedzic v Gallivan*, 28 Ad3d 1087, 814 NYS2d 454 [4th Dept 2006]; *Vaupell v Canedo*, 1 AD3d 913, 767 NYS2d 742 [4th Dept 2003]; *Fawcett v City of Buffalo*, 275 AD2d 954, 713 NYS2d 610 [4th Dept 2000]; *S.S. Canadiana Preservation Society, Inc. v Boardman*, 262 AD2d 961, 694 NYS2d 539 [4th Dept 1999].

Accordingly, Petitioners cannot use the Town Board's adoption of a wind overlay district as a pretext to challenge the Special Use Permit and Site Plan approval or the SEQRA determination issued in July, 2011 by the Planning Board. *See Gilmore v Planning Bd. of Town of Ogden*, 16 AD3d 1074, 791 NYS2d 804 [4th Dept 2005]; *Slimrod Ventures v Town Bd. of Town of Amsterdam*, 243 AD2d 944, 663 NYS2d 370 [3d Dept 1997]; *Stewart Park & Reserve Coalition v New York State Dept. of Transp.*, 157 AD2d 1, 555 NYS2d 481 [3d Dept 1990]; *Westage Dev. Group, Inc. v White*, 149 A.D.2d 790, 539 NYS2d 583 [3d Dept 1989].

In sum, the focus of this lawsuit relates to the environmental decision made by the lead agency in July, 2011. The statute of limitations for challenging the SEQRA review expired before this case was commenced. Petitioners cannot use the Town Board's subsequent adoption of an ordinance creating a wind overlay district as a pretext to resurrect a claim that is time-barred. Accordingly, the claims against the Town Board are time-barred.

POINT III

THE PLANNING BOARD, AS SEQRA LEAD AGENCY, TOOK A HARD LOOK AT ALL RELEVANT ENVIRONMENTAL IMPACTS, INCLUDING TURBINE SOUND; ITS DETERMINATIONS SHOULD NOT BE DISTURBED

A. The Standard of Review Provides Significant Deference to the Determinations of Administrative Agencies

Pursuant to § 8-0109 of the Environmental Conservation Law ("ECL" or "Env. Cons. Law") and its implementing regulations, SEQRA requires the state and its municipal subdivisions to:

> incorporate the consideration of environmental factors into the existing planning, review and decision making of regional and local governmental agencies at the earliest possible time. To accomplish this goal, SEQR requires that all agencies determine whether actions they directly undertake, fund or approve may have a significant impact on the environment, and, if it is determined that the action may have a significant adverse impact, prepare or request an environmental impact statement.

6 NYCRR § 617.1(c). It is well settled that SEQRA determinations by administrative agencies should be upheld when the agency identifies the relevant areas of environmental concern, takes a 'hard look' at them, and makes a 'reasoned elaboration' of the basis for its determination. *Matter of Advocates for Prattsburgh, Inc. v Steuben County Indus. Dev. Agency*, 48 AD3d 1157, 1160, 851 NYS2d 759 [4th Dept 2008]; *Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417, 503 NYS2d 298 [1986]. *See also Dunk v City of Watertown*, 11 AD3d 1024, 784 NYS2d 753 [4th Dept 2004]; *Citizens Accord, Inc. v Town Bd. of Town of Rochester*, 192 AD2d 985, 987, 596 NYS2d 921 [3d Dept 1993], *leave to appeal denied*, 82 NY2d 656, 602 NYS2d 805 [1993]. Stated differently,

> The often stated rule regarding [the Court's] role in reviewing SEQRA determinations needs no extended discussion; it is not to weigh the desirability of any proposed action or to choose among alternatives and procedural requirements of SEQRA and the regulations implementing it, . . . but to determine whether the agency took a "hard look" at the proposed

> project and made a "reasoned elaboration" of the basis for its determination. Where an agency fails to take the requisite hard look and make a reasoned elaboration, or its determination is affected by an error of law, or its decision was not rational, or is arbitrary and capricious or not supported by substantial evidence, the agency's determination may be annulled.

WEOK Broadcasting Corp. v Planning Bd. of Town of Lloyd, 79 NY2d 373, 383, 583 NYS2d 170 [1992] (internal citations omitted).

As the Court of Appeals recently stated:

> While it is essential that public agencies comply with their duties under SEQRA, some common sense in determining the extent of those duties is essential too…[because] SEQRA proceedings "can generate interminable delay."
>
> * * *
>
> A "rule of reason" (*Matter of Jackson v New York State Urban Development Corp.*, 67 NY2d at 417) is applicable not only to an agency's judgments about the environmental concerns it investigates, but to its decisions about which matters require investigation.

Save the Pine Bush, Inc. v Common Council of City of Albany, 13 NY3d 297, 890 NYS2d 405 [2009].

The Court should defer to the agency's judgment regarding environmental impacts and resist the temptation to "weigh the desirability of any action" or "second-guess" the lead agency. *See, e.g.*, *Akpan v Koch*, 75 NY2d 561, 570, 555 NYS2d 16 [1990] ("agencies have considerable latitude evaluating environmental effects" and "courts may not substitute their judgment for that of the agency"); *Dunk v City of Watertown*, 11 AD3d 1024, 784 NYS2d 753 [4th Dept 2004].[5]

5 *See also Jackson*, 67 NY2d at 416-417 [1986] ("it is not the role of the courts to weigh the desirability of any action" or to "second-guess the agency's choice"); *Schodack Concerned Citizens v Town Bd. of Town of Schodack*, 148 AD2d 130, 134, 544 NYS2d 49, *appeal denied*, 75 NY2d 701, 551 NYS2d 905 [1989].

In *Matter of Town of Henrietta v Dept. of Envtl. Conservation of State of N.Y.*, the Fourth Department declared:

> SEQRA therefore requires a decision maker to balance the benefits of a proposed project against its unavoidable environmental risks in determining whether to approve the project. While an EIS does not require a public agency to act in any particular manner, it constitutes evidence which must be considered by the public agency along with other evidence which may be presented to such agency. Thus, the general substantive policy of the Act is a flexible one. <u>It leaves room for a responsible exercise of discretion and does not require particular substantive results in particular problematic instances</u>.

Matter of Town of Henrietta v Dept. of Envtl. Conservation of State of N.Y., 76 AD2d 215, 222, 430 NYS2d 440 [4th Dept 1980] (emphasis supplied).

When, as here, the lead agency's decision was preceded by the preparation of a DEIS and FEIS the agency's SEQRA determinations are given an especially wide berth by the courts. (*See* Gerrard, Ruzow & Weinberg, *Environmental Impact Review in New York* ("*Impact Review*") § 7.04 [3]).

Courts have recognized that different experts may reach differing conclusions concerning potential significant adverse impacts of a project on the environment; however, such differing conclusions are insufficient to void an agency's conclusions under SEQRA.[6]

6 *See also Matter of Orchards Assoc. v Planning Bd. of Town of N. Salem*, 114 AD2d 850, 494 NYS2d 760 [2d Dept 1985]; *Cohalan v Carey*, 88 AD2d 77, 452 NYS2d 639 [2d Dept 1982]; *Roosevelt Islanders for Responsible Southtown Dev. v Roosevelt Is. Operating Corp.*, 291 AD2d 40, 54, 735 NYS2d 83 [1st Dept 2001], *lv to appeal denied*, 97 NY2d 613, 742 NYS2d 606 [2002], *lv to appeal denied*, 98 NY2d 608, 746 NYS2d 692 [2002] (finding that it was not the role of the court to resolve disagreements among experts and differing conclusions reached by experts concerning potential adverse environmental impacts are insufficient to annual an agency's determination); *Matter of Fisher v Giuliani*, 280 AD2d 13, 720 NYS2d 50 [1st Dept 2001], (reasoning that when reviewing an agency's determination that a proposed change in zoning did not require issuance of an environmental impact statement, it was not the role of the court to weigh the desirability of the proposed action, choose among alternatives, resolve disagreements among experts, or substitute its judgment for that of the agency).

A lead agency approval need only incorporate mitigation measures intended to minimize or avoid adverse environmental impacts identified in the FEIS "to the maximum extent practicable," with the approval being made after performing a balancing of whether the mitigation measures are "consistent with social, economic and other essential considerations." In other words,

> An agency may not approve an action unless it makes "an explicit finding that the requirements of [SEQRA] have been met and that consistent with social, economic and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided" by incorporating as conditions to the decision those mitigative measures which were identified as practicable.

Jackson, 67 NY2d at 416; *see* ECL 8-0109 [8]; 6 NYCRR 617.11 [d] [5] (stating that "adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable").

B. The Lead Agency Identified the Relevant Areas of Environmental Concern, Took a "Hard Look" and <u>Then Provided a Reasoned Elaboration for Its Decision</u>

In this case, the record demonstrates an extensive analysis of sound impacts associated with wind energy conversion systems (WECS) and turbines. (*See* Hessler Affidavit) The record shows that the Lead Agency was educated over a three year period with respect to potential sound impacts from WECS, including the appropriate standards for such project.

The record shows that the Lead Agency was aided in its review of the project proposal, and the sound impacts of the project, by an independent engineering firm, CRA. (*See, e.g.*, R-118-143, 229-231, 298-311, 1524, 3673-4140, 4650-4657, 5654-5662) The claims of the Citizens Group regarding noise impacts were also evaluated by Hesser Associates, Inc., an acoustic engineering firm

that specializes in evaluating sound impacts of WECS. (*See* Hessler Affidavit)

The Lead Agency analyzed this information in the extensive DEIS (R-325-2175) and FEIS (R-4160), and articulated the basis for its decision in its responsiveness document and the findings regarding the sound impacts.[7] (R-6478-6593, 6531)

The Findings Statement provides:

> **3.13 <u>Sound</u>** (R-6531)
>
> Noise from construction and operation of the Project is a major concern for local residents (as reflected in the number of public comments received on the DEIS), as well as the Planning Board. The Planning Board hired its own expert engineers to conduct reviews of the Allegany Wind DEIS and FEIS, and to conduct independent sound studies. The Planning Board's studies included Ambient Sound Level Assessment and Noise Impact Modeling. The conclusions of the Planning Board are based on the reports and findings of the Planning Board's experts, in addition to the information provided in the DEIS and FEIS.
>
> Analyses were performed in the Town to establish baseline ambient noise levels, and to assess the impact the Allegany Wind Project will have on potential noise receptors during both Project construction and operation.
>
> One tool for considering potential sound impacts is the DEC guidance document (NYSDEC "Program Policy DEP-00-1 Revised: June 3, 2003 — Assessing and Mitigating Noise Impacts" ["DEC guidance"]). Among other things, this guidance provides that if studies demonstrate circumstances in which Project sound could exceed background sound at sensitive receptors by 6 dBA or more, additional evaluation should be undertaken to determine whether this circumstance would result in adverse impacts.
>
> Studies conducted by the Applicant, and verified by independent studies conducted by the Town's consultants, confirmed that, due to unusually low background sound levels in the Town, under worst-case conditions, Project sound could exceed this low background

7 The Town Board as a SEQRA involved agency also issued findings pursuant to 6 NYCRR § 617.11(c), which parallel the Planning Board's findings. (R-7478-7575)

> level by more than the 6 dBA threshold at certain sensitive receptors. Consistent with the DEC guidance, the Planning Board recognizes two control mechanisms which will ensure that any such exceedances of the 6 dBA threshold will not result in undue adverse sound impacts to sensitive receptors....
>
> * * *
>
> At the time the FEIS was released, Project sound exceeded the 45dBA standard at seven non-participating property boundaries and exceeded 40dBA at 10 non-participating residential structures. The Applicant committed to bringing the Project into compliance with these standards....
>
> Subsequent to the issuance of the FEIS, the Applicant has provided a report demonstrating that updated sound power level information for the Nordex N100 will reduce the noise levels predicted in the DEIS/FEIS.
>
> * * *
>
> The Applicant's report states that the updated sound power level information, as well as sound dampening measures proposed to be used at Turbine 4E, will bring the Project into full compliance with the 40dBA and 45dBA thresholds. The Town's consultant, CRA, has run an independent model based on the updated sound power level for the Nordex N100 including the reduced sound power level at Turbine 4E resulting from sound dampening at this turbine. CRA has confirmed, using 1.5 meters as the height of the receptor and using the full power mode of 106 dBA, all parcels shall comply with the 40 dBA at non-participating residences....
>
> Accordingly, the Planning Board concludes that, based on the updated Sound Power levels, the Project, without further easements or controls, will comply with the 45dBA/40dBA standards with one exception. Under worst case conditions Turbine 4E will cause an exceedance of the 45dBA standard up to 149 feet within the property line of a single nonparticipating property. Consequently, unless or until the Applicant is able to secure a sound easement for this single property affected by Turbine 4E, the Applicant will implement sound dampening at Turbine 4E (*i.e.* will not operate this turbine at a power mode exceeding 104 dBA) to avoid and mitigate any potential adverse sound impacts on this non-participating property to the maximum extent practicable, consistent with the Town's local law and the Board's intended permit condition.

See R-6531-6535 [Statement of Findings § 3.13].

The Record supports and expands the Lead Agency's Findings regarding sound. (R-4318-4359) The Petition focuses on low frequency, impulsive sound. The Planning Board specifically considered this issue and reasonably determined that: (A) the Project would not have undue adverse impacts regarding low frequency, impulsive sound (defined in Allegany Wind Law §5.25[c][2][b] as "sound below 20 HZ"), and (B) the Project complies with the Wind regulations. This determination was supported by expert studies and reports in the record. (*See generally* Responsiveness document (R-4323-4327) and Hessler Report (November 9, 2010 letter) at R-4664) As such, the Board's determination is entitled to deference from this Court and should not be disturbed.

Studies and reports provided in the DEIS and the FEIS show that modern wind turbine Projects do not generate low frequency, impulsive sound beyond levels ordinarily found in the typical rural background environment. (R-1725-1954; 4650-4681) As such, the Project will not cause undue adverse impacts to health or the environment on account of low frequency sound. (*see*, DEIS pp. 148-149 (R-483-484); DEIS Appendix O (R-1760-1954); DEIS Appendix N (R-1725-1759) [Hessler, Environmental Sound Survey and Noise Impact Assessment [Hessler Report] {Jan 27, 2010} p. 26-28] (R-1750-1752) FEIS Appendix K (R-4650-4680) [Hessler, Letter [Nov 9,2010], p. 10-12 (R-4672-4674) and Attachment 2 (R-4676-4680)).

Regarding low frequency impulsive sound, the Hessler Report concludes:

> The results of this testing show that for a typical turbine its sound levels taper down steadily in magnitude towards the low end of the frequency spectrum and that the sound energy below about40 Hz is actually comparable to or less than the sound energy in the natural rural environment where the measurements were made (as shown in Figure 3.6.1).

(*See* Hessler Report [DEIS Appendix N] at pp. 27 (R-1751)). Furthermore, Mr. Hessler specifically

repudiated the central criticism of Petitioners' consultant. Mr. James contends that Mr. Hessler's testing methodology was flawed because Mr. Hessler used A-weighted noise limits, rather than C-weighted limits. Mr. Hessler explains that the C-weighted analysis is itself flawed and distorts the perceived presence of low frequency sound due to microphone distortion when using this technique. Mr. Hessler explained:

> Secondly, with respect to C-weighted noise limits, there is no practical way of measuring C-weighted sound levels under windy conditions due to wind-induced microphone distortion. C-weighted sound limits are perfectly appropriate for gas turbine installations where the measurements can be taken under totally calm wind conditions but, from a practical standpoint, this metric cannot be applied to wind turbines because any measurement of operational wind turbines must be taken, by definition, during moderately windy conditions. The wind tunnel testing of windscreen performance alluded to earlier (Note 2) found that elevated levels of false signal noise will be observed in the low end of the frequency spectrum even at low wind speeds no matter what type of windscreen is used. What this means is that any casual sound level measurement in an exposed field in the presence of even a light breeze will record apparently high levels of low frequency noise – whether a wind turbine is present or not. This measurement error, which is not widely recognized, is probably one of the principal reasons wind turbines are mistakenly believed to produce high levels of low frequency noise. A-weighted sound levels are almost unaffected by this low frequency distortion but C-weighted levels are completely dominated and skewed by this phenomenon

Hessler, Letter [Nov 9, 2010], p. 10-11 (R-4672-4673); FEIS, Appendix O (R-1760-1954)).

Moreover these studies are supported by testimony from experts in other proceedings. (R-1750-1954) Acoustics experts are critical of Mr. James' methodology and conclusions. Peer reviewed studies (James's analysis is not peer reviewed) reject the notion of that modern, upwind blade turbines cause low frequency/impulsive sound impacts. This testimony and these studies were collected and included in the DEIS at Appendix O. (R-1760-1954)

Although the Petition did not directly challenge other aspects of the various noise studies and conclusions in the FEIS/Findings Statement, the James Affidavit is critical of these documents. These contentions include Mr. James' criticisms of: (A) measurement of background conditions; (B) the application of ANSI standards to wind projects; (C) the use of A-weighted vs. C-weighted sound analysis (discussed above); (D) his disagreement regarding ground adsorption calculations; (E) wind shear analysis; and (F) the application of WHO *Guidelines for Community Noise.* The Lead Agency reviewed Mr. James' comments and rejected them based on the expert analysis referenced in the DEIS/FEIS. These documents included: (A) the studies/reports submitted by the Applicant's consultant, David Hessler, and (B) the studies, reports and analysis of the Planning Board's own independent experts, Conestoga-Rovers & Associates (CRA). (*See generally* R-4649-4695) The Affidavit of David Hessler provides the Record citations for this information.

The Special Use Permit (R-6580-6593) also provides a number of conditions to ensure that sound impacts are not an issue—during construction or when the turbines are operational. The permit conditions provide, among other things, for post construction monitoring, purchase of sound monitoring equipment for the Town, and a complaint resolution process in the event noise complaints are filed. The conditions provide:

> Allegany Wind will submit an updated Environmental Monitoring Plan ("EMP") five (5) days prior to construction. The EMP will contain all permits, permit conditions, and other commitments made by Allegany Wind during the permitting processes before local, State and Federal agencies. [Permit Condition § 3.1] (R-6582)
>
> * * *
>
> Pursuant to the EMP, Allegany Wind will employ dedicated, discipline oriented Quality Technician/Inspector(s) ("Environmental Inspector(s)"), who will have the credentials, knowledge and

experience required for understanding the environmental and agricultural requirements as set forth in the permits, permit conditions and approvals for this Project. The EMP shall identify the Environmental Inspector(s) responsible for implementing the EMP on behalf of Allegany Wind. Environmental Inspector(s) shall prepare compliance reports per the EMP and submit same to the Town until construction is completed. [Permit Condition § 3.3] (R-6582)

The Complaint Resolution Procedure shall be implemented as set forth in the Project EISs. [Permit Condition § 14.1] (R-6590)

The Complaint Resolution Procedure specifically addresses those residences affected by Project impacts including but not limited to shadow flicker, noise, stray voltage, spring or well water impacts and television reception issues. Any such impacts must be verified by the Town's Designated Engineer. [Permit Condition § 14.2] (R-6590-6591)

Residences and businesses of the Project that experience sound pressure levels above the maximum noise levels established by the Town of Allegany Zoning Ordinance II or the Statement of Findings may lodge a complaint through the Complaint Resolution Procedure. The Town's Designated Engineer shall investigate the noise levels at a residence or business once a complaint has been lodged, in order to verify the complaint. If the complaint is verified, the affected residence or business shall be offered the opportunity to have appropriate landscaping (e.g., tree line between the offending wind turbine(s) and window(s)), fencing, window treatments or other screens to mitigate noise impacts at the expense of Allegany Wind. [Permit Condition § 14.4] (R-6591)

A post construction noise assessment shall be conducted within one year of commencement of operation. [Permit Condition § 15.1.1] (R-6591)

Sound Meter. Allegany Wind shall purchase and provide to the Town of Allegany a SPER Scientific Direct, Model #840015, certified Type 1 Sound Meter, or similarly sophisticated sound meter. [Permit Condition § 15.1.2] (R-6591)

Courts reviewing similar claims of alleged insufficient SEQRA review of noise impacts from WECS have found such findings and conditions sufficient. *See, e.g., Clear Skies Over Orangeville v Town Board of Town of Orangeville*, 32 Misc3d 1235(A), 2010 WL 7357949 [Sup Ct Wyoming County April 19, 2010], *aff'd*, slip op. no. CA 10-01650 [4th Dept March 25, 2011], *leave to appeal denied*, slip op. no. 87105 [2011].

In sum, the record shows the Planning Board and the Town Board took a "hard look" at the sound impacts associated with Allegany Wind's project, and made a reasoned elaboration for their decision to approve the project and create a wind overlay district for the project.

POINT IV

PETITONERS' CLAIM THAT THE PLANNING BOARD'S ACTION WAS ULTRA VIRES IS FRIVOLOUS

The Second and Third causes of action of the Petition allege that the Planning Board "acted outside its lawful authority" and the issuance of the Special Use Permit for Allegany Wind's project was "ultra vires." These claims are frivolous and should be dismissed as a matter of law.

A. Planning Board Had Jurisdiction to Issue Permits

The Town's Zoning Ordinance clearly grants the Planning Board the power to issue a Special Use Permit and Site Plan approval for a WECS project. Section 5.25(B) of the Town's Ordinance provides: "(1) Prior to construction of any commercial WECS, the project proponent shall first obtain [a] Special Use Permit and Site Plan Approval from the Town of Allegany Planning Board...." Section 5.25(L) of the Zoning Ordinance provides: "The Planning Board may grant the Special Use Permit, deny the Special Use Permit, or grant the Special Use Permit with written stated conditions." Although the Petition presents a confusing discussion of the amendments to the

Ordinance and Wind Energy Regulations, each amendment confirmed that the Planning Board was responsible for issuing permits for WECS, and no other permits or approvals could be granted by the Town Board or the Code Enforcement Officer until the Planning Board has issued a Special Use Permit and Site Plan approval. Section 5.25(B)[1] provides "Upon completion of the Special Use Permit and Site Plan and [sic] the Town Board shall consider [a] rezoning request."

Consequently, there is no doubt that the Planning Board had the authority and the power to issue the permits and approvals for Allegany Wind's project, and lawfully granted those permits. Under the Ordinance, the "overlay" approval responsibilities of the Town Board were to follow the Planning Board's Special Use and Site Plan approval and did not divest the Planning Board of its jurisdiction. The actions of the Planning Board and the Town Board are entitled to a presumption of validity. *Citizens for Responsible Zoning v Common Council of the City of Albany*, 56 AD3d 1060, 868 NYS2d 800 [3d Dept 2008]. Their interpretation of these provisions of the Zoning Ordinance is entitled to deference.[8]

B. Time to Challenge Planning Board's Authority Has Expired

If Petitioners wished to challenge the Planning Board's authority to issue the permits, the time to do so expired years ago. The application for the project was filed in August, 2008. In accordance with Section 7.03 of the Zoning Ordinance, the application was filed with the Town's Code Enforcement Officer (CEO). The CEO has the power to review all applications for permits in the Town. (Zoning Ordinance § 7.03(A)(1)) The Ordinance provides that the CEO "shall make the

8 The zoning determinations of local boards should be afforded deference unless that interpretation is unreasonable or irrational. *Frishman v Schmidt*, 61 NY2d 823, 824, 473 NYS2d 957 [1984]; *see also Schodack Concerned Citizens v Town Bd. of Town of Schodack*, 148 AD2d 130, 135, 544 NYS2d 49 [3d Dept 1989], *appeal denied*, 75 NY2d 701, 551 NYS2d 905 [1989] *citing Appelbaum v Deutsch*, 66 NY2d 975, 499 NYS2d 373 [1985]; *Walt Whitman Game Room, Inc. v Zoning Bd. of Appeals of Town of Juntington*, 62 AD2d 183, 184, 404 NYS2d 123 [2d Dept 1978].

following referrals": "(1) All applications for Special Use Permit [and] Site Plan approval...shall be referred to the Planning Board for its action." As noted above, this language in the Ordinance has not been amended since Allegany Wind's application was submitted in 2008.

In accordance with the Ordinance, the CEO referred Allegany Wind's application to the Planning Board in late, 2008, and the Board thereafter commenced the review process in accordance with the wind Regulations in the Ordinance and the State Environmental Quality Review Act. The Planning Board continued in its role as lead agency for the project for almost three (3) years, and the Petitioners' never objected to the Planning Board's authority.

If the Petitioners wished to challenge the CEO's referral of the application to the Planning Board—as opposed to some other body or agency—they needed to file a timely appeal with the Zoning Board of Appeals. Pursuant to Section 267-a[9] of the NY Town Law, any appeal from a determination or interpretation of the zoning law must be filed within sixty (60) days of the decision or interpretation. The rule is a statute of limitations. *See Schulz v Town of Red Hook Zoning Bd. of Appeals*, 293 AD2d 621, 740 NYS2d 235 [2d Dept 2002] (affirming ZBA dismissal of appeal on grounds of statute of limitations); *Stanton v Town of N. Hempstead*, 222 AD2d 511, 513, 634 NYS2d 763 [2d Dept 1995] (applying Town Law § 267-a(5)(b) sixty day statute of limitations). Unless an appeal is timely filed, the zoning board of appeals lacks jurisdiction to entertain and decide an appeal. *See Rattner v Planning Commn. of Vil. of Pleasantville*, 156 AD2d 521, 524, 548 NYS2d 943 [2d Dept 1989].

9 Section 267-a(5)(b) of the Town Law provides: "An appeal shall be taken within sixty days after the filing of any...decision, interpretation or determination of the administrative official by filing with such administrative official and with the board of appeals a notice of appeal, specifying the grounds thereof and the relief sought." (Emphasis added)

Petitioners did not "appeal" the CEO's referral of the application to the Planning Board until September, 2011. The initial referral of the Application to the Planning Board occurred in late 2008. Accordingly, years before any "appeal" was filed with the ZBA, the statute of limitations expired.

C. <u>Amendment of Zoning Ordinance/Laches</u>

If Petitioners are arguing that the amendment of the Zoning Ordinance in January, 2010—establishing a process for the creation of a wind overlay district—deprived the Planning Board of its jurisdiction, the argument must fail. First, the argument defies common sense and the plain language of the Ordinance. The amendment to the Zoning Ordinance expressly provides that creation of a Wind Overlay District must wait until the Planning Board "first" has issued a Special Use Permit and Site Plan for the project. (Zoning Ordinance § 5.25[B][1]) If Petitioners are arguing that the Planning Board lacked jurisdiction until an overlay district was created, the reasoning is circular. Such an interpretation of the Ordinance would create a Catch 22. The applicant would be in limbo because the Town Board would not be empowered to create an overlay district until the Planning Board granted a Special Use Permit, and the Planning Board could not grant a permit for the project until the Town Board created an overlay district. Neither the law nor common sense supports this result.

Second, wind projects are permitted uses in the R-F zoning district. (*See* Zoning Ordinance II §§ 4.06 and 4.06, Schedule A). The amendment creating overlay districts for wind projects did not make a use that was previously prohibited a permitted use. Instead, wind projects (WECS) were always permitted in the R-F zoning district, subject to the issuance of a special use permit and site plan approval. This zoning designation is a legislative determination that the use will <u>not</u> detrimentally affect the area. *See Retail Prop. Trust v Board of Zoning Appeals of Town of*

Hampstead, 98 NY2d 190, 195, 746 NYS2d 662, 666, 774, NE2d 727, 731 [2002]; *Tanana Oil Corp. v Town Bd. of Town of Irondequoit*, 204 AD2d 1049, 613 NYS2d 107 [4th Dept 1994]. Allegany Wind's project is located in the R-F zoning district. Accordingly, the project was a permitted use at the time the application was filed in 2008, and it was a permitted use after the Zoning Ordinance was amended in January, 2010.

Finally, the doctrine of laches applies in this case. *See Fleming v Giuliani*, 3 NY3d 544, 788 NYS2d 655 [2004]; *Schulz v State*, 81 NY2d 336, 348, 599 NYS2d 469 [1993]; *Boland v Town of Northampton*, 25 AD3d 848, 807 NYS2d 205 [3d Dept 2006]. If Petitioners wished to challenge the authority of the Planning Board after the Zoning Ordinance was amended in January, 2010, they were obligated to timely raise the objection. Because no objection was raised, the claim is barred by the doctrine of laches. The Planning Board continued to review the application after the amendment, accepted the DEIS as complete for public review, held a public hearing, and accepted the FEIS. The Planning Board took all of these actions in the eighteen months following the January, 2010 amendment of the Zoning Ordinance. Petitioners, however, never challenged the Planning Board's authority.

In sum, if the challenge was not time-barred by the statute of limitations, the claim is now barred by the doctrine of laches.

D. The ZBA Correctly Rejected Petitioners' "Appeal"

For these reasons, and the reasons cited by the Zoning Board of Appeals' counsel, the ZBA correctly dismissed the Petitioners' efforts to file an administrative appeal from the Planning Board's decision granting a Special Use Permit and Site Plan approval. Such a challenge must be brought in the context of an Article 78 proceeding. The Town Law makes this clear. See NY Town Law § 274-

a(11) (court review of site plan approval); NY Town Law § 274-b(9) (court review of special use permit). The Petitioners cannot circumvent the law by styling their challenge as an "appeal" of a zoning interpretation or decision. *Viscio v Town of Wright*, 42 AD3d 728, 839 NYS2d 840 [3d Dept 2007].

For these reasons, the claims alleging that the Planning Board's action was "ultra vires" are frivolous and should be dismissed.

POINT V

THE PLANNING BOARD WAS THE PROPER LEAD AGENCY FOR THIS PROJECT

Petitioner claims the Planning Board was not the proper "lead agency" for the project. The claim is meritless. Selection of the Planning Board as the lead agency under SEQRA for this action was appropriate. The courts have routinely rejected challenges to the selection of a lead agency when a coordinated SEQRA review is conducted. *See, e.g., Advocates for Prattsburgh, Inc. v Stueben County Indus. Dev. Agency*, 48 AD3d 1157, 1159, 851 NYS2d 759, 761-62 [4th Dept 2008]; *Schodack Concerned Citizens v Town Bd. of Town of Schodack*, 148 AD2d 130, 134, 544 NYS2d 49 [3d Dept 1989], *appeal denied*, 75 NY2d 701, 551 NYS2d 905 [1989].

A. The Law

SEQRA requires a coordinated review of larger projects, which are denominated as "Type I" actions in the regulations. *See* 6 NYCRR 617 [b] [3] and 617.4. A coordinated review is a process by which an agency which proposes to directly undertake, fund or approve a Type I action transmits the environmental assessment form to all involved agencies to make a determination as to which agency will be lead agency. *See* 6 NYCRR 617.6 [b] [3] [i]. Pursuant to the regulations, the lead

agency is "an involved agency principally responsible for undertaking, funding or approving an action, and therefore responsible for determining whether an environmental impact statement is required in connection with the action, and for the preparation and filing of the statement if one is required." 6 NYCRR 617.2 [u]. In accordance with that definition only "involved agencies"[10] are entitled to be the lead agency.

When actions to be carried out are approved by two or more agencies, the lead agency should be an entity having principal responsibility for carrying out or approving such action. *See* ECL 8-0111 [6]; *Mobil Oil Corp. v City of Syracuse Indus. Dev. Agency*, 224 AD2d 15, 23 [4th Dept 1996] (an agency with a continuing role in the project is the agency principally responsible for undertaking, funding or approving the proposed action and is the appropriate lead agency).

Agency designations for a SEQRA review have been sustained when, as here, the lead agency consulted with other agencies involved and received their approval. *See Violet Realty, Inc. v City of Buffalo Planning Bd.*, 20 AD3d 901, 798 NYS2d 283 [4th Dept 2005]. In considering challenges to lead agency designations, the courts routinely grant deference to the agency's determination where the choice of lead agency is "not irrational". *See Schodack Concerned Citizens v Town Bd. of Town of Schodack*, 148 AD2d 130, 134, 544 NYS2d 49 [3d Dept 1989], *appeal denied*, 96 NY2d 701, 551 NYS2d 905 [1989] (designation of planning board which had to approve a subdivision application, site plan and special use permit as lead agency and not the town board which had to approve a zone change was correct and did not violate SEQRA's policy of requiring the ultimate decision-maker to consider environmental factors).

10 The regulations define an "involved agency" as: "an agency that has jurisdiction by law to fund, approve or directly undertake an action. If an agency will ultimately make a discretionary decision to fund, approve, or undertake an action, then it is "an involved agency." 6 NYCRR 617.2 [s].

B. The Planning Board Was Principally Responsible for the Project Review

In this case, the Planning Board complied with the SEQRA regulations before assuming its role as lead agency for the Project. The Planning Board issued a Notice of Intent to Act as lead agency for the Project. (R-85) The Town Board received the notice and did not object to the designation. On October 29, 2008, the Planning Board passed a resolution to act as lead agency for the Project. (R-194)

This designation was rational. The Town's Zoning Ordinance expressly provides that any WECS project must "first" receive a special use permit and site plan approval from the Planning Board. Section 5.25(B)(1) provides:

> (1) No Commercial WECS shall be constructed, reconstructed, modified, or operated in the Town of Allegany except in a Wind Energy Overlay Zone created by the Town Board. Prior to construction of any commercial WECS, the project proponent shall **first** obtain Special Use Permit and Site Plan Approval from the Town of Allegany Planning Board and a Building Permit from the Town's Code Enforcement Officer.
>
> Upon receipt of an application, the Special Use Permit and Site Plan Approval shall be processed by the Planning Board in accordance with this Section. The rezoning request will be referred to the Planning Board as required by Section 12.02 of this Ordinance, except that the Town Board may wait until the Planning Board has completed its application review, and any variances the Zoning Board of Appeals has granted, if required, prior to holding its public hearing. Upon completion of the Special Use Permit and Site Plan and the Town Board shall consider rezoning request. The Town Board and Planning Board may, if they wish, hold joint public hearings.

Here, it is clear that the Planning Board was the agency "principally responsible for carrying out funding ***or approving the proposed action***." *See* 6 NYCRR 617.2 [u]; *see generally Coca-Cola Bottling Co. of N.Y. v Board of Estimate of City of N.Y.*, 72 NY2d 674, 682-683, 536 NYS2d 33

[1988] (the final determination on environmental review must remain with the lead agency principally responsible for approving the project).[11] Consequently, the seventh cause of action of the Petition should be dismissed.

POINT VI

THE COURT SHOULD NOT CONSIDER MATTERS THAT ARE *DE HORS* THE RECORD

In an Article 78 proceeding, review of the evidence is based on the Administrative Record developed by the agency whose decision is being reviewed. *See* Weinstein, Korn & Miller, New York Civil Practice, CPLR 7804.06-07 (Matthew Bender) [2005]. The Court of Appeals has held that a fundamental tenet of Article 78 review is that "[j]udicial review of administrative determinations is confined to the 'facts and record adduced before the agency.'" *Featherstone v Franco*, 95 NY2d 550, 554, 720 NYS2d 93 [2000]. Administrative decisions may be neither buttressed nor challenged on the basis of factual material not formally in the administrative record under review. *Forjone v Bove*, 280 AD2d 948, 720 NYS2d 869 [4th Dept 2001]; *Matter of Haz-O-Waste Corp. v Williams*, 103 AD2d 1001, 478 NYS2d 198 [4th Dept 1984].

Courts may refuse to consider documents or affidavits that are submitted for the first time during the litigation and not made available to the agency during its deliberations. *See e.g.*, *Kaufmann's Carousel v City of Syracuse Indus. Dev. Agency*, 301 AD2d 292, 304, 750 NYS2d 212 [4th Dept 2002]; *City of Saratoga Springs v Zoning Bd. of Appeals of Town of Wilton*, 279 AD2d

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11 *See Seaboard Contr. & Material, Inc. v Department of Envtl. Conservation*, 132 AD2d 105, 111, 522 NYS2d 679 [3d Dept 1987] (since town has decision-making authority, albeit not the ultimate authority to issue or deny a permit, and is clearly concerned with the local impact of the project, the designation of the lead agency was not irrational); *Congdon v Washington County*, 130 AD2d 27, 31-32, 518 NYS2d 224 [3d Dept 1987] (the body selected as lead agency must have decision-making power and the determination of the agency as to which entity will be lead agency may only be set aside if it is irrational).

756, 719 NYS2d 178 [3d Dept 2001] (refusing to consider engineering reports not provided to planning board).

This rule is similar to the doctrine of exhaustion of administrative remedies. The requirement is designed to assure administrative agencies of the right to exercise fully their jurisdiction and expertise. *See Jackson v New York State Urban Development Corp.*, 67 NY2d 400, 503 NYS2d 298 [1986]; *Schodack Concerned Citizens v Town Bd. of Town of Schodack*, 148 AD2d 130, 544 NYS2d 49 [3d Dept 1989], *appeal denied*, 75 NY2d 701, 551 NYS2d 905 [1989].

The Petitioners are relying on an "expert" affidavit of Richard James that is not included in the administrative record. Accordingly, the Affidavit should not be considered. Moreover, because the affidavits of Ted Gorden, Paula Mohr, Daniel Mohr, James Severtson, and Ray Mosman are not included in the administrative record, they should not be considered by this Court.

POINT VII

PETITIONERS LACK STANDING TO BRING THE INSTANT ARTICLE 78 PETITION

A. The Test

In 2009, the Court of Appeals revisited the test for establishing standing. See *Save the Pine Bush, Inc. v Common Council of City of Albany*, 13 NY3d 297, 890 NYS2d 405 [2009]. The Court explained that when a citizen group or association brings a SEQRA challenge, petitioners must allege and prove that their injury is real and different from the injury most members of the public face. Standing requirements "are not mere pleading requirements but rather an indispensable part of the plaintiff's case" and therefore "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof...." *Id.*, 13 NY3d at 306-07 (internal

citations omitted).

As a general matter, "standing to challenge compliance with SEQRA turns on a showing by the challenger that it has sustained an injury-in-fact different from that of the public at large and one that falls within the zone of interest protected by SEQRA." *Village of Canajoharie v Planning Bd. of Town of Florida*, 63 AD3d 1498, 1501, 882 NYS2d 526 [3d Dept 2009]. The Court of Appeals has recognized that an organization or agency that uses and enjoys a natural resource more than most other members of the public has standing under SEQRA to challenge actions that threaten that resource. *Save the Pine Bush, Inc. v Common Council of City of Albany*, 13 NY3d at 304-05.

B. <u>Petitioners Failed to Prove Standing</u>

There is no proof in this record that the Petitioner Concerned Citizens of Cattaraugus County, Inc. has standing to maintain this action. There are no allegations that the members of the Citizens Group use the private lands on which the Project is proposed to be sited more than other members of the public. In fact, there is very little information about the Citizens Group in the Petition or the supporting affidavits. The Petition merely alleges that the organization is an "environmental membership organization" whose individual members reside in neighborhoods surrounding the project and "along the paths that supply trucks and heavy equipment…." (Petition ¶ 11) The members of the organization allegedly would experience "noise" impacts from the project. (Petition ¶ 11) Respondents submit that the Citizen Group did not satisfy the standing test established in the *Save the Pine Bush* case.

Nor has the individual Petitioner, Kathy Bosner, submitted any proof that she has suffered, or will experience, any harm from the project that is different in kind or degree from the impacts experienced by the public at large. The Affidavit of Kathleen Bosner-Premo states that she resides

8,000 feet away from the nearest turbine location. That is more than 1.5 miles away from the project. Accordingly, Petitioners' lack standing to maintain this proceeding.

POINT VIII

PETITIONERS FAILED TO MEET THEIR BURDEN FOR A PRELIMINARY OR A PERMANENT INJUNCTIVE RELIEF

A. No Grounds for Injunctive Relief

Petitioners cannot satisfy the stringent requirements of Section 6301 of the Civil Practice Law and Rules ("CPLR"). To obtain such drastic relief, Petitioners must prove each of the following three prongs of the test (CPLR § 6301) for obtaining a preliminary injunction:

1. a likelihood of ultimate success on the merits;
2. irreparable injury to Petitioners if the injunction is not granted; and
3. a balancing of the equities in Petitioners' favor.

Doe v Axelrod, 73 NY2d 748, 750, 536 NYS2d 44 [1988].

The Petition is devoid of the requisite showing necessary for issuance of a preliminary injunction. *See generally Town of Porter v Chem-Trol Pollution Servs., Inc.*, 60 AD2d 987, 988, 401 NYS2d 646 [4th Dept 1978]. Preliminary injunctive relief "is a drastic remedy" which cannot be granted absent the Petitioners establishment of "a clear right thereto." *See e.g., Peterson v Corbin,* 275 AD2d 35, 37, 713 NYS2d 361 [2d Dept 2000].

Conclusory allegations of irreparable injury will not suffice. *J. S. Anand Corp. v Aviel Enters., Inc.*, 148 AD2d 496, 538 NYS2d 840 [2d Dept 1989]. Petitioner "must submit affidavits and other proof supplying evidentiary detail" on these points. *Armbruster v Gipp*, 103 AD2d 1014, 478 NYS2d 419 [4th Dept 1984] ("The plaintiff has the burden of proof in seeking a preliminary

injunction, and must demonstrate factually and convincingly through affidavits and other proof supplying evidentiary detail that he would be irreparably damaged if an injunction were not granted before trial").

Most importantly, Petitioners cannot show probability of success on the merits. This alone mandates denial of the requested relief. *See Doe v Axelrod*, 73 NY2d 748, 750, 536 NYS2d 44 [1988]. *Borland v Wilson*, 202 AD2d 946, 610 NYS2d 891 [3d Dept 1994] (request for preliminary injunctive relief denied where plaintiff "failed to show that he would suffer irreparable injury if his request for the preliminary injunction was not granted."

The third prong of the test for injunctive relief requires the Court weigh all factors to determine whether the balance of the hardships weighs in Petitioners' favor. *423 S. Salina St., Inc. v City of Syracuse*, 68 NY2d 474, 482-83, 510 NYS2d 507 [1986], *cert. denied*, 481 US 1008, 107 S. Ct. 1880 [1987]. When the potential loss to a party sought to be enjoined is greater than the hardship to the party seeking an injunction, the injunction must be denied. *See id.*

Petitioners fail to even *allege* that a balance of the equities favors the granting of preliminary injunctive relief. In the absence of proof of irreparable injury or a balance of the equities in its favor, Petitioners' request for a preliminary injunction must be denied. *See e.g., O'Neill v Poitrus*, 158 AD2d 928, 929, 551 NYS2d 92 [4th Dept 1990]; *Town of Porter v Chem-Trol Pollution Servs., Inc.*, 60 AD2d 987, 988, 401 NYS2d 646 [4th Dept 1978] (denying injunctive relief because "although it is arguable that plaintiff has made a prima facie showing of a right to relief so as to meet the requirement that it demonstrate the likelihood of ultimate success on the merits, there has been a total failure on its part to show either irreparable injury to it in the absence of the relief requested or a balance of equities in its favor") (citations omitted).

Accordingly, Petitioners' request for an injunction must be denied.

B. If An Injunction Is Granted, Petitioners Must Post a Bond

Section 6312(b) of the CPLR provides:

> Prior to the granting of a preliminary injunction, the [plaintiff] shall give an undertaking in an amount to be fixed by the court, that the [plaintiff], if it is finally determined that he was not entitled to an injunction, will pay to the Defendant all damages and costs which may be sustained by reason of the injunction...

N.Y. Civ. Prac. L. & R. § 6312 (McKinney 1980) (emphasis supplied). An undertaking is thus a prerequisite to injunctive relief. There is "no authority" to grant a preliminary injunction "...without requiring the Petitioner to give an undertaking, as mandated by statute." *Family Affair Haircutters, Inc. v Detling*, 110 AD2d 745, 488 NYS2d 204 [2d Dept 1985]; *Cool Insuring Agency, Inc. v Rogers*, 125 AD2d 758, 759, 509 NYS2d 180 [3d Dept 1986]. The purpose of an undertaking is to indemnify the enjoined party for damages incurred as a result of the preliminary injunction. *See Margolies v Encounter, Inc.*, 42 NY2d 475, 477, 398 NYS2d 877 [1977].

The Affidavit of Kevin Sheen of Allegany Wind, LLC clearly shows that the damages due to a preliminary injunction would be staggering. Based on the foregoing, Respondents respectfully request that if a preliminary injunction is granted, Petitioners be ordered to post an undertaking in an amount commensurate with Allegany Wind's potential damages: $10 million.

CONCLUSION

The claims set forth in the Petition are time-barred. Moreover, the record demonstrates that the Town took a "hard look" at the environmental impacts of the project and set forth a reasoned elaboration for its decision to grant approvals and permits for the project. The Planning Board acted with full authority when it granted permits and approvals for the project. The decisions of the Planning Board and the Town Board are rational and are entitled to a presumption of validity. Consequently, the Petition should be dismissed, with costs.

DATED: October 25, 2011
Albany, New York

Respectfully submitted,

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