STATE OF NEW YORK
SUPREME COURT: COUNTY OF CATTARAUGUS

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

V.

DECISION
Index No. 79455

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

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

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

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

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

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

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

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

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

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

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

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

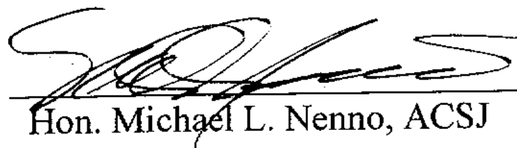
process, it specifically provided for SEQR review. It appears that this challenge is not really one about jurisdiction, but rather an indictment of the decision of the lead agency for their approval of the SEQRA application. Again, even if this court had found some basis to ignore the limitations statute,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

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

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

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

Petition Dismissed. Submit order accordingly.



Hon. Michael L. Nenno, ACSJ