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Turbulence continues in Allegany turbine project

BY DENISE M. CHAMPAGNE

A Pennsylvania-based wind energy development company would like to proceed with a planned turbine project in the southern Cattaraugus County town of Allegany, but the town claims it did not start the project within the approved time frame and that circumstances have since changed.

Allegany Wind LLC is represented by J. Michael Naughton, a partner in the Albany law firm Young/Sommer LLC. He argued before the Appellate Division, Fourth Department on Friday that the company was proceeding, but said it was clear the town Planning Board had “flip flopped” on its decision.

The town is represented by Daniel A. Spitzer, a partner with the Buffalo office of Hodgson Russ LLP, who countered Allegany

Wind was not moving forward, even appeared to be stalling for time, had switched the type of turbines it wanted to use and that an engineer determined the substituted turbines were not legal.

Allegany Wind, a subsidiary of EverPower Wind Holdings Inc., headquartered in Pittsburgh, had received approval in July 2011 for a special use permit from the town of Allegany Planning Board for a \$12 million 29-turbine project on approximately 9,000 acres with a capacity to produce enough electricity to power approximately 17,000 homes annually.

It had one year to start working on the project, but nearly three months later, a citizens

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group brought a suit seeking to overturn the town's approval. The suit was dismissed by Cattaraugus County Supreme Court Justice Michael L. Nenno. An appeal was filed, but never completed and ultimately dismissed.

As the original one-year deadline approached, Allegany Wind sought a one-year extension from the town Planning Board, which agreed to extend the deadline by one year or 90 days after the still-pending appeal was completed, whichever came first.

Since the appeal was dismissed by the Appellate Division, Fourth Department on Sept. 6, 2012, Justice Nenno calculated the extension would expire on Dec. 5, 2012.

On Feb. 28, Justice Nenno ruled Allegany Wind did not proceed with the project or take measures to challenge the 90-day extension, even though it knew the clock was ticking. He dismissed its Article 78 challenge to the Planning Board's extension decision and would not extend the time limit, prompting the latest appeal.

Naughton told the five-justice panel, if it reversed Justice Nenno's latest deci-

sion, Allegany Wind would like to start building next summer.

He said there were "a lot of balls in the air" between the significant number of property owners, pending litigation and seeking financing. He said there were many triggers and that agreements on various aspects were all in the works.

Justice Eugene M. Fahey said the three core issues he saw were the changes in the types of turbines, a previously unknown affected property owner who was not notified and an issue raised concerning eagles.

"How are these not a change in circumstances?" Justice Fahey asked.

Naughton said Allegany Wind still wants the option to substitute different turbines which he said are generally the same as those originally proposed, but the board considered them having a substantial impact and wanted a Supplemental Environmental Impact Statement.

Justice Stephen K. Lindley mentioned a May 14, 2012 board meeting, telling Naughton his client conceded it was changing the turbine blades and that Allegany Wind knew the board would have to review the change; that it was cor-

rectly asking for information about noise and other factors.

Justice Nancy E. Smith, presiding, asked how nobody could know a property owned by Ted Gordon would be among those affected.

Naughton said Gordon approached Allegany Town Supervisor John Hare after the project was approved.

Gordon, according to testimony, owns a hunting cabin in the town that was originally thought to be illegal because it lacked a building permit, but Spitzer said the building inspector was wrong; that Gordon's cabin had been built before 1968 when building permits started being required.

Naughton said it is Allegany Wind's position that Gordon should have intervened when the extension was granted in 2012, but he did not.

Justice Lindley said Allegany Wind should have been granted a one-year extension and asked Naughton why he did not challenge the Planning Board's decision. He said Allegany Wind also acted to prolong the pending litigation and then objected to the dismissal of the citizen's group lawsuit which Allegany Wind had won.

Naughton said the company has spent \$4 million getting approvals for the project and still has \$500,000 in escrow. He

acknowledged the court could find the company's litigation strategy strange. He objected to Justice Fahey's asking why Allegany Wind did not move for a stay when it knew its deadline was going to expire, saying it had.

Spitzer told the panel that Justice Nenno got it right. He said Allegany Wind broke off negotiations, did not try to get necessary access rights to the project site from the neighboring town of Carrollton and that the company never asked for a building permit until early this year, the day before it filed its petition with Justice Nenno.

"They sat on everything," Spitzer said.

He said the main concerns regarding wind projects have to do with noise, visibility and shadows from the moving blades. He said an engineer, not a lawyer, determined the proposed new turbines appeared to break the law. Spitzer said if there is a change in turbines, there is a change in circumstances and the town did not have to grant an extension.

Also on the panel were Justices Joseph D. Valentino and Gerald J. Whalen. A decision could come as early as Dec. 27, the next scheduled decision release date, but is more likely to happen early next year.

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