

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.

ANSWER OF
ALLEGANY WIND, LLC

Index No.: 79455

Respondent Allegany Wind, LLC, by its attorneys, Young/Sommer LLC, for its Answer to the Verified Petition, dated September 28, 2011, alleges:

1. Denies the allegations set forth in paragraph 1 of the Petition, except admits that the Petitioners purport to set forth a summary of their allegations and claims.
2. Denies the allegations set forth in paragraph 2 of the Petition, except admits that the Petitioners purport to set forth a summary of their allegations concerning “jurisdictional objections.”
3. Denies the allegations set forth in paragraph 3 of the Petition, except admits that the Petitioners purport to set forth a summary of their allegations concerning objections under the State Environmental Quality Review Act (“SEQRA”).

4. Denies the allegations set forth in paragraph 4 of the Petition, except admits that the project site is located on land that is near the Allegany River in the Town of Allegany.

5. Denies the allegations set forth in paragraph 5 of the Petition, except admits that: the project involves construction of 29 wind turbines installed on towers that are approximately 500' high; trucks and cranes will be used to deliver the turbines, towers, and concrete for construction; gravel roads will be constructed for the turbine installations.

6. Denies the allegations set forth in paragraph 6 of the Petition, except admits that the project site is located generally along two ridges in the Town of Allegany.

7. Denies the allegations set forth in paragraph 7 of the Petition, except admits that the only allegations of "substantive" environmental impacts alleged by Petitioners relate to: (A) sound impacts (which Petitioner refers to as "noise") and (B) the alleged impact of sound on the "character of the community."

8. Admits that the Petitioners have commenced this proceeding pursuant to Article 78 of the Civil Practice Law and Rules, but denies the allegations set forth in subparagraphs (a)-(g) of paragraph 8 of the Petition.

9. Denies the allegations set forth in paragraph 9 of the Petition, except admits that Petitioners seek a preliminary injunction.

10. Denies the allegations set forth in paragraph 10 of the Petition, except admits that Petitioners are requesting permanent injunctive relief.

11. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 11 of the Petition, but denies, upon information and belief, that Concerned Citizens of Cattaraugus County, Inc. (the "Citizen Group") has standing to maintain this proceeding.

12. Denies the allegations set forth in paragraph 12 of the Petition.
13. Admits, upon information and belief, the allegations set forth in paragraph 13 of the Petition.
14. Admits, upon information and belief, the allegations set forth in paragraph 14 of the Petition, but respectfully refers the Court to the text of the Zoning Ordinance for its complete terms.
15. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 15 of the Petition, and refers the Court to the Zoning Ordinance in effect at the time of the approvals and permits were granted for the project.
16. Denies the allegations set forth in paragraph 16 of the Petition, but admits that Petitioners purport to quote an excerpt of Section 5.25 of the Zoning Ordinance, which provides:

(A) Intent and Purpose

The Town of Allegany recognizes that wind energy is an abundant, renewable and nonpolluting energy resource of the Town and that its conversion to electricity will reduce dependence on nonrenewable energy resources and decrease air and water pollution that result from the use of conventional energy sources.

The purpose of these regulations for Commercial Wind Energy Conversion Systems (**WECS**) is to ensure that development of these facilities will have a minimal impact on adjacent properties and to protect the health, safety and welfare of residents of the Town. Specifically, regulation of the siting and installation of wind turbines is necessary for the purpose of protecting the health, safety, and welfare of neighboring property owners and the general public. Wind Energy Facilities represent significant potential aesthetic impacts because of their large size, lighting, and shadow flicker effects. If not properly regulated, installation of Wind Energy Facilities can create drainage problems through erosion and lack of sediment control for facility sites and access roads, and harm farmlands through improper construction methods. Wind Energy Facilities may present a risk to bird and bat populations if not properly sited. If not properly sited, Wind Energy Facilities may present risks to the property values of

adjoining property owners. Wind Energy Facilities are significant sources of noise, which, if unregulated, can negatively impact adjoining properties. Construction of Wind Energy Facilities can create traffic problems and damage local roads. Wind Energy Facilities can cause electromagnetic interference issues with various types of communications.

17. Admits that paragraph 17 of the Petition quotes an excerpt from the Town's Zoning Ordinance relating to the potential impact of sound generated by WECS.

18. Admit the allegations set forth in paragraph 18 of the Petition, and states that the Ordinance speaks for itself.

19. Denies the allegations set forth in paragraph 19 of the Petition, except admits that Petitioners purport to quote excerpts of the law defining "A weighted sound pressure level," and respectfully refers the Court to the text of the Zoning Ordinance for the full definition.

20. Denies the allegations set forth in paragraph 20 of the Petition, except admits that in January, 2010, the Town Board adopted an amendment of the Zoning Ordinance, which provides: "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."

21. Denies the allegations set forth in paragraph 21 of the Petition, except admits that on August 21, 2008, an application was filed with the Planning Board of the Town of Allegany ("Planning Board") for a special use permit for the project and site plan approval, and the application was accompanied by a Full Environmental Assessment Form ("FEAF") in accordance with SEQRA.

22. Admits the allegations set forth in paragraph 22 of the Petition.

23. Denies the allegations set forth in paragraph 23 of the Petition, but admits that a DEIS was submitted by the Applicant in mid-February, 2010, and the Planning Board accepted the DEIS

as complete on February 24, 2010.

24. Denies the allegations set forth in paragraph 24 of the Petition, except admits that the Planning Board received written comments from the public and involved and interested agencies concerning the DEIS and the project.

25. Denies the allegations set forth in paragraph 25 of the Petition, but admits that the Planning Board held a public hearing on the project on April 21, 2010.

26. Denies the allegations set forth in paragraph 26 of the Petition, except admits that on July 11, 2011 the Planning Board adopted a Resolution approving a Decision and SEQRA Findings Statement, and issued a Special Use Permit and Site Plan approval for the project.

27. Denies the allegations set forth in paragraph 27 of the Petition, except admits that the Town Board issued a findings statement pursuant to SEQRA and adopted a Resolution approving Ordinance No. 1 of 2011, which created a Wind Energy Overlay Zone for the project site.

28. Denies the allegations set forth in paragraph 28 of the Petition, except admits that Petitioners have quoted excerpts of a letter from Gary Abraham, dated February 20, 2009, which was addressed to the Planning Board, and which requested that the Planning Board “deem” all homes in the “Chipmonk Road valley as sensitive receptors.”

29. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 29 of the Petition.

30. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 30 of the Petition.

31. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 31 of the Petition, except admits that: (A) on September 16, 2009 Gary Abraham, Esq. submitted a Petition to the Town Board, which requested amendments to

Section 5.25 of the Zoning Ordinance, (B) the proposed amendments relate to WECS, and (C) Mr. Abraham purported to submit the Petition on behalf of 94 individuals.

32. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 32 of the Petition.

33. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 33 of the Petition.

34. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 34 of the Petition.

35. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 35 of the Petition.

36. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 36 of the Petition.

37. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 37 of the Petition.

38. Denies the allegations set forth in paragraph 38 of the Petition.

39. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 39 of the Petition, but admits that the Citizen Group's attorney and other individuals submitted letters to the Town Board and the Planning Board commenting on sound/noises issues relating to the project and the standards for sound analysis.

40. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 40 of the Petition, except admits that the Town received a letter from Richard R. James, which comment on sound standards and wind turbine noise.

41. Denies knowledge or information sufficient to form a belief as to the truth of the

allegations set forth in paragraph 41 of the Petition, except admits that Petitioners purport to summarize the methodologies employed by E-Coustic Solutions and the dates on which that firm completed its study.

42. Denies the allegations set forth in paragraph 42 of the Petition, except admits that the Planning Board's independent consultant performed sound measurements at residential areas near the project site, and provided the results of its studies to the Planning Board.

43. Denies the allegations set forth in paragraph 43 of the Petition, except admits, upon information and belief, that the Petitioners contend that each increase of 10 dBA is perceived as a doubling of sound levels.

44. Denies the allegations set forth in paragraph 44 of the Petition, except admits, upon information and belief, that the Citizen Group submitted comment letters disputing the results and methodologies of the sound studies conducted for the project.

45. Denies the allegations set forth in paragraph 45 of the Petition, except admits, upon information and belief, that the Citizen Group submitted comment letters making claims regarding the sound generated by the turbines proposed for the project.

46. Denies the allegations set forth in paragraph 46 of the Petition, except admits, upon information and belief, that the Citizen Group submitted comment letters making assertions regarding the New York State Department of Environmental Conservation (NYSDEC) guidelines.

47. Denies the allegations set forth in paragraph 47 of the Petition, except admits, upon information and belief, that NYSDEC submitted comments regarding the project.

48. Denies the allegations set forth in paragraph 48 of the Petition.

49. Denies the allegations set forth in paragraph 49 of the Petition, except admits, upon information and belief, that the Citizen Group submitted comment letters regarding standards and

methods of assessing sound impacts.

50. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 50 of the Petition.

51. Denies the allegations set forth in paragraph 51 of the Petition, except admits that Petitioners have quoted a sentence from the DEIS.

52. Denies, upon information and belief, the allegations set forth in paragraph 52 of the Petition.

53. Denies the allegations set forth in paragraph 53 of the Petition, but admits that the Planning Board approved the project after consideration of all timely submitted comments and studies regarding sound impacts.

54. Admits, upon information and belief, the allegations set forth in paragraph 54 of the Petition, but denies that the Zoning Board of Appeals had jurisdiction to consider the "appeal" filed by Mr. Abraham.

55. Denies the allegations set forth in paragraph 55 of the Petition, but admits, upon information and belief, that the Zoning Board of Appeals, through its counsel, dismissed, or rejected, the "appeal."

56. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 56 of the Petition.

57. Admits the allegations set forth in paragraph 57 of the Petition.

58. Denies the allegations set forth in paragraph 58 of the Petition, but admits, upon information and belief, that the Citizen Group and local residents continued to submit written comments regarding the project during the Planning Board's review of the project.

59. Denies the allegations set forth in paragraph 59 of the Petition, but admits that the

Planning Board and the Town Board sought consultation and advice from its consultants, engineers, special counsel and planners.

60. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 60 of the Petition.

61. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 61 of the Petition, and denies that there is any basis for the alleged "concerns."

62. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 62 of the Petition, and denies that the unidentified members of the Citizen Group have standing.

63. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 63 of the Petition.

64. Admits the allegations set forth in paragraph 64 of the Petition.

65. Denies the allegations set forth in paragraph 65 of the Petition, but admits that the Planning Board acted in a manner consistent with the Town's Zoning Ordinance, and that the Planning Board has discretion to make determinations regarding the issuance of a Special Use Permit and Site Plan approval consistent with the zoning ordinance then in effect.

66. Admits the allegations set forth in paragraph 66 of the Petition.

67. Denies the allegations set forth in paragraph 67 of the Petition, except admits, upon information and belief, that the Zoning Board of Appeals of the Town of Allegany has jurisdiction to make determinations regarding variances and timely appeals from decisions of the Code Enforcement Officer regarding interpretations of the Zoning Ordinance.

68. Admits the allegations set forth in paragraph 68 of the Petition.

69. Denies the allegations set forth in paragraph 69 of the Petition.
70. Denies the allegations set forth in paragraph 70 of the Petition.
71. Denies the allegations set forth in paragraph 71 of the Petition.
72. Denies the allegations set forth in paragraph 72 of the Petition.
73. Denies the allegations set forth in paragraph 73 of the Petition.
74. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 74 of the Petition.
75. Denies the allegations set forth in paragraph 75 of the Petition.
76. Respondent Allegany Wind, LLC repeats and realleges each and every response to the allegations set forth in paragraph 76 of the Petition.
77. Denies the allegations set forth in paragraph 77 of the Petition.
78. Respondent Allegany Wind, LLC repeats and realleges each and every response to the allegations set forth in paragraph 78 of the Petition.
79. Denies the allegations set forth in paragraph 79 of the Petition.
80. Respondent Allegany Wind, LLC repeats and realleges each and every response to the allegations set forth in paragraph 80 of the Petition.
81. Denies the allegations set forth in paragraph 81 of the Petition.
82. Respondent Allegany Wind, LLC repeats and realleges each and every response to the allegations set forth in paragraph 82 of the Petition.
83. Denies the allegations set forth in paragraph 83 of the Petition.
84. Respondent Allegany Wind, LLC repeats and realleges each and every response to the allegations set forth in paragraph 84 of the Petition.
85. Denies the allegations set forth in paragraph 85 of the Petition.

86. Respondent Allegany Wind, LLC repeats and realleges each and every response to the allegations set forth in paragraph 86 of the Petition.
87. Denies the allegations set forth in paragraph 87 of the Petition.
88. Respondent Allegany Wind, LLC repeats and realleges each and every response to the allegations set forth in paragraph 88 of the Petition.
89. Denies the allegations set forth in paragraph 89 of the Petition.
90. Respondent Allegany Wind, LLC repeats and realleges each and every response to the allegations set forth in paragraph 90 of the Petition.
91. Denies the allegations set forth in paragraph 91 of the Petition.
92. Respondent Allegany Wind, LLC repeats and realleges each and every response to the allegations set forth in paragraph 92 of the Petition.
93. Denies the allegations set forth in paragraph 93 of the Petition.
94. Respondent Allegany Wind, LLC repeats and realleges each and every response to the allegations set forth in paragraph 94 of the Petition.
95. Denies the allegations set forth in paragraph 95 of the Petition.
96. Respondent Allegany Wind, LLC repeats and realleges each and every response to the allegations set forth in paragraph 96 of the Petition.
97. Denies the allegations set forth in paragraph 97 of the Petition.
98. Denies the allegations set forth in paragraph 98 of the Petition.
99. Denies the allegations set forth in paragraph 99 of the Petition.
100. Denies the allegations set forth in paragraph 100 of the Petition.

**OBJECTIONS IN POINT OF LAW
AND AFFIRMATIVE DEFENSES**

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

101. One or more of the claims set forth in the Petition fails to state a cause of action.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

102. The claims are barred by the statute of limitations.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

103. The Petitioners lack standing.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

104. The claims are barred by the doctrines of laches and/or estoppel.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

105. Petitioners failed to name and serve all necessary parties.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

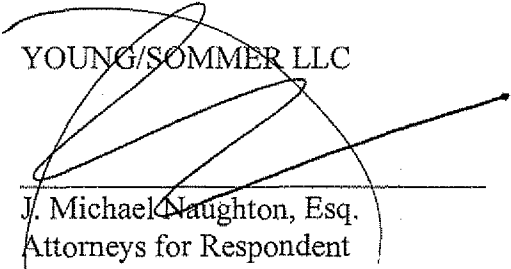
106. Petitioners have unclean hands and are not entitled to equitable relief.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

107. The Petitioners failed to exhaust their administrative remedies and waived certain objections and claims set forth in the Petition. The Court should not consider documents and information that is *de hors* the record.

WHEREFORE, Respondent Allegany Wind, LLC demands judgment dismissing the Petition with costs, and granting such other and further relief as the Court deems just.

Dated: October 25, 2011

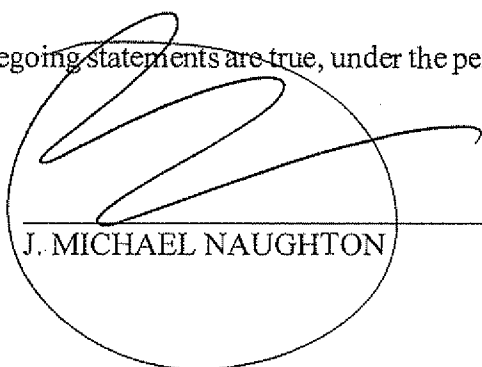
YOUNG/SOMMER LLC
BY: 

J. Michael Naughton, Esq.
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(518) 438-9907

VERIFICATION


The undersigned, is an attorney admitted to practice in the courts of New York State, is the attorney of record for the Respondent Allegany Wind, LLC, in the within action; deponent has read the foregoing Answer and is familiar with the contents thereof; the same is true to the deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent and not by the Respondent because the Respondent does not reside nor maintain its office in the county where your deponent maintains his office. The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are based upon a review of the facts, and administrative record in this proceeding, as well as conversations with the Respondent's representative.

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.



J. MICHAEL NAUGHTON

Sworn to before me this
25th day of October, 2011



Notary Public

LORI-ANN SCHROM
Notary Public, State of New York
Qualified in Albany County
No. 5060306
Commission Expires May 20, 2014