

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 Laws and Rules

VERIFIED PETITION

Index No. 79455

Against

Honorable _____

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.

Submitted by:

Richard E. Stanton, Esq.,
Of Counsel,
Muscato and Shatkin, PLLC
434 Delaware Avenue
Buffalo, NY 14202
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CATTARAUGUS COUNTY CLERK
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Petitioners, CONCERNED CITIZENS OF CATTARAUGUS COUNTY, INC., (“CCCC”), and KATHY BOSER, by and through their attorney, Richard E. Stanton, Esq., as and for their Verified Petition herein, come forth and allege upon information and belief as follows:

I. THE NATURE OF THE ACTION

1. This is an action brought by the Petitioners challenging:
 - a. The Town of Allegany Planning Board's (hereinafter referred to as the “Planning Board”) jurisdiction to consider a site plan for a wind farm proposed by Allegany Wind, LLC (the “Project”), at a time when the Town's zoning ordinance included no land use zones within which a wind farm could be permitted;
 - b. The Town of Allegany Town Board's (“Town Board”) approval of rezoning to accommodate the Project by legislatively creating a Wind Overlay District that precisely coincides with the Project area, supported by no more than a defective site plan review of the Planning Board that preceded the rezoning;
 - c. The Town of Allegany Zoning Board of Appeal's refusal to hear an appeal by Petitioner CCCC seeking a correct interpretation of the provisions of the Town’s ordinances concerning requirements in the local zoning ordinance for environmental noise measurements and assessments; and
 - d. The Town of Allegany's Code Enforcement Officer issuing a building permit to Respondent Allegany Wind, LLC in violation of the Town’s ordinances

governing site plan approval for wind farms and the conduct of environmental noise measurements and assessments.

2. The jurisdictional objections focus on :
 - a. the decision of the Town Board, mid-way through the Planning Board's site plan review for the Project, to legislatively change the local zoning ordinance to require that a Wind Overlay Zone be approved by the Town Board as a precondition for approval to construct a wind farm; this removed the Planning Board's authority to consider a site plan proposal until after the Wind Overlay Zone was finally approved by the Town Board; and
 - b. the failure of the Planning Board during its site plan review to receive any specific study of low frequency and impulsive sound effects of the Project as required by the Town's zoning ordinance; and
 - c. the failure of the Planning Board during its site plan review to require the sound studies it did receive to comply with with published professional standards and procedures for sound measurement as required by the Town's zoning ordinance; and
 - d. the failure of the Planning Board during its site plan review to determine whether residences identified as “sensitive receptors” of noise impacts of the Project would be affected by sound levels exceeding those allowed pursuant to the Town's zoning ordinance.
3. The SEQRA objections focus on:
 - a. The Planning Board's failure of jurisdiction during its review of potential environmental impacts of the Project, which deprived the Planning Board

of lead agency status in the environmental impact review pursuant to the SEQRA regulations at 6 N.Y.C.R.R. § 617.2 (u) and 6 N.Y.C.R.R. § 617.6(b); and

- b. the Planning Board's and the Town Board's failure to meaningfully consider the effect on residents near the Project area of low frequency noise and repetitive or impulsive noise expected from the Project; and
- c. the Planning Board's and the Town Board's failure to avoid or mitigate significant noise impacts on nearby residents identified in the course of the Planning Board's project review.

4. The Project is proposed to be sited on an over 9,000 acre site along the Allegheny River in the Town of Allegany. It is to be constructed on land leased by a small number of landowners who do not reside there and who currently use the land for natural resource extraction, including timber, lumber, oil and gas.

5. Project site construction would involve installing 29 large wind turbines on sleek, modern tubular towers reaching approximately 500 feet in height at the upper reach of any of three rotors (or “blades”), at least 8,500 deliveries by heavy trucks carrying turbine parts up to approximately 160 feet in length, and the building or reconstruction of new access roads both through undeveloped woodlands and replacing existing roads, to accommodate thousands of loads of gravel, cement and heavy equipment needed for the installations, including a crane weighing approximately 400 tons.

6. The 29 wind turbines would be installed on top of two ridges between which is located the residential community of Chipmonk, an historical neighborhood in the Town of

Allegany, and to the immediate east of which is the Four Mile Road and West Branch Road, home to another residential community in the Town.

7. The substantive areas of the surrounding environment for which the potential adverse impacts of the Project have not been adequately considered involve noise impacts, a listed environmental impact under SEQRA's implementing regulations, (*see* 6 N.Y.C.R.R. § 617.2(1)), including both construction and operational noise, and the adverse impacts of the Project on the character of the community. *See id.* and 6 N.Y.C.R.R. § 617.1(d).

8. This Petition is brought pursuant to CPLR §7803(1-4) based upon:

- a. the Respondent Planning Board and Town Board's failure to perform actions enjoined upon them by law (CPLR 7803(1)); and
- b. the Respondent Zoning Board of Appeal's failure to perform actions enjoined upon it by law (CPLR 7803(1)); and
- c. the Respondent Planning Board, Town Board, and Code Enforcement Officer's exceedance of their lawful authority (CPLR 7803(2)); and
- d. the Respondent Planning Board, Town Board, and Code Enforcement Officer's violation of lawful procedure (CPLR 7803(2)); and
- e. the Respondent Planning Board and Town Board's actions being arbitrary and capricious and an abuse of discretion (CPLR 7803(3)); and
- f. the Respondent Planning Board and Town Board's determinations not being supported by substantial evidence (CPLR 7803(4)); and
- g. the Respondent Planning Board, Town Board, and Code Enforcement Officer's taking actions in reliance upon errors of law (CPLR 7803(3)).

9. This Petition is further submitted in support of the application for preliminary injunctive relief necessary to preserve the *status quo* until this matter may come to be fairly adjudicated.

10. This Petition is further submitted in support of the Petitioners' application for permanent injunctive relief until such time as a proper environmental review is coordinated in full compliance with the Town's zoning ordinance and thence completed, after a thorough study of the potential significant adverse impacts of the site on noise sensitive areas of the host environment, and a weighing of the same is made against economic and social benefits and costs of the Project, all as required pursuant to Article 8 of New York State's Environmental Conservation Law.

II. THE PETITIONERS

11. Petitioner CCCC is an environmental membership organization incorporated under New York's Not-for-Profit Law and recognized as a charitable organization under the federal Internal Revenue Code, Section 501(c)(4). CCCC's members include individuals who reside in the neighborhoods surrounding the proposed Project, and along the paths that supply trucks and heavy equipment that trucks are anticipated to take through residential neighborhoods, including Nichols Run Road and Chipmonk Road, and near enough to the Project area that they would experience noise exceeding limits for both common law nuisance and the numerical standards and intent of the Town's zoning ordinance. *See* Affidavit of Richard R. James, attached hereto.

12. For the reasons set forth below, it is respectfully submitted that the Petitioners are the very individuals the environmental laws, and other land-use laws, the application of which are the subject of this action, were intended to benefit.

III. THE LAND USE REGULATIONS AND PROJECT REVIEW AT ISSUE

A. Local regulation of wind projects in Allegany

13. On August 10, 2006, the Town Board enacted a moratorium on wind energy facilities in the town, effectively banning such facilities until new legislation could be adopted.

14. On or about August 28, 2007, the Town Board enacted amendments to the town's zoning ordinance providing, among other things, that “commercial wind energy conversion systems” (“Commercial WECS”) may be permitted as a special use subject to approval by the Planning Board. *See* Allegany Zoning Ordinance II, (“Zoning Ord. II”), § 5.25.

15. In 2007 and ever since Section 5.25 of the Town zoning ordinance also provided that noise generated by Commercial WECS may not exceed 3 decibels, A-weighted (or 3 “dBA”), above the pre-existing ambient sound level at “sensitive receptors,” defined as residences and other listed types of property, within 2,500 feet of any wind turbine, or any other sensitive receptors specifically identified by the Planning Board. *Id.*, § 5.25(C)(2)(a)(ii).

16. The stated purpose of Section 5.25 “is to ensure that development of these facilities will have a minimal impact on adjacent properties.” *Id.* (preamble).

17. Such minimal impacts include the impact on “the nighttime or daytime ambient sound level at any sensitive noise receptors.” *Id.*, § 5.25(C)(2)(a)(ii).

18. On February 24, 2011, while the Planning Board was still reviewing the Project at issue here, the Town Board enacted amendments to Section 5.25 and the definitions applicable to Section 5.25.

19. The February 24, 2011 changes provide under the heading, “A WEIGHTED SOUND PRESSURE LEVEL,” that “the measurement of the sound pressure level may be done according to the American National Standard, Quantities and Procedures for Description and Measurement

of Environmental Sound (ANSI/ASA S12.9-1993, Parts 1, 2 and 3, Reaffirmed by ANSI April 2008), published by the Acoustical Society of America (ASA) and the American National Standards Institute (ANSI), or other accepted procedures.”

20. The February 24, 2011 changes also provide: “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.” Zoning Ord. II § 5.25(B)(1).

B. The project application review process

21. On August 21, 2008, Everpower Renewables, parent company for Respondent Allegany Wind, LLC, submitted an application for a special use permit to the Planning Board, initiating the SEQRA process for the board's review of the application and the Project.

22. On September 12, 2008, the Planning Board forwarded a proposal to designate itself as Lead Agency for the SEQRA process to potentially interested or involved SEQRA agencies, and subsequently no agency objected to the Planning Board assuming the role of Lead Agency.

23. On or about February 24, 2010, the Project sponsor submitted a complete Draft Environmental Impact Statement (“Draft EIS”) to the Planning Board and other involved agencies.

24. At that time the Planning Board scheduled a public comment period on the Draft EIS, the comment period closed on May 3, 2010, and CCCC, involved and interested agencies and dozens of people from the area submitted to the Planning Board written comments on the Draft EIS before the close of the comment period.

25. The Planning Board held one public hearing on the Project, on April 21, 2010.

26. On July 11, 2011, the Planning Board by a 3-2 vote approved the Project site plan and issued a Final EIS in support of findings justifying approval of the Project.

27. On August 26, 2011, the Town Board by a 4-1 vote adopted the Planning Board's findings and approved the Project's sponsor's application for rezoning, creating a new Wind Overlay District in the Town that coincides precisely with the Project area.

C. Petitioner's efforts to obtain compliance with the zoning law.

28. On February 20, 2009, CCCC through its attorney wrote to the Planning Board, through its staff professional planner, as follows: "It has become clear that most of the Chipmonk families I represent are outside the 2500 ft. distance from proposed turbine sites to qualify automatically as sensitive receptors for purposes of the noise standards under the Allegany zoning ordinance. I am therefore renewing my request that the Planning Board exercise its discretion to deem all homes in the Chipmonk Road valley as sensitive receptors . . ."

29. The purpose of this request was to apply the 3 dBA limit on project noise increases above the ambient sound level to residents living farther away from the Project than 2500 feet, on the understanding that application of this provision of the local zoning ordinance would otherwise be expected to result in lesser noise increases to those residents.

30. The Planning Board rejected this request, determining initially that no noise limits would apply to residents or other sensitive receptors located farther from the Project than 2500 feet.

31. On September 16, 2009, 94 people who own property in and are registered to vote in the Town of Allegany, submitted a petition to the Allegany Town Board to eliminate the 2500 feet distance requirement for applicability of the 3 dBA limit on noise increases. *See* Zoning Ord. II, Art. XII.

32. On February 12, 2010, the Planning Board wrote to CCCC's attorney inviting submission of a short list of residences in the vicinity of the Project that could be designated as

“sensitive receptors,” as referenced in the Town's zoning law. *See* Zoning Ord. II, § 5.25(C)(2)(a)(ii).

33. Soon thereafter CCCC by its attorney submitted a list of approximately 40 residences in response to the invitation.

34. On March 8, 2010, the Planning Board voted unanimously to accept eight of the listed residences as “sensitive receptors.”

35. However, subsequently the Planning Board determined that the 3 dBA limit on noise increases pursuant to the Town's zoning law, section 5.25(C)(2)(a)(ii), would not apply to these eight residences.

36. Also on March 8, 2010, the Planning Board unanimously voted to recommend to the Town Board that reference to 2500 feet in Section 5.25 be eliminated, but also that a town-wide limit on noise of 40 dBA be added to Section 5.25.

37. Subsequently, the Town Board rejected the recommendation.

38. Following the rejection of its recommendation the Planning Board nevertheless adopted the 40 dBA limit on Project noise without regard to distance, and continued its Project review.

39. CCCC submitted letters to the Planning Board, the Town Board or both commenting on the failure of the Project sponsor to demonstrate compliance with the noise limits and sound study requirements of Section 5.25 several times, including on February 20, 2009; February 17, 2010; February 23, 2010; January 7, 2011; May 11, 2011; May 26, 2011; and August 25, 2011.

40. These letters included technical comments by Richard R. James of E-Coustic Solutions, a Michigan-based acoustic and noise assessment consultant with 35 years of experience evaluating industrial noise sources, including wind turbine noise.

41. E-Coustic Solutions also performed a background sound study based on measurements at several residential locations near the Project area, finding that pre-existing sound levels at those locations at night are between 24 and 33 dBA. The E-Coustic Solutions study was completed on May 26, 2010 and submitted to the Planning Board soon thereafter.

42. The Planning Board's environmental consultant also performed a background sound study based on measurements at four of the residential locations selected for the E-Coustic Solutions study, finding sound levels at those locations at night are as low as 18.3 dBA, using the same procedure as did E-Coustic Solutions.

43. CCCC's comment letters and technical submissions asserted, among other things, that each increase of 10 dBA is perceived as doubling the sound level.

44. CCCC's comment letters and technical submissions asserted, among other things, that the Project sponsor's sound studies departed from ANSI or comparable procedures for measuring sound, or were based on no standards for assessing noise whatsoever.

45. CCCC's comment letters and technical submissions asserted, among other things, that the manufacturer's specifications for the wind turbine model proposed for the Project states the sound level emitted by each turbine is over 100 decibels (A-weighted).

46. CCCC's comment letters and technical submissions asserted, among other things, that guidelines for assessing noise issued by the New York State Department of Environmental Conservation ("NYSDEC") identify an increase in sound levels caused by a project that is 6 dBA in excess of pre-existing sound levels as cause for community complaints, and a 20 dBA increase is identified as "very noticeable to intolerable."

47. NYSDEC submitted its own comments to the Planning Board urging that its guidelines for assessing noise be followed, recommending that project noise be limited to 6 dBA

in excess of pre-existing sound levels, and urging that the same procedure used in the E-Coustic Solutions background sound study be utilized by the Planning Board.

48. None of NYSDEC's recommendations on noise assessment were followed by the Town.

49. CCCC's comment letters and technical submissions asserted, among other things, that low frequency noise impacts are poorly assessed using A-weighted numerical estimates, and should instead be assessed using C-weighted estimates, and independent scientific measurements of wind turbine noise demonstrate that low frequency is a significant or dominant component of the noise.

50. However, no report on C-weighted project sound levels was submitted to the Town.

51. In fact, the Draft EIS asserts: "Modern wind turbines of the type proposed for this project do not generate low frequency or infrasonic noise to any significant extent and no impact of any kind is expected from this." This statement is incorporated into the Final EIS on which the Planning Board and the Town Board relied when approving the project and the Wind Overlay Zone.

52. Prior to the Planning Board's July 11, 2011 vote to approve the Project at least one resident of the Chipmonk area who lives within 2500 feet of the Project notified the Board that his residence was ignored by the Project application and sound studies, but the Board approved the Project anyway. *See* Affidavit of Ted Gordon, attached hereto.

53. CCCC's effort to have additional sensitive receptors farther away than 2500 feet from the Project identified by the Planning Board was successful, but the board ultimately determined that the town's zoning restriction on sound level increases above pre-existing sound levels would not apply and, on that basis among others, approved the Project anyway.

54. On September 12, 2011, CCCC appealed to the Allegany Zoning Board of Appeals (“ZBA”) seeking an interpretation of the noise limit and study requirements imposed by the local zoning law. *See* Town L. § 267-a(5)(b).

55. On September 21, 2011, the Town by its attorney rejected the petition, stating that the ZBA is not authorized to hear such appeals.

56. When CCCC members went to the public meetings of the Planning Board to express their concerns about the proposed Project they were told they could listen but not speak.

57. Over the course of a two-year Project review by the Planning Board, at several meetings of the board the Project's manager, engineers and attorney were allowed to discuss and debate environmental issues at length.

58. At many of these meetings facts and conclusions about noise impacts were discussed to which CCCC objected, but without an opportunity to speak these objections had to be submitted to the board in writing.

59. On information and belief, few if any of these written submissions were fully reviewed by the Planning Board or the Town Board, and instead the boards sought advice on evaluating the submissions from their environmental consultant, staff planner and special counsel.

60. The Planning Board's environmental consultant and special counsel have worked in the past and currently work for wind farm developers.

61. CCCC members living near the Project area did, and still do have concerns about the health issues associated with chronic sleeplessness, and the potential for night time operations of wind turbines to affect their ability to sleep undisturbed; the degradation of the ridges immediately above their homes, including the strobe-light-like effect of “shadow flicker,”

occurring when spinning turbines intersect the sunlight at dawn and dusk; and the truck traffic impacts and the general deterioration of the neighborhood that will be caused by the permitting of the Project.

62. The Chipmonk community, which may be hardest hit by Project impacts because it is located between the two ridges on which the Project is primarily sited, has historic roots and includes CCCC members whose families have been there for up to four generations. *See* Affidavits of Kathleen Boser Premo and Ray Mosman, attached hereto.

63. Several CCCC members living near the Project area chose their homes for its peace and quiet. *See id.*, and Affidavits of Ray Mosman, James Severtson, Ted Gordon, and Dan Mohr, all attached hereto.

IV. THE RESPONDENTS

64. The Planning Board is a public agency charged with site plan reviews.

65. The Planning Board is further charged with ensuring all its actions are consistent with the Town of Allegany's zoning law.

66. The Town Board is a municipal body corporate and politic, and a New York State governmental agency subject to compliance with the laws of the State of New York.

67. The ZBA is charged with hearing appeals of decisions made by administrative officials such as the Planning Board.

68. Respondent, Allegany Wind, LLC is named as the Project Sponsor and is listed as the applicant for site plan review and is the proposed future operator of the Project.

V. THE PLANNING BOARD AND TOWN BOARD FAILED TO REVIEW A COMPLETE APPLICATION FROM ALLEGANY WIND, LLC

69. For the reasons stated above, and in the accompanying Affidavit of Richard R. James, which is incorporated by reference, it is submitted that the Project would result in substantial noise pollution in an area one kilometer from the Project. A project area map is included with the Affidavit of Kathleen Boser Premo.

70. As briefly set forth above, the Planning Board failed to obtain any study of low frequency and impulsive sound effects of the Project.

71. In addition, the Planning Board and Town Board failed to obtain full information about those who live less than 2500 feet from the Project. *See* Affidavit of Ted Gordon.

72. In addition, the Planning Board and Town Board accepted and credited sound studies it received from the Project sponsor that fail to comply with ANSI S12.9 Parts 1, 2 and 3, or other accepted procedures.

73. The capacity of the proposed Project is the annual generation of about 20% of the electricity the project is designed to generate if it could operate 24 hours per day, seven days a week, and the design capacity of the Project is a fraction of the capacity of a small conventional power plant.

74. The Project is also substantially contiguous to a scenic overlook from NYS Route 16, near Rock City, a privately operated park open to the public.

75. The Project is in the view shed of nearly every point in the City of Olean, St. Bonaventure University, and the Village of Allegany not obstructed by a building or natural topography.

VI. CLAIMS FOR RELIEF

As and For a First Claim for Relief

76. The Petitioners repeat and re-allege each and every of the foregoing paragraphs with the same force and effect as if more fully set forth herein.

77. Based upon all of the foregoing together with the Planning Board and Town Board's failure to receive a complete Site Plan and rezoning application, owing to the absence of any study of low frequency and impulsive sound effects of the Project, it is submitted that the Planning Board and Town Board failed to perform actions enjoined upon them by law.

As and For a Second Claim for Relief

78. The Petitioners repeat and re-allege each and every of the foregoing paragraphs with the same force and effect as if more fully set forth herein.

79. It is herein alleged that the Planning Board acted outside its lawful authority in issuing a site plan approval for the Project.

As and For a Third Claim for Relief

80. The Petitioners repeat and re-allege each and every of the foregoing paragraphs with the same force and effect as if more fully set forth herein.

81. Based upon the provision of the Allegany zoning law in place prior to the Planning Board's purported Project approval, requiring rezoning as a precondition for permitting any new Commercial WECS such as the Project, it is hereby submitted that the Planning Board has taken actions included but not limited to granting Site Plan approval to the Project, which are *ultra vires* and in exceedence of their lawful authority and the Project should be enjoined from commencing construction until such time as the mandates of the local zoning law are procedurally and substantively met.

As and For a Fourth Claim for Relief

82. The Petitioners repeat and re-allege each and every of the foregoing paragraphs with the same force and effect as if more fully set forth herein.

83. The Planning Board's determination that by imposing a sound level limit of 40 dBA, found nowhere in the local law, they imposed conditions that fully mitigated all potential significant adverse noise impacts of the Project was arbitrary and capricious.

As and For a Fifth Claim for Relief

84. The Petitioners repeat and re-allege each and every of the foregoing paragraphs with the same force and effect as if more fully set forth herein.

85. The Planning Board and Town Board by ignoring sensitive noise receptors at residential locations outside the Project area identified by the Planning Board failed to perform a duty enjoined upon them by law.

As and For a Sixth Claim for Relief

86. The Petitioners repeat and re-allege each and every of the foregoing paragraphs with the same force and effect as if more fully set forth herein.

87. The Planning Board and Town Board's determinations that the Project was consistent with the local zoning law was arbitrary and capricious.

As and For a Seventh Claim for Relief

88. The Petitioners repeat and re-allege each and every of the foregoing paragraphs with the same force and effect as if more fully set forth herein.

89. Based upon the foregoing the Planning Board and the Town Board have engaged in violations of lawful procedure with regard to compliance with the State's Environmental Quality Review Act with regard to the continuation of the Planning Board in the role of "lead agency."

As and For an Eighth Claim for Relief

90. The Petitioners repeat and re-allege each and every of the foregoing paragraphs with the same force and effect as if more fully set forth herein.

91. Based upon the Planning Board and the Town Board's failure to fully consider the potentially significant adverse impacts on the host environment which includes noise impacts, it is respectfully submitted that these boards failed to avoid, minimize or mitigate the Project's impacts to the maximum extent possible and the issuance of Project approvals was arbitrary and capricious and an abuse of discretion.

As and For a Ninth Claim for Relief

92. The Petitioners repeat and re-allege each and every of the foregoing paragraphs with the same force and effect as if more fully set forth herein.

93. Based upon the foregoing, it is hereby submitted that the conclusions within the SEQRA findings statements of the Planning Board and the Town Board were arbitrary and capricious, affected by error of law, and not supported by substantial evidence.

As And For A Tenth Claim for Mandamus Relief

94. The Petitioners repeat and re-allege each and every of the foregoing paragraphs with the same force and effect as if more fully set forth herein.

95. Based upon the foregoing the Petitioners request this Court grant mandamus relief directing the Town Board, the Planning Board and the Code Enforcement Officer of the Town of Allegany to fully comply with SEQRA and the local zoning law.

As And For An Eleventh Claim for Mandamus Relief

96. The Petitioners repeat and re-allege each and every of the foregoing paragraphs with the same force and effect as if more fully set forth herein.

97. Based upon the foregoing, it is respectfully submitted that the Petitioners have established a reasonable likelihood of success on the merits based upon the respondent Planning Board's failure to comply with the the procedural, and substantive mandates the Town's zoning law.

98. It is further submitted that the Project, if built, threatens the Petitioner group with irreparable harm, not compensable with money damages. This threat is exacerbated by the fact that some of the petitioner members are unusually sensitive to sleep disturbance, and the Project would generate noises with qualities and numerical sound levels expected to disturb the ability to sleep.

99. It is further submitted that protection of the public health, safety and welfare, and quality of life in the community balance the equities in the favor of petitioner over the Town which appears to have ignored its fundamental duty in protecting residents beyond minimal noise impacts at night, where several Petitioner members have maintained their homes for generations.

100. Finally, granting the preliminary injunctive relief will preserve the *status quo* until this matter may come to be fully heard.

VII. RELIEF REQUESTED

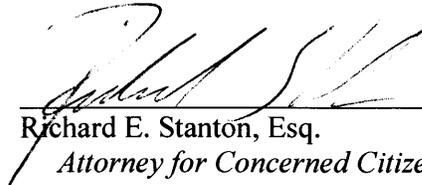
WHEREFORE, it is respectfully submitted that the Petitioners have no adequate remedy at law; and accordingly request this Court to:

1. Issue Preliminary Injunctive Relief staying the issuance of any Building Permit or permits for the use of Town roads, site clearance and construction of the Project until this matter may come to be fully heard and adjudicated; and

2. Issue Preliminary Injunctive Relief staying the Respondent, Allegany Wind, LLC from undertaking any physical activities, in furtherance of the proposed Project; and
3. Determine null and *void ab initio* the SEQRA Findings of the Town Board and Planning Board; and
4. Determine *ultra vires* Findings and approvals involving the Project issued by the Planning Board; and
5. Determine null and *void ab initio* the Site Plan Approval issued by the Planning Board; and
6. Permanently enjoin the taking of actions in furtherance of this Project by any of the Respondents or their agents until a supplemental environmental investigation is performed which fully studies the potential significant adverse impacts of the Project including but not limited to:
 - a) The production of a complete sound assessment at sensitive neighboring and neighborhood receptors previously identified by the Planning Board; and
 - b) the consideration of both economic benefits and adverse impacts and other social impacts on and near the Project area prior to the adoption of legal Findings Statements.
7. Permanently enjoin the taking of actions in furtherance of this Project by any of the Respondents or their agents until they complete a revised noise assessment in compliance with ANSI standards or comparable procedures for assessing noise impacts of industrial projects; and

8. Award reasonable costs to the Petitioners from the Respondent Planning Board and Town Board; and
9. Grant such other further and different relief as this Court deems just and equitable.

Dated: September 28, 2011



Richard E. Stanton, Esq.
*Attorney for Concerned Citizens of
Cattaraugus County, Inc.*
434 Delaware Avenue
Buffalo, NY 14202
(716) 842-0550

VERIFICATION

STATE OF NEW YORK)
) s.s.:
COUNTY OF CATTARAUGUS)

KATHY BOSER, being duly sworn, states that he is the President of CONCERNED CITIZENS OF CATTARAUGUS COUNTY, INC., that on behalf of CCCC as well on her own behalf she states that annexed Petition is true to her own knowledge, except as to matters therein alleged upon information and belief, and as to those matters she believes it to be true.



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

Subscribed and sworn to before me this 28th day of September, 2011.



Notary Public

CARY ALAN ABRAHAM #02AB6064367
Notary Public, State of New York
Resides in Cattaraugus County
My Commission Expires 9/24/20. 

LIST OF AFFIDAVITS AND ATTACHMENTS

1. Affidavit of Richard R. James, E-Coustic Solutions, Okemos MI, dated September 26, 2011, attaching:

- a. Richard R. James resume
- b. Minnesota Department of Health, Environmental Health Division, *Public Health Impacts of Wind Turbines*, dated May 22, 2009, excerpts
- c. Richard R. James, Review of Final Environmental Impact Statement, Allegany Wind Project, dated May 26, 2011

2. Affidavit of Ted Gordon, 180 Chipmonk Road, Allegany, New York, dated September 28, 2011, attaching:

- a. “Wind Turbine Setback Distances,” Allegany Wind Power Project, Draft Environmental Impact Statement, Figure 4, dated January 2010
- b. Closeup of same (showing Gordon residence location)
- c. “Proposed Project Layout” Map, Allegany Wind Power Project, Draft Environmental Impact Statement, Figure 4, dated January 2010
- d. Closeup of same (showing Gordon residence location)
- e. Google Earth aerial imagery of same
- f. Photos of Gordon residence, dated September 26, 2011

3. Affidavit of Kathleen Boser Premo, 1250 Chipmonk Road, Allegany, New York, dated September 28, 2011, attaching:

- a. Closeup of “Proposed Project Layout” Map, Allegany Wind Power Project, Draft Environmental Impact Statement, Figure 4, dated January 2010 (showing Premo residence location)

4. Affidavit of Ray Mosman, 1064 Chipmonk Road, Allegany, New York, dated September 28, 2011.

5. Affidavit of James C. Severtson, 925 Chipmonk Road, Allegany, New York, dated September 27, 2011, attaching:

- a. Letter from Bill Spencer, Everpower, dated on or about June 8, 2011, to Mr. Severtson, with proposed “Wind Project Neighbor Agreement”

6. Affidavit of Daniel Mohr, 3854 West Brach Road, Allegany, New York, dated September 28, 2011, attaching:

- a. Closeup of “Proposed Project Layout” Map, Allegany Wind Power Project, Draft Environmental Impact Statement, Figure 4, dated January 2010 (showing Mohr residence location)
- b. Google Earth aerial imagery of same