

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-

**AFFIDAVIT OF
KEVIN SHEEN
[ALLEGANY WIND, LLC]**

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
ENCORCEMENT OFFICER, and ALLEGANY WIND,
LLC.

Respondents.

KEVIN SHEEN, being duly sworn, deposes and says:

1. I am a Vice President of Allegany Wind, LLC (the "Applicant"), a Respondent in this proceeding. I have personal knowledge of the facts set forth in this Affidavit. I submit this Affidavit in opposition to: (A) the relief requested in the Petition, and (B) Petitioners' request for preliminary and permanent injunctive relief.

I. OVERVIEW

2. The Applicant requests that the Petition be dismissed. The Applicant, and its predecessor in interest, Everpower Renewables, have spent approximately \$4 million in development costs for this 29 turbine (approximately 72.5 megawatt ("MW")), wind energy

project in the Town of Allegany, New York (the "Town"). The development process began in 2005, the application for approvals to construct the project was filed in August, 2008, and approvals were finally granted in July, 2011. In light of the substantial investment in time and capital, the Applicant submits that the Petitioners are not entitled to a preliminary injunction.

3. The Town and its residents also have much to lose if an injunction is granted. The projected revenue to the Town, County and Schools from the Payment In Lieu of Taxes (PILOT) agreement and Host Community Agreement is approximately \$615,000/year. The project also will generate approximately 200 construction jobs, and the Applicant expects to spend approximately \$2 million/year in the community in goods and services once the project is in operation.

4. For the reasons discussed below, an expeditious resolution of this lawsuit is essential. Allegany now has all approvals and permits for the project, and is ready to proceed with construction. Unless the Petition is dismissed prior to December, 2011, it is likely that the project will be abandoned. The next few weeks are critical for funding/financial reasons.

II. FUNDING CONSIDERATIONS/TIMING

5. The Applicant has arranged a Department of Energy (DOE) grant and additional state funding from the New York State Energy Research Development Authority (NYSERDA) for this project as follows: (1) Construction of the Project must be substantially commenced prior to December 31, 2011 in order to receive the DOE grant, and (2) The project must generate commercially available electricity prior to December 31, 2012 to receive funding from NYSERDA. Missing these deadlines will mean that the Applicant will lose these funding sources for the project. Without the government grants for this alternative energy project, the project is not viable under current economic conditions.

6. For this reason, I was particularly disturbed to read that the principal project opponent, Gary Abraham, Esq., was quoted in the September 13, 2011 edition of the local newspaper as stating:

Mr. Abraham said he believes the [Concerned Citizens Group's] appeal will help stall the process of building the [Allegany Wind] wind farm.

* * *

He noted that EverPower has to begin construction on the 29-wind turbine farm this fall, and have it up and running by the end of 2012, to receive federal grant money for the project.

(The Article appeared in the Olean Times Herald, and is available on-line at http://www.oleantimesherald.com/news/article_7e2e2b0e-de18-11e0-81bd-001cc4c002e0.html), an excerpt of the article is annexed to this Affidavit as **Exhibit A**.)

7. Mr. Abraham is an attorney who was a vocal opponent of the project and purported to represent the citizens group, Concerned Citizens of Cattaraugus County, Inc., during the project review. Mr. Abraham also filed a Petition with the Town of Allegany, which advocated revisions to the Town's Wind Energy Conversion System (WECS) law and regulations. Mr. Abraham appears to be the leader, or architect, of the strategies employed by the citizens group that commenced this lawsuit, and—based on his comments—he seems to be intent on defeating the project through a process of attrition.

8. Allegany Wind, LLC respectfully requests that this Court review this lawsuit on an expedited basis given the financial consequences of even a short delay in construction. In addition to the financing deadline, winter conditions will impact the construction contractor's ability to pour concrete foundations for the wind turbines/towers and construct access roads.

III. EQUITABLE CONSIDERATIONS

9. The equities are in favor of the Applicant in this instance, and the Petitioners have

made no effort to show that they will suffer irreparable injury if the project is constructed.

10. Over the last few years, Allegany Wind, LLC has invested over \$4 million dollars and hundreds of hours in an effort to obtain all permits and approvals for this project. The process began in 2005, with the investigation of the site to determine whether it is suitable for wind power production. Once tests were complete, the Applicant began the time consuming process of: (A) preparing engineering and environmental studies for the application, and (B) negotiating leases and easements with the local property owners. There are dozens of property owners who have signed leases or easements for the project.

11. The Applicant has paid consultants and engineers for studies needed for the environmental impact review. The Applicant also has reimbursed the Town of Allegany for the costs it incurred for independent engineering firms and attorneys. The Town hired special counsel to assist the Planning Board and the Town Board with its review of the project. To date, the Applicant has paid over \$500,000 for these costs.

12. These out-of-pocket expenses do not include operating revenue that Allegany Wind, LLC will lose if an injunction is issued. Annual revenues are estimated in the range of hundreds of thousands of dollars.

13. The Town, and its residents, will receive substantial PILOT payments (in lieu of tax revenues) once the project is constructed. Annual revenues from the project improvements are estimated to be \$615,000, which will benefit the County, the Town, and the School District. Over the 20 year life of the project, the total anticipated payments are \$7.5 million. This does not include payments to landowners.

14. The project also will generate jobs. The project is estimated to create 200 construction jobs over a two (2) year period. Once constructed, it is anticipated that the project

will generate six (6) to seven (7) permanent, high paying jobs. This does not include the numerous jobs that will be generated by the estimated \$2 million in annual expenditures that the Applicant will make in the community.

15. The Applicant also has entered into a host community agreement with the Town, which will generate an average of \$225,000 annually (estimated) in revenue for use by the Town and its residents.

16. The project will provide statewide economic benefits. New York's spent more than \$57 billion for energy in 2005 and 90% of that was imported from outside New York. The State Energy Plan goals promote diversity of the State's economy through the use of alternative energy sources, such as wind.

17. The Project will also provide significant environmental and health benefits. The project is anticipated to provide clean renewable energy for approximately 17,000 to 26,500 homes annually based on average energy consumption. The clean renewable energy generated by the project will reduce the need for fossil fuel generation providing a reduction in key air pollutants, sulfur dioxide, nitrogen dioxide (acid rain precursors), mercury, and carbon dioxide (a contributor to global climate change).

18. If construction were enjoined, it is likely that the Applicant will lose its entire investment in this project, and the loss of funding will make it highly unlikely that the project will ever be built. As a consequence, approximately 200 construction workers will be out of work, and the suppliers and subcontractors that rely on the construction companies will lose another source of revenue during these economically challenging times. Local companies that supply concrete, gravel and other aggregates used during construction will be denied the opportunity to supply hundreds of thousands of dollars of their product to the project.

Additionally, if construction is enjoined, the Town, the County, and the local School District will lose millions of dollars in tax revenues, and the intended beneficiaries of the host community agreement will lose hundreds of thousands of dollars each year.

19. If the project is not built, New York will lose the benefits associated with the addition of 72.5 MW of clean renewable energy to the New York electric grid. New York will lose the opportunity to reduce the use of imported fossil fuels. New York will lose the benefits of the development of this unique wind resource and the health benefits associated with the development of an energy source that emits no harmful chemicals such as mercury. If the project is not built, it will be more difficult for New York to meet the goals of the 2009 New York State Energy Plan (<http://www.nysenergyplan.com/2009stateenergyplan.html>) which requires the increase use of energy systems that reduce greenhouse gas emissions, the Renewable Portfolio Standard (Case No. 03-E-0188), which requires the State obtain 30% of its energy from renewable sources by 2013, and other state and federal policies encouraging wind farm development.

20. Upon information and belief, the Petitioners have not demonstrated that they have standing to maintain this action, nor have the Petitioners shown that they will suffer immediate irreparable harm if the project is constructed.

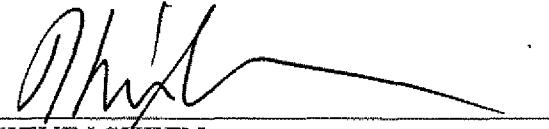
IV. GORDON CABIN

21. I have reviewed the Affidavit of Ted Gordon regarding his cabin on Chipmonk Road. Until June, 2011, Allegany Wind was not aware of this cabin being considered a full-time resident by the owner. (Apparently, the cabin was not listed on the tax map, and the Town has no record of a second legal residence on the property.) Since the cabin is not a legal dwelling, the set back requirements in the Wind Energy Regulations should not apply to Mr. Gordon's

cabin. Nevertheless, when we learned about Mr. Gordon's cabin, Allegany Wind offered Mr. Gordon the same Agreement we offered the other residents in close proximity to the project site, which includes an initial payment of \$1,500 to sign up with the project company and an annual payment of \$1,500. Mr. Gordon then provided a signed letter to the Town Board members in August, 2011 (a copy of which is annexed as **Exhibit B** to this Affidavit) stating that he and his wife "are amenable to entering into an agreement and working with Allegany Wind." Mr. Gordon later informed us that he was concerned that payments to him under the agreement may impact his eligibility for disability benefits. He requested that we pay for various improvements to his cabin including new windows, roof and other improvements; we agreed. Over time, Mr. Gordon's list of demands continued to grow. We were not aware that Mr. Gordon had changed his mind until we received this lawsuit and saw an article in the local paper.

V. CONCLUSION

22. The Applicant submits that the Petition should be dismissed, and the request for injunctive relief should be denied. If, however, the Court finds that a preliminary injunction is appropriate, the Applicant submits that such relief should be conditioned on the requirement that Petitioners file a bond, or undertaking, in the minimum sum of \$10 million. The bond amount should be set at a level sufficient to compensate the Applicant, and the Town, for the damages occasioned by the issuance of an injunction.



KEVIN SHEEN

Sworn to before me this
24 day of October, 2011



Notary Public

CLARA SIERRA
NOTARY PUBLIC-STATE OF NEW YORK
No. 01SI6208623
Qualified in New York County
My Commission Expires 26-2013

Concerned Citizens Appeal Wind Decision

Posted: Tuesday, September 13, 2011 10:55 am

By Kate Day Sager Olean Times Herald

ALLEGANY — The group Concerned Citizens of Cattaraugus County has filed an appeal to the contesting the recent approval of an EverPower wind farm project.

On Monday, the group's attorney, Gary Abraham, said the appeal is asking the zoning board for Allegany zoning law, and is arguing that the Allegany Planning Board failed to analyze noise im-

When reached today, Mr. Abraham said he believes the appeal will help stall the process of build-

"The division we're appealing under authorizes the zoning board to interpret the local law to see been met, actually apply," Mr. Abraham said.

He noted that EverPower has to begin construction on the 29-wind turbine farm this fall, and have receive federal grant money for the project.

Mr. Abraham said if the appeal is unsuccessful, Concerned Citizens has other options.

"I don't think this is over by any means," Mr. Abraham said.

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Theodore D. Gordon, Sr.

180 Chipmunk Road
Allegany, NY 14706

Town of Allegany Planning Board

Re: Noise Limitation Waiver

Dear Board Members:

This letter is written to advise you that we are currently negotiating an agreement with Allegany Wind LLC that will address any noise setback issues that may arise from any wind turbines that are located on adjacent to our property which is designated as No. 111.002-1-35. While we have not finalized the payment terms of the agreement, we are amenable to entering into an agreement and working with Allegany Wind.

Theodore D. Gordon 8/4/11
W.M.H. 8/4/11

EXHIBIT B