STATE OF NEW YORK
SUPREME COURT : COUNTY OF CATTARAUGUS

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

Petitioners,

Index No.: 2011-79455
Hon. Michael Nenno

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 ENFORCEMENT OFFICER, and ALLEGANY WIND, LLC,

Respondents.

MEMORANDUM OF LAW IN OPPOSITION TO THE VERIFIED PETITION

HODGSON RUSS LLP
Attorneys for the Town of Allegany Town Board, Planning Board, Zoning Board of Appeals, and Code Enforcement Officer
Daniel A. Spitzer, Esq.
Charles W. Malcomb, Esq.
The Guaranty Building
140 Pearl Street, Suite 100
Buffalo, NY 14202-4040
(716) 856-4000

WENDY A. TUTTLE, ESQ.
Town Attorney for the Town of Allegany, New York
98 West Main Street
P.O. Box 88
Allegany, New York 14706
(716) 372-3226

TABLE OF CONTENTS

TABLE OF CONTENTS - cont'd

TABLE OF CONTENTS - cont'd

TABLE OF AUTHORITIES

PAGE

STATE CASES

TABLE OF AUTHORITIES - cont'd

TABLE OF AUTHORITIES - cont'd

TABLE OF AUTHORITIES - cont'd

TABLE OF AUTHORITIES - cont'd

PAGE

LOCAL STATUTES

REGULATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

New York courts have long been skeptical of those who would misuse public policy "as a sword for personal gain rather than a shield for the public good,"[1] especially in the context of environmental review. SEQRA "is not there to be rattled as a sword which threatens to bleed the opposition to death by interminable litigation."[2] Yet Petitioners' counsel in this largely frivolous, mostly time-barred proceeding have announced that exact goal, proudly declaring their efforts are aimed at stalling the Allegany Wind Farm, so it loses federal funding.[3] The Court is respectfully requested to dismiss the Petition because:

- All claims against the Planning Board and its approvals, as well as its environmental review, are time-barred by the applicable thirty-day statute of limitations.
- Petitioners' "*ultra vires*" argument does not save them from the statute of limitations. As their dispute is with the accuracy of the noise study rather than its existence, the claim is not one of lack of jurisdiction, but of abuse of discretion. Such claims, even if true, do not toll the statute of limitations.
- In reality, all Petitioners present is dissatisfaction with the noise study. But each and every point they raised was exhaustively reviewed and answered by the Planning Board. Both the Planning Board and the Town Board took the requisite hard look at all relevant environmental impacts—including low frequency noise—and issued a reasoned elaboration for their decisions, fulfilling their obligation under SEQRA.
- The "eight residences" referenced in the Petition were never designated as "sensitive receptors" for purposes of the Zoning Ordinance; rather, the Planning Board, as part of its thorough environmental review, chose eight residences for purposes of a noise study only. The noise study was confirmed by the Town's independent engineering consultants. The

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1 *Charlebois v. J.M. Weller Associates, Inc.*, 72 N.Y.2d 587, 595, 535 N.Y.S.2d 356, 360 (1988).

2 *Weiss v. Planning Bd. of Poughkeepsie*, 130 Misc. 2d 381, 385, 496 N.Y.S.2d 627, 630 (Sup. Ct. 1985).

3 Kate Day Seeger, "Concerned Citizens Appeal Wind Decision," OLEAN TIMES HERALD, September 13, 2011, at 1 (attached as Exhibit A to this Memorandum of Law).

Allegany Wind Project fully complies with all sections of the Zoning Ordinance dealing with noise.

- Mr. Gordon's structure is not a residence because it was not legally built and no one may legally live there; it cannot be a "sensitive receptor" for purposes of the Zoning Ordinance.

- There is no appeal allowed from Planning Board decisions to the Zoning Board of Appeals.

- The Wind Energy Overlay District regulations specifically mandate that the Planning Board must complete its review of the site plan and special use permit application before the Town Board may review any request for creation of a Wind Energy Overlay Zone; thus, the Planning Board retained jurisdiction to issue the special use permit, approve the site plan, and act as lead agency pursuant to SEQRA.

At best, Petitioners have presented simple disagreements with the reviewing bodies; at worst, they deliberately misuse the judicial process with colorless claims; in neither instance have they presented this Court with any procedural or jurisdictional flaw in the reviewing process. The Court is respectfully requested to dismiss the Petition in its entirety.

STATEMENT OF FACTS

Everpower Renewables ("Everpower") on behalf of Allegany Wind, LLC ("Allegany Wind") (collectively "Allegany Wind" or the "Applicant"), applied to the Town of Allegany (the "Town") for the requisite approvals to construct a wind energy generating facility—a wind farm—in the Town (the "Project").[4] The Planning Board issued a special use permit and approved a site plan for the Project after a three (3) year environmental review.[5] Thereafter, as required by the Town's Zoning Ordinance II (the "Zoning Ordinance"), the Town

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4 Certified Record, dated October 25, 2011 ("R.") 1-73.

5 R. 6474-6711.

Board approved an application for a rezoning to create a Wind Energy Overlay District.[6] This Article 78 proceeding was brought to challenge those approvals.

A. Regulatory Background.

In 2007, the Town updated its Zoning Ordinance to include special rules applicable to Wind Energy Conversion Systems ("WECS") projects.[7] The comprehensive ordinance, known as the "Wind Energy Regulations,"[8] provided the planning tools needed to regulate such projects and "ensure that the development of these [WECS] facilities will have minimal impact on adjacent properties and to protect the health, safety, and welfare of residents of the Town."[9] The Wind Energy Regulations included provisions for siting and approving WECS, and reflected the Town Board's legislative judgment that wind energy facilities would be beneficial to the community provided that they are properly regulated. For example, the Wind Energy Regulations recognized that such facilities are a source of "renewable and nonpolluting energy . . . [which] will reduce dependence on nonrenewable energy resources and decrease air and water pollution . . . ."[10] These regulations also required that prior to construction of a wind facility, an applicant would be required to obtain a special use permit and site plan approval from the Planning Board.[11]

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6 R. 7466-7575.

7 Affidavit of Carol H. Horowitz, sworn to October 26, 2011 ("Horowitz Aff."), ¶¶ 6-7.

8 The current version of the Wind Energy Regulations (Section 5.25 of the Zoning Ordinance) is attached as Exhibit A to the Affidavit of Carol H. Horowitz. The version attached to Petitioners' Brief is out of date.

9 TOWN OF ALLEGANY ZONING ORDINANCE § 5.25(A); Horowitz Aff., ¶¶ 6-7.

10 TOWN OF ALLEGANY ZONING ORDINANCE § 5.25(A).

11 Horowitz Aff., ¶ 7.

B. Everpower Submits The Application To The Town And The SEQRA Review Begins.

In August 2008, the review process commenced when Everpower filed its initial application with the Town Code Enforcement Officer, in accordance with the procedure established by the Zoning Ordinance.[12] The application was then referred to the Planning Board for its review.[13] The Planning Board adopted a Notice of Intent to act as Lead Agency under the State Environmental Quality Review Act ("SEQRA"), and circulated it to other involved and interested agencies.[14] After the Planning Board had been established as the Lead Agency, it issued a positive declaration of significance, directing the project sponsor to prepare a draft environmental impact statement ("DEIS") for the Project.[15] To provide independent analysis and to assist in the environmental review process, the Town hired its own engineering firm, Conestoga-Rover & Associates ("CRA").[16] Throughout the environmental review of the Project, CRA evaluated the information and studies provided by the Applicant, and was available to answer technical questions raised by the Planning Board and members of the public.[17] With its consultants, the Planning Board conducted a full, thorough, and independent environmental review that fully complied with the requirements of SEQRA.

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12 R. 1-73.

13 R. 74.

14 R. 78-80; R. 83-103.

15 R. 144-146; R. 193-194; R. 195-214; R. 218-225.

16 R. 118; Horowitz Aff., ¶¶ 13-16; Affidavit of David M. Britton, P.E., sworn to October 26, 2011 ("Britton Aff."), ¶¶ 5-6.

17 Britton Aff., ¶ 6.

C. The 2010 Amendments To The Wind Energy Regulations.

The Town Board amended the Wind Energy Regulations in January 2010 to require that all WECS be located in a Wind Energy Overlay District.[18] In direct contradiction to the allegations of the Petition,[19] the amendment provided that any Wind Energy Overlay District would be considered by the Town Board only **after** the Planning Board issued its approvals for any project.[20] The amended Wind Energy Regulations required wind-project applicants to submit a map or plan, showing the location of the WECS facility, including the location of adjoining properties that have granted noise (or other) setbacks for a proposed project.[21] Allegany Wind complied with the law by submitting an overlay map.[22]

These amendments unequivocally provided that the Planning Board would continue to have principal responsibility for approval of wind projects, through its authority to issue special use permits and review site plans.[23] No overlay district could be established by the Town Board until **after** the Planning Board issued a special use permit and granted site plan approval for a project.[24] The Zoning Ordinance could not be any plainer, despite Petitioners' claims to the contrary.

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18 Horowitz Aff., ¶ 8.

19 Petition, ¶ 2a.

20 TOWN OF ALLEGANY ZONING ORDINANCE § 5.25(B)(1) ("Upon completion of the Special Use Permit and Site Plan . . . the Town Board shall consider [any] rezoning request."); Horowitz Aff., ¶ 10.

21 Horowitz Aff., ¶ 11.

22 R. 6714-6718.

23 Horowitz Aff., ¶¶ 9-10; TOWN OF ALLEGANY ZONING ORDINANCE § 5.25(B)(1).

24 Horowitz Aff., ¶ 10.

D. The DEIS Is Accepted By The Planning Board As Adequate For Public Review; The SEQRA Process Continues.

After reviewing the DEIS and requiring additional information, in February 2010, the Planning Board accepted the DEIS as complete and adequate for public review.[25] Although Petitioners focus on several aspects of the Noise Study, the DEIS evaluated a wide range of potential environmental impacts including geology, soils and topographic; water resources; biology, terrestrial and aquatic ecology resources; climate and air quality; aesthetic and visual resources; historic, cultural, and archeological resources; noise; transportation; socioeconomics; public safety; community facilities and services; irreversible and irretrievable commitment of resources; communication facilities; and land use and zoning.[26] The DEIS is the initial statement prepared in accordance with 6 N.Y.C.R.R. § 617.9 and is the means for agencies, project sponsors, and the public to systematically consider significant adverse environmental impacts, alternatives, and mitigation; the DEIS facilitates the weighing of social, economic, and environmental factors early in the planning and decision-making process.[27] The DEIS accepted by the Planning Board addressed each of the issues now contested by the Petitioners.

The Planning Board issued and published a notice of completion of the DEIS to all involved and interested agencies. It also scheduled a public hearing, its first of two on the Project, in which Petitioners fully participated.[28] Moreover, the Planning Board established a

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25 R. 2268-2273.

26 R. 325-2175; Britton Aff., ¶¶ 10-11.

27 6 N.Y.C.R.R. § 617.2(n).

28 R. 2268-2273.

public comment period in excess of the minimum provided for by law;[29] Petitioners' counsel continued to submit comments long after the comment period had closed.

E. The 2011 Amendments To The Wind Energy Regulations.

During the course of the Planning Board's review, the Town Board revised the Wind Energy Regulations a second time.[30] Project opponents filed a petition with the Town Board, urging an amendment to the Zoning Ordinance relating to wind projects.[31] They claimed that the law should be amended to provide further protections to the residents. The petition was filed by Gary Abraham, Esq., a vocal opponent of Allegany Wind's Project and the attorney who purported to represent the Concerned Citizens of Cattaraugus County, Inc. ("CCCC"). Mr. Abraham's petition was accompanied by a proposed ordinance and articles intended to justify the rigorous sound/noise standards advocated by Mr. Abraham and CCCC. Each of these was part of the Planning Board's and the Town Board's record on the proposed amendments.

Mr. Abraham's efforts generated a number of technical reports from Allegany Wind's sound expert, Hessler Associates, Inc., the Town's independent consultants, CRA, and the "expert" retained by Mr. Abraham, Richard R. James. The letters and reports evaluated the proposed noise standards and the claims regarding the potential adverse impacts of wind projects.

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29 *Id.*

30 Horowitz Aff., ¶ 12.

31 Petition, ¶ 31.

Prior to adopting the new regulations, the Town Board held meetings and public hearings regarding the proposed amendments. The discussion focused on new definitions in the regulations, including the definition of "A-Weighted Sound Pressure Level," and the standards for measuring sound impacts.[32] On February 24, 2011, the Town Board adopted an ordinance amending the Wind Energy Regulations.[33] Significantly, the new regulations maintain the provisions that the Planning Board is the agency primarily responsible for approving wind energy projects.[34]

There were no judicial challenges to the 2007 wind regulations, the 2010 and 2011 amendments, the related environmental reviews, or to any of the Town's laws amending the Zoning Ordinance. Yet this case is largely a challenge to those very standards.

F. The Planning Board Issues The FEIS, And Adopts A Statement Of Findings And Decision.

The Planning Board, together with its consultants, prepared and issued a Final Environmental Impact Statement ("FEIS"), which included responses to the comments received, including technical reports regarding sound and other environmental impacts.[35] At several Planning Board meetings (January 10, March 21, and April 11, 2011), the Planning Board

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32 Horowitz Aff., ¶ 12.

33 *Id.*

34 *Id.*

35 R. 4160-5673; R. 5674-5676.

worked extensively with its independent consultants on the FEIS, reviewing it section by section. The Planning Board issued the FEIS on April 27, 2011.[36]

In July 2011, almost three (3) years after it commenced the environmental review process, the Planning Board approved Allegany Wind's project for 29 wind turbines and related infrastructure. The Planning Board adopted a resolution: (1) adopting an 87-page Findings Statement pursuant to SEQRA; and (2) issuing a special use permit and approving the site plan for the Project.[37] The Findings Statement demonstrates an exhaustive review of all potential environmental impacts of the Project, including the sound/noise issues raised by CCCC; it included a specific section on **Low Frequency Noise**.[38]

The Planning Board's decision was filed in the Town Clerk's office on July 14, 2011.[39] The Planning Board's issuance of the special use permit and approval of the site plan are subject to a thirty-day statute of limitations period under the New York Town Law.[40] Petitioners commenced this proceeding well past the expiration of the applicable statutes.

G. The Town Board Establishes A Wind Energy Overlay District.

After the Planning Board issued a special use permit and approved the site plan for the Project, the Town Board adopted an ordinance establishing a Wind Energy Overlay

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36 *Id.*

37 R. 6474-6711.

38 R. 6507-6513.

39 Horowitz Aff., ¶ 5, Ex. B; R. 6478.

40 N.Y. TOWN LAW § 274-a(5) (for site plans); N.Y. TOWN LAW § 274-b(11) (for special use permits).

District.[41] This was done after the Town Board—an involved agency under SEQRA—issued its own statement of findings.[42] The Town Board could not properly consider this application until the Planning Board issued its approvals.[43] The boundaries of the overlay district coincide with the Project location, as required by the Zoning Ordinance. The Town Board adopted the ordinance on August 26, 2011 by a 4-1 vote.[44]

H. CCCC Improperly Files An Appeal With The Zoning Board of Appeals.

With no legal basis or authority, Petitioners took the unusual step of filing an "appeal" from the Planning Board's decision to the Town's Zoning Board of Appeals ("ZBA").[45] When interviewed by the press about his legal strategy, Petitioners' attorney, Gary Abraham, stated that he merely wanted to stall the process.[46] Delay was the goal to stop the Project because, as Mr. Abraham noted, the Applicant must begin construction of the Project in the Fall of 2011 in order to receive federal grant money for the Project.[47]

Because the "appeal" to the ZBA was obviously the wrong legal mechanism to challenge the Planning Board's action and its review of the Project under SEQRA, the attorney for the ZBA rejected the appeal.[48] Citing State and local law and *Viscio v. Town of Wright*,[49] the

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41 R. 7470-7477.

42 R. 7478-7575.

43 Horowitz Aff., ¶ 10; Town of Allegany Zoning Ordinance § 5.25(B)(2)

44 R. 7469.

45 R. 7651-7673.

46 Affidavit of Kevin Sheen, sworn to October 24, 2011 ("Sheen Aff."), ¶ 6; *see* Exhibit A, attached hereto.

47 *Id.*

48 R. 7674-7675.

ZBA's attorney informed Mr. Abraham that the ZBA lacked jurisdiction to consider his "appeal."[50]

SUMMARY OF ARGUMENT

The State Legislature has established a shorter statute of limitations for actions against planning boards specifically to prevent the death by litigation Petitioners hope to inflict here. All eleven causes of action[51] include claims against the Planning Board that are time-barred under the thirty (30) day statute of limitations period applicable to the issuance of the special use permit and approval of the site plan, as well as the Planning Board's corresponding environmental review.

As to the Planning Board losing jurisdiction (Second and Third Causes of Action), the Petitioners' Brief alleges the application was not complete because an element of the noise study was not followed and, therefore, the Planning Board lacked jurisdiction to approve the Project. Even if the allegation were true—and it is utterly false—the issue raised is whether the Planning Board acted in an arbitrary and capricious manner. The Planning Board, as the reviewing body and Lead Agency under SEQRA, had full discretion to determine the extent of the study, and the claim that the Planning Board's action was "*ultra vires*" is simply frivolous.

Similarly without merit is the assertion that creation of the Wind Energy Overlay District requirement during the application process ousted the Planning Board of responsibility

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49 *Viscio v. Town of Wright*, 42 A.D.3d 728, 839 N.Y.S.2d 840 (3d Dep't 2007).

50 R. 7674-7675.

51 Petition, ¶¶ 76-100.

for approving special use permits and site plans for wind projects. As the last amendment to the Zoning Ordinance unambiguously states: "Upon completion of the Special Use Permit and Site Plan . . . the Town Board shall consider [any] rezoning request."[52] The fact that the Town Board was charged with the responsibility of amending the zoning map—after the Planning Board's approvals were granted—to include the overlay district did not change a thing. Accordingly, CCCC's claims alleging the Planning Board was without authority to grant approvals or act as "lead agency" for SEQRA purposes should be rejected.

Even had the Petition been timely filed, the administrative record and the Zoning Ordinance demonstrate that CCCC's claims lack merit because both the Planning Board and Town Board took a hard look at the environmental impacts of the Project, and made a reasoned elaboration for their determinations. Both the substantive and procedural elements of SEQRA were complied with. The SEQRA causes of action focus solely on the perceived sound/noise impacts, but the record demonstrates an exhaustive review of the issue, including specific responses to the very points raised in the Petition. CCCC simply disagrees with the Planning Board's findings and conclusions and now demand its judgment be substituted for the Town's. But it is not the role of this Court to second-guess the lead agency's decision when it comes to evaluating environmental impacts. The Petition is devoid of merit and should be dismissed.

Equally without basis in law is Petitioners' appeal to the ZBA. Appeals to zoning boards are, by law, solely from decisions of administrative officials, not planning boards.

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[52] TOWN OF ALLEGANY ZONING ORDINANCE § 5.25(B)(1).

Petitioners were on notice that their efforts had been rejected by the State courts. The proper avenue of review was to this Court, but Petitioners did not take that route in a timely manner.

ARGUMENT

POINT I. THE STANDARDS ADOPTED BY THE TOWN WERE BASED ON EXPERT ADVICE AND ARE MORE RESTRICTIVE THAN THOSE REPEATEDLY UPHELD BY STATE COURTS.

At the outset, this Court should have no misunderstanding of what this case is actually about. The Town Board and Planning Board, based on expert advice and after long public consultations, established noise restrictions through local ordinances and permit conditions that, in their considered opinions, minimize the potential impacts to the community. Although presented in the Petition and Petitioners' Brief as a hyper-technical discussion of the sufficiency of the low frequency noise study and compliance with ANSI standards, Petitioners true demand is that the Court substitute its opinion as to appropriate setbacks for those of the Town. But a court is not a superlegislature; "it is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure the agency itself has satisfied SEQRA, procedurally and substantively."[53]

That inquiry is made considerably easier when it is recognized that the setbacks challenged as inadequate here—where the nearest non-participating residences are over 2,500 feet away from the nearest turbine—are more restrictive than those consistently upheld by other New York courts, including the Fourth Department. Consider:

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[53] *Matter of Jackson v. New York State Urban Development Corp.*, 67 N.Y.2d 400, 416, 503 N.Y.S.2d 298, 304 (1986).

In *Clear Skies Over Orangeville v. Town of Orangeville*,[54] the courts upheld a statute imposing a 50 dBA maximum, as measured at any off-site dwelling. The standard in Allegany at the nearest off-site dwelling is 40 dBA, a significantly tougher standard.

In *Finger Lakes Preserv. Assn. v. Town Bd. of Italy*,[55] the Court, after noting that the "Town was not required to mitigate noise to the greatest extent possible," upheld a 45 dBA standard at the nearest non-participating dwelling; again, the Allegany standard is the more restrictive: 40 dBA imposed by the Planning Board as a permit condition.

The local wind law in the the Town of Cohocton was upheld because the "Board concluded that the noise levels established by Local Law No. 2 were in keeping with the character of the Town and consistent with EPA guidelines for rural nighttime noise standards."[56] There, the Court upheld a 52 dBA maximum, measured at the property line of a non-project participating parcel; the Allegany Ordinance requires that noise levels not exceed "45 dB(A) for more than five (5) minutes out of any one-hour time period or exceed 50 dB(A) for any time period, at the boundary of the proposed project site."[57]

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54 *Clear Skies Over Orangeville v. Town of Orangeville*, 32 Misc. 3d 1235A, 2010 WL 7357949 (Sup. Ct. 2010), *affirmed*, 82 A.D.3d 1644; 919 N.Y.S.2d 426 (4th Dep't 2011), motion for leave to appeal denied, Mo. No. 2011-817 (Oct. 20, 2011).

55 *Finger Lakes Preserv. Assn. v Town Bd. of Italy*, 25 Misc. 3d 1115, 887 N.Y.S.2d 499 (Sup. Ct. 2009).

56 *Matter of Trude v. Town Bd. of Town of Cohocton*, 17 Misc. 3d 1104A, 851 N.Y.S.2d 61 (Sup. Ct. 2007). The Cohocton law is available at http://dutchhillwind.com/PDFs/DEIS/Appendices/Appendix%20L/Appendix%20L%20part%202%20-%20CohoctonWindmillLaw_No%202.pdf.

57 TOWN OF ALLEGANY ZONING ORDINANCE § 5.25(C)(2)(a)(i).

These cases all stand for the same proposition: when a town has carefully adopted a law and has exhaustively evaluated a project, including each and every one of Petitioners' concerns (and more), the courts have no basis to overturn the municipal decisions.

It is also respectfully submitted that the "battle of experts" Petitioners attempt to force on the Court—on the use of C-weighted noise limits versus A-weighted noise limits or the compliance with ANSI standards—is simply no contest. It is undisputed that the evaluation of evidence, including expert testimony, is sole province of the municipal bodies.[58] Every decision made was backed by substantial evidence and every one of Petitioners' assertions was refuted by independent experts.

The Court may not reach the merits of this case; as noted below, the claims presented are time-barred. But should it do so, it will find the standards adopted have already passed muster with the courts, and that the decisions are supported by a well documented record, reflecting a fair and comprehensive review. Petitioners' disingenuous efforts to "stall the project" can find no home in this record and the Petition should be fully dismissed.

POINT II. ALL CLAIMS CHALLENGING THE PLANNING BOARD'S APPROVAL OF THE PROJECT ARE BARRED BY THE APPLICABLE STATUES OF LIMITATIONS.

All claims challenging the Planning Board's decision to issue a special use permit and to approve the site plan for the Project must be dismissed as time barred. This includes

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58 *Albany-Greene Sanitation, Inc. v. Town of New Baltimore Zoning Bd. of Appeals*, 263 A.D.2d 644, 646, 692 N.Y.S.2d 831, 832 (3d Dep't 1999).

Petitioners' challenge to the environmental review conducted by the Planning Board as Lead Agency.

A. A Planning Board's Issuance Of A Special Use Permit And Approval Of A Site Plan Are Governed By A Thirty (30) Day Statute Of Limitations Period.

Any challenges to a planning board's approval of a site plan or special use permit must be commenced within thirty (30) days of the date the decision was filed in the office of the Town Clerk.[59] The Planning Board approved the site plan and issued a special use permit for the Project on July 11, 2011.[60] And the Planning Board's Statement of Findings and Decision was filed in the Town Clerk's office on July 14, 2011.[61] Therefore, the statute of limitations period for any judicial challenge to the Planning Board's action expired on August 16, 2011. This Article 78 proceeding was commenced on September 28, 2011. The statute of limitations expired more than a month prior to the date Petitioners filed the Verified Petition.

B. The Thirty (30) Day Statute Of Limitations Period Also Applies To The Environmental Review Conducted By The Planning Board As Lead Agency.

SEQRA does not have its own statute of limitations period.[62] Rather, the timing for mounting a SEQRA challenge is controlled by the limit applicable to the act that renders final

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59 N.Y. TOWN LAW § 274-a(11); N.Y. TOWN LAW § 274-b(9).

60 R. 6474-6593.

61 R. 6478; Horowitz Aff., ¶ 5.

62 *Crepeau v. Zoning Board of Appeals of Village of Cambridge*, 195 A.D.2d 919, 921, 600 N.Y.S.2d 821, 823 (3d Dep't 1993) ("A challenge based upon alleged noncompliance with SEQRA must be instituted within the proscribed time limit following a decision that renders final the consideration of SEQRA issues."); *see also Matter of Long Island Pine Barrens Soc'y v. Planning Bd. of Town of Brookhaven*, 78 N.Y.2d 608, 613-614, 578 N.Y.S.2d 466, 469 (1991) ("[T]he Board's filing of the preliminary plat approval was a decision which triggered the 30-day Statute of Limitations of section 282 for challenging the subdivision proposal on SEQRA grounds.").

consideration of SEQRA issues.[63] The 30-day statute of limitations for challenging the Planning Board's SEQRA determination and findings began running when the Planning Board's decision issuing the special use permit and approving the site plan was filed in the Town Clerk's office.[64] Here, the Planning Board's decision granting approvals and permits for the Project was filed on July 14, 2011.[65] The resolution adopting the Planning Board's Statement of Findings under SEQRA was also filed on that date.[66] Because the special use permit and site plan approval were issued **and** the SEQRA determination was made on the same date, the statute of limitations for any SEQRA challenge began to run on July 14, 2011 and expired on August 16, 2011.

"[F]inal agency action triggering the statute of limitations" occurred when the Planning Board, as lead agency, concluded the SEQRA process and issued a special use permit and approved a site plan for the Project.[67] Because this proceeding was commenced on

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63 *Id.*; *see Save the Pine Bush, Inc. v. Zoning Board of Appeals of the Town of Guilderland*, 220 A.D.2d 90, 94, 643 N.Y.S.2d 689, 692 (3d Dep't 1996) (holding that a SEQRA challenge to a decision of a town's zoning board of appeals must be brought within 30-days after the filing of the decision of the board with the town clerk).

64 *See Matter of Essex County v. Zagata*, 91 N.Y.2d 447, 453, 672 N.Y.S.2d 281, 284 (1998) (holding that agency action is final when the decision-maker arrives at a definitive position on an issue).

65 R. 6478; Horowitz Aff., ¶ 5.

66 R. 6478-6593.

67 *Stop-The-Barge v. Cahill*, 1 N.Y.3d 218, 222-223, 771 N.Y.S.2d 40, 41-42 (2003) (holding that agency action becomes final and statute of limitations for a SEQRA challenge begins to run where a developer has the ability to proceed with the project); *Fawcett v. City of Buffalo*, 275 A.D.2d 954, 955, 713 N.Y.S.2d 610, 612 (4th Dep't 2000) (holding that an agency determination is final and binding when it has its impact on a petitioner who is thereby aggrieved); *Matter of McNeill v. Town Bd. of Town of Ithaca*, 260 A.D.2d 829, 688 N.Y.S.2d 747 (3d Dep't 1999); *see also Lebow v. Village of Lansing Planning Bd.*, 151 A.D.2d 865, 542 N.Y.S.2d 840 (3d Dep't 1989); *Whiteco Metrocom Div. of Whiteco Indus., Inc. v. Lambert*, 221 A.D.2d 750, 751, 633 N.Y.S.2d 640, 641 (3d Dep't 1995) (limitations period commences when the decision is filed).

September 28, 2011, more than a month after the statute of limitations expired, Petitioners' SEQRA claims are time-barred.[68]

POINT III. THE CLAIMS CHALLENGING THE SEQRA REVIEW OF THE TOWN BOARD'S CREATION OF A WIND ENERGY OVERLAY DISTRICT ARE SIMILARLY BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

Petitioners charge that the Town Board has similarly failed to consider its environmental obligations, and suggest, therefore, that the Town Board's rezoning ordinance, creating the Wind Energy Overlay District, is somehow tainted. But "actions barred from review by the statute of limitations are considered to be 'protected from further challenge' in the event that SEQRA litigation is initiated with respect to a subsequent phase of the project."[69] Petitioner levels no procedural or substantive defect against the rezoning ordinance, only a vicarious SEQRA attack that must also be rejected.

A. In Challenging The Town Board's Creation Of A Wind Energy Overlay District, Petitioners Merely Attack The Planning Board's SEQRA Review. Since The Time Period Within Which Petitioners Could Have Challenged The SEQRA Review Expired, The Claims Against The Town Board Must Be Dismissed.

In determining the applicable statute of limitations period governing an Article 78 proceeding, courts look beyond the allegations in the Petition to determine the "focus" of the

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[68] The Court of Appeals decision in *Matter of Eadie v. Town Bd. of North Greenbush*, 7 N.Y.3d 306, 317, 821 N.Y.S.2d 142, 147 (2006) also supports this result. In that case, the Court noted that if the SEQRA process "inflicts the injury of which petitioner complains," the statute of limitations for a SEQRA challenge will have run notwithstanding that there is a "rezoning" decision that postdates the lead agency's SEQRA determination. The Court of Appeals explained that "when the injury complained of would not be a consequence of the rezoning, but of the SEQRA process, [then] it would make little sense either to require or to permit the person injured to await the enactment of zoning changes before bringing a proceeding." *Id.* at 317. In this case, CCCC is complaining about the SEQRA process—sound/noise impacts—not the adoption of the Wind Energy Overlay District.

[69] 9 ENVIRONMENTAL LAW AND REGULATION IN NEW YORK § 4:39 (2d ed. 2009) (citing *E.F.S. Ventures Corp. v. Foster*, 71 N.Y.2d 359 (1988)).

proceeding.[70] The "focus" of an article 78 proceeding is the underlying decision that gave rise to the litigation.[71] In *City of Saratoga Springs v. Zoning Bd. of Appeals of Town of Wilton*,[72] the Court stated:

> In order to determine what event triggered the running of the Statute of Limitations, we must first ascertain what administrative decision Petitioner is actually seeking to review, and then find the point when that decision became final and binding and thus had an impact on the Petitioner . . .[73]

When a petitioner challenges the adequacy of a board's SEQRA review of the environmental impacts of a project, the lead agency's SEQRA determination constitutes the "discrete and final" action commencing the statute of limitations, provided the lead agency also issues a permit for the project.[74] Here, the Planning Board's SEQRA determination, issuance of the special use permit, and approval of the site plan constitute the "discrete and final" action, commencing the statute of limitations.

Matter of McNeil v. Town Bd. of Town of Ithaca[75] is directly on point. There, a developer sought to construct a 56-unit apartment complex. The planning board was the lead agency under SEQRA, conducted the requisite environmental review, and granted preliminary

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70 *See Westage Dev. Group, Inc. v. White*, 149 A.D.2d 790, 791, 539 N.Y.S. 2d 583, 584 (3d Dep't 1989) (affirming dismissal of petition as time-barred).

71 *See, e.g., Slimrod Ventures v. Town Bd. of Town of Amsterdam*, 243 A.D.2d 944, 947, 663 N.Y.S.2d 370, 372 (3d Dep't 1997).

72 *City of Saratoga Springs v. Zoning Bd. of Appeals of Town of Wilton*, 279 A.D.2d 756, 719 N.Y.S.2d 178 (3d Dep't 2001).

73 *Id.* (citations omitted).

74 *See Matter of Stop-The-Barge v. Cahill*, 1 N.Y.3d 218, 222-223, 771 N.Y.S.2d 40, 41-42 (2003).

75 *Matter of McNeil v. Town Bd. of Town of Ithaca*, 260 A.D.2d 829, 688 N.Y.S.2d 747 (3d Dep't 1999).

site plan and subdivision approval. Just as happened in this case, the planning board referred the matter to the town board for a rezoning, with a recommendation that the rezoning request be approved. The town board rezoned the subject property by local law. Thereafter, petitioners challenged the local law granting the rezoning on the grounds that SEQRA was not complied with. Although petitioners framed their arguments to attack the town board's rezoning on the grounds that it violated SEQRA, petitioners were really challenging the SEQRA review by the lead agency (the planning board).

> Although petitioners' challenge was ostensibly directed at Local Law No. 3, the actual basis of their claim is the alleged impropriety of the SEQRA review conducted by the Planning Board . . . . The governing Statute of Limitations is found in Town Law § 274-a(11), under which a proceeding to review a board decision must be commenced within 30 days after the filing of such decision in the office of the town clerk. Where the challenged action relates to SEQRA review, the limitations period commences with the filing of a decision which represents the final determination of SEQRA issues . . . . [That] review was completed upon the issuance of the negative declaration.[76]

Because the proceeding was not timely brought against the lead agency, the Court dismissed the petition.[77]

Matter of McNeil is directly applicable to this case. First, Petitioners' challenge to the ordinance creating a Wind Energy Overlay District is really a challenge to the SEQRA review by the Planning Board (the lead agency). Second, because the Planning Board's Statement of Finding and Decision was filed in the Town Clerk's office on July 14, 2011, Petitioners commenced this proceeding too late. Third, as a result of Petitioners' failure to

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[76] *Id.* at 829-830.

[77] *Id.* at 830.

commence this proceeding timely, all Petitioners' claims should be dismissed. The subsequent action of the Town Board creating a Wind Energy Overlay District for the Project site cannot resuscitate a time-barred claim.

B. Subsequent Decisions Or Approvals On A Project Cannot Revive Time-Barred Claims.

The Court of Appeals has held against the exact practice Petitioners are now employing by brining this proceeding. Petitioners are trying to extend the statute of limitations period applicable to the SEQRA review by challenging subsequent approvals or decisions on a Project. But the Court of Appeals has unequivocally held that the issuance of a later approval or modification of an approval cannot be used "as a pretext for the correction of perceived problems which existed and should have been addressed" at an earlier time in the approval process.[78] "[A] subsequent governmental action . . . does not provide an occasion for reopening consideration of an earlier action that has already been rendered 'impervious to attack' by the statute of limitations."[79] The Planning Board's SEQRA review is "protected from further challenge" because the statute of limitations expired.[80] Later actions cannot be used as a pretext to challenge earlier, time-barred decisions regarding the same project.[81] This principle is followed by the Fourth Department.[82] Accordingly, Petitioner cannot use the Town Board's adoption of a

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78 *E.F.S. Ventures Corp. v. Foster*, 71 N.Y.2d 359, 373, 526 N.Y.S.2d 56, 64 (1988).

79 9 ENVIRONMENTAL LAW AND REGULATION IN NEW YORK § 4:39 (2d ed. 2009) (citing *E.F.S. Ventures Corp. v. Foster*, 71 N.Y.2d 359, 373 (1988)).

80 *E.F.S. Ventures Corp.*, 71 N.Y.2d at 363.

81 *See Schultz v. State of New York*, 274 A.D.2d 615, 618, 710 N.Y.S.2d 702, 705 (3d Dep't 2000) (holding that later actions cannot be used as a pretext to challenge an earlier, time-barred decision regarding the same project).

Wind Energy Overlay District as a pretext to challenge the Planning Board's issuance of the special use permit, approval of the site plan, and the SEQRA review; these determinations are "protected from further challenge" by the statute of limitations.[83]

The Petition is clear that the only "substantive" issues that Petitioner is challenging relate to sound or noise generated by the wind turbines, and the impacts of the noise on the Town's residents.[84] Petitioners concede that noise is the **only** "substantive" claim.[85] This is an issue that was exhaustively reviewed by the Planning Board throughout the SEQRA process; the administrative record shows the fastidiousness of the Planning Board's review of this potential environmental impact. The focus of this lawsuit, therefore, relates to the environmental review conducted by the lead agency in July 2011. The statute of limitations for challenging the SEQRA review expired before Petitioners commenced this proceeding.

Petitioners must not be allowed to use the Town Board's subsequent adoption of an ordinance creating a Wind Energy Overlay District as a pretext to resurrect a claim that is time-barred.

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82 *See, e.g., Dziedzic v. Gallivan*, 28 A.D.3d 1087, 814 N.Y.S.2d 454 (4th Dep't 2006), *Vaupell v. Canedo*, 1 A.D.3d 913, 767 N.Y.S.2d 742 (4th Dep't 2003), *Fawcett v. City of Buffalo*, 275 A.D.2d 954, 713 N.Y.S.2d 610 (4th Dep't 2000), *S.S. Canadiana Preservation Society, Inc. v. Boardman*, 262 A.D.2d 961, 694 N.Y.S.2d 539 (4th Dep't 1999).

83 *E.F.S. Ventures Corp.*, 71 N.Y.2d at 373; *see Gilmore v. Planning Bd. of Town of Ogden*, 16 A.D.3d 1074, 791 N.Y.S.2d 804 (4th Dep't 2005); *Slimrod Ventures v. Town Bd. of Town of Amsterdam*, 243 A.D.2d 944, 663 N.Y.S.2d 370 (3d Dep't 1997); *Stewart Park & Reserve Coalition v. New York State Dep't of Transp.*, 157 A.D.2d 1,555N.Y.S.2d 481 (3d Dep't 1990), *Westage Dev. Group, Inc. v. White*, 149 A.D.2d 790, 539 N.Y.S.2d 583 (3d Dep't 1989).

84 Petition, ¶¶ 2, 37, 83, 85, 91.

85 Petition, ¶ 7 ("The substantive areas of the surrounding environment for which potential adverse impacts of the Project have not been adequately considered involve noise impacts . . . including both construction and operational noise . . . .").

POINT IV. BOTH THE PLANNING BOARD AND THE TOWN BOARD FULLY COMPLIED WITH THE WIND ENERGY REGULATIONS IN THE ZONING ORDINANCE WHEN APPROVING THE PROJECT AND CREATING THE WIND ENERGY OVERLAY DISTRICT.

Apparently recognizing that the statute of limitations has set on their claims, Petitioners assert supposed jurisdictional flaws in the Planning Board's action. The Petition asserts that the Planning Board lost jurisdictional authority to review the Project's site plan and special use permit application because of amendments to the Zoning Ordinance.[86] But their brief claims the Planning Board lacked jurisdiction to review the Project because the application was incomplete.[87] Petitioners are trying to raise two, albeit incorrect, points in an attempt to circumvent the applicable statutes of limitations. The Town satisfied all true jurisdictional requirements, from directly granting the Planning Board statutory authority to act, to making the required referrals to the County Planning Board (which recommended approval of the Project). The type of defects alleged by Petitioners, if they were true, would not present jurisdictional flaws that would toll the statute of limitations. The Court should reject both these far-fetched arguments and dismiss the Petition in its entirety.

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86 Petition, ¶ 2a.

87 Petitioners' Brief, pp. 9-16.

A. Petitioners' Attempt To Do An End Run Around The Statute Of Limitations By Asserting "Jurisdictional" Claims Should Be Rejected As Frivolous.

1. Whether Or Not An Application Is Complete Is Within The Planning Board's Discretion; These Claims Are Reviewed Under The Arbitrary And Capricious Standard And Must Be Asserted Within The Applicable Statute Of Limitations Period.

Petitioners contend in their brief that Allegany Wind's application was incomplete because the noise report submitted did not discuss low frequency noise.[88] Petitioners further claim that an incomplete application is a jurisdictional defect, rendering the Planning Board's actions *ultra vires*.[89] Section 5.25(B)(1) of the Zoning Ordinance unequivocally vests the Planning Board with jurisdiction to review site plans and decide special use permit applications for commercial WECS.[90] The Zoning Ordinance also provides application requirements for commercial WECS.[91] The Appellate Division has specifically held that whether or not an application meets the Zoning Ordinance's requirements as to completeness is within the discretion of the Planning Board.[92] A planning board's interpretation of the zoning ordinance it administers is "given great weight and judicial deference . . . ."[93] Courts routinely "accord great deference to a planning board's interpretation of a zoning ordinance."[94]

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88 Petitioners' Brief, p. 13.

89 *Id.*

90 TOWN OF ALLEGANY ZONING ORDINANCE § 5.25(B)(1).

91 TOWN OF ALLEGANY ZONING ORDINANCE § 5.25(B)(2)-(3).

92 *Shop-Rite Supermarkets, Inc. v. Planning B. of Town of Wawarsing*, 82 A.D.3d 1384, 1386-1387, 918 N.Y.S.2d 647, 650 (3d Dep't 2011) (holding that a planning board's determination that an application was complete was entitled to great deference).

93 *Applebaum v. Deutsch*, 66 N.Y.2d 975, 977, 499 N.Y.S.2d 373, 374 (1985).

94 *Matter of North County Citizens for Responsible Growth, Inc. v. Town of Potsdam*, 39 A.D.3d 1098, 1100, 834 N.Y.S.2d 568, 570 (3d Dep't 2007).

The basic flaw in Petitioners' attempt to revive their expired claims is that a planning board's interpretation of a zoning ordinance or acceptance of an incomplete application is reviewed under the arbitrary-and-capricious or rational basis standard.[95] Thus, these claims must be brought within the applicable 30-day statute of limitations period; they are not jurisdictional defects.[96] Petitioners attempt to support their jurisdictional argument by citing inapposite case law dealing exclusively with General Municipal Law § 239-m (requiring referral of the action to the county planning agency).[97] The Planning Board's acceptance of Allegany Wind's application as complete and its interpretation of the Zoning Ordinance's requirements were proper; they have absolutely nothing to do with General Municipal Law § 239-m. Petitioners have cited no case where a planning board's misinterpretation of a zoning ordinance was held to be a jurisdictional defect. They have not because they cannot. Petitioners should not be allowed to do an end run around the statute of limitations period by equating an "abuse of discretion" argument with a jurisdictional defect.

2. Allegany Wind's Application Was Complete And Contained All Required Elements Set Forth In Section 5.25 Of The Zoning Ordinance.

In any event, Petitioners' argument that Allegany Wind's application was incomplete is simply wrong. The noise report required by Section 5.25(B)(3)(h) of the Zoning

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95 *Id.* at 1100 (stating that a planning board's interpretation of a zoning ordinance will be upheld unless it lacks a rational basis and is not supported by substantial evidence).

96 N.Y. TOWN LAW § 274-a(11); N.Y. TOWN LAW § 274-b(9).

97 Petitioners' Br., pp. 15-16. It should be noted that there is a split amongst the Appellate Division Departments as to whether a jurisdictional defect under General Municipal Law § 239-m must be asserted within the applicable statute of limitations period. In any event, General Municipal Law § 239-m compliance is not at issue here and Petitioners' attempt to rely upon inapplicable case law should be rejected.

Ordinance was indeed submitted by the Applicant.[98] It was included in the DEIS and was analyzed and evaluated by CRA, the Town's independent engineers. First, low frequency and impulsive noise are discussed in Section 3.6 of the noise assessment report, prepared by Hessler Associates (the "Hessler Report").[99] The following was included in the Hessler Report with respect to low frequency noise:

- Low frequency noise ("LFN") produced by wind turbines has been shown through the work or multiple investigators to be inconsequential in magnitude and usually similar to, or indistinguishable from, the low frequency sound level in the natural environment;
- That the widespread but mistaken belief that high or even harmful levels of LFN are produced by wind turbines probably arose from a confusion between the periodic sound (amplitude modulation) that can be produced and actual low frequency sound;
- That this belief can also be attributed to wind-induced microphone distortion where high levels of low frequency sound will always be recorded when measuring in windy conditions—whether a turbine is present or not; and
- Wind turbine noise can and often does have a periodic character but it is not usually considered impulsive.[100]

Petitioners' contention that the Applicant did not submit a noise analysis that discussed low frequency noise is frivolous. Allegany Wind's application was complete, and the Planning Board had jurisdiction to issue the special use permit and approve the site plan; the Petition should be dismissed.

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98 R. 1724.

99 Affidavit of David M. Hessler, P.E., sworn to October 24, 2011 ("Hessler Aff."), ¶ 7; R. 1750 (DEIS, Appendix N).

100 *Id.*

B. The Amendments To The Zoning Ordinance In No Way Removed The Planning Board's Jurisdiction To Review The Project's Site Plan And Special Use Permit Application.

Petitioners assert that the adoption of amendments to the Zoning Ordinance, requiring commercial WECS to be located in a Wind Energy Overlay District, deprived the Planning Board of jurisdiction over the site plan and special use permit application.[101] Petitioners' Brief offers no discussion of this fanciful notion, which was apparently based on an erroneous belief that such uses were not otherwise allowed (before creation of the Wind Energy Overlay District) and no site plan could be approved.[102] The plain text of the Zoning Ordinance quickly eliminates either claim.

The Zoning Ordinance outlines the procedure by which the necessary site plan, special use permit, and creation of the Overlay District are to be considered.

> Upon receipt of an application, the Special Use Permit and Site Plan Approval shall be processed by the Planning Board in accordance with this Section. The rezoning request will be referred to the Planning Board as required by Section 12.02 of this Ordinance, except that the Town Board may wait until the Planning Board has completed its application review, and any variances the Zoning Board of Appeals has granted, if required, prior to holding its public hearing. ***Upon completion of the Special Use Permit and Site Plan . . . the Town Board shall consider rezoning request.*** The Town Board and Planning Board may, if they wish, hold joint public hearings.[103]

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101 Petition, ¶ 2a.

102 Petition, ¶ 1a.

103 TOWN OF ALLEGANY ZONING ORDINANCE § 5.25(B)(1) (emphasis added).

As to the allowable uses argument, commercial WECS are specifically authorized in the Agriculture & Farming Zone as a conditional use, as shown in the District Use Regulations.[104] The requirement of an overlay district does not change the allowable uses or requirements of an underlying district.[105] As defined in the Town Zoning Ordinance, an Overlay District is a "district classification, such as for flood hazard areas, which is superimposed over and ***is in addition to***, another basic district classification. The overlay district adds further regulations controlling structures or uses to the underlying regulations which are established under the basic district classification."[106] The foundation for the consideration of the site plan and special use permit was firmly embedded in the Zoning Ordinance.

The new requirements in no way deprived the Planning Board of jurisdiction; thus, the Petitioners' claim that the Planning Board was not the proper "lead agency" for SEQRA review of the Project is meritless and should be rejected. The Planning Board was the agency "principally responsible for carrying out funding ***or approving the proposed action***."[107] Consequently, the seventh cause of action of the Petition should be dismissed.

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104 TOWN OF ALLEGANY ZONING ORDINANCE § 4.02.

105 *See* 3 PATRICIA E. SALKIN, NEW YORK ZONING LAW AND PRACTICE § 32A:76 (4th ed. 2011) ("Overlay zones can be created in advance to encourage development or protect specific areas, or can be added on a project by project basis.").

106 TOWN OF ALLEGANY ZONING ORDINANCE § 2.02 (emphasis added).

107 6 N.Y.C.R.R. § 617.2(u) (emphasis added); *see Coca-Cola Bottling Co. of N.Y. v Board of Estimate of City of N.Y.*, 72 N.Y.2d 674, 682-683, 536 N.Y.S.2d 33 (1988) (the final determination on environmental review must remain with the lead agency principally responsible for approving the project); *see also Seaboard Contr. & Material, Inc. v. Department of Envtl. Conservation*, 132 A.D.2d 105, 111, 522 N.Y.S.2d 679 (3d Dep't 1987) (since town has decision-making authority, albeit not the ultimate authority to issue or deny a permit, and is clearly concerned with the local impact of the project, the designation of the lead agency was not irrational), *Congdon v. Washington County*, 130 A.D.2d 27, 31-32, 518 N.Y.S.2d 224 (3d Dep't 1987) (the body selected as lead agency must have decision-making power and the determination of the agency as to which entity will be lead agency may only be set aside if it is irrational).

POINT V. MR. GORDON'S PROPERTY IS NOT A "SENSITIVE RECEPTOR" UNDER THE ZONING ORDINANCE.

Among the papers submitted with the Petition is the affidavit of Ted Gordon, who alleges that he lives at 180 Chipmonk Road in Allegany, is a member of CCCC, and that his home is located approximately 1,900 feet from Turbine 18E of the Project.[108] The Petition alleges that Mr. Gordon's "residence" is located within 2,500 feet of a turbine and, as a result, the sound level from the operation of the WECS "shall not increase by more than 3 dB(A) the nighttime or daytime ambient sound level . . ." at his property.[109] But Mr. Gordon's structure is not a legal residence under the Zoning Ordinance, nor could it be under State law. Thus, no violation has occurred.

The Zoning Ordinance provides that "[t]he sound level from the operation of a Commercial WECS shall not increase by more than 3 dBA the nighttime or daytime ambient sound level at any sensitive noise receptors, i.e., residences, hospitals, libraries, schools, places of worship, and similar facilities within 2,500 feet of the turbine . . . ."[110] While the definition of "sensitive noise receptors" includes residences, Mr. Gordon's structure does not qualify as a residence because he may not legally live there.

Mr. Gordon, in violation of the Zoning Ordinance and the Uniform Fire Prevention and Building Code, maintains an illegal structure on his property.[111] The Town only recently became aware that Mr. Gordon has erected an illegal structure. No building permit has

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108 Affidavit of Ted Gordon, sworn to September 28, 2011 ("Gordon Aff."), ¶¶ 1-3.

109 TOWN OF ALLEGANY ZONING ORDINANCE § 5.25(C)(2)(a)(ii).

110 *Id.*

111 Affidavit of Gerard E. Dzuroff, sworn to October 25, 2011 ("Dzuroff Aff."), ¶¶ 3-4.

been issued for the structure, nor has a certificate of occupancy been issued.[112] Under the Zoning Ordinance, the "issuance of the Certificate of Compliance allows the premises to be occupied."[113] But none has ever been issued to Mr. Gordon. Mr. Gordon's structure was never listed on the Town's assessment roll, and he has not been paying real property taxes on the structure.[114] The setbacks of the Zoning Ordinance protect legal structures; thus, they apply if "a building permit for such structure has been issued by the Town's Building Inspector, even if construction is not yet completed and the residence is not yet occupied."[115]

These are not minor matters; State law prohibits the property from being used as a residence because Mr. Gordon owns a land-locked parcel without access to his property through a state, county, or town street or highway.[116] New York Town Law § 280-a(1) prohibits the issuance of a building permit for any structure unless it has access to an official town, county, or state street or highway.[117]

Allegany Wind was required to demonstrate compliance with the noise limits at residences, and it did so. Mr. Gordon's illegal occupation of his structure does not make it a

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112 Dzuroff Aff., ¶ 5.

113 TOWN OF ALLEGANY ZONING ORDINANCE § 7.05(F)(2).

114 Dzuroff Aff., ¶ 7.

115 TOWN OF ALLEGANY ZONING ORDINANCE § 5.25(C)(1)(c) (setback from turbines to residences).

116 Dzuroff Aff., ¶ 8.

117 N.Y. TOWN LAW § 280-a(1).

"residence"; thus, Mr. Gordon's property is not a sensitive receptor for purposes of the Zoning Ordinance.[118] No violation has occurred.

POINT VI. BOTH THE PLANNING BOARD AND THE TOWN BOARD COMPLIED FULLY WITH THE PROCEDURAL AND SUBSTANTIVE ELEMENTS OF SEQRA; EACH BOARD TOOK A HARD LOOK AT ALL RELEVANT ENVIRONMENTAL IMPACTS, INCLUDING TURBINE NOISE; THEIR DETERMINATIONS ARE ENTITLED TO DEFERENCE AND SHOULD BE UPHELD.

A. An Agency's Determination Under SEQRA Is Entitled To Great Deference.

The deferential standard of review that applies to municipal board determinations also applies to determinations under SEQRA. SEQRA requires that an agency, in reviewing an action, identify significant environmental impacts, and, consistent with social, economic and other essential considerations, mitigate or avoid those impacts "to the maximum extent practicable."[119] In reviewing a municipality's SEQRA determination, a court must determine whether the agency identified the relevant areas of environmental concern, took a "hard look" at them, and made a "reasoned elaboration" of the basis for its decision.[120] "[I]t is not the role of the courts to weight the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively."[121] "Court review, while supervisory only, insures that the agencies will honor the mandate regarding environmental protection by complying strictly with prescribed procedures and giving reasoned consideration to

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118 Dzuroff Aff., ¶ 10.

119 N.Y. ENVTL. CONSERV. LAW § 8-0109(1); 6 N.Y.C.R.R. § 617.11(d)(5).

120 *Akpan v. Koch*, 75 N.Y.2d 561, 570, 555 N.Y.S.2d 16 (1990) (citing *Matter of Jackson v. New York State Urban Development Corp.*, 67 N.Y.2d 400, 417, 503 N.Y.S.2d 298 (1986)).

121 *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 416-417, 503 N.Y.S.2d 298 (1986).

all pertinent issues revealed in the process."[122] Most importantly, "**[n]othing in the law requires an agency to reach a particular result on any issue, or permits the courts to second-guess the agency's choice, which can be annulled only if arbitrary capricious or unsupported by substantial evidence**."[123] SEQRA "leaves room for a responsible exercise of discretion and does not require particular substantive results in particular problematic instances."[124]

In *WEOK Broadcasting Corp. v. Planning Bd. of Town of Lloyd*,[125] the Court of Appeals explained:

> The often stated rule regarding our role in reviewing SEQRA determinations needs no extended discussion; it is not to weigh the desirability of any proposed action or to choose among alternatives and procedural requirements of SEQRA and the regulations implementing it, but to determine whether the agency took a "hard look" at the proposed project and made a "reasoned elaboration" of the basis for its determination. Where an agency fails to take the requisite hard look and make a reasoned elaboration, or its determination is affected by an error of law, or its decision was not rational, or is arbitrary and capricious or not supported by substantial evidence, the agency's determination may be annulled.[126]

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122 *Id.*

123 *Id.*

124 *Matter of Town of Henrietta v. Dep't of Envtl. Conservation*, 76 A.D.2d 215, 222, 430 N.Y.S. 2d 440 (4th Dep't 1980).

125 *WEOK Broadcasting Corp. v. Planning Bd. of Town of Lloyd*, 79 N.Y.2d 373, 583 N.Y.S.2d 170 (1992).

126 *Id.* at 383; *see also Dunk v. City of Watertown*, 11 A.D.3d 1024, 784 N.Y.S.2d 753 (4th Dep't 2004).

"Substantial evidence" is "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" or "the kind of evidence on which responsible persons are accustomed to rely in serious affairs."[127]

This broad discretion applies not only to an agency's review of environmental impacts, it also applies to an agency's determination of what impacts should be investigated.[128] The Court of Appeals stated that "[a] rule of reason is applicable not only to an agency's judgment about the environmental conditions it investigates, but to its decisions about which matters require investigation."[129] The Court noted that "some common sense in determining the extent of [an agency's SEQRA review] is essential . . . [because] SEQRA proceedings can generate interminable delay."[130]

Where, as here, the lead agency's decision was preceded by the preparation of a DEIS and FEIS, the agency's findings are given an especially wide berth by the courts.[131]

B. The Planning Board Identified The Relevant Areas Of Environmental Concern, Took A Hard Look At Them, And Then Provided A Reasoned Elaboration For Its Decision.

It cannot be seriously disputed that the Planning Board identified the relevant areas of environmental concern, as required by SEQRA. Petitioners have not identified a single area of concern that was supposedly omitted by the Planning Board. After the Planning Board

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127 *Id.*

128 *Save the Pine Bush, Inc. v. Common Council of City of Albany*, 13 N.Y.3d 297, 890 N.Y.S.2d405 (2009).

129 *Id.* at 308 (quotation omitted).

130 *Id.* (quotation omitted).

131 *See* GERRARD, RUZOW & WEINBERG, ENVIRONMENTAL IMPACT REVIEW IN NEW YORK § 7.04[3].

issued a positive declaration of significance for the Project, the Applicant submitted the DEIS.[132] The DEIS was accepted for public review on February 24, 2010, only after the Planning Board members and their consultants were satisfied with the document.[133] The DEIS identified existing conditions, potential impacts, and mitigation measures with respect to (1) water resources; (2) biological resources; (3) climate and air quality; (4) visual and aesthetic resources; (5) historic, cultural, and archeological resources; (6) sound/noise; (7) traffic and transportation; (8) socioeconomics; (9) public safety; (10) community facilities and services; (11) communication facilities; and (12) land use and zoning.[134] Various studies and plans related to these areas of concern, potential impacts, and mitigation measures were submitted and evaluated by the Planning Board.[135] During the course of the environmental review, the Planning Board held several meetings over three years to evaluate, review, and discuss these issues.

The Planning Board evaluated each of these areas exhaustively, asking questions of the Town's independent consultants. Petitioners even concede that the Planning Board members, the Town's independent consultants and engineers, and the applicant's consultants "discuss[ed] and debate[d] environmental issues at length."[136] At several meetings, Planning Board members invited CRA to explain and discuss potential impacts.[137] Planning Board members also ensured they understood their legal obligations under SEQRA by involving their

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132 R. 325.

133 R. 2268-2273.

134 R. 325; Britton Aff., ¶¶ 9-11.

135 Britton Aff., ¶¶ 9-11.

136 Petition, ¶ 57.

137 Britton Aff., ¶ 9.

special counsel, Hodgson Russ LLP. Throughout the environmental process, the Planning Board asked the Town's independent consultants to review all studies, reports, and submissions by Allegany Wind. After the public hearing and receipt of public comments on the DEIS, the Planning Board again met with its independent consultants for the purpose of reviewing, responding, and summarizing the substantive comments received on the DEIS.[138] The Planning Board not only utilized the Applicant's consultants, but it required its own independent consultants to prepare the FEIS. As the lead agency is responsible for the adequacy and accuracy of the FEIS, the Planning Board members and their independent consultants worked diligently to issue the document. After several Planning Board meetings and after extensive preparation, the Planning Board issued the FEIS on April 27, 2011.[139]

After the FEIS was issued, the Planning Board, with the benefit of a complete SEQRA record, issued an 87-page Statement of Findings and Decision.[140] As required by SEQRA, the Statement of Findings considered the relevant environmental impacts, facts, and conclusions disclosed in the FEIS.[141] It also weighed and balanced relevant environmental impacts with social, economic and other considerations, and provided a rationale for the Planning Board's decision to issue the special use permit and approve the site plan.[142] Moreover, the Planning Board certified that SEQRA was complied with and that consistent with social, economic and other essential considerations from among the reasonable alternatives available,

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138 *See, e.g.*, R. 4144-4150; R. 3673.

139 R. 5675-5676.

140 R. 6478.

141 6 N.Y.C.R.R. § 617.11(d)(1); R. 6478-6571.

142 R. 6478-6571.

the Project avoids or minimizes adverse environmental impacts to the maximum extent practicable.[143]

The Planning Board's Statement of Findings also incorporates conditions and mitigation measures to avoid or mitigate adverse environmental impacts to the maximum extent practicable.[144] The mitigation measures adopted by the Planning Board in the Statement of Findings are also conditions to the special use permit and site plan for the Project.[145]

1. Sound/Noise Impacts.

The only allegations in the Petition relevant to the Planning Board's SEQRA review revolve around potential sound/noise impacts from the Project.[146] Petitioners claim that the Planning Board failed to adequately review potential sound/noise impacts and that the sound studies reviewed by the Planning Board were inadequate.[147] Both these claims lack merit and should be rejected.

The record demonstrates an extensive analysis of sound impacts associated with Wind Energy Conversion Systems ("WECS") and turbines. In fact, Petitioners admit in the Petition that "[a]t many of [the Planning Board's] meetings, facts and conclusions about noise

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143 *Id.*

144 *Id.*

145 R. 6581 (Permit Condition 1.3: "All representations and commitments made by Allegany Wind in its application, as amended, in the Draft and Final Environmental Impact Statement and in the Planning Board's Statement of Findings and Decision are applicable and shall be followed unless otherwise approved by the Town.").

146 Petition, ¶¶ 3b, 3c.

147 *Id.*

impacts were discussed."[148] The record also shows that the Planning Board and Town Board were educated over a three year period with respect to potential sound impacts from WECS, including the appropriate standards for such project. Sound impacts were discussed at several Planning Board meetings.[149] Information and comments on sound impacts were received from CCCC, Mr. Abraham, Mr. Abraham's "expert" Richard James, and members of the public. The Applicant also responded to this information in a very detailed and technical way. The Applicant's sound expert, David M. Hessler, P.E., provided information and analysis of potential sound impacts.[150] All of this information was extensively reviewed by the Town's independent engineers at CRA, who also presented information and analyses to the Planning Board for review.[151] SEQRA contemplates that experts will not always agree. The Planning Board may evaluate the findings of various experts and decide which findings are most reliable.[152] That is one of the lead agency's functions under SEQRA.[153] With respect to a lead agency's decision to accept one expert's findings over another, "[t]he scope of judicial review is very limited . . . ."[154] "[I]t is not a court's function to resolve the disparity in data presented to an agency. All that is

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148 Petition, ¶ 58.

149 Britton Aff., ¶¶ 9, 12-18; *see, e.g.*, R. 4148-4150; R. 4156-4157.

150 Hessler Aff., ¶ 7; R. 1750.

151 Britton Aff., ¶¶ 14, 16, 17, 18.

152 *Sun Co. Inc. (R&M) v. City of Syracuse Indus. Dev. Agency*, 209 A.D.2d 34, 51, 625 N.Y.S.2d 371 (4th Dep't 1995) ("A lead agency may rely upon the advice it receives from others, including consultants, if reliance is reasonable. The scope of judicial review is very limited, and it is not a court's function to resolve the disparity in data presented to an agency. All that is required is that [the lead agency] consider the data and give a reasoned response." (quotations omitted)).

153 *Id.*

154 *Id.*

required is that [the lead agency] consider the data and give a reasoned response."[155] Disagreement with studies relied upon by the lead agency does not alter or void the lead agency's determination.[156]

The Planning Board's acceptance of information and analysis provided by the Applicant's sound experts, Hessler Associates, and the information and analysis provided by its independent experts at CRA, was reasonable and should be upheld. Mr. Abraham and his expert's disagreement with the Planning Board's review "does not alter [the Planning Board's] determination, since scientific unanimity need not be achieved."[157]

The Planning Board considered all the data and gave a reasoned response. After carefully evaluating all the information received by Hessler Associates, CRA, Mr. James, and the public, the Planning Board and the Town Board made the following findings with respect to sound impacts:

> **3.13 Sound**
>
> Noise from construction and operation of the Project is a major concern for local residents (as reflected in the number of public comments received on the DEIS), as well as the Planning Board. The Planning Board hired its own expert engineers to conduct reviews of the Allegany Wind DEIS and FEIS, and to conduct independent sound studies. The Planning Board's studies included

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155 *Id.*; *see also Mobil Oil Corp. v. City of Syracuse Indus. Dev. Agency*, 224 A.D.2d 15, 646 N.Y.S.2d 741 (4th Dep't 1996) ("We do not disregard the fact that petitioners' experts have reached a different conclusion . . . . [H]owever, it is not a court's function to resolve the disparity in data presented to an agency. All that is required is that [the lead agency] consider the data and give a reasoned response." (quotation omitted)).

156 *Schodack Concerned Citizens v. Town Bd. of Town of Schodack*, 148 A.D.2d 130, 134, 544 N.Y.S.2d 49 (3d Dep't 1989) ("That petitioners' expert disagrees with the studies used does not alter this determination, since scientific unanimity need not be achieved."); *see also Sun Co. Inc. (R&M)*, 209 A.D.2d at 51.

157 *Id.*

Ambient Sound Level Assessment and Noise Impact Modeling. The conclusions of the Planning Board are based on the reports and findings of the Planning Board's experts, in addition to the information provided in the DEIS and FEIS.

Analyses were performed in the Town to establish baseline ambient noise levels, and to assess the impact the Allegany Wind Project will have on potential noise receptors during both Project construction and operation.

One tool for considering potential sound impacts is the DEC guidance document (NYSDEC "Program Policy DEP-00-1 Revised: June 3, 2003 — Assessing and Mitigating Noise Impacts" ["DEC guidance"]). Among other things, this guidance provides that if studies demonstrate circumstances in which Project sound could exceed background sound at sensitive receptors by 6 dBA or more, additional evaluation should be undertaken to determine whether this circumstance would result in adverse impacts.

Studies conducted by the Applicant, and verified by independent studies conducted by the Town's consultants, confirmed that, due to unusually low background sound levels in the Town, under worst-case conditions, Project sound could exceed this low background level by more than the 6 dBA threshold at certain sensitive receptors. Consistent with the DEC guidance, the Planning Board recognizes two control mechanisms which will ensure that any such exceedances of the 6 dBA threshold will not result in undue adverse sound impacts to sensitive receptors....

* * *

At the time the FEIS was released, Project sound exceeded the 45dBA standard at seven non-participating property boundaries and exceeded 40dBA at 10 non-participating residential structures. The Applicant committed to bringing the Project into compliance with these standards....

Subsequent to the issuance of the FEIS, the Applicant has provided a report demonstrating that updated sound power level information for the Nordex N100 will reduce the noise levels predicted in the DEIS/FEIS.

* * *

The Applicant's report states that the updated sound power level information, as well as sound dampening measures proposed to be

used at Turbine 4E, will bring the Project into full compliance with the 40dBA and 45dBA thresholds. The Town's consultant, CRA, has run an independent model based on the updated sound power level for the Nordex N100 including the reduced sound power level at Turbine 4E resulting from sound dampening at this turbine. CRA has confirmed, using 1.5 meters as the height of the receptor and using the full power mode of 106 dBA, all parcels shall comply with the 40 dBA at non-participating residences....

Accordingly, the Planning Board concludes that, based on the updated Sound Power levels, the Project, without further easements or controls, will comply with the 45dBA/40dBA standards with one exception. Under worst case conditions Turbine 4E will cause an exceedance of the 45dBA standard up to 149 feet within the property line of a single nonparticipating property. Consequently, unless or until the Applicant is able to secure a sound easement for this single property affected by Turbine 4E, the Applicant will implement sound dampening at Turbine 4E (*i.e.* will not operate this turbine at a power mode exceeding 104 dBA) to avoid and mitigate any potential adverse sound impacts on this non-participating property to the maximum extent practicable, consistent with the Town's local law and the Board's intended permit condition.[158]

Likewise, the Planning Board evaluated low-frequency noise, despite Petitioners' claims to the contrary:

3.9.7 Low Frequency Noise

Modern 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 low frequency sound associated with this Project. According to the turbine manufacturer's certified specifications, turbine vibration is minimal on properly functioning wind turbines. If vibration occurs, the turbine computer system detects the abnormality and the turbine is automatically shut down. Numerous studies show that the low frequency content in the sound spectrum of a typical modern wind turbine—like those proposed for this Project—is no higher than that of the natural background sound level in rural

158 R. 6531-6535.

areas (Sondergaard & Hoffmeyer, 2007; Hessler, 2008; Hessler et. al., 2008).

In response to concerns that sounds emitted from wind turbines cause adverse health consequences, AWEA and CanWEA established a scientific advisory panel to conduct a review of current literature pertaining to the perceived health effects of wind turbines (see DEIS Appendix O). The objective of the multidisciplinary panel was to provide an authoritative reference document. The panel evaluated peer-reviewed literature on sound and health effects, as well as sound produced by wind turbines. The panel concluded that there is no evidence that the audible or sub-audible sounds produced by operating wind turbines have any direct adverse physiological effects, and the ground-borne vibrations from wind turbines are too weak to be detected by, or to affect, humans. In addition, based on the levels and frequencies of the sounds produced by operating wind turbines and the panel's experience with sound exposures in occupational settings, the sounds produced from operating wind turbines are not unique and therefore do not likely cause direct adverse health consequences (Colby et al., 2009).

The Planning Board received comments that wind energy facilities present health risks, particularly from low frequency noise. The FEIS addresses public comments on this issue. After reviewing the evidence presented, the Planning Board finds the studies referenced in the DEIS and FEIS are reliable and confirm there is no evidence of adverse public health effects from low frequency sound from wind turbines.[159]

As discussed above, it is within the Planning Board's discretion to determine which expert's findings to accept, and it is certainly within its discretion as to how much attention a potential impact should receive.[160]

Low frequency noise was discussed in the Hessler Report, which was included in the DEIS. The Hessler Report explained that (1) low frequency noise ("LFN") produced by

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159 R. 6512-6513.

160 *See Save the Pine Bush, Inc. v. Common Council of City of Albany*, 13 N.Y.3d 297, 307-308, 890 N.Y.S.2d 405 (2009).

wind turbines has been shown through the work or multiple investigators to be inconsequential in magnitude and usually similar to, or indistinguishable from, the low frequency sound level in the natural environment; (2) the widespread but mistaken belief that high or even harmful levels of LFN are produced by wind turbines probably arose from a confusion between the periodic sound (amplitude modulation) that can be produced and actual low frequency sound; (3) this belief can also be attributed to wind-induced microphone distortion where high levels of low frequency sound will always be recorded when measuring in windy conditions—whether a turbine is present or not; (4) wind turbine noise can and often does have a periodic character but it is not usually considered impulsive.[161]

Further demonstrating a complete SEQRA review are the conditions requiring mitigation of potential adverse environmental impacts. This is consistent with the Planning Board's obligation to require mitigation of potential adverse impacts to the maximum extent practicable. The special use permit and site plan approval provide several conditions to ensure that sound impacts are mitigated to the maximum extent practicable—both during construction and when the turbines become operational. The permit conditions provide, among other things, for post construction monitoring, purchase of sound monitoring equipment for the Town, and a complaint resolution process in the event noise complaints are filed. The conditions provide:

> Allegany Wind will submit an updated Environmental Monitoring Plan ("EMP") five (5) days prior to construction. The EMP will contain all permits, permit conditions, and other commitments made by Allegany Wind during the permitting processes before local, State and Federal agencies. [Permit Condition § 3.1]
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> * * *

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[161] Hessler Aff., ¶ 7.

Pursuant to the EMP, Allegany Wind will employ dedicated, discipline oriented Quality Technician/Inspector(s) ("Environmental Inspector(s)"), who will have the credentials, knowledge and experience required for understanding the environmental and agricultural requirements as set forth in the permits, permit conditions and approvals for this Project. The EMP shall identify the Environmental Inspector(s) responsible for implementing the EMP on behalf of Allegany Wind. Environmental Inspector(s) shall prepare compliance reports per the EMP and submit same to the Town until construction is completed. [Permit Condition § 3.3]

The Complaint Resolution Procedure shall be implemented as set forth in the Project EISs. [Permit Condition § 14.1]

The Complaint Resolution Procedure specifically addresses those residences affected by Project impacts including but not limited to shadow flicker, noise, stray voltage, spring or well water impacts and television reception issues. Any such impacts must be verified by the Town's Designated Engineer. [Permit Condition § 14.2]

Residences and businesses of the Project that experience sound pressure levels above the maximum noise levels established by the Town of Allegany Zoning Ordinance II or the Statement of Findings may lodge a complaint through the Complaint Resolution Procedure. The Town's Designated Engineer shall investigate the noise levels at a residence or business once a complaint has been lodged, in order to verify the complaint. If the complaint is verified, the affected residence or business shall be offered the opportunity to have appropriate landscaping (e.g., tree line between the offending wind turbine(s) and window(s)), fencing, window treatments or other screens to mitigate noise impacts at the expense of Allegany Wind. [Permit Condition § 14.4]

A post construction noise assessment shall be conducted within one year of commencement of operation. [Permit Condition § 15.1.1]

Sound Meter. Allegany Wind shall purchase and provide to the Town of Allegany a SPER Scientific Direct, Model #840015,

> certified Type 1 Sound Meter, or similarly sophisticated sound meter. [Permit Condition § 15.1.2].[162]

Courts have reviewed similar claims of alleged insufficient SEQRA review with respect to sound/noise impacts from WECS, and have found them to be without merit.[163] In *Clear Skies Over Orangeville v. Town Board of Town of Orangeville*,[164] the petitioners challenged the adoption of a noise standard for commercial WECS on the ground that the town board ignored low-frequency noise. But there, as here, the administrative record showed that low frequency noise was discussed and evaluated by the town board, and public comments on the subject were reviewed and responded to.[165]

It is difficult to imagine how a harder look could have been taken at sound/noise impacts. The Planning Board and the Town Board fully discharged their duties under SEQRA by taking the requisite "hard look" at the sound impacts associated with the Project, and they made a reasoned elaboration for their decisions to approve the Project. All of Petitioners' claims to the contrary should be dismissed.

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162 R. 6581-6593.

163 *See, e.g.*, *Clear Skies Over Orangeville v. Town Board of Town of Orangeville*, 32 Misc.3d 1235(A), 2010 WL 7357949 (Sup. Ct. Wyoming Co. 2010), *a'ffd* 82 A.D.3d 1611, *l.v. denied*, 919 N.Y.S.2d 426 (4th Dep't 2011), Mo. No. 2011-817 (Oct. 20, 2011) ("Upon examining the record, including the minutes of the public hearings, the written public comments, the minutes of the Town Board meetings and work sessions, and the completed EAF, this Court determines that respondents did not fail to give detailed attention to the issue of noise generation, including low-frequency noise.").

164 *Id.*

165 *Id.* at *5.

POINT VII. THE APPEAL TO THE ZBA WAS PROPERLY REJECTED.

In another apparent effort to overcome the expired limitations period, Petitioners filed an appeal of the Planning Board's approvals to the Town Zoning Board of Appeals ("ZBA") under the guise of seeking an "interpretation" of the zoning requirements.[166] The CCCC ZBA Petition was devoid of any discussion of the ZBA's jurisdiction, and was rejected on numerous grounds, as the ZBA has no appellate authority over the actions of the Planning Board.[167]

The CCCC ZBA Petition asserts that it is seeking an interpretation pursuant to Town Law 267-a(5)(b), which reads:

> An appeal shall be taken within sixty days after the filing of any order, requirement, decision, interpretation or determination of the ***administrative official,*** by filing with such administrative official and with the board of appeals a notice of appeal, specifying the grounds thereof and the relief sought. The ***administrative official*** from whom the appeal is taken shall forthwith transmit to the board of appeals all the papers constituting the record upon which the action appealed from was taken.[168]

Therein lies the first fatal hurdle Petitioners face; appeals to the ZBA are from determinations of administrative officials only. There is no authorization in the State statute upon which they assert jurisdiction for an appeal of the Planning Board's actions. The Town Zoning Ordinance follows the same rule. Under Section 7.07(B)(1)(a), the ZBA's power is

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166 Appeal of Concerned Citizens of Cattaraugus County against the Planning Board to the Zoning Board of Appeals (herein the "CCCC ZBA Petition"), filed September 12, 2011; R. 7651.

167 Letter from Wendy A. Tuttle, Esq. to Gary A. Abraham, Esq, dated September 21, 2011; R. 7674.

168 N.Y. TOWN LAW § 267-a(5)(b) (emphasis added).

limited to an appeal of an "interpretation made by the Code Enforcement Officer."[169] There is nothing in State law or the Zoning Ordinance authorizing appeals from decisions or interpretations of the Planning Board.

The CCCC ZBA Petition also ignores the only avenues for review of Planning Board actions permitted by the State Legislature. Town Law § 274-a(11) (site plans) and § 274-b(9) (special use permits) specifically state that Planning Board issuance of site plan and special use permit approvals are to be appealed to the state courts *via* an Article 78 proceeding.[170] The Petitioners may not skirt the only authorized avenue of relief—and thereby revive time-barred claims—by ignoring State law.

As Petitioners were informed by Attorney Tuttle, this type of claim was dealt with in the case of *Viscio v. Town of Wright*.[171] At issue there was a subdivision approval. The court noted that Town Law § 282 mandates that appeals from the Planning Board must be to State court. The town passed a zoning ordinance which permitted appeals against the Planning Board to first go to the zoning board before the appeal could be reviewed by the courts. The Court ruled that this was permissible, but to do so the ordinance had to specifically state that it was superseding State law. Absent this, State law governs, requiring appeals of planning board decisions to go directly to State court. Since the ordinance did not contain any supersession language, the necessary delegation of appellate authority was invalid. Here, the Town of

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169 TOWN OF ALLEGANY ZONING ORDINANCE § 7.07(B)(1)(a).

170 N.Y. TOWN LAW § 274-a(11) (site plans); N.Y. TOWN LAW § 274-b(9) (special use permits).

171 *Viscio v. Town of Wright*, 42 A.D.3d 728, 839 N.Y.S.2d 840 (3d Dep't 2007).

Allegany has not attempted to change State law; any argument to the contrary must fail because there is no hint of any supersession language in the Town's Zoning Ordinance.

The CCCC ZBA Petition was a frivolous action designed—according to CCCC's attorney Gary Abraham—to stall the wind farm; the claim here is similarly devoid of merit and should be dismissed.

POINT VIII. PETITIONERS HAVE NOT DEMONSTRATED ENTITLEMENT TO PRELIMINARY INJUNCTIVE RELIEF. THEIR REQUEST SHOULD BE DENIED, BUT, IF GRANTED, PETITIONERS MUST POST A SIGNIFICANT UNDERTAKING TO COMPENSATE ALLEGANY WIND FOR POTENTIAL DAMAGES.

A. Petitioners Have Not Made The Required Showing For Preliminary Injunctive Relief.

Petitioners cannot satisfy the stringent requirements of CPLR § 6301. To obtain such drastic relief, Petitioners must prove each of the following to demonstrate they are entitled to preliminary injunctive relief:

1. a likelihood of ultimate success on the merits;
2. irreparable injury to Petitioners if the injunction is not granted; and
3. a balancing of the equities in Petitioners' favor.[172]

The Petition fails to meet any of these three requirements.[173] Preliminary injunctive relief "is a drastic remedy" which cannot be granted absent the Petitioners' establishment of "a clear right thereto."[174]

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172 N.Y. C.P.L.R. § 6301; *Doe v Axelrod*, 73 N.Y.2d 748, 750, 536 N.Y.S.2d 44 (1988).

173 *See generally Town of Porter v Chem-Trol Pollution Servs., Inc.*, 60 A.D.2d 987, 988, 401 N.Y.S.2d 646 (4th Dep't 1978).

Conclusory allegations of irreparable injury will not suffice.[175] Petitioner "must submit affidavits and other proof supplying evidentiary detail" on these points.[176] Petitioners have utterly failed to do so. But most importantly, Petitioners cannot show probability of success on the merits. This alone mandates denial of the requested relief.[177]

The third prong of the test for injunctive relief requires the Court to weigh all factors to determine whether the balance of the hardships weighs in Petitioners' favor.[178] When the potential loss to a party sought to be enjoined is greater than the hardship to the party seeking an injunction, the injunction must be denied.[179] Petitioners *fail to even allege* that a balance of the equities favors the granting of preliminary injunctive relief. In the absence of proof of irreparable injury or a balance of the equities in its favor, Petitioners' request for a preliminary injunction must be denied.[180]

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174 *See e.g., Peterson v Corbin*, 275 A.D.2d 35, 37, 713 N.Y.S.2d 361 (2d Dep't 2000).

175 *J. S. Anand Corp. v Aviel Enters., Inc.*, 148 A.D.2d 496, 538 N.Y.S.2d 840 (2d Dep't 1989).

176 *Armbruster v Gipp*, 103 A.D.2d 1014, 478 N.Y.S.2d 419 (4th Dep't 1984) ("The plaintiff has the burden of proof in seeking a preliminary injunction, and must demonstrate factually and convincingly through affidavits and other proof supplying evidentiary detail that he would be irreparably damaged if an injunction were not granted before trial.").

177 *See Doe v Axelrod*, 73 N.Y.2d 748, 750, 536 N.Y.S.2d 44 (1988); *Borland v Wilson*, 202 A.D.2d 946, 610 N.Y.S.2d 891 (3d Dep't 1994) (request for preliminary injunctive relief denied where plaintiff "failed to show that he would suffer irreparable injury if his request for the preliminary injunction was not granted").

178 *423 S. Salina St., Inc. v City of Syracuse*, 68 N.Y.2d 474, 482-83, 510 N.Y.S.2d 507 (1986).

179 *See id.*

180 *See e.g., O'Neill v. Poitrus*, 158 A.D.2d 928, 929, 551 N.Y.S.2d 92 (4th Dep't 1990); *Town of Porter v. Chem-Trol Pollution Servs., Inc.*, 60 A.D.2d 987, 988, 401 N.Y.S.2d 646 (4th Dep't 1978) (denying injunctive relief because "although it is arguable that plaintiff has made a prima facie showing of a right to relief so as to meet the requirement that it demonstrate the likelihood of ultimate success on the merits, there has been a total failure on its part to show either irreparable injury to it in the absence of the relief requested or a balance of equities in its favor") (citations omitted).

B. Petitioners Must Post A Considerable Undertaking To Be Entitled To Preliminary Injunctive Relief.

Section 6312(b) of the CPLR provides that posting a bond is a prerequisite to obtaining preliminary injunctive relief. "Prior to the granting of a preliminary injunction, the [plaintiff] **shall give an undertaking** in an amount to be fixed by the court, that the [plaintiff], if it is finally determined that he was not entitled to an injunction, will pay to the Defendant all damages and costs which may be sustained by reason of the injunction . . . ."[181] There is "no authority" to grant a preliminary injunction "...without requiring the Petitioner to give an undertaking, as mandated by statute."[182] The purpose of an undertaking is to indemnify the enjoined party for damages incurred as a result of the preliminary injunction.[183]

The municipal Respondents agree with Allegany Wind's calculation of potential damages if a preliminary injunction were granted. Therefore, Respondents respectfully request that if a preliminary injunction is granted, Petitioners be ordered to post an undertaking in the amount of $5 million, an amount commensurate with Allegany Wind's potential damages.

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181 N.Y. C.P.L.R. 6312(b) (emphasis added).

182 *Family Affair Haircutters, Inc. v. Detling*, 110 A.D.2d 745, 488 N.Y.S.2d 204 (2d Dep't 1985); *Cool Insuring Agency, Inc. v. Rogers*, 125 A.D.2d 758, 759, 509 N.Y.S.2d 180 (3d Dep't 1986).

183 *See Margolies v Encounter, Inc.*, 42 N.Y.2d 475, 477, 398 N.Y.S.2d 877 (1977).

CONCLUSION

The Petition should be dismissed in its entirety because Petitioners' claims are time-barred, the Planning Board and Town Board fully complied with SEQRA, and the approvals granted by the Town fully comply with the Zoning Ordinance. The determinations of the Town Board and Planning Board are entitled to great deference and should be upheld.

Dated: October 27, 2011
Buffalo, New York

HODGSON RUSS LLP
Attorneys for Respondents Town of Allegany Town Board, Planning Board, Zoning Board of Appeals, and Code Enforcement Officer

By: _____
Daniel A. Spitzer, Esq.
Charles W. Malcomb, Esq.
The Guaranty Building
140 Pearl Street, Suite 100
Buffalo, NY 14202-4040
(716) 856-4000

WENDY A. TUTTLE, ESQ.
Town Attorney for the Town of Allegany, New York
98 West Main Street
P.O. Box 88
Allegany, New York 14706
(716) 372-3226