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### ZONING AND LAND USE PLANNING

## The Regulation of Wind Farms And Windmills in New York

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New York state has approximately 5,000 megawatts of land-based wind potential, enough to generate about 13 million megawatt-hours of power—equivalent to about 10 percent of the state's electricity consumption.<sup>1</sup> Realizing that potential requires that commercial wind farm developers—as well as individuals interested in having a windmill constructed on their own property—and other interested parties, engage in a rather lengthy series of steps, from dealing with the technological issues to obtaining the necessary financing. Perhaps most importantly, they also have to work through the land use planning and zoning issues.

#### Public Utility

Wind farms and wind turbines in New York state often are regulated as a special or conditional use, which is a form of zoning regulation that authorizes a particular land use, subject to certain requirements designed to assure that the proposed use is in harmony with a municipality's zoning ordinance and will not adversely affect the neighborhood.<sup>2</sup> Some municipalities specifically regulate wind farms as a special or conditional use, while others regulate wind farms indirectly by deeming them to be a form of public utility that requires a special or conditional use permit.



A GROUP of windmills along the Lake Erie shoreline near Buffalo.

In two cases of considerable importance to wind developers in New York state, the Third and Fourth departments recently upheld determinations by local zoning boards that wind farms may be considered public utilities under local zoning regulations. These cases are significant because public utilities are entitled to a relaxed standard of review under local zoning.<sup>3</sup>

In *Matter of West Beekmantown Neighborhood Association Inc. v. Zoning Board of Appeals of the Town of Beekmantown*,<sup>4</sup> the petitioners challenged a determination by the Beekmantown zoning board to grant a conditional use permit to allow Windhorse Power, LLC, to construct a wind farm on a 700-acre parcel within the town. The petitioners argued, among other things,

that the zoning board had erroneously determined that Windhorse was entitled to a conditional use permit as a public utility providing an essential service, as defined by the town's zoning regulations, and, therefore, that its subsequent grant of the conditional use permit was arbitrary and capricious.

In the zoning district in which the proposed wind farm was to be located, the town code required a conditional use permit for an essential service, which it defined as the "[e]rection, construction, alteration, operation or maintenance by municipal agencies or public utilities of...electrical or gas substations...and familiar facilities that provide essential use and services...."<sup>5</sup> In the absence of a showing by the petitioners

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that the zoning board's determination that Windhorse was a public utility for zoning purposes was irrational or unreasonable, the court refused to disturb the zoning board's interpretation.

In *Matter of Wind Power Ethics Group (WPEG) v. Zoning Board of Appeals of Town of Cape Vincent*,<sup>6</sup> the Fourth Department reached a similar result. In that case, the court held that the zoning board's classification of a series of wind-powered generators as a "utility" under the town's zoning regulations was neither irrational nor unreasonable, and that such determination was supported by substantial evidence.

### SEQRA Rules

Many of the zoning-related matters that typically have to be considered in the siting of wind generators were discussed by the Supreme Court of Onondaga County in a case<sup>7</sup> in which residents and landowners in the upstate towns of Warren and Stark challenged two special use permits authorizing the construction of the Jordanville Wind Power Project, a 68 turbine wind farm. The petitioners alleged that the Warren Town Board, as the lead agency under the State Environmental Quality Review Act (SEQRA), failed to comply with SEQRA's substantive requirements and failed to take the requisite "hard look" at the project's potential environmental impacts.

In particular, the petitioners claimed that the town had failed to properly evaluate and analyze sufficient and acceptable alternatives to the project involving shorter or fewer turbines, the phasing in of turbines, as well as their location, and that the town failed to provide the level of detail necessary to permit comparable assessment of those alternatives.<sup>8</sup>

The court agreed. It observed that although the draft environmental impact statement (DEIS) and the final environmental impact statement (FEIS) mentioned that commentators advocated the consideration of alternative project sites or location, alternative turbine size, alternative project size, alternative project design/layout, alternative project scale and magnitude or technologies, alternative construction phasing and the alternative of no action whatsoever, the town had declined to perform an alternative analysis with supporting data.

The court added that although the FEIS

contained two separate areas of discussion of alternatives (referencing alternatives on one page of the report and in one appendix, which stated that it was "unreasonable to conduct an analysis of a project with larger turbines as the project sponsor is utilizing existing turbine commitments"), the town failed to support its conclusions with "rationally based assumptions" and there were no field studies or expert reports to provide the requisite quantitative and scientific basis for the board's approval; as such, the court ruled, its approval of the FEIS was improper.

The court next considered the petitioners' contentions that the town had failed to adequately review, analyze, and mitigate certain potential adverse environmental impacts. In response, the town relied on the supplemental DEIS and the FEIS, as well as conditions attached to each of the special use permits for the project. The town contended that implementation and enforcement of these mitigation measures would be pursuant to the permit conditions and that construction

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Concerns about the impact of wind turbines on neighboring property owners, birds, and property values, as well as general safety issues, are among the issues likely to be raised when a local government is approached by a property owner or developer seeking to construct one or more turbines on residential, commercial, or industrial property.

of the project could not begin until specified mitigation plans or measures had been approved by town engineers, with the violation of any of the conditions of the permits being grounds for permit revocation.

The court decided, however, that approval of mitigation measures after the SEQRA process was completed denied the petitioners and other members of the public their intended input with respect to whether such analysis and mitigation was appropriate or acceptable. Moreover, the court added, the town's tentative plans for mitigation measures concerning significant issues were "wholly insufficient." For instance, the court found

that the town had not properly considered the impact on "historic cultural landscape resources" that could potentially be affected by views of the project.

It also noted that the special use permits required the developers to submit a plan in the future to the town to mitigate noise impacts and to provide a "complaint resolution procedure" for residents, but ruled that the reliance on plans for future mitigation was "improper." Likewise, the town's approval allowed bird and bat studies to be conducted in the future and provided that if the studies indicated significant impacts to wildlife might occur or had occurred, the developer would then be required to develop, in consultation with the DEC, an adaptive management strategy to minimize impacts to wildlife. Providing for postponement of review of environmental impacts or reliance on tentative plans for future mitigation of preconstruction studies violated SEQRA, the court found.

The court also found that the town board had unlawfully delegated its SEQRA obligations to the Public Service Commission and the New York State Office of Parks, Recreation and Historic Preservation with respect to historic site mitigation after the completion of the SEQRA process. As lead agency, the town board itself was required to exercise its critical judgment and render a final determination on SEQRA issues and this function could not be delegated to other agencies.

Accordingly, the court concluded that the town board, as lead agency, had failed to properly evaluate and analyze sufficient and acceptable alternatives to the project, had improperly relied upon plans for future mitigation and improperly delegated its SEQRA duties to other agencies. Consequently, the court decided that the town board failed to take the requisite "hard look" under SEQRA and that the issuance of the special use permits was arbitrary, capricious, and an abuse of discretion.

In another recent decision, the Supreme Court of Yates County rejected an SEQRA challenge by petitioners who sought to annul a local law that rezoned two areas of an upstate town as Wind Energy Incentive Zones.<sup>9</sup>

This growing body of case law relating to the regulation of wind generators provides valuable guidance about land use issues involved with wind development. Another very helpful tool to understand the issues

relating to the permitting of wind generators is one of the first comprehensive local wind ordinances adopted in New York: in the Town of Islip, on Long Island.<sup>10</sup>

### Local Legislation

The Islip ordinances,<sup>11</sup> which can serve as a model for other municipalities across the state, highlight the wide range of issues that need to be considered to obtain approval for wind projects. Section 68-420.09 of the Islip Town Code applies to standalone and/or roof-mounted wind energy turbines constructed primarily to supplement the existing power supplies for individual buildings; Section 68-420.10 applies to industrial wind energy turbines.

Under Section 68-420.09, turbines are required to conform to applicable industry standards and to applicable New York State codes; all electrical components must conform to relevant and applicable local, state, and national codes. Turbines must be designed to withstand winds of up to 120 miles per hour, and they must be equipped with a redundant braking system.

With respect to visual appearance, the Islip ordinances require that turbines must be a “nonobtrusive color,” such as white, off-white, or gray. They may not be artificially lighted, except to the extent required by the Federal Aviation Administration or another applicable authority that regulates air safety. Moreover, on-site transmission and power lines have to be placed underground.

Islip requires that any tower used in connection with a wind energy turbine may not be climbable up to 15 feet above ground surface. Audible sound may not exceed 55 decibels, as measured at the exterior of any occupied building on an adjacent property.

The operators of a wind energy turbine must make “reasonable efforts” to “minimize shadow flicker to any occupied building on any adjacent property.” They also must make “reasonable efforts” to “avoid any disruption or loss of radio, telephone, television or similar signals,” and must mitigate any harm caused by the turbine.

If accessory to a residential, office, general service, or commercial use, the height of a wind energy turbine may not exceed 42 percent of the lot width, and at no time can it exceed 45 feet. If accessory to an industrial use, the height of an accessory wind energy turbine shall not

exceed 50 percent of the lot width and at no time can it exceed 70 feet. The lowest moving component may not be less than 15 feet from ground level.

Wind turbines mounted to a free-standing tower are not permitted in any front yard. Roof-mounted turbines may be allowed on that portion of a pitched roof that faces the rear yard or, in the case of a flat roof, a turbine may be located on the rear half of such roof.

The Islip ordinances also provide for side and rear yard set backs. A turbine must be set back from side and rear property lines by a distance “greater than the height of the turbine or the highest component thereof.”

Industrial turbines generally must meet these same requirements, in addition to several others set forth in Section 68-420.10. For example, as required by Section 68-420.10, the base of any proposed industrial wind energy turbine or tower supporting such a turbine must be a minimum of 500 feet away from any residential district or use; the height of any proposed industrial wind turbine may not exceed 156 feet; an industrial turbine may not cause any significant shadow flicker on any residential property regardless of the distance of the residential property from the turbine; and the industrial turbine may not produce any noise in excess of 60 decibels as measured at the exterior of any occupied building on an adjacent property.

The set back requirements for industrial turbines under Section 68-420.10 are somewhat different from those mandated by Section 68-420.09. As provided in Section 68-420.10, the base of any industrial wind energy turbine must be set back from any side or rear property lines by a distance of 10 feet, although at no time may the turbine’s blades encroach upon the air rights of any adjoining property.<sup>12</sup>

### Conclusion

Concerns about the impact of wind turbines on neighboring property owners, birds, and property values, as well as general safety issues, are among the issues likely to be raised when a local government is approached by a property owner or developer seeking to construct one or more turbines on residential, commercial, or industrial property. Because there is little doubt that the use of wind energy is going to grow substantially in the near future in New York, these matters must be—and can be—successfully navigated. Local governments

and property owners should familiarize themselves with the issues and prepare to move forward together.



1. New York State Energy Research and Development Authority (NYSERDA), “Large Wind Farm Developments,” available at [http://www.powernaturally.org/Programs/Wind/UtilityScale\\_LargeWind.asp?i=8](http://www.powernaturally.org/Programs/Wind/UtilityScale_LargeWind.asp?i=8).

2. See, e.g., Town Law §274-b (1).

3. See, *Matter of Cellular Tel. Co. v. Rosenberg*, 82 N.Y.2d 364 (1993).

4. 53 A.D.3d 954 (3rd Dept. 2008).

5. Town of Beekmantown Zoning Law, Art. 2.

6. 60 A.D.3d 1282 (4th Dept. 2009).

7. *Matter of Brander v. Town of Warren Town Bd.*, 18 Misc.3d 477 (Sup. Ct. Onondaga Co. 2007).

8. See 6 NYCRR 617.9(b)(5)(v).

9. *Finger Lakes Preserv. Assn. v. Town Bd. of the Town of Italy*, 25 Misc. 3d 1115 (Sup. Ct. Yates Co. 2009).

10. See Town of Islip Town Code §68-420.9, Accessory Wind Energy Turbine Ordinance; §68-420.10, Industrial Accessory Wind Energy Turbine Ordinance.

11. The ordinances are available online at <http://www.townofislip-ny.gov/e-services/town-code>.

12. Model ordinances are available in the Wind Energy Toolkit prepared by NYSERDA, available at <http://www.powernaturally.org/Programs/Wind/Wind%20Energy%20Toolkit.pdf>.