STATE OF NEW YORK
SUPREME COURT : COUNTY OF WYOMING

KENNETH FRIEDHABER, ELIZABETH WAGNER, MARK MOORE, NADJA LASKA, CYNTHIA A. BLAIR and KENNETH J. BLAIR,

Petitioners

For a Judgment pursuant to CPLR Art. 78 and § 3001

MEMORANDUM DECISION

v.

Index No. 38491
[Wyoming County]

TOWN BOARD OF THE TOWN OF SHELDON, ZONING BOARD OF APPEALS OF THE TOWN OF SHELDON and SHELDON ENERGY, LLC

Respondents

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES: **Arthur J. Giacalone, Esq.**
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CURRAN, J.

Petitioners commenced this Article 78 proceeding for a judgment annulling the actions of the defendant Town Board ("Board") and Zoning Board of Appeals ("ZBA") which

approved the land use requests of defendant Sheldon Energy to establish the High Sheldon Wind Farm. Petitioners also seek a preliminary injunction enjoining the respondent Sheldon Energy from commencing or continuing any physical alteration of any real property in the Town of Sheldon during the pendency of this proceeding.

The papers submitted by the parties do not present any issues of disputed material fact and, at oral argument, none of the attorneys claimed that there are any such issues. Because the motion for a preliminary injunction necessarily involves the Court in evaluating the merits of the proceeding, the Court will render its decision on the motion and on the merits.

The petition contains six (6) causes of action. The first alleges that the ZBA acted without authority in granting certain variances because the local law which the ZBA followed in granting those variances is not a "zoning regulation" within the meaning of Town Law § 267 (1) (b) and § 274-b. The second cause of action alleges that the Board exceeded its jurisdiction by granting certain variances because the aforesaid local law does not give the Board specific authority to grant such variances. The third cause of action alleges that the Board violated the local law by authorizing setback variances for properties not subject to such setbacks under the law. The fourth cause of action alleges that the Board violated the doctrine of legislative equivalency by allowing amendments to the local law through variances rather than through amendments. The fifth cause of action alleges that the ZBA invaded the Board's legislative province by granting the variances. The sixth cause of action alleges that respondents failed to make certain disclosures as required by the General Municipal Law and that, therefore, the purported contracts entered into by the respondent municipal officers through the resolutions approving the High Sheldon Wind Farm must be voided.

BACKGROUND

The High Sheldon Wind Farm ("wind farm") is most comprehensively described at Exhibit ("Ex.") 49 of the Administrative Record ("AR"). Essentially, the project consists of seventy-five (75) wind turbines located in twelve (12) clusters within the Town of Sheldon, County of Wyoming ("Town"). Exhibit A attached to the Petition shows the project layout.

The wind turbines have a maximum height of 397 feet and a rotor diameter of up to 270 feet. The twelve clusters are to be served by approximately twenty (20) miles of access roads. The project also involves an electrical collection system that would allow delivery of electricity to a new substation.

Sheldon is a small community of 2,561 people with just 916 households spread over the hills east of the Erie County line and west of state Route 98. It is undisputed that agriculture is the backbone of the economy in the Town of Sheldon.

The history of the wind farm can be traced to the Board's adoption of Local Law No. 1 of 2001, authorizing the installation of meteorological towers within the town for a limited period of time (AR Ex. 2). The towers are the first physical step in wind farm development once a site has been proposed.

The next most significant step in the development of the wind farm was the Board's adoption of Local Law No. 1 of 2003 which is the local law regulating "wind energy conversion systems" ("WECS") (AR Ex. 3). The purpose of this local law is to promote "the effective and efficient use of wind energy conversion systems" and to protect "the public health, safety and welfare of neighboring property owners or occupants." A WECS is defined within the law as "any device such as a wind charger, windmill or wind turbine which is designed to

convert wind energy to a form of usable energy." The law establishes application requirements, minimum setbacks, sets safety standards and requires a decommissioning plan.

In August of 2005, certain residents of the Town of Sheldon commenced a lawsuit in Supreme Court, Wyoming County, seeking a declaratory judgment invalidating the WECS law (*Moore v Town Bd of the Town of Sheldon*) ("*Moore* action") (AR Ex. 4). In November of 2005, Supreme Court dismissed the *Moore* action finding that "plaintiffs' conclusory claims that Local Law No. 1 of 2003 was not adopted in accordance with the Town's comprehensive plan are insufficient to state a claim for relief" (AR Ex. 6). The appeal in the *Moore* action was ultimately dismissed for failure to perfect (AR Ex. 13).

In November of 2005, the first applications for the wind farm were filed with the Town. Review under the State Environmental Quality Review Act ("SEQRA") thereafter commenced. The entire process for SEQRA review, public hearings and all steps leading to the ultimate approval of the wind farm lasted until the Board and the ZBA adopted the resolutions which are contested in this proceeding in April of 2007. The record reflects numerous reviews and discussions of this project in various Board meetings and the minutes from those meetings likewise reflect relatively substantial attendance by town residents at those meetings. There is no doubt that this is a significant project in the Town which received a considerable amount of attention among its residents and elected officials.

"WISDOM OR MERITS" OF THE PROJECT

Petitioners assert that neither the Board nor the ZBA possessed the authority to grant certain of the variances acted upon in April of 2007. Petitioners also assert that the approvals granted by the Board and the ZBA were "affected by errors of law, were made in

violation of lawful procedure, were arbitrary and capricious, and/or were an abuse of discretion" (Petition, ¶ 4). Petitioners have summarized their claims as alleging that the Board and the ZBA "have clearly exceeded their authority under the WECS law and the laws of the State of New York, and have failed to strictly comply with the duties of public officials under GML Article 18 and our state common law" (Petition ¶ 67).

The judicial review provided by Article 78 is a limited one and the Court must limit its review to the questions raised by petitioners under CPLR § 7803 (*Matter of Gramercy N. Assoc. v Biderman*, 169 AD2d 345, 349 [1st Dept 1991]), *appeal denied* 78 NY2d 863 [1991]. It is well-settled that the "wisdom or merit" of the project or of the actions of the Board and ZBA are not within this Court's judicial review powers (*Matter of Voelckers v Guelli*, 58 NY2d 170, 177 [1983]; *P & N Tiffany Properties v Village of Tuckahoe*, 33 AD3d 61, 66 [2d Dept 2006], *appeal dismissed* 8 NY3d 943 [2007]; *Gramercy N. Assoc.,* 169 AD2d at 348).

OBJECTIONS TO THE RECORD

Petitioners have objected to the inclusion in the record of a DVD of WGRZ-TV's broadcast from August of 2006 and a letter written in response to WGRZ (AR Exs. 31 & 32). Petitioners have not asserted any prejudice with respect to the inclusion of these items and, in the absence of such asserted prejudice, the Court has the authority to include these materials in the record (*Fahey v Public Health Council*, 89 AD2d 702 [3d Dept 1982], *appeal dismissed* 58 NY2d 778 [1982]; *Fama v Mann*, 196 AD2d 919 [3d Dept 1993], *appeal denied* 82 NY2d 662 [1993]). The administrative record is replete with references to the news reports, including through letters to the Board and references thereto in the minutes. There is no prejudice to

including these items in the record as they merely complete what is otherwise referred to elsewhere. Petitioners' objection is therefore overruled.

STANDING

Respondents assert that petitioners lack standing to commence this proceeding. In matters involving land use, legal standing is determined by a two-prong test by which a petitioner must show that he has (1) an interest that falls within the zone of interest to be protected by the statute, and (2) an injury or harm that is different in kind or degree from that of the public at large (*Society of Plastics Indus., Inc. v County of Suffolk*, 77 NY2d 761, 775 [1991]). In meeting the first prong of the test, petitioners allege that the wind turbines will create increasing noise, impairment of scenic vistas and the existing rural character, a potential decrease in property value, potential exposure to "shadow effect," and a decreased ability to peacefully and quietly enjoy their property. These harms fall within the zone of interest protected by land use, development and zoning laws of both New York State and the Town of Sheldon (*Matter of McGrath v Town Board of Town of N. Greenbush*, 254 AD2d 614, 616 [3d Dept 1998], *appeal denied* 93 NY2d 803 [1999]; *Rosch v Town of Milton Zoning Bd. of Appeals*, 142 AD2d 765 [3d Dept 1988]). Thus, petitioners meet the first prong of the test.

Petitioners have likewise met the second prong of the test. Due to the proximity of their property to the proposed wind turbine sites, the wind farm development may result in direct injury or harm to their health, their land, and their rights to the enjoyment of the property that is different in kind and degree from the public at large. "Proximity alone permits an inference that the challenger possesses an interest different from other members of a community" (*Gernatt Asphalt Products, Inc. v Town of Sardinia*, 87 NY2d 668, 687 [1996];

LaDelfa v Village of Mount Morris, 213 AD2d 1024, 1025 [4th Dept 1995]; *King v County of Monroe*, 255 AD2d 1003 [4th Dept 1998]). Thus, as in the *Moore* action, this Court concludes that the petitioners' property would be affected by the development of the wind farm and petitioners have therefore sufficiently demonstrated standing (AR Ex. 6, p. 3).

NECESSARY PARTIES

Respondents assert that this action should be dismissed because it was not timely commenced against all necessary parties. Respondents assert that all of the landowners who would be part of the wind farm development should have been joined and that petitioners' failure to do so is a fatal defect. The Court disagrees. Unlike situations where landowners are currently receiving payments for the conveyance of their land use rights or where a landowner's current use of his or her property would be affected by a court decision, this proceeding involves applications by respondent Sheldon Energy to construct a project which is not yet underway or in actuality benefitting the landowners. Any interest possessed by the landowners who may eventually enjoy a benefit from this project have been adequately represented throughout the approval process by respondent Sheldon Energy. Moreover, at the request of petitioners, all interested parties who may wish to join in the proceeding were invited to do so through the execution of this Court's initial Order to Show Cause. If any landowners wished to join the proceeding, they have had an adequate opportunity to do so. Accordingly, this Court rejects respondents' argument based on necessary parties.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

Respondents assert that petitioners have failed to exhaust their administrative remedies by neglecting to return to the ZBA for an interpretation of the WECS law. This

argument is without merit because petitioners contest the power of the Board and ZBA to act as they did. This issue is one for the Court and not the ZBA (*See, e.g., Matter of Social Spirits, Inc. v Town of Colonie*, 74 AD2d 933 [3d Dept 1980]). Additionally, by its actions, the Board has exercised the Town's ultimate authority to interpret the WECS law and to the extent that this interpretation is contested in this proceeding, it is a final action of the Town ripe for judicial review.

FIRST CAUSE OF ACTION

The first cause of action is premised on the allegation that the WECS law is not a "zoning regulation" within the meaning of Town Law §§ 267 (1) (b) and 274-b. This argument is strained at best because the subject local law is consistent with the grant of powers afforded to a Board outlined in Town Law § 261. In addition, the intent expressed in the local law is consistent with the purpose and intent of a typical zoning regulation. There can be no doubt based on the language of the local law that it is designed to regulate and restrict a variety of factors involving WECS including, among other things, the height and placement of such systems. Morever, as the Court found in the *Moore* action, the local law appears to comply with the normal requirements of the Town Law with respect to the adoption of zoning regulations.

The Petition suggests that petitioners are claiming that the respondents are judicially estopped from taking a contrary position in this proceeding than they took in the *Moore* action. However, petitioners' reply papers make no such claim and, at oral argument, petitioners' counsel acknowledged that petitioners were not advancing a judicial estoppel theory.

Because the Court concludes that the WECS law is a zoning regulation enacted under Article 16 of the Town Law, the first cause of action must be dismissed.

SECOND CAUSE OF ACTION

The second cause of action is likewise without merit because, as the Court also observed in the *Moore* action, the Board has the authority under the Town Law to reserve unto itself the power to grant variances (Rice, Practice Commentaries, McKinney's Cons Laws of NY, Book 61, Town Law § 274-b) ("a town board may reserve all or a portion of such review authority to itself"). The Board's exercise of that authority is consistent with the Town Law. It also appears that the Board acted on the variances in an abundance of caution to address the issues raised in the letter from petitioners' counsel (AR Ex. 62). By having both the ZBA and the Board grant the variances, the Town acted cautiously to ensure that it complied with the law. Because this Court concludes that both the ZBA and the Board had the authority to grant the five (5) variances acted on by the ZBA, it makes no difference whether the ZBA, the Board or both did so. The second cause of action is therefore dismissed.

THIRD CAUSE OF ACTION

The third cause of action requires the Court to interpret the local law with respect to the setback variances granted by the Board. Petitioners assert that the setback variances allowed for under the local law may be granted only for a contiguous parcel which has situated on it a "conversion system" as defined in the local law.

In construing the language of the local law, the Court notes that the use of the term "conversion development" is unique to the paragraph referring to the authority of the Board to grant certain setback variances. The term "conversion development" is not used

anywhere else in the local law and is not otherwise defined in the law. The use of the word "development" in the term "conversion development" appears to be intended to afford that term a broader meaning than the term "wind energy conversion *system*" (emphasis added) which refers to a "*device* such as a wind charger, windmill or wind turbine" (emphasis added). In this Court's view, by equating a "system" with a "device," the local law connotes that the word "development" should be afforded a broader meaning.

The question is whether the language "conversion development on contiguous parcels" means: (1) setback variances are allowed only for parcels that are contiguous to parcels that have devices (i.e., a wind turbine) on them (as petitioners maintain); or (2) setback variances are allowed for parcels that are contiguous to parcels that have a portion of the "conversion development" on them (as respondents maintain). The primary consideration in construing the local law is to ascertain and effect the intention of the Board (Statutes § 92). The intention is first to be sought from a literal reading of the law (Statutes § 92 [b]). Through its use of the word "development" rather than "device," the Board has conveyed its intention to allow setback variances for parcels that are contiguous to such a development. Obviously, there can be no such development without the access roads or electrical distribution cables associated with it.

Accordingly, this Court concludes that setback variances are allowed for any parcel which is contiguous to any other parcel which has any portion of the "conversion development" located thereon, including turbines, access roads and electrical distribution cables. On this basis, petitioners' construction of the local law is rejected and the third cause of action is dismissed.

FOURTH AND FIFTH CAUSES OF ACTION

The fourth and fifth causes of action are mostly covered by the Court's analysis of the first two causes of action. In particular, because the Board has the power under the Town Law to grant variances, and because that power is further set forth specifically in the terms of the local law which has been upheld by the Court in the *Moore* action, the Board had the authority to grant the setback variances in question. By granting the setbacks already authorized under the local law, the Board did not legislate a new law but rather acted pursuant to an existing law in exercising the discretion afforded by the law and without attempting to alter the language or meaning of the law. Likewise, under the language of the Town Law and, by virtue of the delegation from the Board, the ZBA also had the authority to grant the non-setback variances upon which it acted. By respecting the authority afforded to it, the ZBA did not transgress on the legislative prerogative. The fourth and fifth causes of action are therefore dismissed as well.

SIXTH CAUSE OF ACTION

Petitioners allege that the respondent municipal officers violated provisions of Article 18 of the General Municipal Law ("GML") governing conflicts of interest of municipal officers and employees. Specifically, petitioners assert that certain of the respondent municipal officers possessed interests in the wind farm and, by voting to approve the variances sought by respondent Sheldon Energy, acted in conflict with their responsibilities as municipal officers. On this basis, petitioners allege that the resolutions adopted by the respondent municipal officers constitute contracts which should be voided under GML § 804. Additionally, petitioners assert that respondent Sheldon Energy failed to comply with GML § 809 and that

therefore the votes taken by the respondent municipal officers should be voided under common law principles which may be invoked to set aside decisions of local boards based upon a judicial finding of a conflict of interest by board members participating in the decisions (*Matter of Tuxedo Conservation and Taxpayers Assn. v Town Bd. Of Tuxedo*, 69 AD2d 320 [2d Dept 1979]; *Matter of Zagoreos v Conklin*, 109 AD2d 281, 287 [2d Dept 1985]).

Respondents deny the existence of any conflicts of interest prohibited under the GML or by common law. Respondents assert that: (1) any alleged conflicts of interest were publicly disclosed and publicly debated; (2) the resolutions adopted by the respondent municipal officers are not "contracts" within the meaning of GML § 804; and (3) that only two of the respondent municipal officers had any interest as defined by law in the wind farm project and each such individual disqualified himself from voting on the resolution which pertained to the property in which he was interested.

The first issue is whether the resolutions adopted by the ZBA and Board should be invalidated pursuant to the language of the statute. The statutory language makes clear that the resolutions adopted by the ZBA and Board are not "contracts" as referred to in GML § 804 because such resolutions are not within the statutory definition of a "contract" set forth in GML § 800 (2) (1974 Ops Atty Gen No. I 74-106; Ops St Comp No. 83-114). This Court disagrees with any analogy petitioners seek to draw to the decision in *People v Pinto* (88 Misc 2d 303 [Mount Vernon City Ct 1976]), because this Court concludes that it must follow the statutory definition of a "contract" and should not expand that definition without legislative guidance. Because the resolutions adopted by the ZBA and Board are not "contracts" within the meaning

of GML § 804, there is no basis on which to grant petitioners any relief voiding these purported contracts.

As to the question of whether any of the respondent municipal officers have an "interest" in the wind farm project, the Court must again defer to the statutory language. GML § 800 (3) defines "interest" as one involving a "municipal officer employee" as well as any matter involving "his spouse, minor children and dependents . . .." The "interests" alleged by petitioners as to respondents Knab and Metz are not an "interest" within the statutory definition because the interests belong to family members not encompassed within that statutory definition. The same is true with respect to the purported improper interest by respondent Kehl by virtue of his relationship to his adult son who possesses an interest in the wind farm project.

As to respondent Fontaine and otherwise as to Kehl, both possess "interests" within the statutory definition. Fontaine and Kehl disqualified themselves from voting on the actions pertaining to the clusters in which their properties are located. Petitioners assert that Fontaine and Kehl violated GML § 801 by voting to approve actions for the other clusters and by otherwise voting on matters involving the project. However, the only issue before the Court is whether the actions taken by the respondents in April of this year are valid. Because Fontaine and Kehl will receive a "direct or indirect pecuniary or material benefit" only from the properties they own, and because the record reflects that each cluster can stand on its own as an independent project, the votes by Fontaine and Kehl as to the other clusters do not establish a prohibited conflict of interest. In any event, the record reflects that there was a sufficient number of votes to adopt each of the resolutions at issue even if Fontaine and Kehl had disqualified themselves from voting.

Petitioners further assert that Fontaine and Kehl failed to file the written disclosures required of such board members under GML § 803 (1). While the record does not show any such formal written disclosures, the record has an abundant number of references to the interests possessed by both Fontaine and Kehl in the wind farm development, including references in meeting minutes, communications with the boards and media attention. The Appellate Division has held that these types of disclosure are "sufficient to protect the public-interest purpose underlying the statute" (*Stettine v County of Suffolk*, 105 AD2d 109, 118 [2d Dept 1984, *affd* 66 NY2d 354 [1985]).

As to petitioners' argument under GML § 809 that respondent Sheldon Energy did not make disclosures required by that statute, petitioners acknowledge that the only remedy referred to in that statute pertains to a knowing and intentional violation resulting in a criminal remedy. There is no civil remedy set forth in that statute negating the actions of the respondent municipal officers. Petitioners nevertheless encourage the Court to invalidate the actions of the respondent municipal officers under the common law which permits such a judicial remedy where the Court finds a conflict of interest. One Appellate Division decision limits this doctrine to situations where the conflict of interest is "clear and obvious" (*Peterson v Corbin*, 275 AD2d 35, 38 [2d Dept 2000], *appeal dismissed* 95 NY2d 919 [2000]).

The only "clear and obvious" conflicts of interest were those possessed by Fontaine and Kehl and they appropriately disqualified themselves from the clusters in which they possessed an interest as defined under law. The other purported conflicts of interest alleged by the petitioners are not "clear and obvious" and are not the sort which should result in the Court's interference with legislative action. This Court will not inject itself into the

legislative process without a "clear and obvious" conflict of interest and without statutory authority granted by the State legislature. For these reasons, the sixth cause of action is dismissed.

CONCLUSION

As the Court has addressed the merits of each of the causes of action asserted by the petitioners, there is no need to address the further arguments of the parties on the preliminary injunction motion such as whether there is irreparable injury or balancing of the equities. Accordingly, the motion for a preliminary injunction is in all respects denied and the petition is dismissed.

Settle Order.

DATED: September 18, 2007

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HON. JOHN M. CURRAN, J.S.C.