

Dd
RECEIVED
JAN 23 2020
asm

NEW YORK STATE
SUPREME COURT

CHENANGO COUNTY

In the Matter of the Application of

DONALD KOVALCHIK & BARBARA KOVALCHIK;
ED KERSHEN; PAULETTE GURAL; and JESSICA GOMBACH

2020X016

Petitioners,

NOTICE OF PETITION

-against-

TOWN OF GUILFORD TOWN BOARD
&
CHENANGO COUNTY PLANNING BOARD

Respondents,

For and Order and Judgment Pursuant to Article 78 of the Civil Practice Law & Rules

PLEASE TAKE NOTICE, that upon the accompanying Verified Petition dated January 22, 2020, with exhibits and the accompanying Memorandum of Law in Support dated January 22, 2020, Petitioners will make an application to Supreme Court, Chenango County, to be heard at the Chenango County Supreme Court, Chenango County Courthouse, 13 Eaton Ave., Norwich, NY 13815, on March 9, 2020 at 9:00 in the forenoon, or as soon thereafter as counsel may be heard, for an Order and Judgment pursuant to NY CPLR Article 78, granting the following relief:

- 1) Annuling and vacating the Negative Declaration adopted by respondent Town of Guilford Town Board on September 25, 2019 in connection with the Renewable Energy Local Law No. 3 of 2019 that is the subject of this proceeding;
- 2) Annuling and vacating the Renewable Energy Local Law No. 3 of 2019 adopted by Respondent Town of Guilford Town Board on September 25, 2019 that is the subject of this proceeding;

- 3) Annulling and vacating the GML 239 recommendation granted by Respondent Chenango County Planning Board on August 13, 2019 on the Renewable Energy Local Law No. 3 of 2019;
- 4) Annulling and vacating the 2019 Comprehensive Plan Update adopted by the Respondent Town of Guilford Town Board on June 12, 2019; and
- 5) Granting such other, further and different relief as to the Court may seem just and proper.

PLEASE TAKE FURTHER NOTICE, that an answer and supporting affidavits, if any, must be served at least five (5) days before the return date of this application.

Dated: January 22, 2020

Slingerlands, NY



Kenneth Kovalchik, AICP
Land Use Planner for Petitioners
225 McCormack Road North
Slingerlands, NY 12159
(702) 513-3042

pd
RECEIVED
JAN 23 2020
asm

NEW YORK STATE
SUPREME COURT

CHENANGO COUNTY 2020X016

In the Matter of the Application of

DONALD KOVALCHIK & BARBARA KOVALCHIK;
ED KERSHEN; PAULETTE GURAL; and JESSICA GOMBACH,

Petitioners,

**MEMORANDUM OF
LAW IN SUPPORT OF
VERIFIED PETITION**

-against-

TOWN OF GUILFORD TOWN BOARD
&
CHENANGO COUNTY PLANNING BOARD

Respondents,

For and Order and Judgment Pursuant to Article 78 of the Civil Practice Law & Rules

**PETITIONER'S MEMORANDUM OF LAW
IN SUPPORT OF VERIFIED PETITION**

KENNETH KOVALCHIK, AICP
Land Use Planner for Petitioner's
225 McCormack Road North
Slingerlands, NY 12159

TABLE OF CONTENTS

PRELIMINARY STATEMENT1

STATEMENT OF FACTS3

ARGUMENT3

**POINT 1: THE TOWN BOARD VIOLATED THE STATE ENVIRONMENTAL
 QUALITY REVIEW ACT BY NOT CONDUCTING A COORDINATED
 REVIEW ONCE A TYPE I ACTION WAS ISSUED3**

**POINT 2: THE TOWN BOARD VIOLATED THE STATE ENVIRONMENTAL
 QUALITY REVIEW ACT BY NOT ISSUING A POSITIVE DECLARATION6**

**POINT 3: THE TOWN BOARD DID NOT ADDRESS CONCERNS EXPRESSED BY AN
 INTERESTED AGENCY (TOWN OF UNADILLA) PRIOR TO ISSUING
 A SEQR NEGATIVE DECLARATION AND ADOPTING LOCAL LAW NO. 3 OF 201923**

POINT 4: TOWN SUPERVISOR VIOLATED TOWN OF GUILFORD CODE OF ETHICS24

POINT 5: TOWN SUPERVISOR VIOLATED ARTICLE 18 OF THE GENERAL MUNICIPAL LAW29

**POINT 6: TOWN SUPERVISOR CONFLICT OF INTEREST BY NOT RECUSING HIMSELF
 FROM THE CHENANGO COUNTY PLANNING BOARD DURING
 THE GENERAL MUNICIPAL LAW 239 REVIEW OF LOCAL LAW NO. 3 OF 201931**

**POINT 7: THE TOWN BOARD VIOLATED §271 AND §272-A OF NEW YORK STATE
 TOWN LAW BY NOT REFERRING THE COMPREHENSIVE PLAN UPDATE AND
 RENEWABLE ENERGY LOCAL LAW NO. 3 OF 2019 TO THE TOWN
 PLANNING BOARD32**

**POINT 8: CHENANGO COUNTY PLANNING DEPARTMENT AND
 CHENANGO COUNTY PLANNING BOARD DID NOT CONDUCT
 A PROPER GML 239 REVIEW34**

STANDING37

CONCLUSION41

TABLE OF AUTHORITIES

Cases

<i>Matter of Coca-Cola Bottling Co. v. Board of Estimate</i> , 72 NY2d 674, 679 (1988).....	3
<i>Matter of Sour Mtn. Realty, Inc. v. New York State Department of Environmental Conservation</i> , 260 AD2d 920, 923, 688 N.Y.S.2d 842	3
<i>Matter of Tri-County Taxpayers Assn. v. Town Bd. of Town of Queensbury</i> , 55 NY2d 41, 46, 432 N.E.2d 592, 447 N.Y.S.2d 699	3
<i>Matter of Long Island Pine Barrens Society, Inc. v. Planning Board of the Town of Brookhaven</i> , 80 NY2d 500, 515	4
<i>Matter of Gernatt Asphalt Products. v. Town of Sardinia</i> , 87 NY2d 668, 688	4
<i>Chinese Staff v. City of New York</i> , 68 N.Y.2d 354, 509 N.Y.S.2d 499	6
<i>Shawangunk Mountain Environmental Association v. Planning Board of Town of Gardiner</i> , 157 A.D.2d 273, 557 N.Y.S.2d 495	7
<i>Town of Dickinson v. County of Broome</i> , 183 A.D.2d 1013, 1014, 583 N.Y.S.2d 637, 638	7
<i>Kahn v. Paskik</i> , 231 A.D.2d 568, 647 N.Y.S.2d 279	7
<i>Wellsville Citizens for Responsible Development v. Walmart Stores</i> , 140 A.D.3d 1767	11
<i>Udell v. Haas</i> , 21 N.Y. 463, 469, 235 N.E.2d 897, 900	12
<i>City of Richmond v. Board of Supervisors of Henrico County</i> , 199 Va. 679, 686, 101 S.E.2d 641, 646	14
<i>Southern Railway Co. v. City of Richmond</i> , 205 Va. 699, 707, 139 S.E.2d 82, 88	14
<i>Blankenship v. City of Richmond</i> , 188 Va. 97, 105, 49 S.E.2d 321, 325	14
<i>Northern Virginia Community Hospital, L.L.C. v. Loudoun County Board of Supervisors</i> , 70 Va. Cir. 283 ..	14
<i>Brander v. Town of Warren</i> , 18 Misc. 3d 477, 847 N.Y.S. 2d 450	15
<i>Ecogen, LLC v. Town of Italy, NY</i> , 443 F.Supp 2d at 149	15
<i>Tuxedo Conservation and Taxpayers Association v. Town Board of the Town of Tuxedo</i> , 69 A.D.2d 320, 418 N.Y.S.2d 638	26
<i>Keller v Morgan</i> , 149 A.D.2d 801, 539 N.Y.S2d 589	28
<i>Matter of Nancy M. West et al., Petitioners, v. Victor R. Grant, as Supervisor of The Town of Lake Luzerne, Warren County</i> , Respondent 243 A.D.2d 815 (1997) 662 N.Y.S2d 863	28

<i>Matter of Morin v Gallagher</i> , 221 A.D.2d 765 , 766; <i>Matter of Smith v Perlman</i> , 105 A.D.2d 878	28
<i>Matter of Feldberg v Friedland</i> , 221 A.D.2d 766 , 767	28
<i>Matter of Deats v Carpenter</i> , <i>supra</i> , at 322	28
<i>Paliotto v. Town of Islip</i> , 31 Misc. 2d 447, 456 (N.Y. Misc. 1962)	34
<i>Society of Plastics Indus. v. County of Suffolk</i> (77 NY2d 761 [1991])	37-38
<i>Matter of Save the Pine Bush, Inc. v. Common Council of the City of Albany</i> , 13 NY3d 297, 308-309 (2009)	38
<i>Dental Soc. of New York v. Carey</i> , 61 NY2d 330, 333 (1984)	38

Statutes

Article 18 of General Municipal Law	29-30
General Municipal Law 239	31, 34, 35, 37
Town Law §271	32, 33
Town Law §272-A	32,33

Regulations

6NYCRR 617.4	2, 3, 6, 7
CRR-NY 617.6	4
6 CRR-NY 617.7	7

PRELIMINARY STATEMENT

This Article 78 proceeding concerns Local Law No. 3 - Renewable Energy Local Law (Local Law) approved by the Town of Guilford Town Board on September 25, 2019. The Local Law was adopted in response to a proposed 100 megawatt (MW) wind project in the Town of Guilford. High Bridge Wind LLC, a wholly owned subsidiary of Calpine Corporation, on Jan. 24, 2019 filed with the New York State Public Service Commission a preliminary scoping statement (PSS) regarding the company's proposal to build the High Bridge Wind Farm Project in the Town of Guilford in Chenango County, N.Y.

As noted in the filing, a PSS generally provides an outline and summary of what will eventually become the company's formal Article 10 application, which High Bridge hopes to file in the summer of 2019. The PSS and related "scoping" process are designed to gather stakeholder input at a relatively early stage before a project sponsor has a fully developed proposal so that issues and resources of particular concern to the community can be identified and incorporated into final project design.

High Bridge is proposing the wind energy generating facility of up to 100.8 MW that would be located on leased private lands that are rural in nature. Those parcels under, or being pursued, for lease – or other real property interests – with High Bridge for the location of all facility components – referred to as the facility site – collectively total about 28,000 acres, the filing added.

The High Bridge wind project would include the installation and operation of up to 30 wind turbines, together with the associated collection lines, access roads, permanent and temporary meteorological towers, laydown area, as well as an operation and maintenance (O&M) building.

In anticipation of the High Bridge Wind project being approved through the Article 10 process, the Town of Guilford took the steps to adopt Renewable Energy Local Law No. 3 of 2019 to permit

industrial wind and solar projects in the town. On July 10, 2019 the Town Board made a preliminary classification of action as an Unlisted action pursuant to part 617 of SEQRA regulations. The Town Board also determined they intended to serve as lead agency with respect to SEQRA review. A copy of the resolution was sent to interested and involved agencies allowing 30 days to challenge the Board's Lead Agency designation and provide written comments on the Environmental Assessment Form.

On September 4, 2019 the Town Board reclassified the action as a Type I action pursuant to 6NYCRR 617.4(b)(2). On September 25, 2019 the Town Board prepared, reviewed and considered parts 1, 2 and 3 of a full Environmental Assessment Form and based on review determined the Local Law will not result in significant, adverse environmental impacts and therefore issued a Negative Declaration. On September 25, 2019 the Town Board passed Local Law No. 3 of 2019 – Renewable Energy Systems Law.

Petitioners submit this Memorandum of Law in support of their Verified Petition seeking annulment of the SEQRA Negative Declaration and annulment of Local Law No. 3 of 2019 – Renewable Energy Systems Law.

As set forth below and in the Verified Petition, The Town Board violated SEQRA by not conducting a coordinated review for a Type I Action, and the Town Board should have issued a Positive Declaration under SEQRA and completed an Environmental Impact Statement. Town Supervisor George Seneck should have recused himself from the Local Law adoption proceedings due to having a financial interest in the project. Town Supervisor George Seneck should have also recused himself due to having an interest in a contract with the Town of Guilford. Finally, the Town Board did not address serious concerns expressed by the Town of Unadilla Supervisor prior to issuing a Negative Declaration and adoption the Local Law. For the reasons that follow, the Negative Declaration and the Local Law must be annulled.

STATEMENT OF FACTS

The facts underlying this proceeding are set forth in the Verified Petition and exhibits annexed thereto, along with the certified record of proceedings that will be filed by Respondent Town of Guilford Town Board and Chenango County Planning Board. Accordingly, the Court is respectfully referred to the Verified Petition, its exhibits, and the certified record of proceedings, once filed, for a full recitation of facts.

ARGUMENT

POINT 1:

THE TOWN BOARD VIOLATED THE STATE ENVIRONMENTAL QUALITY REVIEW ACT BY NOT CONDUCTING A COORDINATED REVIEW ONCE A TYPE I ACTION WAS ISSUED.

The purpose of SEQRA "is to inject environmental considerations directly into governmental decision making." *Matter of Coca-Cola Bottling Co. v. Board of Estimate*, 72 NY2d 674, 679 (1988). It is well established that SEQRA "is a law of general applicability" (*Matter of Sour Mtn. Realty, Inc. v. New York State Department of Environmental Conservation*, 260 AD2d 920, 923, 688 N.Y.S.2d 842 [1999], lv denied 93 NY2d 815, 719 N.E.2d 923, 697 N.Y.S.2d 562 [1999]). Moreover, the Legislature has declared "that to the fullest extent possible' statutes should be administered by the State and its political subdivisions in accordance with the policies set forth in SEQRA and that environmental factors should be considered in reaching decisions on proposed projects." (*Matter of Tri-County Taxpayers Assn. v. Town Bd. of Town of Queensbury*, 55 NY2d 41, 46, 432 N.E.2d 592, 447 N.Y.S.2d 699 [1982] of *Tri-County Taxpayers Assn. v. Town Board of Town of Queensbury*, 55 NY2d 41, 46, 432 N.E.2d 592, 447 N.Y.S.2d 699 [1982] [quoting ECL 8-0103 (6)]). *City Council v. Town Board*, 3 NY3d 508, 515-16 (2004).

"Under SEQRA, the individual agency having the primary authority to approve or disapprove a particular project application is responsible for making the environmental impact assessment (see, ECL

§§8-0105[7]; 8-0109, 8-0111)." *Matter of Long Island Pine Barrens Society, Inc. v. Planning Board of the Town of Brookhaven*, 80 NY2d 500, 515 (1992). "In reviewing whether a determination was made in accordance with SEQRA and its implementing regulations, the court is "limited to reviewing whether the determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." *Matter of Gernatt Asphalt Products. v. Town of Sardinia*, 87 NY2d 668, 688 (1996).

On July 10, 2019 the Town of Guilford Town Board issued a preliminary classification of action on the proposed Local Law as an Unlisted action pursuant to part 617 of SEQRA regulations. The Town Board also determined they intended to serve as lead agency with respect to SEQRA review. A copy of the resolution was sent to interested and involved agencies allowing 30 days to challenge the Board's Lead Agency designation and provide written comments on the Environmental Assessment Form.

On August 9, 2019 a letter was submitted to the Town Board from Kenneth Kovalchik, AICP (Professional Land Use Planner) questioning the Town Board classifying the action as Unlisted. The Kovalchik letter cites SEQR regulations as to why the action should be considered a Type I Action. On September 4, 2019 the Town Board reclassified the action as a Type I action pursuant to 6NYCRR 617.4(b)(2). On September 25, 2019 the Town Board prepared, reviewed and considered parts 1, 2 and 3 of a Full Environmental Assessment Form (FEAF) and based on the review determined the Local Law will not result in significant, adverse environmental impacts and therefore issued a Negative Declaration.

The Town Board followed the procedures for initial review of Unlisted actions, pursuant to 6 CRR-NY 617.6(a)(3). When the Town Board amended the classification of action at their September 4, 2019 Town Board meeting, from an Unlisted action to a Type I action, the Board completed an FEAF pursuant to 6 CRR-NY 617.6(a)(2). The Town Board failed to conduct a coordinated review for the Type I action, as required by 6 CRR-NY 617.6(b)(3), and transmit Part 1 of the FEAF to interested and involved

agencies to respond with comments on the Local Law, FEAF and opportunity challenge the Town Board's Lead Agency designation. While the short and full Environmental Assessment Forms ask for similar information, the full Environmental Assessment Form is an expanded form providing more comprehensive details on a proposed project as compared to the short Environmental Assessment Form. In Part 1, Section A of the FEAF it states the project location as being "Town wide" in terms of where wind and solar facilities will be allowed to be located in Town. Considering wind and solar facilities would be allowed to be installed anywhere in Town, for the purposes of conducting a SEQR coordinated review, a coordinated review letter should have been sent to any counties and towns abutting the Town of Guilford. For these reasons the following County and municipal agencies should have been included in the SEQR coordinated review:

1. Otsego County
 - Town of Butternuts
 - Town of Unadilla
2. Chenango County
 - Town of Bainbridge
 - Town of Oxford
 - Town of Norwich

The utility scale solar and wind farm uses approved in the Local Law could have negative impacts on the environment and through the coordinated review process there may have been comments related to restricting the use in certain areas of the Town, or recommendations for mitigating impacts that could have been included in the Local Law. Additionally, NYSDEC provides an online EAF mapping tool (<http://www.dec.ny.gov/eafmapper/>) to assist in identifying potential environmental impacts that should be addressed. Based on the results of the EAF Mapping Summary Report the following State and Federal agencies should have been included in a Type I Action coordinated review.

1. NYS Historic Preservation Office – The EAF Mapper identified dozens of sites as eligible properties for the National or State Register of Historic Places. The Historic Preservation Office should be allowed to determine what impacts allowing 676' tall wind turbines and solar facilities in close proximity to historic sites could have on the eligibility to be placed on the National or

State Register of Historic Places. The Historic Preservation Office may have recommendations for increased setbacks or buffer areas from eligible historic sites.

2. United States Department of Interior – Fish and Wildlife Service – The EAF Mapper identified the Green Floater and Bald Eagle as a threatened or endangered species and the Longtail Salamander and Hellbender as rare animals. The Fish and Wildlife Service should be allowed to determine what impacts allowing 676’ tall wind turbines and solar facilities will have if constructed in close proximity to habitat for these species. The Fish and Wildlife Service may have recommendations for increased setbacks or buffer areas from identified habitat to protect the listed species.
3. NYS Department of Environmental Conservation – The EAF Mapper identified seven State wetland areas and a principal aquifer as being located in the Town of Guilford. The NYSDEC should be allowed to review the proposed Local Law to determine what impacts allowing 676’ tall wind turbines and solar facilities will have if constructed in close proximity to wetland areas and aquifers. One concern is that the foundations for each turbine site will be approximately 40 feet deep and blasting of bedrock may be required to construct the foundation. The NYSDEC may have concerns with proximity of turbine sites to aquifers and/or wetlands due to the land disturbance required to install the foundations. The NYSDEC may have provided recommendations for increased setbacks or buffer areas from identified wetland or aquifer sites.

Considering the Town Board failed to conduct a coordinated review of a Type I action the Negative Declaration must be annulled as arbitrary and capricious, affected by an error of law, made in violation of lawful procedure, and unsupported by evidence in the record. Additionally, the resulting adoption of Local Law No. 3 of 2019 must likewise be annulled.

POINT 2:

**THE TOWN BOARD VIOLATED THE STATE ENVIRONMENTAL
QUALITY REVIEW ACT BY NOT ISSUING A POSITIVE DECLARATION.**

Pursuant to §6 CRR-NY 617.4(b)(2) the proposed Local Law is considered a Type I action under SEQRA as the Town is proposing “adoption of changes in the allowable uses within any zoning district, affecting 25 or more acres.” An action or project that has been listed as Type I carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require preparation of an Environmental Impact Statement (EIS). “The threshold at which the requirement that an EIS be prepared is triggered relatively low.” *Chinese Staff v. City of New York*, 68 N.Y.2d 354, 509 N.Y.S.2d 499 (1986). When a Type I Action is involved, the threshold for an EIS is especially low, since

Type I Actions “are more likely to require the preparation of an EIS” than other actions. 6 NY-CRR §617.4(a); *see also Shawangunk Mountain Environmental Association v. Planning Board of Town of Gardiner*, 157 A.D.2d 273, 557 N.Y.S.2d 495 (3rd Dep’t 1990). Thus, for a “Type I Action an EIS is presumptively required.” *Town of Dickinson v. County of Broome*, 183 A.D.2d 1013, 1014, 583 N.Y.S.2d 637, 638 (3d Dep’t 1992); *Kahn v. Paskik*, 231 A.D.2d 568, 647 N.Y.S.2d 279 (2d Dep’t 1996).

Pursuant to §6 CRR-NY 617.7(a)(1) “to require an EIS for a proposed action, the lead agency must determine that the action may include the potential for at least one significant environmental impact.” For all individual actions which are Type I or Unlisted, the determination of significance must be made by comparing the impacts which may be reasonably expected to result from the proposed action with the criteria for determining significance listed in §6 CRR-NY 617.7(c). Adoption of the Local Law allows as a permitted land use anywhere in the Town wind turbines at a height of 676 feet and solar energy facilities. Pursuant to §6 CRR-NY 617.7(c) the following could be considered potential indicators of significant adverse impacts on the environment of allowing 676 feet tall wind turbines and, therefore, should have required the Town Board to issue a Positive Declaration:

§6 CRR-NY 617.7(c)(1)(i) - A substantial adverse change in existing air quality, ground or surface water quality or quantity, traffic or noise levels; a substantial increase in solid waste production; a substantial increase in potential for erosion, flooding, leaching or drainage problems;

Ground or surface water quality or quantity; leaching or drainage problems:

The wind turbines proposed for use are large mechanical devices that require large amounts of lubricants, greases, gearbox fluids, hydraulic oils, etc. to operate efficiently. Each wind turbine requires approximately 200 gallons of fluids to operate efficiently. The nacelle units for each wind turbine will be located 400’ to 500’ above the ground. In the event of mechanical failure and leakage, the fluids from the turbine, due to the height above the ground, have the opportunity to be broadcast over a wide area of land and not leach into the ground directly below the turbine.

Many of the proposed wind turbines are located in proximity to wetland areas and waterways. Of particular concern for the High Bridge Wind Project is the number of wind turbines located in close

proximity to, and along ridge tops directly above the Unadilla River, and Kent Brook, Moses Brook and Guilford Creek, all tributaries of the Unadilla River. The Unadilla River is located within the Chesapeake Bay Watershed (<https://www.dec.ny.gov/lands/33279.html>) with waters within New York State administered by the NYS Department of Environmental Conservation.

Due to the proximity of the wind turbines to the Unadilla River and its tributaries, the potential exists for leaching impacts into the Chesapeake Bay Watershed. The Town of Guilford should have consulted with NYSDEC Region 7 for proper containment measures, which could have been addressed as part of a coordinated review and Environmental Impact Statement. In January 2013 the NYSDEC prepared the “Final Phase II Watershed Implementation Plan for New York - Susquehanna and Chemung River Basins” where one of the items discussed was related to heightened implementation of DEC’s General Permits for Construction Activity and multi-sector industrial activity. The DEC should provide Best Management Practices (BMP) for containment of fluids at each wind turbine site in order to fully protect the watershed. The Town then should have incorporated the BMP’s as part of mitigation measures in the Environmental Impact Statement and adoption of the Local Law.

Traffic :

The majority of traffic impacts will be experienced during the construction phase of solar and wind projects when large construction equipment will be required for building of new roads to access project sites and impacts to Town, County and State roads to and from each of the sites. In the Highway Protection section of the Town’s Comprehensive Plan (pg. 20) it states that any large scale industrial development in the Town could result in substantial increases in truck traffic on Town roads. To protect the Town from having to bear the expenses for repairs to roads caused by such unusual volume of large vehicles, the Comprehensive Plan recommended the adoption of: (1) a road use agreement to be entered into by the Town and firms operating the vehicles, and (2) a road use law which specifies the legal responsibilities of those firms under those circumstances. The Town Board contracted with Delta

Engineers, Architects and Land Surveyors to conduct a baseline survey of town roads, determining what major projects using Town roads would need to be regulated, and in those instances, the extent of repairs needed and how much those repairs will cost the developer. Funds from the developer would be placed in an escrow account and would apply to projects of a sufficient size and with specific start and end dates.

Environmental impacts associated with construction traffic should have been addressed as part of an Environmental Impact Statement, with the Chenango County Highway Department and New York State Department of Transportation included as involved agencies considering construction traffic will impact County and State roadways located in the Town. The Town Board should have completed an existing conditions analysis (written and photo) of all Town, County and State roads to be impacted by construction equipment for the High Bridge Wind project. The Town Board and Highway Superintendent should have analyzed (length, width, weight) of the typical construction vehicles that will be utilized during the construction phase of wind projects, such as the High Bridge Wind project, and the number of daily trips expected for each wind turbine site.

In the Highway Costs section of the Comprehensive Plan (pg. 19) it states highway related costs account for 69% of the Town budget (2014 figures). It further states the Town Board and Highway Superintendent will be seeking ways to prevent this from consuming an even larger share of the budget. It does not appear the Town Board and Highway Superintendent took any measures to protect Town roads from damage caused by the heavy construction vehicles and loads. The construction impacts are related to the weight of the individual component of a wind turbine and the vehicle trips needed to construct each turbine. For example, nacelles for the High Bridge Wind Project can weigh as much as 70 tons, blade assembly can weigh 36 tons and the tower units over 70 tons. There will be a large number of oversize and heavy construction vehicle trips needed for each wind turbine site to deliver the components for each facility. Roads and intersections should have been identified that cannot accommodate the turning radius and/or weight of the construction vehicles. The Town should have

completed an impact analysis of the project and cost to repair and/or improve roads to accommodate the wind project. A mitigation measure the Town could have taken, if a proper EIS had been completed, was to require High Bridge Wind, LLC to place funds in an escrow account to be used to repair roads caused by damage of construction vehicles.

Solid Waste Production Issues:

Most wind turbine blades are disposed of in landfills. Wind turbine blades are made of non-recyclable fiberglass and are difficult to crush. Destroying the blades requires compacting equipment that is larger and more powerful than most municipal operated landfills. What is the plan for disposing of the blades? Does the Town of Guilford have the capacity to accept the blades in local landfills and does Guilford have the compacting equipment necessary to destroy the blades? Other states, particularly western states, have had wind turbines in operation for many years with many now at the end of their lifespan and disposal is not becoming an issue.

“I think it’s one of those things no one thought about too much back then when blades were first made,” Carbon County, Wyoming Planning and Development Director Sid Fox said. “Back then, there just wasn’t a lot of review in terms of permitting and people didn’t ask hard questions. I personally think the energy industry needs to find ways to recycle or reuse these blades. While the burial of the blades may not affect Carbon County immediately, it could have a larger impact on the state as a whole, both environmentally and economically.” Ellen Fike, “Casper Regional Landfill now taking in hundreds of decommissioned wind turbine blades.” Rawlins Times, October 7, 2019.

“Decommissioned blades are also notoriously difficult and expensive to transport. They can be anywhere from 100 to 300 feet long and need to be cut up onsite before getting trucked away on specialized equipment, which costs money, to the landfill. Once there the size of the blades can put landfills in a tough spot. If you’re a small utility or municipality and all of a sudden hundreds of blades start coming to your landfill, you don’t want to use up your capacity for your local municipal trash for wind turbine blades. The permits for more landfill space add another layer of expenses. Cindy

Langstrom manages the turbine blade disposal project for the municipal landfill in Casper, Wyoming. Though her landfill is one of the only ones in the state, not to mention the entire U.S., with enough space to take wind farm waste, she said the blades durability initially posed a financial hurdle. Our crushing equipment is not big enough to crush them.” Christina Stella, “Unfurling the Waste Problem Caused by Wind Energy.” NPR, September 10, 2019.

The Town of Guilford should have addressed the issue of disposal of wind turbine blades as part the decommissioning plan. The Town of Guilford should have addressed which landfill facility would be able to accept the wind turbine blades and other materials into their facility. The Town of Guilford should have addressed if the landfill facilities have the proper compacting equipment to handle the size of the components to be crushed. The Town of Guilford should have consulted with NYSDEC to assess whether any additional permitting would be required to accept wind turbine components for disposal. All of this could have been addressed as part of an Environmental Impact Statement.

§6 CRR-NY 617.7(c)(1)(ii) - The removal or destruction of large quantities of vegetation or fauna; substantial interference with the movement of any resident or migratory fish or wildlife species; impacts on a significant habitat area; substantial adverse impacts on a threatened or endangered species of animal or plant, or the habitat of such a species; or other significant adverse impacts to natural resources;

As previously mentioned in Argument #1, the Green Floater and Bald Eagle have been identified as being located in the Town of Guilford and are classified as a threatened or endangered species. The Longtail Salamander and Hellbender are located in the Town of Guilford and are classified as rare animals. The Fish and Wildlife Service should be allowed to determine what impacts allowing 676’ tall wind turbines and solar facilities will have if constructed in close proximity to habitat for these species. The Fish and Wildlife Service may have recommendations for increased setbacks or buffer areas from identified habitat to protect the listed species.

In *Wellsville Citizens for Responsible Development v. Walmart Stores*, 140 A.D.3d 1767 (4th dept. 2016) the approval of a Walmart Supercenter was annulled after citizens reported sightings of threatened bird species at the site, but the Town Board never undertook or required on-site surveys.

§6 CRR-NY 617.7(c)(1)(iv) - The creation of a material conflict with a community's current plans or goals as officially approved or adopted;

The Town of Guilford Comprehensive Plan Vision Statement includes phrases such as “highly value the natural beauty of the area” and that “our local government respects the property rights of residents” and “that new growth will fit well with our rural character”. The Community Goals section of the Comprehensive Plan encourages the following:

1. Economic Prosperity – promotes businesses that are environmentally friendly and fit with the character of the Town.
2. Individual Freedoms – protects the rights of individual landowners.
3. Environmental Health and Community Character – conserves its natural resources including air, water and open spaces; maintains its essential rural and small town character; preserves the natural beauty of the landscape.
4. Community – maintains our buildings and landscapes.

The Local Law adopted by the Town of Guilford will permit wind turbine heights up to 676 feet, which petitioners argue is in material conflict with the Town’s Comprehensive Plan. Heights of this nature do not fit with the character of the Town, does not maintain the rural and small town character, does not preserve the natural beauty of the landscape and does not protect the rights of individual landowners concerned with the environmental and health impacts.

Comprehensive Planning has been interpreted by the New York Court of Appeals to be an “almost universal statutory requirement” of any local zoning scheme so that local land use decisions give due consideration to the “needs of the community as a whole” (*Udell v. Haas*, 21 N.Y. 463, 469, 235 N.E.2d 897, 900 (1968)). For the purposes of siting a wind facility that will survive Article 78 review, “New York law suggests that comprehensive plans include components regarding the location of public and private utilities and infrastructure, the protection of the sensitive environmental areas and the improvement of the local economy.” (*John R. Nolon & Jessica Bacher, Wind Power: An Explanation of Regulation and*

Litigation 3 (Feb. 20, 2008). In April 2019 the Town of Guilford updated the 2014 Comprehensive Plan to include a section related to renewable energy. The Local Law adopted by the Town Board will allow wind and solar facilities to be sited anywhere in the Town. This is proof that the Town Board did not “include components regarding the location of public and private utilities and infrastructure, the protection of the sensitive environmental areas and the improvement of the local economy” into consideration while adopting the 2019 Comprehensive Plan update. The Town Board did not address the possibility of adopting zoning in the Town or adopting overlay districts in the Town to determine where wind and solar uses would be appropriate.

According to the New York State Energy Research and Development Authority (NYSERDA), a comprehensive plan should have four parts: (1) inventory, (2) analysis, (3) goals and objectives, and (4) implementing an action strategy (*NYSERDA Comprehensive Plan Report, supra note, 36, at 3*). The inventory and analysis stage is related to determining the highest yield areas for wind facilities and less compatible areas for wind energy development due to potential conflicts. The April 2019 Comprehensive Plan amendment adopted by the Town Board fails to analyze this. The implementation stage is to set the comprehensive plan in motion by identifying specific areas for wind generation development. Although this process will inherently involve locations where wind yield is most heavily concentrated, it is recommended that this process incorporate community expectations and opinions to avoid future opposition and litigation. More importantly, a court will be more willing to uphold approval of a wind generation facility if it is consistent with a development scheme set out in a comprehensive plan. The April 2019 Comprehensive Plan amendment fails to identify areas in the Town of Guilford for wind development, other than saying it is allowed anywhere in Town. The Town Board failed to take a ‘hard look’ at areas of Town that should be protected from large scale wind and solar land uses.

The Town Board has failed to adopt zoning districts and/or overlay districts in the Town since the adoption of the 2014 Comprehensive Plan and subsequent 2019 update, a logical next step once a Comprehensive Plan is adopted. The Town Board should adopt zoning districts and/or overlay districts

to identify areas where wind and solar facilities would be feasible and appropriate. The purpose of zoning is “to promote the health, safety, morals, and general welfare of the community, to protect and conserve the value of buildings, and encourage the most appropriate use of the land.” *City of Richmond v. Board of Supervisors of Henrico County*, 199 Va. 679, 686, 101 S.E.2d 641, 646 (1958); see also *Southern Railway Co. v. City of Richmond*, 205 Va. 699, 707, 139 S.E.2d 82, 88 (1964) (“the purpose of zoning is in general two-fold: to preserve the existing character of an area by excluding prejudicial uses, and to provide for the development of the several areas in a manner consistent with the uses for which they are suited”). Zoning regulations strive to achieve these purposes by regulating or restricting the use of property within the zoning area. *Blankenship v. City of Richmond*, 188 Va. 97, 105, 49 S.E.2d 321, 325 (1948); see also *Northern Virginia Community Hospital, L.L.C. v. Loudoun County Board of Supervisors*, 70 Va. Cir. 283 (2006) (in sustaining and overruling demurrers in an action challenging the board’s denial of various land use applications related to an acute-care hospital, the court said that “zoning is concerned, not only with the questions of needed services, but also with compatibility and orderly growth”).

Petitioners argue that by the Town Board stating the wind and solar uses are allowed anywhere in the Town, and by not adopting zoning districts and/or overlay districts to assess where industrial wind and solar facilities would be appropriate, the Town Board has failed to promote the health, safety, morals, and general welfare of the community, to protect and conserve the value of buildings, and encourage the most appropriate use of the land.

Furthermore, the 2019 Comprehensive Plan amendment fails to address how to mitigate potential visual and environmental impacts, a concern expressed by residents. The Town Board failed to “incorporate community expectations and opinion”. For example, visual impacts to the Unadilla River Valley should have been addressed. An action item to mitigate visual and aesthetic impacts could have been to incorporate setbacks from the river extending out a distance of 2 miles. This setback would protect the visual impacts of wind facilities from being located along ridge tops that parallel the river valley.

In 2007, deficiencies in a town board's SEQR process sank plans to install a 68 turbine wind project in Jordanville, NY that would have generated an estimated 136MW of electric power. According to the court, the local board's environmental impact statement did not contain consideration of alternative project sizes and layouts, which the court determined the lead agency failed to take a 'hard look' at the project's impact on the surrounding landscape and communities, as required under SEQR (*Brander v. Town of Warren*, 18 Misc. 3d 477, 847 N.Y.S. 2d 450 (.Y. Sup 2007)).

In a more widely cited case related to moratoriums on wind energy development (*Ecogen, LLC v. Town of Italy, NY*, 443 F.Supp 2d at 149) the court upheld "protection of aesthetics" as a legitimate public concern justifying the moratorium. Town residents and residents and public officials from adjacent municipalities have expressed concerns related to visual impacts of the High Bridge Wind project, an issue the Town Board failed to address. In an email dated August 5, 2019 the Town of Unadilla Town Supervisor George Denys sent an email to the Town of Guilford Supervisor expressing concerns related to "protection of aesthetics". Supervisor Denys concluded his email by stating "Until visual, sound and health concerns are completely addressed to the satisfaction of public health officials and the Town of Unadilla, we must strongly oppose the nine wind turbines proposed in the south east corner of the High Bridge wind project." The Town of Unadilla is considered an interested agency and would have been included as part of a Type I Action coordinated review, had one been completed by the Town of Guilford. The Town of Guilford did not address the concerns expressed by the Town of Unadilla prior to adopting the Local Law.

The Town Board should not have taken action on adoption of the Local Law until such time that a proper view shed analysis and visual simulations were completed to determine appropriate locations in the Town for wind and solar facilities and proper setbacks to mitigate impacts to residents in the Town of Unadilla.

§6 CRR-NY 617.7(c)(1)(vi) - A major change in the use of either the quantity or type of energy;

The Local Law will permit land uses allowing large scale ground mounted solar facilities and large scale wind farms. The 100MW High Bridge Wind Project, located in the Town of Guilford, is currently being reviewed under Article 10 of the Public Service Law.

§6 CRR-NY 617.7(c)(1)(vii) - The creation of a hazard to human health;

Infrasound and Low Frequency Noise:

The rapidly spinning blades of huge wind turbines have an effect on their surroundings, and it goes beyond aesthetics. The rapidly spinning blades can produce a weak but distinctive noise, as well as disruptions in air pressure. The noise is generated by the movement of the blades through the air, as well as from the turbine machinery.

Infrasound, is sound that is lower in frequency than 20 Hz or cycles per second. That's the "normal" limit of human hearing. Infrasound is the primary issue for those concerned about wind-turbine syndrome. They also say that audible sound and vibrations coming from wind turbines contribute to the health problems reported by some people who live close to wind farms. Symptoms of wind-turbine syndrome might include:

- Headaches
- Sleep problems
- Night terrors
- Ringing in the ears (tinnitus)
- Mood problems (irritability, anxiety)
- Concentration and memory problems
- Issues with equilibrium, dizziness and nausea

Infrasound, if not mitigated substantially, propagates over very long distances. In scientific studies, infrasound from wind turbines has been measured at levels so low that the sound is not perceived by humans. It has also been determined that infrasound from wind turbines does not give rise to noise damage in the traditional sense. In general, infrasound from wind turbines has a rhythmic pulsing

sound, and the pulsating sound pressure affects the inner ear, although no sound is perceived by the individual. The pressure waves propagate into the inner ear fluid-filled cavities, and this “massage effect” affects the sensory cells in the inner ear hearing and organs of balance. Some persons are affected by the pulsating sound pressure while others are not affected by it in any significant way. Such sensory stimulation can occur in people with sensory hypersensitivity, causing symptoms such as unsteadiness, dizziness, headache, concentration difficulties, visual disturbances, and more. The problems arise even if the noise level is relatively low, since infrasound constantly affects and rhythmically changes the pressure in the inner ear via the sound paths. The pulsing sound pressure from wind turbines also indirectly activates the autonomic nervous system, causing increased secretion of adrenaline with constant stress effects, risk of panic anxiety, high blood pressure and heart attacks for people with increased sensory sensitivity.

The Bruce McPherson Infrasound and Low Frequency Noise Study was completed in December 2011 to assess the health effects produced by large industrial wind turbines experienced by people living in close proximity to an industrial wind facility in Falmouth, Massachusetts. The purpose of the study was to investigate and confirm or deny the presence of infrasonic and low frequency noise emissions. The study concluded that the acoustic energy from the wind turbine was found to be greater than or uniquely distinguishable from the ambient background levels and capable of exceeding human detection thresholds. The study revealed dynamically modulated low frequency and infrasonic energy from the nearby wind turbine occurring at the blade pass rate; energy which was found to be amplified indoors below 10Hz. The infrasonic modulations were absent when the wind turbine was off. The dBA levels were inversely correlated to adverse health effects experienced; effects were more severe indoors where dBA levels were much lower. The increase in modulations indoors was consistent with stronger adverse health effects indoors.

The research revealed that persons without a pre-existing sleep deprivation condition, not tied to the location nor invested in the property, can experience within a few minutes the same debilitating

health effects described and testified to by neighbors living near the wind turbines. The study confirms that large industrial wind turbines can produce real and adverse health impacts and suggests that this is due to acoustic pressure pulsations, not related to the audible frequency spectrum, by affecting the vestibular system especially at low ambient sound levels. The study results emphasize the need for epidemiological and laboratory research by medical health professionals and acousticians concerned with public health and well being. This study underscores the need for more effective and precautionary setback distances for industrial wind turbines. It is especially important to include a margin of safety sufficient to prevent inaudible low-frequency wind turbine noise from being detected by the human vestibular system.

The Shirley Wind Project, located in Brown County, Wisconsin, is a 20 megawatt facility (8 wind turbines) that became operational in December 2010. In February 2015 the Brown County Board of Health (BOH) issued a statement that the BOH had been studying the adverse health effects for the past 4 ½ years in the Shirley Wind Project. The BOH stated they had received at least 50 medical complaints including ear pain, pressure, headache, tinnitus, vertigo, nausea, chest pain, chest pressure, loss of concentration, sleep deprivation and more, as well as more than 80 other complaints. There had been 2 formal studies of infrasound/low frequency noise by acousticians in 2012 and 2014. The latter study revealed symptom generating infrasound and low level frequency noise at a distance of 4 ½ miles. The BOH petitioned the State to conduct further studies, including an epidemiological study. The BOH received no actionable response from the State.

The BOH took action, considering the State did not respond, by adopting Brown County ordinance 38.01 Public Health Nuisance Human Health Hazard. "Human Health Hazard means a substance, activity or condition that is known to have the potential to cause acute or chronic illness or death if exposure to that substance, activity or condition is not abated" to the industrial wind turbines at the Shirley Wind Project. The exact wording of the declaration is "To declare the industrial wind turbines at the Shirley Wind Project in the Town of Glenmore, Brown County, Wisconsin a human health hazard for all people

who are exposed to infrasound/low frequency noise and other emissions potentially harmful to human health.”

In March 2006 Nina Pierpont, MD, PhD provided testimony before the New York State Legislature Energy Committee. In that testimony Dr. Pierpont discussed a symptom know as “Wind Turbine Syndrome , which produces symptoms such as sleep deprivation, headaches, dizziness, exhaustion, difficulty concentrating and tinnitus. Dr. Pierpont did state that not everyone living near turbines suffers the effects of these symptoms. The differences are known as risk factors and means there are differences among people in susceptibility. Data from a number of studies and individual cases documented that in rolling terrain, similar to the terrain in the Town of Guilford, disturbing symptoms of the Wind Turbine Syndrome occur up to 1.2 miles away from the closest turbine. In long Valleys, similar to the Unadilla River Valley, with turbines on ridgetops, disturbing symptoms occur up to 1.5 miles away. In mountainous terrain, disturbing symptoms occur up to 1.9 miles away.

Dr. Pierpont recommended in New York State, with its mixed terrain, a setback of 1.5 miles should be required from industrial wind turbines to people’s homes, schools, hospitals, or similar institutions, to protect people from the adverse health effects of industrial wind turbines.

In November 2019 the Chautauqua County, NY Board of Health, after two years of listening to concerns on wind turbines, said it plans to submit letters to all local municipalities with recommendations related to industrial wind turbines. The Board of Health recommended to restrict industrial wind turbines from being constructed within 1 ½ miles of any residence and to generate 35 or fewer decibels in sound frequency.

Petitioners argue the Town of Guilford Town Board did not take a “hard look” (required by SEQRA) in determining proper setbacks of industrial wind turbines to residential dwellings, particularly related to infrasound and noise. This is evidenced by a May 29, 2019 letter prepared by Young/Sommer, LLC Counselors at Law, which is a comment letter on the proposed Local Law. It should also be noted that Young/Sommer is the legal counsel to Calpine, who is the developer of the proposed High Bridge Wind

Project in the Town of Guilford. There are numerous sections of the letter, page 2, 5 and 6, where statements are made related to setbacks Calpine needs for the High Bridge Wind project. On page 6 it states "Calpine can agree to a 1.25 times tip height setback from non-participating parcel boundaries (845 feet). However, the previously proposed 1.5 times tip height setback from non-participating parcel boundaries (1,014 feet), given the tax parcel layout in the Town, would be unworkable. This is clear evidence of a conflict of interest in allowing a project developer to dictate to the Town of Guilford Town Board what the setbacks should be in the Local Law. The Town Board appears to have based their decision on what Calpine wanted and not what Town residents or scientific studies recommended to mitigate infrasound and low level frequency noise.

Fire

Wind Turbine fires are more common than not and should have been addressed prior to any action being taken on the Local Law. The heights of each nacelle (houses the generating components in a wind turbine including the generator, gearbox, drive train and brake assembly) will be at an approximate height of 500 feet above the ground. What is the current capacity of the Guilford Fire District and Borden Hose Fire District to contain a fire at this height? Do the fire districts have the proper fire apparatus to control a fire at this height? Do surrounding fire districts, Sidney or Norwich, have apparatus to control a fire at this height? If the answer is no, what is the Town's plan to address this public health and safety issue? Is the policy going to be to "let it burn"? If this is the Town's policy it is failing to address health and safety issues for three primary reasons.

First, debris from turbine fires typically falls from the turbine during the fire. The larger debris tends to fall in a more vertical manner due to its weight. Lighter debris, which is on fire, is carried by the wind at horizontal distances emanating outwards from the tower. This is a concern related to setbacks from residential uses and the potential to cause brush fires. If there are not proper residential setbacks there is an opportunity for the flaming debris to land on nearby residential structures. The Town Board should have addressed this issue prior to issuing a SEQR Negative Declaration.

Second, a “let it burn” policy will allow the fire to burn in place. The concern here is turbine fires last for an extended period of time. Extended periods of heat on metal can negatively impact the structural integrity of that metal. If the structural integrity of the tower is compromised there is a higher probability of tower failure and collapse.

Third, a “let it burn policy” increases the likelihood of brush fires due to the falling debris which is on fire.

Shadow Flicker

Shadow flicker is the effect of the sun (low on the horizon) shining through the rotating blades of a wind turbine, casting a moving shadow. It will be perceived as a “flicker” due to the rotating blades repeatedly casting the shadow. Although in many cases shadow flicker occurs only a few hours in a year, it can potentially create a nuisance for homeowners in close proximity to turbines.

Computer models can accurately predict when, where, and to what degree this problem will occur, so wind project developers can mitigate this impact during the site selection process. In addition, many local ordinances incorporate language addressing shadow flicker to minimize any potential impact on neighbors.

The 10 turbines that could negatively impact the petitioner Kovalchik’s property, located in the Town of Unadilla, are proposed on a ridge to the west and southwest of their property. The sun sets behind this ridge and shadow flicker and infrasound are a concern the Town Board should have addressed as part of the SEQR review. Imposing a 2 mile setback for wind turbines from the Unadilla River is a way to address this concern. A visual impact study should have been completed to determine if land in this area of town is suitable for placement of wind facilities, or if the impacts will be such that they cannot be mitigated. Photo renderings of what the 10 turbines will look like, as viewed from the Kovalchik property, were not completed until October 2019, after the Local Law had already been adopted by the Town of Guilford. This also speaks to the email the Town of Unadilla supervisor sent to

the Town of Guilford Supervisor, expressing concerns related to noise, visual and health impacts. The Town of Guilford adopted the Local Law prior to receiving all the research needed to make an informed SEQR determination.

Petitioners Kershen, Gural and Gombach reside between 1,600 to 4,600 feet from a nearest turbine. Impacts of shadow flicker and infrasound will impact each of these properties. The only way to mitigate shadow flicker and infrasound is to require a greater setback distance. As previously discussed, many health and scientific experts recommend a minimum 1 ½ mile setback to mitigate adverse health impacts. The Town of Guilford Town Board failed to take into consideration the many scientific studies and testimonies related to adverse health impacts and applying proper mitigation to address those impacts.

§6 CRR-NY 617.7(c)(1)(viii) - A substantial change in the use, or intensity of use, of land including agricultural, open space or recreational resources, or in its capacity to support existing uses; and

Based on the approved Local Law, wind and solar uses will be allowed anywhere in the Town. Allowing the uses will potentially impact open space and agricultural lands as sites will be proposed on these lands. Access roads will need to be installed to each wind turbine site and there is an extensive amount of land disturbance associated with the installation of the foundations for each wind turbine.

Not only will there be a substantial change in the land use and intensity of the land use for each wind turbine facility, there will also be a change in use and intensity of use related to disposal of the wind turbine blades and components at landfills. For a landfill located near Casper, Wyoming approximately 1,000 decommissioned wind turbines need to be disposed of. “Each turbine blade will need between 30 and 44.8 cubic yards of landfill space, using a total of 448,000 cubic yards.” Isaac Orr, “Wind Turbine Landfill or Mass grave? We Report, You Decide”, August 14, 2019, Center of the American Experiment.

§6 CRR-NY 617.7(c)(1)(ix) - The encouraging or attracting of a large number of people to a place or places for more than a few days, compared to the number of people who would come to such place absent the action.

Construction of large scale wind and solar projects will require a large number of construction workers that will be in the Town on a temporary basis. Typically, employees working on large scale renewable projects are not from the immediate area or are from out of state.

Based on this record, it is evident the Town Board failed to fulfill its obligation as SEQRA lead agency to take a 'hard look' at relevant areas of environmental concern. Considering the Town Board failed to issue a Positive Declaration as required by SEQRA regulations, the Negative Declaration issued by the Town Board must be annulled as arbitrary and capricious, affected by an error of law, made in violation of lawful procedure, and unsupported by evidence in the record. Additionally, the resulting adoption of Local Law No. 3 of 2019 must likewise be annulled.

POINT 3:

**THE TOWN BOARD DID NOT ADDRESS
CONCERNS EXPRESSED BY AN INTERESTED AGENCY (TOWN OF UNADILLA)
PRIOR TO ISSUING A SEQR NEGATIVE DECLARATION
AND ADOPTING LOCAL LAW NO. 3 OF 2019.**

On July 10, 2019 the Town Board made a preliminary classification of action as an Unlisted action pursuant to part 617 of SEQRA regulations. The Town Board also determined they intended to serve as lead agency with respect to SEQRA review. A copy of the resolution was sent to interested and involved agencies allowing 30 days to challenge the Board's Lead Agency designation and provide written comments on the Environmental Assessment Form.

On August 5, 2019 Town of Unadilla Supervisor George Denys sent an email to Town of Guilford Supervisor George Seneck and Secretary of the Department of Public Service Kathleen H. Burgess. In the email Supervisor Denys identified the Town of Unadilla as an "adjacent and affected municipality to the

High Bridge Wind Project” and that The Town of Unadilla “has serious concerns about the proposed project.”

First, Supervisor Denys indicates there will be 9 turbines that will be installed on top of a ridge directly across the Unadilla River from our township. Supervisor Denys requested that studies, protections and safeguards afforded to the Town of Guilford should also be directly applied to the Town of Unadilla in the same scope and manner regardless of county or town boundaries.

Second, Supervisor Denys states the 9 turbines proposed on the ridge will directly affect residences in the Town of Unadilla, particularly at sunset, and shadow flicker is a concern for residences in this area. Supervisor Denys stated to his knowledge no visual studies have been completed to determine the visual impacts on Town of Unadilla residents and the potential for shadow flicker therefore the visual study is incomplete.

Third, the prevailing wind direction in this area, as reported by the Sidney New York AWOS 3 automated weather station, is from the northwest. This puts residents in this area of the Town of Unadilla downwind of the proposed wind farm. Any effects of sound from the turbines will most likely have a greater impact on Town of Unadilla residents than Town of Guilford residents. Supervisor Denys stated “we have a vested interest in knowing what the proposed noise limits and low frequency/infrasound impacts will be in the Town of Unadilla. To date, I have received no data in regards to this.”

Forth, Supervisor Denys indicates the majority of land uses in this area of the Town of Unadilla is agriculture and expressed a concern of the health implications of infrasound on humans and livestock. Supervisor Denys requested this issue to be investigated and addressed.

Supervisor Denys concludes his email by stating the Town of Unadilla believes the High Bridge Wind Project should not move forward until and unless these issues are addressed in a mindful and impartial manner. Supervisor Denys further states that “until visual, sound and health concerns are

completely addressed to the satisfaction of public health officials and the Town of Unadilla, we must strongly oppose the 9 wind turbines proposed in the southeast corner of the High Bridge Wind Project.”

Visual simulations were completed by Calpine from a Town road adjacent to petitioners Kovalchik’s property, but not until during the month of October 2019, after the Town Board issued a SEQR Negative Declaration and adopted the Local Law. No data on infrasound or other health impacts and recommendations how the Town of Guilford would mitigate those impacts to residents in the Town of Unadilla were provided to the Town of Unadilla as requested by the Supervisor in order for the Town to review and provide comments on mitigation.

Considering the Town of Guilford failed to provide the requested additional information to the Town of Unadilla in order for the Town of Unadilla to adequately assess the impacts to their Town, the Town of Guilford failed to fulfill its obligation as SEQRA lead agency to take a hard look at relevant areas of environmental concern therefore, the Negative Declaration must be annulled as arbitrary and capricious, affected by an error of law, made in violation of lawful procedure, and unsupported by evidence in the record. Additionally, Local Law No. 3 of 2019 must likewise be annulled.

POINT 4:

TOWN SUPERVISOR VIOLATED TOWN OF GUILFORD CODE OF ETHICS

Town Supervisor George Seneck has a family member (sister-in-law) who signed a lease with High Bridge Wind, LLC, subsidiary of Calpine, which currently has a 100 megawatt wind project proposed in the Town of Guilford and is under an Article 10 review by the New York State Department of Public Service. The Town Board adopted Local Law No. 3 of 2019 – Renewable Energy Systems Law in response to the proposed wind project in order to allow this type of land use in the Town.

In September 1970 the Town of Guilford adopted Local Law No. 2 of 1970, which established a code of ethics for municipal officers and employees of the Town of Guilford. Section 4 – Standards of

Conduct requires Town employees to be subject to and abide by 13 standards. By not recusing himself from any matter involving the adoption of Local Law No. 3 of 2019 the Town Supervisor violated the following Standards of Conduct listed in Local Law No. 2 of 1970:

Section 4(d) – He shall not engage in any transaction as representative or agent of the Town with any business entity in which he has a direct or indirect financial interest that might reasonably tend to conflict with proper discharge of his official duties.

Section 4(e) – He shall not by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is affected by the kinship, rank, position or influence of any party or person.

Section 4(f) – He shall not invest or hold any investment directly or indirectly in any financial, business, commercial or other private transaction, which creates a conflict with his official duties.

Section 4(g) – He shall endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are a violation of his trust.

Section 4(k) – He shall not directly or indirectly, solicit any gift; or accept or receive any gift having a value of twenty-five dollars or more, whether in the form of money, services, loan, travel, entertainment, hospitality, thing or promise, or any other form, under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his official duties or was intended as a reward for any official action on his part.

Town Supervisor George Seneck has an indirect financial interest in the High Bridge Wind Project based on the fact that his sister-in-law signed a lease with High Bridge Wind, LLC. This was an issue that was brought to the Supervisor's attention throughout the process to adopt the Local Law. The Supervisor refused to recuse himself. The value of the lease has been redacted from public record, but one could easily surmise the financial value of the lease, over the lifetime of the lease, could be worth hundred's of thousands of dollars (well over the maximum gift amount of \$25 permitted in the Town of Guilford Code of Ethics). In several cases, indirect financial benefits have been raised as a possible conflict. In *Tuxedo Conservation and Taxpayers Association v. Town Board of the Town of Tuxedo*, 69 A.D.2d 320, 418 N.Y.S.2d 638 (2d Dept 1979), the Court held that "it requires no feat of mental gymnastics to infer that if the application is approved, the board member's agency might benefit. 69

A.D.2d at 323, 418 N.Y.S.2d at 639. Even though “the letter of the law (General Municipal law §809) may not apply to his action, the spirit of the law was definitely violated.” 69 A.D.2d at 324, 418 N.Y.Sd at 640. Thus, the project approval was annulled, since “the test to be applied is not whether there is a conflict, but whether there might be.” 69 A.D.2d at 325, 418 N.Y.S.2d at 640. Petitioners argue that it requires no feat of mental gymnastics to infer that approval of the Local Law, allowing industrial scale wind projects as a permitted land use in the Town, will financially benefit the Town Supervisor’s family considering they have land leased with High Bridge Wind, LLC for the High Bridge Wind Project.

According to the State Comptroller, a board member “should consider abstaining from discussions and voting on any matter which, will not violate any Article 18 or the Town’s Code of Ethics, suggests even an appearance of self-interest, partiality or economic impropriety.” Op. State Compt. 88-68. In *Tuxedo Conservation and Taxpayers Association v. Town Board of the Town of Tuxedo*, 69 A.D.2d 320, 418 N.Y.S.2d 638 (2d dept 1979), the court held that “the test to be applied is not whether there is a conflict, but whether there might be.” 69 A.D.2d at 325, 418 N.Y.S.2d at 640.

Considering the Town Supervisor failed to recuse himself from being involved with the adoption of Local Law No. 3 of 2019 and had an indirect financial interest in Calpine’s High Bridge Wind project, the Local Law must be annulled as arbitrary and capricious, affected by an error of law, made in violation of lawful procedure, and unsupported by evidence in the record.

Additionally, Section 6 – Violations of the Town of Guilford Code of Ethics states, “In addition to any penalty contained in any other provision of law, any person who shall knowingly and intentionally violate any of the provisions of this local law may be fined, suspended or removed from office or employment, as the case may be, in the manner provided by law.” Considering the severity of the actions by the Town Supervisor and number of the Town Code of Ethics that have been violated the petitioners argue this rises to the level warranting the Supervisor be removed from office.

In *Keller v Morgan*, 149 A.D.2d 801, 539 N.Y.S2d 589 (3d Dept 1989) a board member was removed because of a conflict of interest. While the plaintiff was a member of the Planning Board for the Town of Schodack, he held an interest in a construction company. The conflict arose when the company entered into a contract with a developer that was waiting for approval of a subdivision by the Planning Board. The Plaintiff voted to approve the subdivision without disclosing his interest in the construction company and the work being performed. Following an investigation into the alleged conflict, the Plaintiff was removed as the Planning Board's Chairman. The court upheld Plaintiff's dismissal from office because he "neither disqualified himself in this matter nor made any statement concerning the conflict." The dismissal was proper because "the existence of a conflict of interest in such circumstances is patent, and the potential damage to the public welfare in general and the integrity of the Planning Board in particular is obvious."

In the Matter of *Nancy M. West et al., Petitioners, v. Victor R. Grant, as Supervisor of The Town of Lake Luzerne, Warren County*, Respondent 243 A.D.2d 815 (1997) 662 N.Y.S2d 863. Petitioners, residents of the Town of Lake Luzerne in Warren County, commenced this proceeding seeking to remove respondent from his position as Town Supervisor. The petition alleges, *inter alia*, a conflict of interest involving the Town's use of respondent's wholly owned insurance agency to broker the Town's insurance coverage resulting in respondent's receipt of commissions, and an impropriety with respect to respondent's use of Town gasoline in his personal vehicle without accounting for its usage. The facts establish a pattern of intentional wrongdoing involving self-dealing conflicts of interest which constitute a violation of the public trust and a continuing crime (*see, Matter of Morin v Gallagher*, [221 A.D.2d 765](#), 766; *Matter of Smith v Perlman*, [105 A.D.2d 878](#)). The record clearly shows that the issue of the conflict of interest was brought to respondent's attention. The self-dealing and the financial rewards behind the years of respondent's intentional violations of the law supported in the record, and in the Referee's findings, reach a level more than sufficient to warrant respondent's removal from office (*see, Matter of Feldberg v Friedland*, [221 A.D.2d 766](#), 767; *see also, Matter of Deats v Carpenter, supra*, at 322).

Accordingly, we confirm the Referee's finding of fact on the conflict of interest issue and conclude that respondent's conflict of interest warrants his removal from public office pursuant to Public Officers Law §36.

Considering the Town Supervisor failed to recuse himself from the adoption of the Local Law due to a financial interest in the adoption of the Local Law, and as required by the Town Code of Ethics, Local Law No. 3 of 2019 must be annulled as arbitrary and capricious, affected by an error of law, made in violation of lawful procedure, and unsupported by evidence in the record. Additionally, the Town Supervisor should be removed from office for violating the Town Code of Ethics.

POINT 5

TOWN SUPERVISOR VIOLATED ARTICLE 18 OF THE GENERAL MUNICIPAL LAW

On January 24, 2019 Calpine, through its subsidiary High Bridge Wind, LLC (High Bridge Wind) filed a Preliminary Scoping Statement (PSS) to identify and describe the environmental studies the company plans to conduct during the Article 10 permitting process to assess potential impacts from its 100 megawatt wind facility proposed for the Town of Guilford. In filing the PSS, High Bridge Wind also submitted \$35,000 toward an intervenor fund, which can be used by qualified local parties to defray legal, expert and administrative costs associated with participation in the pre-application and scoping phases of the Article 10 proceeding. The Town of Guilford applied for and was awarded the full \$35,000 submitted by Calpine into the intervenor fund, thus creating a contract between the Town of Guilford and Calpine. In the intervenor contract the Department of Public Service is listed as the State agency and the Town of Guilford is listed as the contractor. The Town Supervisor signed the contract.

Article 18 of the General Municipal Law prohibits municipal officers and employees from having interests in contracts with the municipality for which they serve. In order for a municipal officer or employee to have a prohibited interest in a contract (one that violates the law), four conditions must be met: (1) there must be a contract; (2) the individual must have an interest in the contract; (3) the

individual, in his or her public capacity, must have certain powers or duties with respect to the contract; and (4) the situation must not fit within any of the exceptions listed in §802 of Article 18.

Petitioners argue all four conditions listed above have been met, as follows: (1) a contract exists (intervenor funds contract) between the Town of Guilford and High Bridge Wind, LLC, project developer of the High Bridge Wind Project; (2) the Town Supervisor has an interest in the contract in that the intervenor funds were used to cover the Town's administrative costs in adopting the Local Law. Adoption of the Local Law allows as a permitted use in the Town industrial scale wind projects, a land use that financially benefits a family member of the Town Supervisor. The Town Supervisor has an indirect financial interest in allowing this type of land use in the Town in that his sister-in-law has signed a lease with High Bridge Wind, LLC; (3) The Town Supervisor applied for and signed the contract for intervenor funds, funds that were used to adopt a Local Law allowing a land use that financially benefits a family member; and (4) no exceptions listed in §802 of General Municipal Law have been met.

According to the New York State Comptroller, "You have an interest in a contract when you receive a direct or indirect financial or material benefit as a result of a contract with your municipality. This is a factual determination. You are also deemed to have an interest in contracts of certain individuals and business entities with which you have relationships." Office of the New York State Comptroller, Division of Local Government and School Accountability, April 2010.

Pursuant to General Municipal Law Article 18 §805 (Violations) any municipal officer or employee who willfully and knowingly violates the foregoing provisions of this article shall be guilty of a misdemeanor. Petitioners allege the Town Supervisor was aware of the conflict of interest as residents of the Town made statements related to the conflicts during the public meetings that were held during the adoption of the Local Law.

Considering the Town Supervisor failed to recuse himself from being involved with the adoption of Local Law No. 3 of 2019 and had a financial interest in Calpine's High Bridge Wind project,

the Local Law must be annulled as arbitrary and capricious, affected by an error of law, made in violation of lawful procedure, and unsupported by evidence in the record.

POINT 6

TOWN SUPERVISOR CONFLICT OF INTEREST BY NOT RECUSING HIMSELF FROM THE CHENANGO COUNTY PLANNING BOARD DURING THE GENERAL MUNICIPAL LAW 239 REVIEW OF LOCAL LAW NO. 3 OF 2019

Section 239 l, m, n and nn of General Municipal Law is a State law that requires local municipalities to send certain projects to the County Planning Board for review and comment. Pursuant to General Municipal Law §239-m.3.ii Local Law No. 3 of 2019 was referred to the Chenango County Planning Board for review. The Town Supervisor is a member of the Chenango County Planning Board and failed to recuse himself during the GML239 review process of the Local Law. Based on meeting minutes of the Chenango County Planning Board the Town Supervisor discussed the High Bridge Wind Project and/or Local Law No. 3 of 2019 at the following County Planning Board meetings in 2019: February 13, 2019; June 11, 2019; and August 13, 2019. The County Planning Board voted to approve the Local Law at their August 13, 2019 Board meeting. The Town Supervisor did abstain from voting on the Local Law.

The legal issue is related to ‘Compatibility of Office’, which addresses the question of whether one may hold more than one office or position of employment. Considering the Town Supervisor is also a member of the Chenango County Planning Board, he held two offices at the time the Local Law was being considered and approved, and was simultaneously providing recommendations on the Local Law to both offices (Town of Guilford Town Board and Chenango County Planning Board). Similar to the ethics standards and the prohibition on interests in contracts detailed in Article 18 of the General Municipal Law, the compatibility doctrine is designed to maintain public confidence in the integrity of government. Conflicts of duties are sometimes difficult to determine because the duties of the positions may be set forth in several locations, including state law, local laws, charters or through local practice. Also, if the duties intersect and there is some conflict, the initial question is whether recusal is

an appropriate remedy. Recusal is viable only when the holder of the offices can substantially perform the duties of the positions. The Town Supervisor did substantially perform his duties with both the Town of Guilford Town Board and Chenango County Planning Board, thus allowing the duties to intersect.

Considering the Town Supervisor is a member of the Chenango County Planning Board and failed to recuse himself from discussions of the Local Law at three County Planning Board meetings, the Local Law must be annulled as arbitrary and capricious, affected by an error of law, made in violation of lawful procedure, and unsupported by evidence in the record.

POINT 7

THE TOWN BOARD VIOLATED §271 AND §272-A OF NEW YORK STATE TOWN LAW BY NOT REFERRING THE COMPREHENSIVE PLAN UPDATE AND RENEWABLE ENERGY LOCAL LAW NO. 3 OF 2019 TO THE TOWN PLANNING BOARD

Prior to adopting the Local Law the Town of Guilford updated their 2014 Comprehensive Plan. The 2014 Plan included a small section on 'Alternative Energy' with recommendations that the Town should investigate the possibility of supplying all or part of the electrical needs of Town Hall and the Town Garage using solar power. It should also be noted that in this section of the Plan it states "Based on information from the Chenango County Planning Office, there are few promising sites for wind power installation in the Town. Any attempt to reduce dependence on fossil fuel sources in the Town will likely rely on a much more widespread adoption of solar energy applications."

On the cover page of the Comprehensive Plan Update it lists a timeline of the process included to update the Plan, as follows:

- Public hearing held: May 8, 2019 and June 12, 2019
- County referral made: May 9, 2019
- SEQR completed: May 8, 2019
- Adopted by Town Board: June 12, 2019

At no time during the Comprehensive Plan Update were the proposed amendments to the Plan referred to the Town Planning Board. Additionally, petitioners prepared a summary of the Town of Guilford Planning Board activities from June 2018 through 2019, based on Planning Board agendas. From June 2018 to adoption of the Comprehensive Plan Update in June 2019 there were no referrals made from the Town Board to the Planning Board seeking recommendations on the Comprehensive Plan Update.

§271(14)(b) of NYS Town Law states “The Planning Board may review and make recommendations on a proposed town comprehensive plan or amendment thereto. In addition, the planning board shall have the full power and authority to make investigations, maps, reports and recommendations in connection therewith relating to the planning and development of the town as it seems desirable, providing the total expenditures of said board shall not exceed the appropriation provided therefore.”

§272-a(5)(a) of NYS Town Law states “Any proposed comprehensive plan or amendment thereto that is prepared by the town board or a special board may be referred to the town planning board for review and recommendation before action by the town board.”

The Town Board was in the process of adopting a local law that would allow as a permitted land use industrial scale wind and solar projects, arguably the most intensive type of land use ever to be permitted in the Town’s history. Due to the environmental impacts and potential to change the character of the town by allowing wind and solar land uses, the Town Board should have referred the draft 2019 Comprehensive Plan Update and draft Local Law to the Planning Board as encouraged by NYS Town Law and allowed the Planning Board the opportunity to review and comment on the draft 2019 Comprehensive Plan Update and draft Local Law.

“Thus, it is readily apparent that the plaintiff's contention is well founded and that defendant Town Board could not legally consider the approval or disapproval of any rezoning amendments "Until such Planning Board has had a reasonable time to submit its report thereon" to the defendant Town

Board." *Paliotto v. Town of Islip*, 31 Misc. 2d 447, 456 (N.Y. Misc. 1962). *Paliotto v. Town of Islip*, 31 Misc. 2d 447, 457 (N.Y. Misc. 1962). "Properly administered, zoning ordinances do not destroy but add to values; arbitrarily administered or adopted, *without regard to the proper limits of police power, they become instruments of hardship and of tyranny* which can only be relieved by *multitudinous* applications to the court."

Considering the Town Board failed to refer the Comprehensive Plan Update and Local Law to the Planning Board, the Comprehensive Plan Update and Local Law must be annulled as arbitrary and capricious, affected by an error of law, made in violation of lawful procedure, and unsupported by evidence in the record.

POINT 8

CHENANGO COUNTY PLANNING DEPARTMENT AND CHENANGO COUNTY PLANNING BOARD DID NOT CONDUCT A PROPER GML 239 REVIEW

Pursuant to General Municipal Law 239-m, the Chenango County Planning Department reviews certain developments throughout the County for inter-municipal and countywide impacts. §239-m(3)(ii) of General Municipal Law, adoption or amendment of a zoning ordinance or local law, triggered the requirement of the Town of Guilford Town Board to refer the proposed Local Law to Chenango County. The role of the County Planning Department and County Planning Board, as part of a 239 referral, is to determine if there will be any countywide or inter-municipal impacts as a result of the proposed action. Items the County may consider as part of their review include, but are not limited to:

- Compatibility of adjacent land uses
- Impact of any additional traffic
- Compatibility with existing municipal comprehensive plans or land use laws
- Effects on community character and appearance
- Impact on community facilities

The objective of the zoning referral process is improved planning. Many communities find the referral process useful, especially when dealing with large and contentious projects, as was the case with the adoption of the Local Law. Suggestions made by the County are often similar to those which

will be brought up by the boards, but there are incidents when the County, due to the information available and having a county-wide perspective, brings up new issues. Pursuant to §239-m(4)(b) of General Municipal Law, which states, “Such county planning agency shall recommend approval, modification, or disapproval, of the proposed action, or report that the proposed action has no significant countywide or inter-community impact.”

In a letter dated August 12, 2019 prepared by Gary A. Abraham, Esq. and sent to Shane H. Butler, Director of Chenango County Planning and Development, Mr. Abraham outlines a deficiency in the Local Law 239 referral from the Town of Guilford. The Town had originally classified the action of adopting a new local law for wind and solar as an Unlisted Action and prepared a short Environmental Assessment Form. The Town reclassified the action as a Type I Action, but failed to refer the full Environmental Assessment Form to the County.

In a letter dated August 9, 2019 prepared by Kenneth Kovalchik, AICP and sent to the Town Supervisor and copied to Town Board members and Shane Butler, Director of Chenango County Planning and Development. The letter discussed the following:

1. How the Town had incorrectly classified the action as Unlisted and refers to SEQR regulations as to why it should be classified as a Type I Action.
2. Provided my professional planning opinion as to why Mr. Butler’s opinion that the Local Law should be classified as a Type II Action was incorrect.
3. References sections of the Comprehensive Plan and how the proposed Local Law may not be in substantial conformance.
4. Identifies a number of SEQR regulations that could be considered potential indicators of significant adverse impacts by allowing wind and solar land uses, which could trigger a Positive Declaration and need to prepare an Environmental Impact Statement.
5. Identified how my family’s property is located in an abutting Town and County, which showed there are inter-municipal concerns with the proposed Local Law

On August 13, 2019 the Chenango County 239 Review Committee reviewed and approved the Local Law. Minutes of the meeting show Mr. Butler made the following comments to the Committee, “Write in comments have been received and are available at the Planning Office. Some of the comments pertained to the project and not the Local Law, those comments were not accepted.” The comments made by Mr. Kovalchik in the letter questioned the validity of the SEQR process, stating the SEQR action

was improperly classified as a Type II Action and not a Type I Action, and the EAF was not correct when referred to the County for GML 239 review. The minutes also show that the Town Supervisor George Seneck stated, "The comments have been sent to the Town's attorney and he disagreed with the comments."

The fact Mr. Butler did not provide the Kovalchik letter to the County Planning Board (a letter written by a professionally certified land use planner with expertise in the SEQR process), shows a complete disregard for the planning process and allowing public participation in that planning process. Mr. Butler gave himself the sole authority to decide what was "not acceptable" to be reviewed by the County Planning Board. The letter discusses possible issues the Town and County should have considered related to compatibility of land uses, traffic impacts, compatibility with plans, effects on community character and impacts on community facilities, and could have inter-municipal and countywide impacts. All of these are considered issues a County Planning Board are tasked to review as part of a 239 referral. The letter should have been included as part of the 239 review by the entire County Planning Board. The Board as a whole should have decided what relevant information to take into consideration, not the County Planning Director.

Additionally, regarding the statement the Town Supervisor made that the Town Attorney had reviewed the letter and disagreed with the comments. No letter was provided by the Town to the County, from the attorney, indicating the reasons why he disagreed with the statements made in the letter. There is no public record to prove what the Town Supervisor stated is correct, or for the County Planning Board to review and make their own decisions. Furthermore, there was no opportunity for the public to review the attorney letter to question its conclusions.

The majority of review comments provided by the County Planning Board were related to grammatical errors of the proposed Local Law. The County Planning Board failed to comment on compatibility of land uses, traffic impacts, compatibility with existing plans, effects on community

character and impacts to community facilities, which are required to be reviewed by county planning boards as part of a GML referral.

On September 23, 2019 the Chenango County Planning Board's 239 Review Committee issued a letter to the Town of Guilford indicating the Committee has approved the application with "No Concerns". §239-m(4) of General Municipal Law states that a "County Planning agency shall recommend approval, modification, or disapproval of the proposed action, or report that the proposed action has no significant countywide or inter-municipal impact." The County Planning Board failed to provide a recommendation to the Town that is in compliance with General Municipal Law, nor did the County Planning Board review the entire public record prior to making their motion to approve.

Petitioners argue the Kovalchik letter and Town attorney letter should have been included as part of the "full statement of such proposed action" pursuant to §239-m(1)(c) of General Municipal Law. Petitioners also find the County Planning Board did not fulfill their duties in reviewing and commenting on inter-municipal and countywide impacts, therefore, the GML 239 referral must be annulled as arbitrary and capricious, affected by an error of law, made in violation of lawful procedure, and unsupported by evidence in the record. Additionally, the resulting adoption of Local Law No. 3 of 2019 must likewise be annulled.

STANDING

To establish standing to challenge a governmental action, a petitioner must demonstrate an injury-in-fact that falls within the zone of interests. SEQRA cases involving standing issues have been decided under rules in *Society of Plastics Indus. v. County of Suffolk* (77 NY2d 761 [1991]). In that case the court recognized that the Legislature did not intend every person or citizen to have the right to sue to compel SEQRA compliance (*id.* at 770). Rather, in order to have standing, a party must demonstrate an "injury in fact"—an actual legal stake in the matter being adjudicated—which falls within the "zone of interests, or concerns, sought to be promoted or protected by the statutory provision under which the agency has acted" (*id.* at 772-773 [citations omitted]). With particular reference to land use cases, courts

have held that the injury must constitute a "special harm" such that the party would "suffer direct harm, injury that is in some way different from that of the public at large" (id. at 774). In other words, the plaintiff must show a "direct interest in the administrative action challenged, different in kind or degree from the public at large" (id. at 775).

Matter of Save the Pine Bush, Inc. v. Common Council of the City of Albany, 13 NY3d 297, 308-309 (2009)(Pigott, J., concurring). "These same principles of standing apply whether the party seeking relief is one person or . . . an association of persons." *Society of Plastics Indus. v. County of Suffolk*, 77 NY2d 761, 775 (1991). For organizational petitioners, it is also required "that some or all of the members themselves have standing to sue, for standing which does not otherwise exist cannot be supplied by the mere multiplication of potential plaintiffs." *Dental Soc. of New York v. Carey*, 61 NY2d 330, 333 (1984).

Petitioners argue they have standing in the Article 78 due to living in close proximity to the proposed wind turbines. The adverse impacts (health and visual) that will be experienced by the Petitioners will be far greater than that of the general public due to living in close proximity to the wind turbines. As discussed in this petition, scientific studies have shown the adverse health impacts, particularly related to infrasound, can be experienced up to approximately 2 miles away. The visual impacts, and related shadow flicker caused by the wind turbines, of living in close proximity to wind turbines are far greater than someone living farther away and have no view of the wind turbines and no shadow flicker. The following provides a summary of the distances from each petitioner residence to the nearest wind turbine, with addition comments provided as follows:

Paulette Gural
836 County Road 36
Guilford, NY 13780

Nearest Wind Turbine – approximately 2,164 feet (0.41 miles)

Comments:

The visual impact from our house will be greatly impacted from the wind turbines. Views from Wahlberg Rd. and County Rd 36 were recognized by the Chenango Land Trust's Land Stewardship Award in 2007. The proposed wind turbines on the hill behind Wahlberg Road would greatly impact our property. If we were to sell our house after the wind turbines are up. It would greatly impact the sale of the house.

Also, I am very concerned about the impact of shadow flicker since I have vertigo. Turbine-related shadow flicker has the potential to cause nausea, dizziness, and disorientation. We get our water supply from the well on our property. Construction of the foundation of a single wind turbine can change the groundwater distribution and flow and we are downhill from the turbine.

Ed Kershen
198 High Bridge Road
Mt. Upton, NY 13809

Nearest Wind Turbine – approximately 4,646 feet (.88 miles)

Jessica Gombach
245 Blower Road
Guilford, NY 13780

Nearest Wind Turbine – approximately 1,531 feet (0.29 miles)

Comments:

My husband and I live at 245 Blower Rd in Guilford, pretty much in the center of the project area. Along with property value loss and shadow flicker, noise and quality of life is a huge concern for our family. We have an autistic son who already receives special accommodations in our home due to noise and light sensitivity. So it's not just concerns with use of my home, but our property as well as health impacts to our son, and no one wants to address that.

Donald and Barbara Kovalchik
504 River Road
Mt. Upton, NY 13809

Nearest Wind Turbine – approximately 1 ½ miles away

Comments:

Calpine completed a photo rendering of what the turbines will look like from a location on River Road in front of Petitioners residence. There will be 10 wind turbines within 1 ½ to 2 miles away, installed on top of a ridge on the opposite side of the Unadilla River Valley from the Kovalchik property. The ridge is approximately 700 feet higher than the valley floor, so it gives the impression the turbines are taller than they actually are. The main concern Don and Barb have is related to infrasound and visual impacts. The studies discussed in the petition have shown infrasound can travel up to 2 miles. There are no natural features between the 10 wind turbines and the Kovalchik residence to block or mitigate the infrasound impacts.

Don and Barb have owned the property since 1969 and is an operating small dairy farm. Studies have shown infrasound can affect animals, particularly cows, showing evidence of miscarriages and still

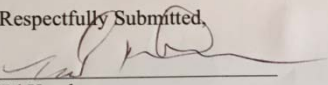
births. Don and Barb live on the property and lease the land to a dairy farmer. They are in their mid 80's, are on a fixed income and depend on the annual lease payments from the farmer to supplement their income. The concern is that if the adverse impacts of infrasound affect the dairy cows it may cause a financial burden to the farmer of losing cows and loss of milk production, and the potential to leave the farm altogether.

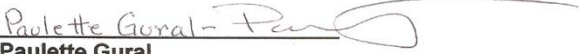
CONCLUSION

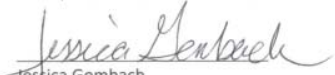
For these reasons, the Petitioners request that the Court grant the Verified Petition, and enter a judgment to annul the SEQRA Negative Declaration issued by the Town of Guilford Town Board and annul the Renewable Energy Local Law No. 3 of 2019 approved by the Town of Guildford Town Board.

Furthermore, pursuant to the Town of Guilford Code of Ethics, the Petitioner's request the Court to remove Town Supervisor George Seneck from office due to not recusing himself from the process to adopt Local Law No. 3 of 2019. The actions of Town Supervisor George Seneck are a clear violation of public trust, public welfare and general integrity of the planning process.

Dated: January 22, 2020

Respectfully Submitted,

Ed Kershen
198 High Bridge Road
Mt. Upton, NY 13809


Paulette Gural
836 County Road 36
Guilford, NY 13780


Jessica Gombach
245 Blower Road
Guilford, NY 13780

Don Kovalchik
504 River Road
Mt. Upton, NY 13809


Petitioners

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

KENNETH KOVALCHIK, being duly sworn, deposes and says:


I am the land use planner for Petitioners in this proceeding. My residence is located at 225 McCormack Road North, Slingerlands, NY 12159. I have read the foregoing Verified Petition and know the contents thereof. The foregoing Verified Petition is true to my knowledge, except as to matters therein stated on information and belief, and as to those matters, I believe them to be true. The grounds of my belief as to all matters not stated upon my knowledge are a review of publicly available documents associated with the subject of this proceeding, contents of my file, and consultation with the Petitioners. The reason this verification is made by the undersigned instead of Petitioners is because Petitioners are not within the County of Albany, which is the county where my residence is located.



Kenneth Kovalchik, AICP

Sworn to me
this 22 day of January, 2020

Jill E. Grimmick
Notary Public, State of New York
Qualified in Rensselaer County
No. 01GR6380049
Commission Expires 08/27/2022



NOTARY PUBLIC