



Haller & Colvin
ATTORNEYS AT LAW

ROBERT W. EHERENMAN
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MARCH 4, 2016

**Certified Mail
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Indiana Political Subdivision
Risk Management Commission
Attn: Financial Services
Indiana Department of Insurance
311 West Washington St., Ste 300
Indianapolis, Indiana 46204

Board of Commissioners of the County
of Rush, Bruce Levi, Mark Bacon, and
Paul Wilkinson, both in their individual
and official capacities
101 East Second Street, Room 102
Rushville, Indiana 46173

Mary Ann Beard
Rush County Auditor
101 E. Second Street, Room 212
Rushville, Indiana 46173

Leigh Morning, Esq.
Morning Law Office, LLC
226 N. Main Street
Rushville, Indiana 46173

NOTICE OF TORT CLAIM PURSUANT TO I.C. § 34-13-3

RE: *Flat Rock Wind, LLC/Apex Clean Energy, Inc.*

This notice is pursuant to Ind. Code § 34-13-3, the Indiana Tort Claims Against Governmental Entities and Public Employees Act.

1. Circumstances which brought about loss.

On March 30, 2015, Flat Rock Wind, LLC and Apex Clean Energy, Inc. (collectively "Apex") applied to the Rush County Area Board of Zoning Appeals ("BZA") for a special exception under the Rush County Zoning Ordinance for a Wind Energy Conversion System ("WECS"). The WECS project included land in both Rush County and Henry County. As part of the WECS, and in reliance on the Rush County Zoning Ordinance adopted by the Board of Commissioners for the County of Rush ("County Commissioners"), Apex was induced to enter into numerous lease agreements with landowners who desired to use their real estate for the development of the wind energy project, and Apex has spent hundreds of thousands of dollars in lease payments and development costs in reliance on the zoning ordinance. The Rush County Zoning Ordinance states that the purpose of the WECS provisions are, in part, "to facilitate economic opportunities for local residents" and "to promote the supply of wind energy in support of Indiana's alternative energy sources potential and other such economic development tools." The Rush County Zoning Ordinance states that an applicant for a WECS and Rush County must enter into an a Decommissioning Plan and Economic Development, Drainage, and Road Use and Maintenance Agreements.

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444 E Main St | Fort Wayne IN 46802 | p 260.426.0444 | f 260.422.0274

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On May 7, 2015, at the BZA hearing, County Attorney Leigh Morning testified, under oath, that Rush County and Apex:

have reached a point for the Economic Development and the Decommissioning Agreement where I think we're about 98% complete on those two agreements and we're close to being able to sign. There's a couple of terms left on the Economic Development Agreement that need to be completed and those are just basically the dates for the abatement hearing. The council and the commissioners have wanted to wait until all three Agreements are ready to sign before we set the date for the abatement hearing to sign all three Agreements.

* * *

It's been a long road, but we've got to the point where at least with the Decommissioning Agreement and the Economic Development Agreement -- those terms have been satisfactorily met.

After the May 7 BZA hearing was continued, on May 25, 2015, Apex received approval from the Henry County Plan Commission for a portion of the WECS project. On July 1, 2015, the BZA approved Apex's special exception for a WECS development; however, at the conclusion of the BZA hearing, the BZA voted to recommend to the County Commissioners to enact a moratorium upon further WECS development in Rush County. Upon information and belief, the County Commissioners had previously negotiated and entered in an Agreement Regarding County Roads and Drains, an Economic Development Agreement, and a Decommissioning Agreement with a competing wind developer, Whitewater Wind, LLC.

On September 8, 2015, after the BZA had approved Apex's WECS special exception, the County Commissioners made a motion "to cease and desist all negotiations with APEX Wind Energy on the Flat Rock Wind and reject the project."

2. Extent of loss.

Apex will sustain economic damages, including but not limited to, lost profits and incurred development expenses as a result of the County Commissioners' arbitrary, capricious, unconstitutional and tortious refusal to negotiate and enter into the agreements required under Rush County Zoning Ordinance for the development the WECS. The County Commissioners' action tortiously interferes with the lease agreements between Apex and its landowners, which were induced by, and entered into in reliance of, the Rush County Zoning Ordinance enacted by the County Commissioners. The County Commissioner's action also tortiously infers with other business relationships. The County Commissioners' action results in a *de facto* moratorium that was enacted contrary to Indiana law and in violation of Indiana Constitution and the United States Constitution. The action of the County Commissioners amounts to a violation of procedural and

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substantive due process under the Indiana Constitution and the United States Constitution. The County Commissioners' action violates constitutional equal protection by arbitrarily and capriciously favoring one wind developer or another wind developer. The County Commissioners' action amounts to a regulatory taking under the Indiana Constitution and the United States Constitution. The extent of Apex's damages have not been determined at this time and additional legal theories may be subsequently discovered based upon the facts and circumstances.

3. Time and place loss occurred.

Apex's loss commenced on September 8, 2015, when the County Commissioners took their official action to cease and desist all negotiations with Apex and to arbitrarily and capriciously reject the wind energy project, and the losses are continuing and will exceed the statutory maximum of \$700,000.00.

4. Names of all persons involved if known.

a) Mark Bacon
101 East Second Street, Room 102
Rushville, Indiana 46173

b) Bruce Levi
101 East Second Street, Room 102
Rushville, Indiana 46173

c) Paul Wilkinson
101 East Second Street, Room 102
Rushville, Indiana 46173

d) Mary Ann Beard
101 East Second Street, Room 212
Rushville, Indiana 46173

e) Leigh Morning
Morning Law Office, LLC
226 N. Main Street
Rushville, Indiana 46173

5. Amount of damages sought.

The amount of damages sought is a just and reasonable sum permitted by statute not to exceed the statutory tort claim amount based upon proof of all damages sustained by Apex. Apex reserves the right to claim additional damages in excess of the statutory maximum for the County Commissioners' state and federal constitutional violations.

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6. **Residence of claimant.**

Flat Rock Wind, LLC/Apex Clean Energy, Inc.
310 4th Street NE, Suite 200
Charlottesville, Virginia 22902

For the purposes of this claim, Apex is represented by Robert W. Eherenman, Haller & Colvin, P.C., 444 East Main Street, Fort Wayne, Indiana 46802, (260) 426-0444.

7. The information contained in this notice is complete to the extent presently known by the claimant at the time of the notice. The governmental entity is cautioned that neither the claimant nor counsel have had an opportunity to conduct discovery and the investigation is ongoing. This notice is timely filed pursuant to Ind. Code § 34-13-3-8.

8. All governmental entities provided notice herein are urged to conduct a prompt and complete investigation of the events surrounding and resulting in the injuries and damages to claimants if they have not already done so, so as not to be heard to claim prejudice at a later date due to insufficiency or inadequacy of notice.

Sincerely yours,

HALLER & COLVIN, P.C.



Robert W. Eherenman

cc: Scott Koziar
Brenna Gunderson
Kurt Friesen

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PS Form 3800, January 2005

REFERENCE: 28606.001 - File # - RWE

SENDER: Mary Ann Beard
Rush County Auditor
101 E. Second Street, Room 212
Rushville, IN 46173

TO: Leigh Morning, Esq.
Morning Law Office, LLC
226 N. Main Street
Rushville, IN 46173

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PS Form 3800, January 2005

REFERENCE: 28606.001 - File #FILE #1 - RWE

SENDER: Board of Commissioners of the County of Rush
Bruce Levi, Mark Bacon & Paul Wilkinson
101 East Second Street, Room 102
Rushville, IN 46173

TO: Indiana Political Subdivision
Risk Management Commission
Attn: Financial Services
Indiana Department of Insurance
311 West Washington St., Ste. 300
Indianapolis, IN 46204

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