At a Special Term of the Supreme Court, State of New York, at the courthouse in Buffalo, New York on the 4TH day of JANUARY, 2012

STATE OF NEW YORK :
SUPREME COURT : COUNTY OF WYOMING

ROBERT WHITE,

Petitioner,

v.

DECISION and JUDGMENT

TOWN BOARD OF THE TOWN OF ORANGEVILLE, ZONING BOARD OF APPEALS OF THE TOWN OF ORANGEVILLE, and STONY CREEK ENERGY LLC,

INDEX NO. 44131

Respondents.

APPEARANCES: DEBORAH J. CHADSEY, ESQ., for Petitioner
DAVID M. DiMATTEO, ESQ., for the Town of Orangeville respondents
DANIEL A. SPITZER, ESQ., for Respondent Stony Creek Energy LLC

PAPERS CONSIDERED: The ORDER TO SHOW CAUSE, REQUEST FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER, and the AFFIDAVIT of ROBERT WHITE, with annexed exhibits, including the MEMORANDUM OF LAW SUBMITTED IN SUPPORT OF PETITIONER"S APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION;

the NOTICE OF VERIFIED PETITION and VERIFIED PETITION;

the verified ANSWER of the Town of Orangeville respondents;

the verified ANSWER of Respondent Stony Creek Energy LLC;

the CERTIFIED RECORD OF PROCEEDINGS (Volumes 1 to 10B);

the untitled affidavit of Donald Roberts;

the AFFIRMATION OF DAVID M. DiMATTEO, ESQ., with annexed exhibit;

the AFFIDAVIT OF MICHAEL C. MULCAHEY, with annexed

exhibits;

the MEMORANDUM [OF LAW] IN OPPOSITION TO THE PETITION;

the REPLY TO COUNTERCLAIM;

PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF REPLY TO COUNTERCLAIM OF RESPONDENTS;

the AFFIDAVIT of Deborah J. Chadsey, Esq., with annexed exhibits;

AFFIDAVIT of Robert White, with annexed exhibits;

the SUPPLEMENTAL AFFIRMATION OF BENJAMIN K. AHLSTROM, ESQ., with annexed exhibit;

the further AFFIDAVIT of Deborah J. Chadsey, Esq., with annexed exhibits.

This CPLR article 78 proceeding follows governmental approvals of a proposal by respondent Stony Creek Energy LLC (Stony Creek) to build and operate a wind energy farm consisting of 59 wind energy conversion devices (or windmills) and related infrastructure (hereinafter the project) on about 14,500 acres owned mostly by "participating" third parties and spread over some 25 square miles within the Town of Orangeville (Town), Wyoming County. Although the petition hints at some issues (including some raised under article eight of the State Environmental Quality Review Act [SEQRA]) that might go to the siting and approval of the project as a whole, this proceeding concerns the siting and approval of only one of the 59 windmills, known as T-28. T-28, which would have a maximum height (including its tower and rotor blades) of 426.4 feet, is to be erected in proximity to lands owned by petitioner Robert White on Bantam Road in the Town, and more particularly within 800 to 900 feet of petitioner's small hunting cabin or "seasonal residence." Petitioner is not a participant in the project and, although he apparently does not oppose the project as a whole, he does take issue with the siting of T-28 near his cabin.

On its face, the petition seeks to annul, as illegal, arbitrary and capricious, and an abuse of discretion (*see* CPLR 7803 [3]), the 1) August 11, 2011 determination of respondent Town Board of the Town of Orangeville (Town Board) approving the special use permit and site plan for the wind farm project with respect to T-28 pursuant to section 1116 (C) of the Town of Orangeville Zoning Code (Town Code); and 2) the August 25, 2011 determination of respondent Zoning Board of Appeals of the Town of Orangeville (ZBA) granting a certain area variance for wind turbine T-28 pursuant to Town Law § 267-b and Town Code § 1116 (B) (1) (b) (v).[1] Although the petition on its face predominately concerns the ZBA's granting of an area variance allowing construction of T-28 in otherwise unlawful proximity to Bantam Road, petitioner's subsequent submissions make clear that he now takes issue only with respondents' siting of T-28 within unlawful proximity to his nonparticipating "dwelling," as petitioner characterizes his hunting cabin.[2] The allegation of unlawfulness refers to Town Code § 1116 (B) (1) and (2), which require that each windmill be set back at least 500 feet from the next nearest windmill, 500 feet from its nearest property line, 700 feet from the property line of any nonparticipating resident, 1320 feet from any public building or "dwelling" (absent a waiver expressed in a written and recorded instrument), and 1.2 times its height (thus in this case 511.8 feet) from any public road. Thus, petitioner's quarrel is not with the area variance actually sought and granted with respect to T-28 (which variance permits T-28 to be constructed only 200 feet from Bantam Road), but with regard to a dwelling setback variance neither sought nor

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[1]The Town Board's approval of the entire project, being prior to the ZBA's consideration of the application of the area variance with regard to T-28, was conditioned on the granting of such variance.

[2]Petitioner thus specifically represents that he does "not pursue the . . . challenge to the [ZBA's] approval of the area [i.e., road setback] variance for . . . T-28 . . . [and persists only in his] challenge to the Town Board's approval of the Special Use Permit and Site Plan of Stony Creek with respect to the location of . . . T-28."

granted.[3]

Respondents' rejoinder is that, on account of its lack of basic amenities (including plumbing) and necessary approvals (including a building permit and certificate of occupancy), petitioner's hunting cabin is not a dwelling under local or State law, meaning that no such further variance was required. Indeed, respondent Stony Creek counterclaims for a declaration to that effect. Alternatively, respondents urge that, if this Court should determine that petitioner's cabin is a dwelling, the proper remedy is not to overturn the variance already granted but, rather, to remit the matter to the ZBA for its further consideration. As to that alternative argument, the Court agrees at the outset that it should not overturn the granting of a variance (i.e., from the road setback condition) that petitioner now explicitly does not challenge. The Court further notes that it could not possibly remit to the ZBA for a determination of the appropriateness of an area variance (i.e., from the dwelling setback condition) for which Stony Creek has yet made no application (and which may or may not be available in any event). The Court thus determines that, if petitioner should prevail on the merits of his contention that T-28 has been improperly sited within 1320 feet of a nonparticipating dwelling, then the appropriate remedy would be to annul the Town Board's granting of the special use permit and site plan approval with respect to T-28 only, which is in fact the relief sought under paragraph B. of the petition's "Wherefore" clause.

As to respondents' primary argument, it is now clear to the Court that respondents failed to seek a variance from or to enforce the 1320-foot nonparticipating dwelling setback in the case of petitioner's cabin not because they believed all along that the cabin is not a dwelling,

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[3]Respondents' position clearly is that they still may apply for an additional variance from the required setback between T-28 and petitioner's cabin, if it is deemed to be a dwelling, and petitioner seems to concede that. Thus, neither party addresses whether a variance from the dwelling setback requirement may be precluded by the peculiar structure of the local zoning ordinance (*compare* Town Code § 1116 [B] [1] [b] [I], [ii], and [iv] *with* § 1116 [B] [1] [b] [iii] and [v]). In any event, the Court sees no present need to resolve that issue.

but rather because they failed to discern its existence and location. Town Code § 1116 (C) (2) (b) (iv) requires that, as part of the site or "plot plan" to be submitted for approval along with the application for a special use permit to construct and operate a wind farm, the applicant must show, *inter alia,* the "[l]ocation of the offsite dwellings located near the site and the distance [from] each such dwelling to the nearest proposed wind[mill]," and further must draw circles showing compliance with the 1320-foot dwelling setback in the case of each windmill. Petitioner points out that, as part of that dwelling-plotting process (and also as part of the mapping done in connection with the environmental review) various small cabins or seasonal residences located within the project area, including some in the Bantam Road area that likewise are undersized and lack basic amenities, had their locations plotted out by respondents. Indeed, respondents themselves assert that they put forth "great effort" and exercised "extraordinary diligence" to correctly map the locations of all such "dwellings" (although respondents evidently did not uniformly succeed in doing so). Moreover, as part of their site plan approval process and/or environmental review, respondents tabulated several such "seasonal residences" (all designated by an assigned "H[ouse]" number) located within a 1320-foot radius of a windmill. In the case of two such seasonal residences, it was contemporaneously projected that the windmill in question would have to be "moved beyond the 1/4 mile minimum setback distance *from [the d]wellings* unless a setback agreement [wa]s reached with the landowner" (emphasis supplied). In at least one such instance, according to petitioner, a windmill ultimately was re-sited in order to grant a quarter-mile setback to a seasonal residence whose owner refused to participate in the project. By the same token, respondents separately tabulated those dwellings within the project area, apparently including several seasonal residences, with respect to which respondents had accorded (albeit in some cases barely) the quarter-mile setback. The upshot of all of the foregoing is that, with the apparent single exception of petitioner's cabin, respondents neither intentionally nor accidentally sited any windmills within 1320 feet of any

such cabins or seasonal residences.

Of even more significance herein is petitioner's convincing showing that efforts were made by respondents to accurately plot petitioner's hunting cabin and thereby assure that no windmill was sited within 1320 feet of it. However, in attempting to map the location of petitioner's cabin or otherwise depict his property situation, respondents plotted his "dwelling," denominated "H[ouse]-2102," in an incorrect location, one well outside a 1320-foot radius from the then proposed site of T-28.[4] In fact, in the location so plotted by respondents, there exists no dwelling or other structure. (Moreover, petitioner shows that respondents additionally mistakenly plotted a supposed second structure [designated as "H[ouse]-2101"] on petitioner's property in another location where there exists no man-made structure, but rather only a beaver dam.) Where petitioner's cabin is in fact located, respondents initially mapped no construction of any type (an omission blamed by respondents on the fact that petitioner's cabin is too small to have shown up in aerial photographs).[5] Petitioner points out that he or his counsel repeatedly attempted to bring the mapping errors to the attention of authorities at public meetings of the Town Board and Zoning Board, but that the authorities either refused to hear the information as untimely "public comment" or otherwise simply disregarded the information.

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[4]That apparently was a carryover from a mistake initially made on maps prepared by or for the Town tax assessor. Petitioner alleges that, in inaccurately mapping his cabin, respondents failed to study, consider, mitigate, etc., the noise, open space, visual, safety, and other impacts thereat, thus corrupting or compromising the Town Board's environmental review of the project. The Court does not feel it must address that aspect of petitioner's challenge, which stands or falls on whether his cabin is a dwelling as to which respondents must observe the quarter-mile setback.

[5]Petitioner notes that, in their recently revised "Turbine Layout Map," respondents now accurately map the location of petitioner's cabin (labeled a house) within 1320 feet of T-28, but that they nonetheless persist in mis-mapping the two nonexistent structures (likewise labeled houses) at respective locations on petitioner's property outside the 1320-foot radius from T-28. Petitioner further notes that, after ascertaining the proper location of his cabin and being sued herein, Stony Creek approached petitioner and unsuccessfully sought his consent to site T-28 within the dwelling setback radius of his cabin. The Court disregards that effort at settlement as probative of nothing.

Petitioner now urges that, given their obvious error in mapping the situation, and especially given the deference accorded to other seasonal residences, respondents' current argument that petitioner's cabin does not qualify as a dwelling appears to have been fashioned after the fact an attempt to evade the consequences of their clear mistake.

Of course, the fact that respondents' entire argument (like most lawyering) may be a post hoc rationalization of a given state of affairs does not necessarily mean that the argument lacks any legal merit. The Court thus addresses the parties' dispute in light of the facts and circumstances emphasized and the legal sources cited by the parties.

Petitioner's approximately 81½-acre property and cabin are located off Bantam Road, which is an unpaved and lightly traveled seasonal use road. The cabin itself is situated about 117 feet off the road, according to petitioner. Because the road is not maintained by the Town during the winter, petitioner's and his neighbors' access to their respective properties during such months must be by snowmobile or other off-road vehicle.

Petitioner bought the then vacant property in 1995 and improved it with the cabin, which was constructed by contractor, the following year. As so constructed, the cabin consists of one story of 200 square feet. Petitioner emphasizes that following the construction of the cabin, the Town tax assessor visited petitioner's property in order to inspect the cabin, following which petitioner's property tax classification was changed from vacant rural land to "seasonal residence," and petitioner's taxes were accordingly "significantly increased." Petitioner emphasizes that such tax classification and level of assessment have been in place since that time.

Petitioner emphasizes that his cabin has a wood stove, a cooking area or "kitchen," kitchen cabinets, a "living room," a dining table, chairs, two beds, and an outhouse. He further emphasizes that he and his family spend, on average, three or four months per year at the cabin, particularly using it during the fall months (i.e., a time of year during which the cabin

might be least accessible and for which it would appear least equipped for habitation).

Respondents emphasize that petitioner's cabin does not contain permanent provisions for living, sleeping, eating, cooking and sanitation inasmuch is it lacks beds (*but see supra*) and separate bedrooms and has an outhouse and washtubs as opposed to dedicated space for a kitchen (*but see supra*) and a bathroom. Respondents further emphasize that the cabin lacks plumbing fixtures, a sewage disposal system, and a water supply. (The record implies that petitioner' cabin further lacks electrical service, but the Court sees nothing explicit about that.) Respondents emphasize that petitioner did not obtain a building permit before having his cabin built, and that petitioner has never obtained a certificate of occupancy for the cabin. (Petitioner emphasizes that he was never told of the former requirement, at least, by his contractor.)

Respondents argue that section 202 of the 2010 Residential Code of New York State (19 NYCRR part 1220) defines as a "dwelling" "any building that contains one or two dwelling units used, intended, or designed to be built, used, rented, leased, let or hired out to be occupied, or that are occupied[,] for living purposes." Respondents further argue out that, pursuant to that same definitional provision of State law, a particular "dwelling unit" must "provid[e] complete independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking and sanitation." Respondents still further argue that, according to more substantive requirements of the State building code, adequate "sanitation" means a connection to a public water supply and/or public sewer system, if available, but if not, then to an individual water supply and an individual or private sewage disposal system. Respondents argue that, in adopting the 2009 version of the Town Code (*see infra*), Town officials did not and indeed could not lawfully have deviated from the requirements set out in State law.[6] Respondents thus contend that because it lacks even the most basic

[6] The Court regards that argument as being overly ambitious and ultimately unavailing in this circumstance. Obviously, words have (and may be defined as having) different meanings

permanent kitchen and/or bathroom facilities, has no running water, and contains no separate sleeping quarters, petitioner's cabin does not qualify as a dwelling and thus need not have been considered by respondents in siting T-28.

The Court will simply conclude that this is not a zoning compliance case under local law (i.e., vis-à-vis the cabin as opposed to the windmill) or a building-code enforcement case under either State or local law. Even if this were a building-code enforcement case under State law, the Court would conclude that petitioner's cabin meets the basic definition of a "dwelling" under State law (and Town law – *see infra*) as "any building that contains one or two dwelling units used, intended, or designed to be built [or] used . . . to be occupied, or that are occupied[,] for living purposes." The more specific amenity requirements cited by respondents are just that – requirements *for* dwellings – and thus cannot be deemed to be part of the definition of a dwelling, for the obvious logical reason that the amenity requirements in question are applicable *only to* dwellings. Thus, the failure of petitioner's cabin to possess some of the amenities of a dwelling may have every tendency to show that it is a substandard dwelling, but it has no real logical tendency to establish that it is not a dwelling. Similarly, with regard to the alleged failure of petitioner to obtain a building permit and certificate of occupancy, the Court will observe that a building permit is required for the cabin because it is a building (which it continues to be either

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in different contexts. Any requirement that local officials define a "dwelling" (or any other concept) for purposes of land-use regulation in the same way that the State (or the locality itself) defines the concept for purposes of building code enforcement would merely create the risk that certain real property uses and improvements that are out of compliance with the building code would prove impossible to effectively regulate for purposes of local land-use restriction (on account of the failure of such uses or improvements to meet the building code's supposedly controlling minimal definition of the thing being restricted). In any event, respondents' argument that the Town could and did not define a "dwelling" any differently in section 201 of the Town Code than the State has done in its building code is belied by the inclusion of a "bed and breakfast" within the State definition of a "dwelling" and the exclusion of a "bed and breakfast" from the Town Code's definition. There are also differences between the two definitional sections in terms of how many units a "dwelling" may contain ("one or two" under the State law versus "one [1] or more" under the Town Code).

with or without a permit), whereas a certificate of occupancy is required because (whether the building is a dwelling or not) it is being used or occupied. A given building is a dwelling (if at all) by virtue of its general nature, construction, and intended or actual use, and it does not magically become a dwelling only upon the obtaining of a building permit and certificate of occupancy. Simply, there is a difference between a building that for the time being may not legally be maintained in existence or occupied (whether as a dwelling or otherwise) and a building that is not in fact a dwelling.

By the same token, although petitioner points out that the Town tax assessor's manual defines a "seasonal residence" (such as his cabin has been classified for tax purposes) as a "[d]welling unit[ ] generally used for seasonal occupancy [and] not constructed for year-round occupancy [on account of] inadequate insulation, heating, etc.," this Court notes that this is not a tax assessment case. Thus, the outcome of the case is not controlled by the tax classification or assessment status of the cabin, however inconsistent and unseemly it may be for Town authorities to classify the cabin as a residence for tax purposes while seeking to deny its status as a dwelling for instant purposes.

The Court concludes that the controlling legal provisions here are those set forth in the Town Code. Its section 201 defines a "dwelling" as a "building designed or used for one (1) or more families," excluding "a motel, hotel, boarding house, bed and breakfast, or travel trailer." The Court concludes that petitioner's cabin fits within that definition, which is exceedingly broad, barely connotes the idea of habitability, and in no way incorporates the aforementioned requirements concerning the minimum amenities of a dwelling. The Court has no basis for concluding that the meaning of the word "dwelling" in Town Code § 1116 (B) (1) (b) (ii) (i.e., the quarter-mile setback provision) is any narrower than the definition of "dwelling" set forth in Town

Code § 201.[7] The Court further notes that Town Code § 1116 (B) (1) (c) stipulates only that "[s]ingle family and multi-family dwellings must meet the minimum floor area [otherwise set forth in the Town Code][8] *or be in existence at the time of the adoption of this Law* [i.e., the 2009 wholesale amendment of the Town Code and the promulgation of new section 1116] in order to be afforded the protection of subparagraph ii above [i.e., the quarter-mile dwelling setback]" (emphasis supplied).[9] The first part of the foregoing provision tends powerfully to show that substandard dwellings are (if grandfathered by virtue of their pre-2009 existence) entitled to the protection of the 1320-foot setback. More important, by the unequivocal command of Town Code § 1116 (B) (1) (c), the location of petitioner's cabin, which was in existence as of 2009, is to be taken into account in siting T-28. It is determinative here that the foregoing Town Code

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[7] It is sufficient for present purposes for the Court to conclude that the meaning of the word "dwelling" in section 1116 is no more narrow than the definition set forth in section 201 of the Town Code. However, the Court has cause to believe that the word "dwelling" in section 1116 was meant to convey, if anything, a somewhat less restrictive meaning than the aforementioned definition. The Court has difficulty believing that, in interpreting section 1116, Town officials would accord a nonparticipating "boarding house" or "bed and breakfast" property (nominally excluded from the Town Code's generalized definition of a "dwelling") only a 500- or 700-foot buffer from a windmill, while according the quarter-mile buffer to such nonresidential properties as churches, schools, golf courses, libraries, museums, civic organization halls, police and fire stations, and other governmental buildings (*see* Town Code § 1116 [B] [1] [b] [iii] *in conjunction with* the definition of "Public Building" in Town Code § 201).

[8] 1250 feet for single-family dwellings (other than manufactured homes), and 800 feet per unit in multiple-family dwellings.

[9] Respondents argue that the existence and use of petitioner's cabin was illegal under the 1964 Town Zoning Code from the time it was built because petitioner never acquired a building permit or a certificate of occupancy. Petitioner's rejoinder is that, during the windmill-siting process, respondents accorded setback protection to other non-permitted seasonal residences within the project area. The Court merely observes here that, in order to merit the dwelling setback under the windmill-siting provisions of the 2009 Town Code, the cabin/dwelling must merely have "been in existence" prior to 2009 (Town Code § 1116 [B] [1] [c]). The concept of existence under that subparagraph does not, this Court feels, encompass the idea of legal construction and occupancy. The Court strives to make as clear as it possibly can that it makes no determination herein with regard to the legality of petitioner's cabin or its use under either the former or current versions of the Town Code and from a permitting and approval, building-code compliance, or land-use regulation standpoint.

provision makes no exception for hunting cabins or seasonal residences in general or, more specifically, for dwellings that lack building permits, certificates of occupancy, or certain minimal amenities.

It appears that respondents themselves followed the foregoing interpretation or construction of section 1116 insofar as they apparently generally endeavored to take account of the existence and locations of other cabins or seasonal residences within the project area and thereby accord them the protection of the quarter-mile setback. Indeed, the Court discerns that, apart from petitioner's cabin, no such cabin or seasonal residence is within a 1320-foot radius of any of the 59 windmills.[10] Consequently, the Court concludes that respondents have acted, however mistakenly or inadvertently, illegally, arbitrarily and capriciously in not regarding petitioner's cabin as a "dwelling" and in not according it the protection of the 1320-foot setback from T-28. The Court notes that the proper interpretation of the unequivocal provisions of the Town Code, particularly including a definitional section, is a purely legal question as to which the Court need not defer to Town officials (*see Matter of New York Botanical Garden v Board of Stds. & Appeals of City of N.Y.*, 91 NY2d 413, 419 [1998]; *Matter of Toys "R" Us v Silva*, 89 NY2d 411, 419 [1996]; *Matter of Sabatino v Suffolk County*, 74 AD3d 825, 827 [2d Dept 2010]; *Matter of BBJ Assoc., LLC v Zoning Bd. of Appeals of Town of Kent*, 65 AD3d 154, 160 [2d Dept 2009]; *Matter of Blalock v Olney*, 17 AD3d 842, 843-844 [3d Dept 2005]). In any event, where as here the local authorities' "interpretation of a zoning code is irrational or unreasonable, [their]

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[10]Petitioner contends that if in applying the setback requirements respondents "had made a reasoned determination that they were not going to consider any seasonal residence that did not meet [building code or permitting requirements]," then respondents "could have denied unpermitted seasonal residences the protections of the setback requirements, as long as they treated every similar seasonal residence in the same manner." The Court cannot accept that concession. Although respondents here are to be faulted for not according petitioner's cabin the same treatment as similarly situated properties, the issue here is adherence to the unequivocal requirements of the Town Code, and not uniformity or inconsistency of treatment per se.

determination will be annulled" (*Matter of Tartan Oil Corp. v Bohrer,* 249 AD2d 481, 482 [2d Dept 1998]; *see Matter of RSM West Lake Rd. LLC v Town of Canandaigua Zoning Bd. of Appeals,* 55 AD3d 1222, 1227 [4th Dept 2008], *affd* 12 NY2d3d 843 [2009]; *Matter of Tallini v Rose,* 208 AD2d 546, 547 [2d Dept 1994], *lv denied* 85 NY2d 801 [1995]).

Accordingly, the verified petition is GRANTED, and the August 11, 2011 determination of respondent Town Board of Town of Orangeville is ANNULLED insofar as the Town Board issued a special use permit and granted site plan approval for the project with respect to T-28. With respect to the counterclaim of respondent Stony Creek Energy LLC, it is DECLARED that petitioner's cabin is a "dwelling" within the meaning of section 1116 of the Town of Orangeville Zoning Code.

SO ORDERED:

HON. PATRICK H. NeMOYER, J.S.C.

GRANTED

JAN 04 2012

BY KEVIN J. O' CONNOR
COURT CLERK