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County
City of
Town CHERRY CREEK
Village

Local Law No. 2 of the year 2011 .

A LOCAL LAW GOVERNING WIND ENERGY FACILITIES IN THE TOWN OF CHERRY CREEK

Be it enacted by the Town Board of the

of
Town . **CHERRY CREEK**

This Local Law shall be known as the "Wind Energy Facilities Law of the Town of Cherry Creek."

Section One—Purpose

The Town Board of the Town of Cherry Creek adopts this Article to promote the effective and efficient use of the Town's wind energy resource through wind energy conversion systems (WECS), and to regulate the placement of such systems so that the public health, safety, and welfare will not be jeopardized.

Section Two—Authority

A. The Town Board of the Town of Cherry Creek adopts this Article under the authority granted by:

1. Article IX of the New York State Constitution, § 2(c)(6) and (10).
2. New York Statute of Local Governments, § 10 (1), (6), and (7).

3. New York Municipal Home Rule Law, § 10 (l)(i) and (ii) and § 10 (l)(a)(6), (11), (12), and (14).

4. The supersession authority of New York Municipal Home Rule Law, § 10 (2)(d)(3).

5. New York Town Law, Article 16 (Zoning).

6. New York Town Law § 130(l)(Building Code), (3)(Electrical Code), (5)(Fire Prevention), (7)(Use of streets and highways), (7-a)(Location of Driveways), (ll)(Peace, good order and safety), (15)(Promotion of public welfare), (15-a)(Excavated Lands), (16)(Unsafe buildings), (19)(Trespass), and (25)(Building lines).

7. New York Town Law § 64(17-a)(protection of aesthetic interests) and (23)(General powers).

Section Three – Findings

A. The Town Board of the Town of Cherry Creek finds and declares that

1. Wind energy is an abundant, renewable, and nonpolluting energy resource of the Town and its conversion to electricity may reduce dependence on nonrenewable energy sources and decrease the air and water pollution that results from the use of conventional energy sources.

2. The generation of electricity from properly sited wind turbines, including small systems, can be cost effective, and in many cases existing power distribution systems can be used to transmit electricity from wind-generating stations to utilities or other users, or on-site consumption can be reduced.

3. Regulation of the siting and installation of wind turbines is necessary for the purpose of protecting the health, safety, and welfare of neighboring property owners and the general public.

4. Wind Energy Facilities represent significant potential aesthetic impacts because of their large size, lighting, and shadow flicker effects.

5. If not properly regulated, installation of Wind Energy Facilities can create drainage problems through erosion and lack of sediment control for facility sites and access roads, and harm farmlands through improper construction methods.

6. Wind Energy Facilities may present a risk to bird and bat populations if not properly sited.

7. If not properly sited, Wind Energy Facilities may present risks to the property values of adjoining property owners.

8. Wind Energy Facilities are significant sources of noise, which, if unregulated, can negatively impact adjoining properties.

9. Construction of Wind Energy Facilities can create traffic problems and damage local roads.

10. Wind Energy Facilities can cause electromagnetic interference issues with various types of communications.

Section Four – Definitions.

A. As used in this Article, the following terms shall have the meanings indicated:

1. AGRICULTURAL OR FARM OPERATIONS — means the land and on-farm buildings, equipment, manure processing and handling facilities, and practices which contribute to the production, preparation, and marketing of crops, livestock, and livestock products as a commercial enterprise, including a commercial horse boarding operation," as defined in New York Agriculture and Markets Law § 301 and "timber processing," as defined in subdivision fourteen of New York Agriculture and Markets Law § 301. Such farm operation may consist of one or more parcels of owned or rented land, which parcels may be contiguous or noncontiguous to each other.

2. EAF — Environmental Assessment Form used in the implementation of the SEQRA as that term is defined in Part 617 of Title 6 of the New York Codes, Rules and Regulations.

3. RESIDENCE — means any dwelling suitable for habitation existing in the Town of Cherry Creek on the date SEQRA for the specific application is completed, including seasonal homes, hotels, hospitals, motels, dormitories, sanitariums, nursing homes, senior housing, schools or other buildings used for educational purposes. A residence may be part of a multi-dwelling or multipurpose building, but shall not include correctional institutions.

4. SEQRA — the New York State Environmental Quality Review Act and its implementing regulations in Title 6 of the New York Codes, Rules and Regulations, Part 617.

5. SOUND PRESSURE LEVEL — means the level which is equaled or exceeded a stated percentage of time. An L_{10} - 50 dBA indicates that in any hour of the day 50 dBA can be equaled or exceeded only 10% of the time, or for 6 minutes. The measurement of the sound pressure level can be done according to the International Standard for Acoustic Noise Measurement Techniques for Wind Generators (IEC 61400-11), or other accepted procedures.

6. SMALL WIND ENERGY CONVERSION SYSTEM ("Small WECS") — A wind energy conversion system consisting of a wind turbine, a tower, and associated control or conversion electronics, which has a rated capacity of not more than 10 kW and which is intended to primarily reduce on-Site consumption of utility power.

7. SITE — The parcel(s) of land where the Wind Energy Facility is to be placed. The Site could be publicly or privately owned by an individual or a group of individuals controlling single or adjacent properties. Where multiple lots are in joint ownership, the combined lots shall be considered as one for purposes of applying setback requirements. Any property which has a Wind Energy Facility or has entered an agreement for said Facility or a setback agreement and received the required variance shall not be considered off-site.

8. TOTAL HEIGHT — The height of the tower and the furthest vertical extension of the WECS.

9. WIND ENERGY CONVERSION SYSTEM ("WECS") — A machine that converts the kinetic energy in the wind into a usable form (commonly known as a "wind turbine" or "windmill").

10. WIND ENERGY FACILITY — Any Wind Energy Conversion System, including Small Wind Energy Conversion Systems, or Wind Measurement Tower, including all related infrastructure, electrical lines and substations, access roads, and accessory structures.

11. WIND MEASUREMENT TOWER — a tower used for the measurement of meteorological data such as temperature, wind speed, and wind direction.

12. WIND OVERLAY DISTRICT — a district which encompasses part or parts of one or more underlying districts and that establishes requirements for Wind Energy Facilities.

Section Five – Permits and Rezoning Required.

A. No Wind Energy Facility shall be constructed, reconstructed, modified, or operated in the Town of Cherry Creek except in compliance with this Article.

B. No WECS including Small WECS shall be constructed, reconstructed, modified, or operated in the Town of Cherry Creek except in a Wind Overlay District, pursuant to an application for rezoning and for special use permit approved pursuant to this Article.

C. No Wind Measurement Tower shall be constructed, reconstructed, modified, or operated in the Town of Cherry Creek except pursuant to a Special Use Permit issued pursuant to this Article, except as allowed by subdivision H of this Section.

D. Notwithstanding any other provision of Local Law, Ordinance, Rule or Regulation, all applications for Wind Overlay Districts and Special Use Permits in the Town of Cherry Creek under this Wind Energy Facilities Law shall be to the Town Board of the Town of Cherry Creek. The Town Board of the Town of Cherry Creek shall have jurisdiction over all matters, permits, creation of Wind Overlay Districts, Rule, and/or regulation, and exceptions with respect to the Wind Energy Facilities Law of the Town of Cherry Creek, and such jurisdiction shall rest and reside in the Town Board of the Town of Cherry Creek alone.

N/A

E. Exemptions. No permit or other approval shall be required under this Article for WECS utilized solely for agricultural operations in a state or county agricultural district, as long as the facility is set back at least one and a half times its Total Height from a property line, and does not exceed 120 feet in height. Towers over 120 feet in Total Height utilized solely for agricultural operations in a state or county agricultural district shall apply for a special use permit in accordance with this Local Law, but shall not require a height variance. Prior to the construction of a WECS under this exemption, the property owner or a designated agent shall submit a sketch

plan or building permit application to the Town to demonstrate compliance with the setback requirements.

F. This Article shall apply to all areas of the Town of Cherry Creek. Please refer to Section 7 (Wind Overlay District Rules) for regulations regarding the permitted location of wind overlay districts.

G. Transfer, No transfer of any Wind Energy Facility or Special Use Permit, nor sale of the entity owning such facility including the sale of more than 30% of the stock of such entity (not counting sales of shares on a public exchange), will occur without prior approval of the Town, which approval shall be granted upon written acceptance of the transferee of the obligations of the transferor under this Article, and the transferee's demonstration, in the sole discretion of the Town Board, that it can meet the technical and financial obligations of the transferor. No transfer shall eliminate the liability of the transferor nor of any other party under this Article unless the entire interest of the transferor in all facilities in the Town is transferred and there no outstanding obligations or violations.

H. Notwithstanding the requirements of this Article, replacement in kind or modification of a Wind Energy Facility may occur without Town Board approval when (1) there will be no increase in Total Height; (2) no change in the location of the WECS; (3) no additional lighting or change in facility color; and (4) no increase in noise produced by the WECS.

Section Six – Applicability.

A. The requirements of this Article shall apply to all Wind Energy Facilities proposed, operated, modified, or constructed after the effective date of this Article.

B. Wind Energy Facilities for which a required permit has been properly issued and upon which construction has commenced prior to the effective date of this Article, shall not be required to meet the requirements of this Article; provided, however, that

1. Any such preexisting Wind Energy Facility which does not provide energy for a continuous period of twelve (12) months shall meet the requirements of this Article prior to recommencing production of energy.

2. No modification or alteration to an existing Wind Energy Facility shall be allowed without full compliance with this Article.

3. Any Wind Measurement Tower existing on the effective date of this Article shall be removed no later than twenty-four (24) months after said effective date, unless a Special Use Permit for said Wind Energy Facility is obtained.

C. Wind Energy Facilities may be either principal or accessory uses. A different existing use or an existing structure on the same Site shall not preclude the installation of a Wind Energy Facility or a part of such facility on such Site. Wind Energy Facilities constructed and installed in accordance with this Article shall not be deemed expansions of a nonconforming use or structure.

Section Seven – Wind Overlay District Rules.

A. Wind Overlay District may be created in the Agricultural-Residential District III, only.

B. Initial requests for Wind Overlay Districts shall be submitted with applications for WECS Special Use Permits. No Wind Overlay District may be initially created without specific requests for WECSs.

C. Once a Wind Overlay District has been created, new WECSs or accessory structures or facilities may be added in that District by grant of a Special Use Permit pursuant to the requirements of this Article.

Section Eight – Applications for Wind Energy Conversion Systems and Wind Overlay District.

A. A joint application for creation of a Wind Overlay District and Special Use Permit for individual WECS shall include the following:

1. Name, address, and telephone number of the applicant. If the applicant is represented by an agent, the application shall include the name, address, and telephone number of the agent as well as an original signature of the applicant authorizing the representation.

2. Name and address of the property owner. If the property owner is not the applicant, the application shall include a letter or other written permission signed by the property owner (i) confirming that the property owner is familiar with the proposed applications and (ii) authorizing the submission of the application.

3. Address, or other property identification, of each proposed tower location, including Tax Map section, block, and lot number.

4. A description of the project, including the number and maximum rated capacity of each WECS.

5. A plot plan prepared by a licensed surveyor or engineer drawn in sufficient detail to clearly describe the following.

(a) Property lines and physical dimensions of the Site.

(b) Location, approximate dimensions, and types of major existing structures, including all residences, and uses on Site, public roads, and adjoining properties within five hundred (500) feet of the boundaries of the proposed Wind Overlay Zone.

(c) Location and elevation of each proposed WECS.

(d) Location of all above ground utility lines on the Site or within one radius of the Total Height of the WECS, transformers, power lines, interconnection point with transmission lines, and other ancillary facilities or structures.

(e) Location and size of structures above 35 feet within a five-hundred-foot radius of the proposed WECS. For purposes of this requirement, electrical transmission and distribution lines, antennas, and slender or open lattice towers are not considered structures.

(f) The zoning designation of the subject and adjacent properties as set forth on the official Town Zoning Map.

(g) Proposed boundaries of the Wind Overlay Zone.

(h) To demonstrate compliance with the setback requirements of this Article, circles drawn around each proposed tower location equal to:

(i) One and a half times the tower height radius.

(ii) Five-hundred foot radius.

(iii) One-thousand two-hundred foot radius.

(i) Location of residential structures within one thousand two hundred feet of each proposed tower. The distance from the center of the tower to any off-site residence within one thousand feet shall be noted.

(j) All proposed facilities, including access roads, electrical lines, substations, storage or maintenance units, and fencing.

6. Vertical drawing of the WECS showing Total Height, turbine dimensions, tower and turbine colors, ladders, distance between ground and lowest point of any blade, location of climbing pegs, and access doors. One drawing may be submitted for each WECS of the same type and Total Height.

7. Landscaping Plan depicting vegetation describing the area to be cleared and the specimens proposed to be added, identified by species and size of specimen at installation and their locations.

8. Lighting Plan showing any FAA-required lighting and other proposed lighting. The application should include a copy of the determination by the Federal Aviation Administration to establish required markings and/or lights for the structure, but if such determination is not available at the time of the application, no building permit for any lighted facility may be issued until such determination is submitted.

9. List of property owners, with their mailing addresses, within 500 feet of the boundaries of the proposed Wind Overlay Zone. The applicant may delay submitting this list until the Town Board calls for a public hearing on the application.

10. Decommissioning Plan: The applicant shall submit a decommissioning plan, which shall include: 1) the anticipated life of the WECS; 2) the estimated decommissioning costs in current dollars; 3) how said estimate was determined; 4) the method of ensuring that funds will be available for decommissioning and restoration; 5) the method, such by annual re-estimate by a licensed engineer, that the decommissioning cost will be kept current; and 6) the manner in which the WECS will be decommissioned and the Site restored, which shall include removal of all structures and debris to a depth of three feet, restoration of the soil, and restoration of vegetation (consistent and compatible with surrounding vegetation), less any fencing or residual minor improvements requested by the landowner. The Plan shall include the Decommissioning Bond required by this Article.

11. Complaint Resolution: The application will include a complaint resolution process to address complaints from nearby residents. The process may use an independent mediator or arbitrator and include a time limit for acting on a complaint.

12. An application shall include information relating to the construction/installation of the wind energy conversion facility as follows:

(a) A construction schedule describing commencement and completion dates; and

(b) A description of the routes to be used by construction and delivery vehicles, the gross weights and heights of those loaded vehicles and the estimated total number of loads to be delivered in connection with the construction and installation.

13. Completed Part 1 of the Full EAF.

14. Applications for Special Use Permits for Wind Measurement Towers subject to this Article may be jointly submitted with the WECS application.

15. For each proposed WECS, include make, model, picture, and manufacturer's specifications, including noise decibels data. Include Manufacturers' Material Safety Data Sheet documentation for the type and quantity of all materials used in the operation of all equipment including, but not limited to, all lubricants, and coolants.

16. If the applicant agrees in writing in the application that the proposed WECS may have a significant adverse impact on the environment, the Town Board shall issue a positive declaration of environmental significance.

17. If a positive declaration of environmental significance is determined by the SEQRA lead agency, the following information shall be included in the Draft Environmental Impact Statement ("DEIS") prepared for a Wind Energy Facility. Otherwise, the following studies shall be submitted with the application:

(a) Shadow Flicker: The applicant shall conduct a study on potential shadow flicker. The study shall identify locations where shadow flicker may be caused by the WECSs and the expected durations of the flicker at these locations. The study shall identify areas where

shadow flicker may interfere with residences and describe measures that shall be taken to eliminate or mitigate the problems.

(b) Visual Impact: Applications shall include a visual impact study of the proposed WECS as installed, which may include a computerized photographic simulation, demonstrating any visual impacts from strategic vantage points. Color photographs of the proposed Site from at least two locations accurately depicting the existing conditions shall be included. The visual analysis shall also indicate the color treatment of the system's components and any visual screening incorporated into the project that is intended to lessen the system's visual prominence.

(c) A fire protection and emergency response plan, created in consultation with the fire department(s) having jurisdiction over the proposed Zone.

(d) Noise Analysis: a noise analysis by a competent acoustical consultant documenting the noise levels associated with the proposed WECS. The study shall document noise levels at property lines and at the nearest residence not on the Site (if access to the nearest residence is not available, the Town Board may modify this requirement). The noise analysis shall provide pre-existing ambient noise levels and include low frequency noise.

(e) Property value analysis prepared by a licensed appraiser in accordance with industry standards, regarding the potential impact of values of properties adjoining WECS Sites, including properties across public roads from the Site.

(f) An assessment of potential electromagnetic interference with microwave, radio, television, personal communication systems, and other wireless communication.

18. Tower design information sufficient to demonstrate compliance with wind-loading requirements.

19. Analysis of potential ice-throwing and damage from blade throw impacts.

20. A statement, signed under penalty of perjury, that the information contained in the application is true and accurate.

Section Nine – Application Review Process.

A. Applicants may request a pre-application meeting with the Town Board, or with any consultants retained by the Town Board for application review

B. Six copies of the application shall be submitted to the Town Clerk. Payment of all application fees shall be made at the time of application submission. If any variances are requested, variance application fees shall be paid at the time of the receipt of the application.

C. Town staff or Town-designated consultants shall, within 30 days of receipt, or such longer time if agreed to by the applicant, determine if all information required under this Article is included in the application.

D. If the application is deemed incomplete, the Town Board or its designated reviewer shall provide the applicant with a written statement listing the missing information. No refund of application fees shall be made, but no additional fees shall be required upon submittal of the additional information unless the number of WECSs proposed is increased.

E. Upon submission of a complete application, including the grant of any application waiver by the Town Board, the Town Clerk shall transmit the application to the Town Board. The applicant shall post the completed application and any accepted environmental impact statements on the Internet. The application shall be referred to the Planning Board in accordance with this Local Law.

F. The Town Board shall hold at least one public hearing on the application. Notice shall be given by first class mail to property owners within 500 feet of the boundaries of the proposed Wind Overlay District, and published in the Town's official newspaper, no less than ten nor more than twenty days before any hearing, but, where any hearing is adjourned by the Town Board to hear additional comments, no further publication or mailing shall be required. The applicant shall prepare and mail the Notice of Public Hearing prepared by the Town, and shall submit an affidavit of service. The assessment roll of the Town shall be used to determine mailing addresses.

G. The public hearing may be combined with public hearings on any Environmental Impact Statement or requested variances.

H. Notice of the project shall also be given, when applicable, to (1) the Chautauqua County Planning Board, if required by General Municipal Law §§ 239-1 and 239-m, and (2) to adjoining Towns under Town Law § 264.

I. SEQRA Review. Applications for WECS are deemed Type I projects under SEQRA. The Town shall conduct its SEQRA review in conjunction with other agencies, and the record of review by said agencies shall be part of the record of the Town's proceedings. The Town may require an escrow agreement for the engineering and legal review of the applications and any environmental impact statements before commencing its review. At the completion of the SEQRA review process, if a positive declaration of environmental significance has been issued and an environmental impact statement prepared, the Town shall issue a Statement of Findings, which Statement may also serve as the Town's decision on the applications.

J. Upon receipt of the report of the recommendation of the County Planning Board (where applicable), and the report of the recommendation of the Town Planning Board (where applicable), the holding of the public hearing, and the completion of the SEQRA process, the Town Board may approve, approve with conditions, or deny the applications, in accordance with the standards in this Article.

Section Ten – Standards for WECS.

A. The following standards shall apply to all WECS and related infrastructure, unless specifically waived by the Town Board as part of a permit.

1. All power transmission lines from the tower to any building or other structure shall be located underground to the maximum extent practible.

2. No television, radio, or other communication antennas may be affixed or otherwise made part of any WECS, except pursuant to the telecommunications provisions of the Town Zoning Code. Applications may be jointly submitted for WECS and telecommunications facilities.

3. No advertising signs are allowed on any part of the Wind Energy Facility, including fencing and support structures.

4. Lighting of tower. No tower shall be lit except to comply with FAA requirements. Minimum security lighting for ground level facilities shall be allowed as approved on the Site plan. Security lighting shall be designed to minimize light pollution, including the use of light hoods, low glare fixtures, and directing lights at the ground.

5. All applicants shall use measures to reduce the visual impact of WECSs to the extent possible. WECSs shall use tubular towers. All structures in a project shall be finished in a single, non-reflective matte finished color or a camouflage scheme. Individual WECSs within a Wind Overlay Zone shall be constructed using wind turbines whose appearance, with respect to one another, is similar within and throughout the Zone, to provide reasonable uniformity in overall size, geometry, and rotational speeds. No lettering, company insignia, advertising, or graphics shall be on any part of the tower, hub, or blades.

6. The use of guy wires is prohibited.

7. No WECS shall be installed in any location where its proximity with existing fixed broadcast, retransmission, or reception antenna for radio, television, or wireless phone or other personal communication systems would produce electromagnetic interference with signal transmission or reception. No WECS shall be installed in any location along the major axis of an existing microwave communications link where its operation is likely to produce electromagnetic interference in the link's operation. If it is determined that a WECS is causing electromagnetic interference, the operator shall take the necessary corrective action to eliminate this interference including relocation or removal of the facilities, or resolution of the issue with the impacted parties. Failure to remedy electromagnetic interference is grounds for revocation of the Special Use Permit for the specific WECS or WECSs causing the interference.

8. All solid waste and hazardous waste and construction debris shall be removed from the Site and managed in a manner consistent with all appropriate rules and regulations.

9. WECSs shall be designed to minimize the impacts of land clearing and the loss of open space areas. Land protected by conservation easements shall be avoided when feasible. The use of previously developed areas will be given priority wherever possible.

10. WECSs shall be located in a manner that minimizes significant negative impacts on rare animal species in the vicinity, particularly bird and bat species.

11. WECS and related infrastructure shall be located in a manner consistent with all applicable state and Federal wetlands laws and regulations.

12. Storm-water run-off and erosion control shall be managed in a manner consistent with all applicable state and Federal laws and regulations.

13. The maximum Total Height of any WECS shall be 420 feet.

14. Construction of the WECS shall be limited to the hours of 7 a.m. to 8 p.m. except for certain activities that require cooler temperatures than possible during the day subject to approval from the Town.

15. Substations required to serve WECS are an Essential Public Service under this Zoning Code. Substations shall be screened from public view to the extent possible.

16. The Town of Cherry Creek shall be named as an additional insured under the general liability policy of the applicant, the amount of which insurance shall be no less than an amount to be determined by the Town Board given the nature and scope of the project proposed by the applicant.

17. Any construction or ground disturbance involving agricultural land shall be done in according to the NYS Department of Agriculture and Markets' publication titled Guidelines for Agricultural Mitigation for Wind Power Projects.

Section Eleven – Required Safety Measures.

A. Each WECS shall be equipped with both manual and automatic controls to limit the rotational speed of the rotor blade so it does not exceed the design limits of the rotor.

B. If the property owner submits a written request that fencing be required, a six-foot-high fence with a locking portal shall be required to enclose each tower or group of towers. The color and type of fencing for each WECS installation shall be determined on the basis of individual applications as safety needs dictate.

C. Appropriate warning signs shall be posted. At least one sign shall be posted at the base of the tower warning of electrical shock or high voltage. A sign shall be posted on the entry area of the fence around each tower or group of towers and any building (or on the tower or building if there is no fence), containing emergency contact information, including a local telephone

number with 24 hour, 7 day a week coverage. The Town Board may require additional signs based on safety needs.

D. No climbing pegs or tower ladders shall be located closer than twelve (12) feet to the ground level at the base of the structure for freestanding single pole.

E. The minimum distance between the ground and any part of the rotor or blade system shall be twenty (20) feet.

F. WECSs shall be designed to prevent unauthorized external access to electrical and mechanical components and shall have access doors that are kept securely locked.

G. Accurate maps of the underground facilities shall be filed with the town and with "Dig Safely New York (1-800-962-7962)" or its successor.

Section Twelve – Traffic Routes.

A. Construction of WECS poses potential risks because of the large size construction vehicles and their impact on traffic safety and their physical impact on local roads. Construction and delivery vehicles for WECS and/or associated facilities shall use traffic routes established as part of the application review process. Factors in establishing such corridors shall include (1) minimizing traffic impacts from construction and delivery vehicles; (2) minimizing WECS related traffic during times of school bus activity; (3) minimizing wear and tear on local roads; (4) minimizing impacts on local business operations. Permit conditions may require remediation during construction, limit WECS-related traffic to specified routes, and include a plan for disseminating traffic route information to the public, and all applicable state, county, and municipal highway authorities and superintendents whose roads are included in the WECS traffic routes plan. Notification to all applicable highway authorities and superintendents will include the number and type of vehicles and their size, their maximum gross weight, the number of round trips, and the dates and time periods of expected use of designated traffic routes; and (5) in compliance with all local road postings.

B. The applicant is responsible for remediation of damaged roads upon completion of the installation or maintenance of a WECS. A public improvement bond shall be posted prior to the issuance of any building permit in an amount, determined by the Town Board, sufficient to compensate the Town for any damage to local roads.

C. If the applicant uses any seasonal use highway in the off-season, it shall be solely responsible for the maintenance of said highway including but not limited to snow plowing. No act of maintenance on a seasonal use highway by an applicant shall be considered as Town maintenance of that highway for purposes of determining the seasonal use status of the highway.

Section Thirteen – Setbacks for Wind Energy Conversion Systems.

A. The statistical sound pressure level generated by a WECS shall not exceed L_{10} - 50 dBA measured at the closest exterior wall of any residence existing at the time of completing the

SEQRA review of the application. If the ambient sound pressure level exceeds 50 dBA, the standard shall be ambient dBA plus 5 dBA. Independent certification shall be provided before and after construction demonstrating compliance with this requirement.

B. In the event audible noise due to WECS operations contains a steady pure tone, such as a whine, screech, or hum, the standards for audible noise set forth in subparagraph 1) of this subsection shall be reduced by five (5) dBA. A pure tone is defined to exist if the one-third (1/3) octave band sound pressure level in the band, including the tone, exceeds the arithmetic average of the sound pressure levels of the two (2) contiguous one third (1/3) octave bands by five (5) dBA for center frequencies of five hundred (500) Hz and above, by eight (8) dBA for center frequencies between one hundred and sixty (160) Hz and four hundred (400) Hz, or by fifteen (15) dBA for center frequencies less than or equal to one hundred and twenty-five (125) Hz.

C. In the event the ambient noise level (exclusive of the development in question) exceeds the applicable standard given above, the applicable standard shall be adjusted so as to equal the ambient noise level. The ambient noise level shall be expressed in terms of the highest whole number sound pressure level in dBA, which is exceeded for more than five (5) minutes per hour. Ambient noise levels shall be measured at the exterior of potentially affected existing residences. Ambient noise level measurement techniques shall employ all practical means of reducing the effect of wind generated noise at the microphone. Ambient noise level measurements may be performed when wind velocities at the proposed project Site are sufficient to allow Wind Turbine operation, provided that the wind velocity does not exceed thirty (30) mph at the ambient noise measurement location.

D. Any noise level falling between two whole decibels shall be the lower of the two.

E. Each WECS shall be setback from Site boundaries, measured from the center of the WECS, a minimum distance of:

1. 500 feet from the nearest Site boundary property line, except the setback shall be 500. feet where the boundary is with state, county, town, or village-owned property.

2. 500 feet from the nearest public road.

3. 1,000 feet from the nearest off-Site residence existing at the time of application, measured from the exterior of such residence.

4. 100 feet from state-identified wetlands. This distance may be adjusted to be greater or lesser at the discretion of the reviewing body, based on topography, land cover, land uses, and other factors that influence the flight patterns of resident birds.

5. 500 feet from gas wells, unless waived in writing by the property owner and well owner.

F. Other Wind Energy Facility structures and improvements shall comply with the underlying zoning district regulations.

Section Fourteen – Noise and Setback Easements; Variances

A. In the event the noise levels resulting from a WECS exceed the criteria established in this Article, or a setback requirement is not met, a waiver be granted from such requirement by the Town Board in the following circumstances:

1. Written consent from the affected property owners has been obtained stating that they are aware of the WECS and the noise and/or setback limitations imposed by this Article, and that they wish to be part of the Site as defined herein, and that consent is granted to (1) allow noise levels to exceed the maximum limits otherwise allowed or (2) allow setbacks less than required; and

2. In order to advise all subsequent owners of the burdened property, the consent, in the form required for an easement, shall be recorded in the County Clerk's Office describing the benefited and burdened properties. Such easements shall be permanent and may not be revoked without the consent of the Town Board, which consent shall be granted upon either the completion of the decommissioning of the benefited WECS in accordance with this Article, or the acquisition of the burdened parcel by the owner of the benefited parcel or the WECS.

3. In any case where written consent is not obtained, a variance from the Zoning Board of Appeals shall be required.

Section Fifteen – Creation of Wind Overlay Districts and Issuance of Special Use Permits.

A. Upon completion of the review process, the Town Board shall, upon consideration of the standards in this Article and the record of the SEQRA review, issue a written decision setting forth the reasons for approval, conditions of approval, or disapproval.

B. If approved, the Town Board will direct the Town Clerk to modify the Official Map to reflect the creation of the Wind Overlay Districts, and authorize Town staff to issue a Special Use Permit for each WECSs upon satisfaction of all conditions for said Permit, and direct the building inspector to issue a building permit, upon compliance with the Uniform Fire Prevention and Building Code and the other conditions of this Article.

C. The decision of the Town Board shall be filed within five days in the office of the Town Clerk and a copy mailed to the applicant by first class mail.

D. If any approved WECS is not substantially commenced within two years of issuance of the permit, the special use permit shall expire.

Section Sixteen – Abatement.

A. If any WECS remains non-functional or inoperative for a continuous period of 1 year, the applicant agrees that, without any further action by the Town Board, it shall remove said system at its own expense. Removal of the system shall include at least the entire above ground structure, including transmission equipment and fencing from the property, and below ground, removal of all structures and debris to a depth of at least three feet, and restore soil and vegetation to the area. This provision shall not apply if the applicant demonstrates to the Town that it has been making good faith efforts to restore the WECS to an operable condition, but nothing in this provision shall limit the Town's ability to order a remedial action plan after public hearing.

B. Non-function or lack of operation may be proven by reports to the Public Service Commission, NYSERDA, or by lack of income generation. The applicant shall make available (subject to a non-disclosure agreement) to the Town Board all reports to and from the purchaser of energy from individual Wind Energy Conversion Systems, if requested necessary to prove the WECS is functioning, which reports may be redacted as necessary to protect proprietary information.

C. Decommissioning Bond or Fund. The applicant, or successors, shall continuously maintain a fund or bond payable to the Town for the removal of non-functional towers and appurtenant facilities in an amount to be determined by the Town for the period of the life of the facility. This fund may consist of a letter of credit from a State of New York-licensed financial institution. All costs of the financial security shall be borne by the applicant.

Section Seventeen – Limitations on Approvals; Easements on Town Property.

A. Nothing in this Article shall be deemed to give any applicant the right to cut down surrounding trees and vegetation on any property to reduce turbulence and increase wind flow to the Wind Energy Facility. Nothing in this Article shall be deemed a guarantee against any future construction or Town approvals of future construction that may in any way impact the wind flow to any Wind Energy Facility. It shall be the sole responsibility of the Facility operator or owner to acquire any necessary wind flow or turbulence easements, or rights to remove vegetation.

B. Pursuant to the powers granted to the Town to manage its own property, the Town may enter into noise, setback, or wind flow easements on such terms as the Town Board deems appropriate, as long as said agreements are not otherwise prohibited by state law or this Article.

Section Eighteen – Permit Revocation.

A. Testing fund. A Special Use Permit shall contain a requirement that the applicant fund periodic noise testing by a qualified independent third-party acoustical measurement consultant, which may be required as often as every two years, or more frequently upon request of the Town Board in response to complaints by neighbors. The scope of the noise testing shall be to demonstrate compliance with the terms and conditions of the Special Use Permit and this Article

and shall also include an evaluation of any complaints received by the Town. The applicant shall have 90 days after written notice from the Town Board, to cure any deficiency. An extension of the 90 day period may be considered by the Town Board, but the total period may not exceed 180 days.

B. Operation. A WECS shall be maintained in operational condition at all times, subject to reasonable maintenance and repair outages. Operational condition includes meeting all noise requirements and other permit conditions. Should a WECS become inoperable, or should any part of the WECS be damaged, or should a WECS violate a permit condition, the owner or operator shall remedy the situation within 90 days after written notice from the Town Board. The applicant shall have 90 days after written notice from the Town Board, to cure any deficiency. An extension of the 90 day period may be considered by the Town Board, but the total period may not exceed 180 days.

C. Notwithstanding any other abatement provision under this Article, and consistent with Section 16, if the WECS is not repaired or made operational or brought into permit compliance after said notice, the Town may, after a public meeting at which the operator or owner shall be given opportunity to be heard and present evidence, including a plan to come into compliance, (1) order either remedial action within a particular timeframe, or (2) order revocation of the Special Use Permit for the WECS and require the removal of the WECS within 90 days. If the WECS is not removed, the Town Board shall have the right to use the security posted as part of the Decommission Plan to remove the WECS.

Wind Measurement Towers

Section Nineteen – Wind Site Assessment.

The Town Board acknowledges that prior to construction of a WECS, a wind Site assessment is conducted to determine the wind speeds and the feasibility of using particular Sites. Installation of Wind Measurement Towers, also known as anemometer ("Met") towers, shall be permitted as a Special Use in the Agricultural-Residential District I & III.

Section Twenty – Applications for Wind Measurement Towers.

A. An application for a Wind Measurement Tower shall include:

1. Name, address, and telephone number of the applicant. If the applicant is represented by an agent, the application shall include the name, address, and telephone number of the agent as well as an original signature of the applicant authorizing the representation.

2. Name, address, and telephone number of the property owner. If the property owner is not the applicant, the application shall include a letter or other written permission signed by the property owner (i) confirming that the property owner is familiar with the proposed applications and (ii) authorizing the submission of the application.

3. Address of each proposed tower Site, including Tax Map section, block, and lot number.

4. Site plan

5. Decommissioning Plan, based on the criteria in this Article for WECS, including a security bond or cash for removal.

Section Twenty-One – Standards for Wind Measurement Towers.

A. The distance between a Wind Measurement Tower and the property line shall be at least the Total Height of the tower. Sites can include more than one piece of property and the requirement shall apply to the combined properties. Exceptions for neighboring property are also allowed with the consent of those property owners.

B. Special Use permits for Wind Measurement Towers may be issued by the Town Board for a period of up to two years. Permits may be renewed if the Facility is in compliance with the conditions of the Special Use Permit.

Small Wind Energy Conversion Systems

Section Twenty-Two – Purpose and Intent.

The purpose of this Article is to provide standards for small wind energy conversion systems designed for on-site home, farm, and small commercial use, and that are primarily used to reduce on-site consumption of utility power. The intent of this Article is to encourage the development of small wind energy systems and to protect the public health,; safety, and community welfare.

Section Twenty-Three – Permitted Areas.

Small Wind energy systems may be permitted in Zoning District I & III upon issuance of a Special Use Permit.

Section Twenty-Four – Applications.

A. Applications for Small WECS special use permits shall include:

1. Name, address, and telephone number of the applicant. If the applicant will be represented by an agent, the name, address, and telephone number of the agent as well as an original signature of the applicant authorizing the agent to represent the applicant.

2. Name and address of the property owner. If the property owner is not the applicant, the application shall include a letter or other written permission signed by the property owner (i) confirming that the property owner is familiar with the proposed applications and (ii) authorizing the submission of the application.

3. Address of each proposed tower Site, including Tax Map section, block, and lot number.

4. Evidence that the proposed tower height does not exceed the height recommended by the manufacturer or distributor of the system.

5. A line drawing of the electrical components of the system in sufficient detail to allow for a determination that the manner of installation conforms to the Electric Code.

6. Sufficient information demonstrating that the system will be used primarily to reduce on-site consumption of electricity.

7. Written evidence that the electric utility service provider that serves the proposed Site has been informed of the applicant's intent to install an interconnected customer-owned electricity generator, unless the applicant does not plan, and so states so in the application, to connect the system to the electricity grid.

8. A visual analysis of the Small WECS as installed, which may include a computerized photographic simulation, demonstrating the visual impacts from nearby strategic vantage points. The visual analysis shall also indicate the color treatment of the system's components and any visual screening incorporated into the project that is intended to lessen the system's visual prominence.

Section Twenty-Six – Development Standards.

All small wind energy systems shall comply with the following standards. Additionally, such systems shall also comply with all the requirements established by other sections of this Article that are not in conflict with the requirements contained in this section.

1. A system shall be located on a lot a minimum of one acre in size, however, this requirement can be met by multiple owners submitting a joint application.

2. Only one small wind energy system tower per legal lot shall be allowed, unless there are multiple applicants, in which their joint lots shall be treated as one lot for purposes of this Article.

3. Small Wind energy systems may be used primarily to reduce the on-Site consumption of electricity.

4. Tower heights may be allowed as follows:

(a) 65 feet or less on parcels between one and five acres.
(b) 120 feet or less on parcels of five or more acres.
(c) Any proposed tower height exceeding 120 feet on five acres or more will require a specific variance as to the height of the tower from the Town Board, for good cause shown.

(d) The allowed height shall be reduced if necessary to comply with all applicable Federal Aviation Requirements, including Subpart B (commencing with Section 77.11) of Part 77 of Title 14 of the Code of Federal Regulations regarding installations close to airports.

5. The maximum turbine power output is limited to 10 kW.

6. The system's tower and blades shall be painted a non-reflective, unobtrusive color that blends the system and its components into the surrounding landscape to the greatest extent possible and incorporate non-reflective surfaces to minimize any visual disruption.

7. The system shall be designed and located in such a manner to minimize adverse visual impacts from public viewing areas (e.g., public parks, roads, trails). To the greatest extent feasible a small wind energy system:

(a) Shall not project above the top of ridgelines.

(b) If visible from public viewing areas, shall use natural landforms and existing vegetation for screening.

(c) Shall be screened to the maximum extent feasible by natural vegetation or other means to minimize potentially significant adverse visual impacts on neighboring residential areas.

8. Exterior lighting on any structure associated with the system shall not be allowed except that which is specifically required by the Federal Aviation Administration.

9. All on-site electrical wires associated with the system shall be installed underground except for "tie- ins" to a public utility company and public utility company transmission poles, towers and lines. This standard may be modified by the decision-maker if the project terrain is determined to be unsuitable due to reasons of excessive grading, biological impacts, or similar factors.

10. The system shall be operated such that no disruptive electromagnetic interference is caused. If it has been demonstrated that a system is causing harmful interference, the system operator shall promptly mitigate the harmful interference or cease operation of the system.

11. At least one sign shall be posted on the tower at a height of five feet warning of electrical shock or high voltage and harm from revolving machinery. No brand names, logo, or advertising shall be placed or painted on the tower, rotor, generator, or tail vane where it would be visible from the ground, except that a system or tower's manufacturer's logo may be displayed on a system generator housing in an unobtrusive manner

12. Towers shall be constructed to provide one of the following means of access control, or other appropriate method of access:

(a) Tower-climbing apparatus located no closer than 12 feet from the ground.
(b) A locked anti-climb device installed on the tower.

(c) A locked, protective fence at least six feet in height that encloses the tower.

13. Anchor points for any guy wires for a system tower shall be located within the property that the system is located on and not on or across any above-ground electric transmission or distribution lines. The point of attachment for the guy wires shall be enclosed by a fence six feet high or sheathed in bright orange or yellow covering from three to eight feet above the ground.

14. Construction of on-site access roadways shall be minimized. Temporary access roads utilized for initial installation shall be re-graded and re-vegetated to the pre-existing natural condition after completion of installation.

15. To prevent harmful wind turbulence from existing structures, the minimum height of the lowest part of any horizontal axis wind turbine blade shall be at least 30 feet above the highest structure or tree within a 250 foot radius. Modification of this standard may be made when the applicant demonstrates that a lower height will not jeopardize the safety of the wind turbine structure.

16. All small wind energy system tower structures shall be designed and constructed to be in compliance with pertinent provisions of the Uniform Building Code and National Electric Code.

17. All small wind energy systems shall be equipped with manual and automatic over-speed controls. The conformance of rotor and over-speed control design and fabrication with good engineering practices shall be certified by the manufacturer.

Section Twenty-Seven – Standards.

A Small Wind Energy System shall comply with the following standards:

1. Setback requirements. A Small WECS shall not be located closer to a property line than one and a half times the Total Height of the facility.

2. Noise. Except during short-term events including utility outages and severe wind storms, a Small WECS shall be designed, installed, and operated so that noise generated by the system shall not exceed the 50 decibels (dBA), as measured at the closest neighboring inhabited dwelling.

Section Twenty-Eight – Abandonment of Use.

A. Small WECS which is not used for twelve (12) successive months shall be deemed abandoned and shall be dismantled and removed from the property at the expense of the property

owner. Failure to abide by and faithfully comply with this section or with any and all conditions that may be attached to the granting of any building permit shall constitute grounds for the revocation of the permit by the Town.

B. All Small WECS shall be maintained in good condition and in accordance with all requirements of this section.

Miscellaneous

Section Twenty-Eight – Fees.

A. There shall be non-refundable Application fees as follows:

1. Wind Overlay Zone rezoning: $500 per zone.

2. WECS Special Use Permit: $50 per megawatt of rated maximum capacity.

3. Wind Measurement Towers: $20 per vertical foot per tower.

4. Wind Measurement Tower Special Use Permit renewals: $200 per Wind Measurement Tower.

5. The cost of all legal notices and mailings shall be assessed to the applicant.

B. Building Permits.

1. The Town believes the review of building and electrical permits for Wind Energy Facilities requires specific expertise for those facilities. Accordingly, the permit fees for such facilities shall be increased by administrative costs which shall be $100 per permit request, plus the amount charged to the Town by the outside consultant hired by the Town to review the plans and inspect the work. In the alternative, the Town and the applicant may enter into an agreement for an inspection and/or certification procedure for these unique facilities. In such case, the Town and the applicant will agree to a fee arrangement and escrow agreement to pay for the costs of the review of the plans or certifications, or to conduct inspections as agreed by the parties.

2. The applicant shall, prior to the receipt of a building permit, demonstrate that the proposed facility meets the system reliability requirements of the New York Independent System Operator, or provide proof that it has executed an Interconnection Agreement with the New York Independent System Operator and/or the applicable Transmission Owner.

C. Nothing in this Article shall be read as limiting the ability of the Town to enter into Host Community agreements with any applicant to compensate the Town for expenses or impacts on the community. The Town shall require any applicant to enter into an escrow agreement to pay

the engineering and legal costs of any application review, including the review required by SEQRA.

D. The Town Board may amend these fees, by resolution after a properly noticed public hearing.

Section Twenty-Nine – Tax Exemption.

The Town hereby exercises its right to opt out of the Tax Exemption provisions of Real Property Tax Law §487, pursuant to the authority granted by paragraph 8 of that law.

Section Thirty – Enforcement; Penalties and remedies for violations.

A. In addition to the Code Enforcement Officer, the Town Board may appoint such Town staff or outside consultants as it sees fit to enforce this Article.

B. Any person owning, controlling, or managing any building, structure, or land who shall undertake a wind energy conversion facility or wind monitoring tower in violation of this Article or in noncompliance with the terms and conditions of any permit issued pursuant to this Article, o,r any order of the enforcement officer, and any person who shall assist in so doing, shall be guilty of an offense and subject to a fine of not more than $350 or to imprisonment for a period of not more than fifteen days, or subject to both such fine and imprisonment for a first offense, for a Second offense (both within a period of five years), a fine not less than $350 nor more than $700, or imprisonment not to exceed six months, or both, and for a Third or more offense (all of which occurred within five years), a fine not less than $700 nor more than $1,000, or imprisonment not to exceed six months, or both. Every such person shall be deemed guilty of a separate offense for each week such violation shall continue. The Town may institute a civil proceeding to collect civil penalties in the amounts set forth herein for each violation and each week said violation continues shall be deemed a separate violation.

C. In case of any violation or threatened violation of any of the provisions of this Article, including the terms and conditions imposed by any permit issued pursuant to this Article, in addition to other remedies and penalties herein provided, the Town may institute any appropriate action or proceeding to prevent such unlawful erection, structural alteration, reconstruction, moving, and/or use, and to restrain, correct, or abate such violation, to prevent the illegal act.

Section Thirty-One – Severability.

Should any provision of this Local Law be declared by the courts to be unconstitutional or invalid, such decision shall not affect the validity of this Local Law as a whole or any part thereof other than the part so decided to be unconstitutional or invalid.

Section Thirty-Two – Effective Date.

This Local Law shall be effective upon its filing with the Secretary of State in accordance with the Municipal Home Rule Law.

5. (City local law concerning Charter revision proposed by petition.)

I hereby certify that the local law annexed hereto, designated as local law No. ..... of 19.... of the City of ..... having been submitted to referendum pursuant to the provisions of section (36)(37) of the Municipal Home Rule Law, and having received the affirmative vote of a majority of the qualified electors of such city voting thereon at the (special)(general) election held on..... 19...., became operative.

6. (County local law concerning adoption of Charter.)

I hereby certify that the local law annexed hereto, designated as local law No. ..... of 19.... of the County of ..... State of New York, having been submitted to the electors at the General Election of November ..... 19...., pursuant to subdivisions 5 and 7 of section 33 of the Municipal Home Rule Law, and having received the affirmative vote of a majority of the qualified electors of the cities of said county as a unit and a majority of the qualified electors of the towns of said county considered as a unit voting at said general election, became operative.

(If any other authorized form of final adoption has been followed, please provide an appropriate certification.)

I further certify that I have compared the preceding local law with the original on file in this office and that the same is a correct transcript therefrom and of the whole of such original local law, and was finally adopted in the manner indicated in paragraph ...1..., above.

Mary J. Pulkam
Clerk of the County legislative body, City, Town or Village Clerk or officer designated by local legislative body

(Seal)

Date: April 16, 2011

(Certification to be executed by County Attorney, Corporation Counsel, Town Attorney, Village Attorney or other authorized attorney of locality.)

STATE OF NEW YORK
COUNTY OF CHAUTAUQUA

I, the undersigned, hereby certify that the foregoing local law contains the correct text and that all proper proceedings have been had or taken for the enactment of the local law annexed hereto.

[signature]
Signature

Town Attorney
Title

~~County~~
~~City~~
Town of Cherry Creek
~~Village~~

Date: April 25, 2011

1. I hereby certify that the local law annexed hereto, designated as local law No. 2 of 2011 of the Town of Cherry Creek was duly passed by the Town Board of the Town of Cherry Creek on April 11, 2011, in accordance with the applicable provisions of law.

(Seal)

Date: April 11, 2011

Mary J. Rullison
Clerk of the Town of Cherry Creek

(Certification to be executed by County Attorney, Corporation Counsel, Town Attorney, Village Attorney or other authorized attorney of locality.)

STATE OF NEW YORK
COUNTY OF CHAUTAUQUA

I, the undersigned, hereby certify that the foregoing local law contains the correct text and that all proper proceedings have been had or taken for the enactment of the local law annexed hereto.

Lundberg & Gustafson LLP
By: Dana A. Lundberg, Esq.
Attorney
Town of Cherry Creek

Date: 4.25.11