STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

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In the Matter of the Application of

HAMLIN PRESERVATION GROUP,
JERRY L. BORKHOLDER, FLORA G. BORKHOLDER,
RONALD E. BROWN, BARBARA A. BROWN,
ANTHONY C. CALLARI, MARY L. CALLARI,
HERBERT B. CANNON, MARYLOU F. CANNON,
RENEE CLIFF, DALE CLIFF,
JOHN E. COOK, TAMMY E. COOK,
LORIANN D'AGOSTINO,
LINDA G. DeRUE, JOHN G. DeRUE,
JAY DORNEY, PATRICIA DORNEY,
DIANA HANLEY, RONALD KINGSBURY,
DOROTHY P. LAPINSKI, PAUL F. LAPINSKI,
THOMAS R. LAVACCA, MELANIE L. LAVACCA,
DAVID LUKAS, JOYCE LUKAS,
MATTHEW S. MacDONALD,
AMANDA J. VALEK-MacDONALD,
TROY NESBITT, PAMELA ANN NESBITT,
JOHN W. SHEVLIN, JR., CHRISTINE M. SHEVLIN,
ANDREW C. SIMPSON, DENISE D. SIMPSON,
STEVE C. SNYDER, HEATHER K. SNYDER,
KIMBERLY A. SPELLAN and GLENDON J. SPELLAN,
**Petitioners/Plaintiffs**

**For a Judgment pursuant to CPLR Art. 78 & Sec. 3001**
**-against-**

TOWN BOARD OF THE TOWN OF HAMLIN,
**Respondent/Defendant.**

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**Index No. 2008/11217**

**ORDER AND JUDGMENT**

**Hon. David Michael Barry**



**Barry, J:**

Petitioners bring this application for a judgment pursuant to CPLR Article 78 and CPLR section 3001 against respondent/defendant Town Board of the Town of Hamlin (Board): (1) annulling and setting aside respondent's April 24, 2008 approval of a Determination of Non-Significance/Negative Declaration relating to the town's proposed Wind Energy Facilities Law, as violative of the requirements of SEQRA and the regulations promulgated thereunder; (2) annulling and setting aside respondent's April 24, 2008 approval of a local law entitled "A Local Law

Governing Wind Energy Facilities in the Town of Hamlin" [Local Law 3 of 2008], as violative of the requirements of SEQRA and the regulations promulgated thereunder; and (3) declaring the local law adopted by respondent on April 24, 2008, entitled "A Local Law Governing Wind Energy Facilities in the Town of Hamlin", null and void as violative of Section 263 and/or Section 272-a(11) of the Town Law of the State of New York.

**Petitioner's First Claim:**

In their first claim, petitioners assert that respondent Board adopted its Wind Energy Facilities Law (Wind Law) without first conducting the rigorous environmental assessment incorporated into SEQRA's Environmental Impact Statement (EIS) process. Petitioners assert that rather than issuing a Determination of Significance/Positive Declaration and preparing a Draft EIS to take the mandatory "hard look" at the potential areas of environmental concern (i.e., adverse impacts on human health, aesthetic resources, noise levels community character, bird and bat populations, etc.), respondent Board issued a Determination of Non-Significance/Negative Declaration on April 24, 2008, and adopted specific criteria and standards for setbacks from roads and existing residences and noise levels that were far weaker than those recommended by the Wind Tower Committee. They argue that the requirements to issue a Positive Declaration and prepare a draft EIS ("DEIS") is triggered by a "relatively low threshold", i.e., a DEIS is needed if the action may have a significant effect on any one or more aspects of the environment. Petitioners assert that by ignoring the relatively low threshold for issuing a Positive Declaration and requiring the preparation of a DEIS, respondent has disregarded its obligation under SEQRA to assess potential environmental impacts at the earliest possible time.

As a result, petitioners argue that by adopting the Negative Declaration and enacting the Wind Law without first fully complying with its obligations under SEQRA, respondent has failed to perform a duty enjoined upon them by law, proceeded without or in excess of its jurisdiction, and rendered a determination that is contrary to law, arbitrary and capricious, and/or an abuse of discretion.

**Petitioner's Second Claim:**

Petitioners argue that the SEQRA regulations require a lead agency's determination of significance or non-significance, that is, Positive Declaration or Negative Declaration, respectively, to be in written form "containing a reasoned elaboration and providing reference to any supporting documentation." They further

assert that the Negative Declaration issued by the Board on April 24, 2008 consists of conclusory statements, devoid of any substantive information, and therefore, violates the process mandated by SEQRA. The petitioners state that the Board attempts to justify its Determination of Non-Significance by generic and unsupported assertions that "no specific site is involved" "no facility is permitted" and "the proposed law severely restricts where facilities can be placed."

Petitioners argue that by adopting the Negative Declaration and enacting the Wind Law without first fully complying with its obligations under SEQRA, respondent has failed to perform a duty enjoined upon them by law, proceeded without or in excess of its jurisdiction, and rendered a determination that is contrary to law, arbitrary and capricious, and/or an abuse of discretion.

**Petitioner's Third Claim:**

In their third claim, petitioners assert that respondent Board failed to take the requisite "hard look" at potential adverse impacts on human health prior to establishing the minimum setback requirements and noise standards contained in the Wind Law, choosing instead to provide the following inadequate reasoning for its determination that the Wind Law would not have a significant adverse impact on human health by stating "No project is allowed under the proposed law, therefore nothing could create a hazard to human health."

By adopting the Negative Declaration and enacting the Wind Law without first fully complying with its obligations under SEQRA, petitioners argue that respondent has failed to perform a duty enjoined upon them by law, proceeded without or in excess of its jurisdiction, and rendered a determination that is contrary to law, arbitrary and capricious, and/or an abuse of discretion.

**Petitioner's Fourth Claim:**

Petitioners assert that Respondent Board violated Town Law §§ 263 and 272-a. Specifically, they state that Section 263 mandates that all zoning regulations be made "in accordance with a comprehensive plan" and with "reasonable consideration" of several important factors, and that Section 272-a(11)(a) provides that a town's Land use regulations must be in accordance with a comprehensive plan adopted pursuant to 272-a. Petitioners argue that respondent's refusal to adopt the major recommendations of the Wind Tower Committee regarding setbacks and noise standards in the Wind Law is inconsistent with policy and goals in the Town's Comprehensive Plan, i.e., to "encourage citizen participation" and to establish a

"balance of land use," and with several policies and purposes in the Local Waterfront Revitalization Program which seek to protect and enhance the scenic and open farmland south of the Lake Ontario State Parkway.

By reason of the foregoing, petitioners argue that respondent has violated Town Law 263 and 272-a, and thus the Wind Law must be declared null and void.

Petitioners do not request preliminary relief at this because there is no application under the Wind Law for creation of a Wind Energy Overlay District and no Special Use Permit has been submitted to the Town of Hamlin.

**Respondent's Answer and Opposition:**

Respondent submitted a verified answer containing denials and admissions to petitioners' verified complaint, and seeks dismissal of the petition in addition to costs and attorneys fees.

The Town Board argues that it fully complied with SEQRA, that it issued a proper reasoned elaboration for its decision, and that the local Wind Law is consistent with the Town's Comprehensive Plan. In essence, respondent asserts that petitioners are really objecting to the fact that the Board did not adopt their opinions regarding setbacks and noise, and not to the process that led to the decision. Respondent also asserts that petitioners' arguments rely on the erroneous belief that the local Wind Law increased the allowable uses. With respect to the Comprehensive Plan, respondents argue that because the wind law is a legislative enactment, petitioners must prove beyond a reasonable doubt that it is an unreasonable arbitrary and capricious action.

## DISCUSSION

"The basic purpose of SEQR [State Environmental Quality Review] is to incorporate the consideration of environmental factors into the existing planning, review and decision-making processes of state, regional and local government agencies at the earliest possible time. To accomplish this goal, SEQRA requires that all agencies determine whether the actions they directly undertake, fund or approve may have a significant impact on the environment, and, if it is determined that the action may have a significant adverse impact, prepare or request an environmental impact statement [EIS]." 6 NYCRR 617.1(c); *see* also ECL section 8-01029(2).

"SEQRA [State Environmental Quality Review Act] insures that agency

decision-makers -- enlightened by public comment where appropriate -- will identify and focus attention on any environmental impact of proposed action, that they will balance those consequences against other relevant social and economic considerations, minimize adverse environmental effects to the maximum extent practicable, and then articulate the bases for their choices." *Jackson v. New York State Urban Development Corp.*, 67 N.Y.2d 400, 414 -415 (1986).

"In assessing the significance of a proposed action under SEQRA, the lead agency must 'thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment; and . . . set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation (6 NYCRR 617.7[b][3], [4]).'" *New York City Coalition to End Lead Poisoning, Inc. v. Vallone*, 100 N.Y.2d 337, 347 (2003). "Where the lead agency concludes either that 'there will be no adverse environmental impacts [from the action] or that the identified adverse environmental impacts will not be significant,' (6 NYCRR 617.7[a][2]), the agency may issue a negative declaration," which obviates the requirement for an Environmental Impact Statement (EIS). *Id.*; 6 NYCRR 617.2(y).

In contrast, when the lead agency determines that a proposed action "may include the potential for at least one significant adverse environmental impact," [6 NYCRR 617.79(a)(1), *Jackson v. New York State Urban Development Corp.*, 67 N.Y.2d at 415], a lead agency will issue a Positive Declaration "indicating that [the] implementation of the action as proposed may have a significant adverse impact on the environment and that an environmental impact statement will be required." 6 NYCRR 617.2(ac).

To arrive at its determination of significance, the lead agency must identify 'the relevant areas of environmental concern' and take a 'hard look' at them." *Merson v. McNally*, 90 N.Y.2d 742, 751 (1997), *quoting Matter of Chemical Specialties Mfrs. Assn. v. Jorling*, 85 N.Y.2d 382, 397 (1995). "The agency must set forth a reasoned elaboration for its determination." *Merson v. McNally*, 90 N.Y.2d at 751.

"Judicial review of a lead agency's negative declaration is restricted to 'whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination.'" *New York City Coalition to End Lead Poisoning, Inc. v. Vallone*, 100 N.Y.2d 337, 348 (2003), *quoting Matter of Jackson v. New York State Urban*

*Dev. Corp.*, 67 N.Y.2d 400, 417 (1986). "The role of a court is not 'to weigh the desirability of any proposed actions or choose among alternatives but only to insure that the agency has satisfied the substantive and procedural requirements of SEQRA and of the regulations implementing it.'" *Advocates for Prattsburgh, Inc. v. Steuben County Indus. Development Agency*, 48 A.D.3d 1157, 1160 (4th Dept. 1998), *quoting Matter of Village of Westbury v. Department of Transp. of State of N.Y.*, 75 N.Y.2d 62, 66 (1989).

"'[W]here an agency fails to take the requisite hard look and make a reasoned elaboration, or its determination is affected by an error of law, or its decision was not rational, or is arbitrary and capricious or not supported by substantial evidence, the agency's determination may be annulled.'" *Merson v. McNally*, 90 N.Y.2d 742, 752 (1997), *quoting Matter of WEOK Broadcasting Corp. v. Planning Bd.*, 79 N.Y.2d 373, 383 (1992).

**Type of Action**:

Petitioners argue that the Wind Law adopted by the Town Board constituted an action under SEQRA, as defined in 6 NYCRR 617.2(b)(2), that is, "agency planning and policy making activities that may affect the environment and commit the agency to a definite course of future decisions."

In contrast, as set forth in respondent's Determination of Non-Significance/Negative Declaration, the SEQR Status of the proposed Wind Law is listed as an "Unlisted Action." The Determination of Non-Significance/Negative Declaration also states that it "adopts regulations for wind facilities for the first time, and has determined that the proposed local law will not have a significant adverse environmental impact and that a Draft Environmental Impact Statement will not be prepared." It then goes on to state that current existing law allows for wind facilities in certain listed zoned districts, that the setbacks are insufficient, and that there are no noise regulations, operating requirements nor removal requirements.

In arriving at its determination, and in response to specific criteria that a lead agency must consider when determining the significance of a Type I or Unlisted Action, as set forth at 6 NYCRR 617.7(c)(1), the Board states in the "Reasons Supporting this Determination" section of the Determination of Non-Significance/Negative Declaration, that "[t]here are no adverse impacts because the proposed law severely restricts where facilities can be placed" and "no specific site is involved" or "no specific project site is approved" or "no project is allowed under the

proposed law, therefore nothing could create a hazard to human health" or "the local law allows nothing" or "the local law does not permit anything" and "the local law strengthens the Town goals by severely restricting a currently allowable use."

## DECISION

The Court concludes that even though the Board identified "the relevant areas of environmental concern" in arriving at its Determination of Non-Significance/Negative Declaration, the Board did not take a "hard look" at them, nor did the Board set forth a "reasoned elaboration" for its determination. Moreover, the Court disagrees with respondent's characterization that the wind facilities that were allowed prior to the enactment of Local Wind Law 3 - 2008 are public utilities. Accordingly, the Determination of Non-Significance/Negative Declaration and the Local Wind Law 3-2008 are hereby set aside and annulled. Finally, the Court finds no merit in petitioner's argument that the Local Wind Law violates Section 263 and/or Section 272-a(11) of the Town Law of the State of New York.

For the foregoing reasons, the petition is hereby granted in part and denied in part.

SO ORDERED.

DATED: January 5, 2009
Rochester, New York

HON. DAVID MICHAEL BARRY
SUPREME COURT JUSTICE