*To be Argued by:*
BENJAMIN E. WISNIEWSKI
*(Time Requested: 15 Minutes)*

# New York Supreme Court

## Appellate Division—Fourth Department

TOWN OF FARMERSVILLE,

*Petitioner,*

– against –

NEW YORK STATE BOARD ON ELECTRIC GENERATION SITING AND THE ENVIRONMENT, ALLE-CATT WIND ENERGY, LLC, STATE OF NEW YORK, JOHN DOE CORPORATIONS AND JOHN DOES,

*Respondents.*

**Docket No.: OP 20-01406**

**BRIEF FOR PETITIONER**

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## PRELIMINARY STATEMENT

The Alle-Catt Wind Project proposed by ACWE is a 340-megawatt wind energy project consisting of up to 116 wind turbines, each up to 700 feet tall, to be located in the six rural towns of Farmersville, Arcade, Centerville, Machias, Freedom, and Rushford, New York. The Town of Farmersville brings this original proceeding pursuant to Section 170 of the Public Service Law and Article 78 of the CPLR, seeking judicial review of the Board on Electric Generation Siting and the Environment's (the "Siting Board's") award of a Certificate of Environmental Compatibility and Public Need (a "Certificate") to Alle Catt Wind Energy, LLC ("ACWE"). *See* Department of Public Service Case Number 17-F-0282 ("Alle-Catt Wind" or the "Project"). The Certificate permits the construction of the Alle-Catt Wind Energy project. The siting proceeding below was conducted by the Siting Board and administrative law judges ("Presiding Examiners") in accordance with Article 10 of the New York State Public Service Law, and other applicable procedural laws and regulations governing administrative proceedings, including 16 NYCRR § 3.1 et seq; and the New York State Administrative Procedures Act ("SAPA").

The Town of Farmersville—slated to host 21 of the 116 turbines—respectfully requests the Court reverse the award of a Certificate and direct the Siting Board to carry out what the State Constitution and Public Service Law

require: a thorough review of whether Alle-Catt can comply with the substantive requirements in Farmersville's Wind Energy Facilities Law, or whether those laws may appropriately be waived.

## QUESTIONS PRESENTED

1. Did the Siting Board act in excess of its jurisdiction or in violation of the state constitution, laws, or applicable regulations when it failed to either apply or waive Farmersville Local Laws 1 and 4 of 2020?

Answer below: No, the laws were enacted too late to review.

Answer requested: Yes, the Siting Board failed to apply or waive local laws as required by PSL 168(3); failed to support waiver with facts and analysis; and failed to extend the proceeding by up to 6 months pursuant to PSL 165(4).

2. Was the Siting Board's purported waiver of Farmersville's Local Laws 1 and 4 of 2020 based on substantial evidence in the record?

Answer below: The Siting Board declined to consider the laws.

Answer requested: No, because the record contains no evidence the local laws is unreasonably burdensome in light of existing technology or the needs of the ratepayers, and because the record contains no such evidence.

3. Did the Siting Board abuse its discretion by refusing to extend the hearing by up to 6 months based on assumed possible harm to ACWE, without any evidentiary basis in the record demonstrating such harm?

Answer below: No, the mere possibility of harm is enough.

Answer requested: Yes, because there is no evidence in the Record supporting the Siting Board's bald assumption that a delay or extension of the proceeding by 6 months would result in harm to the Applicant, and because the Record indicates the outcome of the 2019 Farmersville local election and adoption of revised local laws in early 2020 constitute extraordinary circumstances justifying a brief reopening of the record.

4. Are Farmersville Local Laws 1 and 4 of 2020 inapplicable to the Alle-Cat project because they are preempted by state law?

Answer below: Yes, late adopted laws need not be considered.

Answer requested: No, Farmersville Local Laws 1 and 4 are not expressly or impliedly preempted by the Public Service Law, and review of the laws is consistent with state law so long as the Siting Board has the ability to extend the one-year deadline for adjudication by up to 6 months pursuant to PSL 165(4).

5. Did the Siting Board abuse its discretion, exceed its jurisdiction, and act without evidentiary basis in rejecting Farmersville's interpretation of its own law, and holding Amish residences cannot be considered churches eligible for enhanced setbacks from wind turbines?

Answer below: No, Amish residences are not churches.

Answer requested: Yes, the Siting Board lacks jurisdiction to substitute its

interpretation for a town's; and the record includes ample evidence that Amish residences are churches; and the assumed frequency of services is not supported by evidence, or indicative of whether an Amish residence is used as a church.

## PROCEDURAL HISTORY AND RELEVANT FACTS

### Adoption of Applicable Local Laws by Farmersville

In 2007, the Town of Farmersville enacted Local Law 1 of the year 2007, entitled "Wind Energy Facilities Law of the Town of Farmersville, New York". Local Law No. 1 of 2007 of the Town of Farmersville[1].

In the year 2008, the Town of Farmersville enacted Local Law 1 of the year 2008, entitled "Local Law Establishing a Moratorium on the Development of Wind Energy Conversion Facilities". Local Law 1 of 2008 of the Town of Farmersville[2] .

On January 12, 2009, the Town of Farmersville enacted Local Law 1 of the year 2009, entitled "Town of Farmersville Wind Energy Conversion Facilities Law". Local Law No. 1 of 2009 of the Town of Farmersville[3] . Of relevant note, the 2009 Law permits commercial wind turbines under the following conditions:

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[1] Available at: https://locallaws.dos.ny.gov/sites/default/files/drop_laws_here/ECMMDIS_appid_DOS20150218075529_31/Content/090213438000fe0b.pdf

[2] Available at: https://locallaws.dos.ny.gov/sites/default/files/drop_laws_here/ECMMDIS_appid_DOS20150218075528_35/Content/090213438000d9d2.pdf

[3] Available at: https://locallaws.dos.ny.gov/sites/default/files/drop_laws_here/ECMMDIS_appid_DOS20150218075531_38/Content/090213438000c8c1.pdf

maximum blade tip height of 450 feet; maximum noise exposure of 50 dB; and minimum setback of at least 1.2 times the height of the turbine or at least 540 feet for turbines 450 feet high, measured from the property line. *Id.* at pp. 4 – 5.

Farmersville did not begin reviewing its wind energy laws again until 2018, when ACWE circulated a model wind law to host towns, including Farmersville, to relax or lessen standards contained in existing local laws applicable to the Project. R. DMM 223, CCC-Heberling direct testimony, pp. 13 – 15. For context, in 2018 the Farmersville town board was controlled by supporters of the ACWE project. *Id*. After receiving the law form ACWE, the Town Board referred the 2018 to the Cattaraugus County Planning Board, which recommended significant changes. R. DMM 214, Pre-Filed Testimony of Lorrie Fisher, pp. 10 – 11. The town board decided to abstain from voting on the proposed 2018 law. *Id.*

Later, in 2019, the Town Board adopted a wind law with even more permissive requirements than the 2018 law rejected by the Cattaraugus County Planning Board. *Id*. Over fierce public opposition, the Town of Farmersville enacted Local Law 3 of the year 2019, entitled "Wind Energy Facilities Law of the Town of Farmersville, New York". Local Law No. 3 of 2019 of the Town of Farmersville[4]. The 2019 Law purported to repeal and replace the 2007 Law, the

[4] Available at: https://locallaws.dos.ny.gov/sites/default/files/drop_laws_here/ECMMDIS_appid_DOS20190830060058/Content/0902134380280196.pdf

2008 Moratorium, and the 2009 Law, and increased the allowable height for wind turbines from 450 feet to 600 feet, while reducing required setbacks to property lines and homes, among other changes. *Id*. The 2019 Law was filed with the Department of State in Albany on August 28, 2019, although its validity is disputed given certain procedural errors in its enactment. *Id*.

Fisher testimony?

In 2018 and 2019, throughout the time the Farmersville Town Board was considering amending its wind energy zoning law to the benefit of ACWE, a majority of board members supported the Alle-Catt Wind project. R. DMM 223, CCC-Heberling direct testimony, pp. 13 – 15. The record indicates multiple town board members, or their relatives stood to benefit financially from the project. *Id*. at 21 – 23. The New York State Attorney General even fined ACWE $25,000.00 for alleged violations of the Attorney General's Wind Developer Code of Conduct, for violations relating to the personal pecuniary interest in the project held by certain town officials or their relatives. R. DMM 298, Exhibit 486 – AG Notice of Violation.

no—the fine was for failure to disclose

After the town adopted the more lenient 2019 law over the public's opposition, Farmersville's citizens elected new board members less supportive of the proposed ACWE project during local elections held in November of 2019. R. DMM 298, Exhibit 485 – Farmersville Incoming Town Board Letter. The newly elected board members ran on a platform that included repealing the improperly

R.288-3.

adopted 2019 wind law, and generally ensuring appropriate health, welfare and safety protections would be applied by the Siting Board. *Id.* Soon after the November election, incoming town board members filed letters in the Article 10 proceeding to notify the Siting Board of alleged improper behavior of the previous board and stating the incoming board's intention to revise the town's laws applicable to large-scale wind energy projects. *Id.* To be clear, incoming Farmersville town board members informed the Siting Board of Farmersville's intent to modify its local laws no later than November of 2019, before the evidentiary record in the Article 10 proceeding had closed. *See Id.* The evidentiary record did not close until December 5, 2019. R. DMM 419, Order on Rehearing, p. 6.

Upon taking their seats in January 2020, the new Farmersville Town Board members began the process of repealing and replacing the improperly adopted 2019 Wind Law. R. DMM 315, Motion for Judicial Notice of Five Town of Freedom Resolutions and Three Town of Farmersville Resolutions and exhibits. On January 6, 2020, the newly constituted town board held a special meeting wherein it adopted three resolutions by a majority vote, each relevant to the Alle-Catt Wind Project, including two relevant here:

> Resolution 3 of 2020: Resolution Recognizing that Town of Farmersville Local Law 3-2019 titled the Wind Energy

Facilities Law of the Town of Farmersville is void and invalid and affirming that Local Law 1 of 2009 remains in full force and effect; and (this approach was approved under GML Art. 18 in Lexjac (2d Cir, 2017)

Resolution 4 of 2020; Resolution Introducing Local Law 1-2020 "Town of Farmersville Wind Energy Facilities Law"; Referring Proposed Local Law to County Planning Board; Declaring Lead Agency Status.

*Id.*, pp. 5 – 6, and exhibits F, G, and H. The Town subsequently filed and served copies of the resolutions on the Siting Board and sought official notice of the resolutions via motion dated January 10, 2020. R. DMM 315, Motion for Judicial Notice of Five Town of Freedom Resolutions and Three Town of Farmersville Resolutions.

On January 17, 2020, the Town of Farmersville filed a post hearing brief where it joined in any request for extension of the statutory deadline to allow for further review of pending potential changes to Farmersville's local law. R. DMM 327, Freedom Farmersville Brief_Jan 17 2020, pp. 3 – 4 (Arguing, "it cannot be disputed that additional time is needed to develop a record concerning evolving local laws . . .")

Subsequently, on February 10, 2020, the Town of Farmersville Town Board enacted Farmersville Local Law 1 of the year 2020, titled Wind Energy Facilities

Law. R. DMM 357, Motion for Official Notice of Law and Exhibit A. The February 2020 Law was received by the Department of State in Albany on February 19, 2020, at which time it became effective and binding. *Id.* Section 17 of the February 2020 law contains numerous substantive provisions which Alle-Catt Wind, as currently designed, does not comply with, including but not limited to the following: more stringent noise limits; increased setbacks from residences, roads, conservation areas, wetlands, public utilities, churches, schools, cemeteries, gas lines, bat roosts, floodplains, private or public wells, regulated dams, and property lines; siting requirements for substations; and height restrictions limiting turbines to a total height of 455 feet. *See* R. DMM 357, Exhibit A, pp. 25 – 26**;** Farmersville Local Law 1 of 2020[5]. On February 21, 2020, the Town of Farmersville served a copy of the February 2020 Local Law on the Siting Board along with a motion for official notice of the law. R. DMM 357, Motion for Official Notice of Law and Exhibit A.

On February 19, 2020, ACWE commenced an action in Cattaraugus County Supreme Court against the Farmersville Town Board to annul Resolution 3 of 2020 and seeking to annul Local Law 1 of 2020. Alle-Catt Wind Energy LLC and David Murphy v. Town Board of the Town of Farmersville, New York, Town of

[5] Available at: https://locallaws.dos.ny.gov/sites/default/files/drop_laws_here/ECMMDIS_appid_DOS20200303060036/Content/09021343802abf80.pdf

Farmersville, New York and Mark Heberling, Cattaraugus County Supreme Court, Index No. 89082 (Parker, J.) (the "ACWE Suit"). The ACWE Suit is ongoing (Id.). The ACWE suite does not challenge the validity of Farmersville Local Law 4 of 2020. *See Id.*

In light of the ACWE Suit and upon review of the recommendations of the Cattaraugus County Planning Board of Local Law No. 1 of 2020, Farmersville opted to amend its Wind Energy Facilities Law, and on April 13, 2020, the Town of Farmersville enacted Farmersville Local Law 4 of the year 2020. R. DMM 388, Motion for Mandatory Official Notice_Farm LL4 2020 and Farmersville Exhibit 1. The April 2020 Law was received by the Department of State in Albany on April 16, 2020, at which time it became effective and binding. *Id*. The Siting Board was served with a copy of Local Law 4 of 2020 on May 20, 2020 with a motion for official notice. *Id.*

Substantive provisions of the Farmersville Local Law 4 of 2020 applicable to the Alle-Catt project include but are not limited to: a noise limit of 45 dBA(dn) outside any habitable building, and a 42 dBA(Leq-1 hr.) limit at Sensitive Receptor property lines; turbine setback requirement of 3,000 ft. from any residence or property line; a 1-mile setback from conservation areas, wetlands, public utilities, churches, schools, and cemeteries, including Amish homes which serve as churches ~~on a rotating basis~~; a 1.5-mile setback from bat roosts, maternity roosts,

or hibernacula; setbacks necessary to achieve shadow flicker exposure for non-participating landowners of no more than 8 hours per year and 1 hour per month; and a turbine height limitation of 455 feet. Local Law No. 4 of 2020 of the Town of Farmersville[6]. By its terms, Local Law 4 of 2020 repealed Local Law 1 of 2020. *Id.*

**Procedural History of Article 10 Proceeding**

ACWE filed its ~~final~~ initial proposed Application for a Certificate on December 18, 2018. R. DMM 86 – 96. It filed supplemental application materials on March 15, 2019. R. DMM 133, 134, and 136. After ACWE filed its application, Examiners LeCakes and Caruso issued a ruling confirming Farmersville's party status on March 6, 2019. R. DMM 129, Ruling Requiring Further Action for Party Status. On May 8, 2019, the Siting Board deemed ACWE's application compliant with the requirements of PSL 164, thereby commencing the adjudication phase of the article 10 proceeding. R. DMM 152, Letter from Chair Rhodes to J. Dax Regarding Application Compliance. The adjudication phase of an Article 10 proceeding is not to exceed 12 months under normal circumstances, and not to exceed 18 months under extraordinary circumstances. PSL 165(4).

On October 4, 2019, many parties to the administrative proceeding filed

[6] Available at: https://locallaws.dos.ny.gov/sites/default/files/drop_laws_here/ECMMDIS_appid_DOS20200810060051/Content/09021343802c0863.pdf

direct testimony. *See* R. DMM 214-223. Of specific note, the Coalition of Concerned Citizens ("CCC") filed testimony from member Mark Heberling, who would later be elected to the Farmersville Town Board as part of the 2019 election. R. DMM 223, CCC-Heberling direct testimony. Mr. Heberling's testimony describes the changes in Farmersville's local laws, and the town board's changing positions and interest, between 2018 and the time the more permissive 2019 local law was purportedly adopted. *Id.*

On November 22, 2019, ACWE filed supplemental testimony concerning whether it could comply with, or seek wavier of, local laws. R. DMM 277, Motion to Introduce, ACWE Supplemental Testimony Miller, and exhibits. ACWE ultimately declined to seek waiver of any local laws or provide evidence in support of waiver. *Id*; R. DMM 313, ALLE-CATT TO EXAMINERS & SECRETARY re Withdrawal of Motion.

On January 7, 2020, only six days after the new town board was seated, and one day after an emergency board meeting was held on January 6, 2020, Farmersville filed a Request for Extension of Briefing Deadline, in part to allow the Towns "the opportunity to speak regarding the applicability of recent and anticipated changes and rulings related to their local laws." R. DMM 310, Request for Extension of Briefing Deadline and exhibits. At this point, the Siting Board could have extended the deadline for adjudication by up to 6 months even without

ACWE's consent but declined to do so. *See* PSL 165(4).

In a subsequent motion filed January 10, 2020, the Town of Farmersville requested that the Examiners take official notice of three Town of Farmersville resolutions dated January 6, 2020 and assigned hearing exhibit numbers to all the resolutions. R. DMM 315, Motion for Judicial Notice of Five Town of Freedom Resolutions and Three Town of Farmersville Resolutions and exhibits. On January 16, 2020 (the day before initial post-hearing briefs were due), the Examiners issued a Ruling on Farmersville's motion declining to extend the deadline for briefing. R. DMM 321, Ruling on the motion of the Towns of Freedom and Farmersville.

On January 17, 2020, the Town of Farmersville submitted its Post-Hearing Brief arguing that ACWE's project cannot comply with the duly enacted laws of the Town Farmersville, that ACWE had expressly declined to request waiver, and that the Application must be dismissed, or the Certificate denied. R. DMM 327, Freedom Farmersville Brief_Jan 17 2020.

On January 31, 2020, the Town of Farmersville filed a Reply Brief in which it asserted that local laws must be applied or waived and stating that if the Siting Board fails to either apply or waive Farmersville's local law, it must deny the Certificate or require modification to the project to demonstrate conformity with the substantive requirements of Farmersville local laws R. DMM 344, Freedom Farmersville Reply Brief. In its post hearing brief, the Town also joined in the

Coalition's pending motion for extension of the statutory deadline for adjudication to allow for review of whether the project can comply with applicable local laws. R. DMM 307, Joint Motion for Scheduling Relief and Amended Motion to Dismiss Application.

On February 21, 2020, the Town of Farmersville filed a Motion for Official Notice of the Town of Farmersville Local Law 1 of 2020, its newly adopted Wind Energy Facilities Law. R. DMM 357, Motion for Official Notice of Law.

The Presiding Examiners issued their recommended decision (the "Recommended Decision") on February 27, 2020. R. DMM 358, Notice of Schedule for Filing Exceptions and Recommended Decision. The Recommended Decision noted: "In the Examiners' view, the Siting Board is therefore faced with a choice. It should either (1) extend the period of the Siting Board's consideration of this matter for up to 6 months pursuant to PSL §165(4)(a) based on 'extraordinary circumstances'; or (2) determine that LL#1 is unreasonably burdensome pursuant to PSL §168(3)(e)". *Id*., p. 155. The Siting Board ultimately declined either recommendation, instead opting to waive the law because it was filed after the close of the evidentiary record—a ground for waiver not included in PSL 168(3)(e) or enabling legislation. *See* R. DMM 399, Order Granting Certificate of Environmental Compatibility and Public Need with Conditions; PSL 168(3); 16 NYCRR 1001.31.

? missing step:

ACWE agreed that extending the litigation scheduled was not "impossible" AND would not harm it (see below, 38-39):

PSC Case 16-F-0205, Application of Canisteo Wind Energy LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 for Construction of a Wind Energy Project in Steuben County, DMM Item No. 237, 34:16-23 (applicant's motion for an unreasonably burdensome determination, "in order to be entertained, would have to be accompanied by consent to extend the 12 month statutory time frame"); Alle-Catt agreed that if local laws change "after the certificate is granted we will have to file a request to amend the certificate." Hrg. Tr., 687. This case: ACWE moves to reopen the record, and to conduct additional discovery on the basis for a waiver of Freedom LL #3 of 2007 as unreasonably burdensome, R.305-2 (1/3/20); Ruling denying motion, R.312-1 (1/8/20) ("we decline to reopen the hearing record unless we are provided written commitment by ACWE to extend the existing Article 10 statutory 12-month time frame for a Siting Board decision by an additional 90 days").

On April 1, 2020, the Town of Farmersville filed a brief on Exceptions taking exception to numerous recommendations in the Recommended Decision. R. DMM 370, Brief on Exceptions. Farmersville filed its brief opposing exceptions on April 16, 2020. R. DMM 383, Brief Opposing Exceptions and exhibits.

On May 20, 2020, the Town of Farmersville filed a Motion for Mandatory Official Notice of Town of Farmersville Local Law 4 of the Year 2020, Wind Energy Facilities Law. R. DMM 388, Motion for Mandatory Official Notice_Farm LL4 2020 and exhibits. The law, which went into effect April 16, 2020, contains restrictions on noise limits, setbacks, and turbine height limits; all of which are incompatible with the proposed Alle-Catt Wind project. *Id*.

Despite Farmersville's demands that its local laws enacted in February and May of 2020 be complied with, on June 3, 2020, the New York State Board on Electric Generation Siting and the Environment issued an Order Granting Certificate of Environmental Compatibility and Public Need with Conditions for the Alle-Catt Wind facility (the "Order"). R. DMM 399, Order Granting Certificate of Environmental Compatibility and Public Need with Conditions. In the Order, the Siting Board declined to consider either Farmersville Local Law 1 or Local 4 of 2020, stating that the timing of the adoption of the laws made it unreasonably burdensome and "impossible" to consider under applicable law and regulations. *Id.* at 73 – 81. Contrary to the Siting Board's assertion, it was not impossible for the

Siting Board to consider Farmersville's laws, because the Siting Board could have extended the proceeding by up to 6 months to adjudicate the issue. PSL §165(4)(a).

On July 3, 2020, Farmersville filed a petition for rehearing challenging the Siting Board's award of a Certificate to Alle Catt. R. DMM 406, Petition for Rehearing. The Town filed a corrected petition on July 6, 2020. R. DMM 409, Farmersville P for Rehearing (clean).

On September 25, 2020, the Siting Board denied Farmersville's petition for rehearing. R. DMM 419, Order on Rehearing. In its September 25 Order, the Siting Board again declined to apply any law enacted by the Town of Farmersville after the close of the evidentiary record, which occurred late in December of 2019. *Id.* at 6 – 8. In support of its decision, the Siting Board reiterated its position that it could not extend the proceeding for 6 months, as also expressly permitted by PSL 165(4), because such an extension could harm the applicant, ACWE. *Id*. The Siting Board failed to identify any evidence in the record in support of its holding that an extension of the proceeding by no more than 6 months would harm the applicant. *See Id*.

## STANDARD OF REVIEW

Under PSL §170(1), (2) "any party aggrieved by the board's decision denying or granting a certificate may … obtain judicial review of such decision." In reviewing the Board's decision, the Court may consider whether the Board's

decision and opinion are:

(a) in conformity with the constitution, laws and regulation of the state and the United States;

(b) supported by substantial evidence in the record and matters of judicial notice properly considered and applied in the opinion;

(c) within the board's statutory jurisdiction or authority;

(d) made in accordance with procedures set forth in this article or established by rule or regulation pursuant to this article;

(e) arbitrary, capricious or an abuse of discretion; or

(f) made pursuant to a process that afforded meaningful involvement of citizens affected by the facility regardless of age, race, color, national origin and income.

PSL §170(1)(2). Similarly, CPLR §7803(4) provides that an aggrieved party may seek judicial review of a final agency action to determine "whether … [its determination] is, on the entire record, supported by substantial evidence."

A determination is supported by substantial evidence if it is supported by "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact . . .." *See 300 Gramatan Ave. Assoc. v. State Div. of Human Rights*, 45 N.Y.2d 176, 180); *see also Koch v. Dyson*, 85 A.D.2d 346, 364–65, 448 N.Y.S.2d 698, 709–10 (1982).

"[W]here an agency fails to support its findings, its decision-making can appropriately be deemed arbitrary and capricious by a lower court based on the agency's failure to properly consider the evidence in the record." *Boone v. New York City Dep't of Educ*., 38 N.Y.S.3d 721 (N.Y. Sup. Ct. 2016).

## LEGAL ARGUMENT

Article IX of the New York State Constitution, concerning Home Rule, was adopted in 1963 by vote of the people. Peter J. Galie, Christopher Bopst, *The New York State Constitution* 266 (G. Alan Tarr, 2d. ed. 2012). There can be no doubt that that the 1963 Home Rule amendment was intended to strengthen local legislative powers in a variety of ways. As revealed in the papers of the Governor of New York, Nelson N. Rockefeller, "[t]he new Bill of Rights for Local Governments [included in the 1963 Amendment] embodies a new concept of state-local relations. The Bill of Rights expressly recognizes that the 'expansion of powers for effective local self-government' is a purpose of the people of the state." New York State Governor, *Public Papers of Nelson Rockefeller, 1962* 825 (Alban, n.d.).

The 1963 Amendment attempted to expand the powers for effective local self-government by clearly identifying the source of state and local legislative power, and by clarifying that local governments hold sovereign powers distinct from any power delegated by the state legislature. Specifically, Article IX of the

state constitution strengthens and safeguards local legislative power by:

> (1) reversing Dillon's Rule (the presumption that all local legislative powers are delegated by the legislature) through creation of a presumption of liberal construction of local powers and immunities, and granting local governments organic legislative powers as part of a "Bill of Rights", and also by expressly granting local legislative power over "property, affairs, and government", and other enumerated subjects (*see* N.Y. Const. art. IX, §§ 1(a), 3(c); 1(c), 2(c));
>
> (2) prohibiting the state government from interfering with the local legislative power absent adherence to certain procedural safeguards (N.Y. Const. art. IX, § 2(b)(2); and
>
> (3) identifying a specific subset of important local legislative powers and requiring a double enactment procedure before such powers can be repealed, diminished, impaired, or suspended (N.Y. Const. art. IX, § 2(b)(1)).

Here, the Siting Board's action in refusing to even consider whether the Alle Catt project can comply with the Town of Farmersville's substantive laws is wholly inconsistent with the state constitution's mandate that local powers be liberally construed. Arguably, the very structure of the Article 10 statute—through which the legislature delegates a discretionary power to waive local laws on a case-

by-case basis—is wholly unconstitutional. The State Constitution prohibits the legislature from over-riding local laws on a case-by-case basis (as distinguishable from enacting preemptive laws of general applicability), and it is therefore unclear how the legislature could delegate to the Siting Board a power the legislature itself lacks.

Although the constitutionality of the supersession clauses in Article 10 and similar statutes is an important issue, the Court need not address these concerns in the case at bar. The Siting Board did not event attempt to waive Farmersville's local laws as permitted by statute, it simply ignored them.

This case boils down to a simple matter of statutory construction, and specifically whether state statute permits the Siting Board to ignore a local law enacted late in a proceeding. In this regard, Article 10 ~~it~~ is clear on its face: the Siting Board is required to apply or waive substantive local laws such as those contained in Farmersville Local Laws 1 and 4 of 2020 regardless of when they were adopted. *See* PSL 168(3)(e). Farmersville also disputes the Siting Board's interpretation of the setback provision in Farmersville's local law, which would strip enhanced setback protections from Amish residences doubling as churches.

For the following reasons, this matter should be remanded to the Siting Board for further proceedings on the issue of whether the Alle-Catt wind project can comply with Farmersville's local laws, or in the alternative, whether any

portion of the local laws may properly be waived. Should the Siting Board opt to waive Farmersville's local laws on remand, the issue of whether the waiver power itself is constitutional will be ripe for review. In addition, the Court should hold that Amish residences should be afforded the same protection as other places of worship in Farmersville's community.

## POINT I: THE SITING BOARD EXCEEDED ITS AUTHORITY AND VIOLATED THE PSL BY FAILING TO CONSIDER, APPLY, OR WAIVE THE TOWN OF FARMERSVILLE'S LOCAL WIND ENERGY FACILITIES LAW

While the Article 10 siting process preempts local procedural laws such as those requiring site plan applications or local use permits, it expressly requires the Siting Board to apply or waive all substantive local laws. *See* NY PSL §§168(3)(e), 172; 16 NYCRR §1001.31. Examples of substantive local laws include things like limitations on turbine height, minimum setbacks, zoning district limitations, and area coverage limits. *See* 16 NYCRR 1000.2(t), (u). Farmersville Local Laws 1 and 4 of 2020 contain numerous substantive provisions applicable to the Alle-Catt facility. *See* Procedural History and Relevant Facts, *supra*. The Siting Board violated statutory and state constitutional mandates by failing to apply or waive Farmersville's Local Laws 1 and 4 of 2020.[7]

[7] Although Local Law 4 repealed and replaced Local Law 1, it is important to note both local laws were adopted after the evidentiary record closed in December 2019, but before the Siting Board issued its final Order granting a Certificate on June 3, 2020. The Siting Board refused to address either law on the grounds they were adopted by the Town too late in the proceeding.

PSL §168(3)(e) provides that the Siting Board cannot grant a certificate without explicitly finding that "the facility is designed to operate in compliance with applicable [] local laws . . . concerning, among other matters, the environment, public health and safety, all of which shall be binding upon the applicant. . .." NY PSL §168(3)(e)."

The plain language of PSL 168 does not limit the Siting Board's review to local laws in the evidentiary record, but instead requires a finding the facility is designed to operate in compliance with all applicable local laws. *See* PSL 168(3)(e). The law also grants the Siting Board the power to waive local laws in certain specific circumstances, but waivers can only be made upon the specific showing required by PSL 168(3)(e) and 16 NYCRR 1001.31.

The Siting Board erred in this case by waiving Farmersville's laws without the justification or analysis required by PSL 168(3) and 16 NYCRR 1001.31. In its Order Granting a Certificate, the Siting Board held, without evidentiary support, that Farmersville Local Law 1 of 2020 is unreasonably burdensome because it was enacted too late in the evidentiary proceeding:

> "Accordingly, we adopt the Examiners' recommendation that we decline to apply the post-hearing resolutions and laws adopted by the Towns of Freedom and Farmersville. We determine that Local Law #1 of 2020 is unreasonably burdensome pursuant to PSL § 168(3)(e). In addition, as we decided in the Bluestone Wind Order, PSL § 168(1) provides that the Board "shall make the final decision on an application for a certificate . . . upon the record before

> the presiding officer." As in Bluestone, the legislation in question here was enacted too late for full consideration on the record. The statute does not allow us to go beyond the record in this proceeding."

Siting Board decisions are not consistent or coherent

R. DMM Item No. 399, Order Granting Certificate, p. 81.

Contrary to the Siting Board's position, the timing of the enactment of a local law is not a basis for waiver, and in any event, the Siting Board itself has held in other Article 10 proceedings that, "the Siting Board is required to apply the law in effect at the time a determination is rendered." *See* PSL 168; In the Application of Baron Winds, Case No. 15-F-0122, Order Approving Amendment, Application of Baron Winds, Case No. 15-F0122, (DMM Item No. 505) (Wherein the Siting Board considered and applied a local law adopted by a town board only after the record had closed, and Certificate had been awarded). PSL 168 (3) requires the Siting Board to consider Farmersville's local law despite the practical difficulties of comparing the law to evidence in the record at such a late stage in the proceeding. In Case 12-F-036, In the Matter of the Rules and Regulations of the Board on Electric Generation Siting and the Environment, contained in 16 NYCRR, Chapter X, Certification of Major Electric Generating Facilities, The Memorandum and Resolution Adopting Regulations directly addresses the issue at bar:

> "[a]s to the consideration of local laws adopted after the submission of an application, we will have to consider that matter on a case-by-case basis… We also note that

> the Article 10 process has some built in deadlines that, without imposing a special change in procedure, will act as a practical hindrance on the consideration of new local laws including the application deadline, the deadlines for testimony, and the date upon which hearings are closed."

*Id.*

Instead of extending the proceeding using the special procedure already supplied by the legislature via PSL 165(4) (allowing for a 6-month extension of the statutory deadline in extraordinary circumstances), the Siting Board chose to simply not consider Farmersville's law.

In addition, the Siting Board's decision to not apply Farmersville's local laws is not based on substantial evidence in the record and does not comport with implementing regulations. PSL 168 (3)(e) only permits waiver of substantive local laws upon the specific finding that a law is unreasonably burdensome in view of the existing technology or the needs of or costs to ratepayers. PSL 168(3)(e). Waiver must be based on "facts and analysis" that show, "the degree of burden caused by the requirement, why the burden should not reasonably be borne by the Applicant, that the request cannot reasonably be obviated by design changes to the proposed facility, the request is the minimum necessary, and the adverse impacts of granting the request are mitigated to the maximum extent practicable." 16 NYCRR 1001.31(e).

Alle Catt did not request waiver, or provide evidence in support of waiver, and the Siting Board failed to make any of the required findings and

determinations in refusing to consider Farmersville's local law. The Order Granting certificate is not based on substantial evidence in the record, is arbitrary and capricious, and violates the express requirements for waiver found in PSL 168. *See Boone v. New York City Dep't of Educ*., 38 N.Y.S.3d 721 (N.Y. Sup. Ct. 2016) ("[W]here an agency fails to support its findings, its decision-making can appropriately be deemed arbitrary and capricious by a lower court based on the agency's failure to properly consider the evidence in the record."). bad law, if the argument is that local laws are not evidence

The Siting board may argue that, because copies of Farmersville's local laws did not exist in the evidentiary record at the time the evidentiary record closed in December 2019, the Siting Board is barred from reviewing the laws. This argument lacks merit because it conflates laws and evidence. Laws are not evidence, and local laws are binding upon the Siting Board regardless of whether a paper or digital copy of the law is included in an evidentiary record. New York Law requires that "[e]very court shall take judicial notice without request of . . . ordinances and regulations of . . . governmental subdivisions of the state or of the United States . . .." CPLR 4511(b) (emphasis added), extended to this proceeding through 16 NYCRR 1000.12(a)(10). The phrase 'ordinance, resolution, by-law, rule or proceeding' of the former statute [Civil Practice Act §344-a] is encompassed by 'ordinances and regulations' of this rule." Legislative Study, McKinney's Con. Laws of NY, 2019 Electronic Update, CPLR 4511. *See also*,

*Fix v. City of Rochester*, 50 Misc.2d 660, 662 (Monroe Co. Sup. Ct. 1966) (taking judicial notice of resolution); *Hotel Taft Associates v. Sommer*, 34 Misc.2d 367, 371 (N.Y. Co. Sup. Ct. 1962) (taking judicial notice of zoning resolution).

Although Farmersville understands the evidentiary record may, at present, lack testimony directly addressing the issue whether ACWE can comply with Local Law 1 or 4 of 2020, the Siting Board has provided no explanation for why it was impossible to review the record for other facts demonstrating compliance with the law during the 4 months that elapsed between the time Local Law 1 was enacted and the time a Certificate was awarded. For example, a local law limiting turbine height could have easily been compared to the planned height of the turbines without creating more than a minute or two of delay. Furthermore, if the Siting Board felt additional evidence was needed given the extraordinary circumstances present in this case, it could have reopened the record for up to an additional 6 months pursuant to PSL 165(4).

CCC motion filed 1/6/20, at 3, (R.307-2), describes ACWE's motion to consider supplemental testimony, and to conduct additional discovery on Freedom Local Law No. 3 of 2007, then ACWE's withdrawal of the motion, as "extraordinary circumstances" warranting "a substantial modification of the litigation schedule".

The plain language of Article 10 is clear: the Siting Board is required to apply or waive applicable local laws. Ignoring a local law enacted later in a proceeding is not an option. The Siting Board has agreed with this principle in other cases where late filed laws were more consistent, rather than less consistent, with a proposed project. In the Application of Baron Winds, Case No. 15-F-0122, the Siting Board applied Local Law #4 of the Town of Freemont to the Baron

Winds project, stating, "the Siting Board is required to apply the law in effect at the time a determination is rendered." P. 13. Order Approving Amendment, Application of Baron Winds, Case No. 15-F0122, p. 13 (DMM Item No. 505) (Wherein the Siting Board considered and applied a local law adopted by a town board only after the record had closed and a Certificate had been awarded). It is arbitrary and capricious and an abuse of discretion for the Siting Board to apply a late filed local law that benefits a project in one case, while refusing to consider late filed law that creates heightened substantive requirements in another.

For the foregoing reasons, the Siting Board exceeded its jurisdiction and acted in violation of law and regulations in refusing to consider, apply, or waive, Farmersville's Local Laws 1 or 4 of 2020. The appropriate remedy is to remand the proceeding to allow no more than 6 months of additional proceedings before the Siting Board. *See* Koch v. Dyson, 85 A.D.2d 346, 402, (1982) ("[T]he matter is remitted to the Siting Board for a rehearing on the question of whether the proposed facility is designed to operate in compliance with local laws and regulations or, in the alternative, that said local laws and regulations are unreasonably restrictive as applied to the proposed facility"). Additional hearings are needed to develop a record necessary for the Siting Board to rule on the issue of whether Alle Catt complies with the substantive requirements of Farmersville Local Law 4 of 2020, or whether any portions of the law may be appropriately

waived. In the alternative, the Court could issue a ruling modifying the Certificate to require full compliance with Farmersville Local Law 4 of 2020.

**POINT II: FARMERSVILLE LOCAL LAWS 1 AND 4 OF 2020 ARE NOT PREEMPTED BY STATE LAW**

The New York Constitution guarantees "every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law ... except to the extent that the legislature shall restrict the adoption of such a local law." N.Y. Const., art. IX, § 2[c][ii].

In *Wallach v. Town of Dryden,* 23 N.Y.3d 728, 742, (2014), the Court of Appeals recognized the power of local government to enact laws for the "protection and enhancement of [their] physical and visual environment" (Municipal Home Rule Law § 10[1][ii][a][11] ) and for the "government, protection, order, conduct, safety, health and well-being of persons or property therein" (Municipal Home Rule Law § 10[1][ii][a][12] )." Land use regulation is a core power of local governance. *See DJL Rest. Corp. v. City of New York*, 96 N.Y.2d 91, 96, (2001).

Although municipalities clearly have the power to engage in land use planning through local legislation, and also hold police powers to protect public health, safety, and welfare, the power to enact local laws is not absolute. It is well settled that local laws may be overridden by the state legislature where the legislature passes a generally applicable law that either expressly or impliedly preempts local legislation. *See e.g. Wallach,* 23 N.Y.3d at 742, (Discussing express

preemption); *Consol. Edison Co. of New York v. Town of Red Hook*, 60 N.Y.2d 99, 105 (1983) (Discussion implied preemption). Preemption may come in the form of express conflict preemption, implied conflict preemption, or field preemption.

Express conflict preemption occurs where a state law expressly prohibits what the local law allows. *See Albany Area Bldrs. Ass'n v Guilderland*, 74 NY2d 372, 377 (1989) ("[p]reemption applies . . . in cases of express conflict between local and State law . . .."). Express preemption is well-grounded in Article IX of the constitution, which prohibits a local government from enacting laws "inconsistent with the provision of this constitution or any general law. . .." N.Y. Const. art. IX, §3(c).

Implied conflict preemption occurs when it is impossible for one to act in compliance with both the State and Local laws, or when a local law stands as an obstacle to the accomplishment and execution of the full proposals and objectives of the state legislature. *See Guice v. Charles Schwab & Co.*, 89 N.Y.2d 31, 39, 674 N.E.2d 282, 285 (1996).

Finally, field preemption occurs where, "a local law regulating the same subject matter [as a state law] is deemed inconsistent with the State's transcendent interest, whether or not the terms of the local law actually conflict with a State-wide statute." *Albany Area Builders Ass'n v. Town of Guilderland,* 74 N.Y.2d 372, 377, 546 N.E.2d 920, 922 (1989).

As demonstrated below, Farmersville's local laws do not expressly or impliedly conflict with Article 10 of the public service law and are fully consistent with state law. In addition, the plain language of Article 10 carves out a prominent place for the application or waiver of local laws in an Article 10 proceeding, rather than preempting the field of power plant siting and overriding local laws entirely.

### A. Farmersville Local Laws 1 and 4 of 2020 are not expressly preempted by state law.

Article 10 of the Public Service law does not expressly preempt Farmersville Local Laws 1 and 4 of 2020 because the express supersession clause in Article 10 is limited, and because the local laws are consistent with state law.

In determining whether a state statute contains an express suppression clause, the Court must consider three factors: "(1) the plain language of the supersession clause; (2) the statutory scheme as a whole; and (3) the relevant legislative history." *Wallach,* 23 N.Y.3d at *744-45* (Holding that local fracking ban was not expressly preempted by Oil Gas and Solution Mining Law, and therefore the OGSML was not a law of general applicability properly preempting local laws pursuant to Article IX of the N.Y. Constitution).

First, the plain language of Article 10 only preempts local laws of a procedural nature, stating: "[n]otwithstanding any other provision of law, no . . . municipality . . . may . . . require any approval, consent, permit, certificate or other condition for the construction or operation of a major electric generating facility

with respect to which an application for a certificate hereunder has been filed . . .." N.Y. Pub Serv Law §172(1). The limited suppression clause in PSL 172 is consistent with the express requirement in PSL 168 that the Siting Board apply applicable substantive local laws by default. PSL 168(3) (e). In addition, the Siting Board acknowledges the difference between Article 10's treatment of procedural or substantive local laws in its implementing regulations, where an applicant is required to list laws of a procedural nature that are expressly preempted, as well as those laws of a substantive nature which it must comply with or seek waiver of. 16 NYCRR 1001.31(a)("[L]ocal procedural requirements are supplanted by PSL Article 10 unless the Board expressly authorizes the exercise of the procedural requirement by the local municipality or agency."); 16 NYCRR 1001.31(d)(Stating the application shall include, "[a] list of all local ordinances, laws, resolutions, regulations, standards, and other requirements applicable to the construction or operation of the proposed . . . facility … that are of a substantive nature, together with a statement that the location of the facility as proposed conforms to all such local substantive requirements . . . .").

Second, the structure and statutory scheme of Article 10 represent a careful balancing of Home Rule powers against the state's policy goal to expedite the siting of power plants. The legislature could have expressly preempted all local laws related to power plant siting, but it did not. The structure of Article 10 does

not call for preemption of substantive local laws, it calls for application of such laws by default. *See* PSL 168 (3) (e).

Third, the legislative history of Article 10 shows the legislature did not intend to preempt local substantive laws. The legislative sponsors memorandum for Article 10 states, "The Board may not issue a certificate for the construction or operation of a major electric generating facility absent findings and determinations that, among other things, the facility will . . . (iv) comply with all state and local laws and regulations unless such laws and regulations are found to be unreasonably burdensome with respect to the proposed project." New York Sponsors Memorandum, 2012 A.B. 8510.

Article 10 of the Public Service Law does not expressly preempt the substantive components of Farmersville Local Laws 1 and 4 of 2020, and the Siting Board was required to apply Farmersville's laws by default.

**B. Farmersville's Laws are not impliedly preempted by state law.**

Where there is no express preemption, preemption may be implied "from a declaration of State policy by the Legislature, or from the fact that the Legislature has enacted a comprehensive and detailed regulatory scheme in a particular area." *Consol. Edison Co. of New York v. Town of Red Hook*, 60 N.Y.2d 99, 105 (1983). Also, "authority to enact local laws under the Constitution or the Municipal Home Rule Law is conditioned on the exercise of such authority not being

inconsistent with any State enactment." *Id.* at 107. However, where "there is no express conflict and, moreover, the State Legislature expressly provided for localities to have a role in the approval process for [specified] projects", a local law or ordinance is not preempted. *Landmark Colony at Oyster Bay v. Board of Supervisors*, 113 A.D.2d 741, 742 (N.Y. App. Div. 2d Dep't 1985).

Here, implied preemption is not supported by a review of legislative intent or state power plant siting policy. Although Article 10 is a comprehensive and detailed regulatory scheme for siting power plants, the process expressly incorporates procedures for verifying compliance with local laws. As demonstrated in Point II(A) *infra*, the legislature expressly requires the Siting Board to apply substantive local laws by default, or in the alternative, waive local laws upon the required evidentiary showing by an applicant. PSL 168; PSL 172; 16 NYCRR 1001.31.

Furthermore, the timing of the adoption of Farmersville Local Laws 1 and 4 of 2020 is fully consistent with the comprehensive and detailed regulatory scheme set forth in Article 10 and implementing regulations, and therefore the local laws are not impliedly preempted based on incompatibility with Article 10 procedure. Although the Siting Board claimed it would have been "impossible" to consider Farmersville's laws (R. DMM Item 399, Order Granting Certificate, p. 80), Section 165(4) of the public service law provides a built-in method through which the

Siting Board could have extended the proceeding by up to six months for consideration of Farmersville's local laws.

The Siting Board also argues in its Order on Rehearing that the late adoption of Farmersville's local laws deprived the applicant of the opportunity to make a showing in support of waiver. This holding is legal error because it ignores the possibility of reopening the evidentiary record pursuant to PSL 165(4), which would allow the applicant the opportunity to demonstrate compliance or request waiver based on the required facts and analysis.

The Siting Board also argues reopening the record was inconsistent with Article 10 because, "such a remedy could well have been harmful to the Applicant and would not necessarily have solved the problem." R. DMM 419, Order on Rehearing, p. 6. This holding is not based on substantial evidence in the record and should be reversed. The Siting Board failed to cite to, and the record does not contain, any evidence that a delay of no more than 6 months to address the issue of compliance with local law "could well have been harmful to the Applicant . . ..". *See id.*

Finally, the Siting Board argues review of late filed laws is inconsistent with the statutory scheme because, if the Siting Board were to reopen the record to assess compliance with the 2020 laws, and if Farmersville were to amend its local law yet again prior to final decision on the reopened record, the siting board would

be left without any procedural options. *Id.* at 7. The scenario described by the Siting Board may well be inconsistent with state law, but it is not the scenario in the case at bar. Here, the Siting Board has not yet availed itself of the opportunity to extend the proceeding by up to 6 months to address compliance with state law, and therefore review of Farmersville Local Laws 1 and 4 of 2020 is fully consistent with the statutory and regulatory regime.

For the forgoing reasons, Farmersville Local Laws 1 and 4 of 2020 are not impliedly preempted by the comprehensive regulatory regime set forth by Article 10 of the Public Service Law and enabling regulations.

### C. Farmersville Laws 1 and 4 of 2020 are consistent with state law and not subject to field preemption (state concern doctrine).

"The doctrine of field preemption prohibits a municipality from exercising a police power 'when the Legislature has restricted such an exercise by preempting the area of regulation'." *See Citizens for the Hudson Valley v. N.Y. State Bd. on Elec. Generation Siting,* 281 A.D.2d 89, 95 (3d Dep't 2001). "Intent to preempt the field may be implied from the nature of the subject matter being regulated and the purpose and scope of the State legislative scheme, including the need for State-wide uniformity in a given area." *Id.* (internal citations omitted). "[W]here the state has demonstrated its intent to preempt an entire field and thereby preclude any further local regulation, local laws regulating the same subject area will be deemed inconsistent and will not be given effect." 25 N.Y. Jur. 2d Counties, Etc. § 346

(citing *City of New York v. Town of Blooming Grove Zoning Bd. of Appeals*, 305 A.D.2d 673, 761 N.Y.S.2d 241 (2d Dep't 2003)).

Although state courts have held Article 10 governs a matter of state concern and properly preempts the field of local procedural regulations, and further held that the waiver power wielded by the Siting Board is constitutional, the Court has never held that local substantive laws are automatically preempted absent the evidentiary showing required under the statute and regulations. *See e.g. Consolidated Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99, 105 (1983); *Citizens for the Hudson Valley v. N.Y. State Bd. on Elec. Generation Siting,* 281 A.D.2d 89, 95 (3d Dep't 2001).

Here, Farmersville's Local Laws 1 and 4 of 2020 are not subject to field preemption because the legislative scheme advanced by Article 10 expressly requires the application or waiver of substantive local laws. *See* PSL 168 (3) (e). In enacting Article 10, the legislature did not evince an intent to occupy the field of power plant siting to such a degree that substantive local laws are preempted by the mere existence of the state siting statute. *See* Arguments II(A) and II(B) *supra.* Furthermore, the legislatures enactment of PSL 165(4), which includes a provision for extending Article 10 proceedings by up to six months, contradicts any argument that the inclusion of an initial time limit of one year for adjudication

somehow indicates field preemption of any substantive local law enacted late in the initial one-year adjudicatory period.

For the forgoing reasons, field preemption is not applicable to the substantive components of Farmersville Local Laws 1 and 4 of 2020, and the appropriate remedy is to remand the proceeding to the Siting Board to review whether Alle Catt can comply with Local Law 4 of 2020, or whether the law might properly be waived. *See Koch v. Dyson*, 85 A.D.2d 346, 402, (1982).

## POINT III: THE SITING BOARD'S REFUSAL TO REOPEN THE RECORD TO ADDRESS COMPLIANCE WITH LOCAL LAW WAS ARBITRARY AND CAPRICIOUS, AN ABUSE OF DISCRETION, AND BASED ON A MERE SUPPOSITION THAT DELAY COULD HARM THE APPLICANT.

### A. The Siting Board's decision was arbitrary and capricious and an abuse of discretion when it based its decision on an inference lacking any evidentiary support.

To provide the Siting Board the opportunity to determine whether ACWE could comply with Farmersville's local laws, the Town of Farmersville sought an extension of the proceeding, not to exceed six months, on two separate occasions between January 17, 2020 and April 16, 2020. R. DMM 327, Freedom Farmersville Brief Jan 17 2020, pp. 3 - 4; R. DMM 383, Brief Opposing Exceptions, pp. 4 - 10. The first such request was made 4 months and 17 days before the Siting Board issued its final Order granting a Certificate. R. DMM 399, Order Granting Certificate of Environmental Compatibility and Public Need with Conditions.

In support of its refusal to reopen the record, the Siting Board offers the bald claim that delay could be harmful to an applicant, without identifying any evidence in the record of potential harm. R. DMM 419, Order on Rehearing p. 7 ("However, as the Siting Board concluded in the Certificate Order, such a remedy could well have been harmful to the Applicant . . .."). The Siting Board's refusal to reopen the record was an abuse of discretion and should be reversed.

The Third Department has found that, "[u]pon judicial review of a determination rendered by an administrative body after a hearing, review is limited to whether the agency's decision is supported by substantial evidence, which turns on whether there exists a rational basis in the record to support the findings upon which the agency's determination is predicated." *Civil Employees Ass'n., Inc. v. New York State Pub. Employment Relations Bd.,* 301 A.D.2d 946 (2003). Administrative agencies have, "the responsibility to comb through reports, analyses and other documents before making a determination." *Riverkeeper, Inc. v. Planning Bd. of Town of Se.*, 9 N.Y.3d 219 (2007). Furthermore, "where an agency fails to support its findings, its decision-making can appropriately be deemed arbitrary and capricious by a lower court based on the agency's failure to properly consider the evidence in the record." *Boone v. New York City Dep't of Educ*., 38 N.Y.S.3d 721 (N.Y. Sup. Ct. 2016).

Here, the record contains no evidence in support of the Siting Board's

refusal to extend the proceeding for review of local laws. The Siting Board based its decision not to reopen the evidentiary record on the baseless assumption that the Applicant "could well have been harmed" by extending the proceeding, but there is no evidence in the record that supports this claim. Order p. 80-8; Order on rehearing p. 7. ACWE did not offer any evidence of harm should the proceeding be extended by no more than six months. R. DMM 399, Order Granting Certificate of Environmental Compatibility and Public Need with Conditions p. 79, 80-81. The only evidence before the Board on this issue was proffered by the Town in support of its multiple requests for extension of the statutory timeline, which were improperly denied for the reasons set forth in Point III (B), below.

Accordingly, the Siting Board's decision not to reopen the record after it had notice of the newly adopted laws was arbitrary, capricious and not based upon substantial evidence in the record, and should be reversed.

**B. The Siting Board's decision to not reopen the evidentiary record was arbitrary and capricious or an abuse of discretion because the Siting Board ignored the extraordinary circumstances surrounding the passage of Farmersville Local Laws 1 and 4 of 2020.**

The Siting Board has the power to reopen the record for up to six months in extraordinary circumstances, such as the passage of an amended local law following the election of a new town board, or the enactment of local laws applicable to a project during the pendency of an Article 10 proceeding. *See* PSL

= enactment of potentially burdensome local substantive law after the evidentiary record closes and before the Siting Board makes its final determination (enactment of such local law after a final determination can be brought to the Siting Board's attention by motion of the town)

165(4) (Allowing reopening of the record and extension of the one-year deadline for adjudication by no more than 6 months to address emergent issues.).

In defense of its refusal to reopen or extend the proceeding the Siting Board argues without statutory support that, "[a]t some point in the process, the Applicant is entitled to some certainty about what local laws apply to the Project [and] [c]onsideration of such late-enacted local laws would have unreasonably extended the process." R. DMM 419, Order on Rehearing p. 8. The Siting Board further found that, "the passing of a new law after the close of the evidentiary record, purporting to apply to a Project that has been under consideration for years [did not] create [] 'extraordinary circumstances,' . . .") R. DMM 419, Order on Rehearing p.7; PSL § 165(4)(a). This holding ignores the extraordinary circumstances present in this case and effectively seeks to over-rule the results of a local election. An account of the extraordinary circumstances follows.

In 2018 and 2019, a majority of Farmersville Town Board members supported the Alle-Catt Wind project. R. DMM 223, CCC-Heberling direct testimony, pp. 13 – 15. In 2019 the board enacted a law in 2019 with substantive standards beneficial to Alle Catt. *Id.* Throughout the time the Farmersville Town Board was reviewing proposed changes to the wind energy law in 2018 and 2019, including when the Town Board voted to adopt the lenient 2019 law, multiple town board members or their family members stood to benefit financially from the

project. *Id*. at 21 – 23. The New York State Attorney General even fined ACWE $25,000.00 for alleged violations of the Attorney General's Wind Developer Code of Conduct. R. DMM 298, Exhibit 486 – AG Notice of Violation. The alleged violations related to the personal pecuniary interest in the project held by certain town officials or their family members. *Id*.

ACWE's obligation to disclose

After the town board adopted the more lenient 2019 law over the public's opposition, Farmersville's citizens elected new board members less supportive of the proposed ACWE project in November of 2019. R. DMM 298, Exhibit 485 – Farmersville Incoming Town Board Letter. The newly elected board members ran on a platform that included repealing the improperly adopted 2019 wind law, and generally ensuring appropriate health, welfare and safety protections would be applied by the Siting Board in cases such as Alle-Catt. *Id.* Soon after the November 2019 local elections, incoming town board members from the town of Farmersville filed letters in the Article 10 proceeding for Alle-Catt alleging improper behavior of the previous board and stating the incoming board's intention to change the town's policy regarding large-scale wind energy projects. *Id.*

To be clear, incoming Farmersville town board members informed the Siting Board of Farmersville's intent to modify its local laws no later than November of 2019, before the evidentiary record in the Article 10 proceeding had closed. *See Id.* The evidentiary record did not close until December 5, 2019. R. DMM 419, Order

on Rehearing, p. 6.

Upon taking their seats in January 2020, the new Farmersville Town Board members began the process of repealing and replacing the improperly adopted 2019 Wind Law. R. DMM 315, Motion for Judicial Notice of Five Town of Freedom Resolutions and Three Town of Farmersville Resolutions and exhibits. On January 6, 2020, the newly constituted town board held a special meeting wherein it adopted three resolutions by a majority vote, each relevant to the Alle-Catt Wind Project, and expressing a clear intent to update the local law applicable to the Alle Catt project. *Id.*, pp. 5 – 6, and exhibits F, G, and H. The Town subsequently filed and served copies of the resolutions on the Siting Board and sought official notice of the resolutions via motion dated January 10, 2020. R. DMM 315, Motion for Judicial Notice of Five Town of Freedom Resolutions and Three Town of Farmersville Resolutions.

On January 17, 2020, the Town of Farmersville filed a post hearing brief where it joined in any request for extension of the statutory deadline to allow for further review of pending potential changes to Farmersville's local law because, "it cannot be disputed that additional time is needed to develop a record concerning evolving local laws . . .." R. DMM 327, Freedom Farmersville Brief_Jan 17 2020, pp. 3 - 4

Subsequently, on February 10, 2020, the Town of Farmersville Town Board

enacted Farmersville Local Law 1 of the year 2020, titled Wind Energy Facilities Law. R. DMM 357, Motion for Official Notice of Law and Exhibit A. *See* R. DMM 357, Exhibit A, pp. 25 – 26**;** Farmersville Local Law 1 of 2020[8]. On February 21, 2020, the Town of Farmersville served a copy of the February 2020 Local Law on the Siting Board along with a motion for official notice of the law. R. DMM 357, Motion for Official Notice of Law and Exhibit A.

On February 19, 2020, ACWE commenced an action in Cattaraugus County Supreme Court against the Farmersville Town Board to annul Resolution 3 of 2020 and seeking to annul the February 2020 Law. The ACWE Suit is ongoing. *Id*.

In light of the ACWE Suit challenging Local Law No. 1 of 2020, Farmersville opted to amend its Wind Energy Facilities Law, and on April 13, 2020, the Town of Farmersville enacted Farmersville Local Law 4 of the year 2020. R. DMM 388, Motion for Mandatory Official Notice_Farm LL4 2020 and Farmersville Exhibit 1. The April 2020 Law was received by the Department of State in Albany on April 16, 2020, at which time it became effective and binding. *Id*. The Siting Board was served with a copy of the April 2020 law on May 20, 2020 with a motion for official notice. *Id.*; Local Law No. 4 of 2020 of the Town

[8] Available at https://locallaws.dos.ny.gov/sites/default/files/drop_laws_here/ECMMDIS_appid_DOS20200303060036/Content/09021343802abf80.pdf

of Farmersville[9]. By its terms, Local Law 4 of 2020 repealed Local Law 1 of 2020. *Id.*

The forgoing facts demonstrate the extraordinary circumstances surrounding passage of Local Laws 1 and 4 of 2020. The Siting Board and the applicant were aware no later than November of 2019 that Farmersville's local laws would likely be modified in early 2020. The Siting Board's refusal to Consider Local Laws 1 and 4 of 2020 amounts to the disenfranchisement of Farmersville's voters. The Siting Board should not be permitted to effectively undermine the results of the 2019 local election to benefit of ACWE.

The Siting Board's holding also ignores the Siting Board's own prior statements highlighting the importance of local government intent with regard to application of local laws. As noted by the Siting board in another matter, "(m)unicipal officials are often best situated to understand the sensibilities of their residents ... a Town can make its intent known with respect to [the applicability of local laws] through the filing of testimony in the proceeding or a town resolution making clear that it does not object to the waiver of specific local laws." Application of Number Three Wind LLC, Case No. 16-F-0328, Order Granting Certificate, p. 98 (Nov. 12, 2019). Here, Farmersville did everything in its power to

[9] Available at: https://locallaws.dos.ny.gov/sites/default/files/drop_laws_here/ECMMDIS_appid_DOS20200810060051/Content/09021343802c0863.pdf

demonstrate its intent to the Siting Board, including passing and filing resolutions at the earliest opportunity in January 2020, but was ignored.

Finally, this case resembles the case of *New York Tel*., in which a company argued that the Public Service Commission was in error when it refused to reopen the record in a ratemaking case to consider the predicted rate rather than operating results before issuing a final order. *New York Tel. Co. v. Pub. Serv. Comm'n*, 29 N.Y.2d 164 (1971). In that instance, the Court of Appeals found that refusing to reopen, "was arbitrary," and that there would be, "a great disparity," in the results if the new results were not taken into account," especially where "limited reopening . . . would only require a minimal amount of investigation." *New York Tel. Co.* 29 N.Y.2d at 171. Here, giving an extension of six months to review the new local law would be a limited reopening and will result in a "great disparity" if the local law was not examined. *See id*. Furthermore, and assessment of compliance with local laws should be a relatively straightforward comparison of the existing study results and physical parameters to the substantive standards contained in the local law. See *id.*

The Examiners and the Siting Board were required to apply Farmersville Local Laws 1 and 4 of 2020 to this proceeding. *See* CPLR 4511(b); NY PSL 168(3). It was arbitrary and capricious for the Examiners and the Siting Board to deny Farmersville's requests for extension of the statutory deadline to determine

the projects compliance with those laws.

The appropriate remedy is to remand the proceeding to allow no more than 6 months of additional proceedings before the Siting Board. See *Koch v. Dyson*, 85 A.D.2d 346, 402, (1982) ("[T]he matter is remitted to the Siting Board for a rehearing on the question of whether the proposed facility is designed to operate in compliance with local laws and regulations or, in the alternative, that said local laws and regulations are unreasonably restrictive as applied to the proposed facility").

**POINT IV: THE SITING BOARD EXCEEDED ITS JURISDICTION IN REJECTING FARMERSVILLE'S INTERPRETATION THAT LOCAL LAWS 1 AND 4 AFFORD AMISH RESIDENCES THE SAME PROTECTION AS CHURCHES.**

The Town of Farmersville considers Amish residences to be churches for the purposes of applying local laws that afford differing levels of protection for residences and places of worship. Rather than honoring Farmersville's interpretation that Amish residences should be considered churches, and applying or waiving Farmersville's enhanced setback protections for Amish residences, the Siting Board chose to reinterpret Farmersville's local law in a manner that would deprive Amish residences of enhanced setback protections. The Siting Board's interpretation of Farmersville's local laws is self-serving, unreasonable, and at odds with the Town's own interpretation. The Siting Board's position should be afforded no deference, especially in light of the constitutional mandate that local

powers be liberally construed. For these and the following reasons, the Siting Board's position should be reversed, and enhanced setbacks should be applied to Amish residences, which double as places of worship.

### A. The Siting Board exceeded its jurisdiction when it rejected the Town of Farmersville's reasonable interpretation of its own law.

The Siting Board claims that because, "this case [is] an Article 10 proceeding, the ultimate responsibility of interpreting Farmersville's local law lies with the Siting Board," but Article 10 does not give any authority to the Siting Board to reject a municipality's own interpretation of its law. Order p. 76; PSL 168 (3). The Siting Board's power to verify compliance with, or waive, local law, does not include the power to reject a town's reasonable interpretation of its own law. *See* PSL 168(3).

It is clear that, "a municipality's interpretation of its local law is entitled to great deference, and its interpretation will be upheld if it is not irrational, unreasonable, or contrary to governing language." 25 N.Y. Jur. 2d Counties, Etc. § 367. Furthermore, "the legislative history . . . make[s] abundantly clear the legislative intent to compel compliance with local laws and regulations, except those in those extraordinary circumstances where . . . such local laws and regulations are unreasonable." *Koch v. Dyson*, 85 A.D.2d 346 (1982). *See also*, *Comm. to Protect Overlook, Inc. v. Town of Woodstock Zoning Bd. of Appeals*, 24

A.D.3d 1103 (2005) "[A] [p]lanning board's interpretation of the zoning ordinance is entitled to deference and its determination will be upheld if it has a rational basis and is supported by substantial evidence."

Similarly, the Third Department has found, "a town's zoning determination is entitled to a strong presumption of validity [and] [e]ven if the validity of a zoning provision is fairly debatable a municipality's judgment as to its necessity must control." *Troy Sand & Gravel Co. v. Town of Sand Lake*, 185 A.D.3d 1306 (2020).

Farmersville's Local Law 3-2019 requires, among other things, that wind turbines be set back "2,200 feet or more from the property line of any school, church, hospital, or nursing facility", Farmersville Local Law 3- 2019 (§13[E][5]) (R. DMM Item No. 277, acwe_31_local_laws_and_ordinances Farmersville_2019_3 Wind Energy Facility). In both its Post Hearing Brief and its Brief on Exceptions, the Town of Farmersville informed the Siting Board of its reasonable interpretation that Amish residences should be considered churches requiring the enhanced 2,200-foot setback protection R. DMM Item No. 335, Freedom Farmersville Brief Clean, pp. 22-23; R. DMM Item No. 370, Brief on Exceptions, pp. 17-18.

The Town's position that Amish residences should be treated like churches is reasonable and based on substantial evidence in the record. The expert testimony

of Dr. Steven M. Nolt provides a great deal of information about Amish life in Farmersville. R. DMM Item No. 223, CCC Nolt direct testimony. The Farmersville Amish settlement is comprised of 22 households. Id. at 4:4-6, 4:8-9. "[E]ach family home is a place of worship in the Amish tradition and has been for centuries. Weddings and funerals also take place in homes. Thus, each home within the Amish settlement functions as a church building." Id. at 14:12-14. Among the Farmersville Amish (also known as Swartzentruber Amish), church services "in the hotter months of summer" may take place "in the barn". Id. at 17:8.

Indeed, the Siting Board appears to have completely ignored Dr. Nolt's lengthy explanation of why Amish residences should be considered churches:

> The Swartzentruber Amish hold church services in the homes of church members. They do not have church buildings as such; rather, each member's home functions as a church meetinghouse since Sunday morning worship rotates from one home to another in a systematic way throughout the settlement and throughout the year. Families take turns hosting worship (in the house or, in the hotter months of summer, perhaps in the barn) by totally rearranging or removing furnishings and setting up benches to create a worship space. Unlike Christian congregations that own a meetinghouse, parsonage, or other church property, the only church property of the Swartzentruber's are the benches ('pews') and hymnals, which are transported from one home to another. Sunday morning worship, weddings, and funerals all take place in member's homes. <u>In this way, Swartzentruber religion is not only a pervasive way of life, but also a pattern of distinct rituals that that involve all members' homes</u>.

> These rituals resist modification and are essential to the practice of their sincerely held beliefs, having been carried on in this way for centuries. The effects of the Invenergy project disrupt the ability of the Swartzentruber community to practice their religion. The location, noise, and sight of the turbines in proximity to their homes and barns, which necessarily serve as their places of worship, disrupt their religious ritual and practice.

R. DMM Item No. 223, CCC Nolt direct testimony, 17: 4-20 (emphasis added).

ACWE proposes to site 21 wind turbines in Farmersville, and six of these are closer than 2,200 feet to the property line of a Swartzentruber Amish family. R. DMM Item No. 169, acwe_06_wind_power_facilities_rev2-REDLINE, §6.b.6 (Specifically, Turbines 104, 105 and 106, respectively, are approximately 1,270 feet, 800 feet and 755 feet from the boundary of Parcel 23.004-1-23, 725 Tarbell Rd., owned by Levi Swartzentruber; Turbines 107 and 108, respectively, are approximately 870 feet and 900 feet from the boundary of Parcel 31.002-1-12.2, Older Hill/Eichler Rd., owned by Eli Swartzentruber; Turbine 39 is approximately 800 feet from the boundary of Parcel 23.001-1-20.1, 10232 Blue Street, owned by Samuel J. Swartzentruber. See ACWE Applic., Fig. 4-4 (rev1), Sheets 20, 25, 26, 30. Also, a new Farmersville Amish family recently moved to Parcel 23.004-1.5, located on both sides of NYS Route 98, and turbine 106 is approximately 2,125 feet from the property boundary.)

There is unrebutted evidence in the Record that ACWE cannot comply with

Farmersville's law, and ample evidence supporting the Towns desire that setback protections for churches be applied to all Amish residences. Nevertheless, the Siting Board rejected the town's own interpretation of the law and held without evidentiary basis that Amish residences are not churches. R. DMM 419, Order on Rehearing pp. 9-12. The Siting Board's position should be rejected because the Town's interpretation of its own law is reasonable, supported by evidence in the record, and controlling given the state constitution's mandate for liberal construction of the powers of local government. *See* N.Y. Const., Art. IX § 3(c) ("Rights, powers, privileges and immunities granted to local governments by this article shall be liberally construed."); Koch *v. Dyson*, 85 A.D.2d 346 (1982). *See also*, *Comm. to Protect Overlook, Inc. v. Town of Woodstock Zoning Bd. of Appeals*, 24 A.D.3d 1103 (2005); *Troy Sand & Gravel Co. v. Town of Sand Lake*, 185 A.D.3d 1306 (2020).

The Court should reverse the Siting Board's arbitrary and unsupported interpretation of Farmersville Local Law 3 of 2019, and require ACWE to comply with the requirement that wind turbines be set back "2,200 feet or more from the property line of any school, church, hospital, or nursing facility", Farmersville Local Law 3- 2019 (§13[E][5]). R. DMM 277, acwe_31_local_laws_and_ordinances Farmersville_2019_3 Wind Energy Facility

## B. The Siting Board's holding that Amish residences should not be afforded the same protection as churches is unreasonable and should be rejected.

As demonstrated above, there is ample evidence in the Record supporting Farmersville's position that Amish residences should be afforded the same setback protections as churches. Nevertheless, the Siting Board claimed that it, "interpret[s] the plain language of the term 'church' to be inapplicable to residences in the Amish community." Order p. 76. Additionally, the Siting Board found it was, "unreasonable to interpret the term 'church' to include what is in essence a full-time residence," merely because the residence used for worship on a rotating basis. Order P. 75-76. This argument is not supported by the facts in the record (*see* previous argument) and is also inconsistent with the law.

The First Amendment to the U.S. Constitution states: "Congress shall make no law respecting an establishment of religion, [or] prohibiting the free exercise thereof . . ." As such, Courts have routinely held that "'[t]he use . . . of real property for the purpose of religious exercise shall be considered ... religious exercise.'" *Congregation rabbinical College of Tartikov, Inc. v. Vil. Of Pomona,* 138 F.Supp.3d 352, 431 (SDNY 2015). The Court of Appeals has found, "that special status of religious institutions under the First Amendment freedom of religion is the dominant factor in determining validity of zoning restrictions." *Jewish Reconstructionist Synagogue of N. Shore, Inc. v. Inc. Vill. of Roslyn*

*Harbor*, 342 N.E.2d 534 (1975).

Additionally, the Court has found that the, "[e]xercise of First Amendment right of freedom of religion is not limited to the boundaries of one's place of residence." *Id.* at 540 (Here, the Court found a setback requirement for a synagogue applied to a guest house that was occupied by the Rabbi). Also, it is, "well settled that [a] church is more than merely an edifice affording people the opportunity to worship God." *Comm. to Protect Overlook, Inc.* 24 A.D.3d at 1104-1105 (The Planning Board determined a monastery was a place of worship even though Petitioners argued some of the monastery was intended for non-religious uses).

Up to the instant decision by the Siting Board, the State of New York has been generally unwilling to take a position as to what constitutes a Church. Rather, "[t]he state has ever been jealous, since its organization, to protect against appearance of an encroachment upon the right of free worship of God as the conscience of the citizen may choose and direct. No law ha[s] ever been permitted, or practice to that end condoned, respecting any establishment of religion or prohibiting the free exercise of religious belief without discrimination or preference or interference in any manner." *Smith v. Donahue*, 202 A.D. 656, 660 (3d Dep't 1922).

In defense of its holding that Amish places of worship are not churches, the

Siting Board claims that one, "would not call an individual's residence a 'church' under the local law definition simply because they held a prayer meeting or religious study group in that residence on some periodic basis," but this analogy is flawed. Order footnote 171. By this reasoning, the Siting Board reduces formal worship services to informal study groups, and contradicts evidence in the record that, "each member's home functions as a church meetinghouse," and that, "Sunday morning worship, weddings, and funerals all take place in member's homes." *See* R. DMM Item No. 223, CCC Nolt direct testimony, 17: 4 – 20.

The Siting Board also claims that, "[i]f occasional use of a residence for worship services roughly once every 10 months converts the residence into a church, then it follows under the same local law provision that the much more extensive use of a residence for home schooling or home nursing care would convert the residence into a "school" or a "nursing facility." (Order on Rehearing footnote 22). This argument is flawed for multiple reasons.

First, the assertion that worship services in any given Amish home occur once every 10 months is not based on substantial evidence in the record. Rather, it is based on a series of flawed and unsupported assumptions. The record does not indicate that only one Amish residence in Farmersville hosts services in any given week. The Record does not indicate the Amish host services on a fixed schedule including equal time intervals between hosting services at any given house. The

Record does not indicate that no Amish residence would host a church service before all 20 other residences have hosted a service. There is no evidence in the record supporting the Siting Board's math that each Amish residence in Farmersville supports a service once every 10 months.

Second, from a legal perspective, the Siting Board cites no support for the proposition that frequency of worship services is relevant to classification as a church.

Third, and most importantly, the Siting Board' argument completely disregards the broader cultural and normative context provided by Dr. Nolt's testimony. *See* R. DMM Item No. 223, CCC Nolt direct testimony, 17: 4-20. It is offensive to compare the Swartzentruber Amish's highly religious and longstanding way of life to the temporary use of a residence for the home schooling or nursing purposes.

For the forgoing reasons, the Court should reject the Siting Board's arbitrary and illegal refusal to afford religious protections to the Amish community in Farmersville and should require enhanced setbacks be applied to all Amish residences, which double as churches.

## CONCLUSION

The Siting Board abused its discretion, acted without legal authority, and issued an arbitrary and capricious decision not based on substantial evidence in the

record, in refusing to either apply or lawfully waive the applicable, substantive provisions of the local laws of the Town of Farmersville. The Siting Board rejected Farmersville's Home Rule powers and trampled freedom of religion in rejecting the Town of Farmersville's assertion that Amish residences should be afforded the same protections as other churches. For the foregoing reasons, the Court should issue an order:

a. Annulling and vacating the Siting Board's order granting a Certificate of Environmental Compatibility and Public Need to ACWE;
b. Declaring the Siting Board acted in excess of its jurisdiction in refusing to consider, rather than apply, or waive, Farmersville's Local Laws Number 1 and 4 of 2020;
c. Declaring the Siting Board violated state law and the State Constitution by refusing to consider, rather than apply or waive, Farmersville's Local Laws Number 1 and 4 of 2020;
d. In the alternative, if the court holds the Siting Board's failure to review local laws constitutes an attempted waiver of local law, declaring the Siting Board's purported waiver of Farmersville's Local Laws No. 1 and 4 of 2020 was not based on substantial evidence in the record;
e. Declaring the Siting Board abused its discretion in declining to reopen the evidentiary record for a period not to exceed six months to determine

whether the Alle-Catt project complies with the substantive requirements of Farmersville's Local Laws 1 and 4 of 2020, or whether those laws should be waived based on evidence of undue burden;

f. Declaring the Siting Board's decision to not reopen the record to further adjudicate laws based on a nebulous presumption of harm to ACWE is not based on substantial evidence in the Record and is an abuse of discretion;

g. Declaring the Siting Board exceeded its jurisdiction and acted without basis in the record in refusing overruling the Town of Farmersville's interpretation that Amish residences should be considered churches eligible for enhanced setbacks set forth in Farmersville Local Law 3 of 2019;

h. Ordering the Siting Board to reopen the record in the proceeding pursuant to PSL 165(4)(a) for further adjudication of issues as the Court deems just and proper;

i. Enjoining ACWE, or any of its affiliates from engaging in any construction activity until such time that this matter has been finally decided;

j. Enjoining the Siting Board from reviewing any post Certificate compliance filing until such time that additional proceedings on remand

have concluded, and only if a new order granting Certificate with conditions is issued by the Siting Board; and

k. Awarding petitioner its attorneys' fees, costs and disbursements, together with such other and further relief as this court deems just and proper.

Dated: January 29, 2021
Rochester, New York

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## PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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