NEW YORK STATE OF OPPORTUNITY.
Board on Electric Generation Siting and the Environment

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January 24, 2022

Hon. John P. Asiello
Chief Clerk and Legal Counsel
State of New York Court of Appeals
20 Eagle Street
Albany, New York 12207

Jurisdictional Response
Coalition of Concerned Citizens v NYS Board on Electric Generation Siting, APL-2021-00192

Dear Mr. Asiello,

I write on behalf of Appellee New York State Board on Electric Generation Siting and the Environment (Board) in response to this Court's January 13, 2022 letter inviting the parties to the above-referenced appeal to comment on whether the Court possesses subject matter jurisdiction to hear this appeal. For the following reasons, the Board respectfully submits that the appeal of Appellant Coalition of Concerned Citizens (Coalition) does not directly involve a substantial constitutional question to support an appeal as of right pursuant to CPLR §5601(b)(1).

Background

The Board is a special purpose governing body within the New York State Department of Public Service. The Board, at the time the matter below was commenced before it, was vested with exclusive authority within the State to grant certificates authorizing construction and operation of electric generating facilities capable of producing twenty-five thousand kilowatts or more in accordance with

Public Service Law (PSL) Article 10.[1] The Board is empowered, among other things, to apply (or elect not to apply) any local ordinance that would otherwise be applicable to the construction or operation of such facilities.[2]

By order issued June 3, 2020, the Board issued to Appellee Alle-Catt Wind Energy LLC (Alle-Catt) a certificate to construct and operate a wind-powered electric generating facility consisting of 116 wind turbines to be placed within Cattaraugus, Allegany and Wyoming Counties of New York.

The Coalition is a group of local residents opposed to Alle-Catt's renewable energy project. After seeking rehearing of the Board's order, the Coalition commenced an original special proceeding in the Appellate Division, Fourth Department pursuant to PSL § 170 to seek judicial review of the Board's certificate grant to Alle-Catt.[3] It advanced a broad swath of arguments in an effort to challenge the Board's grant.

Relevant to this appeal, the Coalition argued below that the Board had improperly applied a local zoning law that required minimum setback distances between wind turbines and various types of existing structures.[4] That local law specified a 1500-foot turbine setback from residences, and a 2200-foot turbine setback for churches. The local law, however, did not contain a definition of "churches." Based upon the plain language of the local ordinance, the common understanding of what is a "church," and the primary usage of the structures at

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[1] PSL §§ 160-173. Via subsequent legislation, applications for permits for construction and operation of renewable energy facilities greater than twenty-five thousand kilowatts are now reviewed by the Office of Renewable Energy Siting within the New York State Department of State, pursuant to Executive Law § 94-c. L.2020, c. 58, pt. JJJ.

[2] PSL § 168(3)(e).

[3] PSL § 170 provides the exclusive procedure for judicial review of a Board decision granting or denying a certificate.

[4] Brief for Petitioners at 31-32, 42-49, *Matter of Coalition of Concerned Citizens v. New York State Bd. on Elec. Generation Siting & the Envt.*, 199 A.D.3d 1310 (4th Dep't 2021) (No. OP 20-01405).

issue, the Board applied the 1500-foot residence setback to homes occupied by members of the local Swartzentruber Amish community.[5]

The Coalition contended that the Board's application of the residence setback, rather than the church setback, unconstitutionally interfered with the Swartzentruber community's free exercise of religion. The Coalition claimed that because the Swartzentrubers from time to time hold religious services and conduct weddings, baptisms, and funerals in their homes, the homes should be regarded as "churches."[6] It disagreed with the Board's reasoning that because the community members take turns hosting services, each home is utilized for services only once every ten months.[7] The Coalition further asserted that the presence of turbines near the Swartzentrubers' homes would disrupt their religious rituals and practices.[8] It also claimed that the turbines would impair the Swartzentrubers' religious desire to acquire more land in the future that is not in proximity of turbines in order to expand the geographic size of their community.[9]

The Appellate Division did not address the Coalition's constitutional claim on the merits. Rather, it held that the Coalition lacked standing to raise that claim. It concluded that the Coalition, as an organization, was seeking to protect rights or interests that are not germane to the Coalition's organizational purposes.[10]

Furthermore, the Appellate Division also held that the Coalition did not preserve the argument for judicial review because it failed to raise it in its brief on exceptions to the Board's hearing examiner's recommended decision, as required by

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[5] The 700-foot difference between the residential and church setback distances with respect to Swartzentruber homes would have affected the placement of six of the project's 116 turbines.

[6] Brief for Petitioners at 44-48, *Matter of Coalition of Concerned Citizens v. New York State Bd. on Elec. Generation Siting & the Envt.*, 199 A.D.3d 1310 (4th Dep't 2021) (No. OP 20-01405).

[7] *Id.* at 46.

[8] *Id.* at 32.

[9] *Id.* at 30, 47-48.

[10] *Matter of Coalition of Concerned Citizens v. New York State Bd. on Elec. Generation Siting & the Envt.*, 199 A.D.3d 1310, 1313-14 (4th Dep't 2021).

the Board's procedural regulations at 16 NYCRR §§ 4.10(a) and 4.10(d)(2).[11] Consequently, the court held that the Coalition was precluded from raising that argument in its application for rehearing before the Board – which, in turn, barred the court from considering the argument.[12]

Argument

Point I.
There is no direct involvement of a constitutional question.

An appellant seeking an appeal as of right under CPLR § 5601(b)(1) bears the burden of establishing that a constitutional question is directly involved in the decision of the court below.[13] The constitutional question, however, must have been "not only directly but necessarily involved in the decision of the case."[14] That a constitutional question might have been passed on below, but was not, is not sufficient to support jurisdiction.[15]

The Coalition's appeal must be dismissed because the constitutional free exercise question was neither directly nor necessarily decided below. "[A]n appeal as of right does not lie if the decision appealed from was or could have been based on some ground other than the construction of the Constitution."[16] The Appellate Division's dismissal of the Coalition's constitutional claim was clearly and entirely

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[11] *Id.* at 1314.

[12] An argument not properly raised on rehearing before the Board cannot be raised on judicial review. PSL § 170(1) ("No objection that has not been urged by the party in his or her application for rehearing before the board shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.").

[13] *Board of Educ. of Monroe-Woodbury Cent. School Dist. v. Wieder*, 72 N.Y.2d 174, 182 (1988).

[14] *Haydorn v. Carroll*, 225 N.Y. 84, 87-88 (1918).

[15] Arthur Karger, The Powers of the New York Court of Appeals § 7:8 (3d ed. 2005).

[16] *Wieder*, 72 N.Y.2d at 182.

based upon two non-constitutional grounds: standing[17] and preservation. The court did not reach the free exercise issue, and it did not need to reach that issue to dismiss the Coalition's PSL § 170 petition.

Point II.
There is no substantial constitutional question.

This Court's practice guidance states that a constitutional question brought under CPLR § 5601(b)(1) must be substantial.[18] It further states that determination of substantiality of a constitutional question needed to sustain an appeal as of right must be made on a case-by-case basis.[19] That guidance also points out, however, that arguments lacking merit and questions whose merit have been "clearly resolved against an appellant's position' lack the degree of substantiality necessary to sustain an appeal as of right under CPLR 5601(b)(1)."[20]

Even if the Appellate Division had reached the Coalition's constitutional question, that question nevertheless would be insubstantial due to lack of merit. The United States Supreme Court has held that an essentially identical claim did not state a cause of action under the First Amendment. In *Lyng v. Northwest Indian Cemetery Protective Assn.*,[21] members of three Native American tribes claimed that the government's permitting of timber harvesting and road construction on property adjacent to tribal lands would violate their First Amendment religious freedom by irreparably damaging sacred areas that were integral to their belief system.[22] The Court held that although it was undisputed that the government's action could have devastating impacts upon the tribes'

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[17] Standing is not a constitutional issue. Rather, it is a justiciability question based in part upon policy considerations. *Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 769 (1991).

[18] The New York Court of Appeals Civil Jurisdiction and Practice Outline at 4 (2020), http://www.nycourts.gov/ctapps/forms/civiloutline.pdf (visited Jan. 19, 2022).

[19] *Id.*

[20] *Id.* (quoting *Matter of David A.C.*, 43 N.Y.2d 708, 709 (1977)).

[21] 485 U.S. 439 (1988).

[22] *Id.* at 442.

religious practices, the action did not implicate the First Amendment.[23] In so holding, it distinguished governmental actions that deliberately coerce or penalize religious behavior from actions that may impact but neither direct nor prohibit such behavior.[24]

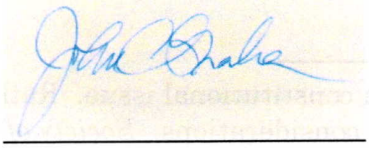
Like the governmental permits at issue in *Lyng,* the Board's grant of permission to construct wind turbines on other persons' properties does not regulate the Swartzentrubers' behavior in any way and, consequently, does not prohibit the free exercise of religion in violation of the First Amendment. Because the Supreme Court has resolved a highly analogous case against the Coalition's position, the Coalition has failed to present a substantial constitutional question for the purposes of this Court's subject matter jurisdiction under CPLR § 5601(b)(1).

The logical result of the Coalition's claim would be that any person or group of persons claiming a religious objection to real estate development on a third party's property could dictate the use of other persons' adjoining or nearby lands. As the Supreme Court recognized in *Lyng*, however, "[t]he First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion."[25]

Conclusion

For the foregoing reasons, this Court should dismiss the Coalition's appeal on the ground that no substantial constitutional question is directly involved.

Respectfully submitted,



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[23] *Id.* at 451-52.

[24] *Id.*

[25] *Lyng*, 485 U.S. at 452.