To be argued by John C. Graham
15 minutes requested

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FOURTH DEPARTMENT

In the Matter of
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 OF RESPONDENT NEW YORK STATE BOARD ON ELECTRIC GENERATION SITING AND THE ENVIRONMENT

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**STATE STATUTES AND REGULATIONS**

## LOCAL AND TOWN LAWS

## PRELIMINARY STATEMENT

In this original special proceeding pursuant to Public Service Law (PSL) § 170, Petitioner Town of Farmersville (Farmersville) seeks judicial review of a Certificate of Environmental Compatibility and Public Need (Certificate) granted on December 16, 2019 by Respondent New York State Board on Electric Generation Siting and the Environment (Siting Board) to Respondent Alle-Catt Wind Energy LLC (Alle-Catt) to build and operate a wind-powered electric generation facility. That facility will consist of up to 116 wind turbines built on leased private lands within the Town of Arcade, Wyoming County; the Towns of Centerville and Rushford, Allegany County; and the Towns of Farmersville and Freedom, Cattaraugus County, New York.[1]

The Siting Board is a special purpose State entity created by the Legislature. Through PSL Article 10 (PSL §§ 160-173), the Legislature delegated to the Siting Board exclusive authority within the State over the siting and construction of electric generating facilities capable of generating 25,000 kilowatts or more of electric power. The Siting Board

[1] A summary description of Alle-Catt's proposed facility can be found in the Siting Board hearing examiners' February 27, 2020 Recommended Decision, Record Document Filing Number (R.) 358-1 at pages 2-3.

granted Bluestone's Certificate after a robust evidentiary process that complied with the requirements mandated by Article 10. That statute prescribes an expedited "one-stop" process, which overrides and replaces other State and local permits that otherwise would have been required. It also authorizes the Siting Board to supersede local substantive requirements (*e.g.*, building and design codes) that would apply to electric generating facilities within the statute's purview. Under the Article 10 process, the Siting Board has one year to issue a decision on a completed Certificate application.

Farmersville's main contention is that Article 10 required the Siting Board to review a local wind energy siting law that the town – a statutorily necessary party that received notice of Alle-Catt's proposal in 2016 and had participated throughout the Siting Board's proceeding – enacted months after the close of hearings in that proceeding. Article 10, however, requires that (1) the municipality, which seeks enforcement of its local law, demonstrate to the Siting Board why the municipality's local law(s) should apply to the Certificate applicant; and (2) the applicant be provided an opportunity to show why the Siting Board should waive compliance with those local laws. This exchange is

to be conducted during the Article 10 evidentiary process before the hearing examiners. Consequently, the Siting Board correctly held that it could not consider Farmersville's belated ordinance because it was enacted well after the evidentiary process had concluded.

Farmersville asks this Court to remand this matter to the Siting Board with a directive to reopen and extend the Article 10 proceeding by six months to accommodate the town's belated local law changes. Such a directive would be inconsistent with Article 10, as it would contravene the Legislature's intent to expedite siting decisions and would divest the Siting Board of its control over the timing of those decisions. Article 10, moreover, permits a six-month extension only under extraordinary circumstances. An after the fact local siting law enactment by a municipality that, after a post-hearing change in administration, suddenly became an avowed opponent of the project hardly qualifies as an extraordinary circumstance.

Farmersville further claims that the Siting Board contravened the town's interpretation of the term "church" in town code and, consequently, allowed turbines to be placed too close to Swartzentruber Amish properties. As the Siting Board properly recognized, however,

the town board never actually rendered an interpretation on this issue, so there could not have been any conflict. In any event, the Siting Board correctly ruled that Swartzentruber residences are not "churches" for the purposes of local land use law. Under New York law, whether land use is deemed religious depends upon the primary use of the property. Nothing in the record demonstrates that the primary use of the four Swartzentruber properties at issue is anything other than residential and agricultural.

As for Farmersville's First Amendment constitutional claim, not only does the town lack standing and capacity to pursue that claim, but it also failed to preserve that claim for judicial review. Siting Board procedural rules preclude consideration of arguments not raised in briefs on exceptions to the examiners' recommended decision, and that prohibition carries through to judicial review. In any event, Farmersville fails to state a First Amendment claim because the Siting Board did not directly prohibit any Amish religious practice or require the Amish to behave in a manner contrary to their religious beliefs.

## STATEMENT OF FACTS

### Legal framework

Over the last 50 years, the New York State Legislature has enacted several statutes, codified in the Public Service Law, providing for State review, control, and approval of proposed electric generation facilities.

*Historical background*

Article 10 is the most recent version of a State electric generation siting statute by which the Legislature has vested authority to grant all necessary permits for the construction and operation of electric generating facilities in one single entity – the Siting Board. The statute's initial predecessor was enacted in 1972 as PSL Article VIII. L 1972, ch 385. In that enactment, the Legislature found:

> that there is a need for the state to control determinations regarding the proposed siting of major steam electric generating facilities within the state and to cooperate with other states, regions and countries in order to serve the public interest in creating and preserving a proper environment and in having an adequate supply of electric power, all within the context of the policy objectives heretofore set forth …

*Id.* § 1. Governor Nelson A. Rockefeller, moreover, in his statement in support of Article VIII, stated:

> This bill creates a State Board on Electric Generation Siting and the Environment enabling the State to further the production of needed increased electrical power while fully protecting the State's natural environment. This board will replace the current uncoordinated welter of approvals, procedures and agencies that have virtually paralyzed the construction of needed new power plants.
>
> * * *
>
> The Board will consist of the Chairman of the Public Service Commission, the Commissioners of Environmental Conservation, Health and Commerce and an appointed member residing in the area in which the plant is primarily proposed to be located. This composition will assure a balanced weighing of the many factors relevant to siting determinations.

1972 McKinney's Session Laws of NY at 3391.

That original version of Article VIII expired on January 1, 1979. L 1972, ch 385, § 8. A nearly identical version became effective August 4, 1978. L 1978, ch 708, § 2. It was amended by L 1983, ch 721 and expired January 1, 1989. L 1983, ch 721, § 2.

In 1992, three years after Article VIII expired, the Legislature enacted Article X of the PSL to reinstate Siting Board control over

electric generation siting. Governor Mario M. Cuomo's memorandum in support of Article X stated:

> With the expiration of Article VIII of the Public Service Law, the construction of major generating facilities again became subject to numerous licensing and permitting on the State and local government levels. [This] bill provides a State siting process that will enable comprehensive review of the benefits and impacts anticipated from proposed facilities without unreasonable delay.

1992 McKinney's Session Laws of NY at 2898. That memorandum described Article X as a "one-stop process for the siting of major electric generating facilities." *Id.* Article X was broader in scope than Article VIII, as it was not limited to steam electric generating facilities. It applied to any electric generating facility with a generating capacity of 80,000 kilowatts or more. L 1992, ch 519, § 6 (former PSL § 160(2)). That statute expired on January 1, 2003 by its own terms.

The current Article 10 became effective August 4, 2011. L 2011, ch 388, § 12. Again, the Legislature stated its intent to provide "a simplified regulatory process to site new power plants." 2011 McKinney's Session Laws of NY at 2029 (Sponsor's Memorandum). The Sponsor's Memorandum pointed to several new features of the statute – specifically:

- Streamlining the regulatory process for the siting of energy sources 25 megawatts or larger;
- Providing for enhanced community input;
- Providing for additional environmental justice studies;
- Requiring facilities to meet all applicable air emission requirements;
- Granting as-of-right participation in the administrative process to municipalities, individual residents, and not-for-profit organizations; and
- Expanding the amount of money available to local interested parties who wish to participate but lack sufficient funds.

*Id.* Notably, the legislative memo indicates that the vehicle for incorporating local concerns is through enhancing the ability of municipalities and local residents to participate in the Siting Board proceeding. *Id.*

*Procedure under Article 10*

The Siting Board is a state regulatory entity within the New York State Department of Public Service (Department). PSL § 160(4). It is comprised of the chair of the Department, the commissioner of the Department of Environmental Conservation, the commissioner of the Department of Health, the chair of the New York State Energy Research and Development Authority, the commissioner of the Department of Economic Development, and, for each project, two

residents of the municipality where the project is proposed to be located. *Id.* Site preparation for, or construction of, an electric generating facility subject to Article 10 may not commence without a certificate of environmental compatibility and public need issued by the Siting Board. PSL §§ 162(1), 160(5).

PSL Article 10 provides for advance notice and outreach to local municipalities. Before a project applicant can file a formal application with the Siting Board, it must serve a preliminary scoping statement on, *inter alia*, the chief executive officer of each municipality where any portion of the project is proposed to be located and a library serving the district of each State legislator where any portion of the project is proposed to be located. PSL §§ 163(2), 164(2); 16 NYCRR § 1000.5. It must also provide notice to residents of those municipalities. *Id.* That scoping statement must include, among other things, a description of the proposed facility and its environmental setting, potential environmental and health impacts, and proposed studies to evaluate those impacts. PSL § 163(1). For wind energy facilities, those studies must also examine potential impacts to bat and avian species. PSL § 163(1)(c).

PSL Article 10 also seeks to provide an opportunity for participation. By providing for (i) pre-application scoping and communications (e.g., PSL § 163(2),(3)),, (ii) a determination informing interested persons when the Siting Board found the application complete (e.g., PSL § 165(1)), and (iii) an administrative hearing process (e.g., PSL § 165(3)), the Legislature provided participants in an Article 10 siting proceeding an opportunity to test, support, or challenge other parties' contentions and previously-exchanged exhibits in an orderly manner.

Article 10 contains three provisions addressing the applicability of local laws and ordinances to electric generating facilities within the statute's purview. The first, which directly addresses powers of municipalities and other state agencies, states in relevant part:

> Notwithstanding any other provision of law, no state agency, municipality or any agency thereof may, except as expressly authorized under this article by the board, 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 … provided, however, that in the case of a municipality or an agency thereof, such municipality has received notice of the filing of the application therefor.

PSL § 172(1). The second pertains to one of the requisite findings that the Siting Board must make in any decision granting a certificate. It provides in relevant part:

> The board may not grant a certificate for the construction or operation of a major electric generating facility, either as proposed or as modified by the board, unless the board determines that: … (e) the facility is designed to operate in compliance with applicable state and local laws and regulations issued thereunder concerning, among other matters, the environment, public health and safety, all of which shall be binding upon the applicant, except that the board may elect not to apply, in whole or in part, any local ordinance, law, resolution or other action or any regulation issued thereunder or any local standard or requirement … which would be otherwise applicable if it finds that, as applied to the proposed facility, such is unreasonably burdensome in view of the existing technology or the needs of or costs to ratepayers whether located inside or outside of such municipality. The board shall provide the municipality an opportunity to present evidence in support of such ordinance, law, resolution, regulation or other local action issued thereunder.

PSL § 168(3), (3)(e). The third provides, in relevant part:

> [A]ny municipality entitled to be a party herein and seeking to enforce any local ordinance, law, resolution or other action or regulation otherwise applicable shall present evidence in support thereof or shall be barred from the enforcement thereof.

PSL § 166(1)(j).

**Town of Farmersville – Local wind energy facilities siting law**

In April 2016, Alle-Catt began outreach meetings with town officials, including those of Farmersville, to inform them of its plans to construct a wind-powered electric generation facility. R. 1-1 at 5, 8, 20. Farmersville states in its brief that it had previously enacted local laws specifically pertaining to wind energy facilities in 2007, 2008 and 2009. Brief for Petitioner (P. Br.) at 4.

Alle-Catt commenced the Article 10 proceeding before the Siting Board by filing its Public Involvement Plan on May 15, 2017. By letter issued May 8, 2019, the Siting Board Chair declared Alle-Catt's application complete. R. 152-1. That notice of completion event started the statutory twelve-month time clock for the Siting Board to render a determination. PSL § 165(4)(a). The Siting Board's statutory deadline for a decision on Bluestone's application, then, became May 8, 2020.

On August 19, 2019, Farmersville enacted Local Law #3-2019, entitled "Wind Energy Facility Law of the Town of Farmersville, New York." R. 277-4. It filed that local law with the Secretary of State on August 28, 2019. *Id.* Local Law #3-2019 expressly repealed and

replaced Farmersville's 2007, 2008 and 2009 wind energy facilities laws. *Id.*, Section 1.

On August 28, 2019, Farmersville filed its statement of issues that it proposed to raise at the upcoming evidentiary hearing. R. 179-2. Farmersville stated that "[o]n August 19, 2019, the Town adopted a local law for wind facilities. The Applicant will need to demonstrate compliance with the law." *Id.* at 1.

On November 22, 2019, Alle-Catt filed an updated list of applicable local laws, pursuant to 16 NYCRR § 1001.31, identifying Farmersville Local Law #3-2019 as being applicable, along with a letter acknowledging that it would not seek waiver of that law. R. 277-4, 5.

Between December 2 and 5, 2019, evidentiary hearings were held before the hearing examiners. R. 358-1 at 1. The evidentiary record closed at the conclusion of the hearings, on December 5, 2019. R. 399-1 at 75. Up until and during the evidentiary proceedings, Farmersville neither disputed that Local Law #3-2019 was applicable nor claimed that Alle-Catt's proposed facility did not comply with that law.

Apparently sometime in November or December 2019, three members-elect to the Farmersville Town Board transmitted a letter, dated November 17, 2019, to the Siting Board and the hearing examiners.[2] Those members-elect stated that they intended to enact a moratorium on wind energy facility development in Farmersville. R. 298-3. The letter also states, however, that the members-elect would not be taking office until January 1, 2020. *Id.* at 2.

In their February 27, 2020 Recommended Decision (RD) to the Siting Board, the hearing examiners acknowledged that Farmersville, in early 2020, had taken actions that purported to rescind Local Law #3-2019. R. 358-1 at 145. Nevertheless, the examiners found that "[a]s of the close of the record, Local Law #3-2019 was in effect, and … the Examiners recommend that the Siting Board apply the laws in effect at the close of the record." *Id.* at 146.

On January 10, 2020, more than a month after the evidentiary record had closed, the newly-elected Farmersville Town Board notified the Siting Board that it had issued a resolution purporting to void and

[2] That letter states that the senders had posted it in the Siting Board's electronic docket. It was not posted therein, however, until December 16, 2019.

invalidate Local Law #3-2019. R. 315-5 at 14 of 84. Cattaraugus County Supreme Court, however, subsequently annulled a substantially identical resolution that the Town of Freedom had enacted on January 6, 2020. R. 387-1 at 4. In a hearing transcript in that court case, the Town of Freedom's counsel conceded that a local law cannot be invalidated by resolution. R. 387-1, transcript at 8-11.

On February 21, 2020, Farmersville notified the Siting Board that it had enacted a new wind energy facilities siting law, Local Law #1-2020. In its brief, Farmersville states that the law contained numerous new substantive requirements (as compared to Local Law #3-2019) which the Alle-Catt project could not comply with. P. Br. at 9. Farmersville moved for "official notice" of Local Law #1-2020 but did not offer any evidence in support of that law pursuant to PSL § 166(1)(j). R. 357-2, 3.

After Alle-Catt commenced an action in Cattaraugus County Supreme Court to challenge the validity of Local Law #1-2020, Farmersville enacted an amended version (Local Law #4-2020) and on May 20, 2020 notified the Siting Board of that enactment. R. 388-1, 2, 3. Farmersville represents that Local Law #4-2020 likewise contains

numerous provisions that Alle-Catt cannot comply with. P. Br. at 10-11. Again, Farmersville offered no evidence in support of Local Law #4-2020; it merely moved for official notice. R. 388-1, 2, 3.

In its brief on exceptions to the RD, Farmersville argued, among other things, that (1) in Local Law #3-2019, the 2,200-foot minimum setback for turbines from property lines of "any school, church, hospital or nursing facility" should be applied to Swartzentruber Amish properties because they constitute "churches," and (2) in any event, Local Law #4-2020 superseded Local Law #3-2019. R. 370-1.

On June 3, 2020, the Siting Board granted Alle-Catt's application, with 136 separate conditions designed to mitigate environmental impacts, and issued the Certificate Order. The Siting Board rejected Farmersville's aforementioned arguments on exceptions and accepted the examiners' recommendations pertaining to the local laws. It held that "[i]t is unreasonable to interpret the term 'church' to include what is in essence a full-time residence." R. 399-1 at 76. It further observed that Farmersville, in any event, had never officially interpreted the term "church." Rather, it found that Farmersville's so-called

"interpretation" of that term was merely "a litigation position with no historical application prior to this case." *Id*.

In response to Farmersville's contention that its 2020 law, enacted months after the close of the record, should apply, the Siting Board stated:

> In their exceptions the Towns of Freedom and Farmersville assert that the Farmersville February 10, 2020 law cannot be waived because ACWE did not seek a waiver. Logically, this argument means that if a new piece of local legislation is enacted too late in a proceeding to raise and litigate objections, the Siting Board has no choice but to apply the new legislation. This position is untenable and is rejected as illogical and contrary to the policy of Article 10. To hold otherwise would allow a party to substitute itself for the Siting Board in making the complex balance of competing interests that must be made in generation siting cases. We recognize the importance of local legislation in the siting process. However, we must decide this case on the record and within the statutory timeframe, and the final decision on what local laws to apply must be made by the Siting Board.
>
> Secondly, the Towns argue that the Siting Board's decision not to apply new local legislation can only be based upon a robust and specific evidentiary showing of specific facts and analysis. The Towns complain that they have not been given the opportunity to litigate the evidentiary basis for an override. We recognize this concern, but in this case the legislation in question was enacted too late to make such

an evidentiary record, including testimony, hearings, briefs, reply briefs, a Recommended Decision, briefs on exception and briefs opposing exceptions, in time to meet the statutory deadline of a decision in Article 10. The Towns also argue that the Siting Board must apply whatever legislation is in force at the time of the Siting Board's decision. The result of such a rule would make the Towns, not the Siting Board, the final arbiters of the conditions for renewable generation siting. When it is too late to develop a full evidentiary record on new local legislation, we must decide the case based on the record in front of us. To do otherwise would be unfair to the other parties to the proceeding and would frustrate the clear policy of Article 10 that it is the Siting Board, not the Towns, that makes the final decision on what local laws will be applied to a project.

Third, the Towns argue on exceptions that "the policy of Article 10" is not a valid basis for an override. This argument misapprehends the basis of the Recommended Decision. The basis of the Recommended Decision is that the timing of the legislation has made it impossible for the parties and the Siting Board to evaluate the new legislation with a full and robust record. That impossibility makes the new legislation unreasonably burdensome.

Fourth, the Towns argue that the problem could be cured by extending the period for the Siting Board's decision for up to 6 months pursuant to PSL § 165(4)(a) based on "extraordinary circumstances." We agree with the conclusion in the Recommended Decision that this is not a viable solution. Such an extension could be extremely damaging to an applicant, and nothing would prevent a town board adamantly opposed to a project from passing additional restrictive legislation even later in the extended

process, leaving the Siting Board with the same predicament but without a statutory basis for a further extension.

R. 399-1 at 79-81.

Farmersville subsequently sought rehearing (which is a prerequisite to judicial review), and the Siting Board denied its rehearing petition by order issued September 25, 2020. The instant judicial review proceeding followed.

## STANDARD OF REVIEW

The Siting Board's interpretation of the procedural and substantive requirements of Article 10 is entitled to judicial deference. When reviewing the Siting Board's interpretation of Article 10, the Court must "engage in a realistic appraisal of the particular situation to determine whether the administrative action reasonably promotes or transgresses the pronounced legislative judgment." *Matter of UPROSE v. Power Auth. of the State of N.Y.*, 285 A.D.2d 603, 606 (2d Dep't 2001) (internal citations omitted).

"Substantial evidence is 'a minimal standard' that requires 'less than proof by a preponderance of the evidence' … and 'demands only that a given inference is reasonable and plausible, not necessarily the

most probable.' Although there may be 'substantial evidence on both sides of an issue disputed before an agency,' under the substantial evidence standard, reviewing courts do not weigh the conflicting evidence or decide if they find the evidence convincing; 'instead, when a rational basis for the conclusion adopted by the agency is found, the judicial function is exhausted.'" *Matter of National Fuel Gas Distrib. Corp. v. Public Serv. Commn.*, 169 A.D.3d 1334, 1335 (3d Dep't 2019) (internal citations omitted).

The substantial evidence standard, however, does not apply to discretionary acts of administrative agencies, such as the Siting Board's decision as to whether to extend its proceeding by six months pursuant to PSL § 165(4)(a). Rather, the proper standard is abuse of discretion. *Matter of Columbia Gas Co. of N.Y. v. Public Serv. Commn.*, 118 A.D.2d 305, 308 (3d Dep't 1986). Under that standard, rationality is what is reviewed; if a rational basis for the decision is found, the court must confirm. *Matter of Pell v. Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck*, 34 N.Y.2d 222, 231 (1974).

## ARGUMENT

## POINT I.

## FARMERSVILLE'S 2020 LOCAL LAW ENACTMENTS ARE PREEMPTED BY ARTICLE 10

### A. Municipal home rule does not override the Siting Board's control over the application of local law.

Farmersville asserts that the Siting Board violated the Home Rule provision of the State Constitution by not considering Local Laws #1 and #4 of 2020, the wind energy siting ordinances enacted months after the evidentiary record before the Siting Board had closed. The Siting Board, however, properly refused to consider the Town's untimely enactments. The timing of that ordinance renders it inconsistent with the State Legislature's intent as expressed through Article 10. Farmersville's late-enacted local laws, therefore, are preempted by State law.

Municipal home rule powers are not unlimited. The lawmaking authority of a municipality, which is a political subdivision of the State, can be exercised only to the extent that authority has been delegated by the State. *Albany Area Builders Assn. v. Town of Guilderland*, 74 N.Y.2d 372, 376 (1989). As the constitutional Home Rule provision states, "every local government shall have power to adopt and amend

local laws *not inconsistent with* the provisions of this constitution or *any general law* relating to its property, affairs or government." NY Const, art IX, § 2(c)(i) (emphasis added.)

"The doctrine of preemption represents a fundamental limitation on home rule powers." *Albany Area Builders Assn.*, 74 N.Y.2d at 377. Localities have substantial power to regulate matters of local concern, but preemption effectuates "the untrammeled primacy of the Legislature to act *** with respect to matters of State concern." *Id.* (quoting *Wambat Realty v. State of New York*, 41 N.Y.2d 490, 497 (1977)). Just as the Third Department held in evaluating an electric generating project under Article X, because Article 10 is a comprehensive regulatory scheme for electric generating facilities that applies alike to all localities in the State, it is a "general law" governing an area of State concern; therefore, it overrides municipal home rule powers. *Matter of Citizens for Hudson Val. v. New York State Bd. on Elec. Generation Siting & Envt.*, 281 A.D.2d 89, 95 (3d Dep't 2001). Any local law that is inconsistent with the legislative design of Article 10, therefore, is preempted. *Consolidated Edison Co. of N.Y. v. Town of*

*Red Hook*, 60 N.Y.2d 99, 107 (1983); *Albany Area Builders Assn.*, 74 N.Y.2d at 377.

Using the three-pronged test developed by the Court of Appeals in *Matter of Wallach v. Town of Dryden*, 23 N.Y.3d 728 (2014), Farmersville argues that PSL § 168(3)(e), the Article 10 provision authorizing the Siting Board to override local laws, does not expressly preempt Local Laws #1 and #4 of 2020. As demonstrated below, however, the *Wallach* analysis necessarily leads to the conclusion that the 2020 local laws are indeed preempted. If that were not enough, moreover, those late-enacted laws are also impliedly preempted by Article 10.

1. <u>The structure of Article 10 shows that the applicability of local laws can only be reviewed through the statute's evidentiary process</u>.

As the Siting Board correctly held, PSL § 168(1), which specifies that the Board shall make its decision "upon the record made before the presiding examiner," foreclosed review of any local laws adopted after the close of the evidentiary record. Order at 80-81. The Board's holding reflects the only plausible reading of the statute. "It is a well-settled principle of statutory construction that a statute or ordinance must be

construed as a whole and that its various sections must be considered together and with reference to each other." *People v. Mobil Oil Corp.*, 48 N.Y.2d 192, 199 (1979).

Article 10 contemplates that local laws are part of the evidentiary record upon which the Siting Board must make its decision. It requires the project applicant, as part of its application for a certificate, to explain how its project would comply with local laws and/or why the Siting Board should grant any variances or exceptions. PSL § 164(1)(b)(v). It also requires the applicant to serve its application upon each affected municipality and local residents well *before* the commencement of hearings. PSL §§ 164(2)(a)(i), 164(2)(b)(i). It then affords the municipality an opportunity to present evidence in support of its local law. PSL § 168(3)(e). While local laws are not "evidence" in the strictest sense, the Article 10 process treats them in the same manner as evidence; disputes over local law compliance are to be resolved in an evidentiary forum – *i.e.*, before the hearing examiners, and in an orderly sequence, with an established record. Consequently, the Siting Board rationally held that PSL § 168(1) foreclosed it from examining Farmersville's 2020 laws because they were enacted after

the close of evidentiary hearings and were not available to be reviewed by the parties or the examiners during the evidentiary phase of the proceeding or during post-hearing briefing. R. 399-1 at 78.

2. The presentation of last-minute local enactments to the Siting Board is contrary to legislative intent.

In view of the legislative intent of Article 10, the Siting Board's determination not to review the 2020 local laws was the most reasonable approach under the circumstances. When reviewing the Siting Board's interpretation of Article 10, the Court must "engage in a realistic appraisal of the particular situation to determine whether the administrative action reasonably promotes or transgresses the pronounced legislative judgment." *UPROSE*, 285 A.D.2d at 606. The municipalities in which a proposed facility is located are statutory parties to the Board proceedings and are given copious details about the facility both before and during the proceedings. Using its front-row view of the project's design, a municipality that desires to thwart a project could purposely custom-tailor a local ordinance that the project could not comply with, and then evade the evidentiary process by swooping in with the new ordinance after the close of the hearings.

That is indeed what Farmersville apparently has done here; it unabashedly boasts of Alle-Catt's inability to comply with the 2020 siting laws. Farmersville's states that its belatedly amended wind energy siting law makes numerous changes that render the project non-compliant:

- 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
    - Property lines
- New siting requirements for associated electric substations
- New height restriction of 455 feet for turbines

P. Br. at 9. Given the Legislature's intent that Article 10 is to be an expedited one-stop process, that body could not have intended to enable a municipality to spring a last-minute substantial change of law which would delay the proceeding and potentially derail the project.

Petitioners assert that the Siting Board simply could have extended its review process by six months, as permitted by PSL § 165(4)(a). That provision, however, only allows an extension when the Board finds the existence of "extraordinary circumstances." *Id.* A municipality's post-hearing adoption of a new siting ordinance, especially where, as here, it became an avowed opponent of the project after the evidentiary record closed, can hardly be considered an extraordinary circumstance. If it were, that would only encourage other opposed municipalities to game the process by enacting post-hearing changes to their local laws.

3. The plain language of Article 10 preempts the Town's last-minute enactment.

The plain language of Article 10 does not make preservation of local laws the default condition, as Farmersville wrongly contends. P. Br. at 32. The statute plainly precludes enforcement of a local law that the municipality has failed to justify, as set forth in its provision addressing eligible parties:

> [A]ny municipality entitled to be a party herein and seeking to enforce any local ordinance, law, resolution or other action or regulation otherwise applicable shall present evidence in support thereof or be barred from the enforcement thereof.

PSL § 166(1)(j). This language squarely placed the burden on Farmersville to "present evidence in support" of its 2020 local laws, or else forfeit its authority to enforce them. Moreover, it strongly suggests that the Article 10 evidentiary hearing process – which had already closed by the time the 2020 laws were enacted – is the appropriate forum for determining whether the municipality should be allowed to enforce applicable local laws. In any event, instead of offering any such evidence, Farmersville simply demanded that the proceeding be extended. Thus, it has forfeited any right to enforce its late-enacted local laws as against the Alle-Catt project.

## B. Farmersville's last-minute enactment is inconsistent with the purposes of Article 10.

As demonstrated above, among the purposes of Article 10 are (1) to expedite the siting and construction of major electric generating facilities, (2) to vest all siting and permitting authority in a single State entity, the Siting Board, and (3) to balance the State's need for electricity against local interests. Because Farmersville's belated action conflicts with each of these purposes, it is preempted.

Farmersville incorrectly asserts that PSL § 168(3)(e) requires the Siting Board to take up consideration of local laws enacted after the evidentiary record has closed. Any local law that is either inconsistent with or frustrates the purpose of Article 10, however, is preempted. *Albany Area Builders Assn. v. Town of Guilderland*, 74 N.Y.2d at 376; *see also Consolidated Edison Co. of N. Y. v. Town of Red Hook*, 60 N.Y.2d 99 (holding that PSL Article VIII invalidated a town law regulating electric generation siting). A belated adoption of a substantive local law purporting to regulate wind generation siting is *per se* inconsistent with Article 10's purposes to expedite siting and to vest complete control in the Siting Board. Under Farmersville's view of PSL § 168(3)(e), the Siting Board would have been forced to (1) delay its

decision for up to six months and/or (2) direct Alle-Catt to go back to the drawing board and re-design its project to comply with late-springing local laws that it reasonably would not have anticipated. Either of these outcomes would have upended and divested the Siting Board's control over the timing and substance of its process.

### C. The Board properly exercised its discretion not to extend the proceeding.

Farmersville argues that, regardless of its own belated actions, the Siting Board should have granted Petitioners' request for a six-month extension of its proceedings. Under Article 10, the Board must issue a determination within twelve months of a completed application, except that:

> the board may extend the deadline in extraordinary circumstances by no more than six months in order to give consideration to specific issues necessary to develop an adequate record.

PSL § 165(4)(a).

As a threshold matter, Farmersville is attempting to apply the wrong standard of review. Because Article 10 provides that the Board "may" extend the deadline, its decision to extend or not to extend is discretionary. The judicial standard of review of an agency's

discretionary act is not "substantial evidence," as Farmersville claims (P. Br. at 38); rather, it is abuse of discretion. *Matter of Columbia Gas Co. of N.Y. v. Public Serv. Commn.*, 118 A.D.2d at 308. In general, moreover, an agency's decision of whether to reopen the record in an administrative proceeding is purely discretionary. *Matter of Long Is. Light Co. v. Public Serv. Commn.*, 134 A.D.2d 135, 146 (3d Dep't 1987).

There were no extraordinary circumstances warranting an extension. As a general matter, there is nothing extraordinary about local opposition to construction of electric generating facilities; indeed, it is commonplace.

The crux of Farmersville's extraordinary circumstance allegation is that an administration hostile to the project just happened to have been seated a month after closure of the evidentiary record before the Siting Board. The evidentiary record and hearing provide participants in the Article 10 siting proceeding the opportunity to test, support, or challenge other parties' contentions and previously exchanged exhibits in an orderly manner. Farmersville essentially argues that the Siting Board should have idly stood by while the Town – after the fact – crafted a local law apparently designed to disable the project. The

Siting Board was correct not to find this to be the sort of extraordinary circumstance warranting a six-month extension.

Treating a last-minute local legislative enactment as an "extraordinary circumstance," moreover, would invite mischief and would also thwart the State Legislature's intent for expedition. Any municipal government that wished to delay or stop a project could simply lie in wait until the eleventh hour to enact an ordinance, and then demand an extension.

## POINT II.

## THE SITING BOARD PROPERLY DECLINED TO TREAT AMISH RESIDENTS AS "CHURCHES" FOR THE PURPOSE OF FARMERSVILLE TOWN CODE

The Siting Board properly found that each Swartzentruber residence could not be properly construed as a "church" for the purpose of Farmersville Local Law #3 of 2019. Absent a special definition of "church" – which the Farmersville law does not contain – that term must be construed in accordance with its ordinary and accepted meaning. McKinney's Statutes § 94. The word "church" customarily means a structure whose primary purpose is public worship. Moreover,

the courts of this State have held that for the purposes of zoning, the finding of a religious use must be based upon the primary use of the property in question. *Matter of Yeshiva & Mesitva Toras Chaim v. Rose*, 136 A.D.2d 710, 711 (2d Dep't 1988); *Bright Horizon House v. Zoning Bd. of Appeals of Town of Henrietta*, 121 Misc.2d 703, 710-11 (Sup. Ct. Monroe County 1983). Nothing in the record demonstrates that the primary use of Swartzentruber properties is anything other than residential and agricultural. Farmersville does not dispute the Siting Board's finding that formal religious services are held in each home only once every ten months. R. 399-1 at 76 & n.171; P. Br. at 46. Its attempt to increase that frequency by characterizing weddings and funerals as religious uses (P. Br. at 42, 46) is unavailing because those activities need not be, and often are not, conducted in churches.[3]

Likewise, Farmersville's argument that the Siting Board improperly overruled the town's interpretation of the term "church" is makeweight. The Siting Board correctly recognized that Farmersville officials had never actually rendered an interpretation of that term. R.

[3] Indeed, religious wedding ceremonies are frequently conducted in non-church venues (*e.g.*, banquet halls and parks) and religious funerals are often conducted in secular funeral homes. It cannot be seriously argued that such ceremonies transform those venues into "churches."

399-1 at 76. Rather, that interpretation was, and is, merely a litigation position expressed by Farmersville's outside counsel. *Id.* Moreover, Farmersville has pursued an inconsistent claim on this issue by arguing that, in January 2020, it had adopted a resolution that repealed Local Law 3 of 2019. P. Br. at 7-8.

## POINT III.

## FARMERSVILLE IS BARRED FROM RAISING ITS FIRST AMENDMENT ARGUMENT; IN ANY EVENT, THAT CLAIM FAILS

### A. Farmersville lacks standing and capacity to prosecute a claim on behalf of its residents.

Farmersville asserts that the Siting Board's refusal to treat Swartzentruber residences as "churches" for the purposes of the town law also violates the Swartzentrubers' First Amendment religious freedom rights. P. Br. at 52-55. A town government, however, has no authority to "use its public funds to ultimately aid a private plaintiff in litigation." *Incorporated Vil. of Northport v. Town of Huntington*, 199 A.D.2d 242, 243 (2d Dep't 1993) (quoting *Cooper v. Wertime*, 164 A.D.2d 221, 223 (3d Dep't 1990). As Farmersville seeks to protect private property and interests, rather than public property or interests, it lacks

standing to raise its First Amendment claim on behalf of the Swartzentrubers. *Id.* at 244.

Moreover, as a political subdivision of the State, Farmersville lacks capacity to contest State decisions that "affect them in their governmental capacity or as representatives of their inhabitants." *Matter of Town of Verona v. Cuomo*, 136 A.D.3d 36, 41 (3d Dep't 2015) (quoting *Matter of County of Nassau v. State of New York*, 100 A.D.3d 1052, 1055 (3d Dep't 2012). As Farmersville is merely asserting on behalf of some of its residents that the Siting Board has violated the First Amendment, rather than that the Siting Board is forcing the town itself to commit a constitutional violation, it cannot utilize any of the exceptions to that principle with respect to its First Amendment claim. *See Matter of County of Oswego v. Travis*, 16 A.D.3d 733, 735 (3d Dep't 2005) (listing the exceptions).

### B. Farmersville failed to raise its First Amendment claim on exceptions to the Recommended Decision.

Although Farmersville raised the First Amendment argument on rehearing before the Siting Board, it is nevertheless barred from employing it as a basis for judicial review. Article 10 precludes parties from raising arguments for the first time on rehearing. The

Commission's administrative procedural regulations, applicable to the Siting Board via 16 NYCRR § 1000.3, expressly state that when a party has failed to raise an issue in its brief on exceptions to the examiners' recommended decision, the party is precluded from raising that issue on rehearing. 16 NYCRR § 4.10(d)(2). In other words, "the regulatory requirement that a party take exception to the recommended decision [is] a prerequisite to raising arguments on rehearing." *Matter of Citizens for Hudson Val. v. New York State Bd. on Elec. Generation Siting & Envt.*, 281 A.D.2d at 94 (applying similar provision in PSL Article X). As the Siting Board recognized, Farmersville did not raise its First Amendment argument at any time prior to rehearing. R. 419-1 at 12. Because Farmersville could have raised this issue on exception to the RD, but did not, judicial review is precluded. *New York Inst. of Legal Research v. New York State Bd. on Elec. Generation Siting and the Envt.*, 295 A.D.2d 517 (2d Dep't 2002).

### C. Farmersville fails to state a cause of action under the First Amendment.

In any event, Farmersville's claim – which concerns the placement of only 6 of the project's 116 turbines – fails to state a cause of action

under the Free Exercise Clause of the First Amendment. That amendment states, in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

US Const Amend I. The key word is "prohibiting," as demonstrated below.

The cases Farmersville cites do not support its claim. Each of those cases pertain to local zoning ordinances directly prohibiting religious activities or uses. *See Congregational Rabbinical College of Tartikov, Inc. v. Vil. of Pomona*, 138 F.Supp.3d 352 (S.D.N.Y. 2015) (ordinance directly prohibiting congregation from building a college); *Jewish Reconstructionist Synagogue of N. Shore, Inc. v. Vil. of Roslyn Harbor*, 38 N.Y.2d 283 (1975) (ordinance directly prohibiting use of estate house for religious purpose). By contrast, none of these cases support Farmersville's position that the Free Exercise Clause imposes limits on governmental regulation or approval of activities being conducted *by third parties* that happen to impact the practices of religious adherents.

Indeed, the United States Supreme Court has held exactly the opposite of that which Farmersville asserts. In *Lyng v. Northwest*

*Indian Cemetery Protective Assn.*, 485 U.S. 439 (1988), the Court held that even where it is undisputed that governmental action involving the use of lands adjacent to (and used by) religious adherents will have devastating impacts upon their religious practices, it does not follow that such action violates the Free Exercise Clause. In that case, members of three Native American tribes objected to the government's permitting of timber harvesting and construction of a road upon National Forest property adjacent to their lands. The tribes had been using that property for religious purposes. Similar to that which Farmersville alleges herein, the tribe members claimed that "successful [religious] use of the [area] is dependent upon and facilitated by certain qualities of the physical environment, the most important of which are privacy, silence and an undisturbed natural setting." *Id.* at 442. They further claimed that constructing the proposed road "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples." *Id.*

Even accepting those allegations as true, the Court nevertheless held that the government's action did not violate the Free Exercise

Clause. The Supreme Court acknowledged that "indirect coercion or penalties on the free exercise of religion are subject to scrutiny under the First Amendment." *Id.* at 450. It distinguished, however, those cases from *non-coercive* governmental actions – *i.e.*, actions that do not direct or prohibit the religious adherent's own behavior. As the Court stated:

> [Strict scrutiny of coercion or penalties] does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions. The crucial word in the constitutional text is "prohibit." For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from government.
>
> Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a government action on a religious objector's spiritual development. The Government does not dispute, and we have no reason to doubt, that the logging and road-building projects at issue in this case could have devastating effects on traditional Indian religious practices …
>
> Even if we assume that we should accept the Ninth Circuit's prediction, according to which the G-O road will 'virtually

> destroy the … Indians' ability to practice their religion,' the Constitution simply does not provide a principle that could justify upholding respondents' legal claims. However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires … The 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.

*Id.* at 451-52. The Free Exercise Clause, therefore, was not intended to be used as a cudgel to force the government to exact concessions from third parties solely to benefit religious adherents.

What is relevant, then, is whether Farmersville has alleged that the Siting Board's interpretation of the word "church," and its consequent certification of the Alle-Catt project, would directly regulate the Swartzentrubers' behavior or that it would completely prohibit them from engaging in religious activities. It has not. In fact, it does not even allege that the project would impede the Swartentrubers' religious activities in any way.

Indeed, the record demonstrates that the turbines could not seriously inhibit the Swartzentrubers' ability to practice their religion. Only six turbines are proposed to be located within 2,200 feet of their property boundaries. It is undisputed that the community consists of

twenty-two residences. R. 399-1 at 6. Farmersville alleges, however, that only four Swartzentruber properties would have turbines within 2,200 feet of their boundaries.[4] R. 408-3 at 20 n.55; P. Br. at 50. Thus, eighteen properties would remain beyond the 2,200-foot margin. Even assuming that the turbines would render four of their properties unavailable for religious services, eighteen other properties would remain available – and neither the Swartzentrubers nor their representatives testified that their religion requires *each and every* residence to be available for such services.

The Siting Board correctly observed, moreover, that nothing in the record showed that the standard 1,500-foot setback for turbines would interfere with the Swartzentrubers' religious practices, but the 2,200-foot setback applicable to "churches" would not. The remedy Farmersville apparently seeks, then, is only to enforce the 2,200-foot church property line setback contained in its town code. In the proceeding below, however, Farmersville did not even attempt to demonstrate how moving turbines a maximum of 700 feet farther away

[4] No party provided information regarding the locations of *residences* with respect to the proposed turbines – only periphery property boundaries.

from some of the Swartzentruber properties would eliminate any purported impacts on their religious practices. In any event, as the Siting Board observed, nothing at all in the record definitively establishes that a turbine located at any distance from Swartzentruber properties would cause any such impairment. R. 419-1 at 12-13.

Consequently, Farmersville has not stated a plausible Free Exercise claim. Even if it had, the facts do not support such a claim.

## CONCLUSION

For all of the foregoing reasons, this Court should deny Farmersville's petition in its entirety, deny all of the relief requested therein, and grant to the Siting Board such other and further relief as it deems just and reasonable.

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