

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WYOMING

CLEAR SKIES OVER ORANGEVILLE

Petitioner,

v.

Index No: 42273

Justice: Hon. Patrick NeMoyer

TOWN BOARD OF THE
TOWN OF ORANGEVILLE, and
SUSAN MAY, HANS BOXLER, JR., JAMES HERMAN,
ANDREW FLINT, and TOM SCHABLOSKI, in their
capacities as town board members,

Respondents.

STONY CREEK ENERGY LLC, Proposed Intervenor-Respondent

AFFIRMATION OF BENJAMIN K. AHLSTROM, ESQ.

I, Benjamin K. Ahlstrom, Esq., make the following affirmation which I affirm to be true under the penalties of perjury pursuant to CPLR 2106:

1. I am an associate with Hodgson Russ LLP, attorneys for Stony Creek Energy LLC (“Stony Creek”), the applicant named in the Petition and supporting papers of Clear Skies Over Orangeville (“CSOO”). I make this Affirmation in support of Stony Creek’s motion to intervene under CPLR §§ 1013 and 7802.

2. On February 5, 2010, the Court denied Respondents’ motion to join Stony Creek as a necessary party under CPLR § 1001, finding that it was not a necessary party.

3. Stony Creek brings this motion seeking permission to intervene under CPLR §§ 1013 and 7802 because the claims and defenses in the Petition are common to both the

Town Respondents and Stony Creek. Petitioner alleges certain improper relationships between Stony Creek and Respondents and improper consideration of Stony Creek's wind energy facility application together with the Town's SEQRA analysis. In addition, Stony Creek has a substantial interest in the outcome of this action as the fate of its wind energy project in the Town of Orangeville will be affected.

Background

4. Petitioner Clear Skies Over Orangeville commenced this action by filing its Petition on January 25, 2010. The Petition seeks to "annul, vacate and void Article XI, Section 1116 of the 2009 Amendments to the Town of Orangeville Zoning Law. Pet. ¶ 1.

5. On January 28, 2010, this Court granted Petitioner's Order to Show Cause directing the parties to brief the issue of whether a preliminary injunction should be issued restraining Respondent Town Board of Orangeville and its individual members from "accepting, considering or acting in any way upon an application for approval of a Wind Energy Facility under the Town of Orangeville 2009 zoning amendments, Article XI, Section 1116." The Order to Show Cause initially requested a temporary restraining order which was stricken by the Court.

6. The parties briefed the preliminary injunction motion, and the Court heard oral argument on February 5, 2010. At that time, the Court denied the preliminary injunction motion and directed the parties to brief the merits of the Petition. As noted above, the Court also denied Respondents' motion to join Stony Creek as a necessary party and set a briefing schedule allowing for the filing of any motion to intervene by March 10, 2010.

7. The challenged zoning amendments, which were adopted on September 23, 2009 by the Town Board, set noise limits and required setbacks for wind energy projects within the Town of Orangeville. Pet. ¶ 2.

8. The only “Wind Energy Facility application” received by the Town Board under the challenged 2009 zoning amendments was filed by Stony Creek Energy LLC on October 1, 2009.

9. Under the zoning amendments, Stony Creek sought a special use permit for construction of the Stony Creek Wind Farm, which would consist of 59 General Electric XLE or equivalent wind turbine generators and associated infrastructure.

10. Significant efforts to review the application have occurred. On February 18, 2010, the Town accepted the Draft Environmental Impact Statement for the application review, and has established and advertised a public hearing date of March 25, 2010.

Stony Creek’s Substantial Interests In This Case

11. As conceded in the Petition, Stony Creek identified approximately 75 landowners who would participate in the project by entering into sale, lease, and/or easement agreements with Stony Creek.

12. The Petition further concedes that Stony Creek’s New York State Law Section 809 Disclosure Statement listed many landowners who have already entered into lease and/or easement agreements with Stony Creek. Pet. ¶ 58.

13. In fact, Stony Creek has spent years on this project. Its efforts began as early as 2003, when it “began discussing use of their land for a wind farm project with local landowners in Orangeville and ultimately obtained land use agreements with dozens of landowners in town most of which were recorded prior to September 23, 2009 with the Wyoming County Clerk.” Pet. ¶ 23.

14. The consideration for these agreements involved substantial monetary investments by Stony Creek.

15. In addition to these contractual agreements regarding property rights, Stony Creek has made additional monetary investments including an application fee of \$29,500, environmental studies of over \$300,000, wind measurement equipment and monitoring costs of over \$100,000, electric interconnection review costs of over \$170,000, as well as significant sums paid under an escrow agreement covering the Town's out-of-pocket engineering and legal fees.

Common Questions Of Law And Fact Exist

16. The Petition intermingles claims against Respondents and Stony Creek, which involve "common question[s] of law or fact" as set forth in CPLR § 1013:

- a) A majority of Town Board members had purported conflicts of interest or the appearance of financial interest in the wind farm project, "in violation of the town's code of ethics" due to improper relationships *with Stony Creek*. Pet. ¶¶ 1, 3, 5.
- b) Town officials who entered into allegedly improper land use agreements *with Stony Creek* include former Town Supervisor Kyle Glosser's family, and Town Board members Tom Schablowski and Hans Boxler Jr.'s family. Pet. ¶¶ 37, 42.
- c) *Stony Creek is seeking* further allegedly improper land use agreements, including with Town Board member Andy Flint's family. Pet. ¶ 42.
- d) Impliedly in connection with these actions, "on or about July 29, 2009, the New York State Attorney General entered into an agreement with 16 wind farm companies *[including Stony Creek's*

parent] . . . to comply with a Wind Industry Ethics Code to deter improper relationships between wind development companies and local government officials” Pet. ¶ 56.

17. Petitioner devotes two entire causes of action to purported conflicts of interest and ethical violations caused by allegedly improper dealings with Stony Creek. Pet. ¶¶ 124-35.

18. Petitioner devotes another entire cause of action to address the Town Board’s allegedly improper consideration of the 2009 zoning amendments separate from Stony Creek’s proposed project: “In approving the 2009 zoning amendments, the town board segmented its review of the local law from review of a project to which it is tied” Pet. ¶ 88. Again, Stony Creek’s project is the only wind energy project before the Town Board under the 2009 zoning amendments.

19. Not only do the factual allegations and causes of action involve Stony Creek, so does Petitioner’s requested relief. Thus, Petitioner asks this Court “to annul, vacate and void Article XI, Section 1116 of the 2009 Amendments to the Town of Orangeville Zoning Law.” Pet. ¶ 1.

20. Such an order would effectively result in a *de facto* rejection of Stony Creek’s application to build the Stony Creek Wind Farm, destroying Stony Creek’s investments — including agreements with landowners, application fees, environmental study costs, wind measurement costs, electric interconnection study costs, and payment of engineering and legal fees.

21. Stony Creek would need to start the application and regulatory process anew. This would involve new studies, hearings, and approvals that would not otherwise be required and set the project at least one additional year behind schedule.

22. Thus, the Petition asserts several common claims against Stony Creek and the Town Respondents, and also recognizes Stony Creek's significant financial and property interests at stake.

Intervention is Timely

23. This application for intervention is timely as set forth in the schedule set by the Court during oral argument on February 5, 2010. All applications to intervene are due on March 10, 2010.

Stony Creek's Intervention Will Not Cause Delay Or Prejudice

24. Stony Creek's intervention will not delay a final determination of this case, cause any alteration of the briefing schedule set by the Court at oral argument of the preliminary injunction motion, or cause prejudice to any party.

Conflict of Interest Charges

25. I have also reviewed the conflict of interest charges alleged against the Town and, effectively, Stony Creek. Significant portions of the allegations are factually inaccurate. These allegations also indicate "common question[s] of law or fact" with Respondents' defenses.

26. Stony Creek does not and has never had any agreement with the majority of the Town of Orangeville Town Board.

27. Contrary to the attempt to create an aura of conflicts of interests, the only Town Board member who has had an agreement involving the Stony Creek Wind Farm, Tom Schabloski, has recused himself since the fall of 2008 from any discussions or votes related to the Town's Zoning Code, which Petitioner now challenges.

28. Stony Creek does not have and has never had any contract with James Herman. Upon information and belief, Mr. Herman sold another wind company, Noble Environmental Power, a piece of property on which that company built a substation to serve a project in another community. Mr. Herman would not gain any money from the Stony Creek Wind Farm being built from either Stony Creek or any other company.

29. Similarly, Stony Creek does not have and has never had any contracts with Susan May or Andrew Flint.

30. Stony Creek has, through its High Sheldon Wind Farm, a contract with the father of Town Board member Hans Boxler, Jr. and companies in which Mr. Boxler and his father have an interest.

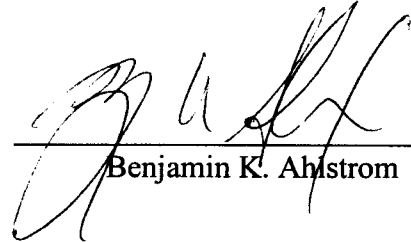
31. The High Sheldon Wind Farm Project is totally unconnected to the Stony Creek Wind Farm project in Orangeville. Neither Mr. Boxler nor any company in which he has an interest would receive any compensation as a result of the Stony Creek Wind Farm in Orangeville.

Attached Exhibits

32. A copy of the Petition is attached as **Exhibit A**.
33. A copy of Stony Creek's Proposed Answer is attached as **Exhibit B**.

WHEREFORE, I respectfully request that this Court grant Stony Creek's motion to intervene.

Dated: Buffalo, New York
March 10, 2010



Benjamin K. Ahlstrom