

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WYOMING

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CLEAR SKIES OVER ORANGEVILLE  
PETITIONER,

-VS-

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.

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VERIFIED PETITION  
AND COMPLAINT

Index No. **42273**

ORAL ARGUMENT  
REQUESTED

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WYOMING COUNTY CLERK  
WARSAW, N.Y.

Petitioner, by its attorney, Gary A. Abraham, Esq., respectfully alleges as follows:

**I. PRELIMINARY STATEMENT**

1. This proceeding is brought pursuant to Article 78 and Section 3001 of the New York Civil Practice Law and Rules (“CPLR”) and asks this Court to annul, vacate and void Article XI, Section 1116 of the 2009 Amendments to the Town of Orangeville Zoning Law (the “rezoning” or the “2009 zoning amendments”), because the TOWN BOARD OF THE TOWN OF ORANGEVILLE (“town board”) did not comply with the State Environmental Quality Review Act, N.Y.

Envtl. Conserv. L. § 8-0101 et seq. (“SEQRA”), and its implementing regulations, when it approved a Negative Declaration of environmental impact in regard to this rezoning and thereafter enacted the rezoning; and because a full statement of the September 23 action was never referred to the county planning agency; and because Section 1116 is in conflict with the goals and policies of the town’s comprehensive plan; and because a majority of the town board acted on September 23 each with the clear appearance of financial interest in wind farm development, in violation of the town’s code of ethics, or were otherwise biased in favor of the financial benefits of such development.

2. The substance of the September 23, 2009 action of the town board complained of here is the approval of noise limits for wind farms that are about six times the existing sound levels in the quiet areas of Orangeville where wind turbines are most likely to be sited; the approval of a 700-foot setback distance from rural residential properties for industrial wind turbines, which is woefully insufficient to protect against nuisance noise levels, visual impacts and safety

hazards; and the approval of a dual setback provision under which setbacks from homes for turbines is 1,320 feet, thus restricting development on private property between a home and the home's property line in the direction of wind turbines for no other reason than to accommodate previously planned and known turbine sites in town.

3. Petitioner argues that more than a year prior to voting for the rezoning, the town board was aware that a wind farm developer prepared a project map based on land contracts in the town it had purchased or begun favorable negotiations, including contracts with Orangeville town board members, their family or friends.
4. In the adjacent towns of Sheldon, Wethersfield and Eagle wind farms were constructed and operating prior to the action complained of here, and the Orangeville town board members were very familiar with the visual and noise impacts of these projects.
5. At least three members of the town board had contracts with wind farm developers in Sheldon, Wethersfield or Orangeville, and the developer in Sheldon is the same developer who prepared a project map for a wind farm project in Orangeville the rezoning was designed

to accommodate.

6. Notwithstanding extensive technical information on potential impacts of wind farms on the health, welfare and safety of town residents that was before the town board on or before September 23, 2009, the board disregarded its obligation to avoid or mitigate several serious impacts by means of the rezoning because doing so would make it too difficult to induce a developer to build a wind farm. Under these conditions, the Court should find the rezoning at issue was an integral step in the development of a wind project because the town board failed to take a hard look at potential adverse impacts of its action; a majority of the town board should have recused themselves from the vote approving the action and sought alternate independent board members; and in any case the town board disregarded the county planning board's notification that it had been unable to review a full statement of the action prior to the vote, thereby depriving the town board of jurisdiction to do so.

## **II. PARTIES**

7. Petitioner CLEAR SKIES OVER ORANGEVILLE (“CSOO”) is an unincorporated association of Orangeville landowners dedicated to protecting the rural beauty and environment of Orangeville. The association and its members have participated vigorously in the town board’s review of the 2009 zoning amendments, more so than most residents of the town.
8. All or most members of CSOO own land in relatively close proximity to a proposed wind turbine project area in the town eligible for permitting under the 2009 zoning amendments and therefore would be harmed by the application of the rezoning differently than the general public.
9. Respondent TOWN BOARD is a municipal corporation with responsibility for regulating and permitting certain land uses in the Town of Orangeville.
10. Respondents SUSAN MAY, HANS BOXLER, JR., JAMES HERMAN, ANDREW FLINT, and TOM SCHABLOSKI were town board members throughout 2009, including at the time of the

September 23, 2007 actions complained of here, and are current town board members.

### **III. VENUE**

11. Venue is properly located in Wyoming County pursuant to CPLR § 506(b) as the county in which the Respondent town board made the decision complained of here.

### **IV. EXHAUSTION OF ADMINISTRATIVE REMEDIES**

12. On May 7, 2009, a public hearing and opportunity to comment on the 2009 zoning amendments in a draft form was provided by the town board. Petitioner and its members submitted written comments and supporting documentation on Article XI, Section 1116 of the amendments relating to wind farms, asserting a number of significant potential adverse impacts would result from enacting the local law. On September 23, 2009, the town board approved a Negative Declaration indicating that it determined no significant environmental impacts could result from adopting the 2009 zoning amendments, and

voted to adopt the zoning amendments. On October 7, 2009, a public notice of the Negative Declaration was published in the Environmental Notice Bulletin. Therefore, no further remedy is available to the petitioner, and this matter is now ripe for judicial review.

#### **V. FACTUAL BACKGROUND**

13. The following is a summary of the facts relevant to this petition, which include facts set forth and sworn to in the accompanying affidavits of petitioner members, and in the accompanying attorney affirmation of Gary A. Abraham,<sup>1</sup> all incorporated herein.
14. Petitioner members all own land in the Town of Orangeville.
15. The value of petitioner members' land in Orangeville lies in its rural setting and the environmental, recreational and aesthetic amenities that characterize the land and community to which it is tied.
16. The physical environment, the recreational practices and the aesthetic and community values of petitioner members would be harmed by the town board decision complained of here because this

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<sup>1</sup> This attorney affirmation accompanies a request for temporary restraining order in this matter.

decision is inseparably tied to a plan to attract a large commercial wind farm to Orangeville, including dozens of industrial wind turbines about 450 feet high, and miles of access roads and power lines.

17. There are no industrial wind turbines in Orangeville.
18. In 2001 and after, at least three different wind development companies began making inquiries with local officials in the neighboring towns of Orangeville and Sheldon, erecting meteorological towers (“met towers”) to test wind conditions under contracts with private landowners in the two towns, and to otherwise assess the prospects for constructing a multi-turbine wind energy power plant or “wind farm.” These companies are Noble Environmental Power, Ecogen Wind, NY Power, and Invenergy.
19. In 2007, following adoption of local laws permitting wind farms under certain conditions, Noble obtained local approvals for wind farms in the towns of Wethersfield and Eagle neighboring Orangeville, and Invenergy obtained local approval for a wind farm in the neighboring Town of Sheldon.



20. In Wethersfield, Sheldon and Eagle, prior to approving wind farm regulations in each municipality, a wind farm developer contracted with town board members, their family members or friends, and other local officials and their family members or friends for payments, or the promise of future payments, in return for permission to use private property for either a met tower, one or more wind turbines, or a transmission line to service the wind farm project, or the promise of such permission in the future.
21. On January 15, 2002, the Orangeville Town Board approved the erection of a met tower by NY Wind Power, LLC on land owned by Orangeville member town board member Tom Schlaboski. This action was preceded by a public hearing on the action, brought on by a motion by Tom Schlaboski.
22. On July 11, 2002, the Orangeville Town Board received information from the adjacent Town of Sheldon regarding Invenergy's proposal to install approximately 52 wind turbines in Sheldon for a project called the "High Sheldon Wind Farm."
23. In 2003, Invenergy 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.

24. On or about August 12, 2004, three members of the Orangeville Town Board met by teleconference with representatives from the New York State Energy Research and Development Authority (“NYSERDA”) to discuss the development of wind energy facilities. The three board members were former Supervisor Glosser, Hans Boxler Jr. and Tom Schabloski.
25. On or about August 16, 2004, NY Power requested approval from the Orangeville town board to re-install a met tower on land owned by Tom Schabloski; the board subsequently approved the request upon Mr. Schlabloski’s affirmative vote.
26. On June 2, 2005, the Wyoming County Board of Supervisors issued “Proposed Wyoming County Guidelines for Wind Energy Facilities,” identifying Invenergy’s “Stony Creek Wind” and NY Power wind farm projects as proposed in Orangeville.
27. On information and belief, on March 6, 2006, Orangeville Town

Board member Hans Boxler Jr., as owner of Boxler Dairy Farms, entered into a contract with Noble Environmental Power (“Noble”) to use Boxler Dairy Farms property in Orangeville for construction of a transmission line to serve Noble’s Wethersfield wind farm project.

28. Also in 2006, Orangeville Town Board members Tom Schabloski and Jim Herman entered into agreements with Noble for use of their property in Orangeville for transmission-related purposes in connection with Noble’s Wethersfield wind farm project.

29. Also in 2006, the Town of Orangeville entered into an agreement with Noble for use of the town’s land for transmission-related purposes in connection with Noble’s Wethersfield wind farm project.

30. On January 16, 2007, the Town of Sheldon town board approved Invenergy’s High Sheldon Wind Farm project.

31. On or about May 10, 2007, the Orangeville Planning Board indicated that Noble and Invenergy had presented information about wind farm development to the planning board.

32. Also on or about May 10, 2007, the Orangeville Planning Board completed a proposed Comprehensive Plan based on the Town of Gainesville Comprehensive Plan, to which was added an Article on

wind farm development.

33. On July 17, 2007, Invenergy alone among wind developers submitted to the Orangeville Planning Board comments on a draft proposed Orangeville wind energy facilities law.
34. On December 13, 2007, following a public hearing, the Orangeville Town Board adopted the Comprehensive Plan as proposed, by a vote of 4-0, there being a vacancy at the time on the town board. Votes in favor of these actions included those of Susan May, Hans Boxler, Jr. and Tom Schlaboski.
35. On January 31, 2008, the Orangeville Town Board held a special meeting the purpose of which was to hear a presentation from representatives of Invenergy regarding the company's plans for the "Stony Creek Wind Farm" project in the town. By this presentation Invenergy indicated that owners of approximately 7,700 acres in the town expressed interest in participating in the project as contract partners with Invenergy; the town would receive direct payments of \$480,000 per year; the project would involve 45 wind turbines with a maximum capacity of 1.5 megawatts ("MW") each, and each would be 389 feet high; new access roads to turbines sites would be 35 feet

wide; pre-project ambient sound levels in town are 45 decibels, A-weighted to reflect the most audible sound frequencies (i.e., “45 dBA”);<sup>2</sup> the proposed turbines would generate 47.5 dBA at a distance of 1,200 feet; flickering shadows from the proposed turbines occur at predictable times; single flashing synchronized lights are required on the proposed turbines by FAA Guidelines; Invenergy would repair damage on local roads caused by project construction; safety would be achieved by imposing a setback distance to non-participant property boundaries based on maximum turbine height multiplied by 1.1; and “next steps” include the adoption of “Town guidelines,” development of layout plans, and SEQRA review of a project application.

36. On April 25, 2008, Invenergy submitted to the town board comments on a draft proposed wind energy facilities law.
37. On May 22, 2008, former Town Supervisor, Kyle Glosser’s wife Avis and son Van Glosser entered into agreements with Invenergy to use their land for a wind farm project.

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<sup>2</sup> The notations “dBA” and “dB(A)” indicate a weighted calculation of measured sound pressure designed to reflect the most audible frequency or range in the sound spectrum, and are commonly utilized in noise ordinances and noise assessment guidelines.

38. On June 12, 2008 Peter Humphrey and other interested property owners in the Town of Orangeville who later became CSOO members, by Mr. Humphrey's attorney, wrote to the town board requesting that the board amend the Town's current zoning ordinance to provide adequate safeguards for industrial scale wind energy development in the town.
39. In June or July 2008 Eric Miller on behalf of Invenergy announced at a public gathering at Byrncliff Resort and Conference Center in Varysburg that Invenergy intended to submit an application for a large-scale industrial scale wind farm in Orangeville in September 2008.
40. At meetings of the Orangeville Town Board held on July 10, August 8 and 19, October 9, and November 6, 2008, numerous concerns regarding wind turbines proposed for development in the town were expressed to the board by Orangeville residents, including members of CSOO.
41. On or about July 15, 2008, the New York State Attorney General launched an investigation into improper dealings with public officials and anti-competitive practices of two companies developing and

operating wind farms in New York, First Wind and Noble.

42. On December 3, 2008, Invenergy provided to the Orangeville Town Board a letter regarding financial interests in wind farm development of board members. The letter indicates Invenergy has a land contract with board member Tom Schlabloski for the company's Stony Creek Wind Farm in Orangeville; and has such a contract with board member Hans Boxler Jr.'s family for the company's High Sheldon Wind Farm; and has approached board member Andy Flint's parents for such a contract; and notes board member James Herman sold land to Noble for a transmission substation and sold an easement to Noble for a transmission line, both for that company's Wethersfield wind farm.

43. At meetings of the Orangeville Town Board held on December 11, 2008; and on February 19, March 5, April 9, May 14, June 11, July 9, August 13, and September 23, 2009, numerous concerns regarding wind turbines proposed for development in the town and how they would be regulated were expressed to the board by Orangeville residents, including members of CSOO. During this period of time the board also held special work sessions on the proposed rezoning at

which expressions of concern from the public were not allowed, including work sessions on July 16 and August 4, 2009.

44. On or about February 26, 2009, the town board referred proposed 2009 zoning amendments to the Wyoming County Planning Board for the planning board's review and recommendations, if any.
45. On April 6, 2009, the Wyoming County Planning Board voted to recommend to the Orangeville town board that the wind energy facilities regulations in the proposed zoning amendment be drafted as a stand-alone local law or, if included in the proposed rezoning, a completed full SEQRA Environmental Assessment Form ("EAF") be provided. However, subsequent to this vote the Wyoming County Planning Board voted to table action on the referral after finding the referral was incomplete.
46. The town board did not make another referral of proposed 2009 zoning amendments to the Wyoming County Planning Board.
47. On April 24, 2009, CSOO member Cathi Orr submitted to the Orangeville town board comments on the proposed 2009 zoning amendments and wind energy facilities law with supporting documentation, indicating that the ambient sound level in rural places



like Orangeville is approximately 25 to 35 dBA; the state Department of Environmental Conservation (“DEC”) has issued noise guidelines indicating that an increase in sound level between 5 and 10 decibels is considered “intrusive,” between 10 and 15 decibels is “very noticeable,” and over 20 decibels is “very objectionable to intolerable”; that “testimonials from residents of [the towns of] Cohocton, Sheldon, Eagle-Bliss and Tug Hill [in New York]” show that a 50 decibel limit for wind turbine noise adopted by those towns has caused complaints; that wind turbine noise can result in adverse health effects for sensitive receptors.

48. On May 7, 2009, the Orangeville town board held a public hearing on the proposed 2009 zoning amendments, including Section 1116 governing wind energy facilities regulations allowing wind turbine noise to reach 50 dbA for 90% of the time noise is measured. However, no action was taken on this date, and the hearing record remained open.
49. The May 7 public hearing attracted about 200 people, almost all of whom provided either oral or written comments on Section 1116 governing wind energy facilities.

50. On May 14, 2009, through its attorney, CSOO submitted comments to the town board, attaching technical comments by an acoustic engineer with experience assessing noise impacts of operating western and central New York wind farms. The acoustic engineer's comments state that the specific distance setbacks from residential property and noise limits in the 2009 zoning amendments can be expected to result in community complaints of noise pollution and nuisance, including sleep disturbance; children and others with sensitive conditions will be exposed to specific health risks, discussed at length; and the setbacks and noise limits in the proposed 2009 zoning amendments are not supported by any scientific basis.
51. CSOO's acoustic engineer's May 14, 2009 comments also state that a critical deficiency in the 2009 zoning amendments is their failure to restrict noise levels during quiet times at night.
52. CSOO's acoustic engineer's May 14, 2009 comments also state that the 2009 zoning amendments are inconsistent with DEC guidelines which state, "In non-industrial settings the SPL [sound pressure level] should probably not exceed ambient noise by more than 6 dB(A) at the receptor," existing sound levels in rural

communities similar to Orangeville are commonly 25 dBA or lower, and by allowing wind turbine noise at a level of 50 dB(A) for 90% of the time, permitted sound levels may reach up to 100 dBA for over one hour per night, a situation that can be analogized to a form of torture.

53. The DEC noise guidelines also state that the dB(A) scale is logarithmic, and an increase of 10 decibels above existing background or ambient sound levels represents a perceived doubling of the sound level.
54. In June 2009 Invenergy completed a study titled “Noise Level Testing for the High Sheldon Wind Energy Center,” in response to complaints by residents in Sheldon about the noise from Invenergy’s operating wind farm.
55. On June 5, 2009, CSOO through its attorney submitted supplemental comments on the proposed rezoning attaching and discussing a Minnesota Department of Health report on industrial wind turbine noise that found that noise from wind turbines engenders annoyance similar to noise from aircraft, road traffic and railroads; the modulation of wind turbine noise, resulting in audibly

rhythmic or pulsing noise, is particularly annoying and causes stress and a variety of additional adverse health effects; low frequency noise from wind turbines is audible and is likely to be louder inside a building than outside; shadow flicker and visibility of turbines increases the annoyance due to noise; a “nighttime standard of 50 dB(A) not to be exceeded more than 50% of the time in a given hour, appears to underweight penetration of low frequency noise into dwellings;” aerodynamic noise from wind turbines may be underestimated during planning, especially at night; and modulating or pulsing turbine noise may be heard at distances greater than one-half mile.

56. On or about July 29, 2009, the New York State Attorney General entered into an agreement with 16 wind farm companies operating in New York, including Invenergy, to comply with a Wind Industry Ethics Code to deter improper relationships between wind development companies and local government officials (hereafter, “Wind Industry Ethics Code”).

57. Among other things, the Wind Industry Ethics Code requires that signatory wind companies provide public disclosure of relationships

between the company and local officials and their siblings, whether minor or adult, and regardless of whether such siblings live with the local officials within the past six years prior to signing the Code; and prohibits wind companies from hiring municipal employees or their relatives, giving gifts of more than \$10 during a one-year period, or providing any other form of compensation that is contingent on any action before a municipal agency.

58. Upon reliable information and belief, sometime in the last quarter of 2009, Invenergy provided to the Office of the Attorney General the disclosure required under the Wind Industry Ethics Code regarding its dealings with Orangeville town officials and employees, but to date the disclosure has not become publicly available.
59. On August 31, 2009, CSOO through its attorney submitted to the town board supplemental comments on the proposed rezoning, including over 100 pages of attached technical literature on the subject of wind farm noise, and noting in the letter that according to a leading study on the subject, as well as the Minnesota Department of Health report, to compensate for the added annoyance of fluctuating or impulsive sound in wind turbine noise, the convention is to add a

penalty of 5 dB(A) to modeled sound or to subtract an equivalent amount from the permitted numerical sound level.

60. The August 31, 2009 CSOO comment letter also discussed at length the basis for concluding that wind farm noise results in chronic sleep disturbance for a significant number of those who live within a mile away from an operating wind farm; noted that the World Health Organization finds that chronic sleep disturbance results in serious health effects and has issued noise guidelines to preserve the ability to sleep; discussed studies explaining the acoustic causes of annoyance and sleeplessness in wind farm host communities; emphasized that, in contrast to newer studies that link exposure to low frequency noise to impairment of the vestibular system or other organs, research-based findings linking noise and sleeplessness are well established in the scientific and regulatory communities; and emphasized the inconsistency of noise limits for wind farms proposed by the town board with recent research.

61. On September 22, 2009, by overnight courier, CSOO through its attorney submitted to the town board's attorney supplemental comments reiterating and summarizing prior CSOO comment letters

expressing concern that the proposed dual setbacks in the rezoning, Section 1116, which provide that wind turbines must be set back a one-quarter mile from dwellings but only 700 feet from a property line, effects a taking of development rights because, under such dual setbacks one cannot develop land between one's dwelling and one's property line in the direction of a compliant turbine site without violating the law.

62. On information and belief, the dual setbacks provided under the 2009 zoning amendments were designed to accommodate specific turbine sites in Orangeville previously committed to by Invenergy.
63. On September 23, 2009, the Orangeville town board resolved to approve a Negative Declaration of Environmental Significance regarding adoption of the proposed 2009 rezoning amendments, and adopted the rezoning amendments as proposed, both by votes of 4-1.
64. On or about September 24, 2009, Invenergy submitted to the Orangeville town board an application for approval of the Stony Creek Wind Farm.
65. On October 5, 2009, by its attorney CSOO submitted to the Orangeville town board a letter notifying the board that the

association intended to seek judicial review of the board's September 23 actions unless the board and CSOO could resolve their differences.

66. On October 28, 2009, CSOO member Peter Humphrey and CSOO's attorney met with the town board's attorney, town board member Andrew Flint, Orangeville planning board member Len Knaggs, and the town's environmental consultant in an effort to resolve the parties' differences, but the town officials indicated an unwillingness to make any changes to the 2009 zoning amendments.

67. On December 10, 2009, the Orangeville town board accepted Invenergy's application for approval of the Stony Creek Wind Farm as complete.

### **FIRST CAUSE OF ACTION**

#### **Failure to take a "hard look" at potential environmental impacts**

68. Petitioner repeats and realleges the prior paragraphs as if fully set forth here.

69. The town board's approval of the 2009 zoning amendments is an action subject to SEQRA. Env'tl. Conserv. Law § 8-0105(4).

70. Prior to deciding whether to approve an action subject to SEQRA, "environmental factors shall be considered," *id.*, § 8-0103(7), and the



lead agency “shall act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects, including effects revealed in the environmental impact statement process.” *Id.*, § 8-0109(1).

71. A town board considering an action subject to SEQRA must, among other things, set forth in writing “a reasoned elaboration” of the basis for the action and “provid[e] reference to any supporting documentation.” 6 N.Y.C.R.R. § 617.7(b)(4).
72. When a town board considering an action subject to SEQRA issues a Negative Declaration, thereby dispensing with the detailed analysis of an EIS, its findings in Part 3 of the completed EAF generally provide the primary record of the basis for the action, relating back to the potentially large impacts identified in Part 2 of the EAF.
73. Unless a lead agency demonstrates adverse impacts will be avoided or minimized, identifying potentially significant impacts in an EAF *requires* an environmental impact statement to analyze the impacts. 6 N.Y.C.R.R. § 617.7(a)(1).

74. On September 23, 2009 the town board approved an EAF that in Part 2 states that potentially large impacts would result from allowing commercial wind energy systems.
75. The board's EAF Part 2 also states that potentially large impacts would result from the rezoning on protected water bodies, agricultural land, aesthetic resources including scenic views known to be important to the area, and the character of the community.
76. Nevertheless, the Orangeville town board issued a Negative Declaration upon an EAF with answers to several questions left blank in Part 2.
77. For those questions in Part 2 of the EAF that were completed, the board indicated that, should the board for the first time allow permitting for industrial wind farm projects that ordinarily require a project area of several square miles, there could be no adverse traffic impacts, no adverse health impacts, no adverse noise impacts, no adverse impacts on the character of the community.
78. The town board's completed EAF Part 2 also indicates that the rezoning *would* have adverse impacts on health, welfare and safety but justifies identifying such impacts as small with the conclusory

assertion that the rezoning protects health, welfare and safety by establishing standards that protect health, welfare and safety.

79. A similar conclusion was made regarding impacts on community character. According to the town board's EAF Part 2, such impacts would be potentially small, even though the EAF indicates the new zoning law would conflict with officially adopted plans or goals.
80. The town board's EAF Part 2 indicates that the rezoning would set an important precedent for future projects, and states this would amount to a potentially large impact, but provides no discussion of such projects.
81. The EAF was justified by the town board in Part 3 of the EAF by stating that a review of impacts will take place later, when a developer submits an application pursuant to the rezoning, and by relying on other towns' or agencies' recommended standards for regulating wind farms but without explaining why these and not other standards are appropriate.
82. Because answers to EAF Part 2 questions about noise and community character impacts were left blank, there is no way to determine whether any town board members understood many of the

potential impacts of setting commercial wind turbines too close to homes and private property or near sensitive community or natural resources.

83. Because the EAF Part 3 fails to show potentially large impacts identified in Part 2 would be avoided or minimized, the board's EAF falls far short of the "reasoned elaboration" of the basis for the action required under SEQRA. 6 N.Y.C.R.R. § 617.7(b).

84. Therefore, the action of the town board was in violation of lawful procedures, was unreasonable, and was made without sufficient basis in substantial evidence, and therefore should be overturned.

## **SECOND CAUSE OF ACTION**

### **Impermissible Segmentation of Actions under SEQRA**

85. Petitioners repeat and reallege the prior paragraphs as if fully set forth here.

86. SEQRA's implementing regulations disfavor the segmentation of actions, i.e., "the division of the environmental review of an action such that various activities or stages are addressed under this Part [i.e., the SEQRA regulations] as though they were independent, unrelated activities, needing individual determinations of

significance.” 6 N.Y.C.R.R. § 617.2(ag).

87. “If a lead agency believes that circumstances warrant a segmented review, it must clearly state in its determination of significance and any subsequent EIS [environmental impact statement] the supporting reasons and must demonstrate that such review is clearly no less protective of the environment. Related actions should be identified and discussed to the fullest extent possible.” 6 N.Y.C.R.R. § 617.3(g)(1).

88. 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 but without so stating in its determination of significance and without providing any supporting reasons for pursuing a segmented review in violation of SEQRA.

89. Therefore, the action of the town board was in violation of lawful procedure, and should be annulled.

### **THIRD CAUSE OF ACTION**

#### **Violation of General Municipal Law Section 239-m**

90. Petitioners repeat and reallege the prior paragraphs as if fully set forth here.

91. “[B]efore taking final action” on a proposed local law that applies to real property within five hundred feet of a municipal boundary, a town board must provide “a full statement of such proposed action” to the county planning agency and provide the agency with a 30-day opportunity to review the proposed local law; failure to do so constitutes a jurisdictional defect. Gen. Mun. Law §§ 239-m(2), (1)(c), (3)(a)(i), (3)(b), (4)(b).
92. “The term ‘full statement of such proposed action’ shall mean a completed environmental assessment form [“EAF”] and all other materials required by the referring body in order to make its determination of significance pursuant to the state environmental quality review act under article eight of the environmental conservation law and its implementing regulations. When the proposed action referred is the adoption or amendment of a zoning ordinance or local law, ‘full statement of such proposed action’ shall also include the complete text of the proposed ordinance or local law. . .” Gen. Mun. Law §§ 239-m(1)(c).
93. On February 26, 2009, the town board referred a draft of the 2009 zoning amendments to the Wyoming County Planning Board,

including a draft Article XI, Section 1116 governing wind farms.

94. On April 6, 2009, the Wyoming County Planning Board met to consider the February 26 referral and, although recommending extensive modifications to the 2009 zoning amendments, including modifications to draft Article XI, Section 1116 regarding wind farms, tabled any action after finding the board had no jurisdiction for failure to submit a full statement of the proposed action.
95. On April 15, 2009 the Wyoming County Planning Board wrote to the Orangeville Town Attorney notifying the attorney that because Parts 2 and 3 of the town board's SEQRA Environmental Assessment Form were never completed, a full statement of the proposed action had not been submitted.
96. Between May 7 and September 23, 2009, the town board made substantive changes to the text of Section 1116 of the rezoning and completed Parts 2 and 3 of the EAF in support of the amendments.
97. The town board never referred the modified draft proposed 2009 zoning amendments finally adopted on September 23 to the Wyoming County Planning Board.
98. The town board never referred the finally approved Part 3 of the

EAF to the Wyoming County Planning Board.

99. The town board never referred to the Wyoming County Planning Board the studies and documentation which informed and therefore were required to make substantive final changes to Section 1116 of the rezoning.

100. Since the Orangeville town board failed to provide any opportunity to a county planning agency to review the complete text of the 2009 zoning amendments, the completed EAF prepared by the town board, and all other materials required by the referring body in order to make its determination of significance pursuant to SEQRA, the town board was without authority to approve the amendments and any purported approval is *void ab initio*. Gen. Mun. Law § 239-m(4)(b).

#### **FOURTH CAUSE OF ACTION**

##### **Rezoning inconsistent with a Comprehensive Plan**

101. Petitioners repeat and reallege the prior paragraphs as if fully set forth here.

102. Town Law section 272-a(11) requires that where a municipality has adopted a comprehensive plan, its zoning decisions must be consistent with that plan.



103. On December 13, 2007, the Town of Orangeville adopted a comprehensive plan.
104. Regarding commercial development the Orangeville comprehensive plan states that the town's goal is to "encourage the development and maintenance of facilities needed to serve the projected population of the Town of Orangeville in an efficient and accessible manner." Town of Orangeville Zoning Ord., Art. XIII, Sect. 1304(A).
105. Commercial wind farms do not specifically serve the populations of their host towns; instead, such projects generate electricity for the regional electric grid system, primarily for urban areas in the region.
106. The 2007 Orangeville comprehensive plan also includes specific policies, including a policy to "concentrate new commercial development within well defined nodes in areas which are suitable for such uses and highly accessible to the population." *Id.*, Sect. 1304(B)(1).
107. The 2009 zoning amendments allow commercial wind farms throughout the town under certain conditions, and include no well defined nodes in areas which are suitable for such uses.

108. An additional specific policy adopted in the comprehensive plan for industrial uses provides that, “although no areas are specifically identified for development as industrial uses on the zoning map, the town board may rezone particular areas for industrial development providing that certain standards and regulations are maintained.” *Id.*, Section 1305(B)(2).

109. The 2009 zoning amendments do not rezone any particular areas for industrial wind farm development but instead rezones the entire town’s land area for industrial wind farm development.

110. The comprehensive plan also adopts specific policies to promote conservation and open space, (*id.*, Sect. 1307), including a policy requiring that “all development preserves the integrity of existing natural areas and concentrates development in areas proposed for growth.” *Id.*, Sect. 1307(B)(1).

111. By allowing industrial wind farm development throughout the entire town, the 2009 zoning amendments provide no specific protections that would preserve the integrity of existing natural areas, proposes no specific area for growth of wind farm development, and fails to concentrate wind farm development in an area.

112. Regarding alternative energy sources, the Orangeville comprehensive plan states that the town's goal is to "allow development of alternative energy sources to take place within the Town but direct it to those areas that are most appropriate." *Id.*, Sect. 1309(A).
113. The 2009 zoning amendments allow the development of alternative energy sources under certain conditions, but fails to direct such development to those areas that are most appropriate.
114. Regarding alternative energy sources, the Orangeville comprehensive plan also adopts a specific policy, to "identify and inventory the Town's natural resource capabilities and constraints to help in guiding local development, management and protection efforts." *Id.*, Sect. 1309(B)(2).
115. The 2009 zoning amendments do not identify and inventory the Town's natural resource capabilities and constraints, and thus fail to help in guiding local development, management and protection efforts.
116. Regarding alternative energy sources, the Orangeville comprehensive plan also adopts a specific policy, to "pinpoint the

sites with the greatest potential for development [and] with the lowest potential for adverse environmental or other impacts.” *Id.*, Sect. 1309(B)(3).

117. The 2009 zoning amendments do not pinpoint the sites with the greatest potential for development and with the lowest potential for adverse environmental or other impacts.

118. Regarding alternative energy sources, the Orangeville comprehensive plan also adopts a specific policy, to “analyze sites in the context of other natural and cultural resources, existing and adjacent land uses and other relevant factors and to direct that planning should involve balancing a variety of needs and priorities, proposed future land uses and activities, which must be analyzed and evaluated for their respective advantages and drawbacks.” *Id.*, Sect. 1309(B)(4).

119. The 2009 zoning amendments do not analyze alternative energy sites in any way.

120. The 2009 zoning amendments do not plan for proposed future alternative energy land uses and activities, nor do the amendments analyze and evaluate future alternative energy land uses and activities

for their respective advantages and drawbacks.

121. Regarding alternative energy sources, the Orangeville comprehensive plan also adopts a specific policy, to “eliminate or reduce dependency on fossil fuel and foreign energy.” *Id.*, Sect. 1309(B)(5).

122. The 2009 zoning amendments do not in any meaningful way eliminate or reduce dependency on fossil fuel and foreign energy.

123. Because the Orangeville 2009 zoning amendments are not consistent with the town’s 2007 comprehensive plan, the zoning amendments violate Town Law section 272-a(11) and should therefore be annulled.

## **FIFTH CAUSE OF ACTION**

### Common law conflict of interest violations

124. Petitioners repeat and reallege the prior paragraphs as if fully set forth here.

125. Pursuant to General Municipal Law, §809[2], when a change in zoning has been requested by a project proponent, a municipal officer or employee is deemed to have an interest in the applicant when he, his spouse, or their brothers, sisters, parents, children, grandchildren,

or the spouse of any of them is a party to an agreement with such an applicant, express or implied, whereby he may receive any payment or other benefit, whether or not for services rendered, dependent or contingent upon the favorable approval of such application, petition or request.

126. Violation of a specific section of the General Municipal Law is not critical to a finding of an improper conflict of interest. An actual conflict of interest, or the significant appearance thereof is sufficient to require compliance with the disclosure provisions of General Municipal Law § 809, and failure to provide such disclosure under those circumstances is a defect requiring invalidation of the town board vote.

127. In 2007 or 2008, and in any case prior to February 26, 2009, Invenergy requested from the Town of Orangeville a change in zoning to accommodate a wind farm project in the town.

128. Prior to approving the rezoning on September 23, 2009, on information and belief a majority of the Orangeville town board had direct or indirect, financial or non-financial private interests in wind farm development in the town, or their family and friends have such

interests such that any reasonable person would conclude under the circumstances—which include an ongoing state Attorney General’s investigation to official self-dealing in wind farm development—there is a significant appearance of conflict of interest in most town board members.

129. Because a majority of the town board had a prohibited appearance of conflict of interest, or had actual conflicts of interest at the time of their September 23, 2009 votes approving the 2009 zoning amendments, the votes were defective requiring invalidation of the September 23 town board vote.

### **SIXTH CAUSE OF ACTION**

#### **Violations of the Town of Orangeville Code of Ethics**

130. As authorized by General Municipal Law § 806, the Town of Orangeville has adopted a local code of ethics imposing rules of ethical conduct in addition to those imposed by Article 18 of the General Municipal Law, including the requirement that members of the town board “publicly disclose on the official record . . . any direct or indirect financial or other private interest he has” in proposed legislation that comes before the board. Town of Orangeville Code of

Ethics, Res. No. 76-94, Section 3(e).

131. The town's Code of Ethics also precludes town board members from holding "any investments directly or indirectly in any financial, business, commercial or other private transaction, which creates a conflict with his official duties." *Id.*, Section 3(f).
132. On information and belief, a majority of the Orangeville town board hold direct or indirect, financial or non-financial private interests in wind farm development in the town, or their family and friends have such interests such that any reasonable person would conclude under the circumstances there is a significant appearance of conflicts of interest in most town board members.
133. On information and belief, a majority of the Orangeville town board hold investments directly or indirectly in land from which they derive income from a wind project, or from which they expect to derive such income in the future, which creates a conflict with their official duties.
134. Except for town board member Tom Schabloski, none of the members of the town board have ever disclosed on the official record any direct or indirect financial or non-financial private interest he or



she has in the 2009 zoning amendments, requiring invalidation of the September 23, 2009 town board vote to adopt the amendments, at least as to Section 1116 of the amendments.

135. Because a majority of the town board failed to disclose interests in the 2009 zoning amendments prior to voting to approve the amendments, under Section 3(e) of the town's Code of Ethics, or because they hold or expect in the future to hold investments in land that is or would be used for wind farm development regulated by the amendments, or because they hold or expect in the future to hold such investments that create a conflict with their official duties under Section 3(f) of the town's Code of Ethics, two or more of the town board's September 23, 2009 votes on the amendments were defective requiring invalidation of the September 23 town board vote.

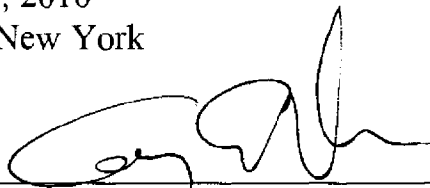
**WHEREFORE**, Petitioners demand judgment against Respondent TOWN BOARD OF THE TOWN OF ORANGEVILLE and its members:

- (1) Declaring that Respondents' decision adopting the town's 2009 zoning amendments violates SEQRA and is invalid and null and void;
- (2) Ordering Respondents to comply with SEQRA's procedural mandates, including but not limited to preparing a written basis for

the Town's determination of potential for significant adverse environmental impacts, as mandated by SEQRA;

- (3) Declaring that the town board lacked jurisdiction to vote to approve the rezoning on September 23, 2009, for failure to comply with the procedural requirements of General Municipal Law Section 239-m;
- (4) Declaring that the September 23, 2009 vote is null and void for failure of two or more members of the town board to disclose the existence of potential or actual conflicts of interest and their failure to recuse themselves from the vote;
- (5) Awarding costs and disbursements and attorney fees of this proceeding;
- (6) And ordering such other and further relief as the Court may deem just and proper.

DATED: January 25, 2010  
Allegany, New York



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Gary A. Abraham, Esq.  
*Attorney for Petitioners*  
170 No. Second Street  
Allegany, New York 14706  
716-372-1913

**VERIFICATION**

STATE OF NEW YORK )  
COUNTY OF WYOMING ) s.s.:

CATHI ORR, being duly sworn, states that she is the President of Clear Skies Over Orangeville (“CSOO”); that on behalf of CSOO as well on her own behalf she states that the annexed Petition is true to her own knowledge, except as to matters therein alleged upon information and belief, and as to those matters she believes it to be true.

*Cathi Orr*

\_\_\_\_\_  
CATHI ORR, PRESIDENT  
CLEAR SKIES OVER ORANGEVILLE

Subscribed and sworn to before me this 25<sup>th</sup> day of January, 2010.

*Sheryl L. Montgomery*  
\_\_\_\_\_  
Notary Public

SHERYL L. MONTGOMERY  
Notary Public, State of New York  
No. 01MO6051835  
Qualified in Wyoming County  
My Commission Expires Dec. 4, 2010