

Town of Allegany Planning Board

Meeting Minutes

October 15 2012 at 7:00 PM
Senior Center, Birch Run Rd.

Present:

Frank DeFiore, Chairman
Peter Hellier
Rick Kavanagh
Helen Larson

APPROVED November 5, 2012

Also Present:

John Hare, Town Supervisor; David Koebelin, Ed Allen, David O'Dell, Jim Hitchcock, Town Board members; Daniel Spitzer, Esq. Charles Malcomb, Esq.; Ben Brazell, EDR; Doug Ward, Esq., Young/Sommer LLC; Kevin Sheen, Everpower; David Britten, CRA; Carol Horowitz, Town Planner; Kate Day-Sager, Times Herald; Lynette Semsel, Secretary; Townspeople

Chairman DeFiore opened the meeting with the Pledge to the Flag at 7:00 PM and welcomed everyone for attending. He then asked if there were any corrections or changes to the minutes of August 13, 2012.

For clarification, Mr. Hellier requested the word "others" in the last sentence of the first paragraph under Old Business be changed to "the third scenario."

Mr. Hellier made a motion to approve the minutes of the September 10, 2012 meeting with the minor change. 2nd by Mr. Kavanagh. Ayes all. Carried.

Old Business

Allegany Wind, LLC

1. Request for change in turbine model

Chairman DeFiore asked Mr. Dan Spitzer to give the Board some input on the request. Mr. Spitzer answered with the following remarks:

When the Board received the modification request, it drafted a resolution identifying several items within the Town Code on which the Board felt it needed information. It instructed the applicant to provide that information to Conestoga-Rovers and Associates (CRA), who is represented here by Dave Britton. CRA has been working on that review in terms of the compliance with the Board's resolution. Mr. Britton has prepared a report which has been handed out to the Planning Board.

Mr. Spitzer asked Mr. Britton, "Did the applicant provide the Planning Board with the information requested in the resolution?"

Mr. Britton: "The information was deficient in certain aspects that I have identified in the specific memo."

Mr. Spitzer highlighted the items in the report as follows:

- a. Information related to safety performance for the proposed models was not provided.
- b. The proposed scenarios appear to result in a noncompliance with respect to the 45 dba noise setback standard.

- c. CRA was not able to confirm noise setback compliance as the figures provided did not identify project boundaries.
- d. There is a residential structure located at 180 Chipmonk Road that was not identified nor included in the original assessment due to the fact the Board was unaware of its existence.
- e. CRA indicates that Shadow Flicker Analysis provided is incomplete.
- f. Since the towers proposed are lower and one scenario actually has fewer towers, there is no indication there is a greater visual impact other than Shadow Flicker.

Mr. Spitzer stated, when the presentation was made at the last Planning Board meeting, there was a very specific reference by the applicant that said they had given the same information they had given in the DEIS. The DEIS is a draft document that is submitted early and the question with the acceptance of a DEIS is whether it is adequate to start public review. The law states to do so as early as possible. There were specific discussions between the Planning Board and the applicant as to whether there would be further information and, in fact, the applicant made some changes. The resolution the Board had written was based on the question, "If we agree to this modification, can we say to the community that we have the exact same information we had at the time of the FEIS which is when we approved this project?" The DEIS is not the measuring point. The FEIS contains substantially more information that fully complied with the statute. Mr. Spitzer's recommendation to the Board is that they require a Supplemental Environmental Impact Statement (SEIS). A resolution has been prepared for the Board's review. Mr. DeFiore then read the resolution.

Mr. DeFiore made the motion that the Board enacts a Resolution Requiring a Supplemental Environmental Impact Statement Due to Changes Proposed for the Project and Newly Discovered Information:

WHEREAS, Allegany Wind, LLC (the "Applicant") applied to the Town of Allegany Planning Board (the "Planning Board") for a special use permit and site plan approval to undertake the development of wind energy facilities in the Town of Allegany, New York (the "Project"); and

WHEREAS, the Planning Board, acting as lead agency pursuant to the State Environmental Quality Review Act ("SEQRA"), issued a Positive Declaration of Environmental Significance for the Project and directed the Applicant to prepare a Draft Environmental Impact Statement ("DEIS"); and

WHEREAS, the Planning Board, after review of the DEIS, accepted the DEIS as complete, established and held a public comment period, set and held a public hearing, filed and circulated the Notice of Completion, and filed the DEIS with the appropriate parties pursuant to SEQRA; and

WHEREAS, following the public comment period on the DEIS, the Planning Board, with its consultants and experts, prepared a Final Environmental Impact Statement ("FEIS"), which was issued; and

WHEREAS, the Planning Board completed the environmental review of the Project by issuing a Statement of Findings and Decision on July 11, 2011, granting the Applicant's special use permit application, and approving the site plan; and

WHEREAS, the Applicant has not yet requested a building permit or commenced construction in furtherance of the special use permit and site plan approvals; and

WHEREAS, the Applicant has submitted a notification to the Planning Board that it intends to use alternate turbine models from those that were part of the Planning Board's initial review of the Project; and

WHEREAS, since the initial approvals, the Planning Board has been presented with newly discovered information: that a residence (Theodore Gordon) is located within 2,500 feet of at least one turbine, and that said residence is a “sensitive receptor” under the Town Zoning Ordinance II; and

WHEREAS, since the initial approvals, the Planning Board has been presented with new information from the U.S. Fish and Wildlife Service regarding the activities of endangered species in the project vicinity; and

WHEREAS, the information provided by the Applicant in response to the Planning Board’s request indicates at least one turbine does not comply with the Town ordinances and the prior approvals; and

WHEREAS, pursuant to SEQRA, the Planning Board must determine whether a Supplemental Environmental Impact Statement (“SEIS”) is required for the Project, resulting from any proposed changes for the Project, newly discovered information, or changes in circumstances related to the Project; and

WHEREAS, the Planning Board requested additional information from the Applicant to determine whether an SEIS will be required, but the Applicant failed to provide all the information requested;

***NOW THEREFORE BE IT RESOLVED,** by the Town of Allegany Planning Board as follows:*

1. *The Planning Board hereby determines that a SEIS is required based upon the changes proposed for the Project, and newly discovered information.*
2. *The Planning Board finds that the following areas require further study*
 - a) *Noise impacts at Theodore Gordon’s residence*
 - b) *Impacts on endangered species in accordance with the issues raised by the U.S. Fish and Wildlife Service*
 - c) *Shadow Flicker impacts from the wider blades*
 - d) *Noise impacts from the newly proposed turbine models, with the applicant to submit studies in accordance with the Board’s August 13, 2012 resolution.*
3. *This resolution shall be effective immediately.*

Passed and adopted by the Town of Allegany Planning Board on the 15th day of October, 2012.

Discussion: Mr. Spitzer wanted to make clear to the Board they are not reopening the review to everything. There is nothing in this resolution that opens up every topic. A Supplemental is limited to those items which are materially different, and the responses that the Board gets from the applicant or the decisions the Board makes may be very small or very large depending on those differences. There have been a lot of issues raised in the newspaper and in letters received by the Board that are simply not in front of the Board. For example, the turbines are smaller and possibly fewer and clearly do not create a greater visual impact. In one scenario the applicant is proposing to remove some roads; that's actually a positive environmental change from what the Board has approved. It is important for the Board to remember it is a very narrow focus in front of them in terms of future investigation. Mr. Spitzer stated he wants the public to understand that this is not back to square one by any means. It is also important to understand is that this is done solely on the basis of what is in front of the Board in terms of the Site Plan and the Special Use Permit modifications. A number of letters were received that have asked the Board to act based on things that are totally the province of

the Town Board. He further stated, "With due respect, what is going on between the Town Board and the applicant regarding contracts is simply not the affair of the Planning Board. The Board needs to make their decision solely on the criteria for Special Use Permits and Site Plans as detailed and delegate to them within the Town Ordinance."

Mr. Kavanagh also asked Mr. Britton, "In your experience, is this something we should be looking for in a Supplemental?"

Mr. Britton: "Yes."

Mr. Kavanagh seconded the motion. Ayes all. Carried

Allegany Wind, LLC

2. Request for extension of Special Use Permit/Site Plan approval

The applicant has requested a one year extension of the Special Use Permit/Site Plan approval. Based on the information the Board received, Mr. DeFiore asked for discussion.

Mr. Spitzer wanted to set the stage correctly before the Board decides on what to do. If there are no changed circumstances, according to the law, the Board does not have the right to say no to an extension. At the end of the last meeting on this topic, he stated he had specifically asked Mr. Moscato, Young & Sommer, if there had been any changes to the project that had been reviewed and approved and the answer was there were none. Now there are changes and a suggested resolution has been prepared for the Board. He further stated he wanted to focus on one point in the resolution. This is not a reopener. There are aspects of the application that they have to demonstrate are still valid but this is not square one should the Board choose to deny the extension. They have a modification request that the Board can consider concurrently with the SEQRA obligations should they go forward. To clear up requests in letters the Board received today, it is very important that people understand this is not a "get out of town" motion. None of those letters was legally viable in Mr. Spitzer's opinion. In front of the Board is a modification, a change in circumstances, to a Special Use Permit and to a Site Plan.

Mr. DeFiore made a motion to enact a Resolution Denying Allegany Wind, LLC's Application for an Extension of its Special Use Permit and Site Plan Approval

WHEREAS, Allegany Wind, LLC (the "Applicant") applied to the Town of Allegany Planning Board (the "Planning Board") for a special use permit and site plan approval to undertake the development of wind energy facilities in the Town of Allegany, New York (the "Project"); and

WHEREAS, the Planning Board, acting as lead agency pursuant to the State Environmental Quality Review Act ("SEQRA"), completed the environmental review of the Project, and issued a Statement of Findings and Decision on July 11, 2011, granting the Applicant's special use permit application, and approving the site plan; and

WHEREAS, the Applicant has not yet requested a building permit nor commenced construction in furtherance of the special use permit and site plan approvals; and

WHEREAS, on April 3, 2012, the Applicant submitted a request to the Planning Board for an extension of the special use permit and site plan approvals for the Project, pursuant to Sections 8.05(e) and 9.05(e) Town of Allegany Zoning Ordinance II (the "First Extension Request"); and

WHEREAS, the Applicant cited pending litigation as the reason why the extension was necessary; and

WHEREAS, in correspondence dated June 5, 2012, counsel for the Applicant assured the Planning Board that there had been “no changes to the Project that was reviewed and approved by the Planning Board in July 2011”; and

WHEREAS, on June 11, 2012, the Planning Board granted the Applicant’s extension request until the earlier of (1) one year from June 11, 2012, or (2) ninety days following the conclusion of the current litigation over the Project; and

WHEREAS, the litigation over the Project has concluded; therefore, on September 28, 2012, the Applicant has sought another extension request from the Planning Board (the “Second Extension Request”); and

WHEREAS, the Second Extension Request differs from the First Extension Request, in that the Applicant has notified that Planning Board that it intends to use alternate turbine models from those that were part of the Planning Board’s initial review of the Project; and

WHEREAS, since the Planning Board conducted its initial review of the Project, it has been made aware of a residence that was previously overlooked by the Applicant and additional information as provided by the U.S. Fish and Wildlife service and, as a result, some aspects of the Project may not be in compliance with Zoning Ordinance II and some of the findings of the Planning Board may not be accurate; and

NOW THEREFORE BE IT RESOLVED, by the Town of Allegany Planning Board as follows:

1. The Planning Board hereby denies the Applicant’s request for an extension of the special use permit and site plan approval for the Project.
2. The Planning Board finds that the Applicant’s Second Extension Request is not ministerial in nature because of proposed changes to the Project. The Planning Board conducted its initial review of the Project based upon the turbine models proposed by the Applicant. The change in turbine models represents a change in conditions since the initial approvals were granted, and this change must be evaluated by the Planning Board.
3. Since the conclusion of the Planning Board’s initial review, it became aware of the existence of Theodore Gordon’s residence, which is located within the Project area, and is within 2,500 feet of at least one turbine. Mr. Gordon’s residence is, therefore, a “sensitive receptor” pursuant to Zoning Ordinance II. As a result, a portion of the Project may not be in compliance with all applicable local laws and ordinances, and the prior approvals. Additionally, material in support of the modification submitted by the Applicant indicates at least one turbine and possibly more are not in compliance with the prior approvals. The Planning Board finds that this new information represents a change in conditions and circumstances that must be reviewed prior to any grant of an extension.
4. Nothing in this Resolution shall be deemed as requiring the Applicant to submit any information in support of a revised request for a Special Use Permit and Site Plan Approval other than material related to the changes in the Project. The Planning Board will conduct its review of the proposed modifications concurrently with its obligations under SEQRA, should the Applicant seek to proceed further.
5. This Resolution shall take effect immediately.

Passed and adopted by the Town of Allegany Planning Board on the 15th day of October, 2012.

Discussion: Mr. Ward stated he was surprised the Board has chosen to do an SEIS for what sounds to him as an additional information request especially as he had thought they had provided everything. They are looking for a modification; however, if they do not get the modification, they still have the active permit. He felt it does not make sense to deny the extension of time on an existing permit just because they had asked for a modification. All the SEIS will do is assess the differences in impacts between what they have now and what they propose. It is not a new look at the whole project.

Mr. DeFiore said it is his understanding that Mr. Ward is saying there is no significant change with the request the applicant is making which is the reason for the extension; however, the Board believes there are some.

Mr. Ward continued that he feels there are two things going on. The applicant would like to continue with their existing permit and, therefore, would like the extension of time with respect to that existing permit. As to the proposed modification, that doesn't take effect until this Board approves the modification. Until then, the applicant can theoretically get a building permit today on the project that has been approved. He said it seems to be the case that by the Board denying the extension, they are essentially nullifying the existent permit. Mr. Spitzer stated that he agrees with that statement. Mr. Ward questioned whether they should withdraw their application for modification.

Mr. Spitzer addressed the Board saying, if the applicant comes back next month with the decision to remove the modification proposal, he would recommend the Board reinstate the prior approvals subject to the applicant getting a variance related to the newly discovered residence, Mr. Gordon. The decision on approving the variance would be the Zoning Board's responsibility. He could find no cases that allow the applicant to keep the permits while pursuing a modification; rather it is a nullification of the prior permits. Should the applicant come back and say they have decided to withdraw the modification, at that point the question for the Board solely will revolve around the newly discovered residence.

Mr. Ward said he disagreed as they have a permit that is good until December 10, the last day of the previous extension. He feels the Board will not be able to make a decision on the modification before that date. He asked Mr. Spitzer what would happen if they don't get the modification before the deadline. Will they be out of their permit? Mr. Spitzer answered that is not this Board's issue. The law is very clear this Board has very limited ability to change a permit if there have been no changed circumstances; however, the applicant has changed the circumstances and the Board is making a determination on the applicant's request.

Mr. Kavanagh seconded the motion. Ayes all. Carried.

New Business

3. Referral from the Town Board: Zoning Map amendment to rescind Wind Overlay District

Mr. DeFiore made a recommendation that the Planning Board respectfully decline to make a recommendation to the Town Board and return it back to them with that.

Mr. Kavanagh moved to respectfully decline to make a recommendation to the Town Board to rescind the Wind Overlay District. 2nd by Mr. Hellier. Ayes all. Carried.

Due to time constraints of board members, it was decided by the Board to continue the Zoning Ordinance update discussion at the October 24, 2012 meeting previously scheduled.

Mr. Hellier made a motion to adjourn. 2nd by Mr. Kavanagh. Ayes all. Carried.

| The meeting was adjourned at 8: 05 PM.

Respectfully submitted,

A handwritten signature in blue ink that reads "Lynette K. Semsel". The signature is written in a cursive style with a large initial "L".

Lynette Semsel
Secretary