

Town of Allegany Planning Board Meeting Minutes

June 11, 2012 at 7:00 PM Senior Center, Birch Run Rd.

Present:

Frank DeFiore, Chairman
Peter Hellier
Rick Kavanagh
Helen Larson
John Sayegh

APPROVED July 9, 2012

Also Present:

John Hare, Town Supervisor; David Koebelin, Ed Allen, Jim Hitchcock, David O'Dell, Town Board; Carol Horowitz, Town Planner; Kevin Sheen, Jim Muscato, Esq., Everpower; Daniel Spitzer, Esq. Charles Malcolm, Esq., Nick Pircio; Kate Day-Sager; Cathy Koebelin; Don Sue; Charles Fortuna; Lynette Semsel, Secretary; Townspeople

Mr. DeFiore opened the meeting with the Pledge to the Flag at 7:00 PM. He then asked if there were any corrections or changes to the minutes of May 14, 2012.

Mr. Hellier made a motion to approve the minutes of the March 12, 2012 meeting with a minor correction. 2nd by Mr. Kavanagh. Ayes all. Carried.

Allegany Wind LLC: Request for extension of Special Use Permit and Site Plan

Mr. DeFiore reminded everyone this is not a public hearing. He mentioned the Board has received a number of correspondence from various sources.

Having received a Site Plan and Special Use Permit extension request from Everpower LLC and having discussed any concerns with representatives of Everpower LLC and Daniel Spitzer, Esq., special counsel for the Town of Allegany, having an opportunity to review all other documentation that was submitted to this Board for review and with the reassurance from Everpower LLC and because of no submission of any variation and/or changes to the SEQRA approval July 2011, Mr. DeFiore made the following motion:

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 commenced construction in furtherance of the special use permit and site plan approvals; and

WHEREAS, the Applicant has 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;

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

1. **The Planning Board hereby extends the Applicant’s special use permit and site plan approval for the Project until the earlier of: (i) one year from the date this Resolution is adopted, or (ii) ninety days following the conclusion of the current litigation over the Project.**
2. **For purposes of paragraph 1, current litigation means the Article 78 proceeding commenced in Cattaraugus County entitled *Concerned Citizens of Cattaraugus County et al. v. Town of Allegany et al.*, Index No. 2011-79455.**
3. **For purposes of paragraph 1, conclusion includes, but is not limited to (i) voluntary withdrawal of the appeal by the petitioners/appellants; (ii) failure of the petitioners/appellants to perfect their appeal within nine (9) months of filing and service of the notice of appeal; (iii) a final determination of the Appellate Division, Fourth Department that is not timely appealed pursuant to the CPLR; (iv) petitioners/appellants have been denied leave to appeal to the Court of Appeals by the Appellate Division, Fourth Department and have not timely sought leave of the Court of Appeals; (v) petitioners have been denied leave to appeal to the Court of Appeals by the Court of Appeals; and (vi) a final determination by the Court of Appeals.**

Mr. Kavanagh seconded the motion.

Mr. DeFiore then asked for further discussion.

Mr. Hellier: Dan, what is the procedure if the applicant makes any changes to the project?

Mr. Spitzer: If the applicant proposes any changes to the project that was approved by the Planning Board, they must come back to the Planning Board to seek an amendment of the approval.

Mr. Hellier: And what does that entail?

Mr. Spitzer: It depends on what the changes are and it is really up to you what it entails.

For example, if they were to come back with a new turbine, I would suspect that CRA at a minimum would want to see a new noise study, a visual study, a new shadow flicker study. If they want a taller turbine or a taller blade, you would certainly have those same types of questions. If they wanted to move one turbine five feet, it might be those three same questions just for that one turbine. What your response would be would be based on whatever they asked for. The more potentially significant impacts, the more that your review may entail. That is totally up to the Board to determine what the scope of the review of any amendments to these permits should be.

Mr. Sayegh: Can you please explain the paragraph one. What does it mean that we are extending one year or ninety days, whichever comes first?

Mr. Spitzer: They requested a one year extension. So one year from today would mean that they would have to start construction within one year of today. The Board has said, since the original

request focused on the end of litigation as part of the issue, that should the litigation end prior to that one year, then we expect construction to start within ninety days of the end of the litigation.

Mr. Sayegh: Do you think, in your opinion, the project still the same as what was previously approved?

Mr. Spitzer: Based on the record that has been submitted, yes. It is still legally the same project.

Mr. Kavanagh: Dan, would it be too much to, I would say as it actually is a speculation that, within the permit guidelines of coming back, would the action come back in front of the Town Board for the road use agreement before any application with the extension of the permit would come back to us?

Mr. Spitzer: It depends on what is requested.

Mr. Kavanagh: I guess what I am asking for is: more than likely the action will come back in front of the Town Board before it came back to us.

Mr. Spitzer: If it is solely talking about roads, the Town Board has approved one specific route. There was an application to change one of the routes. They have since told us specifically at this meeting they are withdrawing that request. If the Town Board is solely asked to evaluate a route which was already considered on the SEQRA, then it would only go to the Town Board. By the way, the Town Board certainly would have the right to ask your opinion even though it is their change, that is up to the Town Board, always. Again as we are speculating, if an amendment to the routes created other impacts not reviewed previously, they would require at least for you to look at whether or not to reopen SEQRA.

Mr. Hellier: What are the ramifications of a yes and no vote tonight on this extension? You made the statement that, in your opinion, nothing has changed. If we voted this down, would it stand up in court?

Mr. Spitzer: The cases we have uncovered indicate that Planning Boards, different than Town Boards, in order to change a yes vote to a no vote, have to have a reason why the conditions that they said were previously met are no longer met. If in fact there has been no change in circumstances and no change in the actual operation, the court opinions that we previously circulated to the Board as our legal opinion indicate there is not a basis for turning down this request, particularly the first request. The ramifications are: if you turn this down, they have no authority to build in the town, they are unable to build their project because their permits have ceased. A no vote means they don't get their extension and their permits have expired. They have no authority to be issued a building permit. A yes vote does not change the project but it gives them the time periods that are laid out in the resolution to commence construction.

Mr. Hellier: Are you effectively telling us that, with no changes to the project, we kind of are under the gun to vote yes for the extension?

Mr. Spitzer: If the board cannot identify reasons why it certified yes to the various questions when it approved, then there is no record supporting a no vote. All things the Planning Board does, there must be a record based on substantial evidence that supports its determination. Based on the case law, absent factual changes in the application, there does not appear to be any basis for changing your vote at this time. I would note, in that regard, most of these submissions you received really were just disagreements with your original decision. Absent factual determination that there has been a change in the application, there is very limited authority to revisit that determination.

Mr. Hellier: We are kind of under the gun, then.

Mr. Spitzer: To a certain extent, the New York Courts have given very limited authority under the code the way your code is written to say no to at least the first extension where there have been no changes in the application.

Since there were no other questions, Mr. DeFiore called for a vote:

Mr. Sayegh: Aye. Mr. Kavanagh: Aye. Mrs. Larson: Aye. Mr. Hellier: Aye. Mr. DeFiore: Aye. Carried.

Other Business

St. Elizabeth Motherhouse

Mark Boehlke emailed Carol Horowitz with a request on the St. Elizabeth Motherhouse site plan. Mrs. Horowitz said, in general, they have to build the project the way it is approved; on the site plan, there is a proposed 6 ft. privacy fence at the rear of the property, almost directly behind the main entrance and around an area that contains a shed, generator and fuel tanks. Due to this area being hidden from view and at the back of the building, they feel the fence does not seem necessary and the Sisters are considering not putting it up. They have requested approval for this change. Mrs. Horowitz stated the Planning Board did not require the fence. The Board felt it was a minor change and, unless it was a requirement by the fire department, they decided to allow it.

Mr. Sayegh made a motion to allow St. Elizabeth Motherhouse/Hoffman LLC to remove the fence unless it is a requirement by the fire department. 2nd by Mr. Hellier. Ayes all. Carried

Wellhead Protection Plan

Mrs. Horowitz had a meeting with Chris Crawford and Lance Jobe on Friday, June 8. Chris is also working with the Town of Carrollton to identify their wellhead protection areas. He did computer modeling and determined part of the protection area is in the Town of Allegany. Carol showed the map to the Board to indicate where the wellhead protection areas overlap in the two towns. Mrs. Horowitz said that much of the land is oil land.

Mr. Hellier asked what would happen if the Town of Carrollton's wellhead protection is far more restrictive than ours, or vice versa. Mr. Sayegh felt the County Planning Board should be taking the lead on the Wellhead Protection for the whole county rather than the Health Department.

Mr. Hellier said, if the county got involved and they looked at all the water systems, made a system of wellhead protection, had someone like Chris develop the maps, then they would have a county overlay of all the wells in the county.

Mr. Sayegh asked why the Planning Board is looking at this. Mrs. Horowitz answered the end goal is to develop an overlay wellhead protection district that would be more or less the same in terms of regulations for both the Town and the Village of Allegany to protect the Village's water wells from potential contamination from different kinds of land uses. Mr. Sayegh suggested the county come up with a plan that would be comprehensive and then they can leave it up to the individual towns and villages to adopt something that would they can live with. Mr. Sayegh asked Mrs. Horowitz to speak with Paul Bishop.

Zoning ordinance update:

Discussion of Schedule A

One of the two areas designated R-2 does not seem to make any sense as it has no access. It is cut off by the railroad track, by I-86 and it is cut off by the strip of R1 along North 7th Street.

Auxiliary dwellings are basically a “granny flat” or an in-law apartment. Accessory apartments, generally the standard term, when allowed are there permanently but our ordinance allows them as a temporary use only; therefore, a special use permit must be obtained from the Planning Board even though they are a permitted use in the R-2. This conflict between permitted versus special use permit needs to be resolved.

The decision was the R-2 zoning district was redundant. Delete the R-2 zone and allow two-family dwellings in C-1 and Ag-Forest.

The board also felt that the model spreadsheet from Great Valley is easier to read than the present spreadsheet used by the Town of Allegany.

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

The meeting was adjourned at 8:45 PM

Respectfully submitted,



Lynette Semsel
Secretary