

STATE OF NEW YORK COUNTY OF ORLEANS
SUPREME COURT

K&W ENTERPRISES,
CHRISTOPHER WATT, and
KAREN D. WATT,

Plaintiffs/Petitioners

vs.

Index No. 13-41436

TOWN OF GAINES
TOWN OF GAINES ZONING
BOARD OF APPEALS,

Defendants/Respondents

Frank A. Aloï, Esq.

Attorney for Plaintiffs

Hodgson Russ, LLP

Attorneys for Defendants

Danielle C. Cordier, Esq.

Attorney for NYS Department of
Agriculture & Markets

JAMES P. PUNCH, Justice Presiding

DECISION AND ORDER

The Petitioners in this matter have moved this Court to renew and re-open their Article 78 proceeding to annul and set aside the Decision and Findings of the Town of Gaines Zoning Board of Appeals (“ZBA”) by reason of the Notice, Determination, and Order of the NYS Commissioner of

Agriculture & Markets. The Respondents appear in opposition.

At the court appearance and oral argument of this matter, the Court issued its decision to re-open the matter based on the fact that the determination of the NYS Commissioner of Agriculture & Markets was not final when the Court issued its previous decision. After the Court appearance, the Department of Agriculture & Markets requested an opportunity to submit an amicus curie memorandum of law, which the parties consented to, provided that each had an opportunity to respond to the same. Additional submissions were subsequently received by the Court.

The Respondents argue that the ZBA's determination and judicial review are based upon the record and that the subsequent administrative processes of the Department of Agriculture and Markets are not relevant; that the Court was aware of the Department's position, which was presented in the form of affidavits, when it issued its Decision and Order; and that Petitioners' argument, in the previous proceeding, revolved, in part, around the AML § 305-a and whether the ZBA's determination was unreasonable in light of the statute's agricultural protections. The Respondents argue that the Department based its determination on the fact that moving the turbine would be unduly

burdensome, and not on public safety. The Respondents state that NY Town Law §274-a(4) is limited by AML § 305-a(1)(a) as the local governments shall not unreasonably restrict or regulate farm operations within agricultural districts...unless it can be shown that the public health or safety is threatened. The Respondents argue that locating the turbine away from the areas where the public is invited does not unreasonably restrict the farm operation and even if the ZBA's setback requirement is unreasonably restrictive, it is necessary to protect the public health and safety.

The Petitioners argue, in response, that the Order of the Department of Agriculture & Markets did not become final until some 3 months after this Court's Decision and Order and, therefore, the Petitioners are able to argue based on the now final Determination and Order of the Department of Agriculture and Markets, that there has been an error of law, which is the failure of the Respondents to accord due deference to a final Order and Determination of the Department of Agriculture and Markets pursuant to AML §305-a(1). Petitioners further argue that there has been a final determination by the Order and Determination of the Department of Agriculture and Markets that the position the Respondents is unduly restrictive and that therefore, the

burden should then shift back to the Respondents to show a threat to public health and safety. The Petitioners argue that no such showing has been made.

The Court has reviewed all submissions and makes the following findings: At the time that the initial Article 78 proceeding the issue before this Court was whether the determination issued by the Respondents was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion. Although the advisory letters issued by the Department of Agriculture and Markets were submitted to the Court during the first proceeding, there was no Determination and Order issued by the Department at the time of the December 2014 Decision and Order of this Court. In its December 2014 Decision and Order, this Court confirmed the decision of the Town of Gaines Zoning Board of Appeals. After the issuance of that Decision and Order, the Department of Agriculture and Markets issued a Determination and Order which concluded that the "Town's administration of its Wind Energy Facilities Law with respect to K&W Enterprises unreasonably restricts the farm operation in violation of AML § 305-a" and further that "[a]lthough given the opportunity to do so, the Town and the Zoning Board of Appeals have not shown that the wind turbine

must be removed to protect against a threat to the public health or safety.” The Determination and Order further ordered that pursuant to the provisions of AML §36, that the Town of Gaines and the Town’s Zoning Board of Appeals comply with the provisions of AML §305-a(1) by not administering any of the provisions of the ZBA’s December 12, 2013 Findings and Decision that require K&W Enterprises to relocate the wind tower from its present location. The Determination and Order, which is now final, is binding on the Respondents and, in fact, supercedes the local ordinance (see AML §36; Matter of the Village of Lacona v. NYS Department of Agriculture and Markets, 51 AD3d 1319 [3rd Dept., 2008]; Matter of Inter-Lakes Health Inc. v. Town of Ticonderoga, 13 AD3d 846 [3rd Dept., 2004]). That Determination and Order had not been issued at the time of the December 2014 Decision and Order and; therefore, was not binding on the Respondents. Once the Determination and Order was issued and became final, it became binding on the Respondents. Therefore, the Court finds that as the Determination and Order orders non-enforcement of the provisions of the Zoning Board of Appeal’s December 12, 2013 Findings and Decision that require K&W Enterprises to relocate the wind tower from its present location; that it renders

the actions which were previously challenged in the initial Article 78 unenforceable; and that it is proper for this Court to grant the Article 78 and to order compliance with the Determination and Order.

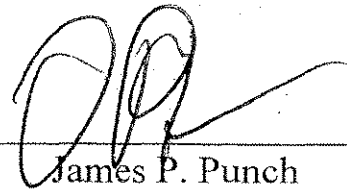
Accordingly, it is hereby

ORDERED that the Article 78 proceeding is granted; and it is further

ORDERED that the Respondents must comply with the Determination and Order issued by the Department of Agriculture and Markets, dated January 13, 2015.

ENTER

Dated: December 11, 2015



James P. Punch
Acting Justice of the Supreme Court