

In the Matter of the Application of
THE TOWN OF CLARENCE and the TOWN OF
CLARENCE ZONING BOARD OF APPEALS,

Petitioners,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

DECISION
AND
ORDER

-against-

RICHARD A. BALL, as Commissioner of the New
York State Department of Agriculture and Markets, THE
NEW YORK STATE DEPARTMENT OF
AGRICULTURE AND MARKETS, KENNETH
THOMPSON and DAWN TRIPPIE, individually and
d/b/a THOMPSON BROTHERS GREENHOUSE, CEC
ENERGY, a Division of Cazenovia Equipment Co., Inc.
And UNITED WIND, INC.,

Respondents.

(Supreme Court, Albany County, Special Term, November 6, 2015)
Index No. 3102-15
(RJI No. 01-15-ST6943)

(Acting Justice Michael H. Melkonian, Presiding)

APPEARANCES: Jaeckle, Fleischman & Mugel, LLP
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MELKONIAN, J.:

Petitioners/plaintiffs the Town of Clarence (the "Town") and the Town of Clarence Board of Zoning Appeals (the "ZBA") (hereinafter collectively referred to as "petitioners") commenced this combined declaratory judgment action/CPLR Article 78 proceeding seeking a review of a determination of respondents/defendants the New York State Department of Agriculture and Markets (the "Department") and Richard A. Ball, as Commissioner (the "Commissioner"), dated June 30, 2015, which found that petitioners' zoning ordinance unreasonably restricted respondent the Thompson Brothers Greenhouse's farm operation by

refusing to grant a variance to build a 153-foot wind turbine to provide electric power to its greenhouse operation. Petitioners allege that the Commissioner's determination is affected by an error of law and is arbitrary, capricious and an abuse of discretion. Respondents Kenneth Thompson and Dawn Trippe, individually and d/b/a Thompson Brothers Greenhouse ("Thompson Brothers" or the "greenhouse") move to dismiss the petition and also move to strike certain documents on the grounds that they add new information not part of the record of the administrative proceeding.¹ The Department opposes the petition and asserts objections in point of law seeking dismissal of the petition on the grounds that it fails to state a cause of action.

Thompson Brothers is a greenhouse operation with 17 greenhouses (approximately two acres under cover) located on 18.9 acres within Erie County Agricultural District No. 14. Thompson Brothers produces horticultural crops year round, the main crop being spring annuals/perennials and shrubs. A portion of the property is also used for composting. Thompson Brothers produces approximately 4,000 mums and 4,000 poinsettias; sells hand-

¹ Rather than request revocation or modification of the Commissioner's determination, petitioners sought court review via CPLR Article 78. The record of this matter was closed when the Commissioner issued his June 30, 2015 Determination and Order (see, Matter of Featherstone v Franco, 95 NY2d 550, 554 [2000]). Petitioners' exhibits 3, 4, 6, 9, 14, 15, 16 and 21 were not part of the original documentation provided by petitioners during the investigation of this matter and cannot be considered here (see, Matter of Lippman v Public Empl. Relations Bd., 296 AD2d 199, 203 [3rd Dept. 2002], lv. denied 99 NY2d 503 [2002]). Notwithstanding, most of the information/documents contained within these exhibits are irrelevant, speculative and/or conclusory and do not add any new information to the record.

made wreaths and Christmas trees; and intends to plant a small apple orchard on the property to enhance their fall mum sales. Its business consists of approximately 60% on-site retail and 40% wholesale; and Thompson Brothers reports that gross sales for 2014 were \$500,000.

To provide the electricity for its greenhouse operation, Thompson Brothers decided to erect a wind turbine with a 140 foot tower. The Town Code Chapter 173-4(C), provides that towers "...shall not exceed 60 feet in height as measured from the average ground surface surrounding the site of the tower." On July 23, 2014, Thompson Brothers submitted an 80 foot area variance request. On August 12, 2014, the ZBA denied the area variance request. On October 2, 2014, Thompson Brothers submitted a second request to the ZBA for a 73.5 foot variance to allow the construction of a 133.5 foot wind turbine. The ZBA denied this request on April 27, 2015.

In October, 2014, Thompson Brothers sought an opinion from the Commissioner regarding whether the Town's administration of its Town Code unreasonably restricted its farm operations and requested that the Department conduct an Agriculture and Markets Law ("AML") § 305-a review.

By letter dated October 24, 2014, the Department informed the Town and the ZBA that the Department had received Thompson Brothers' request for an AML § 305-a review, described the Department's AML § 305-a review process, and requested that the Town submit any information or documentation that it would like the Department to consider. On November 6, 2014, the Department conducted its investigation – it visited the greenhouse,

observed the farm structures and observed the proposed location of the wind turbine and neighboring non-farm development. The Department confirmed that Thompson Brothers is indeed a farm operation and that the proposed site for the turbine was within Erie County Agricultural District No. 14.

By letter dated February 4, 2015, the Department determined that Thompson Brothers meets the Department's standard for AML § 305—a protection as a “farm operation” and that wind turbines are treated as either on-farm-equipment or an on-farm building (depending how the Town classifies wind turbines); and that the proposed wind turbine would supply a portion of the greenhouse's electrical needs not exceeding 110% of its anticipated need. The Department further advised that the Town's Code as administered unreasonably restricts the farm operation in possible violation of AML § 305—a(1), but invited the Town and the ZBA to provide any documentation and other evidence that the public health or safety is threatened by the proposed wind turbine.

By letter dated February 17, 2015, the Town responded, setting forth its position that: (a) granting a height variance is not a Type II Action under SEQRA or the Town's Environmental Quality Review Law (TEQR), but rather is an “Unlisted Action;” (b) the proposed wind turbine would provide power to a residential structure outside the agricultural district, providing the greenhouse with a minimal amount of power; and (c) that the site of the greenhouse was in an increasingly residential area, and, therefore, presented a different situation than the variance granted for a 140 foot tower on agriculturally zoned property

located elsewhere in the Town.

By letter dated March 17, 2015, the Department informed the Town and the ZBA that it had concluded that the denial of the area variance, the prohibition of the construction of a tower on a lot that does not contain a primary structure, requiring the noise generated from the turbine to be less than or equal to the nighttime ambient level as measured from the property line, and the classification of the tower as an unlisted action under SEQRA and TEQR unreasonably restricts the farm operation in violation of AML § 305-a(1). The Department further concluded that the Town and the ZBA did not demonstrate that the public health or safety is threatened by the proposed wind turbine.

On June 30, 2015, the Commissioner issued an order compelling the Town to comply with AML § 305-a by permitting Thompson Brothers to build the 153-foot wind turbine. This proceeding ensued.

AML § 305-a(1)(a) directs that local governments “shall not unreasonably restrict or regulate farm operations within agricultural districts in contravention of the purposes of this article unless it can be shown that the public health or safety is threatened.” Where the “interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute” (Town of Lysander v Hafner, 96 NY2d 558

565 [2001] [citations omitted]). In reviewing an administrative action, the Court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether the administrative determination is rational and supported by the record (see, Flacke v Onandaga Landfill Systems, Inc., 69 NY2d 355, 363 [1987]; Plante v New York State Department of Environmental Conservation, 277 AD2d 639 [3rd Dept. 2000]).

The Court rejects petitioners' contention that Commissioner was required to commence an action prior to enforcing AML § 305-a(1) (Town of Butternuts v Davidson, 259 AD2d 886 [3rd Dept. 1999]).

The Court also rejects petitioners' contention that the Commissioner was without the authority to enforce the provisions of AML § 305-a(1) (AML § 305-a[1]; Matter of Inter-Lakes Health, Inc. v Town of Ticonderoga Town Bd., 13 AD3d 846, 847-848 [3rd Dept. 2004]; Village of Lacona v State, Dept. of Agr. and Markets, 51 AD3d 1319 [3rd Dept. 2008]).

Finally, petitioners have wholly failed to demonstrate that their restriction on the proposed wind turbine is necessary to protect the public health or safety (AML § 305-a[1][a]).

The Court concludes that the Department's investigation was thorough and considered all of the objections and concerns raised by petitioners and properly determined to grant the

variance for the wind turbine. The Commissioner was entitled to rely on the investigation of and recommendations of the Department's staff and reject petitioners' data and the conclusions drawn therefrom (see, Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead, 98 NY2d 190, 196 [2002]; Saratoga Water Servs. v Zagata, 247 AD2d 788, 790 [3rd Dept. 1998]; City of Rensselaer v Duncan, 266 AD2d 657, 660 [3rd Dept. 1999]).

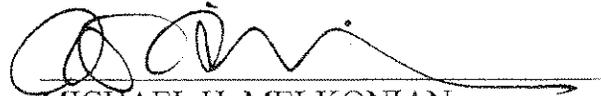
Petitioners' remaining contentions have been considered and are either without merit or not necessary to resolve in light of the foregoing. On this record, the Court finds that the Commissioner's determination and order is not arbitrary, irrational or capricious; it is not based on an error of law nor is it an abuse of discretion.

Accordingly, it is ORDERED that the motion to strike is granted to the extent set forth above; and it is further ORDERED, ADJUDGED and DECLARED that the petition is dismissed.

This constitutes the Decision and Order of the Court. This Decision and Order is returned to the attorneys for Thompson Brothers. All other papers are delivered to the Supreme Court Clerk for transmission to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry. Memorandum constitutes the Decision and Order of the Court.

SO ORDERED.
ENTER.

Dated: Troy, New York
January 5, 2016



MICHAEL H. MELKONIAN
Acting Supreme Court Justice

Papers Considered:

- (1) Notice of Verified Petition and Complaint dated July 27, 2015;
- (2) Verified Petition and Complaint dated July 27, 2015, with exhibits annexed;
- (3) Verified Answer with Counterclaim dated September 25, 2015;
- (4) Verified Answer dated September 25, 2015;
- (5) Notice of Motion dated September 25, 2015;
- (6) Affirmation of Kristen M. Benson, Esq., dated September 25, 2015;
- (7) Affidavit of Kenneth Thompson dated September 25, 2015, with exhibit annexed;
- (8) Affidavit of Dawn Trippie dated September 25, 2015;
- (9) Memorandum of Law dated September 25, 2015, with exhibit annexed;
- (10) Affidavit of Robert Somers dated September 25, 2015, with exhibit annexed;
- (11) Memorandum of Law dated September 25, 2015;
- (12) Memorandum of Law dated September 30, 2015;
- (13) Amended Verified Answer dated October 1, 2015;
- (14) Verified Answer to Counterclaims dated October 23, 2015;
- (15) Reply Memorandum of Law dated October 23, 2015;
- (16) Reply Memorandum of Law dated October 30, 2015, with exhibits annexed;
- (17) Reply Memorandum of Law dated October 30, 2015; and
- (18) Record.

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

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MELKONIAN, J.:

In a Decision and Order dated January 6, 2016, this Court dismissed the underlying petition. As such, the proposed intervenors' motion is denied as moot.

This constitutes the Decision and Order of the Court. This Decision and Order is returned to the attorneys for Respondents Kenneth Thompson and Dawn Trippe, individually

and d/b/a Thompson Brothers Greenhouse. All other papers are delivered to the Supreme Court Clerk for transmission to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry. Memorandum constitutes the Decision and Order of the Court.

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