



Zoning Ordinance adopted in 1983 and as amended in 2011, including §728, "Wind Energy Facilities."

## FINDINGS

1. On August 30, 2011, the Department received a request from Chris Watt, owner of K&W Enterprises fruit farm, for a review of the Town of Gaines Local Law No. 1 of 2008 (Wind Energy Facilities Law) for compliance with AML §305-a. Mr. Watt stated that on June 10, 2011 he was issued a building permit from the Town of Gaines to construct a 140 foot tall lattice tower to support a 10 kW wind turbine for the production of electricity on his farm. Mr. Watt stated that construction began after the issuance of a building permit and the turbine was operational on August 25, 2011. Mr. Watt indicated that he was concerned that the Town was going to revoke his building permit and require a special use permit.
2. K&W Enterprises' fruit farm consists of six parcels in three towns where different types of fruit are grown. Some of the fruit is sold wholesale; while the retail sales facility is located in the Town of Gaines. The retail sales facility parcel, the subject of this review, is located on Oak Orchard Road in the Town of Gaines and consists of approximately 99 acres. This parcel contains approximately 80 acres of fruit trees, a cold storage facility, a retail farm store, equipment/fertilizer barn, wind turbine, office, 20 bushel fruit bins, exterior lighting and a staging area for farm workers. Mr. Watt indicated that his entire farm operation consists of 295 acres. He reports that average crop yields include 110,000 bushels of apples, 700 bushels of pears, 2,000 bushels of peaches, 100 bushels of nectarines, 16,000 pounds of cherries, and 5,000 pounds of plums and apricots. Mr. Watt processes some of the fruit to produce juice, cider, jams, donuts and toppings for ice cream at the Oak Orchard Road location. Based upon documentation submitted, conversations with Mr. Watt and site investigations, the Department determined that K&W Enterprises is a "farm operation" for purposes of AML §305-a(1). Department staff confirmed that the parcel in question is located within Orleans County Agricultural District No. 3, a county adopted, State certified agricultural district.
3. The Town of Gaines Planning Board meeting minutes dated September 12, 2011 state that the Planning Board received three site plan applications from three individuals (Kast, Kirby, and Watt) for the construction of wind towers on their property. The minutes reflect that all three towers exceeded the setbacks required in the Town of Gaines Wind Energy Facilities Law and the guidelines issued by the Department of Agriculture and Markets (*Guidelines for Review of Local Laws Affecting Small Wind Energy Production Facilities*, dated 12/22/06, subsequently updated on 9/18/12).
4. Minutes of the Planning Board's October 3, 2011 meeting indicate that Planning Board Chairman Ahlberg stated that the Kast, Kirby and Watt turbines met the required setbacks, one turbine was to be constructed on each farm, and site plan review was waived due to a hardship created if the applicants lost grant funding to construct the turbines and supporting towers. The Board's November 7, 2011 meeting minutes reflect that the September 2011 meeting minutes were modified to add that the Planning Board members all had copies of the site plans for all three applications (Kast, Kirby and Watt).

5. On or about October 13, 2011, the Town of Gaines Planning Board and Mr. Watt were sued by the adjacent neighbors (Neilans).
6. On or about October 17, 2011, the Department closed its file on Mr. Watts' AML §305-a review of the Town's Wind Turbine Facilities Law. Department staff concluded that Mr. Watt received approval for and constructed the wind turbine and it appeared that the Town was not restricting the farm operation.
7. Mr. Watt and the other two wind turbine applicants (Kast and Kirby) were required to submit to Planning Board review again. According to the minutes of the Town of Gaines November 18, 2011 Planning Board meeting, the Board adopted a resolution approving the site plan for the Watt wind tower.
8. On December 4, 2011, Dan Spitzer, Esq. attorney for the Town of Gaines, requested that the Department provide an Affidavit in Support of the Town Planning Board's approval of the turbine. On December 7, 2011, Dr. Robert Somers, Manager of the Department's Agricultural Protection Unit, submitted an Affidavit in Support in the legal action brought by the Neilans (an Article 78 proceeding - *In the Matter of Neilans vs. Planning Board of the Town of Gaines, et. al., and Christopher Watt*). Dr. Somers' Affidavit describes the Department's AML §305-a process, its findings that wind turbines used to supply a portion of the farm's electrical needs are considered by the Department to be on-farm equipment, and the Department's view that since the Town's site plan review process appeared to be consistent with AML §305-a, the Department's initial AML §305-a review did not proceed. The Department also described Agricultural Data Statement requirements as contained within AML §305-a(2).
9. According to Resolution 10-12 dated January 2, 2012, the Town Board of the Town of Gaines abolished the Town of Gaines Planning Board. The Town of Gaines adopted a local law transferring authority to review site plans and approve special use permits to the Town of Gaines Zoning Board of Appeals (ZBA).
10. Dr. Somers suggested to Mr. Watt that he have an energy audit performed to determine whether his turbine is used solely for agricultural purposes. On September 10, 2012 C. J. Brown Energy, P.C. performed an "energy audit" for K&W Enterprises, located at 3107 Oak Orchard Road, Albion, New York; the report was issued and dated September 17, 2012. The audit concluded that the turbine only provides a small amount of the energy consumed by the agriculturally related equipment in the farm market and his farm operation.
11. On September 21, 2012, the Department provided a second Affidavit in Support of the Gaines Planning Board's action approving Mr. Watt's wind turbine in the legal action brought by the farm's neighbors, the Neilans (*In the Matter of Neilans vs. Planning Board of the Town of Gaines, et. al., and Christopher Watt*). Dr. Somers described the Department's role with regard to administering Article 25-AA, the Department's site investigation, and the Department's position that wind turbines are considered on-farm equipment and protected under AML§305-a. Dr. Somers stated that the turbine appeared to be used "solely for

agricultural operations"; the amount of electricity generated by the turbine does not exceed the electrical needs of the farm and, therefore, is consistent with the Department's wind energy guideline; and the tower/turbine is considered on-farm equipment and part of Mr. Watt's farm operation for purposes of AML §305-a.

12. On January 3, 2013 Orleans County Acting Supreme Court Justice James P. Punch issued a Decision and Order in the Neilans' Article 78 proceeding and remanded the matter (the installation of Mr. Watt's wind turbine) to the Town ZBA for further review and proceedings.

13. On or about January 2013, Mr. Watt requested the Department to resume its AML §305-a review of the Town of Gaines' Zoning Ordinance and its application to his farm operation.

14. By letter dated February 4, 2013, the Department informed Town Supervisor Carol Culhane and ZBA Chair Michael Grabowski that it was renewing its AML §305-a review of the Town's Zoning Ordinance and its application to K&W Enterprises. The Department reiterated that it is not a party to the Neilans' lawsuit and the Department's enforcement of AML §305-a was not at issue in that Article 78 proceeding. The correspondence describes the Department's position that the turbine is agricultural equipment and that it should not require a special use permit; should be designated a Type II Action under SEQRA; and not be subject to height restrictions and lengthy site plan review. The Department concluded the letter by stating that it would review the Town and/or ZBA's decision regarding Mr. Watt's wind turbine. The Department also requested that the Town and ZBA respond to comments made by the Department within 30 days. The Department did not receive any correspondence from the Town or the ZBA.

15. On June 24, 2013, the Town's attorney, Mr. Spitzer, sent K&W Enterprise's attorney, Lance Mark, a letter stating that the Town's ZBA, in compliance with Judge Punch's Decision and Order, would hold a public hearing on August 5, 2013 to evaluate Mr. Watt's application.

16. On July 17, 2013, Dr. Somers sent ZBA Chair Grabowski a letter re-stating that the Department would review the ZBA's decision. The letter describes the Department's position regarding special use permits, height limits and lengthy site plan review requirements for Mr. Watt's wind energy facility.

17. On July 19, 2013 Mr. Spitzer sent Dr. Somers an e-mail concerning the Watt wind tower. Mr. Spitzer stated that the Town Law would not require Mr. Watt to submit to a Special Use Permit nor engage in any of the other practices addressed in Dr. Somers' letter to the ZBA. Mr. Spitzer attached a July 19, 2013 letter from him to attorney Lance Mark and a copy of the Town's Local Law No. 1 of 2008, entitled Wind Energy Facilities. Mr. Spitzer stated that because the public has access to part of Mr. Watt's farm, Dr. Neilans mounted a legal challenge and asked Mr. Mark to address the issue of public safety directly at the August 5<sup>th</sup> public hearing.

18. On August 5, 2013 the ZBA held its public hearing on Mr. Watt's application.

19. On December 4, 2013 the Town of Gaines ZBA issued its Decision on Mr. Watt's application. The ZBA determined that the wind turbine is part of an agricultural operation; the ZBA indicated it did not believe that the Applicant would comply with public safety provisions unless the ZBA clearly directed where the turbine may be placed; and the ZBA found that the turbine should be placed away from areas used by the public and not closer than 169.4 feet from public use areas on the farm.

20. On or about December 30, 2013, Mr. Watt's attorney filed an Order to Show Cause and Article 78 Petition on behalf of K&W Enterprises, Christopher Watt and Karen D. Watt against the Town of Gaines and the Town of Gaines ZBA challenging the ZBA's Findings and Decision adopted on December 4, 2013.

21. On January 24, 2014 the Department issued a letter to ZBA Chair Michael Grabowski stating that the ZBA's December 4<sup>th</sup> Decision that required Mr. Watt to relocate the wind turbine at least 169.4 feet from the farm market, train ride, corn maze and designated u-pick areas and not approving the site plan until the turbine is relocated, unreasonably restricted the farm operation in possible violation of the AML §305-a(1). The ZBA also found that the electric controls for the turbine must be installed in accordance with an electrical permit and in a building that has received a building permit from the town. The Department informed the Town that the structure in question was built pursuant to a building permit, it received a Certificate of Compliance, and it was inspected and found to be in compliance with the Building Code of New York State. In a subsequent letter dated April 25, 2014, the ZBA's attorney, Mr. Spitzer, acknowledged that the ZBA agreed that the 'electric controls building issue has been resolved.' As a result, the Department will not address this issue in this Determination and Order. The Department's January 24, 2014 letter provided the following comments concerning the ZBA's Findings and Decision:

a. The Department wrote that in the ZBA's decision, the Board stated that the "Local Law contains a 1.5 times the height of the tower setback from property lines... ." Town of Gaines Zoning Ordinance Section 728.L(1) states that "[a] small WECS shall not be located closer to a property line than one and a half times the Total Height of the facility." Department *Guidelines for Review of Local Laws Affecting Small Wind Energy Production Facilities and Solar Devices*, dated September 18, 2012, states that such towers should be setback 1.1 times the combined height of the tower and blades from property lines and power lines<sup>1</sup>. The current location of the tower exceeds both the Town and the Department of Agriculture and Markets setback distances from property lines and power lines.

b. The ZBA determined that the separation distance from the tower to the farm market, train route and u-pick areas must be 1.1 times the height of the tower (i.e., 169.4 feet as calculated by the ZBA). The only separation distance specified in the Town's Ordinance is

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<sup>1</sup> *Guidelines for Review of Local Laws Affecting Small Wind Energy Production Facilities* issued by the Department of Agriculture and Markets prior to September 18, 2012 provided that towers should be setback 1.5 times the combined height of the tower and blades from existing structures and property *not owned* by the farm. The Department's guideline was amended to be consistent with revised siting requirements established by NYSERDA.

from a property line [Zoning Ordinance §§728.L(1) and 728.E(E)]. The tower set back requirement from the farm market, train route and u-pick area imposed by the ZBA is not pursuant to provisions of the Zoning Ordinance. Furthermore, the ZBA specified distance exceeds the Department's suggested setback from "human-occupied buildings" of five times the rotor diameter; 118 feet (rotor diameter is 23.6 feet x 5), not 169.4 feet <sup>2</sup>. The Department's suggested separation distance from the tower's base to a "human-occupied building" is based upon the recommendation of a five times the rotor diameter setback made by the New York State Energy Research and Development Authority (NYSERDA); which sets standards for the review and placement of small wind turbines on commercial, residential and agricultural properties. Department staff contacted NYSERDA and was informed that NYSERDA does not have a definition of "human-occupied buildings." However, Mark Mayhew, Project Manager for NYSERDA's On-Site Wind Turbine Incentive Program, stated that under this program, that term has only been applied to buildings that are occupied a majority of the time and does not include agricultural structures. The Department informed the ZBA that its requirement that the turbine location exceed 118 feet from human occupied buildings or areas temporarily visited by the public, such as the train ride route and designated u-pick areas, unreasonably restricts the farm operation in possible violation of AML §305-a (1)(a).

c. A review of the ZBA's Findings and Decision and the minutes of the August 5, 2013 Public Hearing suggests that compelling evidence was not presented to show that an additional 51.4 feet from "human-occupied buildings" or from areas visited by the public is required to protect public health or safety. The only Town Code reference to public health and safety for WECS is contained within Zoning Ordinance §728.D(3), which states that the "[r]egulation of the siting and installation of wind turbines is necessary for protecting the health, safety, and welfare of neighboring property owners and the general public." However, the Zoning Ordinance Development Standards (§728.K) and Standards (§728.L) Sections only include setback requirements from a property line [§728.L(1)] and noise limits [§728.L(2)]; i.e., decibel levels measured from the nearest off-site dwelling.

d. According to the December 4, 2013 ZBA decision, among the reasons that the ZBA ordered the turbine to be moved was that the "ZBA did not believe that the applicant would comply with public safety provisions unless the ZBA clearly directed where the turbine may be placed." In the Department's view, the farm operation should not be required to dismantle, move and reconstruct the turbine in a new location. The Department notes that the farm market, corn maze and many of the designated u-pick areas identified on the farm's site plan are located beyond the 118 foot setback. The ZBA could condition the site plan by restricting the public from entering the 118 foot setback while the turbine is in operation and requiring periodic compliance checks. Further, to the extent that Mr. Watt allows the public within the setback of the turbine, or otherwise does not comply with the site plan, the Town may initiate an enforcement action against him. The Department concluded that requiring the removal and relocation of the turbine unreasonably restricts the farm operation in possible violation of AML §305-a (1).

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<sup>2</sup> *Guidelines for Review of Local Laws Affecting Small Wind Energy Production Facilities and Solar Devices*, NYS Department of Agriculture and Markets as well as NYSERDA, On-Site Wind Turbine Incentive Program-Program Opportunity Notice (PON) 2439, ["Siting Considerations," page 8 .]

e. The Department stated that if the ZBA believes that the public health or safety is threatened by the current location of the WECS, documentation and other evidence should be submitted to the Department. The Department determined that information contained in the ZBA's Findings and Decision did not demonstrate that the current location of the tower threatens the public health or safety. The ZBA was requested to respond in writing within 30 days of receipt of the Department's letter.

22. In a letter to ZBA Chair Grabowski dated March 12, 2014 the Department stated that it had completed its review. The Department noted that it did not receive any response from the Town to the Department's January 24, 2014 letter asking the ZBA to provide any documentation or other evidence it may have that the public health or safety is threatened by the current location of the wind energy system. The letter concludes that to comply with AML §305-a(1), the ZBA must not require the relocation of the turbine or condition approval of the site plan on relocation of the turbine.

23. Lance Mark, Esq., Mr. Watt's attorney, requested that the Department provide an Affidavit in the Article 78 proceeding brought by Mr. Watt against the Town and the ZBA. Dr. Somers submitted an Affidavit on March 14, 2014, describing background on the Department's AML §305-a process; the findings outlined in the Department's January 24, 2014 letter; and its final letter dated March 12, 2014. The Affidavit further described the fact that the Department never heard from the Town or ZBA regarding public health or safety threats.

24. On or about March 18, 2014 Dan Spitzer, Esq., Town Attorney for the Town of Gaines, contacted the Department and asserted that neither he nor the ZBA Chair, or the Town Supervisor received the Department's January 24, 2014 letter.

25. On March 24, 2014 Department staff convened a conference call with the Town and ZBA's attorney, Dan Spitzer, Esq., Mr. Spitzer's associate Chuck Malcomb, Esq. and ZBA Chair Grabowski to discuss the status of the Department's review and entertain the ZBA's request for an extension to respond to the Department. As a result of that conference call, the Department provided another 30 days to the Town and ZBA to respond to the Department's January 24, 2014 letter.

26. On April 8, 2014, Chuck Malcomb, Esq. (Attorney for the Town) submitted an Affirmation in Further Opposition to the Verified Petition filed by Mr. Watt. Mr. Malcomb asserts that Dr. Somers' March 14<sup>th</sup> Affidavit does not represent an Opinion of the Department and that the Department is in ongoing discussions with the Town including the March 24<sup>th</sup> conference call.

27. On April 11, 2014 Michael Latham, Director of the Department's Land and Water Resources Division submitted an Affidavit to Acting Supreme Court Justice Punch in Mr. Watt's Article 78 challenging the ZBA's decision. Mr. Latham discusses the Department's AML §305-a process and the setbacks in the Department's *Guidelines for Review of Local Laws Affecting Small Wind Energy Production Facilities and Solar Devices*. Mr. Latham also

explained that Mr. Malcomb's Affirmation in Opposition mischaracterized Dr. Somers's March 14<sup>th</sup> Affidavit with respect to the contents of the Department's *Guidelines for Review of Local Laws Affecting Small Wind Energy Production Facilities and Solar Devices*.

28. On April 25, 2014 Mr. Latham received a letter from Mr. Spitzer asserting the Town's public health and safety claims. Mr. Spitzer maintained that the public is using an area close to the tower; he attached a picture of a port-o-potty next to the tower to support this claim; and notes that the tower was constructed illegally. Mr. Spitzer stated that based upon information contained in the Department's January 24, 2014 letter to the ZBA Chair the issue with the electric controls building has been resolved.

29. On June 4, 2014, Mr. Latham wrote to ZBA Chair Grabowski addressing the Town's public health and safety claims raised by Mr. Spitzer. Mr. Latham noted that Mr. Spitzer did not provide any documentation of public health or safety threats from the current location of the wind turbine. Rather, Mr. Spitzer made conclusory statements that the ZBA setback is the proper setback for visitors to the property and areas occupied by visitors. Mr. Latham concluded that it is the Department's position that Mr. Watt's turbine is located in compliance with both the Department's current and pre-September 2012 setbacks. The current Guidelines require a 1.1 setback times the combined height of the tower and blades from the property lines and power lines, which the turbine meets; and a minimum setback between the tower base and any *human-occupied* building of five times the rotor diameter, which the turbine meets.

Mr. Latham further stated that information submitted to the Department (the August 29, 2013 site plan demonstrating the u-pick areas, and the transcript of the August 5, 2013 ZBA public hearing) indicates that members of the public are neither in areas close to the tower nor do they have to be. He indicated that the ZBA's approval could have been conditioned on re-routing the train ride and either limiting the public's access to areas adjacent to the turbine or taking the turbine offline during the relatively limited time frame that the u-pick harvest is operational. Further, in the farm operator's site plan the areas for u-pick are located outside of the Department's recommended setback for the turbine. Mr. Latham also explained that the "port-o-potties" depicted in the photograph which Mr. Spitzer provided are used by the farm's migrant workers (not by the general public) and were being stored near the turbine and not used at that time.

Mr. Latham stated that based upon its review in this matter, the Department concluded that the ZBA's administration of the Town Code, through issuance of its Findings and Order, with respect to Mr. Watt's WECS, unreasonably restricts Mr. Watt's farm operation in violation of AML §305-a(1). The Department concluded that the ZBA had not demonstrated that the public health or safety is threatened by the operation of Mr. Watt's WECS at its present location. Mr. Latham reiterated that to comply with AML §305-a(1), the ZBA must not require Mr. Watt to relocate his WECS from its present location.

30. Mr. Spitzer wrote a letter dated July 7, 2014 to Michael Latham asserting that the Department violated the State Administrative Procedure Act (SAPA) by not conducting an administrative hearing; asserting that the turbine was built without permits; and defending

the ZBA's determination as reasonable, consistent with the Town's zoning code and the Department's guidelines. Mr. Spitzer further stated that the ZBA's determination is entitled to deference.

31. By letter dated July 24, 2014, Department Senior Attorney Danielle Cordier responded to Mr. Spitzer's misstatements in his July 7, 2014 letter, and clarified the Department's AML §305-a enforcement process.

32. On January 6, 2015, Senior Attorney Danielle Cordier discussed the costs to dismantle and move Mr. Watt's wind turbine with Mark Mayhew, Project Manager, On-site Wind Turbine Incentive Program, NYSERDA. Mr. Mayhew informed Ms. Cordier that it would cost approximately \$20,000 to do so.

33. A list of Relevant Documents Considered by the Department is attached to this Determination and Order.

### **CONCLUSION**

Based upon the above findings, I conclude the following:

1. The Town of Gaines Wind Energy Facilities Law and a December 12, 2013 Findings and Decision issued by the Town's ZBA requiring the dismantling and relocation of the turbine require K&W Enterprises fruit farm to expend substantial costs and time, with no apparent benefit to the protection of public health or safety. 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(1).
2. Although given the opportunity to do so, the Town and the Zoning Board of Appeals have not shown that the wind turbine must be moved to protect against a threat to public health or safety. The Department Guidelines establish a minimum setback of five times the rotor diameter from the tower base from any human-occupied building. The Department extended this minimum setback for the train ride, u-pick and public assembly, and offered that the Town could condition approval of the site-plan on restricting the public from areas adjacent to the turbine or taking the turbine offline during the relatively limited time frame that the u-pick harvest is operational; however, this was not accepted by the Town and the Town Zoning Board of Appeals.

### **DETERMINATION AND ORDER**

Now, therefore, in consideration of the above-stated findings and conclusions, it is hereby determined that the Town of Gaines and the Town of Gaines Zoning Board of Appeals have violated AML §305-a(1) and it is hereby

ORDERED, pursuant to the provisions of AML §36 that the Town of Gaines and the Town of Gaines Zoning Board of Appeals comply with the provisions of AML §305-a(1) by not administering any 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 Town may require K&W Enterprises to restrict public access from that portion of the farm operation that lies within 118 feet of the base of the tower or to take the turbine offline during any u-pick harvest that may occur within 118 feet of the base of the tower.

This Order shall take effect immediately upon service of a certified copy thereof on the Town of Gaines and the Town of Gaines Zoning Board of Appeals, by mail to Hon. Carol Culhane, Supervisor, 14087 Ridge Road, Albion, New York, 14411; and by mail to Michael Grabowski, Chair of the Town of Gaines Zoning Board of Appeals, 14087 Ridge Road, Albion, New York, 14411.



RICHARD A. BALL, Commissioner of Agriculture  
and Markets of the State of New York

Dated and Sealed this 13<sup>th</sup>  
day of January, 2015  
at Colonie, New York



- 19) August 29, 2013 site plan (15 pages);
- 20) ZBA decision December 14, 2013 (7 pages);
- 21) Department Guidelines for Review of Local Laws Affecting Small Wind Energy Production Facilities and Solar Devices, September 18, 2012 (3 pages);
- 22) Letter from Michael Latham to ZBA Chair Grabowski, January 24, 2014 (4 pages);
- 23) NYSERDA, On-Site Wind Turbine Incentive Program Opportunity Notice (PON) 2439 (83 pages);
- 24) Letter from Michael Latham to ZBA Chair Grabowski, March 12, 2014 (2 pages);
- 25) Robert Somers Affidavit, March 14, 2014 (4 pages);
- 26) Charles Malcomb Affirmation In Opposition to the Verified Petition, April 8, 2014 (6 pages);
- 27) Michael Latham Affidavit, April 11, 2014 (3 pages);
- 28) Letter from Dan Spitzer to Michael Latham, April 25, 2014 (5 pages with attachment);
- 29) Letter from Michael Latham to ZBA Chair Grabowski, June 4, 2014 (3 pages);
- 30) Letter from Dan Spitzer, Esq. to Michael Latham, July 7, 2014 (3 pages);
- 31) Letter from Danielle Cordier, Senior Attorney to Dan Spitzer, July 24, 2014 (2 pages);
- 32) Aerial imagery Watt Farm dated October 5, 2011 (1 page)