

**STATE OF NEW YORK
DEPARTMENT OF AGRICULTURE AND MARKETS**

**In the Matter of Compelling Compliance with the
provisions of Agriculture and Markets Law
§305-a (1) by**

**Town of Clarence and Town
Of Clarence Zoning Board of Appeals
1 Town Place
Clarence, New York 14031**

**DETERMINATION
AND
ORDER**

PRELIMINARY STATEMENT

On October 20, 2014, Kenneth Thompson and Dawn Trippie, owners of Thompson Brothers Greenhouse, requested that the Department of Agriculture and Markets ("Department") determine whether the Town of Clarence and the Town of Clarence Zoning Board of Appeals administered the Town of Clarence's Satellite Antennas and Towers Law (Chapter 173) in a manner consistent with Agriculture and Markets Law (AML) §305-a (1).

The Department staff visited the farm; obtained information from Dawn Trippie and from the New York State Energy Research and Development Authority (NYSERDA); reviewed the site plan and diagrams submitted by United Wind and CEC Energy; communicated with Town of Clarence Director of Community Development, James B. Callahan; reviewed the Town of Clarence Zoning Board of Appeals ("ZBA") meeting minutes; reviewed National Aerial Photography Program and the NYS Digital Orthoimagery Program historical aerial imagery of the farm; and considered the Town of Clarence Zoning Ordinance.

Based upon the facts ascertained by the Department during the course of its investigation and upon its analysis set forth below, the Department has determined that the administration of the Town of Clarence's zoning law unreasonably restricts the farm operation of the Thompson Brothers Greenhouse and that the Town and the ZBA failed to show any health or safety threat posed by the operation of the wind turbine.

BACKGROUND

Thompson Brothers is a greenhouse operation in Erie County Agricultural District No. 14 that produces horticultural crops year round. The farm intends to construct a 140-foot Bergey Excel 10 wind turbine to offset the energy needs of its greenhouse operation.

However, as 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, CEC Energy, on behalf of Thompson Brothers, submitted an 80-foot area variance request to the Town of Clarence ZBA to increase the height of the tower from 60 feet to 140 feet.

On August 12, 2014, the ZBA denied the area variance request for the following reasons: the height of the wind turbine would create an undesirable change in the neighborhood; the turbine would have an effect on aesthetics, noise, animals and the water table; there are other feasible methods or alternatives to generate electricity; the requested variance was substantial and would have an adverse effect on the physical or environmental conditions of the neighborhood; and the need for a turbine is self-created because the parcel where the greenhouse operation resides has been in place for some time and the applicant existed without the need for a variance. Furthermore, the ZBA determined that while the parcel is utilized for farming, it is very close to a large number of residences and that there is nothing in the Town of Clarence or in nearby communities where so many parcels are so close to a structure this tall and this high.

On or about October 2, 2014, CEC Energy, on behalf of Thompson Brothers, submitted a second request to the Town of Clarence ZBA for a 73.5-foot variance to allow the construction of a 133.5-foot wind turbine. On April 27, 2015 the ZBA denied the farm's area variance request to construct a 133.5-foot tower (i.e., a 73.5-foot increase over maximum Town limit of 60 feet).

STANDARD OF REVIEW

AML §305-a (1)(a) mandates that when exercising their powers to enact and administer comprehensive plans and local laws, ordinances, rules or regulations, local governments do so in a manner as may realize the policy and goals of AML Article 25-AA. The statute further provides 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."

FINDINGS

1. On October 20, 2014 the Department received a request from Kenneth Thompson and Dawn Trippie for a review of the Town of Clarence's height limitation, and its administration, as applied to the construction and operation of a small wind energy production facility on Thompson Brothers farm operation for compliance with AML §305-a (1).
2. In connection with that request, Dr. Robert Somers, Manager of the Department's Agricultural Protection Unit, visited Thompson Brothers Greenhouse operation on November 6, 2014. Dr. Somers observed the farm structures, the proposed on-farm location of the wind turbine and neighboring non-farm development.
3. Thompson Brothers is a greenhouse operation with a total of 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 with the main crop being spring annuals/perennials and shrubs. A portion of the property is used for composting. The farm produces approximately 4,000 mums and 4,000 poinsettias, sells hand-made wreaths and Christmas trees and intends to plant a small apple orchard on the property to enhance its fall mum sales. The business consists of approximately 60 percent on-site retail sales and 40 percent wholesale.

4. Thompson Brothers is a "farm operation" for purposes of AML §305-a (1).
5. On February 4, 2015, the Department sent Supervisor Hartzell and ZBA Chair Michnik a letter which determined that the farm meets the Department's standard for AML §305-a protection for wind turbines as either on-farm equipment or an on-farm building and that the wind turbine proposed for the premises would supply a portion of the farm's electrical needs not exceeding 110% of its anticipated need. The Department further advised that that the Town Zoning Code and its administration by the Town and the ZBA unreasonably restricts the farm operation in possible violation of AML §305-a(1).
6. The Department invited the Town and the ZBA to provide any documentation and other evidence that the public health or safety is threatened by the farm operation's construction and use of the wind turbine.
7. James B. Callahan, Town of Clarence Director of Community Development, by letter dated February 17, 2015, responded to the Department's letter, contending, among other things, that: (a) granting a height variance in violation of Town Code Chapter 173 is not a Type II Action under SEQRA or the Town's Environmental Quality Review Law (TEQR) but an "Unlisted Action"; and (b) the proposed wind turbine would provide power to a residential structure which is not located within Erie County Agricultural District 14, thus providing the farm with a minimal amount of power.
8. On February 23, 2015, Stuart Adler, United Wind, sent an e-mail to Mr. Mayhew, Project Manager, On-Site Wind Turbine Incentive Program, NYSERDA, stating that the company revised its proposal to reflect the connection of the turbine to the farm meter rather than the residential account. The revised interconnection schematic from Mr. Storke shows the electrical connections for the turbine to the meter that only serves the greenhouses/farm market.
9. With respect to Thompson Brothers greenhouse operation, The Town of Clarence Code (including Satellite Antennas and Towers, Zoning Ordinance and Environmental Quality Review Laws) and its administration unreasonably restricts the farm operation in violation of AML §305-a with respect to: (a) the limitation of the total tower height to 60 feet; (b) the ZBA's denial of an 80-foot variance request on August 12, 2014 and its denial of a 73.5-foot variance on April 27, 2015; (c) the prohibition of construction of a tower on a lot that does not contain a primary structure; (d) the requirement that the noise generated from the turbine be less than or equal to the nighttime ambient noise level as measured from the property line; and (e) its treatment of the construction of a tower to support a wind turbine as an unlisted action under SEQRA and TEQRA, for the following reasons:
 - a. The Town Code's 60-foot height limitation and the denial of the area variance were unreasonable in light of the fact that a taller tower is needed to access steadier winds to meet the energy demands of the farm and to realize more efficient operation and lower noise levels.

- b. The Town Code states that towers are accessory structures to an existing one-family dwelling on the same lot. Many farmed parcels do not contain a dwelling or primary structure. Further, AML §301(11) defines farm operations as consisting of one or more parcels of land which may or may not be contiguous to one another.
 - c. The Town Code requires towers used for energy conversion to generate a level of noise no greater than the nighttime ambient level as measured from the property line. The Department reviewed published literature examining acoustic noise generated by the Bergey Excel Wind Turbine and found that it is 3-5 dB(A) above background noise. The Department determined that it appears that wind turbines in general would not be able to meet the Zoning Code because the background noise would exceed the ambient nighttime noise level on any given day or night.
 - d. The Town classified the Thompson Brothers Wind Turbine as an "unlisted action" under SEQRA. Agricultural management practices, including construction, maintenance and repair of farm buildings and structures, and land use changes consistent with "generally accepted principles of farming" are designated as Type II actions which do not require preparation of an Environmental Assessment Form. The SEQRA regulations require localities to recognize the Type II actions contained in the statewide list.
10. Although given the opportunity to do so, neither the Town of Clarence nor the ZBA provided to the Department any correspondence, documentation or other information evidencing any public health or safety threat relating to the establishment of the proposed wind turbine.

DETERMINATION AND ORDER

Now, therefore, in consideration of the above-stated findings, it is hereby determined that the Town of Clarence and the Town of Clarence ZBA have violated AML §305-a (1), and it is hereby

ORDERED, pursuant to the provisions of AML §36 that the Town of Clarence and its ZBA comply with the provisions of AML §305-a(1) by: permitting Thompson Brothers to construct a small wind energy device and tower to the total height of 153± feet on their farm; allowing the construction of a tower on a lot that does not contain a primary structure; permitting noise generated from the turbine to exceed the nighttime ambient level as measured from the property line; and classifying the tower as a Type II action under SEQRA and TEQR.

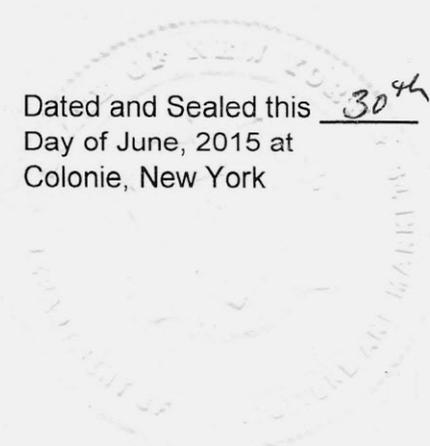
This Order shall take effect immediately upon service of a certified copy thereof on the Town of Clarence's Supervisor and the Chair of the ZBA, by mail to Hon. David Hartzell, Jr., Supervisor, and Chair Daniel Michnik, Town of Clarence ZBA, 1 Town Place, Clarence, NY,

14031. Further, the Town and the ZBA shall notify the Department within ten business days whether the Order is accepted and will be obeyed.



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

Dated and Sealed this 30th
Day of June, 2015 at
Colonie, New York



16. Town of Clarence Zoning Code, including Zoning Map, Chapter 91, Chapter 173, Chapter 229 (125 pages);
17. United Wind quote (10pages);
18. Site Map prepared by Fisher Associates, dated October 23, 2014 (1 page);
19. Wind Turbine Acoustic Noise (26 pages);
20. Wind Turbine Noise Output Evaluation, July 12, 2001 correspondence to Michael Bergey from Wild Sanctuary (5 pages);
21. Acoustic Tests of Small Wind Turbine, P. Migliore, J. Van Dam and A. Huskey, (14 pages);
22. Residential Wind Turbines and Noise Emissions, by Ernest V. F. Hodgson, (33 pages);
23. County Strategies for Successfully Managing and Promoting Wind Power, (22 pages);
24. Noise Test Data for the 10kW Bergey Excel Wind Turbine, June 2007(2 pages);
25. Acoustic Characteristics of the Bergey Excel-S 10kW Wind turbine, (4 pages);
26. Noise Measurements on Bergey Windpower Co. XL.1, (3 pages);
27. February 17, 2015 letter from James Callahan, Town of Clarence Director of Community Development to Michael Latham (4 pages);
28. February 20, 2015 e-mail from Bob Somers, Department Manager of the Agricultural Protection Unit to Mark Mayhew to Dawn Trippie (1 page);
29. February 20, 2015 e-mail from Mark Mayhew to Bob Somers, Department Manager of the Agricultural Protection Unit,(1 page);
30. February 23, 2015 e-mail from Stuart Adler, United Wind to Mark Mayhew (1 page);
31. March 10, 2015 Town of Clarence ZBA meeting minutes, (13 pages);
32. March 17, 2015 letter from Michael Latham to Supervisor Hartzell and ZBA Chair Michnik, (3 pages);
33. April 27, 2015 Town of Clarence ZBA meeting minutes (8 pages);
34. April 28, 2015 e-mail from Dawn Trippie to Dr. Somers, (1 page);
35. Site plan and diagrams submitted by United Wind and CEC Energy, (5pages);
36. National Aerial Photography Program and the NYS Digital Orthoimagery Program historical imagery of the farm, (2 pages);