

TOWN OF GAINES PLANNING/ZONING BOARD MEETING
December 4, 2013 7:30PM

Present: Chairman Michael Grabowski, Vice-Chairman Raymond Burke
Members: Curtis Strickland, Marilynn Miller, David Thom

Guests: G Vaillancourt, Gretchen Sepik, Kay Marsh, Carol and Jerry Culhane,
Connie Mosher, Sue Smith, Dick DeCarlo, Guy Smith, Tom Wilcox, C. R.
Watt, Ron Manella, Mary Neilans, David Allchin

Chairman Grabowski called the meeting to order at 7:31PM with the Pledge of Allegiance to the Flag.

Approval of December 2, 2013 Minutes

On a motion of Vice-Chairman Burke, seconded by Member Strickland, the following was

Carried Ayes 5 Burke, Grabowski, Strickland, Miller, Thom
Nays 0

The December 2, 2013 minutes are approved as is.

Old Business

Chris Watt Wind Turbine Application

Mr. Spitzer opened stating we are looking at the application for K & W Enterprises of Christopher Watt for a wind turbine located at 3121 Oak Orchard Rd. As an opening matter on December 2nd of this week the board received a letter from Mr. Watt's attorney stating that pursuant to town law section that controls ZBA 267A a decision had not been rendered within 62 days of the hearing date plus the extension, that it was deemed approved and therefore Mr. Watt will continue to operate his turbine without any further limitations. Mr. Spitzer stated he replied to Mr. Mark on the same day in regards to law section 267A13 actually states that if you don't act within the time, it is deemed denied automatically and the opportunity to file a law suit has ended. This is also a site plan not an appeal, and is governed by section 274A of the town law. This law does not have a default approval or denial provision, just 62 days as the goal and there is no penalty for people working to get a complete record like we were. The letter is an annulity and the incorrect section was referenced and it has not been automatically denied. Discussing the matter we have already discussed the legal aspects of the application but what to do is a public matter. We have held a public meeting and there is a transcript of that meeting. Mr. Spitzer put together a draft statement of findings that will take us through each of the steps and each of the legal points to grant a decision of yes, yes with conditions or say no. Mr. Spitzer then went on to read the Findings and Decision draft. In section 1. Chairman Grabowski stated that it is a 140' 10 KW wind turbine not a 140 KW turbine. Section 15. Should read 1.5 times the tower is 231 feet, 1.1 times the height of the tower is 169.4 feet not 168.4 feet. In section 26 to approve this site plan under the following conditions the board needs to choose how far from public use areas it needs to be. He also suggested to change 26. A. to read The Wind Turbine be moved to not closer than ____ feet from the public use areas

shown on the August 19, 2013 site plan. He also suggested to add C. That the relocated wind turbine shall comply with all property line setbacks.

Mr. Spitzer stated that the range of setbacks recommended by NYSERDA and other state agencies are between 118' to the town law of 231'. He recommends to do what AG & Markets said to do which is 1.1 times the height of the tower and set back of 168.4 feet as shown on the map. Chairman Grabowski stated that the 168.4 feet should be 169.4 feet.

On a motion of Vice-Chairman Burke, seconded by Member Thom, the following was

Carried Ayes 5 Burke, Grabowski, Strickland, Miller, Thom
 Nays 0

Motion to accept the Findings and Decision as presented correcting paragraph 1 to reflect that it is a 140' 10KW tower, adding to section A. of paragraph 26 the number 169.4 and adding section C. of that same paragraph That the relocated tower shall comply with setbacks from property lines in the town code (see attached).

Roll call vote

Member Miller- approve

Member Burke- approve

Member Grabowski- approve

Member Thom- approve

Member Strickland- approve

New Business

New Shore Environmental Assessment Form (EAF) for SEQR Applications

Chairman Grabowski informed the ZBA that there are new EAF's that became effective October 7, 2013 and Part 1 can be filled out by the applicant. They are also available online at www.dec.ny.gov/eafmapper. If it is filled out online when putting in the map id# it will fill in a lot of the information for the applicant. These new forms must be used from now on. ZBA secretary to replace all the old forms with the new one.

With no further business on a motion from Member Strickland, seconded by Member Thom the meeting was adjourned at 8:04pm.

Respectfully Submitted,
Carol Claus
Zoning Board of Appeals Secretary

Town of Gaines Zoning Board of Appeals
Findings and Decision
Site Plan Permit Application of
K & W Enterprises/Christopher Watt,
3121 Oak Orchard Road, Town of Gaines, Orleans County, New York

This matter comes before this Board on remand from the New York State Supreme Court. The Site Plan Permit Application was originally presented to the Town Planning Board. Responsibility for issuance of site plans has since passed from the Planning Board to the Zoning Board of Appeals ("ZBA"). The ZBA has reviewed the application, the original materials submitted to the Planning Board and the Supreme Court, additional materials provided by the applicant and members of the public, and conducted a public hearing on August 5, 2013. On the basis of its review, the ZBA finds and decides as follows:

1. On June 3, 2011, K & W Enterprises/Christopher Watt submitted a building permit/site plan application for 140 foot, 10 KW wind turbine to serve the farm at 3121 Oak Orchard Road in the Town of Gaines, Orleans County, New York.
2. The New York State Department of Agriculture and Markets ("Ag & Mkts Dept.") has confirmed to the Town that the farm at 3121 Oak Orchard Road is located in a State Certified Agricultural District.

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Gaines Town Clerk's Office

Jen Watt

3. Pursuant to Local Law No. 1 of 2008 of the Town of Gaines, codified as Chapter 728 of the Town Code, a wind turbine over 120 feet in a state or county agricultural district must obtain a site plan approval (§728.E(E)).¹
4. After the Planning Board conducted a review of the Application and granted a site plan approval for the 140 foot tower, an Article 78 proceeding was filed challenging that approval. The matter was eventually remanded to the ZBA.
5. Although the Application is for a 140 foot tower, Mr. Watt's attorney stated at the public hearing that the actual height is 154 feet.²
6. One of the issues before the Planning Board, the Supreme Court, and now this Board was whether the wind turbine in question was an agricultural operation as so defined by the Ag and Mkts Dept.
7. The Department has confirmed to the Town in writing that a wind turbine that produces energy equivalent to up to 110% of the load of the agricultural operation is considered a farming operation. As the energy output of the wind turbine in question is less than the energy required to

¹There was some initial confusion regarding whether a site plan or special use permit was required. Local Law No. 1 of 2008 was amended prior to adoption to require a site plan, rather than a special use permit, at the request of the Ag & Mkts Dept. Unfortunately this confusion continued after Ag. & Mkts was misinformed about the local law by Mr. watt's representative, asserting that the Town was requiring a special use permit, even though Mr. Watt's application clearly states on the form it is for a site plan. This misstatement is but one instance in a troubling pattern of misstatements that have issued the applicant or his representatives.

²Transcript of August 5, 2013 public hearing, at 5.

operate the K & W Enterprises farm, the ZBA finds the wind turbine is an agricultural operation.

8. The purpose of a site plan is to establish the layout of a particular improvement, in this case a wind turbine. Power to issue site plans is pursuant to New York Town Law § 274-a.
9. Town Law 274-a(4) authorizes the ZBA to “impose such reasonable conditions and restrictions as are directly related to and incidental to a proposed site plan.”
10. The authority under 8. Town Law 274-a(4) is limited by Agriculture & Markets Law § 305-A(1)(a), which states in relevant part that “Local governments, when exercising their powers to enact and administer comprehensive plans and local laws, ordinances, rules or regulations, shall exercise these powers in such manner as may realize the policy and goals set forth in this article, and 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.”
11. For reasons of this section, and its limited authority, the ZBA has focused its review on the public safety aspects of the site plan application, specifically the placement of the wind turbine on the property.

12. The ZBA's concern arises from the fact the public is regularly invited onto and uses the property. The public uses include a train ride, corn maze, farm market, and U-Pick 'em areas.
13. The applicant provide a map to the ZBA showing the public use areas. The ZBA also received testimony from the public on the location of public use areas.
14. The Ag & Mkts Dept. has recognized the importance of separating wind turbines from human occupation areas. In its guidance to municipalities, the Ag & Mkts Dept. states local rules may "include a requirement that the minimum setback distance between the tower base and any human-occupied building," recommending five times the rotor diameter. The rotor diameter of the turbine at issue is 23.6 feet. Five times that diameter is 118 feet
15. The Local Law contains a 1.5 times the height of the tower setback requirement from property lines. Ag & Mkts publications suggest 1.1 times setbacks as an acceptable property line/utility line. 1.5 times the tower is 231 feet, 1.1 times the height of the tower is 169.4 feet.
16. NYSERDA, which partially funds these towers on farms, also advises that turbine placement consider buildings, property lines and sensitive areas.
17. NYSERDA recommends a setback, according to the statement of Mr. Watt's attorney at the public hearing, of five time the length of the blade,

and the length of the blade length is 25 feet,³ and five times the blade length is 125 feet.

18. There was testimony at the public hearing on those areas where the public is allowed on the farm. The ZBA specifically requested a site plan of the public use areas from the applicant, and it was provided.

19. The site plan submitted conflicts with the applicant's testimony. For example, the applicant stated "The nectarines aren't U-Pick."⁴ But the site plan shows a nectarine U-Pick area right next to the turbine.

20. The Applicant's site plan shows the route of farm tour train as being right under the turbine. This also contradicts the Applicant's statement that no customers are allowed close to the wind turbine.

21. The ZBA is concerned by the pattern of misinformation from the Applicant throughout the process. In the context of a special use permit, the Fourth Department has stated "Finally, petitioner's persistent, evasive and deceptive conduct in dealing with the Board and the general public would alone be sufficient reason to preclude the grant to it of a special use permit." *Pioneer-Evans Co. v. Garvin*, 191 A.D.2d 1026 (N.Y. App. Div. 4th Dep't 1993). See also, *Holy Spirit Asso. for Unification of World Christianity v. Rosenfeld*, 91 A.D.2d 190, 200-201 (N.Y. App. Div. 2d Dep't 1983) ("if the church would not, or could not, comply with

³Transcript of August 5, 2013 public hearing, at 6.

⁴Transcript of August 5, 2013 public hearing, at 45.

representations made while the application for a special use permit was pending, the zoning board could properly infer that it would not comply with conditions imposed on its proposed use. Further, the church's deceit, in and of itself, justified denial of the special use permit.”).

22. The ZBA does not believe the Applicant will comply with public safety provisions unless the ZBA clearly directs where the turbine may be placed.
23. The electric controls for the tower are in a building which did not receive all the funding it was entitled, according to Orleans County, because it was not built to standards, and apparently the building has never been inspected. The building is used to store and mix flammable substances.
24. The turbine is close to a farm market building. The turbine is 117 feet from that building.⁵
25. The record demonstrates that there have been occasional mishaps involving the turbine type installed at the property.
26. The ZBA finds that for purposes of protecting the public safety, the wind turbine should be placed away from areas used by the public. Based on the site plan of the farm submitted by the Applicant on August 19, 2013, the ZBA directs the site plan is approved on the following conditions.

⁵Transcript of August 5, 2013 public hearing, at 41.

A. The Wind turbine be moved to not closer than 169.4 feet from the public use areas of the farm (including but not limited to the farm market, train route, and U-Pick areas) shown on the August 19, 2013 site plan.

B. That any electric controls for the turbine be installed in accordance with an electrical permit. Any building in which the electric controls are installed in shall obtain a building permit.

C. The relocated tower shall comply with the property line requirements of §728.E(E). The tower shall be relocated within 30 days of this decision.

Adopted by the Town of Gaines Zoning Board of Appeals on December 4, 2013.