

Town of Clarence
 One Town Place, Clarence, NY
 Zoning Board of Appeals Minutes
 Monday April 27, 2015
 7:00 p.m.

Chairman Daniel Michnik called the meeting to order at 7:19 p.m.

Zoning Board of Appeals members present:

Chairman Daniel Michnik	Vice-Chairman Ryan Mills
David D'Amato	Patricia Burkard
Gregory Thrun	Richard McNamara

Town Officials present:

Director of Community Development James Callahan
 Junior Planner Jonathan Bleuer
 Deputy Town Attorney Steven Bengart
 Councilman Robert Geiger
 Councilman Patrick Casilio

Chairman Michnik asked all those in attendance to silence their cell phones. He also noted that there should be no background noise from the audience when someone is speaking. Speakers will have three (3) minutes. Chairman Michnik said many e-mails and letters have been received, if a member of the audience has something new to say, they will have be given the opportunity, otherwise he asked that information not be repeated in order to move through this meeting quickly and efficiently.

Other interested parties present:

Al and Sandra Kistner	Larry Higley	Lindsay Haller	Joe Haller
Bev Tate	Bill Tate	Tom Klebes	Helen Klebes
George Berger	Jim Gaynor	Donna Baia	Mike Dunn
Lynne Vizzi	Anthony Vizzi	Al Coffield	Donna Coffield
Richard Battaglia	Chris Goehel	Tom Goebel	Kathy McEvoy
Paul and Paula Nenni	Elizabeth Crump	Marc Wasseronch	Nicolette Shanley
Frank and Marie Menza	Kevin Shanley	Susan Wickenhiser	Jerry Toneck
Duane Burkard	Leonard Ballaro	Joseph Henning	Ashley Regan
Wayne and Debbie Griffiths	Rob Vanderbles	Jim Campbell	Robert Olczak
Diana and Bob DiBiase	Robert Dixon	Kim Dixon	John Kensy
Kathy Kensy	Bill Johnson	Rose Sickler	Charles Sickler
Judy Pabst	Michael Pabst	Alan Pilarski	T. Hallac
Mary Langan	Joseph Langan	Alexis Coffman	Eliner Trapper
Rick and Donna Pfontner	Linda Moritio	Kyle Gay	Patti Reiter
Peter Reiter	P & G Russell	Dan & Kelly Rossi	Trish Hoppe
Janelle Kurtzman	Alan Kurtzman	Susan Dudek	Joe Dudek
Jim Romanowski	Tressa Romanowski	Pam & John Lopez	William Schneider
Thom Palmer	Edward Majcarzak	Luke Woeppel	Heather Kurtz

Nora Bender	William Hoppe	Richard Schroen	Ale. Ghadersoki
Katerina Kreymer	Hicki Bigham	Sharon Winer	Waynonda Knight
Michael McLaughlin	Patricia McLaughlin	Jason Hurley	Timothy Malchow
Jason MacLaughlin	Cindy Blankenberg	Annette Spendel	Katherine Spendel
Joseph Fritz	Deborah Fritz	Dave & Lisa Haney	Rick & Judy Ejnik
Patrick & Doreen Sheedy	Patricia Spoth	Chris Carollo	Marc Auder
Richard & Loretta Klenk	Stephen M. Calick		

Appeal No. 1

CEC-Energy/Ryan Storke
Residential Single Family

Requests the Board of Appeals approve and grant a 73.5' variance to allow for the construction of a 133.5' wind turbine located at 8850 Clarence Center Road.

Appeal No. 1 is in variance to §173-4(C).

DISCUSSION:

Chairman Michnik noted that at the last Zoning Board of Appeals meeting, in which the applicant was present, the applicant was asked to provide visual information regarding their request. Chairman Michnik asked the applicant if they have that information. Deputy Town Attorney Steve Bengart said at the last two (2) meetings there was discussion about tabling the request to give the applicant the opportunity to bring any visual impact studies at a future meeting.

Ms. Trippie said she is not going to do a visual impact study and her decision has been supported by the Department of Agriculture, who does not support the need for an impact study. She referred to a letter dated March 17, 2015 addressed to the Town Supervisor and the Zoning Board of Appeals Chairman, from the Agriculture and Markets Director Michael Latham which read, in part: "...the Department informed the Town by letter dated January 4, 2015 (to Mr. Callahan) and by my letter dated February 4, 2015 that the tower is considered to be an on-farm structure, which is designated by Title 6, Part 617.5(c) (3) of NYCRR as a Type II action and exempt from environmental review. Furthermore, a review of the Town Code §§91-6(B) and 91-9(A) suggests that consistent with Title 6 of NYCRR, part 617, Type II actions are deemed not to have a significant effect on the environment and if determined to be a Type II action, the application may be processed without further application of this chapter. Although this section of Town Code seems to be duplicative of the SEQRA requirements, the Town's failure to recognize the construction of a small wind energy device, which is used by a farm operation located within a county adopted, State certified agricultural district, to offset energy purchased from the State's electrical grid as a Type II action under SEQRA and the TEQR is unreasonably restrictive in violation of AML §305-a(1)." Ms. Trippie said she has been working with the Department of Agriculture on this project for two and a half years, and they said that it is unduly restrictive.

Chairman Michnik asked for confirmation that Ms. Trippie has not done a Visual Impact Study, she confirmed that she has not, and will not.

Mrs. Burkard asked Ms. Trippie if she has ever owned any property west of the current parcel. The patio homes are south, the applicant's property is north of Clarence Center Road. They use to own to the south, where the current patio homes are, but no further to the east or west.

Ms. Trippie said she is in receipt of the documents the attorney submitted, concerning property values and health and safety, she said they are entitled to their opinion and she is entitled to hers. She referred to the documents she submitted electronically, which included information regarding the taking down of the turbines, safety checks, etc. There were two studies done by the University of Berkley and one regarding property values, these studies were sent in electronically as well.

Elizabeth Holmes and Jeffery Palumbo, attorneys with Damon Morey, are representing a number of Clarence residents who are in opposition to the wind turbine variance request. Ms. Holmes said she submitted a presentation last week; that presentation is on file. She now submits a petition signed by 175 residents. The first point in her presentation is a procedural objection, it states that this is the second application that this Board has heard for this variance. The first time around the variance was denied based on a rational application of the Town Law factors and the applicant should not be entitled to a second "bite of the apple" because they have not demonstrated substantial change of circumstances between this variance application and the previous application that was denied. Essentially, the relief sought in the second application is identical to relief that was already denied by this Board last year. She has included Case Law that supports this objection. The remainder of Ms. Holmes' presentation centers around Town Law §267-b, this is the criteria the Board looks at when reviewing a request. The Board has to look at whether are not the harm to the community and detriment to the nearby properties outweighs the benefit to the applicant. Mr. Holmes submits that the harm does outweigh the benefit to the applicant. Specifically, the diminution in property values, this variance will negatively affect the property value of the homes surrounding this proposed wind turbine. The Board has heard testimony for the surrounding homeowners, Case Law has been submitted that establishes that testimony alone, from those homeowners, is sufficient proof of reduction in value. An expert opinion from a local realtor has been submitted supporting this claim. Additional Case Law has been submitted showing property owners in New York have sued sellers for failing to disclose future construction of a wind turbine.

Ms. Holmes said with regard to the studies the applicant submitted there is a severe lack of data with regards to the property values in homes located in close proximity to a wind turbine. The Massachusetts study indicates that they do not have substantial data when properties are looked at that are located within a quarter mile of a wind turbine, additionally that study evaluates homes with a medium value of \$250,000. The applicant admitted that there is no comparable data in this regard. Mr. Holmes went on to say that there is substantial evidence that the nearby property values would be negatively impacted by the granting of this variance based on the experts testimony contained within the letter of the local realtor and the testimony from the property owners.

Deputy Town Attorney Steve Bengart noted that the applicant is concerned that counsel is going over three (3) minutes for the presentation. He went on to explain that an agreement has been made with Ms. Holmes that she can go over three (3) minutes because she is speaking for her clients, which total 35 individuals. Those clients will not be speaking individually at this meeting.

Ms. Holmes said there are a number of studies that show an adverse effect and diminution in property values. She also submitted information regarding possible noise the wind turbine would produce. The noise ordinance that the Town has imposed would be violated this wind turbine. Based on the applicant's testimony the noise would be equivalent to a plane flying overhead. There will be a possible 40 dba increase from this wind turbine. The Bergy manual indicates a number of scenarios in which the turbine can emit unsavory noise, this includes icing on the blade, which is particularly relevant in a full climate such as Buffalo. Surrounding municipalities have noise ordinances and a maximum dba requirement when establishing a wind mill. This information establishes the fact that there is a legitimate concern with the

noise of the wind turbines. It also speaks to the fact that the Town's ordinance is not unduly restrictive, a lot of municipalities have these ordinances in place for this very concern.

In Ms. Holmes research she came across Case Law with regards to nuisance. Noise emissions and reduction in property values that a wind turbine can produce amounts to a nuisance. The very definition of a nuisance is whatever is dangerous to life or detrimental to health. This wind turbine will create an undesirable change in the community and will be a detriment to the nearby properties.

With regards to alternatives, Ms. Holmes said the applicant's goal is to decrease their electrical costs associated with their greenhouse operation. NYSERDA grants are available to the applicant for both wind energy and solar alternative. The applicant has indicated that they cannot power their greenhouses at night with solar energy and dollar for dollar the cost of solar is higher. Ms. Holmes has a representative in the audience from CIR Electric, Ashley Regan, to answer any questions on solar energy. A concept for solar energy is available that would store some of the energy the sun produces during the day, to be used at night. The applicant would not have any period of time when there was no energy supplied to their greenhouses purely on the fact that it is no longer daylight. Based on the information the applicant submitted, Ms. Reagan provided an assessment that showed the cost would be the same for solar energy, long term it may actually be cheaper. The applicant has not explored this alternative sufficiently.

Ms. Holmes said there is no question that this request is substantial, it is a 122.5 percent increase from the ordinance. This proposal more than doubles the amount of people within a quarter mile proximity of any similar sized towers that NYSERDA has provided grants for, it quadruples the amount of people within a mile and quite possibly is the only turbine within an eighth of a mile from such a densely populated area.

Ms. Holmes addressed the environmental impacts. The applicant previously stated at this meeting that she refuses to comply with the Town's SEQRA process. The Town is well within their rights to establish this is an Unlisted Action, it is a discretionary area variance. The fact that the applicant is refusing to comply with the SEQRA process, alone, is grounds for denial of this variance request.

Ms. Holmes referred to the position that the NYS Agriculture and Markets has taken on this project. In order for them (NYS Agriculture and Markets) to establish a cause of action and prove that an ordinance is unduly restrictive, they (NYS Agriculture and Markets) will have to sue all the municipalities that have these ordinances if they think the noise ordinance is unduly restrictive.

Ms. Holmes said there is alternative means to achieve the objective, there is solar energy available.

Ms. Holmes said it is disingenuous for the applicant to claim a hardship when they sold a major portion or their farmland to a developer with the knowledge that it would be residentially developed well before they applied for the inclusion into the Agricultural District in 2012. The applicant is now telling the residents that they should expect nuisances such as these, because they moved near a farm. There is no doubt that the applicant created this hardship.

Ms. Holmes said she feels it has been sufficiently established that this request would cause substantial harm to the community and the surrounding properties. In her representation of the surrounding residents, she respectfully requests that the Board deny the variance.

Jeff Palumbo, of Damon Morey, said the law is very clear. The variance in the first application was denied. In order for the Board to hear it again a determination would have to be made that the facts are significantly

different. These facts are exactly the same except for a minor reduction in the height. Mr. Palumbo referred to the Agriculture and Markets Law and said the applicant would have the Board believe that they (the applicants) are exempt from everything. The law refers to unreasonable restrictions, but what are they? They are not identified. The Board has been provided with information that clearly details the public health and safety concerns of the residents, this is the second part of the Agriculture and Markets Law that is applicable. Mr. Palumbo goes on to say that the applicant has been asked several times to provide the Board with information and they refuse to do it at the same time asking for a variance.

Ashley Regan, of CIR Electric, explained that Germany is a leader in using solar energy and they have less hours of sunlight than the Western New York area does. There is an energy credit system that allows credits to be built up in the summer time and will roll over to those winter months when there is low sun and shorter days. The panels are made of tempered glass at the top, so in daylight if there is an accumulation of snow it can shed that. If it is nighttime and there is a snow storm, there will be accumulation but typically it will take 1-2 weeks before the panels themselves start accumulating snow. Mr. Mills asked what credits are available for solar energy. Ms. Regan said there are three main incentives, there is NYSERDA which provides a credit for residential and commercial uses, there is a 30% Federal Tax credit and a 25% State tax credit capped at \$5,000. She went on to explain that the costs upfront are a bit lower for a roof mount rather than a ground mount for solar panels. She has mocked up a rendering to show solar panels on the applicant's property to match the energy production of the wind mill. Chairman Michnik asked what the life expectancy of a solar panel is. Ms. Regan said the panels are under warranty for 25 years by the manufacturer, which is for degradation. At 25 years, it is not that the cells don't work anymore it's just that they won't be at 80% efficient. Chairman Michnik asked if there is a yearly inspection and if panels will be replaced as needed. Ms. Regan explained the warranty CIR Electric has with the manufacturer. As far as storing energy, is there more bulk in solar as far as equipment inside the buildings to store the energy or is there more when its wind driven. Everything goes back to the grid and that is where the roll-over credits come into play.

Edward Burkhardt, of 5890 Goodrich Road, asked if the windmills are allowed in Clarence. Deputy Town Attorney Steve Bengart reminded Mr. Burkhardt that this meeting is a public hearing and is for gathering information about the proposal that will be helpful for the Zoning Board of Appeals members in making their decision. It is not a give and take or question and answer session. Mr. Burkhardt referred to decibels and said he learned from the TV that no one heard anything when they stood next to the windmill at Hunts Corners, he does not understand about the decibels there. He also referred to the information he heard that the sound of a plane is 70 decibels and drops property values. He does not have a problem with farms, if someone wants to make a living off the dirt and help the earth by making it greener, isn't that a good thing? This is his only concern. People bought their houses in a right-to-farm community. He is in support of farming.

Lisa Haney, of 6125 Gott Creek Trail, said the concern is not against the turbine nor is it against farming. The applicant owns 18 acres of land, four of which have greenhouses on them. She said people still need to go under the ordinances of this town and maintain their property in such a way. It has been stated that after the contract is up, she (the applicant) would be taking care of that property but we need to stop and look at how they are taking care of the property right now. She submitted photos of the property, the photos are on file. Ms. Haney explained that there are old pallets and board laying around, numerous cars that have just been left there, this is how they take care of their property. All houses from Jessica Place to Millcreek have to look at this. The applicants are being asked to take care of the wind turbine and be a good neighbor, they are not good neighbors now and they do not take care of their property. Who knows what is in the cars, old gas, oil, batteries, acid, etc. There are drainage issues on that property that go into

other areas. They are zoned Residential Single Family but have the right to farm because they have more than five (5) acres, but, how are they handling it? They need to be held accountable for the property that they have right now and maintaining it according to the ordinances of the Town, there are huge wood piles that are perfect habitats for rats. There are homes surrounding that land with little children that play outside all the time.

Mary Langan, of 6229 Creekhaven Drive, is concerned with the noise. On summer nights it is dead silent in her neighborhood and she enjoys that. If they are going to have to put up with a humming or a buzzing noise it will be terribly upsetting to all of them.

Teresa Romanowski, of 8865 Clarence Center Road, said she takes objection to the word "farm" being thrown around as loosely as it has been. Farms grow crops in the ground, farms raise livestock. Greenhouses raise plants inside of glass buildings and they can be in Brooklyn, New York, which is not a right-to-farm community. She is supportive of this area being a right-to-farm community but she likes things to be called what they are.

Alan Pilarski, of 4651 Rock Oak, went to school in Dayton Ohio and received his Master's Degree in Renewable Energy. Ohio is big on coal power and in order to get the coal entire ecosystems are destroyed and here we are just worried about a windmill in Clarence? He went on to say that 2014 was the hottest recorded year on the planet. Everyone needs to think about this issue a little bigger, he is happy that a farm wants to go after renewable energy, he thinks there is a better alternative but that is beside the point. Everybody should consider their part in the future of the planet and the energy that is used.

Ms. Trippie said Agriculture and Markets considers her property a farm. She has always considered herself a good neighbor. She referred to the photos of her property that were submitted and said she hopes that woman was not trespassing on her property or there will be problems, her property is now posted. She referred to a letter that was previously submitted by Kathy McCollum who is a Clarence resident and is also Ms. Trippie's insurance agent. The letter is in support of the wind turbine. Ms. Trippie has two greenhouses that have structural problems because of the snow, greenhouses need the light. She is not going to fill her remaining 18 acres with solar panels. They think one wind turbine is ugly, how about a field of solar panels like they have at UB? It's not going to happen. They don't consider her business a farm, the USDA Department of Agriculture considers the greenhouse a support land, what they may not know is that there is a small pond in the back that is drainage for the property, it's a farm. Somewhere between 2010 and 2011 the zoning was changed from Agriculture to Single Family Residential, they are grandfathered into Agriculture and follow agricultural practices. Down the road .1 mile from her property is another set of greenhouses and a couple 100' from that are residential homes, then there is another farm, it continues up to Roll Road, they were all changed from agriculture to single family residential. The Town's Master Plan was to preserve existing farm land. After changing that entire area to single family residential the Town decided to preserve farmland by buying a huge chunk of it so it is forever agriculture and is being farmed right now as CSA. If you look west of her property there is a cell tower. The residents started putting flyers in people's mailboxes back in October about a 60' wind turbine. She is allowed a 60' wind turbine, she wouldn't even be here or need a variance, they would have fought this. She applied for a 151' variance at the end of August, it was denied. She re-applied in October and decided to compromise with a lower height and lattice instead of guide wire. She found out the hard way that her zoning had changed. Her farm has been there for 150 years, just because some people don't consider horticulture a farm, it still is. Did those people who live on Jessica Lane, and park their cars facing her property, not see that there was a farm there when they bought the house. She has been at that greenhouse for 15 years, it is her livelihood, her husband had been there for 78 years, everybody built around them, she is trying to be a good neighbor, she spent

hundreds of thousands of dollars improving the place, she is sorry they don't like the way the field looks, they have slowly been trying to burn the debris in the back. The vehicles back there are farm vehicles, you will see two of them come out of there with plates on them to deliver their crops. The entire area where she is was zoned agriculture. What about the next time she wants to do something agriculture, what of the farm on Heise wants a turbine? What if it goes a little farther north and six homes are built out there. We need to stand behind the right-to-farm laws and the Agricultural and Market Laws, that is what they were created for. Agriculture and Markets inspected her property in November, they said they have projects in New York City with house closer than those in this area. All those turbines are being approved and are going up. If this variance is denied tonight, the Agriculture and Markets will continue to do their job and there will be a 150' wind turbine put up on her property.

ACTION:

Motion by Ryan Mills, seconded by Patricia Burkard, to **deny** Appeal No. 1. The basis for denial is the following:

-The Board is asked to look at Town Law §267-b. The criteria in that law asks the Board to look at whether an undesirable change will be produced in the character of the neighborhood or a detriment to the nearby properties will be created by granting the variance. There has been an abundance of testimony from both sides all of which has been incorporated into the record. The evidence of testimony illustrates that this request would produce an undesirable change in the character of the neighborhood and would be a detriment to nearby properties. The record reflects that this is a very dense residential area, more dense and more compact with residential homes than some other areas where wind mills have been allowed in the Town of Clarence. These homes consist of residential single family homes as well as patio homes and are in extremely close proximity to the proposed wind mill. The detrimental impact, the undesirable changes include as the record illustrates but is not limited to noise concerns, aesthetic concerns, safety concerns, property values. Testimony has been heard for the applicant's own representative indicating that his business has not installed a turbine in such a densely populated residential area with single family homes. There is other testimony and evidence in the record supporting this first prong.

-The second criteria asks if the benefit sought by the applicant can be achieved by some other method feasible for the applicant to pursue but would not require a variance. There are other possible energy options that include, but are not limited to, solar, and more windmills at a smaller height.

-The third criteria asks the Board to look at if the area variance is substantial. The applicant has reduced the variance request, however the evidence supports that it is still quite substantial at 73.5'.

-The fourth criteria asks the Board to look at whether the proposed variance will have any adverse effects or impacts on the physical or environmental conditions in the neighborhood or district. The Board has heard testimony and evidence that it will have an adverse impact by numerous ways including, but not limited to, the size of it, possible animal concerns, noise levels, possibility for health and safety danger, and possibility of malfunction. That testimony came from, among other sources, the applicant's representative.

-The fifth criteria is whether the difficulty is self-created, the record contains evidence that the property was owned for quite some time by the applicant and his family. Some of the parcel was sold off for residential single family use but the parcel has been there, the zoning has been there. The difficulty is, in fact, self-created.

ON THE QUESTION:

Mr. Callahan said in terms of the action under SEQRA, because a 60' tower is a permitted use in this zone it would be considered a Type II, there is no variance being granted under this motion so there is no SEQRA action required. Mr. Mills and Ms. Burkard agree to this.

Gregory Thrun	Aye	Patricia Burkard	Aye
David D'Amato	Aye	Ryan Mills	Aye
Daniel Michnik	Aye		

MOTION CARRIED.

Meeting adjourned at 8:13 p.m.

Carolyn Delgato
Senior Clerk Typist