

TOWN OF PORTLAND PUBLIC HEARING
PORTLAND TOWN HALL
LOCAL LAW 1-2019
MORATORIUM ON COMMERCIAL WIND ENERGY CONVERSION FACILITIES
JUNE 26, 2019 – 7:00 P.M.

BOARD MEMBERS PRESENT:

Daniel Schrantz	Supervisor
Jerry Boltz	Council
Gary Miller	Council
Patti Farrell	Council
Rick Manzella	Council

OTHERS PRESENT:

Joel Seachrist	Attorney
Roxane Sobecki	Clerk

Approximately 25 people

Supervisor Schrantz opened the Public Hearing at 7:00 p.m. with the pledge to the flag. Supervisor Schrantz stated the purpose of this Public Hearing is Local Law 1-2019, a local law enacting a moratorium on commercial wind energy conversion facilities.

Supervisor Schrantz read Section 2 of the proposed local law:

“Pursuant to the authority and provisions of the New York State Constitution, and Section 10 of the Municipal Home Rule Law, and the Statutory powers vested in the Town of Portland to regulate and control land use and to protect the health, safety and welfare of its residents, the Town Board (the “Board”) of the Town of Portland hereby declares a six (6) month moratorium on applications or proceedings for applications for, the review of applications, or the issuance of approvals or permits for the construction of Commercial Wind Energy facilities within the Town of Portland (the “Town”).

This moratorium will allow time for Town officials to review, clarify, amend, and update the Town’s Regulations for commercial wind development. Additionally, this moratorium will allow the Town to adopt such other regulations as may be necessary to promote and preserve the health, safety and welfare of the Town and its citizens.

The Town has determined that recent technological advances in the manufacture and construction of renewable energy generators render it necessary and advisable to reevaluate terms, requirements and conditions currently enacted or missing in Town of Portland renewable energy development land use regulations pertaining to Commercial Wind Energy Facilities. It may be necessary to amend the regulations following and in light of the 2011 adoption of Article 10 of New York’s Public Service Law, by which diminished the involvement of the Town in the siting approval for large projects. The Town Board desires to address, in a careful manner, the establishment, placement, construction, and development of Commercial Wind Energy Facilities through a comprehensive and up-to-date review of wind energy facilities and their effects on land use, orderly and planned development, and the public welfare.”

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Supervisor Schrantz opened the meeting up for Public Comment:

Residents from the Town of Arkwright spoke of the turbines in their community. They deal with health issues, sound, etc. daily. Other concerns discussed are the health issues associated with infrasound. One-mile setbacks, a property value guarantee, adequate decommission terms and conditions, \$50,000 escrow account for the life of the project, and 35 decibel limits was asked to be included in the new wind law. Kevin Powell-spoke in favor of the Turbines, stating he initiated the project. He said no matter what subject you look at there is research done on both sides of the issue. He stated this turbine is much smaller than the ones in Arkwright. Eric Holton of EWT Direct Wind noted the turbines his company wants to construct are 326 ft compared to the Arkwright Summit at 492 ft. This is a community designed project; residents can save on their electric bill. Mr. Holton reviewed the sites stating no more than ten turbines are planned. The NYSERDA and the Federal Tax Program expires at the end of the year, a moratorium will have an effect on this project. Mr. Holton said they and the landowners have been working on this project for two years developing and working to site them to comply with the Town's current laws. If the Town is to go with a moratorium, he asked the board for a conditional exemption to move forward with the condition EWT meets the new law conditions, which will keep the project alive. Discussion followed. Supervisor thanked everyone for their comments.

LOCAL LAW 1-2019

ENACTION A MORATORIUM ON COMMERCIAL WIND ENERGY CONVERSION FACILITIES

54-19

On a motion of Council Miller, seconded by Council Boltz the following resolution was adopted by a roll call vote:

Boltz	Aye
Miller	Aye
Farrell	Aye
Manzella	Nay
Schrantz	Aye

WHEREAS, a resolution was duly adopted by the Town Board of the Town of Portland for a public hearing to be held by said Board at 7:00 p.m. on June 26, 2019 at the Town of Portland Administration Building, 87 West Main Street, Brocton, New York, to hear all interested parties on a proposed Local Law that would impose a six-month moratorium on the construction of large-scale wind "farms" while the Town works to update and draft appropriate regulations for them, and

WHEREAS, notice of said public hearing was duly published in the *Dunkirk Observer* and posted in the Town Clerk's office, and

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WHEREAS, said public hearing was duly held on June 26, 2019 at the said time and place and all parties in attendance were permitted an opportunity to speak on behalf of or in opposition to said proposed Local Law, or any part thereof, and

WHEREAS, the Town Board, after due deliberation, finds it in the best interests of the Town to adopt said Local Law,

NOW, THEREFORE, BE IT

1. RESOLVED, that the adoption of the proposed local law dealing with the administration of town code is a Type II action for purposes of the State Environmental Quality Review Act, for which no further review is required, and be it further
2. RESOLVED, that the Town Board of the Town of Portland hereby adopts said Local Law as Local Law No. 1 of 2019, a copy of which is attached hereto and made a part hereof, and the Town Clerk hereby is directed to enter said Local Law in the minutes of this meeting and in the Local Law Book of the Town of Portland, and to give due notice of the adoption of the Local Law to the Secretary of State.

**TOWN OF PORTLAND
LOCAL LAW NO. 1 FOR THE YEAR 2019**

A LOCAL LAW ENACTING A MORATORIUM ON COMMERCIAL WIND ENERGY CONVERSION FACILITIES

Section 1. Enactment and Title.

The Town Board of the Town of Portland does hereby enact the Town of Portland Moratorium on Commercial Wind Energy Conversion Facilities Law. This Local Law shall impose a moratorium on applications or proceedings for applications for, the review of applications for, or the issuance of approvals or permits for the construction of any Commercial Wind Energy Facilities that are not Residential Wind Energy Conversion Installations, within the Town of Portland.

The capitalized terms in the foregoing sentence, and as used throughout this local law, shall have the following meanings ascribed to them:

Commercial Wind Energy Facilities- Any individual or collection of Wind Turbine Generators designed to convert the kinetic energy in wind into a usable form of electricity, and any and all related infrastructure, electrical lines, substations, access roads and accessory structures that cover more than ¼ acre of land, which are designed with the intent of producing electricity to be consumed off site.

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Residential Wind Energy Installations- Any wind turbine generator consisting of a wind turbine, a tower, and associated control or conversion electronics, which has a rated capacity of not more than 100 kW, and which is primarily intended to reduce consumption of utility power at that location, and requires less than $\frac{1}{4}$ acre of land.

Residential Wind Energy Installations shall also include, for purposes of this local law, all traditional agricultural uses and alternative agricultural energy uses that are intended to principally generate power for the agricultural enterprise when located within a designated Agriculture District, or as otherwise protected or recognized under New York State Agriculture and Markets Law Article 25-AA, including, without limitation § 305(3), § 305(4) and § 305-a therein, and all implementing regulations and rules, and further including policies therein implemented and hereby adopted relative to supporting traditional and generally acceptable farming practices, further including but not limited to heat recovery from composting systems, biogas recovery systems, anaerobic digester gas-to-electricity systems, and other alternative energy systems that significantly support or advance agriculture and agribusinesses within the Town and its Agricultural Districts.

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Applicant- All landowners and all those claiming through or on behalf of the owner(s), whether by license, lease, easement, contract, or by owner's designation as an agent for purposes of making any application or any land use review or approval, whether for a permit or otherwise.

Section 2. Authorization, Purpose and Intent.

Pursuant to the authority and provisions of the New York State Constitution, and Section 10 of the Municipal Home Rule Law, and the statutory powers vested in the Town of Portland to regulate and control land use and to protect the health, safety and welfare of its residents, the Town Board (the "Board") of the Town of Portland hereby declares a six (6) month moratorium on applications or proceedings for applications for, the review of applications, or the issuance of approvals or permits for the construction of Commercial Wind Energy Facilities within the Town of Portland (the "Town").

This moratorium will allow time for Town officials to review, clarify, amend, and update the Town's Regulations for commercial wind development. Additionally, this moratorium will allow the Town to adopt such other regulations as may be necessary to promote and preserve the health, safety and welfare of the Town and its citizens.

The Town has determined that recent technological advances in the manufacture and construction of renewable energy generators render it necessary and advisable to reevaluate terms, requirements and conditions currently enacted or missing in Town of Portland renewable energy development land use regulations pertaining to Commercial Wind Energy Facilities. It may be necessary to amend the regulations following and in light of the 2011 adoption of Article 10 of New York's Public Service Law, by which diminished the involvement of the Town in the siting approval for large projects. The Town Board desires to address, in a careful manner, the establishment, placement, construction, and development of Commercial Wind Energy Facilities through a comprehensive and up-to-date review of wind energy facilities and their effects on land use, orderly and planned development, and the public welfare.

Section 3. Scope of Controls.

During the effective period of this Local Law:

- A. Neither the Town Board nor the Planning Board shall conduct any review or consider or grant any special permit or other approval that will result in the approval, establishment or construction of any Commercial Wind Energy Facility within the Town.
- B. To the extent permitted by law, this moratorium shall supersede all relevant provisions of the New York State Town Law, the New York State Building Code, any relevant Town local law and any other applicable law, rule or regulation, that may be in conflict herewith. If any ambiguity or conflict exists, this local law shall govern, and the presumption shall in each case be that the moratorium is in effect.

Section 4. No Consideration of New, Revised, or Renewal Applications.

No new, revised, or renewal applications shall be accepted for filing, review, or consideration, and no site plans, authorizations, special permits, permits, building permits, variances, waivers or other approvals that purport to allow or advance the development, siting, or construction of any Commercial

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Wind Energy Facility shall be undertaken, reviewed, considered or issued by any board, officer, employee or agent of the Town, except as specifically set forth in Section 10 of this local law. Nor shall any language or term in this moratorium effect, or be construed to result in, any default approval, and any matter now pending shall be stayed in place during the pendency of this moratorium, with all deadlines or other timelines suspended for the same number of days that this moratorium is in effect.”

Section 5. Term.

The moratorium imposed by this Local Law shall be in effect for a period of six (6) months from the effective date of this Local Law. This moratorium may be extended, or rescinded or removed, by local law.

During the period of this moratorium the Town shall endeavor to update existing regulations for the siting, establishment and construction of Commercial Wind Energy Facilities.

Section 6. Location.

The moratorium imposed by this Local Law shall apply to the territorial limits of the Town of Portland. Any dispute as to whether a property is encompassed within the geographic area detailed above shall be resolved by reference to the Tompkins County Office of Assessment and the official New York corporate boundary maps for the Town of Portland.

Section 7. Penalties.

The following provisions shall apply generally, and the violation of this Local Law shall allow and permit enforcement in any one or more of the following manners:

- A. When any term, provision, or requirement of this Local Law is violated the Enforcement Officer may issue a written notice of violation to the Applicant (or other Person in violation hereof). The notice of violation shall contain; (i) the name and address of the Person alleged to have violated this Local Law; (ii) the address, when available, or a description of the building, structure or parcel upon which the violation occurred or is occurring; (iii) a brief statement specifying the nature of the violation; (iv) a statement of the fine or penalty that may or could be assessed against any Person to whom the notice of violation is directed; and (v) a clear statement identifying whether the notice commences or may commence a civil or criminal proceeding. The failure to comply with a written notice of violation by correcting the violation is in itself a separate violation of this Local Law and may be further enforced as such. In addition, Executive Law § 382 may be duly enforced separately from any such notice, and both notices may take the form of a single notice which must, in addition to the above, contain the information and be served as required by said § 382.
- B. The Enforcement Officer may issue stop work orders for violations of this Local Law. Any Person receiving a stop work order shall be required to halt all clearing, grading, construction, and any other or related activities, until the Enforcement Officer or a court of competent jurisdiction allows work to re-commence.

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- C. Town may also maintain actions or proceedings in the name of the Town in a court of competent jurisdiction to compel compliance with, restrain by injunction the violation of any provision or requirement of this Local Law, including to prevent, enjoin, correct, enforce, or abate any violation of, or non-conformance with, any provision or requirement of this local law or the terms and conditions set forth in any waiver or approval issued hereunder. In any such proceeding the Town shall not be required to: (i) prove the lack of an adequate remedy at law; or (ii) to post a bond or other undertaking as a condition or requirement for any preliminary, interim, or permanent restraining order or injunction. No such action or proceeding shall be commenced without the appropriate authorization from the Town Board.
- D. This Local Law may be enforced civilly or criminally by seeking fines, penalties, and like punishments to deter future violations and sanction offenders. All provisions of New York law and process generally applicable to misdemeanors shall apply to any criminal proceeding brought upon any violations of this Local Law, including for purposes of conferring jurisdiction. The following civil and criminal fines and penalties shall apply to any violation of the requirements or terms of this Local Law:
1. For a first offense, any Person that violates any of the provisions of this Local Law shall be (i) guilty of a violation and subject to a fine of not more than \$500, or (ii) subject to a civil penalty of not more than \$500 to be recovered by the Town in a civil action. Every such Person shall be deemed guilty of a separate offense for each week that such violation, disobedience, omission, neglect or refusal shall continue. Similarly, a separate civil penalty shall apply and be assessable for each week that such violation, disobedience, omission, neglect or refusal shall continue.
 2. For a second offense, being any violation that is found to have occurred within 2 years of any prior civil or criminal determination of any violation of this Local Law, a Person shall be (i) guilty of an unclassified misdemeanor and subject to a fine of not more than \$2,500, or (2) subject to a civil penalty of not more than \$2,500 to be recovered by the Town in a civil action. Every such Person shall be deemed guilty of a separate unclassified misdemeanor for each week that such violation, disobedience, omission, neglect, or refusal shall continue. Similarly, a separate civil penalty shall apply and be assessable for each week that such violation, disobedience, omission, neglect, or refusal shall continue.
 3. The above fines are in addition to any penalty, fine, or sentence allowed or imposable pursuant to said Executive Law § 382.
- E. Upon any violation of this Local Law by an Applicant or any Person, the Town may, and the Enforcement Officer shall, decline and refuse to issue any approvals, endorsements, certifications, building permits, certificates of occupancy, certificates of compliance, and any similar or other document or approval until the Applicant or Person rectifies and cures such violation.

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- F. Any Person violating this Local Law may be required to restore land to its prior or undisturbed condition. If restoration is not undertaken within a reasonable time after notice, the Town may take necessary corrective action, the cost of which shall become a lien upon the property until paid. In addition, the Town may commence any one or more civil proceedings in the Town Court, or any other court or tribunal of competent jurisdiction, to recover the costs of such restoration.
- G. For purposes of this Local Law the Justice Court of the Town is hereby vested and imbued with jurisdiction to: (i) issue administrative or other warrants in compliance with the New York Criminal Procedure Law and administrative codes of the State of New York; and (ii) hear and adjudicate allegations relating to the criminal or civil violation of this Local Law and to thereafter, if appropriate, impose any fine, penalty, or sanction.
- H. Criminal matters arising in relation to enforcement matters under this local law shall be and be classified as offenses per the following guidelines: (i) first offenses shall be deemed violations; (ii) second offenses shall be deemed unclassified misdemeanors; and (iii) violations of Executive Law § 382 shall be classified as set forth by New York State in such § 382.
- I. No remedy or penalty specified in this local law shall be the exclusive remedy available to the Town to address any violation of, or non-compliance with, the requirements of this local law. The rights and remedies of the Town are independent of each other and cumulative. The grant of any right or remedy in this Local Law is in addition to, and not in limitation of or in substitution for any other right or remedy of the Town, whether sounding in law, equity, or admiralty. Further, the election by the Town of any one right or remedy does not forestall or prevent the simultaneous or future election of any other right or remedy, whether relating to enforcement, sentencing, or otherwise.

Section 8. Exemptions and Non-Conforming Uses.

Notwithstanding any provision hereof to the contrary, any Commercial Wind Energy Facility that has already been issued all necessary approvals or permits from the Town Board or the Planning Board (the “Town Approvals”) may continue such projects and such support activities that are being conducted in the Town as of the effective date of this Local Law, so long as such supporting activities are in all respects being conducted in accordance with all applicable laws and regulations and any conditions of approval, including all Town Approvals. Such limited right to proceed when Town Approvals have been issued shall include the right to apply for and obtain a building permit, so long as the same is or are in conformance with any existing Town Approvals.

Any expansion of a lawful, pre-existing, non-conforming use shall not be grandfathered under this Section and instead shall in all respects be prohibited as contemplated by Section 3 hereof. “Grandfathered” and allowed lawful pre-existing uses neither have nor possess any right to expand such non-conforming use whether above or below ground, and no such right shall be deemed, construed, or implied to exist.

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Section 9. Validity.

The invalidity of any provision of this Local Law shall not affect the validity of any other provision of this Local Law that can be given effect without such invalid provision.

Section 10. Hardship.

The Town Board of the Town is hereby authorized to accept and review (after public notice and hearing and in accordance with the requirements of law and of this Local Law) requests for a waiver application of the provisions of this Local Law by persons aggrieved hereby.

No such waiver shall be granted by the Town Board without a showing by the Applicant that applicable regulations and restrictions have caused unnecessary hardship.

- A. Unnecessary Hardship. In order to prove such unnecessary hardship the Applicant is required to demonstrate to the Town Board that, with respect to every permitted use under Town land use, each of the following four criteria is satisfied: (i) the Applicant cannot realize a reasonable return on the entire parcel of property, and such lack of return is substantial as demonstrated by competent financial evidence; (ii) the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood; (iii) the neighborhood; and (iv) the alleged hardship has not been self-created.
- B. Reasonable Rate of Return. In evaluating whether the Applicant can realize a reasonable rate of return, the Town Board must examine whether the entire original or expanded property holdings of the Applicant are incapable of producing a reasonable rate of return (and not just the site of the proposed development project). No waiver shall be granted unless, in addition to satisfying all other applicable provisions of law and this Law, the Town Board finds that the Applicant has clearly demonstrated by detailed “dollar and cents” proof, the inability to obtain a reasonable return for the entire parcel (and not just the site of the proposed project) and for each and every permitted use in the area of the Town the property is located.
- C. Unique Hardship. No waiver shall be granted unless, in addition to satisfying all other applicable provisions of the law and this Law, the Town Board finds that the entire parcel of which the project is a part possesses unique characteristics that distinguish it from other properties in the area.
- D. Essential Character of the Neighborhood. In making its determination, of whether the proposed development project will alter the essential character of the neighborhood, the Town Board shall take into account factors that are of vital importance to the citizens of the Town including without limitation: (i) the rural residential and agricultural character of the Town, (ii) its irreplaceable recreation, historic, and tourism sites, (iii) the extent of hazard to life, limb or property may result from the proposed development project, (iv) health impacts, (v) the social and economic impacts of traffic congestion, noise, dust, odors, emissions, solid waste generation and other nuisances, (vi) the impact on property values, and (viii) whether the Applicant will engage in the type of development that will result in degradation to the air quality, water quality or scenic or other natural resources of the Town. In order to find that the

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proposed development project does not alter the essential character of the neighborhood, the Board shall interpret the public interest in said essential character of the neighborhood to require, at a minimum, that the project will not do any of the following: (x) pose a threat to the public safety, including public health, water quality or air quality, (y) cause an extraordinary public expense, or (z) create a nuisance.

- E. Self-Created Hardship. The Town Board may find that the Applicant suffers from a self-created hardship in the event that the Board finds that (i) the Applicant's inability to obtain a reasonable return on the property as a whole results from having paid too much or from a poor investment decision; (ii) the Applicant previously divided the property and is left with only a portion which suffers from some unique conditions for which relief is sought and which did not apply to the parcel as a whole; (iii) when the Applicant purchased the property, he or she knew or should have known the property was subject to the land use restrictions; or (iv) that the Applicant transferred or obtained property rights with only a unilateral expectation of development or investment character, and it shall be material to this question to examine the degree to which opposed to in fee (actual acquisition of fee simple title), and whether the anticipated income, profits, or receipts were conditional, contingent, or guaranteed.

If the Town Board grants a waiver from the provisions of this Local Law to the Applicant, the Applicant shall be required to comply with all provisions of the Town's then applicable land use regulations and other laws and regulations, together with any amendments to such law or regulations which may be enacted during the term of this Local Law. Any waiver that is granted shall grant only the minimum waiver that the Town Boards deems necessary and adequate to address the unnecessary hardship proven by the Applicant, and at the same time preserve and protect the character of the neighborhood and health, safety, and welfare of the community.

Section 11. Effective Date.

This Local Law shall take effect immediately.

Mr. Holton asked if the SEQRA process could move forward. Town Attorney Joel Seachrist replied no new, revised, or renewal application can be accepted for filing under the moratorium. Mr. Holton asked if modifications are possible so a SEQRA could be reviewed. Mr. Seachrist stated the Town always has the option to revise its local laws.

Supervisor thanked everyone for attending the Public Hearing.

With no further business, on a motion of Council Manzella, seconded by Council Miller the Public Hearing adjourned at 8:00 p.m. Carried unanimously.

Respectfully Submitted by,

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Roxane Sobecki-Town Clerk