THIRD DEPARTMENT UPHOLDS SITING BOARD REJECTION OF LOCAL LAW EFFECTIVE AFTER THE CLOSE OF THE EVIDENTIARY RECORD[1]

Hodgson Russ Renewable Energy Alert
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New York enacted Public Service Law Article 10 (Article 10) and Executive Law § 94-c (94-c) to give sole authority, as a matter of state law, to a state office over the siting and impact review of proposed large-scale electric generating facilities (Article 10) and renewable energy generating facilities (94-c) in particular. Under both statutes, applicants and the state agencies are required to comply with local standards set under local laws unless the applicants demonstrate to the agency's satisfaction that local standards are unreasonably burdensome. Now, in an important decision for the State's efforts at transitioning to renewable energy, the Third Department Appellate Division has upheld a decision in an Article 10 proceeding rejecting an effort to use late-adopted local laws to interfere with a primary goal of the Legislature — expeditious project review.

Bluestone Wind, LLC (Bluestone) was nearing the very end of the permitting process for a 125-megawatt wind project (the Project) when the Town of Sanford (Town) passed a local law imposing significant restrictions on wind projects. The evidentiary hearing was closed, the Hearing Examiners recommended granting the certificate of environmental compatibility and public need ("Certificate"), and the State Board on Electric Generation Siting and the Environment ("Siting Board") was set to act on the application on December 16, 2019.

On the Petitioners' appeal from denial of applications for rehearing, the Court held that the Siting Board's decision to not consider a local law that became effective after the close of the evidentiary hearing was rational. Firstly, under the Public Service Law, the Siting Board may choose not to apply a local law it finds it to be unreasonably burdensome and municipalities seeking to enforce such a local law are required to present evidence when seeking its enforcement. Second, enforcement of the general directive that the Siting Board consider substantive local laws must be consistent with the general legislative intent and regulatory scheme of Article 10. The statute and implementing regulations were enacted to "'[provide] a one-stop process for the siting of major electric generating facilities[,]'" with a goal to "'permit comprehensive review of the benefits and impacts anticipated from proposed facilities without unreasonable delay[.]'"[1] Thus, the Court stated that the "'history and scope of article [10], as well as its comprehensive regulatory scheme, ... would be

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frustrated by' last minute laws such as Local Law No. 4."[2] Crucially, the Court recognized that requiring the Siting Board to consider this new local law would "provide leeway for municipalities in future Article 10 proceedings to prolong or waylay the process by approving more stringent substantive laws well into the review period[,]" contrary to the stated goals and spirit of Article 10.[3]

All further contentions of the Petitioners were deemed similarly without merit. The Court found the Hearing Examiners complied fully with the requirements of the State Administrative Procedure Act and that Bluestone's public involvement activities were adequate, as demonstrated by substantial evidence in the record. The Court also found substantial evidence to support the Siting Board's findings on impacts of the Project on certain species and on environmental justice areas. Providing the requisite deference to the Siting Board, the Court noted its role was not to weigh conflicting evidence or decide which was most convincing, but rather, to determine if the Siting Board had a rational basis for its conclusions.

Ultimately, this decision confirmed that local governments opposed to projects may not delay the state's review process by adopting restrictive local laws after the close of the evidentiary hearing. The purpose of Article 10 and 94-c is to streamline the permitting of renewable energy projects to get facilities up and running to meet the State's aggressive climate goals. In this decision, the Third Department has made clear that if such a local law becomes effective after the evidentiary hearing is closed, barring extraordinary circumstances demonstrated by the municipality, the Siting Board can choose to disregard its substantive requirements and such determination will be upheld as rational and consistent with the statutory scheme.

If you have questions about this decision or the Article 10 or 94-c permitting processes, contact Dan Spitzer (716.848.1420), John Dax (518.433.2414), Bill McLaughlin (518.433.2449), Chuck Malcomb (716.848.1261), Alicia Legland (518.433.2416), or another member of the Hodgson Russ Renewable Energy Practice.

[1] *See In the Matter of Broome County Concerned Residents et al., Petitioners v. N.Y. State Bd. on Opinion and Judgement Electric Generation Siting and the Envt. et al., Respondents, et al., Respondents*, 2021 WL 4994317 (3d Dep't 2021).

[2] *Id.* (*citing Matter of New York Inst. of Legal Research v. N.Y. State Bd. on Elec. Generation Siting & Envt.*, 295 A.D.2d 517, 518-519 (2002)).

[3] *Id.* (*citing Consolidated Edison Co. of N.Y., Inc. v. Town of Red Hook*, 60 N.Y.2d 99, 106 (1983); *Uprose v. Power Auth. of State of N.Y.*, 285 A.D.2d 603, 606 (2d Dep't 2001)).

[4] *Id.*