

**TOWN BOARD
TOWN OF YATES, ORLEANS COUNTY, NEW YORK**

In the Matter of the Application of

LIGHTHOUSE WIND LLC

Re: Town of Yates
Moratorium on Wind Energy Facilities Law of 2016
Section 202: Variance

**STATEMENT OF INTENT
APPLICATION FOR USE VARIANCE**

I. Introduction

Lighthouse Wind LLC ("Lighthouse") proposes the construction of a temporary sixty (60) meter Meteorological Tower on property located at the northeast corner of W Yates Center Road and Route 269 in the Town of Yates, Orleans County, New York (Tax Map Parcel No. 12.-1-16.21) (the project is referred to herein as the "Met Tower").

In April, 2016, Lighthouse filed an application for a Special Use Permit and Site Plan Review with the Yates Town Board for the Met Tower. A copy of the application with all supporting documentation is attached hereto as **TAB 1**. Lighthouse sited the Met Tower within in a district where meteorological towers are permitted uses¹. Lighthouse's application was referred to the Yates Planning Board for its recommendation and the Planning Board recommended the approval of the application. After submitting the application and receiving the Planning Board's recommendation, the Board requested an Agricultural Date Statement, which was provided along with another copy of the application. After receiving the Planning Board's recommendation to approve the application, the Town of Yates enacted the Town of Yates Moratorium on Wind Energy Facilities Law of 2016, Local Law No. 1 of 2016 ("Moratorium").

The Moratorium states that any party may submit an application for a variance from the terms of the Moratorium to the Yates Town Board and that such application should be considered by the Town Board in accordance with the requirements for a use variance.² This Application, including the TABS, is submitted in support of Lighthouse's request for a variance. Given the fact that the Yates Planning Board has already reviewed and recommended approval of the Met Tower application and the Moratorium does not require further review by the Planning Board or Zoning Board of Appeals, the Town Board can act without further input from the Planning Board or Zoning Board of Appeals. We request that the Town review this application and schedule a public hearing on the Met Tower application for the August public hearing.³

¹ The Town previously approved a special use permit for a Met Tower for Lighthouse in July of 2015.

² Lighthouse reserves all rights with respect to the validity of Local Law No. 1 of 2016 and this submission is not intended, in any way, to waive Lighthouse's rights in that regard.

³ Local Law No. 1 of 2016 does not require a hearing on the variance request. To the extent that the Town requires a hearing on this application, the Applicant requests that the hearing be held in conjunction with the public hearing

It is important to note that the review of the Met Tower and this application are Type II actions pursuant to the New York State Environmental Quality Review Act (“SEQRA”) and thus exempt from the requirements of SEQRA. Meteorological towers are explicitly considered Type II in the DEC handbook. (See SEQRA Handbook § 617.5(c)(18). As a Type II action, no further SEQRA review is required because a Met Tower Facility has been determined by the NYS Department of Environmental Conservation to not have significant impact on the environment given its temporary nature.⁴

II. Standard of Review

As noted above, Local Law No. 1 of 2016 imposes the “use variance” standard for review of waivers from the Moratorium, even for temporary uses, such as the Met Tower.⁵ In this situation, the standard for a use variance is relaxed because New York Courts have found that wind projects provide an “essential service” and are entitled to the *Rosenberg* test for use variances. The precedent applying *Rosenberg* to wind projects is equally applicable to a Met Tower, the data from which will be used for siting and development of the wind project and will provide information to calculate the potential energy production from the Project area (*West Beekmantown Neighborhood Assoc. v. ZBA of Beekmantown*, Index No. 2007-0299 [Clinton Co. 2007] aff’d 53 AD3d 954[3d Dept 2008]; *Wind Power Ethics Group v. Town of Cape Vincent ZBA*, Index No. 07-0798 [Jefferson Co. 2007]; *Matter of Consolidated Edison Co. v. Hoffman*, 43 NY2d 598 [1978]; *Cellular Telephone Company v. Rosenberg*, 82 N.Y.2d 364 (1993). The State’s highest Court determined in *Consolidated Edison Co.* that the ordinary variance standard is inapplicable and a company that provides an essential service, such as Lighthouse, applying for relief is entitled to a relaxed zoning standard and need only show that (1) the relief is “required to render safe and adequate service,” and (2) there are “compelling reasons, economic or otherwise,” for needing the variance. *Consolidated Edison*, 43 NY2d at 611.

Moreover, the Appellate Division in *West Beekmantown* relied on the Court of Appeals holding in *Rosenberg* and concluded that a wind company provides an essential service because the proposed wind farm will “generate energy, a useful public service, and will be subjected to regulation and supervision by the Public Service Commission (*West Beekmantown Neighborhood Assoc. v. ZBA of Beekmantown*. (53 AD3d at 956). Electricity has long been considered an essential service (*Wind Power Ethics Group v. Town of Cape Vincent ZBA* (finding that a 136 megawatt wind project provides an essential service); see also Salkin & Burgdorf, p. *3, 4 [“providing electricity has long been considered a core essential service...”]). Wind projects provide an essential service and are thus treated the same as other electric generating facilities.

Likewise, even though the Met Tower Facility is a temporary structure and is being reviewed separately from the wind project which is required to proceed through the State Article 10 siting process, the Met Tower will provide wind and other meteorological data which may be used to

on the Met Tower application.

⁴ Lighthouse provided the EAF even though an EAF is not required when the proposed project is a Type II action.
⁵ The applicability of the use variance standard is ambiguous under Local Law No. 1 and unclear, particularly in light of the *Rosenberg* standard for use variances for essential services, because ordinarily the standard assess compatibility of a use with existing zoning standards. In this case, the Met Tower is otherwise consistent with the zoning law in the Town of Yates and, in fact, a Met Tower was approved last year. The Town did not provide any basis in the record for Local Law No. 1 of 2016 for the need for the Moratorium on Met Towers or why the current zoning law is not sufficiently protective.

satisfy certain requirements under Public Service Law Article 10 for the wind project. As the Town is aware from the previous met tower application which was approved last year, a met tower is part of development of the Project and can assist in the siting of project components based on the available wind resource. The location of the met tower corresponds to the portion of the Project area where data needs to be obtained. In this instance, the relaxed standard is appropriate to apply to the Met Tower, because the collection of meteorological data is directly related to the location and potential future operation of an electric generating facility.

Based upon the foregoing, while Lighthouse's application is limited to the approval of a temporary Met Facility Tower, the Met Tower is a related structure for a wind farm, which is an essential service under New York case law and the Town Board should apply the lightened use variance standard for this application.

III. Purpose and Description of the Met Tower

The purpose of temporary meteorological towers is to measure and gather wind data for purposes of site evaluation and potential development of wind projects. Lighthouse proposes to install an approximately 60 meter (196.85 ft.) temporary Met Tower on an eighty-six (86) acre parcel owned by Dick and Barbara Austin. This parcel is designated as Tax Map Parcel 12.-1-16.21 and is located in the Town's Agricultural/Residential zoning district (and thus located in the district where a Wind Energy Overlay District would be created). Met Towers have no moving parts (other than the anemometer), collecting wind and weather measurement data passively.

In addition to the physical tower that is proposed to be installed, the installation will also include side guy anchors, uphill anchors (back and downwind), and downhill anchors. The installation does not include a foundation. The tower will be setback from adjoining parcels as follows: 411 ft. setback from W Yates Center Road, 385 ft setback from the property of George E. Kumpf, 460 ft. setback from the property of Roger P. Harrison, and 3,821 ft. setback from County Line Road. Please see attached site plan and drawing for complete details on the Proposed Met Tower location, tower layout, site layout, and standard footprint, included in **TAB 1**.

The Met Tower is unmanned, and will be visited for routine maintenance purposes on an as needed basis. As such, the Met Tower will not have any impact on existing water and sewage services. In addition, neither pedestrian nor vehicular access to the premises will be impacted.

IV. Lightened "Use Variance" Standard

The Met Tower meets the applicable *Rosenberg* standard for a variance: the proposed Met Tower and the wind data is necessary in order to determine whether wind turbines within the Town would render safe, adequate and reliable electrical service and no alternative to installing a Met Tower is reasonably available that could be used with less disruption to the Moratorium.

- 1. Facility is Necessary:** As confirmed above, electricity is an essential and necessary service. Growth of wind projects is in furtherance of both Federal and State renewable energy goals and policy and the State Energy Law. The proposed Met Tower will assess the wind resource throughout the proposed Project area for the Lighthouse Wind project.

2. **No Existing Viable Alternatives:** Lighthouse is submitting proof in the form of a technical affidavit from Drew Silverman (attached hereto as **TAB 2**), demonstrating that a Met Tower is the most effective method by which Lighthouse can measure wind data to assess the viability of the Town of Yates as a wind resource. Moreover, Article 10 of New York's Public Service Law requires Lighthouse to provide wind measurement data. *See* 16 NYCRR § 1001.6(d). Accordingly, to submit an Article 10 application, Lighthouse must first conduct a wind assessment and obtain the required wind measurement data. Met Towers are important for obtaining reliable data at the level of detail that ultimately will assist in the design of the wind project and to estimate the energy production information required for financial investment.
3. **Proposed Site Meets Technological Objectives:** The primary prerequisite when determining the location of a proposed wind farm is the existence of a sufficiently strong wind resource. There are only a small percentage of locations in New York that will satisfy this requirement. Wind turbines, similar to other power generating facilities, must be located in close proximity to wind resources, and in this case, the proposed location must be evaluated to determine the level of wind resource in this area. Based on the data to be collected from the Met Tower the Applicant will use the information to site project components to access the available wind resources to enable the renewable energy production from the wind project; a value to the public.
4. **Relief Necessary and Unavoidable:** Based upon the evaluation of technical experts and based upon the Moratorium that was passed, there are no existing alternatives that can be utilized by Lighthouse to gather the same information as the Met Tower. Based on the underlying requirements of the Town of Yates Zoning Law and for the reasons described in this application, the proposed property has been chosen as the most viable location for the proposed Met Tower.

V. **Lighthouse's Application Meets the Standard Use Variance Requirements.**

In the event that the Board does not follow the Court of Appeals and determines that the lightened standard for a use variance does not apply, Lighthouse submits that the application meets the standard for a use variance under Town Law § 267-b(2)(b).

1. **Reasonable Return.** To date, Lighthouse has spent a significant amount of money as part of the Article 10 application process and has made a significant investment in the development of the project generally. To date, Lighthouse has submitted a Public Involvement Program and a Preliminary Scoping Statement in the Article 10 process and is actively working with stakeholders on potential stipulations prior to submitting the Article 10 Application. In addition, the project is investing in necessary studies and evaluation and continues its discussions with landowners for participation in the Project. Based on this investment and the fact that PSL and implementing regulations require wind data as part of the Article 10 application, Lighthouse cannot make a sound investment decision regarding a wind farm project without valuable meteorological data, Lighthouse cannot make any use of the property, as presently prohibited by the Moratorium, which would afford a reasonable return on its investment.
2. **Hardship is Unique.** As described above and in the supporting affidavit, the siting of wind

projects is constrained in that such facilities must be constructed in specific locations to access wind resources and the Met Tower must be located in a location to determine whether there is adequate wind resources available for the wind project. If these measurement towers are not constructed in the proper area, they cannot provide the needed services, potentially limiting the benefits derived from the available renewable energy resource. Given these siting constraints and the town wide moratorium, the location of the Met Tower is limited and therefore the hardship is unique.

3. **Will Not Alter Essential Character of Neighborhood.** The Met Tower is a temporary structure located on a large parcel and will disturb less than one acre of the 86 acre parcel. The Met Tower is not permanent, and therefore will not have any long term negative impact on the overall character of the neighborhood. Further, as discussed above, the proposed Met Tower is a Type II action under SEQRA and therefore categorically will not alter the essential character of the neighborhood. Moreover, the Town issued a permit for a Met Tower at another location last year.
4. **Hardship Not Self-Created.** The hardship is not self-created because Lighthouse entered into the lease agreement with the landowner when the use was permitted on the landowner's property and sought the approval for the Met Tower prior to the enactment of the Moratorium. Moreover, prior to the enactment of the Moratorium, Lighthouse's application was reviewed by the Planning Board and was recommended for approval by the Planning Board.

Accordingly, even if the Town Board applies the standard use variance test, as opposed to the lightened test, Lighthouse is entitled to the variance.

VI. Compliance with Requirements in Town of Yates Zoning Law

In addition to meeting the requirements for a variance, the Met Tower is in harmony with the existing zoning requirements.

1. **Section 102- Purpose.** As stated in subsection D, the purpose of the Town of Yates Zoning Law ("Zoning Law") is "to encourage the use of alternative energy systems and protect solar and wind access." Therefore, if not for the Moratorium, the proposed Met Tower Facility would be directly in line with the goal and purpose of the Zoning Law. The Met Tower Facility will provide valuable data, which could encourage the development of an alternative energy system.
2. **Section 591.1 – Wind Energy Overlay Zone.** The proposal is located in the Overlay zone (Agricultural/Residential District).
3. **Section 591.20 – Permitted Use.** Wind Measurement Towers are permitted as a Special Use in the Agricultural/Residential (AR) District.
4. **Section 591.21 – Application checklist.** All of the required information for this section was submitted with the application, in particular information regarding Lighthouse, property owner, Met Tower location, brief description of the proposal, property boundaries, setback information, completed full EAF (even though this is a

Type II action) and Site Plan.

5. **Section 591.22 – Setback Standards.** Met towers must be setback from property lines at a distance equal to at least the total height of the tower. In this case, the proposed tower is approximately 60 meter (196.85 ft.), and the closest property line is 385 feet from the Tower.

As confirmed by the Town concerning the earlier application for a Met Tower, “a special use exception gives permission to use property in a way that is consistent with the zoning ordinance . . . [which] is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood.” As such, the Town reinforced and supported the determination that Met Towers were in harmony and compliance with the Town’s general, comprehensive zoning plan.

For these reasons, Lighthouse respectfully submits that the Met Tower complies in all material respects with the requirements of the Town of Yates Zoning Law.

VII. Conclusion

Lighthouse respectfully submits that approval of this variance application is consistent with the Town’s zoning law, the prior approval for a Met Tower in the Town, and is not inconsistent with the reasons stated for the Moratorium in the first place. The Met Tower is important to Lighthouse Wind and will assist in the development of wind resource data in the Town and the siting of the Lighthouse Wind project as it proceeds through the Article 10 process. The Met Tower complies in all material respects with the *Rosenberg* variance exception standard or in the alternative, the use variance standard, and any potential impact on the community will not be significant. But for the Moratorium, the Met Tower complies fully with the Town’s zoning law and would be approved. Since there was no stated reason why temporary Met Towers should be included in the Moratorium, the Met Tower, and this variance, should be approved by the Town.

Kindly place this matter on the agenda for discussion at the next available meeting of the Town Board of the Town of Yates. In the meantime, should you have any questions or require any additional information concerning this project, I can be reached at (518) 438-9907.

Thank you for your consideration.

Respectfully submitted,

YOUNG/SOMMER LLC

By:


Robert A. Panasci

Dated: July 7, 2016