# TOWN OF FOREST RESOLUTION NO. <u>5</u>

# DISALLOWANCE OF CLAIM OF EMERGING ENERGIES OF WISCONSIN LLC AND HIGHLAND WIND FARM LLC

WHEREAS, a Notice of Claim and Claim were served on the Town Clerk of the Town of Forest on May 19, 2011, by the above named claimants.

WHEREAS, said Notice of Claim and Claim alleges that the above named claimants sustained damages on or about March 17, 2011, as a result of the Town Board's actions taken at a Town Board meeting at which the Town Board adopted: 1) Resolution rescinding previous Town Board resolution No. 2008-1, dated April 10, 2008; 2) Resolution rescinding previous Town Board Resolution dated August 12, 2010; 3) Resolution rescinding building permits issued on February 2, 2011; and 4) Resolution rescinding driveway permits issued to Highland Wind Farm LLC.

WHEREAS, after review of this matter by the Town Board, the Town Attorney, and the Town's insurer, including but not limited to, reviewing town records, minutes, agendas, e-mails, legal research, relating to this matter, it is recommended that the claim be disallowed. Reasons for the disallowance include, but are not limited to:

- 1. The 2008 and 2010 Town Board resolutions, were adopted without following the procedures required by law, including, but not limited to: a) the requirement that the 2008 and 2010 resolutions be referred to the Plan Commission for its review and recommendation regarding the subject matter of the resolutions, i.e. siting a wind energy conversion system in the Town; and b) the requirement that all meetings of governmental bodies at which a proposed wind energy system would be discussed must be properly noticed as required under the Wisconsin Open Meeting Law;
- 2. There are substantial questions regarding the validity of the 2008 and 2010 Wind Development Agreements because, based on the language of the Agreements, it appears that both Agreements were based on the premise that the proposed Agreements had been referred to the Plan Commission and had received favorable recommendation from the Plan Commission, neither of which had occurred.

The August 2010 Town Board Resolution and the attached Wind Development Agreement states that the Town Plan Commission has conducted a public meeting on and has considered the proposed wind energy system and has recommended favorable consideration. The Town Board minutes for 2010 show that the first time the Town Board reviewed the Wind Development Agreement was at the August 12, 2010 Town Board meeting. The minutes show

that the Town Board adopted a resolution approving the Wind Development Agreement on August 12, 2010. There was no referral to or recommendation from the Plan Commission regarding the Wind Development Agreement prior to the Town Board's adoption of the Wind Development Agreement on August 12, 2010.

The 2008 Wind Development Agreement also contains language that the Plan Commission had reviewed the proposed wind farm development at a public meeting and had recommended favorable consideration. Although the Plan Commission minutes show that the Plan Commission considered a wind monitoring turbine, and setbacks for wind turbines, there is nothing in the Plan Commission minutes showing that it considered and recommended approval of the 2008 Wind Development Agreement Resolution.

Based on the above, there are substantial legal questions regarding the validity of the Wind Development Agreements because the Agreements contain material mis-statements regarding Plan Commission review and recommendation. Based on a review of e-mail correspondence between the former town attorney and the claimants' attorney, it appears that August 2010 Wind Development Agreement was drafted by the claimants. These e-mails are attached hereto and incorporated herein by reference as Exhibit A.

- 3. The Town Board's review of town records showed that there are significant issues regarding whether the previous Town Board members had prohibited substantial financial conflicts of interest in the Wind Development Agreements which the resolutions purportedly approved, which precluded them from acting on the above cited 2008 and 2010 resolutions. Such records include: a) the proposed wind turbine site plan attached to the 2010 Agreement which shows turbine(s) to be located on or within one half mile of the previous Town Board members' properties; and b) e-mails between the former town attorney and the claimants' attorney, discussing the problem created by the Town Board members conflict of interest issue. See Exhibit A.
- 4. Based on the records, it appears that Emerging Energies of Wisconsin, LLC and Highland Wind Farms LLC knew or should have known of these conflict of interest issues, and, despite these conflict of interest issues, Emerging Energies LLC, through their attorney, asked that the Town Board adopt the Resolution at the August 12, 2010, meeting so as not to delay project development. Such records include e-mails between the former town attorney and the claimants' attorney discussing the Town Board members conflict of interest issues and expressing the claimants' desire to proceed so as not to delay the project. See attached Exhibit A.
- 5. The Notice of Claim and Claim does not meet the requirements of <u>Wis</u>. <u>Stat</u>. 893.80, because it fails to state the address of the claimants, and fails to include an itemized statement of the relief sought.

- 6. The Town Board denies Highland Wind Farms, LLC's claim that it fully complied with the Agreements, and denies that the claimants reasonably relied on the Resolutions and the Agreements, but the Town claims that the Agreements are null and void as stated above and in Town Board resolutions previously adopted.
- 7. At all times relevant hereto, the Town Board and the individual Town Board members acted in good faith and within the scope of their duties as Town Supervisors.
- 8. The Town Board members and the Town of Forest reserves its right to raise all defenses, immunities, limitations of liabilities, factual and/or legal as may be appropriate in defense of any claim arising out of these matters.

**NOW, THEREFORE, BE IT RESOLVED** by the Town Board of the Town of Forest, St. Croix County, Wisconsin, that the claim submitted by Emerging Energies of Wisconsin, LLC, and Highland Wind Farm, LLC, be and the same is hereby disallowed. No action on this claim may be brought against the Town of Forest or any of its officers, officials, agents or employees after six months from the date of service of this notice, pursuant to Sec. 893.80(1)(b), Wis. Stats.

BE IT FURTHER RESOLVED, that a copy of this resolution be forwarded to the claimant by certified mail, return receipt requested, as a Notice of Disallowance.

Dated this Laday of August, 2011

APPROVED: TOWN OF FO

Jaime Junker, Town Chair

ATTEST:

Jennifer Anderson, Town Clerk

cc: VIA CERTIFIED MAIL to:

Emerging Energies of Wisconsin, LLC Highland Wind Farm LLC 3664 Lakeview Rd West Hubertus, WI 53033 Lee Cullen and Lester Pines Attorneys for Claimants. Cullen Weston Pines & Bach LLP. 122 West Washington Ave., Suite 900 Madison, WI 53703

#### **Email Report**

**Custom List Format** 

Date Printed: 10/04/2010

Time Printed: 3:17PM
Printed By: JK

i Offiat - 7.

Date

Time

Attach Subject

From

To

I should have referred you specifically to page 8 of the AG opinion in regard to voting and conflict of interests, but the entire opinion is relevant to wind turbine siting issues.

Rick Stadelman

This email has been scanned by the MessageLabs Email Security System. For more information please visit http://www.messagelabs.com/email

7/23/2010 Fri

ri 3:48PM

PM 0 conflict of interest

wtowns1@frontiernet.net

Terry L. Dunst

Terry,

I am not going to be able to give you a more detailed answer to your email today, but I wanted to forward to you an informal Attorney General opinion that discusses the very issues that you have inquired about. I will give a more specific answer to your email in a few days, but it will be based on the information discussed by the AG in the attached opinion.

Rick Stadelman Executive Director Wisconsin Towns Association

This email has been scanned by the MessageLabs Email Security System. For more information please visit http://www.messagelabs.com/email

7/23/2010 Fri

i 3:12PM 0 conflict of in Hello Towns Association legal eagles:

conflict of interest question

Terry L. Dunst

'wtowns@frontiernet.net'

I represent the Town of Forest which is being "courted" for a wind turbine project. This is in St. Croix County, which does not have a wind power ordinance at this time, and the town has no zoning (no county or town zoning). The town chair and one of the supervisors own farms which may be the sites of some of the turbines. There has been little opposition to the proposed wind turbines, this is a very rural town with no incorporated cities or villages. But there is one town resident who very much opposes this project.

The question is, can the town chair and the supervisor act on behalf of the town to enter into an agreement with the company to allow the project? The company is seeking such an agreement.

Attached is an opinion from the Wisconsin Government Accountability Board on this topic. The gist of this opinion is echoed in the Wisconsin Town Officer's Handbook on page 52 and 53.

In a sense, the chair and supervisor would be acting in a way that has general applicability to all town residents - they are not the only ones where towers may be located. Nevertheless they have a pretty substantial interest in the matter. The statute seems to prohibit it: "19.59(1)(c) Except as otherwise provided in par. (d), no local public official may: 1. Take any official action substantially affecting a matter in which the official, a member of his or her immediate family, or an organization with which the official is associated has a substantial financial interest."

If they are conflicted out, can the one remaining supervisor "vote" on this issue and sign an agreement?

I guess there may be other issues I'm not sensing right away, so any guidance you guys can offer

Exhibit A

Filters Used: 1 Tagged Record

# **Email Report**

Form Format

Date Printed: 10/01/2010 Time Printed: 11:45AM

Printed By: JK

Date

7/23/2010 Time

4:44PM

4:44PM Duration

0.00 (hours)

Code

Staff Terry L Dunst

Subject Client

Re: Town of Forest Forest, Town of

MatRef

Forest, Town of-General Business MatNo 10847

From

jvercauteren@cwpb.com

To

Terry L. Dunst

CC To

Lee Cullen

Bcc To Reminders

(days before) Follow N Done N Notify N Hide N Trigger N Private N Status

Call From

Phone #

User3 User4

Thanks, Terry. We will also review this DOJ opinion. Given this apparent conflict with one or two of the board members, we would like the non-conflicted member or members of the board to authorize and sign the wind development agreement at the August 12 board meeting. I am working on the agreement, consistent with the 2008 resolution, so we can have it ready with plenty of time to review before the meeting.

I think the two action items for you are to confirm that the board is okay with this approach and, if so, place this on the August 12 meeting agenda (and satisfy any notice requirements).

Thanks,

Jeff Vercauteren Cullen Weston Pines & Bach LLP 122 West Washington Avenue, Suite 900 Madison, Wisconsin 53703 608.310.3322 (Office) 608.445.9384 (Mobile) vercauteren@cwpb.com www.cwpb.com

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>>> "Terry L. Dunst" <TDunst@bakke-norman.com> 7/23/2010 4:15 PM >>> Hello Jeff,

Attached is the DOJ opinion I mentioned. I need to review it more carefully, and I will discuss things with the town chair next week. I do believe we have conflict of interest issues to be aware of.

As we discussed on the phone, please send me an email with the things you would like me to take some action on (e.g. the town meeting and whatever else).

Regards,

#### **Email Report**

#### **Custom List Format**

Date Printed: 10/04/2010 Time Printed: 3:17PM

Printed By: JK

Date		Time	Attach	Subject	From	То
8/11/2010	Wed	3:56PM	1	Final agreement	TLD	terri.gc@baldwin-telecom.n
	Hi Te	erri,				

Here is a copy of the final agreement. I left Carl a message earlier today, but have not heard back from him. If possible, it would be good for Carl and Douglas to see this before the meeting.

Also, Emerging energies said they be happy to take Carl or Douglas on a site visit prior to the meeting tomorrow. Carl and Doug could not both go at the same time, as that would violate the open meetings law since we haven't posted that (site visits by two or more board members are okay, but not if there's not been any notice posted that it's going to take place).

Terry

Terry Dunst
Bakke Norman, SC.
990 Main Street
PO Box 54
Baldwin, WI 54002
Phone: (715) 684-4545
Fax: (815) 927-0411
tdunst@bakke-norman.com

This fax/email and any files transmitted with it are confidential and intended solely for the use of the individual or entity to whom they are addressed. The information and is intended only for the individual named. If you are not the named addressee you are not authorized to print, save, record, copy, share or distribute this fax/email or any information contained in it. If you have received this fax/email in error please notify the sender by replying to this email.

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8/11/2010 Wed 3:13PM 0 resolution Terry L. Dunst 'terri.gc@baldwin-telecom.r Hi Terri,

The attached is a resolution authorizing Carl to sign the agreement. The purpose of this is to replace

the 2008 resolution signed by Roger, since Roger is not able to participate in this matter.

If Carl and Douglas decide to vote for this thing, which is totally up to them of course, they should pass this resolution, and then Carl could sign the agreement.

Will you take care of preparing a paper original for them to sign, or do you want me to do anything else on this? Let me know.

Terry

Terry Dunst

### **Email Report**

**Custom List Format** 

Date Printed: 10/04/2010

Time Printed: 3:17PM

Printed By: JK

Date Time Attach Subject From To

From: Terri Swanepoel [mailto:terri.gc@baldwin-telecom.net]

Sent: Wednesday, September 08, 2010 10:19 AM

To: Terry L. Dunst

Subject: PSC2010WindRule[1].pdf - Adobe Acrobat Standard

This email has been scanned by the MessageLabs Email Security System. For more information please visit http://www.messagelabs.com/email

8/11/2010 Wed

d 3:59PM

Hi Terri,

Final agreement

Terry L. Dunst

'terri.gc@baldwin-telecom.r

Here is a copy of the final agreement. I left Carl a message earlier today, but have not heard back from him. If possible, it would be good for Carl and Douglas to see this before the meeting.

Also, Emerging energies said they be happy to take Carl or Douglas on a site visit prior to the meeting tomorrow. Carl and Doug could not both go at the same time, as that would violate the open meetings law since we haven't posted that (site visits by two or more board members are okay, but not if there's not been any notice posted that it's going to take place).

Terry

Terry Dunst Bakke Norman, SC. 990 Main Street PO Box 54 Baldwin, WI 54002 Phone: (715) 684-4545

Fax: (815) 927-0411

tdunst@bakke-norman.com

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Date

8/11/2010 Time

5:13PM

5:13PM Duration

MatRef

0.00 (hours)

Code

Subject Client

RE: Highland Wind Farm Documents

Staff Terry L Dunst

Forest, Town of-General Business MatNo 10847

From

Forest, Town of

Terry L. Dunst

To

'Jeffrey Vercauteren'

CC To Bcc To Reminders

(days before) Follow N Done N Notify N Hide N Trigger N Private N Status

Call From

Phone #

User3

User4

Jeff, I did not hear from Carl today, so I cannot say whether it would be of any value for your guys to come up early. As soon as I hear from him I'll let you know. Terry

From: Jeffrey Vercauteren [mailto:jvercauteren@cwpb.com]

Sent: Wednesday, August 11, 2010 3:54 PM

To: Terry L. Dunst

Subject: RE: Highland Wind Farm Documents

Terry,

Please find attached the final version of the agreement. I also ran a quick comparison with the previous version. Simultaneously, I am sending this to my clients for final approval; I do not anticipate any further changes, so this should be the final version for the meeting fomorrow.

I need to step out for a meeting the rest of today, but am available by cell phone at 608.445.9384.

Thanks,

Jeff Vercauteren Cullen Weston Pines & Bach LLP 122 West Washington Avenue, Suite 900 Madison, Wisconsin 53703 608.310.3322 (Office)

#### **Email Report**

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>>> "Terry L. Dunst" <TDunst@bakke-norman.com> 8/11/2010 3:04 PM >>>

Hi Jeff,

I think the agreement looks okay, (although I take no stand on the public policy aspect, that's is for the elected officials of the Town), assuming they are in favor of the Wind Farm, I am okay with the agreement.

I would not recommend to them that they accept Section 21. I don't see why the Town should give up default legal rights they have under contract law in favor of a private company.

Terry

From: Jeffrey Vercauteren [mailto:jvercauteren@cwpb.com]

Sent: Wednesday, August 11, 2010 9:20 AM

To: Terry L. Dunst Cc: Lee Cullen

Subject: Highland Wind Farm Documents

Terry,

Please find attached the revised wind development agreement, with redlines from the version you sent yesterday morning, and a proposed resolution.

On the agreement, we revised one of the recitals so that it is clear the agreement is being approved under the new resolution. We reversed the change you made to Section 21, as the original language came directly from the 2008 resolution; we can discuss this provision if necessary.

In Section 1, we made the changes I mentioned to reflect that Exhibit A shows only turbine locations. We made a few other revisions aimed at achieving what I think is our mutual goal: that the Town approves the project as a whole, subject to the project obtaining any other necessary permits or approvals (e.g., driveway permits, DOT permits, DNR permits, etc.). The language I removed in paragraph (c) seemed too-broad and could be interpreted as the town not actually approving the project.

The best next step may be for us to have a phone conversation after you have a chance to review these materials. I will generally be in the office all day, except for 11:30-1:30 when I will be at a meeting.

Thanks,

Jeff Vercauteren Cullen Weston Pines & Bach LLP 122 West Washington Avenue, Suite 900 Madison, Wisconsin 53703

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Date Printed: 10/01/2010 Time Printed: 11:36AM

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Jeff Vercauteren
Cullen Weston Pines & Bach LLP
122 West Washington Avenue, Suite 900
Madison, Wisconsin 53703
608.310.3322 (Office)
608.445.9384 (Mobile)
vercauteren@cwpb.com
www.cwpb.com

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>>> "Terry L. Dunst" <TDunst@bakke-norman.com> 8/11/2010 3:04 PM >>>

Hi Jeff,

I think the agreement looks okay, (although I take no stand on the public policy aspect, that's is for the elected officials of the Town), assuming they are in favor of the Wind Farm, I am okay with the agreement.

I would not recommend to them that they accept Section 21. I don't see why the Town should give up default legal rights they have under contract law in favor of a private company.

Terry

From: Jeffrey Vercauteren [mailto:jvercauteren@cwpb.com]

Sent: Wednesday, August 11, 2010 9:20 AM

To: Terry L. Dunst Cc: Lee Cullen

Subject: Highland Wind Farm Documents

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Department, we must inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of avoiding penalties under the Internal Revenue Code.

Date

8/11/2010 Time

1:47PM

1:47PM Duration 0.00 (hours)

Code

Staff Terry L Dunst

Subject Client

RE: Wind Development Agreement Forest, Town of

MatRef

Forest, Town of-General Business MatNo 10847

From To

Terry L. Dunst

'Jeffrey Vercauteren'

CC To Bcc To

Reminders

(days before) Follow N Done N Notify N Hide N Trigger N Private N Status

Call From Phone #

User3 User4

Hi Jeff,

I have advised Roger to avoid dealing with this matter, and I don't think he should lobby one of the other board members one way or the other.

It was actually Carl who called me and said he didn't think he was comfortable with the short time frame. It wasn't so much the agreement, but the fact that they haven't seen the agreement or the plans. I sent the agreement to the clerk, but I don't know if Carl or Douglas have seen it. I'll give Carl another call.

rerry

From: Jeffrey Vercauteren [mailto:jvercauteren@cwpb.com]

Sent: Tuesday, August 10, 2010 3:37 PM

To: Terry L. Dunst

Subject: RE: Wind Development Agreement

Terry,

We need to have approval on Thursday so as not to delay project development. The agreement is consistent with the 2008 resolution (except for the new Section 1 we added), so there is not much new material to review. The engineering firm is finishing the project plan this afternoon, which will be a one-page map. I will send that to you as soon as we receive it. I think Roger and Carl should be comfortable with the agreement and project plan, as they have been involved throughout the planning process. I assume the board member you refer to is Douglas. He may be okay if Roger and Carl can get him comfortable with the facts and you can get him comfortable with the law. I will make my clients aware of this situation. Let's touch base tomorrow morning.

Thanks,

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Jeff Vercauteren
Cullen Weston Pines & Bach LLP
122 West Washington Avenue, Suite 900
Madison, Wisconsin 53703
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608.445.9384 (Mobile)
vercauteren@cwpb.com
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Sent: Wednesday, August 11, 2010 9:20 AM

To: Terry L. Dunst Cc: Lee Cullen

Subject: Highland Wind Farm Documents

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Date

8/11/2010 Time

3:06PM

3:06PM Duration 0.00 (hours)

Code

Subject Client

RE: Resolution re Town of Forest

Staff Terry L Dunst

Forest, Town of

MatRef

Forest, Town of-General Business MatNo 10847

From To

Terry L. Dunst

'Jeffrey Vercauteren'

CC To Bcc To

Reminders

(days before) Follow N Done N Notify N Hide N Trigger N Private N Status

Call From

Phone #

User3 User4

You're welcome. I sent the project plan to the clerk, and I'll send her this resolution so she can have it ready.

Terry

From: Jeffrey Vercauteren [mailto:jvercauteren@cwpb.com]

Sent: Wednesday, August 11, 2010 3:01 PM

To: Terry L. Dunst

Subject: Re: Resolution re Town of Forest

Thanks, Terry. Those changes are good.

Jeff Vercauteren Cullen Weston Pines & Bach LLP 122 West Washington Avenue, Suite 900 Madison, Wisconsin 53703 608.310.3322 (Office) 608.445.9384 (Mobile) vercauteren@cwpb.com www.cwpb.com