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TIOGA COUNTY, PA

**IN THE COURT OF COMMON PLEAS  
OF TIOGA COUNTY**

TIOGA PRESERVATION GROUP, :  
DR. STEPHEN OLLOCK, PATRICIA OLLOCK :  
: :  
: :  
: :  
v. :  
: :  
TIOGA COUNTY PLANNING :  
COMMISSION :  
: :

CASE NO. 40 CV 2008

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**LAND USE APPEAL**

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AND NOW COMES Tioga Preservation Group, Dr. Stephen Ollock and Patricia Ollock (collectively "Tioga"), by and through their counsel Smith Cartwright LLP, and file this land use appeal pursuant to section 1001-A of the Pennsylvania Municipalities Planning Code ("MPC"), Act of July 31, 1968, P.L. 805, No. 247, *as amended*, 53 P.S. § 11001-A.

1. Tioga Preservation Group is a community organization comprised of individuals residing and/or owning property in Tioga County and surroundings, and organized to address land use issues in those areas.

2. Dr. Stephen and Mrs. Patricia Ollock (“Ollocks”) are individuals who own and reside at 191 Ollock Road, Mainsburg, Pennsylvania (“Ollock Property”).

3. The Tioga County Planning Commission (“Planning Commission”) is the entity charged with accepting, processing, and deciding applications for subdivision and land development approval under the Tioga County Subdivision and Land Development Ordinance (“Ordinance”). Ordinance § 102.03.

4. On or about September 24, 2007, AES Armenia Mountain Wind, LLC (“AES”) filed a Land Development Application (“Application”) with the Tioga County Planning Commission proposing to construct a wind farm on properties located in eastern Tioga County as more fully described in the Application. The Application indicated the intent to construct 72 turbines; upon reasonable belief, AES has increased the proposed number of turbines to 128 turbines.

5. Based on the information made of record before the Planning Commission on the Application, the properties proposed for land development are not owned by AES. AES represented to the Planning Commission that it intends to lease the properties included in the Application. However, no documents establishing the purported leasehold interests in the properties were made of record.

6. The AES Application requested: (1) “conditional” land development approval under the Tioga County Subdivision and Land Development Ordinance; (2) “modifications” from the Ordinance. The Application did not seek subdivision approval.

7. On December 12, 2007, the Planning Commission considered the Application at a public meeting.

8. By letter of counsel dated December 12, 2007 to Jim Weaver, Director of the Planning Commission, Tioga voiced its objections to the Application. Tioga also appeared and participated at the December 12, 2007 meeting.

9. The Planning Commission granted “preliminary conditional approval” (“Preliminary Approval”) to the Application at the December 12, 2007 meeting. The minutes of the Planning Commission meeting reflect that the Preliminary Approval is subject to “conditions . . . outlined in a letter to the applicant.”

10. On December 18, 2007, the Planning Commission issued a letter to AES memorializing the Preliminary Approval (“Preliminary Approval Letter”). Upon subsequent request directed to Weaver, Tioga obtained a copy of the Preliminary Approval Letter. A true and correct copy of the Preliminary Approval Letter released to Tioga is attached hereto as **EXHIBIT A**.

11. The Preliminary Approval Letter indicates that “a list of the conditions is attached to this letter.” Attached to the Preliminary Approval Letter is a matrix organized under the headers: “Condition”, the “Location in Ap.”, the “Agency,” and “Status.” Items listed under “Condition” are described by title only (i.e. “Waiver of Design Criteria – Screening”). In the case of the “Waiver of Design Criteria” condition, the requirement of the ordinance that is the subject of the “waiver” is not specified nor is the “waiver” specified. Additionally, the following listed “conditions” are noted as status “In Review”: (1) Waiver of Design Criteria – Screening; (2) Design Standards (Roads & O&M Building); (3) Intersections; (4) Decommissioning Plan.

12. In granting the Preliminary Approval, the Planning Commission acted capriciously, abused its discretion, and committed errors of law in the following manner:

- a. AES lacks standing as an “applicant” to submit an application for land development under Section 107 of the MPC, 53 P.S. § 10107.
- b. The Planning Commission failed to require AES to submit a subdivision application, in addition to the Application, where the project proposed by AES constitutes a “subdivision” within the meaning of Sections 107 and 507 of the MPC, 53 P.S. §§ 10107, 10507 (prohibiting a subdivision except in compliance with the provisions of an applicable subdivision and land development ordinance). *See also* Ordinance § 104.01 (requiring application to the Commission for any subdivision).
- c. The Planning Commission granted “conditional” Preliminary Approval without requiring that AES demonstrate compliance with each of the requirements of the Ordinance, 53 P.S. § 10507 (prohibiting a land development except in compliance with the provisions of an applicable subdivision and land development ordinance);
- d. For those requirements of the Ordinance from which AES requested a “modification”, the Planning Commission granted conditional Preliminary Approval of the Preliminary Plan without first taking municipal action on such requests for modification (Preliminary Approval Letter lists “waivers” among the conditions and characterizes them as “pending”).<sup>1</sup>

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<sup>1</sup>The term “modification” is used by AES in its Application; the term “waiver” is used in the Planning Commission’s Preliminary Approval Letter. Upon reasonable belief, both terms refer to AES’ requests for relief from the requirements of the Ordinance applicable to the Application.

e. To the extent waivers from the requirements of the Ordinance were “granted” by the Planning Commission through conditions (as stated in the Preliminary Approval Letter), the Commission erred in granting the “waivers” where:

- (i) AES failed to state in the Application “in full the grounds and facts of unreasonableness or hardship on which the request is based, the provision or provisions of the ordinance involved and the minimum modification necessary.” 53 P.S. § 10512.1(b); Ordinance § 902(2).
- (ii) AES failed to demonstrate that its requests for modification (waivers) were required because of an “undue hardship because of peculiar conditions pertaining to the land in question” and that the waivers “will not be contrary to the public interest and that the purpose and intent of the ordinance is observed.” 53 P.S. §§ 10503(1.1)(8), 10512.1(a); Ordinance §§ 902(1), 902.01.
- (iii) The Planning Commission failed to properly consider and act upon the request for modifications (waivers) prior to granting conditional Preliminary Approval (Preliminary Approval Letter identifies “Waiver . . . pending”) and, further, pursuant to the standard established in Sections 503(1.1)(8) and 512.1 of the MPC and Section 902 of the Ordinance. 53 P.S. §§ 10503(1.1)(8), 10512.1(a); Ordinance §§ 902(1), 902.01.

f. The Preliminary Approval Letter is arbitrary, capricious, and invalid as a matter of law as a “decision” of the Planning Commission pursuant to Section 508 of the MPC, 53 P.S. § 10508, where:

- (i) The Preliminary Approval Letter fails to identify the “conditions” attached to the Preliminary Approval with reasonable certainty; and
- (ii) The Preliminary Approval Letter fails to specifically identify both the requirements of the Ordinance from which modifications (waivers) were sought and the relief “granted” from such unidentified requirements.

WHEREFORE, Tioga respectfully requests the Court:

- (1) Reverse the grant of preliminary approval and deny the Preliminary Land Development Plan; and
- (2) Grant such other alternative relief as may be permitted by law.

Respectfully Submitted,

**Smith Cartwright LLP**



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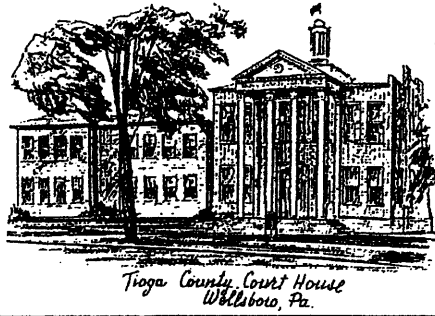
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*Attorneys for Appellants*

DATED: January 17, 2008

# Tioga County Planning Commission

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JIM WEAVER  
PLANNING DIRECTOR  
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December 18, 2007


Bob White  
AES Armenia Mountain Wind, LLC  
4300 Wilson Boulevard  
Arlington, Virginia 22203

RE: Preliminary Conditional Approval, Armenia Mountain Wind Energy Project

Dear Mr. White:

As you know the Tioga County Planning Commission, at their regular December meeting, granted preliminary conditional approval for the application for Land Development for the Armenia Mountain Wind Energy Project in Sullivan and Ward Twp, Tioga Co. A list of the conditions are attached to this letter. Be advised that ALL conditions must be met before construction is authorized for this project. In addition I have included the minutes from the December 12, 2007 meeting for your use. We expect your continued cooperation and diligence in meeting these conditions in the coming months.

Sincerely,

  
Jim Weaver  
Tioga Co. Planning Director

**EXHIBIT A**

12/11/2007

**Conditions for Preliminary Approval  
AES Armenia Mtn Wind Energy Facility  
Sullivan & Ward Townships, Tioga County, PA**

<u>Condition</u>	<u>Location in Ap.</u>	<u>Agency</u>	<u>Status</u>
<b>Waiver of Design Criteria - Screening</b>	Vol 1 pg 1-2	TCPC	In Review
<b>Wetlands JD &amp; Permits</b>	2-18	DEP & COE	In Review
Stream Crossings	2-19	TCDD & DEP	
Fill in Floodway	2-20	DEP	
<b>NPDES</b>	2-22	TCDD & DEP	In Development
E&S PCSMP	2-22	TCDD & DEP	
PPC	2-24	DEP	
<b>Design Standards (Roads + O&amp;M Building)</b>	2-25	TCPC	In Review
Intersections	2-26	TCPC	In Review
<b>Historic &amp; Archaeological Resources</b>	4-5	PHMC	In Review
Telecommunications	Attachment O	FCC & EMS	Complete
Lighting Plan	Attachment L	FAA	Complete
Decommissioning Plan	Attachment R	TCPC	Complete
<b>Clearance for Wildlife &amp; Environmental</b>	Attachment G, I		In Review
PNDI - PGC, BOF, PFBC	Fig 1-1		In Review
DEP - Wetlands, Streams & Floodways	Fig 1-1		In Review
COE - Wetlands	Fig 1-1		In Review