

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN**

**FOREST VOICE, LLC,
JUDI BEESTMAN, BILL DYER,
JEFF ERICSON, BRENDA L. SALSEG,
ROBERT K. SALSEG, and
SCOTT A. VOELTZ,**

Plaintiffs,

Civil Action No. 11-CV-100

v.

**TOWN OF FOREST,
ROGER SWANEPOEL,
CARLTON CRESS,
DOUGLAS KARAU, and
EMERGING ENERGIES OF WISCONSIN, LLC,**

Defendants.

COMPLAINT

Plaintiffs, Forest Voice, LLC, Judi Beestman, Bill Dyer, Jeff Ericson, Brenda L. Salseg, Robert K. Salseg, and Scott A. Voeltz, by and through their attorneys, Glenn M. Stoddard and Patricia A. Keahna, of STODDARD LAW OFFICE, as and for their Complaint against the above-named Defendants, allege as follows:

PARTIES

1. Plaintiff Forest Voice, LLC (“Forest Voice”) is a Wisconsin Limited Liability Company or LLC, whose members are residents or property owners of the Town of Forest, Wisconsin (“Town”) whose goals are to create community awareness about the realities of wind energy development and to ensure that the Town regulates

proposed wind energy developments in a lawful, open and nondiscriminatory manner, without conflicts of interest, so as to protect the broader public interest and the quality of life, health, safety, and the private property rights of the members of Forest Voice.

2. Plaintiff Judi Beestman (“Beestman”) is a member of Forest Voice and a resident of the Town who resides at 1980 – 270th Street, Emerald, Wisconsin 54013.

3. Plaintiff Bill Dyer (“Dyer”) is a member of Forest Voice and a resident of the Town who resides at 1980 – 270th Street, Emerald, Wisconsin 54013.

4. Plaintiff Jeff Ericson (“Ericson”) is a member of Forest Voice and a resident of the Town of Forest who resides at 2022 – 270th Street, Emerald, Wisconsin 54013.

5. Plaintiff Brenda L. Salseg (“Brenda Salseg”) is a member of Forest Voice and a resident of the Town of Forest who resides at 2969 – 210th Avenue, Emerald, Wisconsin 54013.

6. Plaintiff Robert K. Salseg (“Robert Salseg”) is a member of Forest Voice and a resident of the Town of Forest who resides at 2969 – 210th Avenue, Emerald, Wisconsin 54013.

7. Plaintiff Scott A. Voeltz (“Voeltz”) is a member of Forest Voice and a resident of the Town of Forest who resides at 2670 State Highway 64, Emerald, Wisconsin 54013.

8. Defendant Town of Forest (“Town”) is an entity of Town government in St. Croix County, Wisconsin, created by the laws of the State of Wisconsin under Wis. Stat. ch. 60, and at all times relevant it has been governed and managed by the Town Board, consisting of the following elected public officials: Roger Swanepoel, Chair; Carl

Cress, Supervisor; Doug Karau, Supervisor. The Town Clerk is Terri Swanepoel. The Town's address is: Town of Forest, c/o Terri Swanepoel, Clerk, 2778 County Road S, Emerald, Wisconsin 54013.

9. Defendant Roger Swanepoel ("Swanepoel") is the Chair of the Town Board and he resides at 3062 – 200th Avenue, Glenwood City, Wisconsin 54013.

10. Defendant Carlton Cress ("Cress") is a Town Supervisor and he resides at 2007 – 280th Street, Emerald, Wisconsin 54013.

11. Defendant Douglas Karau ("Karau") is a Town Supervisor and he resides at 2643 State Highway 64, Emerald, Wisconsin 54013.

12. Defendant Emerging Energies of Wisconsin, LLC (through its affiliate, Highland Wind Farm, LLC) ("EE"), is a Wisconsin Limited Liability Company in the business of developing wind energy projects, including a proposed wind energy project in the Town. The Registered Agent of EE is William C. Rakocy ("Rakocy"), 2664 Lakeview Road, Hubertus, Wisconsin 53033.

JURISDICTION AND VENUE

13. This action arises under the United States Constitution, namely the Fifth and Fourteenth Amendments, and 42 U.S.C. §§ 1983 and 1988.

14. The Court has Federal Question jurisdiction over this case under 28 U.S.C. § 1331 and 28 U.S.C. § 1341, and venue rests with this Court because all parties reside in the Western District of Wisconsin.

FACTS

15. Sometime in or before early 2008, EE secretly approached a number of Town property owners and the Town Board members to propose development of a private wind energy project within the Town.

16. EE's proposed wind energy project will involve development and construction of 39 wind towers of up to 500 feet in height, although this fact was not disclosed to Plaintiffs and the general public until August 12, 2010.

17. EE quietly and secretly approached only the property owners it wanted to work with within the Town and it convinced them to sign agreements as participating landowners who would ultimately host proposed wind turbines if the project was approved and developed.

18. EE's proposed wind energy project would adversely affect the quality of life, health, safety, and the private property rights of Plaintiffs.

19. According to industry-adopted safety regulations for operators and technicians of large wind turbines which are very similar to the wind turbines that would be constructed by EE, it is unsafe for people to stay within a radius of 400 meters or 1,300 feet from a turbine unless it is necessary. These safety regulations further provide that children should not be allowed to "stay by or play nearby the turbine."

20. EE's proposed wind turbines would eliminate all safe and reasonable use of Plaintiffs' land within the area circumscribed by a 1300-foot radius of the proposed wind turbines. This is an encroachment on Plaintiffs' property that has been undertaken by EE and the other Defendants without Plaintiffs' permission, and it is substantially and unreasonably interfering with the use and enjoyment of a large area of Plaintiffs' land.

21. EE's proposed wind energy project would, therefore, make use of the affected land unsafe for any purpose, thereby totally diminishing its utility and value to Plaintiffs.

22. Plaintiffs' property is located in a relatively quiet, rural setting and is surrounded by farmland and rural residences. While there has been increasing residential development in the area, it was generally quiet and compatible with the use and enjoyment of Plaintiffs' property.

23. Plaintiffs purchased their property seeking a safe, quiet, rural setting where they could raise their families, enjoy the outdoors, and live in relative safety and tranquility.

24. Plaintiffs also purchased their properties with the reasonable expectation that with increasing residential development in the surrounding area they would be able to sell, or subdivide for their own purposes, some of their undeveloped land in the future for compatible rural residential development, consistent with the Town's approved subdivision ordinance.

25. During windy conditions EE's proposed wind turbines will become extremely noisy to Plaintiffs and all other persons living within an approximate one-mile radius of each of EE's proposed wind turbines, and they will cause a continuing nuisance to Plaintiffs.

26. EE's proposed wind turbine blades will make a "wooshing sound" like a jet aircraft, except that the sound is cyclical, alternating louder and softer over short intervals, and more annoying than if it were a steady or constant sound. These effects will be continuing.

27. The noises from EE's proposed wind turbines will be continuing and will often last for many hours or even days, and will occur during all hours of the day and night. Such noises are unpredictable and are generated without notice to Plaintiffs, yet they live within hearing range of EE's closest proposed wind turbines.

28. Development and operation of EE's proposed wind turbines will also cause substantial and unreasonable shadow flicker and strobe light effects on Plaintiffs' property.

29. Development and operation of EE's proposed wind turbines will also cause Plaintiffs' residences and surrounding land to become stigmatized, unmarketable and depreciated in value.

30. Because of the above effects of EE's proposed wind energy project and proposed wind turbines, when EE approached property owners within the Town it did so in a secret and confidential manner and it made various promises and representations, and at the same time EE offered them money and financial incentives if they would sign agreements to be hosts of EE's proposed wind turbines or otherwise be participating property owners who would support development of EE's proposed wind energy project.

31. There was such an emphasis on secrecy and collusion with participating property owners and the Town Board by EE that in one instance EE approached a property owner with a proposal for two contracted wind turbines to be placed on the owner's 200 acres of land; however, the owner was then offering to sell a 40 acre tract of the land to a married couple who are members of Forest Voice, for a residence, yet the seller did not disclose to the potential buyers that the seller had already contracted with EE for two wind turbines, one of which would be within 900 feet, and the other within

one-half mile, of the property line of the 40 acre parcel that was being sold. As a result, the buyers of the 40 acre parcel now adjoin a property with two proposed wind turbines within a half-mile of their newly constructed home, which pose a threat to their quality of life, health, safety, and the private property rights.

32. On February 12, 2009, Plaintiffs Brenda Salseg and Robert Salseg attended a Town Board meeting and requested permission to locate a mobile home on their property for Brenda Salseg's mother to live in. Although they were allowed to proceed with locating the mobile home on their property, the Town Board did not inform them about EE's proposed wind energy project, which would result in the location of at least one wind turbine less than one-fourth of a mile from the mobile home and less than a half-mile from the Salseg's own residence. If they had been so informed, the Salseg's would not have located the mobile home in that location because EE's wind energy project poses a threat to the quality of life, health, and safety of the Salseg's and Brenda Salseg's mother, as well as to the Salseg's private property rights.

33. EE also quietly and secretly approached the Town Board and proposed that the Town Board approve a "Wind Development Agreement Resolution" (hereinafter "2008 Agreement"), to allow EE's proposed wind energy project to be developed within the Town without further regulation by the Town, even though the proposed 2008 Agreement was contradictory to the Town's comprehensive land use plan, as adopted pursuant to Wisconsin's "Smart Growth" law.

34. On or about April 10, 2008, the Town Board approved the 2008 Agreement without notifying affected property owners or holding a public hearing on the proposed Agreement.

35. When the Town Board approved the 2008 Agreement, it was voted on by all three Town Board members and was signed by Defendant Swanepoel.

36. At the time Defendant Swanepoel voted on and signed the 2008 Agreement he had a serious and unlawful conflict of interest under Wis. Stat. § 19.59(1), because he or a member of his immediate family had either signed or were considering signing a wind turbine hosting agreement with EE, under which they would host wind turbines for personal financial gain.

37. On information and belief, at the time Defendant Cress voted on the 2008 Agreement he also had a serious and unlawful conflict of interest under Wis. Stat. § 19.59(1) or he should have known he would have such a conflict in the near future, because he or a member of his immediate family had either signed or were considering signing an agreement with EE to host wind turbines for personal financial gain.

38. In addition, Defendants Swanepoel, Cress and Karau are each owners of occupied residences located within a half-mile of at least one of EE's proposed wind turbines, and they would therefore apparently be eligible for additional annual payments from EE under the 2008 Agreement.

39. The 2008 Agreement approved by the Town Board was not subjected to public hearings by the Town Board and was developed through secret, confidential negotiations between EE, the Town Board, and their respective attorneys, via "walking quorums" using email, telephone, and personal conversations, all in apparent violation of Wisconsin's Open Meetings Law.

40. The 2008 Agreement, at Sec. 2., provides for payments to be made to "owners of neighboring residences within a ½ mile radius" of the wind turbines, if the

residences are “occupied at the time of this agreement,” and if the owners are persons who are “participating in the project.” Such payments are to continue with the property as long as the wind turbines are in existence at their proposed location.

41. The 2008 Agreement, at Secs. 3.1 & 3.2, provide as follows:

3.1 Owner will make annual payments based on Four Thousand Dollars (\$4,000) per megawatt nameplate for a project up to 50MW nameplate capacity as follows:

- a. One Third (1/3) to Town of Forest;
- b. One Third (1/3) to St. Croix County; and
- c. One Third (1/3) to be divided equally by each residence within One half (1/2) mile radius of the turbine site and offered to them individually as their share for participating in the project.

All said payments shall begin 90 days after the date operation commences on the wind turbine facility. Said payments shall be made on the same date of each calendar year thereafter. A copy of the neighbor agreement will be on file with the Town Clerk.

3.2 If the project is 50 MW or more nameplate capacity, payments will be made according to the state law. Additionally, the same payment will be made to neighboring landowners as above indicated.

42. Section 2 of the 2008 Agreement creates a financially favored class of persons who live or own property in the Town, and whose health and safety, quality of life, use of property, and property values, will all be adversely affected by EE’s proposed wind energy project. This class consists of persons who own occupied residences in the Town, as of the date of the 2008 Agreement, which are located within one-half mile of EE’s proposed wind turbines, if the persons are “participating in the project.” This financially favored class will obtain payments from EE pursuant to the 2008 Agreement.

43. Section 2 of the 2008 Agreement also creates a separate but financially disfavored class of persons who live or own property in the Town, and whose health and safety, quality of life, use of property, and property values, will all be adversely affected by EE's proposed wind energy project. This class consists of at least four sub-classes of similarly situated and financially disfavored persons, as follows:

(a) Persons who own occupied residences in the Town, as of the date of the 2008 Agreement, which are located within a half-mile of EE's proposed wind turbines, who elect not to participate in and support development of EE's proposed wind energy project and who are not eligible for payments from EE under the 2008 Agreement;

(b) Persons who own unoccupied residences in the Town, as of the date of the 2008 Agreement, which are located within one-half mile of EE's proposed wind turbines, and who are not eligible for payments from EE under the 2008 Agreement;

(c) Persons who own non-residential property within the Town which is located within one-half mile of EE's proposed wind turbines, and who are not eligible for payments from EE under the 2008 Agreement; and

(d) Persons who own either residential or non-residential property within the Town which is located more than one-half mile from EE's proposed wind turbines, and who are not eligible for payments from EE under the 2008 Agreement.

44. Forest Voice, its members, and the individual Plaintiffs fall under the financially disfavored class of persons described above in paragraph 28 (a) through (d),

and their real property and personal interests, including their quality of life, health, and safety, will be adversely affected by construction and development of EE's proposed wind turbines and wind energy development pursuant to the approval granted by the Town under the 2008 Agreement. Therefore, Plaintiffs have suffered an actual or threatened injury from the Town's approval of the 2008 Agreement.

45. The differential selective treatment of the class of financially favored class of persons relative to the class of financially disfavored persons within the Town under the 2008 Agreement is patently arbitrary and irrationally discriminatory, with no rational relationship to any legitimate governmental purpose or interest of the Town, and is only designed to financially reward participating property owners, including but not limited to Defendants Swanepoel, Cress, and Karau or their families, to the private benefit of EE and Defendants.

46. In 2010, EE and the Town came to realize that Swanepoel and Cress had conflicts of interest when they voted to approve the 2008 Agreement; however, EE and the Town's attorney were most concerned about the conflict of interest by Swanepoel.

47. In order to disguise and ostensibly remedy the conflict of interest by Swanepoel with respect to his vote for and signing of the 2008 Agreement, the Town's attorney and EE, through the Town's attorney, EE's attorneys, and Rakocy, conspired and concocted an illegal plan using a "walking quorum" to have the Town Board adopt a new agreement that would be approved by the Town Board without Swanepoel voting on it. This scheme was carried out and implemented using email, telephone calls, and personal conversations, all in violation of Wisconsin's Open Meetings Law, during the summer of 2010.

48. Although the Town's attorney and EE's attorney knew full well that Cress also had a conflict of interest, they conspired and concocted an illegal "walking quorum" scheme to have the new Agreement taken up for a vote and be approved on August 12, 2010 by Cress and Karau. To do this, the Town's attorney and EE's attorney conducted an illegal "walking quorum" with Karau to have him sign a new, 2010 Agreement between the Town and EE.

49. On August 12, 2010, the Town Board took up the new "Wind Development Agreement" ("2010 Agreement") to replace the 2008 Agreement. In doing so, the Town did not provide meaningful public notice and it did not hold a public hearing on the proposed 2010 Agreement before voting to approve it.

50. Although it falsely and fraudulently states otherwise, the 2010 Agreement was never considered or recommended for approval to the Town Board by the Town Plan Commission.

51. The 2010 Agreement was approved on a vote of two to zero, which had been previously arranged through an illegal "walking quorum," with Cress and Karau voting in favor, and with Cress signing the final version.

52. On information and belief, although Swanepoel ostensibly recused himself from voting on the 2010 Agreement, he worked behind the scenes to ensure its approval by Cress and Karau, and he participated in discussions and meetings with Cress and Karau leading up to the vote to approve the 2010 Agreement on August 12, 2010. As such, he was present during the discussion and deliberations and thus expressly and implicitly pressured Cress and Karau to adopt the 2010 Agreement by his mere presence and known support for EE's proposed wind energy project.

53. On information and belief, at the time Cress voted to approve the 2010 Agreement on August 12, 2010, he had a serious and unlawful conflict of interest under Wis. Stat. § 19.59(1), because he or a member of his immediate family had signed a private agreement with EE to host wind turbines for personal financial gain.

54. Like the 2008 Agreement, the 2010 Agreement approved by the Town Board was not subjected to public hearings by the Town Board and was developed through secret and illegal negotiations between EE, the Town Board, and their respective attorneys, through a “walking quorum,” in apparent violation of Wisconsin’s Open Meetings Law.

55. The 2010 Agreement, at Sec. 3, provides as follows:

Section 3 Annual Payments.

(a) If the project has a nameplate capacity of less than 50 megawatts, [EE] shall make annual payments of four thousand dollars (\$4,000) per megawatt of nameplate capacity for the Project as follows:

- (1) One Third (1/3) to Town of Forest;
- (2) One Third (1/3) to St. Croix County; and
- (3) One Third (1/3) to be divided equally by each occupied residence existing on the date of this Agreement in the Town within one half (1/2) mile of any wind turbine within the Project (measured as a straight line from the vertical centerline of the wind turbine tower to the nearest point on the permanent wall of a residence) and offered to them individually as their share for participating in the Project. [EE] shall file a copy of the neighbor agreement with the Town Clerk.

(b) All payments under this section shall begin 90 days after the commercial operation date of the Project and shall be made annually thereafter until project decommissioning is complete.

(c) All payments provided under paragraph (a)(3) of this section shall benefit and run with the land.

(d) If the Project has a nameplate capacity of 50 megawatts or more, [EE] shall make payments in accordance with Wis. Stat. § 76.28 or

any successor provision in lieu of the payments specified in paragraphs (a)(1) and (a)(2). However, [EE] shall also make the payment specified in paragraph (a)(3).

56. Section 3 of the 2010 Agreement creates a financially favored class of persons who live or own property in the Town, and whose health and safety, quality of life, use of property, and property values, will all be adversely affected by EE's proposed wind energy project. This class consists of persons who own occupied residences in the Town, as of the date of the August 12, 2010 Agreement, which are located within one-half mile of EE's proposed wind turbines, if the persons are "participating in the project." This financially favored class will obtain payments from EE pursuant to the 2010 Agreement.

57. Section 3 of the 2010 Agreement also creates a separate but financially disfavored class of persons who live or own property in the Town, and whose health and safety, quality of life, use of property, and property values, will all be adversely affected by EE's proposed wind energy project. This class consists of at least four sub-classes of similarly situated and financially disfavored persons, as follows:

(a) Persons who own occupied residences in the Town, as of August 12, 2010, which are located within a half-mile of EE's proposed wind turbines, who elect not to participate in and support development of EE's proposed wind energy project and who are not eligible for payments from EE under the 2010 Agreement;

(b) Persons who own unoccupied residences in the Town, as of August 12, 2010, which are located within one-half mile of EE's proposed wind turbines, and who are not eligible for payments from EE under the 2010 Agreement;

(c) Persons who own non-residential property within the Town which is located within one-half mile of EE's proposed wind turbines, and who are not eligible for payments from EE under the 2010 Agreement; and

(d) Persons who own either residential or non-residential property within the Town which is located more than one-half mile from EE's proposed wind turbines, and who are not eligible for payments from EE under the 2010 Agreement.

58. Forest Voice, its members, and the individual Plaintiffs fall under the financially disfavored class of persons described above in paragraph 42 (a) through (d), and their real property and personal interests, including their quality of life, health, and safety, will be adversely affected by construction and development of EE's proposed wind turbines and wind energy development pursuant to the approval granted by the Town under the 2010 Agreement. Therefore, Plaintiffs have suffered an actual or threatened injury from the Town's approval of the 2010 Agreement.

59. The differential selective treatment of the class of financially favored class of persons relative to the class of financially disfavored persons within the Town under the 2010 Agreement is patently arbitrary and irrationally discriminatory, with no rational relationship to any legitimate governmental purpose or interest of the Town, and is designed to financially reward participating property owners, including but not limited to Defendants Swanepoel, Cress, and Karau or their families, to the private benefit of EE and Defendants.

FIRST CLAIM FOR RELIEF
(Procedural Due Process Violations)

60. Plaintiffs reallege and incorporate herein by reference each of the preceding paragraphs and allegations as if set forth in full.

61. Plaintiffs allege that Defendants' actions in approving the 2008 Agreement and the 2010 Agreement without public notice and hearings were carried out intentionally by Defendants, under color of state law, to deprive Plaintiffs of their procedural due process rights under the Wisconsin law, to question and challenge the 2008 Agreement and the 2010 Agreement before they were approved by Defendants, in violation of the Procedural Due Process Clause of the Fifth and Fourteenth Amendments of the U.S. Constitution.

SECOND CLAIM FOR RELIEF
(Substantive Due Process Violations)

62. Plaintiffs reallege and incorporate herein by reference each of the preceding paragraphs and allegations as if set forth in full.

63. Plaintiffs allege that Defendants' actions in approving the 2008 Agreement and the 2010 Agreement were carried out intentionally by Defendants, under color of state law, in a manner that infringes on and violates Plaintiffs' constitutionally protected health, safety, personal privacy, and property interests, based on actions by Defendants that were arbitrary and wrong, in violation of the Substantive Due Process Clause of the Fourteenth Amendment of U.S. Constitution.

THIRD CLAIM FOR RELIEF
(Equal Protection Violations)

64. Plaintiffs reallege and incorporate herein by reference each of the preceding paragraphs and allegations as if set forth in full.

65. Defendants' actions in approving the 2008 Agreement and the 2010 Agreement were carried out intentionally by Defendants, under color of state law, in a manner that provided for differential and selective treatment of the class of financially favored persons relative to the class of financially disfavored persons, including Plaintiffs, in a manner that is patently arbitrary and irrationally discriminatory, with no rational relationship to any legitimate governmental purpose or interest of the Town, and in a manner that is designed to financially reward participating property owners, including but not limited to Defendants Swanepoel, Cress, and Karau or their families, to the private benefit of EE and Defendants, in violation of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

JURY DEMAND

Plaintiffs hereby request a trial by jury pursuant to Rule 38 of the Federal Rules of Civil Procedure on issues of compensatory, nominal, equitable, punitive, and other damages.

REQUESTED RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court find in their favor and against Defendants, and that the Court grant the following relief:

A. Judgment that Defendants' actions in approving the 2008 Agreement and the 2010 Agreement were carried out under color of state law against Plaintiffs in violation of Plaintiffs' Procedural and Substantive Due Process rights, and in violation of

Plaintiffs Equal Protection rights, under the Fifth and Fourteenth Amendments of the U.S. Constitution;

B. A permanent injunction ordering Defendants, their agents, officials, servants, and employees, and all persons in active concert or participation with them, or any of them, to stop taking any actions to construct, develop or otherwise approve or develop EE's proposed wind turbines and wind energy project in the Town of Forest;

C. Judgment that Defendants pay Plaintiffs compensatory, nominal, punitive, and other damages for Defendants' intentional deprivation of Plaintiffs' constitutional rights;

D. Judgment that Defendants pay Plaintiffs' attorneys fees, costs, and expenses in this action, in accordance with 42 U.S.C. § 1988; and

E. Such other and further relief as the Court deems appropriate under the circumstances.

Dated this 9th day of February, 2011.

Respectfully submitted,

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