LARGE WIND ENERGY SYSTEMS – REACHING A BULLET-PROOF DECISION

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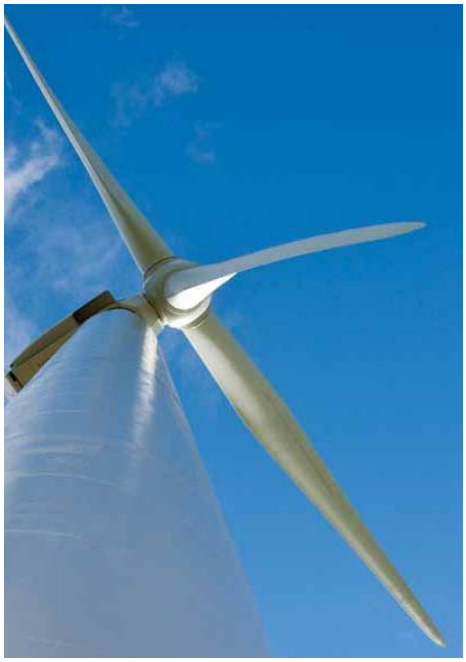
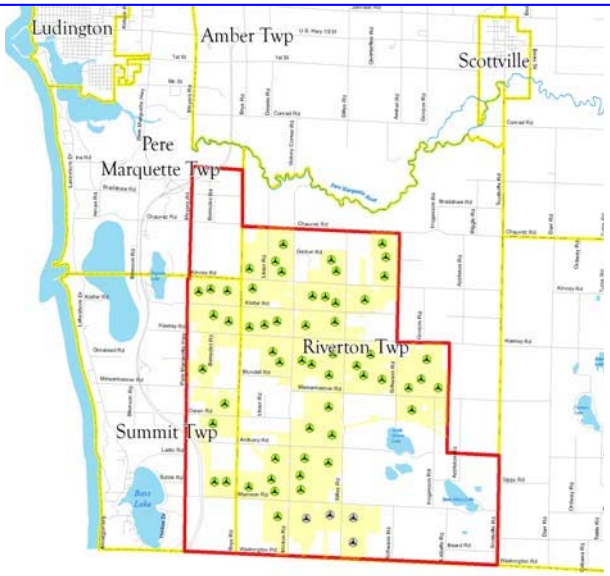
All zoning and land use decisions try to achieve a balance between competing private property interests and, of course, the public good. Spurred by Michigan's renewable energy portfolio standards, large-scale wind energy developments are taking this "balancing act" to an entirely new dimension.



These developments are not limited to a single large parcel with a few concerned neighbors. They can involve numerous non-contiguous properties and cover literally thousands of acres. They are not foisted on a community by slick out-of-towners, but rather they come from our current electrical energy providers or their affiliates. They require a comprehensive understanding of off-site impacts that range far beyond other land uses. And, by their very large footprint, they make many local property owners participants in the deal, by acquiring easements or leases over vast tracts of land. They provide jobs and tax base and they help to implement the policies of Act 295 of 2008 to produce at least 10% of our electrical energy from clean, renewable sources by 2015. But they are unquestionably a change in the landscape. People are always suspicious of change and suspicion can quickly grow to hostility, making the balancing act of land use even more challenging. This is the story of the Lake Winds Energy Park in Mason County.

Background. Lake Winds was presented to the Mason County Planning Commission by Consumers Energy Corporation in January of 2011 as a special land use involving 56, 1.8 megawatt wind turbines to be sited in Riverton and Summit Townships in the southwest part of the County. A total of 309 parcels of land are involved including about 16,000 acres of land (see map). Each tower will reach a height of 312 feet (95 meters) measured to the hub on the nacelle and the rotor would have a radius of 164 feet (50 meters), making each facility a total of 476 feet tall with the rotor in its vertical position. All of the affected land owners had executed easement agreements to permit the facilities on their lands and were compensated and may receive added income upon completion.

In Mason County, the County government has planning and zoning jurisdiction over much of the county, including Summit and Riverton Townships. The Zoning Ordinance addresses Utility Grid Wind Energy Systems as a special land use which may be approved in the Agricultural District. The standards to regulate large wind farms were a part of a new Zoning Ordinance adopted in 2004 and were revised as late as 2010. However, as word of the proposed Lake Winds project began to circulate in the County, a movement began to significantly tighten the



The Lake Winds Energy Park proposed 56, 1.8 megawatt turbines over about 16,000 acres in southwest Mason County

ordinance language and standards pertaining to such projects. A group of concerned citizens filed for an ordinance amendment for large wind energy systems in November 2010. Thus, even as the applicant was putting the final touches on the application, the rules were changing requiring that the submittal materials adjust as well. The amended standards did not affect the setback requirements, but did tighten noise limits and they added new standards on shadow flicker, electromagnetic signal interference, bird and bat mortality, and complaint resolution, among others. Although the original special land use application was received in January 2011 prior to the approval of the Zoning Ordinance amendment, the applicant opted to adjust the submittal to address the new standards which ultimately became effective in early June, 2011.

The Decision Process. Even before the application was officially taken up by the Planning Commission, organized opposition to the project was beginning to form in the community. The County's Planning and Zoning Department includes three staff members and only one professional planner. Recognizing that any decision would be carefully scrutinized and that a thorough review would necessitate significant effort, the County opted to retain consulting planning support to augment its in-house personnel. Early in the process, the staff and consultant met to discuss the review and decision process. At that time it was made clear that the objective was to complete the review carefully and correctly. There was never any "mandate from on high" to guide a decision one way or another. Essentially, the County recognized that any decision would likely be challenged; either by the organized opposition in the event of an approval, or by the applicant in the event of a denial. The objective was to aid the Planning Commission in reaching a decision that would stand up to either challenge; in short a "bullet-proof" (or defensible) decision.

The evaluation process involved a thorough review of six large loose-leaf binders of materials together with 147, 24 x 36 plan sheets. This included the easement documents for each of the 309 affected parcels, a sheet-by-sheet check of all dimensions and property descriptions, and a careful review of the technical papers and specifications presented on each facility. In the course of this review, some anomalies in the site plans were discovered and the applicant worked to make revisions. In addition, as the Zoning Ordinance amendment process was being finalized, added information on sound, shadow flicker and signal interference were submitted as supplements to the original application. Concurrent with the consulting planner's review, the County retained an independent expert to review the acoustic modeling studies presented by the applicant.

Ultimately, the application was deemed sufficiently complete for Planning Commission consideration and a series of three public work sessions were scheduled prior to the public hearing. At these sessions, the applicant's representatives provided a detailed review of the application and the Planning Commission and the public were able to ask questions and seek further information. Because the hearing had not yet been held, the Planning Commission was careful to avoid

PERSONAL AND PROFESSIONAL REFLECTIONS

A Planner's Perspective. This project and process had the effect of energizing the public like no other. The Planning Commission outgrew our regular meeting room quickly, then moved to township halls, schools, and finally auditoriums. I think that most citizens don't know what the Planning Commission does or the importance of their work. For many in the community this was a "wake up call" as to the critical importance of the planning and zoning process. I can only hope that the public engagement process continues, but perhaps in a more positive and constructive way.

Mary Reilly, Planning Director

Handling a Tense Hearing. This was a very challenging experience for everyone on the Planning Commission as our community was pretty much divided on the issue. Starting with the Text Amendment process and then on to the Special Land Use application it was critical to provide time for public comment, stay focused, listen and act in a respectful and professional manner while maintaining control of the meetings. Directing comments/presentations through the Chairman and controlling side bars/outbursts were critical and sometimes a challenge.

Doug Robidoux, Planning Commission

The Consultant's View. In over 40 years of work in planning, zoning and community development, this project may be the most complex I have ever worked with. The range of technical details and the nuanced judgments the Planning Commission was required to make resulted in a very challenging assignment. I might have declined the assignment but for the fact that my direction was to help them reach a decision that would stand up to challenge, not to reach a particular decision. The process was undeniably tense at times, but I was very impressed with the balanced and thoughtful manner in which the Planning Commission did its job.

Jay Kilpatrick, AICP, Planner

rendering judgments at this stage, but the members were encouraged to ask for any additional detail or information so that they would have as complete an understanding of the development as possible.

During this time, the divisions in the community became more pronounced. The tone of the opposition and supporters became more hostile and confrontational. The applicant scheduled and held a community information meeting at a local meeting facility as an opportunity for residents and interested citizens to talk one-on-one with company representatives and Consumers' technical experts such as on sound and shadow flicker. However, the Planning Commission was advised to stay away from this event as participation, however informative, could have been seen as prejudicial. The event itself was not well attended as it was clear the community was choosing sides with both sides undertaking more public relations activities including billboards, yard signs, tee shirts and, as a result, there was less dialogue.

All the public meetings were standing room only like this one.

As the work sessions were completed, the consulting planner was asked to develop a comprehensive report and recommendation for the record at the hearing. This 28-page report dealt with every ordinance standard and the various questions and concerns raised during the work sessions. It included a recommendation for approval subject to numerous conditions. The public hearing was held on June 28, 2011, and the Planning Commission heard comments from 44 speakers, most of whom spoke in opposition to the proposal, basing their concerns either on the aesthetic impact of the facilities or a lack of sufficient assurance that they would not result in health or economic impacts on the community. At the close of the hearing, the Planning Commission scheduled three work sessions to consider the application and to reach a decision. As required by the Open Meetings Act, each of these work sessions involved further public comment opportunity and they essentially became extensions of the public hearing. Eventually, the Planning Commission worked with the County's attorney to adopt a 34-page resolution of approval incorporating more than 25 approval conditions.

The Appeal. Immediately after the hearing, the organized opposition sought a review of the Planning Commission decision by the Zoning Board of Appeals. Under the County Zoning Ordinance the authority of the Zoning Board of Appeals in special land uses is limited to a review of the decision-making process, not a revisiting of the decision itself. This appeal had been anticipated and the County attorney and Planning Director assemble the documentation to demonstrate how the Planning Commission, working with the consultant and County Planner, had done the necessary homework to reach the decision they did. Absent some failure in the process which the Zoning Board of Appeals did not find, they could only conclude that the Planning Commission had properly done its job.

The matter then proceeded from the Zoning Board of Appeals to Circuit Court. In the meantime, the applicant had taken steps to finalize permitting and to order equipment and materials. In short, there was the potential of significant monetary damages should the decision be overturned at the Circuit Court level. The judge spent a significant amount of time on the case and heard some oral argument, but eventually reached the same conclusion the Zoning Board of Appeals did: The Planning Commission and the County had properly followed its ordinance requirements and there was no basis to overturn or remand the decision.

Lessons. The overall challenge facing the Planner, the consultant and the Planning Commission was effectively met. The decision did stand up to the inevitable challenge. But at the core of this process are some fundamental questions for land use planners and local officials.

- ❒ In rural areas, peoples' perspectives of the land are not as uniform as some may think. Nearly all master plans express strong support for protection of rural character and programs to assist agriculture. But as more people move into agricultural areas, the effect of farm practices can create conflicts. This is the issue the Right to Farm Act was meant to address. In an existing agricultural area one must expect off-site impacts from farming. A wind farm that allows a farmer to receive income from harnessing the wind resource

and (as a result) to continue farming, would seem entirely consistent with efforts to protect rural character. And yet many of the opponents to this project argued that the presence of these extremely tall structures would fundamentally undermine the rural character and degrade the rural environment they sought in the first place.

By adopting the Utility Grid Wind Energy special land use in the zoning ordinance, the County had invited this development. Other communities anticipating large scale wind systems should carefully explore both sides of this equation.

- ❒ Related to this is the notion that owners of large tracts of land who had agreed to easements were able to exert control over the region at the expense of the owners of smaller holdings who did not. Of course, most of the large tract owners are farmers whereas most of the small tract owners were residents that felt it was unfair that the farmers could degrade their rural environment, or at least change it in ways that they had not anticipated.

- ❒ Planning Commissions are given some discretion under the Zoning Enabling Act when it comes to dealing with special land uses, but in the end if an application meets the requirements of the Zoning Ordinance it must be approved. Many of the standards for special land uses are subject to interpretation – such as:

  - ♦ "In harmony with the character of area," or
  - ♦ "not change the essential character of the area."

  Taken literally, one could argue that any change in land use would change the essential character of the area or that one use is out of character with another. Reaching a decision on standards such as these is clearly within the scope of the Planning Commission's responsibility, but finding an equitable and reasonable basis to do it was a challenge in this instance. The lesson here is that there is no easy formula and no substitute for careful and thoughtful consideration.

Unfortunately, the "open" format of the approach taken in Mason County and the tendency toward confrontational rhetoric actually had the effect of stifling dialogue and true discussion. The Planning Commission listened patiently each night to many of the same comments being repeated, at times with blistering sarcasm, and in many cases the final decision reflected that input. But as the community became more polarized, a "win at all costs" mentality seemed to grip the opponents and this cowed supporters from coming forward and it left the Planning Commission isolated and reluctant to engage in meaningful dialogue. In the work sessions, the Planning Commission members were careful to choose their words and parse their thoughts because they knew they were being recorded and exploring ideas or trying out alternatives aloud might come back to haunt them.

- ❒ As careful and methodical as this process was, there was nevertheless an underlying suspicion that it was somehow less than transparent and being driven by outside forces. There was no truth to this, but as the intensity of the discussion heightened so did suspicions of conspiracy or hidden agendas.

  In the end, a few of the opponents approached Planning Commissioners privately to say that while they disagreed with the final outcome, they recognized the difficulty of the decision and the extraordinary effort the County made to be comprehensive and thorough. The lesson in this is there is no such thing as too much explanation of procedures, technical matters or standards.

- ❒ The amount of time, effort and expense devoted to this effort was extensive. The County established an applicant escrow account to support the expense of meetings, legal, planning and sound consultants and related expenses. The applicant paid into the escrow and was expected to supplement it when needed. The lesson here is no community should attempt to undertake such an effort without a properly funded applicant escrow account to support the expense of a thorough review process without burdening the general fund.

About the Authors

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