

**IN THE DISTRICT COURT OF WABAUNSEE COUNTY, KANSAS** FILED  
WABAUNSEE COUNTY

ROGER ZIMMERMAN, et al., )  
 Plaintiffs, )  
 and )  
 A.B. HUDSON, et al., )  
 vs. )  
 BOARD OF COUNTY COMMISSIONERS, )  
 OF WABAUNSEE COUNTY, KANSAS, )  
 Defendant. )

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2007 FEB 28 A 9:41  
 KRISENA SILVA  
 CLERK OF  
 DISTRICT COURT  
 Case No. 04 CV 31

**MEMORANDUM DECISION**

This matter is before the Court on the defendant's motion to dismiss plaintiff's case herein. There are pending motions of the plaintiff and plaintiff's interveners to strike the findings of fact filed by the defendant, Wabaunsee County Commissioners; a motion to reconsider the court's memorandum decision of October 12<sup>th</sup>, 2006, and a motion to dismiss the plaintiff intervener's petition and amended petition.

The Court adopts all facts which were put forth in the three memorandums filed by Judge Tracy Klinginsmith in this matter. Said dates of the memorandum decisions are February 23, 2005, July 22, 2005, and March 2, 2006. The Court previously, in said memorandum decisions, has set forth an accurate and thorough rendition of the facts.

First, the Court considers the defendant's motion to reconsider, alter or amend its memorandum decision of August 12, 2006. The same is moot as the County has filed the necessary clarifications requested by the Court. Further, the Court has admitted it used the wrong standard of review in this type of zoning matter.

As to the motion to dismiss the plaintiff intervener's petition and amended petition, which appears not to have ever been filed, the Court again finds this matter to be basically a moot question as the Honorable Tracy Klinginsmith, in his March 2, 2006 memorandum decision referred to plaintiffs and plaintiffs interveners and set forth the various relief requested by the plaintiffs herein. Said motion is denied.

Lastly, on December 21, 2006 the plaintiff and plaintiff interveners filed a motion to strike the defendant's Findings of Fact and Supplemental Findings of Fact, which were filed in response to Judge Klinginsmith's decision of March 2, 2006 and the present Courts decision of October 12, 2006. The parties have also filed an additional brief on or about January 17, 2007 which has been reviewed by this Court. This brief was not only in regards to the motion to strike but reiterates their positions on various parts of this litigation.

The plaintiffs list various reasons which this court should use to strike the documents filed by the defendants herein.

The plaintiffs first indicate that the documents provided are not part of the official commissioner's record.

The Court has reviewed what is known as the "certified record" from pages 001 to 0388. There is ample evidence from the counties finding of facts as to the documents found in the certified records and which of those were considered by the county. It appears the county has complied with Judge Klinginsmith's remand to identify each fact they relied upon in making their decision regarding zoning.

The plaintiffs complain that duplicate copies and evidence favoring wind projects were deleted or omitted making an incomplete document record.

The Court has reviewed both sides' arguments and finds nothing in plaintiff's motion which would lead the court to striking the counties finding of facts and supplemental finding of facts. The "duplicate pages" do support different conclusions and are not "fluffing" as alleged by the Plaintiffs. There is also evidence of favorable articles with information in support of wind projects located within the certified record. The documents are not incomplete and do point the Court to the certified record and what documents were considered by the commissioners at the time of their vote. This claim is without merit.

Next is the sufficiency of the original findings or the record being inconclusive by the present commissioners as to the prior acts of previous commissioners.

It appears from the record and the defendant's response the two commissioners who were both original voters and present commissioners indicate the certified record contains the documents used to make their decision on how they voted. The original findings stated "on the basis of the facts stated above, and using the legislative discretion granted to in by the laws of the State of Kansas, the board arrived at the following conclusions in the adoption of the resolution, and hereby affirms those conclusions, to wit..."

Judge Klinginsmith did not say to hold more hearings or to create transcripts but merely wanted the commissioners to review and identify the record. He wanted them to identify for him the facts they relied upon in making their decision. The Court believes the county has met that burden by the supplemental finding of facts.

Lastly, the Plaintiff's have requested this court to strike the finding of facts because of hearsay and/or parole evidence. The record must consist of hearsay when

articles and publications are used by the commissioners in making their decision.

Further, nothing suggests the certified record has been modified or added to in anyway by the finding of facts. It should be noted the hearsay also includes articles favorable to wind projects.

For the above stated reasons the plaintiff's and interveners motion to strike is denied.

Before the Court determines the balance of the issues before it the Court feels it is necessary to address the issue of procedure and due process raised by the plaintiff's in their latest filing on January 17, 2007.

As to procedure. K.S.A. 12-760 allows any person aggrieved by a final zoning decision of the county or city governing body to maintain an action in the district court...to determine the reasonableness of such final decision. Such a challenge is not an appeal, but is an action under K.S.A. Chapter 60, governed by the rules of evidence. See Keeney v. City of Overland Park, 203 Kan. 389. The issues the Court can decide are limited to the reasonableness and lawfulness of the final decision

The Plaintiff's believe they have been denied due process. An excellent article on zoning issues of the type in this case is found in The Journal of the Kansas Bar Association, January, 2007 beginning on page 28. There is a discussion of procedural due process and substantive due process.

Procedural due process is contained in all zoning decisions. All entities and people involved or affected have procedural rights to notice, a fair and open hearing, as well as impartial decision makers. See McPherson Landfill v. Bd. of County Comm'rs, 274 Kan. 303. The challenges to this are normally improper ex parte communications,

predetermination by a decision-maker, or the decision-maker having a personal interest.

None of these challenges have been advanced in this case.

Looking next at substantive due process. It appears the decision-maker's decision "has no conceivable rational relationship to the exercise of the state traditional police power through zoning." Crider v. Bd. Of County Comm'rs of County of Bolder, 246 F. 3d 1285. The actual purpose of the zoning regulation is not important, but rather the question is whether a "reasonably conceivable" rational basis exists. Crider.

Quoting McPherson:

"In such quasi-judicial proceedings, it is incumbent upon the authority to comply with the requirements of due process in its proceedings. Thus the proceedings must be fair, open, and impartial. A denial of due process renders the resulting decision void."

The McPherson Court then cites a long list of cases standing for that principle so as to establish a long history for said principle. This Court cannot find any fault with the County's process in this matter.

It should be noted that Judge Klinginsmith in his memorandum decision of February 23, 2005 dismissed the plaintiff's second cause of action. In his memorandum decision of July 22, 2005 he then dismissed Counts 1, 4, 5, and 6 of the plaintiff's petition. The Court also indicated that Counts 3 and 7, which are now before this court, were not ripe for determination until the reasonableness of the board's action in adopting the resolution was determined.

Lastly, Judge Klinginsmith indicated to the plaintiff interveners that he would not go back and revisit the issues which he had already decided as they related to the plaintiff interveners petition and unfiled amended petition.

At this time the Court considers the issue of reasonableness of the Board of County Commissioner's actions as well as the taking issues raised by plaintiff or plaintiff interveners. These issues are raised by the defendant's motion to dismiss the plaintiff's case herein.

The following is taken from the Bar article previously referenced.

Cities and counties "are entitled to determine how they are to be zoned or rezoned...No court should substitute its judgment...merely on the basis of a differing opinion as to what is a better policy in a specific situation." Landau v. City Council of Overland Park, 244 Kan. 257. The standard of review is an onerous one for the plaintiff:

An administrative action is unreasonable when [1] it is so arbitrary that it can be said it was taken without regard to the benefit or harm involved to the community at large, including all interested parties, and [2] was so wide of the mark that its unreasonableness lies outside the realm of fair debate. Landau.

The zoning decision-maker is entitled to a presumption that its decision was reasonable. Bd. Of County Comm'rs of Johnson County v. City of Olathe 263 Kan. 667. To prove a decision was unreasonable, the person challenging a zoning decision cannot come forth with a completely new case and new evidence that was not before the planning commission at its public hearing. This is because "whether the action is reasonable or not is a question of law, to be determined upon the basis of the facts, which were presented to the zoning authority," Davis v. City of Leavenworth, 247 Kan. 486. And the court is "not to retry the case on the merits of the application. Landau."

As to the reasonableness of the board's adoption of the resolution this court believes it is guided by R.H. Gump revocable trust, and Nordyke Ventures, LLC, vs. The City of Wichita, Kansas, Kan. App. 2d 501.

This Court has previously found that the zoning resolution voted upon by the board in this matter was a legislative function and not quasi-judicial in character. This is a critical decision to this matter. While Gump was a specific tract zoning case the Court believes the standard of review in Gump would apply to the counties action.

In Gump the Court of Appeals set forth a standard of review for zoning matters.

It is as follows:

“In zoning appeals, the standard of review for district courts as well as for this court is set forth in Combined Investment Co. v. Board of Butler County Commissioners, 227 Kan. 17, 28 (1980)”

A review of Combined Investment Co. leads to the parameters and power of this Court:

- (1) The local zoning authority, and not the court, has the right to prescribe, change or refuse to change, zoning.
- (2) The district court's power is limited to determining (a) the lawfulness of the action taken, and (b) the reasonableness of such action.
- (3) There is a presumption that the zoning authority acted reasonably.
- (4) The landowner has the burden of proving unreasonableness by preponderance of the evidence.
- (5) A court may not substitute its judgment for that of the administrative body, and should not declare an action unreasonable unless clearly compelled to do so by the evidence.
- (6) Action is unreasonable when it is so arbitrary that it can be said it was taken without regard to the benefit or harm involved to the community at large, including all interested parties, and was so wide of the mark that its unreasonableness lies outside the realm of fair debate.
- (7) Whether action is reasonable or not is a question of law, to be determined upon the basics upon the basis of the facts which were presented to the zoning authority.
- (8) An appellate court must make the same review of the zoning authority's action as did the district court.

The Court also notes the issue of whether the commissioners followed the planning commissioner's recommendations may be also raised. Just because a zoning authority does not follow the planning commissions recommendation, it is not unreasonable per se. The function of the planning commission is advisory only, its

authority being limited to a study of the facts and submission of its recommendations to the governing body wherein authority to take final action lies. See Burke and McCaffrey, Inc. v. City of Merriam, 198 Kan. 325.

In Gump, the Court found that the city had taken into account the benefit or harm involved to the community at large. It had exercised its discretion to make a decision on that basis that was not so wide to the mark as to be outside the realm of fair debate. The city had to balance the benefits and the harm to all parties involved and come to a resolution of the case. It also had a strong basis in aesthetics.

In the instant matter there is no doubt the County looked at the aesthetics of having the wind generators as a compatible or incompatible use with the Flint Hills area. In Ware v. City of Wichita, 113 Kan. 153, the court said,

“It does plaintiffs no good to characterize the purpose here as aesthetic. As long ago as 1923 we recognize in a zoning case that there is an aesthetic and cultural side of municipal development which may be fostered within reasonable limits. Such legislation is merely a liberalized application of the general welfare purposes of state and federal constitutions.

The concept of public welfare is broad and inclusive. See Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421. The values it represents are spiritual as well as physical, aesthetics as well as monetary. It is within the power of legislature determined that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled. See Berman v. Parker, 348 U.S. 26.

In Blockbuster Video, Inc. v. City of Overland Park, 24 Kan. App. 2d 358, the court indicated the city had the power to enforce zoning regulation concerning types of awnings based upon aesthetics. The court stated,

“There is an aesthetic and cultural side of municipal development which can be fostered within reasonable limits; regulation of redevelopment or new development is permitted for aesthetic reasons.”

The County also looked at the comprehensive plan which took a substantial amount of time to develop, but indicated the comprehensive plan clearly sets forth the counties values regarding the general welfare issues. The County found that placing the complexes of wind farms, of the size and scope necessary to accomplish their intended purpose, would have a dramatic, and adverse, effect upon all of the general welfare issues found in the comprehensive plan.

One can review the meetings and correspondence which the County conducted in its attempt to determine the wishes of the citizens of Wabaunsee County, Kansas. A large portion of the community's wishes were against the wind farms as proposed by the plaintiffs herein.

An example of the amount of information reviewed is a memo of June 18, 2004 from Bruce Waugh to the commissioners with approximately two hundred pages attached to the same. This document contains both good and bad for wind farms but in total its position is in opposition to wind farms. However, there are a number of articles, research information, and other pertinent information which certainly allowed the County to accumulate a wealth of information.

A review of the certified record finds repeated documents and minutes of meetings, both of the commissioners themselves and of public hearings, wherein the pros and cons of wind farms were discussed.

The Court finds there is substantial evidence which a reasonable mind might accept as adequate to support the conclusions reached by the County.

“Substantial evidence requires more than a scintilla but less than a preponderance. See Sandoval v. Aetna Life and Casualty Ins. Co. 967 f.2d 377.”

“The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agencies finding from being supported by substantial evidence. See Curtis, Inc. v. I.C.C. 662 f.2d 680.”

The Court finds the finding of facts and conclusions of the defendant, board of county commissioners of Wabaunsee County, as well as the supplemental findings of facts give this court the ability to determine what documents and information was used by the board in reaching its determination. These findings of fact are necessary to determine the reasonableness of the counties actions.

It appears to the Court the County has taken into account the benefit or harm involved to the community at large and has exercised a decision on that basis which is not so wide of the mark that its unreasonableness is outside the realm of fair debate. The Court finds that the counties actions were reasonable in the adoption of the resolution. The conclusion is based upon a review of the seven factors set forth earlier in this opinion from Combined Investment Co., as well as a review of the certified record, and the findings of facts and conclusions submitted by the County.

Having decided the reasonableness of the counties actions in adopting the resolution the Court now turns to the taking issues which have been put forth in the plaintiff's and interveners petitions. These are two issues of the initial plaintiffs which are an unlawful taking and a violation of 42 U.S.C. 1983. The plaintiff interveners also have an unlawful taking claim as well as the 42 U.S.C. 1983 claim. The plaintiff interveners also advance an inverse condemnation claim.

Most regulations restricting the use of land of impairing its value do not require compensation under the Fifth and 14<sup>th</sup> amendments. Therefore, even though prohibiting

a particular type of development, like a landfill, may reduce the value of land, it is not usually a taking if other economically viable uses remain available. McPherson.

However, zoning restrictions constitute a "taking" for which compensation is required when the regulations deny "all economically beneficial or productive use of the land.

McPherson.

In reviewing the case law to determine the "taking" claims of both the plaintiff and interveners the court has reviewed McPherson Landfill. In its opinion the court quoted from Penn Central Transp. Co. v. New York City, 438 U.S.-104 as to an analysis if the entire value of the property is not destroyed. In Penn Central the owners of a terminal argued the air space above the terminal amounted to a "valuable property interest". The court rejected that argument.

"The owners could not establish a "taking" simply by showing they had been denied the ability to exploit a property interest that they heretofore had believed was available for development. "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine where the rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole."

The McPherson case also quotes from Jack v. City of Olathe, 245 Kan. 458 holding there is not a taking following a failure to rezone.

"The cases are further distinguishable from the present case in that the various governmental bodies involved had taken affirmative action to restrict and take away a right to the use of property which already existed. In the present case the action of the city was merely to deny the expansion of the existing right to use the property. No taking of the plaintiff's property has been shown in the present case."

In McPherson the court concluded that the boards denial was not a taking under the Fifth Amendment to the United States Constitution but was a decision to deny the expansion of the existing right to use the property.

As the County correctly points out K.S.A. 12-712 (which was the predecessor of K.S.A. 12-760), imposes a duty on city governing bodies to enact only reasonable zoning ordinances. The statute will allow a property owner to challenge the reasonableness of the zoning action by bringing an action against the governing body in district court. Once the district court determines the zoning action was reasonable there is no taking under Jack and McPherson Landfill.

That is exactly what has happened in the counties denial of placing wind farms in the entire county. The County didn't take any existing rights away but only refused to expand the existing rights including wind rights. The plaintiff and plaintiff's interveners have given this Court no cases which either distinguish or overrule Jack and McPherson Landfill. As such the taking claims of both the plaintiff and plaintiff's interveners are dismissed.

As to the taking claims under 42 U.S.C. 1983. In the McPherson Landfill case the same type of claim was alleged. The Court disposed of it rather easily by indicating that one seeking relief under 42 U.S.C. 1983 must satisfy two requirements. First, some person must deprive the plaintiff of a federal right and two, the person who deprived the plaintiff of a federal right must of acted under color of state or territorial law. Since, the plaintiff's and plaintiff's interveners herein have failed to satisfy the first requirement by failing to establish that the board deprived it of a federal right this claim must also fail. Since there was no taking under the Fifth Amendment to the United States Constitution

but only a denial of the expansion of existing rights to use the property this count is also dismissed as to plaintiff's and plaintiff interveners.

The last remaining issue is the plaintiff intervener's claim of inverse condemnation. The court has reviewed City of Wichita, v. McDonald's Corp., 266 Kan. 708 as well as Eberth v. Carlson 266 Kan. 726.

Eberth is an inverse condemnation action. The Court indicated the standard review in such a case is whether there has been a compensable taking of property, which is a question of law.

In both City of Wichita and Eberth the Court clarified its earlier position in Garrett v. City of Wichita, 259 Kan. 896. In each case they made Garrett stand on its specific facts. In each case the Court was not required to apply Garrett to the facts of the case. It appears the plaintiff interveners place great reliance upon Garrett. It appears the plaintiff intervener's reliance upon Garrett is misplaced.

In City of Wichita the court said,

"The test is always been one of reasonableness.... Garrett is not to be read as changing the rational developed by our long standing case law that a compensable taking occurs only if the police power is unreasonable. Initially, the district court is to make a determination of reasonableness. If exercise of police power is unreasonable, a taking has occurred and a compensation award is appropriate.

This Court, having previously found the passing of the resolution by the County was reasonable and within the powers granted to the County, the Court finds no inverse condemnation has occurred. Thus the third count of the plaintiff intervener's amended petition is dismissed.

Reviewing the previous memorandum decisions issued by the Honorable Tracy Klinginsmith as well as this memorandum opinion there exists no viable counts on which the plaintiffs or plaintiff's interveners can go forward. The case is dismissed.

IT IS SO ORDERED.

Dated: February 28, 2007

A handwritten signature in black ink, appearing to read "M. Ireland", written over a horizontal line.

Micheal A. Ireland  
District Judge