



Foster Swift Secures Major Victory for Almer and Ellington Townships in Lawsuits Brought by Wind Energy Company

Michael D. Homier and Laura J. Genovich

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In late August, an 18-month long lawsuit against Almer and Ellington Townships ("the Townships"), which was brought by a subsidiary of wind energy giant NextEra Energy Resources LLC ("NextEra"), was dismissed by the United States District Court for the Eastern District of Michigan, North Division.

Foster Swift attorneys Mike Homier and Laura Genovich, with the assistance of co-counsel for the Townships' insurance carrier, successfully led the fight to uphold the Townships' rights to regulate how land within their townships is used.

The cases stem from NextEra's efforts to build a wind energy project—wind turbines on private property—in the Townships. NextEra, which is the largest generator of wind energy in the United States, entered into agreements through its subsidiary, Tuscola Wind Energy III, LLC ("Tuscola Wind"), with landowners for use of their property for the project.

Because of the nature of the project, Tuscola Wind was required to obtain special land use permits ("SLUP") from the Townships pursuant to the Townships' zoning ordinances.

Tuscola Wind applied for a SLUP from Almer Township, which was denied. Tuscola Wind also applied for a SLUP in Ellington Township, which was not considered in light of a moratorium on such projects that was passed by the Township while it considered adopting amendments to its zoning ordinance.

Tuscola Wind filed lawsuits against each Township, making various arguments that the Townships had acted improperly in their consideration (or in the case of Ellington Township, the lack of consideration) of its SLUP requests.

AUTHORS/ CONTRIBUTORS

Laura J. Genovich

Michael D. Homier

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During the pendency of the litigation, Ellington Township completed its review of its zoning ordinance and adopted amendments that included more comprehensive requirements for wind energy projects.

Ellington then informed Tuscola Wind that its request would be considered under the new ordinance, not the one in effect at the time the request was submitted.

In the lawsuits, Tuscola Wind asserted a number of claims, including that procedural due process violations occurred, that it was denied equal protection, that the Zoning Enabling Act was violated, and that violations of the Open Meetings Act occurred.

Foster Swift represented the Townships both before the lawsuits were filed—helping them to exercise their rights and perform their duties in consideration of the SLUP applications—and during the litigation. Counsel for the Townships brought motions for summary judgment, arguing that the cases should be dismissed without need for a trial.

For example, the Townships argued that Tuscola Wind's procedural due process claim was meritless because Tuscola Wind had no property interest—a prerequisite for such a claim—in its SLUP application.

In other words, if no property interest exists, there can be no deprivation of it in violation of due process. On this, and all other substantive arguments, the courts agreed with the Townships.

Tuscola Wind's claims were dismissed, or deemed moot, and the Townships' actions in considering the SLUP applications were upheld.

These cases, and the actions that preceded them, are a reflection of the growing debate in communities across Michigan, and around the country, about the extent to which municipalities can and should regulate through zoning the construction and operation of wind energy farms. On the one hand, wind energy farms can bring jobs and money to a community. On the other hand, many perceive wind turbines to be unwelcome nuisances.

Municipal boards must consider these competing interests as they consider SLUPs for potential wind farm projects. Better yet, they should take proactive action while working with legal counsel to craft appropriate ordinances before community strife, litigation, and unwanted media attention arise in the event of a dispute. Wind energy companies have deep pockets. Litigation is a real possibility if a wind energy company is denied the ability to operate. In order to succeed in a lawsuit, municipalities must act thoughtfully, strategically, and compliantly when considering a SLUP application, including having an effective zoning ordinance in place, and acting in accordance with the Open Meetings Act, among other things.

Unfortunately, wind energy farm litigation is a reality that many municipalities will have to grapple with over the coming years. After all, there is a massive amount of money at stake as the industry races to expand. Municipalities must be prepared—both in having a solid ordinance and process in place to consider applications as they come, and to fight back in the event litigation ensues.



Foster Swift is here to help municipalities across Michigan, just as we did in these cases, navigate through the challenges they will face.

For more information about these cases, and for assistance with any planning or issues your community may be grappling with, please contact Mike Homier by email at mhomier@fosterswift.com or 616.726.2230 or Laura Genovich at lgenovich@fosterswift.com or 616.726.2238.

