JOHNECHECK V BAY TOWNSHIP
U.S. DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KELVIN and CINDY JOHNECHECK,

Plaintiffs,

v.

BAY TOWNSHIP,

Defendant.

Case No. 1:02-CV-71

HON. DAVID W. McKEAGUE

JUDGMENT ORDER

In accordance with the Court's written opinion of even date,

IT IS HEREBY ORDERED that the motion of plaintiffs Kelvin and Cindy Johnecheck for partial summary judgment is **DENIED**; and

IT IS FURTHER ORDERED that the motion of defendant Bay Township for summary judgment on all five of plaintiffs' claims is **GRANTED**; and

IT IS FURTHER ORDERED that **JUDGMENT** is hereby **AWARDED** to defendant Bay Township on all claims asserted in plaintiffs' complaint.

Dated: September 24, 2003

/s/ David W. McKeague
DAVID W. McKEAGUE
UNITED STATES DISTRICT JUDGE

On November 30, 2000, the Johnechecks applied for the zoning permit to commence construction of the generator towers. The application was denied the same day by Zoning Administrator David Simmons because the Township "zoning ordinance does not address WTG's." On appeal to the Bay Township Zoning Board of Appeals, the Johnechecks argued that wind farming should be deemed a form of "specialized farming," a permitted use in the Agricultural Zoning District under Article VIII, § 8.2(a) of the Township Zoning Ordinance.[1] The Zoning Board of Appeals unanimously rejected the argument on December 18, 2000, thereby affirming the denial of the requested permit.

For the next several months, the Township Board of Trustees and Township Planning Commission actively considered a proposal to amend the Zoning Ordinance so as to permit and regulate installation of wind turbine generators as a "special use." Ultimately, on July 12, 2001, the Board of Trustees, in a 3 to 2 vote, rejected the proposal, concluding that such a special use would be contrary to the Township Land Use Plan.

The Land Use Plan has not been made a part of the record. A relevant excerpt of it has been quoted by defendant Township as follows:

> This document presents a strategy for future land use and development. It is not a zoning ordinance and does not regulate the use or development of land in any way. This Land Use Plan was prepared and adopted under the authority of the Township Planning Act, PA 168 of 1959, as amended, for a number of purposes.
>
> - To provide goals and policies for future land use and development
> - Encourage the preservation and protection of natural and scenic resources

[1]Under § 8.2(a), permitted uses within the Agricultural Zoning District are defined as "[f]arms for general and specialized farming, including nurseries, and single family farm dwellings, and buildings and other structures essential to farming and farm operations."

- Promote the preservation of the community's character, as presented by its low density of residential development, shorelines, woodlands, farmland, and open space
- Promote the preservation of woodlands, wetlands, water courses and shorelines as groundwater recharge and storm water retention areas, and habitat for a variety of plant and animal life
- To recognize farming and forestry as irretrievable components of the community's character and tourism related economic base
- To provide planned implementation recommendations
- Encourage the establishment and implementation of land use policies that promote and protect the health, safety, and general welfare of the community.

Consistent with the goals and purpose of this Land Use Plan, the minutes of the July 12, 2001 Board of Trustees Meeting reflect that rejection of the proposed amendment was motivated primarily by concerns about the potentially negative impact of wind turbine generators on the rural character and scenic viewscapes of the area. Concern about the unknown impact on township property values also played a role. Consequently, the Board refused to adopt "an amendment to the Bay Township Zoning Ordinance that would permit wind turbine generators as a special use in the Agricultural Zoning District." Minutes of July 12, 2001 Board of Trustees Meeting, p. 4.

This action followed. The Johnechecks originally filed their five-count complaint in the Charlevoix County Circuit Court. The Township removed the action to this Court based on federal question jurisdiction. Considering the Township's denial of their permit application and the refusal to amend the Zoning Ordinance together, the Johnechecks allege the Township's actions represent unlawful exclusionary zoning.

In count I, they allege this exclusionary zoning is violative of rights secured to them by the Michigan Constitution and the Fifth and Fourteenth Amendments of the United States Constitution.

In count II, the Johnechecks allege the exclusionary zoning is violative of Michigan's Township Zoning Act, M.C.L. § 125.297a. In count III, the Township's actions are said to have deprived the Johnechecks of property without due process, in violation of the Michigan and United States Constitutions. In count IV, the Johnechecks allege the Township's actions effect a regulatory taking of their property, in violation of the Michigan and United States Constitutions. In count V, the Johnechecks proceed under 42 U.S.C. § 1983, alleging the Township has deprived them of federally protected civil rights under color of state law. The Johnechecks seek declaratory relief, compensatory damages and award of attorney's fees and costs.

II

Now before the Court is the Johnechecks' motion for partial summary judgment, as to their count I claim. The Township has also moved for summary judgment, as to all five counts. The parties' motions for summary judgment require the Court to look beyond the pleadings and evaluate the facts to determine whether there is a genuine issue of material fact that warrants a trial. Fed. R. Civ. P. 56(c). *See generally, Barnhart v. Pickrel, Schaeffer & Ebeling Co.*, 12 F.3d 1382, 1388-89 (6th Cir. 1993). The Court must determine "whether the evidence presents sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). The Court must consider all pleadings, depositions, affidavits, and admissions on file, and draw all justifiable inferences in favor of the party opposing the motion. *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Once the moving party identifies elements of a claim or defense which it believes are not supported by evidence, the nonmovant must present affirmative evidence tending to show a genuine

dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25 (1986). The substantive law identifies which facts are "material." Facts are "material" only if establishment thereof might affect the outcome of the lawsuit under governing substantive law. *Anderson*, 477 U.S. at 248. A complete failure of proof concerning an essential element necessarily renders all other facts immaterial. *Celotex*, 477 U.S. at 322-23. An issue of fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Anderson*, 477 U.S. at 248. Production of a "mere scintilla of evidence" in support of an essential element will not forestall summary judgment. *Id.* at 252.

III

Count I is the only count as to which both the Johnechecks and the Township seek summary judgment. While count I purports to assert both state and federal constitutional claims, the parties' briefing and arguments are based exclusively on state law. The governing standards under Michigan law are not disputed.

Count I is a "facial challenge." "A facial challenge is one that attacks the very existence or enactment of the ordinance; it alleges that the mere existence and threatened enforcement of the ordinance adversely affects all property regulated in the market as opposed to a particular parcel." *Jott, Inc. v. Clinton Twp.*, 224 Mich. App. 513, 524-25 (1997). Zoning ordinances are generally clothed with a presumption of validity. *Countrywalk Condominiums, Inc. v. City of Orchard Lake Village*, 221 Mich. App. 19, 23 (1997). Hence, the burden generally rests on the one challenging a zoning ordinance to show either that there is no reasonable governmental interest being advanced by the subject zoning classification, or that the classification is arbitrary, capricious and unfounded. *Ed Zaagman, Inc. v. City of Kentwood*, 406 Mich. 137, 153 (1979). However, "an ordinance which

totally excludes a use recognized by the constitution or other laws of the state" does not enjoy the usual presumption of validity. *Countrywalk*, 221 Mich. App. at 23. In defense of such a total exclusion, the zoning authority has the burden of going forward with evidence that the exclusion has a reasonable relationship to the health, safety or general welfare of the community. *Id.* at 24. Under Michigan law, "[a]esthetics is a valid part of the general welfare concept; however, it may not serve as the sole reason for excluding a legitimate use of property." *Art Van Furniture, Inc. v. City of Kentwood*, 175 Mich. App. 343, 351 (1989); *Ottawa County Farms, Inc. v. Township of Polkton*, 131 Mich. App. 222, 229 (1984). If the zoning authority carries its burden, it is incumbent on the challenging party to show that the ordinance does not bear a real and substantial relationship to the safety or welfare of the public. *Countrywalk*, 221 Mich. App. at 24.

Applying these standards gives rise to a threshold question. The Johnechecks contend that the Township Zoning Ordinance is not clothed with a presumption of validity because it effects a total exclusion of a legitimate land use. Does the Township Zoning Ordinance, "totally exclude" wind turbine generators from the township? The Township answers in the negative. On its face, the ordinance makes no provision, for or against, wind turbine generators. On its face, the ordinance can hardly be deemed to effect a total exclusion of wind turbine generators ("WTG's") from the township. The Johnechecks insist that the Township's refusal to amend the ordinance so as to provide for regulation of WTG's, coupled with its denial of their permit application, clearly evinces an intent to exclude all WTG's from the township.

The ordinance's silence as to WTG's cannot reasonably be construed as implying total prohibition. The record indicates that in all of Michigan, there are only three operational WTG's of the type here at issue. It is likely that few if any of the thousands of local zoning ordinances across

the state make explicit provisions for WTG's. Their silence does not bespeak antipathy, but apathy. Whether installation of a WTG should be recognized as a permissible land use is a question simply too rare in Michigan to warrant express treatment in local zoning ordinances.

The Johnechecks insist *this* Zoning Ordinance cannot be viewed in a vacuum; its silence is pregnant with meaning. When it is considered in light of their permit denial and the Township's refusal to amend, the Johnechecks maintain this ordinance evidences a clear intent to exclude all WTG's.

The count I claim presents a facial challenge. The Township's decision to deny plaintiffs' permit application is not at issue and has limited probative value. Also, while the proceedings concerning the proposed amendment of the ordinance afford evidence of individual board members' intentions, the end result of the proceedings was simply a collective decision not to adopt a proposed amendment. Moreover, the Township's current position belies any established intent to exclude all wind turbine generators.

The Township contends that a generator less than 30 feet in height would not run afoul of the ordinance's generally applicable height limitation and would be allowable as an accessory use. The Johnechecks insist that until now, the height limitation played no role in the Township's decisions to deny their permit application and not to amend the ordinance. They ask the Court not to credit such a "*post hoc* rationalization," which has traditionally been deemed an inappropriate basis for judicial review of agency action. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971).

Because this action is not in the nature of judicial review, the parties' submissions and the Court's review are not limited to the record compiled in earlier Township proceedings. Moreover,

although the Township authorities appear not to have earlier expressly invoked the ordinance height limitation as a reason for their actions, there is no doubt that concerns over the towers' extraordinary height were decisive. Township authorities' concerns over preserving the rural character and scenic viewscapes of the area undeniably stemmed directly from the towers' "overpowering physical presence." Minutes, July 12, 2001 Board Meeting, p.2. Hence, it is apparent that the Township's reliance on the general height limitation is merely a repackaging of its original and consistent reasoning, not a new "*post hoc* rationalization." It is a repackaging more explicitly open to the possibility that WTG's considerably smaller than those proposed by the Johnechecks would not be excluded.

Granted, there is no evidence that an application to install a 30-foot wind turbine generator would be approved. Yet, neither is there evidence that a 30-foot generator would be excluded from the township. The Township simply has not been faced with such an application.

The Township Zoning Ordinance, in its present form, simply does not expressly address wind turbine generators – to permit them or exclude them. The record demonstrates that the Township has decided not to allow 300-foot WTG's as a special use in the Agricultural Zoning District, because doing so would be contrary to the stated goals of the Township Land Use Plan. Allowing a 30-foot WTG, on the other hand, would not pose the same conflict with the Land Use Plan. Hence, the Township's position that a 30-foot generator would not be excluded is not inherently suspect, but plausible and ostensibly genuine.[2] It follows that the ordinance has not been shown to work a

[2]In this regard, the Court notes also, as observed by the Township in answer to interrogatories, that the Township has not had the occasion to approve or deny an application to permit installation of a wind turbine generator of any size in the Commercial Zoning District. The Johnechecks have not responded with any evidence that WTG's have been or would be excluded from the Commercial District. Indeed, it appears likely that WTG's in the Commercial District would not be viewed as a threat to the rural character or scenic viewscapes of the township.

total exclusion of wind turbine generators.

The Johnechecks object. They insist that a 30-foot wind turbine generator is not reasonably effective or profitable. Thus, they argue that the 30-foot limitation operates to "functionally exclude" all WTG's because wind resources cannot be reasonably and efficiently used at that height. Yet, the deposition testimony of plaintiffs' own expert, Hugh Campbell, recognizes that WTG's as small as 30 feet in height are used as a supplemental direct power source for personal residences. H. Campbell dep. pp. 36-38. To be sure, Campbell acknowledges that tall WTG's are typically more productive than short WTG's. Yet, short WTG's may still be useful.[3] It follows that to the extent the Township recognizes the possibility that installation of a 30-foot WTG may be permitted, it cannot be said that all WTG's are functionally excluded.

In *Sun Oil Co. v. City of Madison Heights*, 41 Mich. App. 47, 55 (1972), the court recognized that although a municipality could not prohibit all advertising within its boundaries, it could regulate the manner of advertising, e.g., by height limitation, so as to preserve aesthetics and protect the community's general welfare. A height limitation is not a prohibition. The Court concludes, therefore, that the record falls short of establishing that wind turbine generators are totally excluded from the Township. Hence, the Township's actions are presumptively valid and the Johnechecks must bear the burden of showing that the Township's actions are not supported by any reasonable governmental interest or are arbitrary and capricious.

The Johnechecks acknowledge that both the denial of their permit application and the Board's refusal to amend the Zoning Ordinance were motivated by aesthetic concerns. Michigan

[3] In fact, a May 2002 publication of the United States Department of Energy, "Wind Power Today," submitted by plaintiffs, reports that "sales of the U.S. small [size unspecified] wind turbine industry amounted to about 13,400 turbines."

law recognizes that aesthetic concerns are a reasonable governmental interest. *Adams Outdoor Advertising, Inc. v. City of Holland*, 234 Mich. App. 681, 693 (1999), *aff'd*, 463 Mich. 675 (2001); *Art Van Furniture*, 175 Mich. App. at 351. *See also Berman v. Parker*, 348 U.S. 26, 33 (1954) ("it is well within the power of the legislature to determine that the community should be beautiful as well as healthy"). Although aesthetic concerns alone may not justify the total exclusion of a legitimate use from the township, *Art Van Furniture*, 175 Mich. App. at 351, the instant ordinance has not been shown to work a total exclusion. Therefore, aesthetic concerns are a legitimate governmental interest sufficient in themselves to support the Zoning Ordinance's restriction of wind turbine generators in the Township.[4]

The Court thus finds no genuine issue of material fact. The Johnechecks have failed to come forward with evidence sufficient to create a triable issue in connection with their "constitutional exclusionary zoning claim." Defendant Bay Township is therefore entitled to summary judgment on the count I claim.

IV

Count II presents a statutory exclusionary zoning claim. In another facial challenge, the Johnechecks contend the Zoning Ordinance violates Michigan's Township Zoning Act, M.C.L. § 125.297a:

> A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a township in the presence of a demonstrated need for that land use within either the township or surrounding area

[4] It is not unfair to characterize the Township's apprehension about WTO's as stemming primarily from aesthetic concerns. Yet, the record also reflects recognition by Township officials of the integral relationship between aesthetics and the Township's tourism-related economic base, as well as property values. In other words, the Township's actions are not a function of mere subjective "taste," but proceed from a genuine respect for and appreciation of the natural beauty and rural character of the area, and a desire to preserve and promote those qualities for the common good – all legitimate matters of governmental regulation.

> within the state, unless there is no location within the township where the use may be appropriately located, or the use is unlawful.

Under this statute, "a zoning ordinance may not totally exclude a land use where (1) there is demonstrated need for that land use in the township or surrounding area, (2) the use is appropriate for the location, and (3) the use is lawful." *English v. Augusta Twp.*, 204 Mich. App. 33, 37-38 (1994); *Eveline Twp. v. H&D Trucking Co.*, 181 Mich. App. 25, 32 (1989).

The Johnechecks cannot prevail on this claim because, as seen above, they have failed to satisfy the requisite threshold showing that the Zoning Ordinance totally excludes all wind turbine generators from the township. *See Whiteford Partners, LLC v. Whiteford Twp.*, 2003 WL 21398299, No. 238719 (Mich. App. June 17, 2003) (recognizing that a finding of total exclusion is essential to viability of exclusionary zoning claim). The Township is entitled to summary judgment on this claim as well.

V

In count III, the Johnechecks allege the Township, by preventing them from wind farming, has deprived them of beneficial use of their property without due process. This is an "as applied" challenge to the denial of their application for a special use permit. To prevail on such a substantive due process theory, plaintiffs must show that the Township's actions do not advance any reasonable governmental interest or constitute an arbitrary and unreasonable restriction of the use of their property, precluding its use for any purposes for which it is reasonably adapted. *Gackler v. Yankee Springs Twp.*, 427 Mich. 562, 571-72 (1986); *Frericks v. Highland Twp.*, 228 Mich. App. 575, 594 (1998); *Bell River Associates v. China Twp.*, 223 Mich. App. 124, 129 (1997).

This claim is premised on the contention that aesthetics do not represent a legitimate governmental justification for the Township's actions. Yet, inasmuch as the Johnechecks have failed to show the Township has totally excluded WTG's, aesthetic concerns are, as discussed above, a legitimate and sufficient governmental interest. Moreover, the Johnechecks have neither argued nor adduced evidence tending to support a finding that they have been deprived of all reasonable beneficial use of their land. There is no genuine issue of material fact; the Township is entitled to summary judgment on the count III substantive due process claim.

VI

The Johnechecks' count IV claim seeks damages for an unconstitutional taking of their property. To establish an unconstitutional taking, plaintiffs must show the Township's actions preclude the land's use for any purpose to which it is reasonably adapted. *Bell River*, 223 Mich. App. at 133. Mere diminution in value does not amount to a taking; plaintiffs must show that they are denied economically viable use of their land because the land is either unsuitable for use as zoned or unmarketable as zoned. *Id.*

The Township has correctly pointed out that the Johnechecks have presented absolutely no evidence in support of these essential elements. The Township's motion for summary judgment on this claim will be granted.

VII

Finally, count V of the complaint sets forth a claim for damages under 42 U.S.C. § 1983, alleging the Township's actions deprived the Johnechecks of the above discussed constitutional rights under color of state law. Because the Johnechecks have failed to adequately support their claims of constitutional violations, this claim, too, must fall.

VIII

For all the above reasons, the Johnechecks' motion for partial summary judgment will be denied and the Township's motion for summary judgment will be granted. A judgment order consistent with this opinion, awarding judgment to defendant Township on all of the Johnechecks' claims shall issue forthwith.

Dated: September 24, 2003

/s/ David W. McKeague
DAVID W. McKEAGUE
UNITED STATES DISTRICT JUDGE