

STATE OF MICHIGAN
IN THE 29TH CIRCUIT COURT FOR THE COUNTY OF GRATIOT

HEARTLAND FARMS WIND PROJECT, LLC,
Appellant,

v.

HON. CORI E. BARKMAN
File No. 2022-516-AA

FULTON TOWNSHIP (GRATIOT COUNTY MICHIGAN),
Appellee.

James R. Griffin, P82966
SCHAIN, BANKS, KENNY &
SCHWARTZ, Ltd.
Attorney for Plaintiff
70 W Madison Street, Ste. 2300
Chicago, IL 60602

Michael D. Homier, P60318
Laura Genovich, P72278
FOSTER SWIFT
Attorneys for Defendant
1700 E Beltline Ave NE Ste 200
Grand Rapids, MI 49525-7044

Paul E. Burns, P31596
Jeffrey D. Alber, P76530
LAW OFFICE OF PAUL E. BURNS
133 W Grand River Avenue
Brighton, MI 48116

FILED

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29th CIRCUIT
GRATIOT COUNTY

At a session of said Court held in the Courthouse
in the City of Ithaca, in Gratiot County,
on this 22nd day of November, 2022

BEFORE HONORABLE CORI E. BARKMAN

OPINION AND ORDER DENYING RELIEF REQUESTED BY APPELLANT

Background Facts

Oral argument in this matter was heard on September 27, 2022. The matter arose after Appellee, the Fulton Township Board (hereafter the Township) voted to deny Appellant Heartland Farms Wind Project, LLC. (Heartland's) application for a special use

permit to install 12 wind turbines in Fulton Township, Gratiot County, Michigan. R. 17-19. The basic timeline and facts are as follows.

In November 2021, Heartland submitted an application for a special land use permit and site plan approval to the Township. In the application, Heartland sought approval for 12 wind energy turbines and other ancillary infrastructure to be located in Fulton Township on land leased from Fulton Township landowners. R. 7-19. Heartland's application sought approval of two separate land use entitlements: (1) a special land use permit (SLUP); and (2) site plan approval. R. 15.

To assist in its decision making regarding the application, the Township retained the Spicer Group, a land planning consultant, to review and provide an expert opinion regarding the project application and to gauge whether the project complied with zoning ordinance standards. The Spicer Group completed and submitted its report, entitled "Review of Application for Special Land Use Permit for the Heartland Wind Project, LLC." regarding its compliance and impact on the area. R. 476 -490. The Spicer Group concluded, among other things, that the additional noise created by adding wind turbines to the area "will add additional noise levels to the area," however, the report ultimately stated that "a combination of proposed and existing turbines does not appear to exceed the noise levels outlined in Fulton Township's Zoning Ordinances." R. 482.

The Fulton Township Planning Commission held a public hearing on the SLUP Application on January 27, 2022. R. 492, 494. It was explained at the hearing that issues related to the special land use permit would be heard on that date but that a hearing on issues related to the site plan review would be held at another time. R. 503. Public comment regarding the special land use application was heard on January 27, 2022. R. 629 - 632. The planning commission

did not vote on the special land use that night and adjourned the matter until March 24, 2022. R. 632.

On March 21, 2022, the Spicer Group issued a site plan report, with its findings that overall, the proposed site plan by Heartland complied with both noise standards under the zoning ordinance and Heartland's voluntary limit on shadow flicker. R. 867-873. However, the March 21, 2022 Spicer Report acknowledged that "prior to construction, the applicant will need to submit detail drawings for the proposed MET towers and receive administrative site plan approval as required by the zoning ordinance." R. 872.

On March 24, 2022, the planning commission conducted a public meeting on the project where the site plan report was presented. R. 1122. At that meeting, citizens also spoke (mostly in opposition) to the project. R. 1029-1221. Some township residents hired outside consultants to opine on the project. Hired consultant Richard James submitted a letter regarding Heartland's noise model study and Consultant Chris Doozan prepared a report regarding the project's compliance with the township master plan. R. 912-920 and R. 922-930, R. 1043-1046. Ultimately, the Planning Commission voted to recommend approval of the SLUP Application, with conditions that included the Township Board voting to approve the same. R. 894-910. The Planning Commission also found that the project satisfied all of the requirements for site plan approval. R. 899-901. However, in its report, the Planning Commission stated that final approval of the project was subject to approval by the Township. R. 878.

On April 20, 2022 the Fulton Township Board held a special meeting to consider the recommendation of the Planning Commission on the SLUP Application. Numerous members of the public spoke at this meeting, again, most of whom were in opposition to the project. Richard James and Chris Doozan also spoke. R. 1342-1521. Ultimately, the Township Board voted to deny the SLUP application

at the April 20, 2022 meeting. R. 1519. The rationale stated for the denial was the information provided in the reports of both Chris Doozan and Rick James regarding the Project's noncompliance with acceptable noise levels and lack of consistency with the township master plan. R. 1515 - 1519.

This appeal then ensued.

Statement of Jurisdiction and Standard of Review

This court has jurisdiction to decide this matter pursuant to MCR 7.122 which governs appeals from zoning ordinance determinations. MCR 7.122(A)(1) provides that an aggrieved party may appeal "to the circuit court from a determination under a zoning ordinance by any officer, agency, board, commission, or zoning board of appeals, and by any legislative body of a city, village, township, or county authorized to enact zoning ordinances."

As noted in both parties' briefing, the standard of review by this court is narrow. Under the Michigan Constitution, final agency decisions may be reviewed to determine "whether such final decisions, findings, rulings, and orders are authorized by law; and in cases in which a hearing is required, whether the same are supported by competent, material, and substantial evidence on the whole record." Const. 1963, art VI section. 28. As indicated in the Township's briefing, "a township's special land use decisions are subject to this deferential standard of review." Citing *Carleton Sportsman's Club v Exeter Twp*, 217 Mich App 195, 201 NW2d 867 (1996).

As also noted, "the competent, material, and substantial evidence standard "constitutes a limited scope of review in which the decision must be affirmed if supported by evidence that a reasonable mind would accept as adequate to support the decision."

Hanlon v Civil Service Comm'n, 253 Mich App 710, 727; 660 NW2d 74 (2002). Substantial evidence is defined as more than a scintilla of evidence although it may be substantially less than a preponderance of the evidence. *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 352-53; 483 NW2d 416 (1992). It is important to note that "when there is sufficient evidence, a reviewing court may not substitute its discretion for that of the administrative tribunal, even if the court might have reached a different result... Great deference must be given to an agency's choice between two reasonable differing views as a reflection of the exercise of administrative expertise." *McBride v Pontiac School District*, 218 Mich App 113, 123; 553 NW2d 646 (1996).

Substantial evidence may be defined as "the amount of evidence that a reasonable mind would accept as sufficient to support a conclusion. While it consists of more than a scintilla, it may be substantially less than a preponderance." *In re Payne*, 444 Mich 679, 692-693; 514 NW2d 121 (1994). Regarding whether a decision was "authorized by law," the basic definition is whether that decision is "allowed, permitted, or empowered by law." *Northwestern Nat Cas Co v Ins Com'r*, 231 Mich App 483, 488; 586 NW2d 563 (1998).

It should be noted that the Michigan Zoning Enabling Act, codified in MCL 125.3502(1) empowers Township Board to "deny, approve, or approve with conditions a request for special land use approval." MCL 125.3502(4).

Findings and Conclusions of Law

In seeking reversal of the Township's decision to deny the application, Heartland asserts that the decision was not authorized by law or supported by competent, material, and substantial evidence on the record. It should be noted that section

601(B) of the Township Zoning ordinance in question provides that "the Township Board, upon recommendation of the Planning Commission shall have the authority to grant special land use approvals" (R. 1683) as well as "to review the circumstances of use in relation to surrounding properties and retain the ability to impose conditions and safeguards upon each use that are deemed necessary for the protection of public welfare." Sec. 603, 604, R. 1686.

Additionally, the Michigan Zoning Enabling Act provides that the final authority to approve special land uses may be vested in the legislative body (in this case, the Township). MCL 125.3502(1). And the Township is empowered to "deny, approve, or approve with conditions, a request for special land use approval." MCL 125.3502(4). Site plan review and approval is a prerequisite for special land use approval. MCL 125.3501(3), Section 603(B). R.1686. This Court finds that the Township was empowered by statute and had the legal authority to decide whether to approve the SLUP -- and that site plan approval was properly reviewed in conjunction with a decision on the SLUP.

In its briefing, Heartland argues that the Township should have reached the same conclusion as the planning commission and should not have considered the reports of Chris Doozan and Richard James, the resident's hired consultants, as part of the record. It should be noted that both Doozan and James provided testimony at the April 20, 2022 meeting regarding noise levels of the project and impact on the community. R. 14009 - 1414, 1462 - 1475. MCR 7.122(E)(1) defines "the record" as including "the original or a copy certified by the city, village, township, or county clerk of the application, all documents and material submitted by any person or entity with respect to the application, the minutes of all proceedings, and any determination of the officer or entity." In the case of *Tuscola Wind III, LLC v Almer Charter Twp*, 2017 WL

11609615 at *2 (ED Mich, August 2, 2017) (Attached to the Township's briefing as Exhibit F), the court held (agreeing with the township) that MCR 7.122(E) can include all documents submitted "with respect to" the application and does not include a temporal limitation regarding when the documents were submitted for consideration. Thus, this Court is persuaded that all documents submitted for consideration by the Township in making its determination to deny the application shall be considered part of the record in this case for both the SLUP approval and the site plan review, including not only the materials submitted by Heartland and the Spicer Group, but also the submitted reports and testimony by both consultants James and Doozan and the statements from the public at the April 20, 2022 hearing. R. 1342 - 1521.

As indicated above, "when there is sufficient evidence, a reviewing court may not substitute its discretion for that of the administrative tribunal, even if the court might have reached a different result... Great deference must be given to an agency's choice between two reasonable differing views as a reflection of the exercise of administrative expertise." *McBride v Pontiac School District*, 218 Mich App 113, 123; 553 NW2d 646 (1996). This Court cites this line of cases again because that is exactly the situation that we find ourselves in this matter. The Township Board clearly relied on the reports of both Doozan and James, both of whom as pointed out in the Township's briefing, are experienced professionals in community planning (Doozan) and acoustics (James).

Both Doozan and James conducted detailed analyses of the Heartland application with respect to its compliance with the zoning ordinance and the impact of noises sources on people living near the proposed site and both opined that ultimately the proposed application would not be in compliant with the Township's zoning ordinance or comply with its master plan. This court cannot

conclude that the testimony and reports submitted by either Doozan or James, on which the township relied in making its decision to deny the application, were not credible.

As indicated in the Township's briefing, this Court's review of the evidence is not to determine which expert was more credible, or which report should have been given more weight, but whether competent, material, and substantial evidence was relied on to support the Township's decision. Again, while a detailed analysis of both Doozan's and James' reports as compared to the Spicer Group's report of the cite plan was discussed in the briefing for both parties, this court will not conduct either a weighing of the credibility between the respective consultant reports or a determination of which report "should have been" considered by the Township.

What this Court does find is that based upon the reports of the Spicer Group and Doozan and James respectively, the Township had at its disposal and discretion, a choice to make between competing analyses regarding whether to approve the application. During the April 20, 2022 hearing, Trustee Baxter detailed the reasons for the Township's denial of Heartland's application. Hence, this Court finds that the Township did comply with MCL 125.3502(4) by providing a detailed statement of findings relative to the Township's decision to deny the application.

Further, this Court finds that the Township properly considered public sentiment expressing concerns that the Project would adversely impact their property values, health, safety, and quiet enjoyment of their properties. This Court finds that the Township is permitted to consider public opposition to a project in reviewing whether a proposed use will be "detrimental to the public welfare, persons, or property by reason of excessive noise, fumes, dust, glare, traffic, or objectionable odors." Sec. 604(A)(1).

In the case of *A and B Enterprises*, a circuit court overturned a denial of a special use application because it believed the township board placed an undue emphasis on public opposition to a project. *A & B Enterprises v Madison Tp*, 197 Mich App 160, 164; 494 NW2d 761 (1992). However, the Court of Appeals ultimately reversed and noted that "the purpose of the statute requiring public comment and affording notice to adjacent property owners [MCL 125.3502(2)] would be defeated if a township board could not consider public opposition." *Id.*

Here, the record is replete with comments from residents opposing the project based upon concerns about property values, health, safety, and their ability to enjoy their property. R.1341 - 1521. Again, those comments were appropriately considered by the Township Board along with the reports of Doozan and James. Therefore, this court finds that the Township Board acted upon competent, material, and substantial evidence on the whole record in making their decision to deny the application in this case.

Conclusion

For the reasons stated in the above Opinion, the Decision of the Township to deny the application as submitted by Heartland is upheld and the relief requested in Heartland's Appeal is denied.



CORI E. BARKMAN,
Circuit Judge