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Mark K. Dausch

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INTRODUCTION

On November 30, 2004, Pennsylvania Governor Edward G. Rendell signed Act 213 of 2004 into law.\(^1\) Act 213, known as the Alternative Energy Portfolio Standards Act (the "Act"), obligates electric generation and distribution companies to generate a certain amount of electricity that they sell to retail customers in Pennsylvania from environmentally beneficial sources.\(^2\) Specifically, the Act provides a fifteen-year schedule, requiring that an increasing percentage of electricity come from alternative energy resources.\(^3\) Energy derived from wind power is noted in the Act as a possible source of alternative energy.\(^4\) The wind energy industry in Pennsylvania may experience substantial growth as a result of the Act.

Recognizing the potential for an increase in wind energy facilities, otherwise known as wind farms, and the benefit to uniform regulation of these facilities, Governor Rendell unveiled the Model Ordinance for Wind Energy Facilities in Pennsylvania (the "Model Wind Ordinance") in April of 2006.\(^5\) Drafted through a collaborative effort of state and local governments and organizations representing the private sector, the Model Wind Ordinance serves as a template that local governments can adopt in whole, or in part, based on their specific needs.\(^6\) The Model Wind Ordinance is designed to guide local governments in regulating wind farms within their municipal borders by addressing issues including: permitting, visual appearance, sound levels, shadow flicker, setbacks,

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1. 73 PA. STAT. ANN. § 1648 (West 2006).
2. 73 PA. STAT. ANN. § 1648.
3. Id.
4. 73 PA. STAT. ANN. § 1648.2.
6. See PA Power Port, supra note 5.
interference with communications devices, protection of public roads, decommissioning, liability insurance and dispute resolution.\(^7\)

This comment discusses the various approaches that a municipality can take in order to adopt an ordinance that regulates wind farms. Specifically, this comment discusses whether a municipality can adopt the Model Wind Ordinance, in whole or in part, through a zoning ordinance, a subdivision and land use ordinance, or the municipality's general police powers.

REGULATING WIND FARMS THROUGH A ZONING ORDINANCE

Wind farms can likely be regulated by adopting the Model Wind Ordinance, or similar regulations, through a zoning ordinance. The Municipalities Planning Code (MPC) confers the power to enact zoning ordinances on municipalities generally.\(^8\) Under the MPC, zoning ordinances may:

\begin{itemize}
  \item permit, prohibit, regulate, restrict and determine: \ldots
  \item Size, height, bulk, location, erection, construction, repair, maintenance, alteration, razing, removal and use of structures.
  \item Areas and dimensions of land and bodies of water to be occupied by uses and structures, as well as areas, courts, yards, and other open spaces and distances to be left unoccupied by uses and structures.\(^9\)
\end{itemize}

Consequently, municipalities have wide-ranging powers to control the use of their land through zoning ordinances. The regulations enumerated in the Model Wind Ordinance would presumably fall within the broad zoning powers that the MPC confers upon municipalities. Nevertheless, the usual zoning limitations would still apply. For example, and perhaps most notably, any zoning ordinance that regulates wind farms cannot be exclusionary.\(^10\)

Pennsylvania law presumes that zoning ordinances are valid and constitutional; however, this presumption can be overcome by proof that the ordinance totally excludes an otherwise legitimate

\begin{footnotes}
\footnote{7. Id.}
\footnote{10. See In re Realen Valley Forge Greenses Assocs., 838 A.2d 718, 728 (Pa. 2003) ("[a zoning] ordinance will be found to be unreasonable and not substantially related to a police power purpose if it is shown to be unduly restrictive or exclusionary").}
\end{footnotes}
use. Exclusionary ordinances can either be de jure, meaning the ordinance, on its face, totally bans a legitimate use, or de facto, meaning the ordinance allows a use on its face, but when applied, it prohibits the use throughout the municipality. Pennsylvania law places a heavy burden on the party challenging an ordinance as exclusionary. This substantial burden was illustrated in APT Pittsburgh, Ltd. Partnership v. Pennsylvania Township Butler County.

In APT Pittsburgh, APT Pittsburgh ("APT") sought to build a communications tower in Penn Township. In order for the communications tower to be effective, the tower had to be constructed on elevated and unobstructed grounds. Soon after APT chose a suitable area, Penn Township amended its zoning regime to restrict communications towers to light industrial districts. APT argued that the ordinance was exclusionary because a majority of the light industrial district land, due to its low elevation, was not technologically feasible for constructing communications towers, and the remaining land was unavailable because its owners would not permit APT to construct its tower on their land.

The APT Pittsburgh court noted that "[t]o succeed on its exclusionary zoning claim before the [Zoning Hearing Board], APT had to prove that no telecommunications provider, including itself, could build a functional tower in any of the [permissible zones]." The court was unsympathetic to APT's need to locate its tower on highly elevated land, which constituted only a small portion of the permissible zones. The majority ruled that APT did not provide sufficient evidence demonstrating that other wireless providers would be unable to construct beneficial communications towers in the permissible areas. Also, the Third Circuit found insufficient

12. APT Pittsburgh, 196 F.3d at 471.
13. Id.
14. Id.
15. Id. at 471.
16. Id. at 472.
17. APT Pittsburgh, 196 F.3d at 472.
18. Id.
19. Id. at 476 (emphasis added).
20. Id. at 477.
21. Id. "Pennsylvania's rule against exclusionary zoning does not impose upon a township the duty to assure that all providers, regardless of the systems they have chosen to construct, will have a suitable site for a functioning tower within the township." Id. (emphasis added).
evidence demonstrating that APT could not feasibly lease elevated, unobstructed land from the current light industrial district land owners.\textsuperscript{22}

The facts in \textit{APT Pittsburgh} resemble potential wind farm situations. Like the communication towers in \textit{APT Pittsburgh}, wind farms would need to be located in highly elevated, unobstructed areas. According to \textit{APT Pittsburgh}, assuming wind farms can be regulated through zoning (which is likely), a zoning ordinance may not be considered exclusionary even if it limits the areas in which wind farms can be located to areas that are controlled by owners who are unwilling to lease their property for wind farms and/or areas that would be mostly unsuitable for wind farms (e.g. a valley). If a potential wind farm operator challenges a zoning ordinance as exclusionary, the challenger would have the substantial burden of proving that no party could build a successful wind farm on any conforming lands and that all sufficient, conforming land is economically unfeasible. Such a burden of proof would prove to be extremely arduous.

\textbf{REGULATING WIND FARMS THROUGH A SUBDIVISION AND LAND DEVELOPMENT ORDINANCE}

Municipalities have the power to regulate subdivisions and land developed within their borders by enacting subdivision ordinances.\textsuperscript{23} If the construction of a wind farm is considered a “land development,” municipalities can regulate wind farms through a wind farm-specific subdivision ordinance. A “land development” includes any of the following:

1. The improvement of one lot or two or more contiguous lots, tracts or parcels of land for any purpose involving:

   i. a group of two or more residential or nonresidential buildings, whether proposed initially or cumulatively, or a single nonresidential building on a lot or lots regardless of the number of occupants or tenure; or

   ii. the division or allocation of land or space, whether initially or cumulatively, between or among two or more existing or prospective occupants by means of, or for the purpose of

\textsuperscript{22} \textit{APT Pittsburgh}, 196 F.3d at 477.
\textsuperscript{23} 53 PA. STAT. ANN. § 10501 (West 2005).
streets, common areas, leaseholds, condominiums, buildings or other features... 24

Pennsylvania case law indicates that leasing land to construct a wind farm would fall within the statutory definition of "land development."

_Tu-Way Tower Co. v. Zoning Hearing Board_25 concerned a company, Tu-Way Tower Co. ("Tu-Way"), that owned a 200-foot communications tower located on its property.26 Tu-Way sought to extend the tower and add two additional towers with accessory buildings.27 In determining whether this construction would constitute a land development, the court noted:

[t]he fact that Tu-Way wishes to construct buildings accessory to its proposed towers does not raise its proposal to a level of land development. Tu-Way did not come before the Board to develop its land with residential or commercial buildings, but rather, to extend a tower or erect additional towers, activities which are not defined as land development under the MPC.28

Additionally, the proposed construction was not a "land development" as defined by the MPC because Tu-Way owned the land on which it sought to construct its additional towers, and therefore, Tu-Way was not proposing the division or redivision of a piece of land.29

Similarly, in _Marshall Township Board of Supervisors v. Marshall Township Zoning Hearing Board_,30 the court held that replacing a 100-foot lamp pole with a 150-foot pole with an antennae and equipment cabinets did not fall within the MPC's definition of "land development."31 In _Marshall_, the Postal Service leased a parking lot to National Wireless Infrastructure, L.P. ("Unisite").32 Unisite then subleased capacity to American Portable Telecom ("APT"), allowing APT to replace one of the lamp poles with a larger pole that had an antennae and equipment cabinets.33 Apply-

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26. 688 A.2d at 744.
27. Id. at 745.
28. Id. at 747.
32. Id. at 2.
33. Id.
ing the same rationale as the *Tu-Way* court, the *Marshall* court held that Unisite’s constructions did not constitute a “land development.”  

34 Thus, “merely adding antennae and 50 feet to a 100 foot tower likewise does not constitute ‘land development’ within the meaning of the MPC.”  

35 Any allocation or subdivision of land occurred when the Postal Service leased its land to Unisite, not when Unisite entered into its sublease agreement with APT.  

The court in *White v. Township of Upper St. Clair* addressed a situation that appears to be analogous to what a typical wind farm agreement would entail.  

37 There, Crown Communications (“Crown”) entered into a lease agreement with Upper St. Clair Township, whereby Crown leased land to erect a communications tower, three adjoining buildings, an eight-foot-high fence, and a road providing access to the tower.  

38 In holding that the lease agreement created a land development, the court noted that the lease, which conveyed the use of a discrete parcel of land from the Township to Crown for up to 100 years, divided a 200-acre parcel that was owned by the Township into a .428-acre lot on which Crown would construct its tower.  

39 Thus, the land was being divided between two parties by a lease for a new use (i.e. housing a communication tower).  

Similarly, the court in *Upper Southampton Township v. Upper Southampton Township Zoning Hearing Board* held that an agreement that allows a party to construct a billboard on a property owner’s land falls within the MPC’s definition of “land development,” even if the agreement does not specify the exact location of the billboards.  

41 The court held that the amount of land and size of a structure is irrelevant to land development jurisprudence.  

42 The agreements in *Upper Southampton* allocated land between two occupants for a new use, the construction and placement of billboards, which clearly constitutes an improvement of one tract of land involving the division of land between two occu-
pants by means of a lease. Therefore, the agreement constituted a land development.

Based on the foregoing cases, a municipality could regulate wind farms through a subdivision and land development ordinance if the wind farm owner or operator enters into a lease agreement to construct a wind farm on someone else’s property, as the lease would allocate the land between its original use and its proposed expanded use as a wind farm, constituting a “land development.” However, the preceding analysis is subject to change because on April 4, 2006, the Pennsylvania Supreme Court granted Allowance of Appeal in Upper Southampton on the issue of whether the billboards fall within the definition of “land development.”

REGULATING WIND FARMS THROUGH POLICE POWERS

Not all Pennsylvania municipalities have zoning ordinances. Nevertheless, these municipalities may still be able to enact the Model Wind Ordinance, in whole or in part, through the municipality’s applicable code under its police powers. The following analysis examines First and Second Class Townships and the scope of their police powers.

The Second Class Township Code empowers Second Class Townships to enact ordinances “necessary for the proper management, care and control of the township and its finances and the

43. Id. at 88.
44. Tu-Way Tower, 688 A.2d at 744. See also Upper Southampton, 885 A.2d at 91; Lehigh Asphalt Paving & Constr. Co. v. Bd. of Supervisors, 830 A.2d 1063, 1071 (Pa. Commw. Ct 2003) (“Lehigh Asphalt’s plans contemplate the allocation of land between the existing single-family residential use and the proposed expansion of the quarry use. Thus, the plans propose ‘land development’ . . . .”).
46. In Pennsylvania, a municipality’s class depends on its population. To qualify as a First Class Township, a municipality must have a population density of at least three hundred people per square mile. See 53 PA STAT. ANN. § 55201 (West 2006), providing:

The townships now in existence and those to be hereafter created are divided into two classes. Townships of the first class shall be those having a population of at least three hundred inhabitants to the square mile, which have heretofore fully organized and elected their officers and are now functioning as townships of the first class, or which may hereafter be created townships of the first class in the manner provided in this act. All townships, not townships of the first class, shall be townships of the second class. A change from one class to the other shall hereafter be made only as provided by this act or the laws relating to townships of the second class.

53 PA STAT. ANN. § 55201.
maintenance of peace, good government, health and welfare of the township and its citizens, trade, commerce and manufacturers." 47

Also, Second Class Townships can enact ordinances "to secure the safety of persons or property within the township" and to prohibit nuisances. 48

Likewise, the First Class Township Code provides for adoption of all ordinances "necessary for the proper management, care and control of the township and its finances, and the maintenance of peace, good government and welfare of the township" as well as any regulations "necessary for the health, safety, morals, general welfare, cleanliness, beauty, convenience and comfort of the township and the inhabitants thereof." 49

Pennsylvania case law indicates that a municipality without a zoning ordinance can likely enact, in whole or in part, the Model Wind Ordinance, through its applicable code. For instance, in IA Construction Corp. v. Bradford, 50 Bradford Township enacted an ordinance that regulated waste pursuant to the police powers enumerated under the Second Class Township Code. 51 IA Construction Corporation ("IA") argued that the ordinance was a de facto zoning ordinance because several of its provisions contained land use and zoning principles and, therefore, was invalid since it was not enacted pursuant to the MPC. 52 The waste ordinance contained setback requirements, requirements that waste activity be at least three miles from ground water, and requirements that vehicles hauling waste use roads at least 900 feet outside of the township. 53

The IA court held that the waste ordinance was not a zoning ordinance, noting that "setbacks are not exclusively hallmarks of zoning." 54 Also, the ordinance did not concern common zoning elements such as determining the "uses of land, dimensions of structures, areas of land to be occupied, and density of population." 55 Likewise, the ordinance addressed few, if any, common zoning purposes, including "the regulation of population growth, the preservation of land for all forms of residential housing, the

47. 53 PA. STAT. ANN. § 66506 (West 2005).
49. 53 PA. STAT. ANN. §§ 56544, 56552 (West 2005).
51. IA, 598 A.2d at 1348.
52. Id.
53. Id. at 1349.
54. Id.
55. Id.
regulation of commercial growth, the preservation of historic, scenic and natural areas, and the creation of different types of districts." The court concluded that the ordinance was not a de facto zoning ordinance, as its overall purpose was to regulate solid waste activity, and none of the sections of the ordinance exceed the scope of that goal. Accordingly, the court held the ordinance was a valid exercise of Bradford Township's police powers.

Similarly, in *Land Acquisition Services, Inc. v. Clarion County Board of Commissioners*, Clarion County, which has no zoning ordinance, enacted an ordinance regulating hazardous waste activities. Specifically, the ordinance designated certain zones as waste sites, established setback requirements, required fences around waste sites, and required that waste site proposal plans be submitted to the commission. Land Acquisition Services argued that the waste ordinance contained zoning characteristics that relate to the use of land as well as the operational aspects of a hazardous waste facility, constituting a zoning ordinance.

The *Land Acquisition* court recognized that the ordinance had components that are often used in zoning and land use legislation, but held that these components were not "exclusive hallmarks of zoning." The court concluded that because the ordinance's primary purpose was to regulate hazardous waste disposal activity and because the ordinance did not exceed the terms of this goal, the ordinance was not a zoning ordinance.

The Model Wind Ordinance concerns issues including permitting, visual appearance, sound levels, shadow flicker, setbacks, interference with communications devices, protection of public roads, decommissioning, liability insurance and dispute resolution. These components, like the components of the ordinances in *IA* and *Land Acquisition*, are not exclusive features of zoning. Furthermore, the Model Wind Ordinance's primary objective is not to regulate land use. Rather, as noted in the Model Wind Ordinance's "Purpose" section, the Ordinance seeks to "provide for the construction and operation of Wind Energy Facilities . . . sub-

56. *IA*, 598 A.2d at 1350.
57. *Id.*
58. *Id.* at 1351.
60. *Land Acquisition*, 605 A.2d at 466.
61. *Id.* at 469.
62. *Id.*
63. *Id.* at 470.
64. *Id.*
ject to reasonable conditions that will protect the public health, safety and welfare." It is probable that the Model Wind Ordinance would be held to not exceed its goal of regulating wind farm activity.

A cursory reading of *IA* and *Land Acquisition* might support the proposition that a municipality can incontestably enact the Model Wind Ordinance, in whole or in part, without a zoning ordinance. However, there is a key distinction between the *IA* and *Land Development* ordinances and the Model Wind Ordinance. The ordinances in *IA* and *Land Acquisition* were both enacted pursuant to police powers and both sought to regulate waste activities. The Second Class Township Code has a specific provision dealing with the "[a]ccumulation of ashes, garbage, solid waste and refuse materials." This section empowers municipalities to prohibit accumulations of these materials and to collect fees for their collection, removal and disposal. Likewise, the First Class Township has a similar provision. No analogous provision exists in either township code that specifically empowers municipalities to regulate wind farms. Therefore, municipalities would need to have the power to enact this wind farm-specific ordinance through their broad police powers in order to regulate wind farms without a zoning or subdivision ordinance. *Taylor v. Harmony Township Board of Commissioners* addressed a similar situation.

In *Taylor*, Harmony Township, a First Class Township, pursuant to its police powers, enacted an ordinance prohibiting timber harvesting in areas determined to be landslide-prone or flood-prone. Robert Taylor was cited for operating a logging business on landslide-prone land without a permit, in violation of the ordinance. Taylor argued that the ordinance was invalid because the general police power provisions of the First Class Township Code do not specifically authorize the Township to regulate logging or timber harvesting.

The court noted that the First Class Township Code has several provisions that provide for broad police powers, allowing municip-

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66. 53 PA. STAT. ANN. § 67101 (West 2005).
67. 53 PA. STAT. ANN. § 56527 (West 2005).
70. *Id.* at 1022.
71. *Id.* at 1022-23.
72. *Id.* at 1024.
palities to enact legislation aimed at protecting its citizens’ health, safety, and welfare. The court held that the ordinance was a valid use of the Township’s police powers, as the ordinance was enacted to “prevent harm to the public welfare caused by landslides and storm water runoff.” Furthermore, the court noted:

[the ordinance] is a valid exercise of the Township’s power because it seeks to minimize floods, landslides, and dangerous stormwater runoff; it seeks to prevent damage to roads, damage to drains, damage to public utilities, damage to watercourses, fire hazards, and reduction in property value; and it seeks to enhance the natural beauty and environment within the Harmony Township. All these aims fall squarely within the general police power provisions of the [First Class Township Code] . . . .

Similarly, the Model Wind Ordinance seeks to minimize safety hazards associated with wind farms, prevent damage to roads, prevent reduction in property value, and maintain the natural beauty and environment within the municipality. Like the goals in the Taylor ordinance, these aims seem to fall squarely within a municipality’s general police powers, which should allow a municipality to regulate wind farms through means other than a zoning ordinance.

CONCLUSION

Municipalities have various effective options for regulating wind farms within their borders. Because the MPC provides Pennsylvania’s municipalities with broad powers to control land use, regulating wind farms through a zoning ordinance appears to be most effective and least susceptible to attack. Thus, a municipality could likely enact the Model Wind Ordinance, or similar regulations, through its zoning ordinance. However, not every municipality in Pennsylvania has a zoning ordinance.

In certain situations, municipalities can regulate wind farms through a subdivision ordinance. If the wind farm is constructed on leased land, the construction would likely constitute a “land development” that can be regulated by a subdivision ordinance.

73. Id.
74. Taylor, 851 A.2d at 1025.
75. Id.
because the lease would allocate the land between its use prior to the construction of the wind farm and its new use as a wind farm. Here, municipalities could likely adopt a subdivision ordinance that mirrors the Model Wind Ordinance's language.

Finally, municipalities can likely enact at least a significant portion of the Model Wind Ordinance through police powers. Municipalities have broad police powers, allowing them to enact legislation protecting their citizens' health, safety and welfare. It is likely that a court would determine that most, if not all, of the Model Wind Ordinance is aimed at protecting the public health, safety and welfare and, therefore, can be enacted through a municipality's general police powers.

Mark K. Dausch