STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF CLINTON
29th JUDICIAL CIRCUIT

FOREST HILL ENERGY-FOWLER FARMS,

Plaintiff

v File No. 13-11152-CK

BENGAL TOWNSHIP, DALLAS TOWNSHIP, and ESSEX TOWNSHIP,

Defendant

_____/

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OPINION AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION

At a session of said Court held in the Courthouse
this 28th day of October, 2013 the Circuit
Court for the County of Clinton, State of Michigan.

PRESENT: HONORABLE RANDY L. TAHVONEN, Circuit Judge

For the reasons set out in this Opinion, the Court grants in whole Forest Hill's motion for summary disposition on Counts 1, 2, and 3 of its complaint and finds that the each township's wind turbine ordinance is invalid, unenforceable, and therefore, void.

AUGUST , 2013 PARTIAL SUMMARY DISPOSITION

On July 30, 2013, this Court conducted a hearing on Forest Hill's first motion for summary disposition, MCR 2.116 (C)(10). After counsel's thoughtful and closely reasoned arguments, the Court issued a bench opinion and ruled that the townships' separate but similar efforts to regulate four aspects of Forest Hill's wind turbine development were invalid. Specifically, township limitations on turbine height, setbacks, noise levels, and "flicker rate" were invalidated. That ruling was later incorporated in an order signed on August 26, 2013.

The Court's reasoning is found in its bench opinion. Clinton County granted Forest Hill a special use permit authorizing Forest Hill to construct wind turbines in Bengal, Dallas, and Essex Townships. The Court found as a matter of law that turbine height, setbacks, noise, and "flicker" rates were issues solely within the county's zoning jurisdiction since all of these criteria related to the long term use of land and the townships had no authority to zone. The Court went on to note that the ruling did not end the case because Forest Hill had challenged more than 25 other township regulations of wind turbine construction, operation, abandonment, and characteristics. Moreover, the earlier motion did not address and the ruling did not resolve Forest Hill's constitutional claim in count 4 of its complaint.

Forest Hill has now filed a further (C)(10) motion as to the remaining township regulations claiming that all must fall as prohibited zoning. The townships each respond that the additional provisions are valid police power regulations of activities on the land and are not zoning of land use.

The Court is persuaded that Forest Hill's position is legally correct and that all provisions of each of the township ordinances is inconsistent with the county's exercise of its exclusive jurisdiction power to zone the properties. Therefore, the townships' ostensible police power regulations, initially presumed valid, have been

shown to be invalid and must be declared void. In short, the townships did not have the legal authority to enact and enforce the ordinances.

SUMMARY DISPOSITION, UNDISPUTED FACTS, AND LEGAL CONCLUSIONS

The facts are not disputed. The language of the county special use permit and township ordinances, the history of their approval and adoption, the identity of controlling state statutes and pertinent case law are set forth without serious controversy by counsel for all parties. The legal conclusions that flow from those undisputed facts is for the Court and summary disposition is the appropriate procedural vehicle for that purpose. The following conclusions control the outcome of the case:

First, Michigan law grants townships the power to zone by adopting a local zoning ordinance. MCL 125.3201 states, in pertinent part:

"(1) A local unit of government may provide by zoning ordinance for the regulation of land development and the establishment of 1 or more districts within its zoning jurisdiction which regulate the use of land and structures to meet the needs of the state's citizens for food, fiber, energy, and other natural resources..."

The same statute defines "local unit of government" to be a county, township, city, or village. MCL 125.3102(o).

Second, if the township choses to adopt its own zoning, the township ordinance controls and divest the county of the power to zone the township lands. MCL 125.3102(w) provides: "The zoning jurisdiction of a county does not include the areas subject to a township zoning ordinance."

Moreover, MCL 125.3209, provides in full:

"Except as otherwise provided under this act, a township that has enacted a zoning ordinance under this act is not subject to an ordinance rule, or regulation adopted by a county under this act."

Third, if the township decides not to adopt its own zoning ordinance the county zoning commission, MCL 125.3301(1)(a), or planning commission, MCL 125.3301(1)(b), MCL 125.3301(2), has exclusive zoning jurisdiction with regard to township property. And, county zoning ordinances control "in the case of inconsistencies between the ordinance and an ordinance adopted under any other law." MCL 125.3210.

It follows that if the townships' ordinances are "inconsistent" with the special use permit granted by the county the townships' ordinances must fall. MCL 125.3210 expressly says as to zoning the county's determinations controls over or trumps inconsistent township ordinances. This inconsistency exists if the township

permits what the county prohibits or requires what the county does not. *Miller v Fabius Twp Bd, 366 Mich 250 (1962).*

All of the remaining 27 provisions of the townships' ordinances have now been separately, briefed and argued by counsel and reviewed by the Court. All fall as inconsistent with the county's special use permit. The use and requirements of the county's special use permit are modified by the townships' ordinances and such inconsistencies are precluded by state law. Therefore the court declares that the townships' ordinances are totally invalid and void.

THE TOWNSHIPS' ARGUMENTS

Counsel for each township has zealously and elegantly argued that this conclusion is flawed. The Court of course respectfully disagrees.

First, the invalidity of the township ordinances is consistent with the Zoning Enabling Act itself. For example MCL 125.3205 (6) says that even though a county zoning authority allows gravel mining, the township can reasonably regulate "hours of operation, blasting hours, noise levels, dust control, measures, and traffic..." That statute exempts designated gravel mining activities from zoning pre-emption found in MCL 125.3210. No such express, statutory exemption exists for wind turbine projects.

Second, striking the township ordinances is consistent with the Court's rationale invalidating the turbine height, setback, noise, and flicker provisions. *Square Lake Condo Ass'n v Bloomfield Twp,* 437 Mich 310 (1991), requires us to ask whether the townships enacted zoning or police power ordinances. In doing that we ask whether the ordinance controls the long-term use of land and structures by characteristics and location or instead governs activities effecting the general health, safety, welfare, or morals. Conceding that "use of land" and "activities" of persons or business entities are neither absolute nor mutually exclusive, each of the remaining 27 township provisions attempt to the use of land for wind turbines earlier regulated by a comprehensive county control zoning scheme.

Third, the order striking the township ordinances is not at war with the principal cases relied upon by the townships.

In *Miller* v *Fabius Twp Bd,* 366 Mich 250 (1962) a state statute prohibited water skiing from one hour after sunset to one hour before sunrise the next day. A Fabius Township, St. Joseph County ordinance prohibited powerboat racing and water skiing between 4 pm one day and 10:00 am the next. The Supreme Court majority in an opinion by Justice Thomas M. Kavanagh held that the state statute did not trump the township ordinance. The majority concluded that the statute and ordinance did not conflict because when the state prohibited waterskiing from one

hour after sunset to one hour before sunrise the legislature was "not expressing a lawful right to water ski without regulation during the other hours of the day. *Miller* at 259. Justice Souris, joined by Justice Otis Smith, dissented;

> "I read the township ordinance to *prohibit* from 4 p.m. until 1 hour before sunset and from 1 hour after sunrise to 10 a.m. that which the State statute* *permits* to be done during a period which includes those hours. The ordinance conflicts with the statute and, therefore, necessarily is invalid." 366 Mich 250, 260.

Miller provides little help to either the parties or the Court here.

In *Detroit* v *Qualls*, 434 Mich 340 (1990), held that the city by a police power ordinance could limit stored fireworks to one hundred pounds even though a state fireworks police power statute did not restrict amounts stored. The Supreme Court found no conflict between the silent state statute and the 100 pound limit in the ordinance. The statute did not, said the Court, pre-empt the field of fireworks regulation and oust the city of its police power to regulate amounts stored. For Supreme Court under, Justice Boyle wrote for the majority:

> "Absent a showing that state law expressly provides that the state's authority to regulate is exclusive, that the nature of the subject matter regulated calls for a uniform state regulatory scheme, or that the ordinance permits what the statute prohibits or prohibits what the state permits"...both the state and the municipality may regulate under the police power the same activities.

The present case involves an express statutory pre-emption clause. If the county is the zoning authority the township can neither zone nor enact ordinances inconsistent with county zoning. The statute says that if a township has a zoning ordinance, the county has no jurisdiction to zone land use in the township. Either way, the local unit of government that exercises the power to zone displaces the other unit.

Moreover, unlike state and local police power nuisance abatement and licensing statutes and ordinances as in *Qualls*, we have here a county zoning scheme and a township ordinance.

In *Rental Property Owners Ass'n of Kent Cty* v *Grand Rapids*, 455 Mich 246 (1997), the Court held that the nuisance abatement statute MCL 600.3801, did not preempt the Grand Rapids drug and prostitution nuisance abatement statute. Justice Weaver, writing for the four justice majority concluded on this issue:

"Because there is no evidence that the nuisance abatement statute intended to occupy the field of nuisance abatement and because the ordinance does not directly conflict with the statute, we hold that the ordinance is not preempted." 455 Mich 246, 263.

Since the Court has found express statutory pre-exemption here and has found inconsistency between the county zoning and township provisions, *Rental Property Owners* does not aid the townships.

The ordinances adopted by the townships are invalid because the townships lacked the legal authority to enact them. Each township yielded its zoning authority to the county; the residents of each township could and many did attend the county zoning hearings; and each township later enacted ordinances the provisions of which are inconsistent with the zoning ordinances and state law. The townships ordinances are more restrictive zoning ordinances masquerading as police power regulations. They cannot stand.

ORDER

The motion of Forest Hill for summary disposition should be, and hereby is, granted. This writing constitutes the Court's opinion and order. No costs or attorney fees are awarded because a question of public concern and importance is involved.

The constitutional claim alleged by Forest Hill is dismissed as moot. This order now resolves the last question and closes our file.

Date: October 28, 2013

Randy L. Tahvonen, Circuit Judge