

COURT DECISION REGARDING DEKALB COUNTY WIND FARM ZONING

On June 10, 2010, an Illinois lower court denied a motion to dismiss a complaint challenging the special use permit for a wind farm that had been approved by the DeKalb County Board. The case was brought by residents of the area against FPL Energy Illinois Wind LLC and DeKalb County. In their complaint, the plaintiffs alleged that DeKalb County's approval of a special use permit for the wind farm violated their rights to substantive and procedural due process. In denying the motion, the court issued a lengthy opinion interpreting recent appellate and supreme court decisions and zoning legislation.

The decision attempted to synthesize the historical standard for zoning reviews with the amended zoning enabling act and with more recent zoning decisions. The result was a hybrid standard of review that could potentially create problems for developers, including wind farms. Specifically, the decision creates at least two risks for the wind farm zoning applicant. One risk will occur for wind farm developers wanting to meet independently with municipal or county officials, as was often done historically. The wind farm developer here took the county board members on a tour of a wind facility in Iowa. Another risk for the wind developer is to proceed when the county did not follow the recent amendments to the Counties Code requiring a county to hold a public hearing not more than 30 days prior to siting the wind farm unless the county had a wind farm ordinance prior to the amendment. The court here allowed the plaintiffs' challenges to both issues stand as due process violations. These risks, and potentially others, will persist until the Illinois Supreme Court or the Illinois Appellate Courts adopt, reject or modify the approach taken in this case.

To appreciate the impact of this decision, it is necessary to consider the historical development of the standard of review of a zoning decision. The first part of the decision discusses the development of that standard of review. The standard has undergone a complete metamorphosis over the past eight years. Historically, zoning decisions in Illinois, even those pertaining to special uses, were considered legislative, rather than administrative, in character. As such, local zoning hearings typically were less formal than administrative hearings. Interested parties were allowed to be heard and ask questions, but the process often was informal. One challenging a local zoning decision did so in a trial *de novo*, meaning the parties would start over in court with a completely new hearing. In fact, the record before the local zoning authority was not even admissible; only the findings and decision of the local government were admissible at the trial. In deciding whether to uphold a local zoning decision the court would apply the so-called LaSalle Factor test, articulated in 1957 by the Illinois Supreme Court. The LaSalle factors include consideration of: the uses and zoning of nearby properties; the extent to which property values are diminished by the particular zoning restrictions; the extent to which the destruction of property values of the



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developer promotes the health, safety, morals and general welfare of the public; the relative gain to the public as compared to the hardship imposed upon the developer; the suitability of the property for the zoned purposes; and the length of time the property has been vacant as zoned considered in the context of land development in the vicinity of the subject property. Over time, two additional factors were added, those being the need in the community for the proposed use and the care with which the community has planned its land use development.

The zoning process changed in 2002 when the Illinois Supreme Court held that local decisions pertaining to special uses were administrative in character. In other words, local zoning proceedings, which historically had been informal, would henceforth be conducted as quasi-judicial hearings. Decisions would be based on the record developed at the local hearing, and interested parties would be allowed to present evidence and cross examine witnesses. When deciding a zoning challenge, the circuit court would review only the record established at the local zoning hearing. The court would not review new evidence.

Most municipalities were aghast at the Supreme Court's decision. Because zoning appeals would be based only on the record established at the local hearing, municipalities would be required to present evidence to support a decision to deny a special use. Otherwise, the only competent evidence in the record would be that presented by the developer. Municipalities, who were not prepared to treat every special use request as a full blown trial, sought a legislative solution.

As a result of their efforts, the Illinois General Assembly amended the zoning enabling statutes for municipalities and counties in order to reverse the Supreme Court's decision. The statutory amendments provided that "any decision by the [local zoning authority] in regard to any petition or application for a special use, variance, rezoning, or other amendment to a zoning ordinance shall be subject to *de novo* judicial review as a legislative decision, regardless of whether the process in relation thereto is considered administrative for other purposes." The amendments also state that the "principles of substantive and procedural due process apply at all stages of the decision-making and review of all zoning decisions."

In determining the appropriate standard of review for the DeKalb County wind farm case, the circuit court reviewed the statutory amendment, several appellate court decisions interpreting the amendment, and recent supreme court cases addressing the standard of review in a zoning case. The court's decision is instructive for developers of wind farms in Illinois.

At first blush, the court's articulation of the standard of review in light of the statutory amendment is not surprising and looks very much like the historical standard used by courts in Illinois before 2002. The court determined that the "appropriate standard of review is therefore rational basis with an analysis of the LaSalle factors." The court found that the plaintiffs alleged sufficient facts to address the LaSalle factors and to overcome FCL and the county's motion to dismiss. Specifically, the plaintiffs alleged that: the wind farm is inconsistent with the surrounding agricultural uses; there would be negative impact on property

values and on the health of the plaintiffs that would outweigh the benefit to the public of having the wind farm; the land is not suitable for a wind farm; the land has always been used for agriculture; and there is no evidence that the county would benefit from the energy produced by the wind farm.

However, the court also determined that the standard of review has a second dimension under the amended statute. Although the rational basis test, which is used to review legislative decisions, is the appropriate standard of review for the actual zoning decision, “the process is considered administrative for other purposes.” Accordingly, the court found that DeKalb County acted in an administrative or quasi-judicial capacity when it conducted zoning hearings on the proposed wind farm.

Finding that the county acted in a quasi-judicial capacity is significant. As noted above, the plaintiffs alleged that the county violated their procedural due process rights by engaging in *ex parte* communications, which are communications made by a party to the decision maker when the other parties to the proceeding are not present. In this case, the plaintiffs alleged that FPL took county board members on a tour of a wind facility in Iowa. Although one of the plaintiffs and their acoustics engineer visited the Iowa wind farm at a different time, there was no guarantee that the plaintiffs were provided the same information as the county board during its independent trip. The court allowed the allegation of a due process violation to stand.

Prior to 2002, it was very common for zoning applicants to meet independently with municipal or county officials. This was not viewed as a due process violation because zoning hearings were considered to be legislative in nature. Now, however, in light of the DeKalb decision, it would not be advisable for a wind farm developer to meet independently with municipal officials after the zoning application has been filed. If a developer believes a tour of another facility would be useful in showing the local zoning authority the characteristics of a wind farm, the tour should be treated as a public meeting, properly noticed and open to the public.

The plaintiffs in the DeKalb case also alleged other procedural due process violations. Most of the claims were not unusual, such as that the county did not follow procedures set forth in its own zoning ordinance, that the zoning application was incomplete and that the county held closed meetings concerning FPL’s proposal. However, one of the procedural due process claims is applicable only to wind farms. A recent amendment to the Counties Code requires a county to hold at least one public hearing not more than 30 days prior to siting a wind farm, unless the county’s zoning ordinance had a provision pertaining to wind farms prior to the effective date of the amendment. DeKalb County asserted that the provision of its zoning code under which FPL’s project was approved pre-dated the amendment of the Counties Code. The plaintiffs contended that DeKalb County approved FPL’s project under a general provision of the county’s zoning code addressing “essential service structures,” not under a provision that was specific to wind farms. Because the county did not hold a hearing within 30

days of the date on which FPL's zoning was granted, the plaintiffs argued that the hearing requirement had been violated by the county, resulting in a due process violation. The court allowed this claim to stand.

There is one other procedural consideration raised by the statutory amendment that imposed the new standard of review in zoning cases. The appellate court decisions cited by the circuit court in the DeKalb County case suggest that the record of the local zoning proceeding is admissible in a judicial appeal. However, the record should not be reviewed to determine if the decision made by the local authority was correct or incorrect at the time it was made. Rather, the record should be considered, along with new evidence presented at the trial *de novo*, to determine the new question of whether the zoning decision should be upheld under the rational basis test, giving full consideration to the LaSalle factors.

In the final analysis, the court in the DeKalb County case attempted to synthesize the amended zoning enabling act with recent decisions of the Illinois Appellate Court and Supreme Court in an effort to articulate a new standard of review for zoning cases in Illinois. In so doing, the court fashioned a hybrid standard of review in which local zoning decisions are treated as legislative but local zoning procedures are treated as quasi-judicial. It remains to be seen whether this approach will be adopted by the higher courts.