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NEW MEETS OLD:
WIND TURBINES AND THE COMMON LAW OF NUISANCE

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By Steven Baron[1]

Introduction

Against the backdrop of worldwide efforts to reduce carbon emissions and dependence on fossil fuels, many have come to regard modern wind farms and their turbines as "elegant symbols of a clean energy future."[2] Not everyone shares that view, however. Although many landowners have welcomed wind energy development and leased their property for that purpose, a few have filed lawsuits to enjoin nearby development and recover monetary damages for alleged injuries. Some of these lawsuits have included claims of "nuisance," a cause of action recognized at common law.

To date, lawsuits attacking wind farms on a nuisance theory have been isolated. In 1982, a New Jersey court held that a 60-foot high wind turbine constructed by a homeowner in a quiet residential neighborhood constituted a nuisance.[3] The unit, located ten feet from a neighbor's property, emitted a noise that exceeded the maximum decibel level permitted by city ordinance. Evidence showed that the noise significantly disturbed the neighbors' ability to sleep, eat, read, watch television, and otherwise relax in their homes.

In 1992, a North Dakota court found that a residential wind turbine did not constitute a nuisance.[4] The evidence in that case failed to show that the turbine noise unreasonably interfered with the complaining neighbor's use of her property. Safety concerns were also unsubstantiated.

More recently, a few nuisance suits have been filed against commercial wind farms. In 2005, several landowners in Taylor County, Texas filed suit against FPL Energy alleging that the company's Horse Hollow wind project constituted a nuisance.[5] The suit claimed

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[1] The views expressed in this paper are those of the author and do not necessarily reflect the views of any client of Steven Baron Consulting and Legal Services.

[2] "Debating the Merits of Energy From Air," New York Times, Nov. 25, 2007.

[3] *See Rose v. Chaiken*, 453 A.2d 1378 (N.J. 1982).

[4] *See Rassier v. Houim*, 488 N.W.2d 635 (N.D. 1992).

[5] *See Dale Rankin, et al. v. FPL Energy, et al.*, Cause No. 46138-A, 42nd Judicial Dist., Taylor County, Tex. (Plaintiff's Eleventh Amended Petition and Request for Injunctive Relief).

principally that the wind turbines were noisy and an eyesore. The landowners sought both to enjoin the operation of the facility and to recover damages. The trial court granted summary judgment in favor of FPL Energy on the aesthetics issue. Upon trial, the jury also found in favor of FPL Energy on the noise issue. The landowners appealed the judgment. The appeal has been briefed and is pending in the Eastland Court of Appeals.[6]

FPL Energy was also named a defendant in a nuisance lawsuit filed in 2006 by landowners in Cooke County, Texas.[7] Noise and aesthetics again formed the gist of the complaint. That case settled prior to trial.

Also in 2006, landowners in Jack County, Texas filed a nuisance suit seeking to enjoin construction of a wind farm by Gamesa Wind US to be located on land leased from nearby landowners.[8] The suit alleged that the wind turbines would be noisy and would have a negative visual impact due to blinking red lights in the night sky and a "strobe and flicker" effect at sunrise and sunset. The suit further alleged that the construction process and turbines would damage wildlife habitats. In addition, the plaintiffs expressed concern that the turbines might create electromagnetic fields that impair their health. The plaintiffs sought to enjoin the project and to recover damages if the project went forward.

Gamesa filed motions for partial summary judgment seeking to eliminate aesthetics as an issue, as in the Horse Hollow case, and to preclude evidence and argument casting wind energy development as misguided public policy. In December 2007, the court granted both motions. Shortly thereafter the plaintiffs filed a nonsuit.

Outside of Texas, landowners in Grant County, West Virginia filed a nuisance suit in 2005 to enjoin the construction and operation of a wind power project planned by Shell WindEnergy, Inc. and NedPower Mount Storm LLC.[9] The trial court dismissed the suit, holding that the state public service commission's approval of the project pursuant to statute deprived the court of jurisdiction to enjoin the project under the common law. This ruling was reversed on appeal by the West Virginia Supreme Court in June 2007.[10] The case is now pending on remand at the trial court.

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[6] *See Rankin v. FPL Energy, LLC*, No. 11-07-00074-CV (Tex. App.–Eastland).

[7] *See Joe O'Dell, et al. v. FPL Energy, LLC, et al.*, Cause No. 06-502, 235th Judicial Dist., Cooke County, Tex.

[8] *See William and Susan Bruck v. Gamesa Wind US, LLC, et al.*, Cause No. 06-0129, 271st Judicial Dist., Jack County, Tex.

[9] *See Burch v. NedPower Mount Storm, LLC*, 647 S.E.2d 879, 885 (W.Va. 2007).

[10] *Id.* at 895.