

## Wind Tower Memorandum for County Commissioners

The purpose of this memorandum is to provide a summary of the legal authorities which establish that the Wabaunsee County Commission has the power not merely to override the Planning Commission's recommendation to impose regulations which would permit industrial scale wind turbine development as a conditional use in the county, but to go so far as to enact regulations to exclude them as an allowable use of land in rural/agricultural areas.

The Planning Commission has never considered a total exclusion, apparently assuming that industrial scale wind turbine developments were inevitable and could only be regulated, not prohibited.<sup>a</sup> This memo demonstrates that such an assumption is incorrect. It also lists the zoning factors the Commission should consider and the evidence with respect to each, which together establish that it is in the best interests of the County to preserve the agricultural heritage and landscape by not permitting industrial scale turbine development.

Riley County faces the same issues as Wabaunsee. A Riley County Planning Board member, Laurence A. Clement, Jr., JD, ASLA, has written a memorandum addressing basically the same two issues addressed here: to what degree, if any, should turbines be permitted in Riley County; and, how can regulations be written so they can withstand legal challenge ("bullet-proof"). Clement's resume is impressive. He is a landscape architect, attorney, and associate professor at KSU in the Department of Landscape Architecture/Regional and Community Planning. He has also served on the Riley County Planning Board for 12 years. Clement's excellent three page memo is attached as Exhibit 1. Clement's conclusion is compelling:

**In Riley County there are solid arguments against WECS-C at the industrial scale. Industrial scale wind turbines are out of place in or near the Flint Hills--clearly some of the most "favored places" in Kansas. We should consider following the precedent set by Bay Township in Michigan, as reported in the *Johnecheck* case, and prohibit WECS at the industrial scale.**

Wabaunsee County should prohibit wind energy conversion systems at the industrial scale, for the reasons set forth below.

### **I. Countywide Exclusion is a *Legislative Action***

It is important in understanding the scope of the County's power to first understand whether a decision by the County which would disallow industrial scale wind turbine development would be legislative or *quasi-judicial* in character. If the entire county is

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<sup>a</sup> At the public hearings, the Planning Commission declared they would only consider testimony regarding the proposed regulations, and that evidence that the proposed use was against the best interests of the County as a whole would not be considered. Nevertheless, at the first hearing, approximately 20 speakers addressed the issue of why the proposed use was not in the County's best interest.

impacted by a zoning action, then the action is legislative and redress is typically sought in the political process, not the courts. The courts give great deference to legislative acts and will not reverse them unless they violate the Constitution or other superior law.

While some zoning decisions are *quasi-judicial*, and thus involve due process rights, a regulation excluding a particular land use completely is not *quasi-judicial*. See *Golden v. City of Overland Park*, 224 Kan. 591, 597 (1978)(zoning decision is quasi-judicial when the focus shifts to one specific tract of land for which a zoning change is urged). Regulations which prohibit wind turbine complexes throughout the County focus on the entire county. Thus, we are concerned here with a legislative action, rather than a quasi-judicial action in which due process applies. Those cases arising in the context of a decision about rezoning an individual parcel have limited application.

## **II. The Law Authorizes the County Commissioners to Override the Planning Commission's Recommendations -- the Facts Mandate It**

The Zoning Regulations contemplate that the County Commissioners may override a recommendation by the Planning Commission. (Indeed, a favorable recommendation by the Planning Commission for a conditional use permit can be overruled by a vote of one County Commissioner if sufficient protest petitions are filed.) A Planning Commission recommendation can be overridden by a vote of the majority of the County Commissioners. After all, the County Commissioners are the elected legislative body for the County.

The Kansas Supreme Court has confirmed this authority in *Board of Johnson County Commissioners v. City of Olathe*, 263 Kan. 667 (1998). A landowner sought to have approximately 95 acres rezoned from agricultural to R-1, single family. The property had a common boundary with the Johnson County Executive Airport and lay under the airport traffic pattern.

The professional planning staff of the City of Olathe recommended denying the zoning change. The City's Planning Commission voted unanimously to deny the request. The Airport Commission also urged denial. Despite all this, the Olathe City Council voted 5 to 1 to approve the zoning change after holding hearings of its own.

Although the City Council lost in the District Court, on appeal the Kansas Supreme Court held that the City had acted reasonably. The court cited the *Golden* factors discussed later in this memorandum. The Olathe case demonstrates the power of the governing body to make zoning decisions and to exercise judgment independent of advisory commission and planning staff recommendations.

As noted above, for whatever reason, the Wabaunsee County Planning Commission refused to hear or consider the evidence presented which supported an exclusion of industrial

scale turbine complexes. Nevertheless, such evidence was presented in abundance, especially at the first hearing.

After an analysis of the facts, if the County Commission acts reasonably and states its reasons in the record, it should prevail in any challenge it might face, regardless of the Planning Commission's recommendation. In the end, the Planning Commission (and the planning staff) has simply made a recommendation to the County Commission. Whether the decision of the County Commission is reasonable does not depend on whether it matches what the Planning Commission has recommended. Indeed, a strong case could be made that the Planning Commission acted unreasonably in refusing to consider the issue of whether industrial scale turbines would be adverse to the welfare of the County as a whole.

### **III. The Law Favors the Zoning Authority**

The power vested in the zoning authority is impressive. The legal principles which apply have been stated in various cases over the years. These well-settled tenets were summarized in *Johnson County Water District No. 1 v. City of Kansas City*, 255 Kan.183, 184 (1994) and have been repeated in other cases since. Those most relevant to this discussion are:

**When a zoning authority like the County Commission acts, the courts assume it has acted reasonably.**

**The person challenging the County's action has the burden of proving by a preponderance of the evidence that the action was improper.**

**A court may not substitute its judgment for that of the County.**

**A court will not declare the County's action unreasonable unless clearly compelled to do so by the evidence.**

**Action is unreasonable only when it is so arbitrary that it can be said that it was taken without regard to the benefit or harm to the community at large and was so wide of the mark that its unreasonableness lies outside the realm of fair debate.**

Any one of the above principles give the zoning authority an advantage. Combined, they present a formidable barrier to challenging a zoning decision. If the County Commission acts reasonably, an adversary will not be able to reverse that decision unless it is simply unlawful. Thus, the acid test for whether the exclusion of wind turbine facilities is defensible is whether it has a legitimate basis and is within the realm of fair debate.

### **IV. Aesthetics, Heritage, and Public Welfare**

There is a wealth of evidence which establishes that the development of industrial scale turbines would be detrimental to the welfare of the County. Issues involving property values,

enjoyment of life, tourism, hunting interests, and others have been addressed at public meetings and at hearings. Likewise, the value to the public welfare of preserving the historic and agricultural aspects of the County has been presented and is emphasized in the Comprehensive Plan and the existing Zoning Regulations. Those issues are summarized later in this memo. However, one issue, aesthetics, has been attacked by the turbine proponents as irrelevant and without significance and legal basis in making zoning decisions.

Aesthetics have a strong role to play in the decision making. Their importance has been addressed by Laurence Clement, Jr., the landscape architect/attorney discussed above. Providing for cultural stability and preserving the identity of our communities is a legitimate governmental interest. Clement has analyzed the visual impact of wind turbine complexes and on that basis has determined that they would be harmful to the cultural stability and identity of the Flint Hills. (See Clement Power Point, Exhibit 2.)

The following subparts of this section outline the legal support for using aesthetics in considering zoning issues such as turbine developments.

**a. The Kansas zoning statutes give the County broad power to protect aesthetic values.** Under K.S.A. 12-741 Kansas counties are given the power to enact zoning regulations to protect public “welfare.” The public welfare has been defined by the U.S. Supreme Court to include a broad spectrum of values, including aesthetics:

**The concept of public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary.**

*Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954). Nothing in the Kansas statute restricts the concept of public welfare to something narrower than the expansive view of the Supreme Court in *Berman*.

The Kansas Supreme Court first recognized aesthetics as a legitimate basis for a zoning decision in 1923, in *Ware v. City of Wichita*, 113 Kan.153, 157 (1923). Since then, Kansas courts have repeatedly recognized the aesthetic and cultural side to development which local governments are empowered to regulate, recently affirmed in *Blockbuster Video v. City of Overland Park*, 24 Kan. App. 2d 358 (1997), in which a City’s regulation of architectural standards was upheld. K.S.A. 12-755 specifically lists the control of aesthetics as one of the legitimate purposes of zoning regulations.

**b. Other states value aesthetics as well.** Other states have also recognized that “[c]ommunity aesthetics and preservation of the character of a neighborhood are valid bases for a regulation.” *Georgia Outdoor Advertising, Inc. v. City of Waynesville*, 900 F.2d 783, 785 (4th Cir.1990) (aesthetics); *Cerro Gordo*, 170 N.W.2d at 361 (character of neighborhood).” *Outdoor Graphics, Inc. v. City of Burlington, Iowa*, 103 F.3d 690 (8th

Cir.1996); *see also Agins v. City of Tiburon*, 447 U.S. 255, 65 L.Ed.2d 106, 100 S.Ct. 2138 (1980) (upholding development restrictions and open-space requirements based on State interest to control premature development, protect residents from ill-effects of development, and preserve scenic beauty).

Aesthetics go beyond mere scenic beauty. It has economic value as well. People visit and spend money in attractive places. The Flint Hills region is an excellent example of this trend. From 1993 to 1998 domestic travel expenditures in Chase County increased 2,017%. Statewide the increase was only 117%. See "Tourism in the Flint Hills" by Deborah Divine, Program Manager, Kansas Scenic Byways. Unfortunately similar data for Wabaunsee County is not readily available.

**c. Preserving agricultural character and heritage is a proper basis for zoning regulations.** Like aesthetic considerations, the preservation of the agricultural character of land and the avoidance of costs to the public purse caused by development are legitimate governmental interests that may be pursued through development restrictions. *See Christensen v. Yolo County Board of Supervisors*, 995 F.2d 161 (9<sup>th</sup> Cir. 1993). The County has broad powers to protect a variety of interests, like "quiet seclusion," and not merely control "filth, stench and unhealthy places." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9, 39 L.Ed.2d 797, 94 S.Ct. 1536 (1974) a U.S. Supreme Court decision.

## **V. *Johnecheck v. Bay Township***

One method of predicting how a court will treat a specific issue is to examine how courts from other states have treated the same issue. In Michigan, a township was presented with a situation remarkably similar to that in Wabaunsee County. The facts and legal reasoning are set forth below in some detail. Essentially, the township board refused to adopt regulations which had been created by the planning commission and which would have permitted industrial turbines. A lawsuit ensued. The court held, without having a trial, that the township was completely within its rights to prohibit industrial scale turbines.

The Michigan case is *Johnecheck v. Bay Township*, U.S. District Court, Western District of Michigan, Southern Division, Case No. 1: 02-CV-71. (Exhibit 3) Property owners in Bay Township, Michigan applied for a permit to erect 300' wind turbines "to supplement the income generated by farming operations." Their application was denied because the Bay Township "zoning ordinance does not address WTG's" (wind turbine generators). The Court Decision described what followed the initial denial of the application:

**For the next several months, the Township Board of Trustees and Township Planning Commission actively considered a proposal to amend the Zoning Ordinance so as to permit and regulate installation of wind turbine generators as a "special use." Ultimately, on July 12, 2001 the Board of Trustees, in a 3-2 vote, rejected the proposal, concluding that such a special use would be contrary to the Township Land Use Plan.**

The decision also set forth provisions of the Bay Township Land Use Plan (a/k/a Comprehensive Plan) as follows:

**This document presents a strategy for future land use and development. It is not a zoning ordinance and does not regulate the use or development of land in any way. This Land Use Plan was prepared and adopted under the authority of the Township Planning Act, PA 168 of 1959, as amended, for a number of purposes.**

- **To provide goals and policies for future land use and development**
- **Encourage the preservation and protection of natural and scenic resources**
- **Promote the preservation of the community's character, as presented by its low density of residential development, shorelines, woodlands, farmland, and open spaces**
- **Promote the preservation of woodlands, wetlands, water courses and shorelines as groundwater recharge and storm water retention areas, and habitat for a variety of plant and animal life**
- **To recognize farming and forestry as irreplaceable components of the community's character and tourism related economic base**
- **To provide planned implementation recommendations**
- **Encourage the establishment and implementation of land use policies that promote and protect the health, safety, and general welfare of the community.**

Meeting minutes reflected that the pro-turbine regulations were rejected “primarily by concerns about the potentially negative impact of wind turbine generators on the rural character and scenic viewscapes of the area.”

After the regulations were voted down, the disgruntled landowners brought suit. The federal court dismissed the landowners' claim before the case even reached trial.

Michigan, like Kansas, has a presumption of validity of ordinances and places the burden on the landowner challenging a zoning ordinance to establish that there “is no reasonable governmental interest being advanced by the subject zoning classification, or that classification is arbitrary, capricious and unfounded.” Michigan, however, does not extend the presumption of validity of an ordinance that, “totally excludes a use recognized by the Constitution or other laws of the state.” The Bay Township zoning regulations imposed a height limit of 30' for wind turbines. The developers argued that the effect of the height limitation was to totally exclude industrial scale wind turbine facilities of the type being proposed in the Flint Hills. The Court rejected that argument, and held that the ordinance did not totally exclude wind turbines because 30' turbines were allowed.

The court then addressed the issue of what role, if any, aesthetic concerns should play in zoning decisions. The court recognized that, “aesthetic concerns are a legitimate

governmental interest sufficient in themselves to support the Zoning Ordinance's restriction of wind turbine generators in the Township."

The complaining landowners alleged "the Township, by preventing them from wind farming, has deprived them of beneficial use of their property without due process." The court recognized that "To prevail on such a substantive due process theory, plaintiffs must show that the township's actions do not advance any reasonable governmental interest or constitute an arbitrary and unreasonable restriction of the use of their property, precluding its use from any purposes for which it is reasonably adapted." The court rejected that argument of the complaining landowners as well. It found that the Township, by permitting turbines up to 30', did not totally exclude WTG's; that aesthetic concerns are a legitimate and sufficient governmental interest; and that the complaining landowners were not deprived of all reasonable beneficial use of their land.

The Johnchecks sought damage for "an unconstitutional taking of their property." Likewise, the court rejected that argument and stated "To establish an unconstitutional taking, plaintiffs must show the township's actions preclude the land's use for any purpose to which it is reasonably adapted. (citation omitted) Mere diminution in value does not amount to a taking; plaintiff's must show they are denied economic viable use of their land because the land is either unsuitable for use as zoned or unmarketable as zoned." [The issue of "taking" as applied by Kansas is discussed below.]

The facts of the Bay Township matter are remarkably similar to those of Wabaunsee County. The zoning regulations and comprehensive plan contained the same intent, goals and values as that of Wabaunsee County. A landowner sought to erect industrial scale turbines. As there were no regulations which directly addressed turbines, the advisory planning board recommended adopting regulations which would permit turbines as a special use. The Township Board rejected the recommendation, in effect prohibiting industrial scale turbines. The landowner sued. The Township Board won without a trial.

Kansas' law is stronger than Michigan's in recognizing aesthetics as a basis for zoning decisions. If Kansas law were applied to the facts of the Bay Township case, the prohibition on industrial scale turbines would be easier to support than applying Michigan law.

Aesthetics is only one of numerous bases for not permitting industrial scale turbines in Wabaunsee County. In addition, although Bay Township undoubtedly could claim pride in its scenic landscape, there is no suggestion that the area was part of an endangered ecosystem or that the existing use of land preserved the heritage of the state, as do the Flint Hills of Kansas.

## **VI. The Exclusion Of One Particular Land Use Is Not A Taking Of Private Property For Which Compensation Is Required.**

No compensation to affected landowners would be required if the County Commission decides that public interests in scenic or rural-character preservation justify prohibiting industrial scale wind turbine developments in Wabaunsee County. Moreover, the question is not a particularly close one. In fact, it appeared even the proponents of industrial development had conceded the argument when Charles Benjamin, former attorney and representative of JW Prairie Windpower, acknowledged at a Task Force meeting that the argument had no role in the issue. However, Wabaunsee County Zoning Administrator Claude Blevins has nevertheless raised the issue, taking a position contrary to the law in an interview with a *Topeka Capital Journal* reporter.<sup>b</sup> Therefore, a memorandum addressing the taking issue, attached as Appendix A, puts to rest any uncertainty that the County or State would be forced to pay people who could not have turbines.

## **VII. The Factors - Including *Golden***

The most common challenge to the action of a zoning authority is that the action is arbitrary and capricious. These challenges have proven successful only when the body making the decision has not taken evidence or has ignored the evidence. In *Golden v. The City of Overland Park*, 224 Kan. 591, 598 (1978) the Overland Park City Council denied the applicant's request for a zoning change without stating any reasons in its record. From this case came the well known *Golden* factors that are included in our own county zoning regulations. While the *Golden* case does not control legislative changes to zoning regulations, some of the factors it identifies are nevertheless useful in evaluating what makes a zoning enactment reasonable. In particular, the proposed regulation's compatibility with the existing Zoning Regulations and the Comprehensive Plan, its impact on the character of the area affected, and the existing land uses, and the ability (or inability) to put the land to productive use. Threshold tests include the regulation's compatibility with the Comprehensive Plan and existing zoning regulations. The ultimate test is its impact on the general public welfare.

As noted above, the Wabaunsee County Planning Commission refused to hear or consider evidence which supported the position that industrial scale turbines were not in the best interest of the County as a whole. Nevertheless, a tremendous amount of testimony has been presented to that effect. In addition, the Commissioners have each educated themselves by attending the numerous public meetings in the County and elsewhere--meetings sponsored by various sides of the issue. To date in the County, the following public meetings have been held: Alma schoolhouse (Farm Bureau and KLA), Alma Hotel (Tallgrass Ranchers), Eskridge Catholic Church (Tallgrass Ranchers), Alta Vista schoolhouse (JW Prairie Windpower), Deep

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<sup>b</sup> *Topeka Capital Journal*, Saturday, April 17, 2004, in an article titled *Wind Farm Rules Elusive*, author Chris Moon stated, "Wabaunsee County zoning administrator Claude Blevins said the state would have to compensate landowners for lost economic opportunities if it banned wind farms in the Flint Hills."

Creek Schoolhouse (Tallgrass Ranchers) and Alta Vista Hall (Tallgrass Ranchers). Other meetings have been held in Geary, Riley, and Morris Counties. Commissioners have heard testimony, and watched Power Points and documentaries (Exhibits 4 and 5). They have been presented evidence that industrial turbine complexes would reduce property values, reduce the enjoyment of life for the residents, and cost the County potential economic benefits through tourism, hunting, and productions such as the filming of the *Eddie Bauer* catalog. Testimony has been presented from several sources (including a township board member) that the initial construction will adversely impact the infrastructure--roads and bridges--of the County.

The one developer who has held a public meeting in the County, JW Prairie Windpower (JWPW), has met with strong opposition from the neighboring landowners and residents who have not signed leases. The Commissioners are aware that at all of the hearings and meetings which have taken place, the only testimony in favor of regulations which would permit turbines has been from individuals with direct financial interest in seeing turbines - either paid representatives of the developers, or landowners who have signed leases. Jerry Lonergan, co-chair of the Task Force, reported that the “vast majority” of public input to the Task Force was in favor of not developing industrial turbine complexes in the Flint Hills. Below is a summary of the factors, together with the evidence that has been presented to or gathered by the Commissioners.

**a. Intent and Purpose of the Zoning Regulations**

Practically all unincorporated land in Wabaunsee County is zoned agricultural. Article 2, Agricultural District Regulations, sets forth the intent and purpose of that district, which is, in part, to offer protection from uses which are objectionable, incompatible with the surrounding area, or unsightly. The District is also intended to protect “scenic areas” and “conserve wildlife habitat.” Section 2-101 of the Zoning Regulations, states in part:

*The purpose of this District is to provide for a full range of agricultural activities on land used for agricultural purposes, including processing and sale of agricultural products raised on the premises; and at the same time offer protection to land used for agricultural purposes from the depreciating effect of objectional, hazardous, incompatible and unsightly uses. The District is also intended to protect watersheds and water supplies; to protect forest and scenic areas; to conserve fish and wildlife habitat; . . . [Emphasis added.]*

These are Regulations which were recommended by the Planning Commission and adopted by the County Commissioners years before the concept of industrial turbines was brought to the County. The words in these Regulations are there for a reason.

The evidence is overwhelming that industrial wind turbine complexes, with dozens of towers 300-400 feet tall, are objectionable, incompatible with the existing use, and unsightly. *The Signal Enterprise*, official county newspaper, has documented the enormous objection to the turbines because of their incompatible and unsightly aspects, among other things. There is

also evidence from studies conducted at Kansas State University that the complexes will have negative impacts on wildlife (See Robel Study, Exhibit 6). As noted above, Laurence Clement has determined that the visual impact from turbine complexes on the ridge lines would adversely impact the cultural stability and identity (i.e., welfare) of the Flint Hills. (See Clement presentation, Exhibit 2.) *See also*, John J. Costonis, *Law and Aesthetics: A Critique and Reformulation of the Dilemmas*, 80 Mich. L. Rev. 355 (1982); John J. Costonis, *Icons and Aliens: Law, Aesthetics, and Environmental Change*, Urbana: University of Illinois Press. 1989.

## **b. Comprehensive Plan**

The Wabaunsee County Comprehensive Plan, including the Goals and Objectives, supports regulations which would prohibit industrial scale turbine complexes, but does not support regulations which would permit such use:

**Page 15:** As noted throughout this Plan, Wabaunsee County has a strong connection to its agricultural past and has shown a great desire to maintain an environment conducive for the continuation of agricultural activities.

**Page 16:** In essence, the intent is to place a very high importance on the retention of agricultural lands for agricultural uses and not look favorably on the conversion of those lands to non-agricultural uses unless it is shown to be truly in the best interests of county as a whole.

### **Goals and Objectives:**

2. Maintain the rural character of the county with respect to its landscape, open spaces, scenery, peace, tranquility, and solitude.
4. Develop realistic plans to protect natural resources such as the agricultural land, landscape, scenic views, and Flint Hills through regulatory policies.
5. Promote historic preservation, which protects and restores historic properties, old limestone buildings, and landmarks in the county.
8. Develop tourism program involving historic properties, nature of rural character, and scenic landscape.

**Page 85-87:** Agricultural lands should be preserved. Open spaces provide economic value as well as sociological importance.

**Page 112 Strength of County:** Agricultural lands, grasslands, wildlife and its habitat, streams and water bodies, and the Flint Hills.

**Page 115 Opportunities for County:** An abundance of historical landmarks . . . located in the wonderful scenic vistas of the Flint Hills and its grasslands.

**Page 116 Threats:** The residents see the county as a rural county and highly value that rural way of life and all it entails, including protection of its grasslands and the Flint Hills. There is great concern over present and future land development in the county.

**Page 122:** Encourage tourism based on the county's heritage and environment, such as the Flint Hills and its historic landmarks.

**Page 126:** In particular, protective measures should be developed that make incompatible development with the agricultural areas of the county less likely to occur.

**Page 126-127:** The specifics of those types of development that are incompatible should be articulated within the regulations, but in general it should be any proposed development activity that is out of character with the agricultural activity of the area. These incompatible activities could be development both out of scale and character such that the resulting impacts would be incompatible with the region. It is recognized this may be inconsistent with the individual interests of some individual landowners, but as has been noted within the community surveys, the natural and physical beauty of this region and its scenic value is of greater importance to the community as a whole than any specific impacts such restrictions might have on a selected few individuals. As such, it should be evident that it is in the public interest to take such action by the county.

**[Emphasis added.]**

No one could seriously suggest that industrial turbine complexes are compatible with the Comprehensive Plan. The Comprehensive Plan promotes maintaining the agricultural scenic and heritage values of the County. It strongly and repeatedly discourages industrial uses such as wind turbines.

Wabaunsee County is known for its scenic vistas, for its historic stone structures, its prairie landscape and sense of history. It trades on its isolation from modern industrialization and its preservation of remnants of pre-settlement and early post-settlement Kansas. Limitations on large scale development inconsistent with the County's character not only help preserve the stability, the identity, and the integrity (and hence protect the value) of the County's image, they protect against other types of incompatible uses. The residents and landowners of the County have expressed--through their participation in the Comprehensive Plan process, their strong desire to preserve the amenities that the citizens of Wabaunsee County value--open, unobstructed spaces and natural beauty.

One Goal of the County (#8, above) is to develop a tourism program which exploits the historic properties and the rural character and scenic landscape of the County. Again, Clement has studied the issue extensively from a highly trained perspective and has concluded that industrial turbines are detrimental to the rural character and scenic landscape of the County. George Terbovich, who purchased the historically significant but vacant Alma Hotel, testified that he would reconsider his plans to renovate the hotel if industrial turbines were permitted. The Special 10<sup>th</sup> Anniversary Edition of the magazine, *Kansas City* for May 2004 rated the

Flint Hills as the third top “day trip from Kansas City,” stating, “Who knew Kansas was so pretty?” (See *Kansas City*, Exhibit 7.)

**c. Market Values of Real Estate.**

The Flint Hills are unique not only in their ecology, heritage, and beauty, but also in the way land is valued. The agricultural use value, based on the expected return on investment of rural Flint Hills land is currently approximately one-third of the fair market value. The difference (the “intangible value”) is driven by the fact that buyers are willing to pay for something beyond the production value of the land. Much of the intangible value is derived directly from the “viewshed” and this value is expected to continue to increase as other areas of the state and nation are developed.

Although industrial turbines would undoubtedly increase the value of the land on which the turbines sit, they will decrease the value of neighboring land within the viewshed--up to 20 miles. Simon McGee has given a presentation regarding this matter to the County officials and at each Tallgrass Ranchers public meeting. McGee is a landowner, rancher, and investment banker. He is knowledgeable in both real estate values in the County and in investment theories. (See Tallgrass Ranchers Power Point, Exhibit 4.)

Studies conducted in other locations have not been faced with property that had the intangible value present in the Flint Hills. Because the turbines are generally placed on high ground, and are of a scale and magnitude unlike anything else in the Flint Hills, their visual impact would be seen for up to 20 miles.

**d. Last Stand of the Tallgrass Prairie.**

The Flint Hills of Kansas and Osage Hills of Oklahoma are unique in that they contain the vast majority of the remaining four percent of the tallgrass prairie which once covered much of the Central United States. The tallgrass prairie is considered one of the most endangered ecosystems of North America. (See *Last Stand of the Tallgrass Prairie* video, Exhibit 5.) Although difficult to quantify, this unique quality has value, whether in the form of the intangible property value described above, or its ability to attract visitors, from tourists to scientists. Placing industrial turbines even on the tilled portion of the Flint Hills threatens the entire area. It not only impacts visually far beyond the location of the towers, but it also impacts the infrastructure of the surrounding area. Even the developers who claim to be focused upon tilled ground admit that their projects would also involve pasture land. To allow industrial development on “disturbed” land would encourage others to turn presently pristine prairie into something else--to become “eligible” for turbines. The County has declared in its recently adopted Comprehensive Plan that the entire county should be treated as worthy of protection from such an intrusive and dominant industrial use.

**e. Existing land use.**

There is not a pressing need to develop alternative land uses for the unincorporated areas of the County. All of the testimony regarding the Comprehensive Plan favored maintaining the unincorporated areas as agricultural. No one testified, nor has there been any evidence presented, that areas of the County are unsuitable for their designated and intended purpose. Indeed, even the developers have admitted that the turbines would only supplement the income of the few participating landowners, but that the current agricultural uses would continue.

**f. Need for turbines.**

Testimony has been presented that placing turbines in Wabaunsee County would reduce global warming and toxic emissions, and even help bring our troops home from Iraq. Regardless of the merit of the arguments, none of these arguments establish a need for industrial turbines in Wabaunsee County. The homes the developers promise to light are not presently dark. (In fact, Kansas is a net exporter of electricity.)

Cell towers at least provide local benefit. The other intrusions in the County--roads, railroads, power grid--were not invited in, but rather forced their way into the County through either eminent domain or the threat of it. Wind turbines would not provide electricity for Wabaunsee County. And, contrary to the threats presented by some proponents, if industrial scale turbines are kept out, the County will not have to live with a coal or nuclear plant hovering above Lake Wabaunsee.

**g. Learn from Others.**

There has been a tremendous amount of articles, editorials, and commentary throughout the western world on this issue recently. There are pro industry groups and groups that are equally as opposed. The one thing that cannot be denied, however, is that a decision to permit turbines is one which would forever change the County. Thus, it is worthwhile to review the experience of other areas that have a track record.

Most of the industrial complexes in the United States have been in areas which are not comparable to the Flint Hills in beauty, heritage, and ecological significance. Great Britain probably gives us a better insight into the effect that turbines would have on an area like Wabaunsee County than does Gray County. A highly regarded weekly British magazine, *Country Life*, recently ran an article on the effect of industrial turbines on areas of Britain similar to Wabaunsee County. (See Exhibit 8, *Country Life* magazine, April 1, 2004). The first paragraph of the article reads:

The single-track road between Machynlleth and the appropriately named hamlet of Staylitle is hardly marked on the map. It takes you over a corner of the ancient Cambrian Mountains, their rounded, green backs mottled with heather and occasionally flecked with sheep. There is little sign of human life in this landscape, which was once nearly designated as a National Park. That is why people come here to walk, ride and sometimes to live.

\* \* \*

The article then describes the significant, and permanent, damage that industrial turbines are causing to some of Britain's most attractive areas.

As with the opposition in Wabaunsee County, *Country Life* is not opposed to the industry altogether, instead it focuses on areas of the country which are not appropriate for turbine complexes. (Denmark, Exhibit 9, and Germany, Exhibit 10, have experienced similar problems to those in Britain).

#### **h. Box of Chocolates.**

“How big, how many, where and how many lights?”--questions that the developers usually give qualified answers to. One German developer interested in Wabaunsee County is JW Prairie Windpower (JWPW). Based strictly upon the printed literature from JWPW, the tower height (without rotor) would be 265' and the rotor diameter would be 250'. Thus, the tip of the rotor would be 380' above ground. (See JWPW pamphlet, Exhibit 11). The literature also states, “JWPW utilizes the most technologically advanced and proven turbines in the business.” That was published in 2003. In April 2004, *Composites Technology* published an article that announced the development of a 410' diameter rotor. Thus, if the center of the rotor were placed on the 50 yard line, the tip of the blade would extend beyond the end zone. (See *Composite Technology*, April 2004, Exhibit 12). A 410' rotor would result in a turbine undoubtedly 500-600' from ground to blade tip. That would be taller than any building from St. Louis to Denver.

#### **i. Phony Science and Tax Credits.**

It is noteworthy that despite the rhetoric from the developers about saving the environment, their hands are never far from the U.S. Tax Code. In fact, the developers are waiting with baited breath for Congress to reinstall the 1.8 cent/KWH tax credit to give them the lifeblood to move forward. The attached article by Eric Rosenbloom (Exhibit 13) exposes the industry for its lack of true benefit to the environment. Wabaunsee County should not trade its heritage, its history, and the beauty of its ridgelines for tax benefits to foreign corporations.

Even if the industry were the solution to all the world's pollution and energy problems, that would not justify placing turbines on the ridge lines and high ground of Wabaunsee County.

**j. General Welfare.**

There has been no credible evidence presented that bringing industrial scale turbines into Wabaunsee County would benefit the general welfare of the County. There has been significant evidence that such would bring harm to the welfare of the County.

**k. Conclusion.**

The County Commissioners should not adopt regulations which would permit industrial scale wind turbines (over 120 feet tall) in Wabaunsee County. Rather, the County Commissioners should adopt regulations which prohibit them.

## APPENDIX A

### Zoning Out Industrial Scale Wind Turbines is Not a Taking

a. What is a taking? Diminution in property value alone, even if dramatic, arising from zoning restrictions cannot establish a taking. *E.g.*, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384, 397, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 131, 57 L.Ed. 2d 631, 98 S.Ct. 2646 (1978). As the United States Supreme Court reiterated recently, “a government regulation . . . that bans certain private uses of a portion of an owner’s property . . . does not constitute a categorical taking.” *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 152 L.Ed.2d 517, 122 S.Ct. 1465, 1479 (2002). A regulation categorically results in a taking only when the regulation denies all economically beneficial uses to an owner’s land. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). In the absence of the complete extinguishing of all economic value, the question of whether there is a taking is evaluated by the balancing framework set out in *Penn Central*. *Lucas*, 505 U.S. at 1019-1020.

A regulation gives rise to a “taking” only when it “goes too far.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322 (1922). The Supreme Court noted it has “‘generally eschewed’ any set formula for determining how far is too far, choosing instead to engage in ‘essentially ad hoc inquiries.’” *Tahoe-Sierra*, 122 S.Ct. at 1481. The significant factors in the inquiry under the *Penn Central* framework include the extent to which the regulation interferes with investment-backed expectations and the character of the governmental action.

The Kansas Supreme Court explains the analysis:

**An economic regulatory taking is a taking only if the economic impact on the landowner outweighs the public purpose of the regulation. . . . [A] two-tier inquiry is made to determine if a compensable taking has occurred. Both the purpose of the regulation and its economic impact on the landowner are considered. This is the arm of the regulatory taking analysis which asks whether the regulation has gone too far in affecting the land’s economic value.**

*Garrett v. City of Topeka*, 259 Kan. 896, 916 P.2d 21 (1996).

b. The Landowners’ Investment-Backed Expectations. As to the economic impact on the landowner, the first inquiry is whether the economic expectation at issue was sufficiently definite and vested to constitute “property.” *Penn Central*, 438 U.S. at 125. Applying this consideration to industrial wind power facilities, no property owner in Wabaunsee County has any reasonable expectation of a right to construct such a facility. If no

moratorium were in effect, an application for conditional use under existing law could be denied based on the same considerations that would prompt an overlay area or prohibition county-wide. The court in *Outdoor Graphics, Inc. v. City of Burlington, Iowa*, 103 F.3d 690, 694 (8th Cir.1996), held there is no “taking” even when a regulation deprives land of all beneficial use when the proscribed use was not previously permitted to begin with. *See also Hoeck v. City of Portland*, 57 F.3d 781, 788-89 (9<sup>th</sup> Cir. 1995) (demolition did not amount to taking since landowner had no right to maintain abandoned structure).

In addition, all uses now allowed as a matter of right, including agricultural uses, would be unaffected by a regulation prohibiting wind turbine towers in the county. Thus the property rights of the landowners would not be changed, and reasonable investment-backed expectations would not be materially affected.

Although the potential opportunity to build industrial scale wind turbines would be extinguished by a restriction on wind turbine development, the question of whether a regulation constitutes a taking does not focus on the particular restriction imposed on the land, but rather the extent of the interference of the rights in the property as a whole. *Penn Central*, 438 U.S at 130-131. Here, the inability to develop land for wind turbines (or more precisely, the inability to request a conditional use for such a development) is an exceedingly minor interference with the rights in the property as a whole. The Supreme Court stated:

**The submission that [land owners] may establish a ‘taking’ simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. Were this the rule, this Court would have erred not only in upholding laws restricting the development of air rights . . . but also in approving those prohibiting both the sub adjacent . . . and the lateral . . . development of particular parcels. [Emphasis added.]**

*Id.*, citations omitted.

c. Character of government action. As to the character of the governmental action, physical invasions by the government will more readily give rise to a taking than other types of regulation for the public benefit. *Penn Central*, 438 U.S. at 124. Here there is no physical occupation by the government. The Supreme Court has repeatedly upheld against taking challenges prohibitions of specific types of developments in designated areas. *E.g.*, *Euclid*, 272 U.S. 365 (use restrictions); *Welch v. Swasey*, 214 U.S. 91, 29 S.Ct. 567, 53 L.Ed. 923 (1909) (height restrictions). In addition, takings are more likely to be found when the regulation effectively appropriates a resource to permit or facilitate a uniquely public function like allowing for overflights or flood water diversion. *Penn Central*, 438 U.S. at 128. A restriction on building wind turbines is not designed to acquire a resource for a governmental function.

d. The interests served by a prohibition are legitimate ones. *Penn Central*, the seminal case on regulatory takings, dealt with New York City's historical landmark law. In it, the Court notes that municipalities have a permissible interest in enacting land-use regulations, "to enhance the quality of life by preserving the character and desirable aesthetic features" of an area. 438 U.S. at 129. That is exactly the function that would be served by regulations protecting Wabaunsee County from industrial-scale turbine power developments.

e. View of the Tenth Circuit. The Federal Courts of Appeal are divided into circuits. Kansas lies in the Tenth Circuit. The Tenth Circuit crystallizes the *Lucas* and *Penn Central* rulings into the following statement of the law of regulatory takings: "A regulation 'goes too far' as to effect a regulatory taking if: (1) it deprives an individual of all economically beneficial use of his or her property; or (2) it does not substantially advance legitimate state interests." *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1576 (10<sup>th</sup> Cir. 1995). A restriction on wind turbines does not deprive property of all economically beneficial use. Moreover, such a restriction serves a legitimate interest in preserving the rural and scenic character of the Flint Hills and the welfare of the community as a whole.