

TUSCOLA COUNTY
AIRPORT ZONING BOARD OF APPEALS

Chairman Keith Kosik called the meeting of the Airport Zoning Board of Appeals (AZBA) of the County of Tuscola, Michigan, held at the Saginaw Valley Research & Extension Center, 3775 S Reese Road, Frankenmuth Michigan 48734, on the 17th day of January, 2020, to order at 3:00 p.m. local time.

Pledge of Allegiance

Roll Call – Clerk Jodi Fetting

Members Present: Keith Kosik, Tim Kinney, Bill Campbell, Paul Hoose, Don Clinesmith

Members Absent: None

Also Present: Clerk Jodi Fetting, Jamie Nisidis, Roy Kauer, Ken Hecht, Jim Tussey, Carrie Nichols, Norm Stephens, Eric King, Tom McGough, Nancy Laskowski, Phil Pavlov, Tom Hess, Carol Hess, Joe Greene, Lynn Hadaway, Maureen Atkerson, Don Atkerson, Neil Arnold, Mike Pattullo, Mel Campbell, Susan Campbell, Chuck Dennis, Ricky Russell, Carl Childs, Karen Goodchild, Heidi Stark, Larry Ruckle, Ben Doyle, Jonathan Lauderbach, Dan Ettinger, Ashley Chrysler, Josh Heinlein, Ryan Pumford, Mike Buza, Garrett Tetil, Mary Brissette, David Traubenkraut, Dennis Ackerman, Robert Gray, Susan Traubenkraut, Carol Graham-Banes, Edward Lysogorski, John Dudock, Pat Osantowski

Adoption of Agenda

2020-M-AZ-004

Motion by Kinney, seconded by Campbell to approve the agenda as amended. Roll Call Vote: Kinney – yes; Campbell – yes; Hoose – yes; Clinesmith – yes; Kosik – yes. Motion Carried.

Approval of Minutes –

2020-M-AZ-005

Motion by Clinesmith, seconded by Kinney to approve the January 13, 2020 minutes. Roll Call Vote – Campbell – yes; Hoose – yes; Clinesmith – yes; Kinney – yes; Kosik – abstain. Motion Carried.

Chairman Kosik recused himself at 3:04 p.m. due to potential conflict of interest. Vice-Chairman Kinney assumed responsibilities of leading the meeting.

New Business – None

Public Comment –

-Larry Ruckle – Provided documentation regarding various anti-wind groups. He also presented a resolution passed by Tuscola Area Airport.

-Josh Heinlein spoke in reference to Visual Flight Rules (VFR) Class G airspace and Class E airspace. He explained his perspective of how a wind turbine could impact the airspace. Discussed differences between Instrument Flight Rules (IFR) and VFR.

-Joe Greene stated that Alma, Ionia and Bad Axe Airports have had variance applications for use of airspace near those airports. Tuscola County has received the most variance applications as to any other area airport. Discussed why the original hanger was removed, why trees near the airport were trimmed and why RC airplanes are no longer flown at the airport.

-Carl Childs stated he feels that the AZBA can make a difference in this decision and determine a way to have everyone work together to have a gain at the end of the project.

-Norm Stephens referenced turbulence emitted from wind turbines. He referenced a conversation that he had with a crop sprayer. He referenced the Almer Township case heard by Judge Ludington. He referenced tax revenue that is generated by wind turbines.

-Ricky Russell referenced the tax revenue realized by Tuscola County and the positive impact it has had on the county budget. He also spoke about crop sprayers. Discussed the airport runway along with the proposed runway. He questioned, when take-off and landings are discussed, which runway is being referenced, the existing or the proposed. He does not feel the wind turbines will affect the airport.

-Mike Buza stated the Board needs to look at the big picture. If a person considered hazards when driving, a person would probably not drive. Look at the benefits as well as give the matter at hand a fair shake.

-Nancy Laskowski referenced that the original project for Pegasus was only for Fairgrove and Juniata Townships in which Gilford was added later. Referenced a newly signed lease in the airport zone where a variance would be required. She referenced weather data over the past 5 years for near the airport.

-Josh Heinlein referenced a protected airspace of a 6.6 mile radius of the airport and how obstacles could not be cleared within the area. He was not trying to portray that it would be a performance issue to clear the turbine.

-Maureen Atkerson provided copies of two reports. The first report was titled "First in site evidence of wakes in the far field behind offshore wind farms." The second submitted was a court decision from the Supreme Court of Iowa from 2019.

-Jim Tussey stated the matter before the Board is unique. He referenced that the airspace should be protected. Stated that the Airport Authority was not contacted during the planning process of the wind turbine project. He spoke in reference to Capital Airspace and how he does not feel that Capital Airspace provided good expertise.

-Member Campbell questioned if Capital Airspace was a lobbyist firm or a consulting firm.

-Tom Hess asked for clarification on IFR flight descent and how an airplane approaches the airport. He asked if any other variance applications such as Caro Center or Long's Petroleum were ever filed and considered by the AZBA. Member Campbell stated that would be under Indianfields and Caro Center has not applied as of yet. Discussed the permits were not acquired by Long's when built within the airport zone. There are hazards in all forms of travel. There are safety issues with everything we do.

-Joe Greene referenced a document submitted by Scott Dianas to Clerk Fetting.

-Ricky Russell discussed the ceiling for the path descent which can be effected by weather. Expansion of the runway was discussed.

-Larry Ruckle discussed the height of a turbine versus a turbine located on higher land based on the topographical area.

-Josh Heinlein stated that airspace is based off from the center of the airport.

-Mike Pattullo referenced the Ellington Township case of fighting the turbines and that they did not receive money from the coal industry to do that.

-Heidi Stark referenced that general aviation nationwide is on the decline. General airports have costs that are increasing while funding has been decreasing. Discussed the membership of the Tuscola Area Airport and how it had decreased over the years.

-Member Campbell referenced the Board of Commissioners minutes from a Public Hearing held on November 10, 2010 where Linn Smith spoke in reference of the Airport.

-Mary Brissette stated the FAA can overturn a Judge's decision as it happened in a case in Massachusetts.

-Member Kinney asked Pegasus to address the Interagency Field Test & Evaluation Industry Report on Wind Turbine – Radar Interference Test conducted by Sandia National Laboratories (SNL) and the Massachusetts Institute of Technology.

Recessed at 4:45 p.m.

Reconvened at 5:03 p.m.

Old Business –

-Variance Applications Received

1. 2019-WTE-80-OE
2. 2019-WTE-81-OE
3. 2019-WTE-4534-OE
4. 2019-WTE-4535-OE
5. 2019-WTE-4536-OE
6. 2019-WTE-4537-OE
7. 2019-WTE-4538-OE
8. 2019-WTE-4539-OE

-Ryan Pumford addressed the impact to Pegasus if the eight variance applications were to be denied. Ryan referenced the closest turbine to the airport is 3.6 miles away. Ryan responded to Clinesmith's question from the previous meeting that Pegasus has not had an accident with one of their turbines and an airplane. The airport is not at risk of losing its federal grant money issued by the FAA if the eight variances were to be granted.

Pegasus is willing to indemnify the airport for 5 years to reimburse the airport in case the FAA did require the airport to repay back any of the grant funds. Ryan referenced the FAA issue of presumed no hazards. Ryan referenced the revenue to the Townships are for turbines that have been granted.

-Ben Doyle referenced the eight wind turbines requested and how it relates to the VFR flight pattern at the airport. He referenced how a pilot uses the airport today and how the pilot would use the airport if the eight wind turbines were to be approved. FAA has did a good job in this project as they had determined some of the proposed turbines would cause hazard and those turbines were moved within the plan. He addressed the question as to why Capital Airspace did not address the Area Airport Authority.

-Dan Ettinger stated the AZBA is charged with reviewing the eight variance applications and they will not be considered to set a precedent. There is no requirement to seek an Advisory opinion on if a variance would be granted or denied prior to applying for the Special Land Use Permit.

-Member Campbell read from a document written by lone Vyse when she was the Airport Administrator and he had concern over the delay from the written document to the application date of the variance requests.

-Member Campbell referenced a statement made by Erico Lopez regarding the wind turbine bases being constructed.

-Closed Session – To Discuss Written Legal Memorandum –
2020-M-AZ-006

Motion by Clinesmith, seconded by Hoose that the AZBA Board meet in Closed Session under Section 8(h) of the Open Meetings Act to discuss the contents of a written legal memorandum from its attorney, which is exempt from disclosure under Section 13(1)(g) of the Freedom of Information Act, with Jamie Nisidis and Jodi Fetting to be allowed to attend the closed session at 5:45 p.m. Roll Call Vote: Hoose – yes; Clinesmith – yes; Campbell – yes; Kinney – yes. Motion Carried.

-Board Discussion/Action –
2020-M-AZ-008

Motion by Campbell, seconded by Clinesmith to approve AZBA Resolution 2020-01 to deny Pegasus Wind LLC’s variance applications for eight wind turbines to be read by Jamie Nisidis.

**TUSCOLA AREA AIRPORT
ZONING BOARD OF APPEALS
RESOLUTION DENYING PEGASUS WIND, LLC’S
VARIANCE APPLICATIONS FOR EIGHT (8) WIND TURBINES**

WHEREAS, the Airport Zoning Act, MCL 259.454(1), provides: “The board of appeals shall allow a variance if a literal application or enforcement of the regulations would result in practical difficulty or unnecessary hardship and the relief granted would not be contrary to the public interest, but would do substantial justice and be in accordance with the spirit of the regulations.”

WHEREAS, Section 5.2G (2) of the Tuscola Area Airport Zoning Ordinance (the “Ordinance”) provides that variances shall be allowed for the following reasons:

- (a) A literal application or enforcement of the regulations would result in practical difficulty or unnecessary hardship.
- (b) Relief granted would not be contrary to the public interest and approach protection.
- (c) Relief granted would do substantial justice.
- (d) Relief granted would be in accordance with the spirit of the regulations of this Ordinance; and

WHEREAS, Section 1.2 of the Ordinance states that it was established “for the purpose of promoting the health, safety, and general welfare of the inhabitants of the County of Tuscola by preventing the establishment of airport hazards, restricting the height of structures and objects of natural growth and otherwise regulating the use of property in the vicinity of the Tuscola Area Airport; providing the allowance of variances from such regulations; designating the Airport Zoning Administrative Agency/Zoning Administrator charged with the administration and enforcement of such regulations; establishing an airport zoning board of appeals; providing for enforcement; and imposing penalties for violation of this Ordinance.”

WHEREAS, on or about October 22, 2019, Pegasus Wind, LLC (“Pegasus Wind”) submitted variance applications under the Ordinance for eight (8) proposed wind turbines that are part of the proposed Pegasus Wind Energy Center (the “Project”) in Tuscola County, Michigan; and

WHEREAS, the variance applications are for eight (8) proposed wind turbines identified as follows:

2019-WTE-45 34-OE; structure ID 15
2019-WTE-4535-OE; structure ID 16
2019-WTE-4536-OE; structure ID 17
2019-WTE-4537-OE; structure ID 18
2019-WTE-4538-OE; structure ID 19
2019-WTE-4539-OE; structure ID 23
2019-WTE-80-OE; structure ID 62-Alt
2019-WTE-81 -OE; structure ID 63-Alt

WHEREAS three (3) of the proposed wind turbines are located in Zone E of the Tuscola Area Airport Permit Thresholds map and five (5) of the proposed wind turbines are located in Zone B.

WHEREAS the eight (8) proposed wind turbines all raise the descent minimums of an instrument approach procedure to the airport as determined by the FAA and therefore would violate Section 3.6G of the Ordinance; and

WHEREAS, one (1) of the proposed wind turbines located in Zone B would also exceed the Legal Height Limitations of Section 3.3 of the Ordinance; and

WHEREAS, Pegasus Wind has provided evidence of valid Special Land Use Permits for all eight (8) proposed wind turbines which are to be located in Fairgrove and Gilford Township; and

WHEREAS, on April 3, 2019 and August 11, 2019 the FAA issued Determinations of No Hazard to Pegasus Wind for all eight (8) proposed turbines; and

WHEREAS, Pegasus Wind has provided the ZBA with a letter from the Michigan Aeronautics Commission indicating that it concurs with the FAA's Determinations of No Hazard and opining that a Michigan Tall Structure Act permit could be issued to Pegasus Wind for the eight (8) turbines after Pegasus Wind receives local airport zoning variance permit approval; and

WHEREAS, the ZBA held a public meeting regarding Pegasus Wind's variance applications on January 13, 2020 and provided Pegasus Wind an opportunity to present and provided members of the public with an opportunity to comment on the variance applications; and

WHEREAS, the ZBA held a second public meeting regarding Pegasus Wind's variance applications on January 17, 2020 in order to provide the public and Pegasus Wind with additional opportunity to comment and present and to provide the ZBA with additional time to review and carefully consider the information provided to it; and

WHEREAS, the ZBA agreed that the entire record created in June and July 2019 regarding Pegasus Wind's variance applications for thirty-three (33) proposed wind turbines would be considered and become part of the record with respect to these eight (8) variance applications; and

WHEREAS, upon consideration of Pegasus Wind's eight (8) variance applications and supporting materials, the presentation made by Pegasus Wind, public comments at the public meetings, and all other information and materials provided to the ZBA, the ZBA finds that Pegasus Wind's variance applications for all eight (8) wind turbines shall be denied for the reasons stated at the January 13, 2020 and January 17, 2020 meetings and as discussed further below.

NOW, THEREFORE, IT IS RESOLVED AND THE ZBA FINDS AS FOLLOWS:

1. Pegasus Wind has not shown that a literal application or enforcement of the height requirements in Section 3.3 and the requirements of Section 3.6G would result in practical difficulty for Pegasus Wind with respect to the eight (8) proposed wind turbines.

In particular, Pegasus Wind has not provided sufficient evidence to establish that the wind project is not financially viable if shorter wind turbines are used or if fewer wind turbines are used and has not established the unavailability of shorter turbines with anything more than conclusory statements. Pegasus Wind has also failed to provide sufficient evidence that potential, alternate locations are not viable options for these eight (8) proposed turbines. Pegasus Wind has also failed to show that denial of the variances

would deprive it of use of the property. The property at issue has other uses, particularly agricultural uses.

Any practical difficulty to Pegasus Wind from its claimed inability to meet its obligations under a Power Purchase Agreement without the variances and/or based on expenditures made by Pegasus Wind on wind turbine construction is self-created and not a proper basis to grant a variance.

Finally, the practical difficulty on which Pegasus Wind bases its application for variances is not inherent in the land and not the result of a unique characteristic of the land.

2. Granting Pegasus Wind variances for the eight (8) proposed wind turbines would be contrary to the public interest and approach protection.

Although approach protection was part of the consideration undertaken by the FAA's study of the turbines at issue, the FAA Determinations of No Hazard are not dispositive. The FAA looks only at substantial impacts taking into account the frequency of certain flights and approaches. Risks and flight limitations not deemed substantial or significant by the FAA will result from the proposed wind turbines, including:

- a. The wind turbines pose a danger to pilots during in-flight emergencies which are by nature unpredictable.
- b. VFR pilots will be unable to comply with 14 CFR 91.155 VFR visibility and cloud clearance criteria in the vicinity of the wind turbines when the flight visibility is less than 3 statute miles or the cloud ceiling is less than 1400 feet, while remaining in compliance with the minimum flight altitudes specified in 14 CFR 91.119. This would require VFR pilots flying in those conditions to circumnavigate the wind turbines and approach the airport from another direction, resulting in a choke point, as well as causing a conflict with IFR pilots conducting a published RNAV instrument approach procedure to the airport for landing. This adversely affects VFR operations and is a safety issue.
- c. The wind turbines require a 300-foot increase in minimum descent altitude for the VOR/DME-A approach and landing, requiring pilots using this approach to visualize the runway from a greater distance and creating additional risk. While the VOR/DME-A approach is not frequently used, not all IFR certified aircraft are equipped to conduct the more precise approaches preferred by the FAA.
- d. Primary radar transmitted from an air traffic control facility is impacted by wind turbines. Since many VFR general aviation aircraft are not equipped with a transponder or ADS-B surveillance technology, air traffic control must rely on primary radar to locate these VFR aircraft. The wind turbines'

interference with primary radar will impact air traffic control's ability to determine if these non-equipped VFR aircraft are airborne near the Tuscola Area Airport.

Additionally, the variances are not in the public interest because they jeopardize the Tuscola Area Airport's ability to meet current or future federal grant assurances. Grants issued pursuant to the National Plan of Integrated Airport Systems and the Airport Improvement Plan require grant recipients to provide certain assurances when accepting a grant, including that the airport will take the actions necessary to protect instrument and visual operations, to protect approaches and prevent the establishment of future airport hazards. The Tuscola Area Airport has received federal grants requiring these assurances and plans to seek additional grants in the future.

There is also no evidence that the energy that will be generated by the Project is needed or would be utilized in the surrounding community.

3. For all the reasons stated previously, Pegasus Wind has not shown that granting it variances for the eight (8) proposed wind turbines would do substantial justice.
4. Pegasus Wind has not shown that granting it variances for the eight (8) proposed wind turbines would be in accordance with the spirit of the Ordinance.
 - a. The spirit and intent of this Ordinance is reflected in the stated purpose in Section 1.2, which is "to promote the health, safety, and welfare of the inhabitants of the County of Tuscola by preventing the establishment of airport hazards, restricting the height of structures and objects of natural growth and otherwise regulating the use of property in the vicinity of the Tuscola Area Airport; providing for the allowance of variances from such regulations..."
 - b. In light of the aviation limitations and risks posed by the wind turbines, denial of the eight (8) variance applications is most consistent with the spirit of the Ordinance.
5. Pegasus Wind's applications for a height variance under Section 3.3 for one (1) of the proposed wind turbines and for variances under Section 3.6.G for all eight (8) proposed wind turbines do not meet the requirements for a variance under the Airport Zoning Act and the Ordinance; therefore, Pegasus Wind's variance applications are denied.
6. All resolutions in conflict in whole or in part are revoked to the extent of such conflict.
7. This resolution may be appealed in conformity with the Airport Zoning Act.

A vote on the above Resolution was taken and was as follows:
Roll Call Vote: Hoose -No; Clinesmith - yes; Campbell – yes; Kinney - yes. Motion
Carried and Resolution Declared Adopted.

Meeting adjourned at 6:30 p.m.

Jodi Fetting
Tuscola County Clerk

On behalf of
William Campbell
AZBA Secretary