

Original Questions:

1. What type of authority do townships have to regulate and control wind farm developments? **See response below.**
2. How do townships ensure corporations are doing business within an ordinance? **See response below.**
3. Will Township officials for both Manistee and Benzie counties have ordinances in place to manage this wind turbine industrial development? **Project specific, but see responses below to D1 and D6.**
4. Should both counties have the same elements in their ordinances to address similar problems if they arise? **See response below.**
5. What right does a township have to make ordinances? How are these rights defended? **Beyond scope of project, but see response to D6.**
6. What is the process for the township's decisions on the wind ordinance? I do not know if any township officials have signed personal contracts with Duke; however, I have strong concerns about Duke signing non-disclosure contracts with any township official who will be making decisions about any ordinance regarding wind turbines. It is definitely a conflict of interest and raises questions of ethics. Has an attorney reviewed this issue? Any official with a signed contract should recuse him/herself from any votes related to the Gale project. I am not accusing anyone of misconduct, but the potential situation raises serious concerns. **See response below.**
7. From such protections stipulated in wind royalty lease arrangements, can the local authority impose its own? Are such stipulations ever used for other kinds of development—such as shopping malls, industrial applications such as gravel pits, processing plants, amusement parks or other large developments that strongly affect the local landscape? **See response below.**
8. How are rights of corporations and townships controlled to ensure intimidation doesn't happen? **Beyond scope of project, but see response below to D9.**
9. Will our townships be able to defend against intimidation tactics by wind developers? Are there funds available on the state or federal level to defend our enacted ordinances? **See response below.**
10. What kind of language can be put in the township ordinance to protect itself from an applicant going bankrupt during the lease/install, etc.? **See response below.**
11. What kind of language can be put in the township ordinance to protect itself from mid-project pull out? For example, if subsidies are taken away and the company decides to stop the project. **See response below to question D10.**
12. How can a township protect itself from a large corporation suing and bankrupting the township in order to get what it wants? **Beyond scope of this project.**
13. How do townships protect themselves legally from liability if a participating land owner's home is too close to a wind turbine and it results in sleep disturbance and eventually health effects? **See response below.**
14. What is the liability and exposure to officials? **Needs further clarification.**
15. Regarding planning, zoning, and permits, what type of legal and financial liability exists for local units of government, for the unit and individual elected officials? **Beyond scope of project, but see responses below to D10 and D13.**
16. Who in the townships is qualified and who will work with the energy company and stand up to it/negotiate as need be on behalf of the township? Is this job too big for the people we have available now. Will the township have to spend money on more lawyers, consultants, etc.? **See response below.**
17. How do officials ensure they are educated on issues? **Value judgment.**
18. Should townships go to other communities for best practices? **See response below.**
19. Are we allowed to enact ordinances that hold to a specific vision of our townships even if it does not include industrial wind energy generation facilities? **See response below.**

20. Should township officials be allowed to be leaseholders, people who benefit from the decisions made about wind energy, can they hold leases and earn direct money from them when they are overseeing them? What are the safeguards against corruption, if that is what the above is? We should define "corruption" first. [See response below.](#)
21. Will there be a public hearing regarding the placement of these turbines? Public comments welcomed? [Project specific.](#)
22. (formerly G10). Can the township restrict already conserved property in any way? [See response below.](#)

Questions and Responses:

These questions may have been recategorized and reorganized. Some may have been sent to another "theme" area (this will have been explained in red under the "Original Questions" section). In other cases two or more questions will be answered with one response.

D1. [What type of authority do townships have to regulate and control wind farm developments?](#)

Response: Townships have broad authority to regulate the use of land and structures, including windmills, through zoning, as authorized by the Michigan Zoning Enabling Act. In general, the zoning power is used to regulate land *uses*, and not the activities themselves, although the impacts or risks from activities of a land use may be considered in establishing restrictions and standards. All restrictions on wind farms in a zoning ordinance must be reasonable and rationally related to a legitimate governmental interest, such as protecting the public health, safety, or general welfare.

The Michigan Zoning Enabling Act specifically recognizes the following valid purposes for the regulation of the use of land and structures: meeting the needs of the state's citizens for food, fiber, energy, and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land; ensuring that use of the land is situated in appropriate locations and relationships; limiting the inappropriate overcrowding of land and congestion of population, transportation systems, and other public facilities; facilitating adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility requirements; or promoting public health, safety, and welfare.

Zoning is also subject to other applicable limitations. For example, if the regulation of wind turbines is different or more stringent than the regulation for other similar uses, then there must be a reasonable justification for treating wind turbines differently. Moreover, the township cannot ban wind turbines, or impose regulations so restrictive that they have the effect of banning wind turbines, unless the Township determines that there is no land in the Township that is suitable for a wind turbine or that there is no demonstrable need for wind energy in the Township or the region (see Question R6 addressing exclusionary zoning). In addition, a local zoning ordinance cannot conflict with state or federal law, permit something state law prohibits, or regulate a concern that state law so fully regulates that it pre-empts local zoning.

Typical regulations in a zoning ordinance might address issues related to the placement, size, and density of wind turbines, often with the goal of ensuring compatibility with surrounding land uses. Restrictions that might be adopted include: minimum setback distances between a turbine and the road or neighbouring properties; limitations on height; limitations on sound levels; and requirements that the turbine be designed in a manner that addresses certain safety or environmental concerns. For an example, see the model wind energy zoning ordinance discussed in question D4.

In addition to zoning ordinances, townships have the authority to adopt township "police power" ordinances to regulate certain activities that involve potentially harmful effects or risks, provided such

regulation is related to the health, safety and welfare of citizens and concerns of the township and not pre-empted by state law that regulates the same activities.

D2. How do townships ensure corporations are doing business within an ordinance?

Response: The zoning ordinance will designate an official or officials, often a zoning administrator, who is responsible for enforcing and administering the provisions of the zoning ordinance. The official enforcing the zoning ordinance may impose a fine or other penalty for a failure to comply with the ordinance or the conditions imposed on any permit or site plan issued to the corporation. If the landowner refuses to comply, an injunction may be sought in court to require the landowner to comply with the zoning ordinance.

D4. Should both counties have the same elements in their ordinances to address similar problems if they arise?

Response: Typically Wind Energy System ordinances contain many of the same elements as they are fashioned after model ordinances developed by their respective states. The elements typically found provide a comprehensive approach for communities to regulate the land use. While they may contain the same elements, the specific requirements of each element may be different. The specifics of the ordinance are based on the uniqueness of each community and should reflect sound scientific evidence, best practices and public input. But, by coordinating various aspects of the ordinances between municipalities you can achieve a regional approach to regulating the land use. A regional approach to regulating land use erases municipal boundaries and considers regional uniqueness, assets, opportunities and barriers. For example, many natural features cross municipal boundaries and therefore require multi-jurisdictional coordination and regulation at the local levels. If both counties contain the same elements in their ordinances and even coordinate the specific regulations as they relate to shared issues, this will help ensure that regionally land use is regulated in a comprehensive and coordinated manner providing the highest level of oversight.

D6. What is the process for the township's decisions on the wind ordinance?

Response: Where the process starts depends on what a given township has in place today. Assuming a township does not allow wind energy generating facilities of any type (usually due to a maximum height limit for structures), two types of amendments would precede any wind development: one for anemometers to test the wind, and one for the generating facilities themselves. Five years ago these two uses were dealt with in separate ordinance changes, but today they are often done together.

Under the Michigan Zoning Enabling Act, the ordinance amendment starts with the township planning commission. The planning commission can first evaluate the issue with meetings, including conducting studies, gathering information, and holding public meetings for comments. The planning commission then considers various ways to address wind energy systems and facilities, and whether it should include an amendment to the township's plan, such as establishing wind zones and overlay districts to enact special use permit regulations. Once an ordinance is drafted based on the plan, the commission holds a public hearing or hearings. After the public hearing, the township planning commission submits a recommended ordinance amendment or set of amendments to the county planning commission if there is one. The county planning commission has 30 days to review and offer its opinion on the proposed amendments. Then the township planning commission submits the proposed amendments and a summary of the public hearing to the township board. The township board may hold another public hearing, and must hold one if a property owner requests a hearing by certified mail addressed to the township clerk.

If the township board passes the ordinance amendment, it takes effect within 7 days after publication in the newspaper, unless a different period is specified. However, within those 7 days a registered voter may submit to the township a letter stating that he or she intends to file a petition to submit the ordinance amendment to the voters of the township in a referendum. The petition proponents then have 30 days to collect signatures representing 15% of the number of registered voters who voted in the preceding

governor's election. If such a petition is filed, the matter is set for referendum. If 30 days expire, the ordinance takes effect.

Typically, zoning ordinances regulating anemometers and wind energy generating facilities require a special use permit and approval of a site plan prior to construction. In some instances, a township may decide to amend the land use plan to address whether specific areas qualify for wind generation and the goals to be achieved through zoning or other measures; based on the plan amendment, overlay districts may be enacted by amendment to the ordinance, as well as special use permit provisions tied to the overlay district and general standards for special uses. These administrative permit processes involve an application and supporting information, another public hearing in front of the township planning commission, and depending on the desire of the community, they can also involve a review by the township board. The process involves the exercise of judgment and discretion by the members of these bodies in determining whether a project meets the standards of the ordinance, and if it approves a project the township has the authority to impose reasonable conditions to protect the public health, safety, and welfare.

- D7. Aside from such protections stipulated in wind royalty lease arrangements, can the local authority impose its own? Are such stipulations ever used for other kinds of development—such as shopping malls, industrial applications such as gravel pits, processing plants, amusement parks or other large developments that strongly affect the local landscape?

Response: This question needs clarification. If the question is asking whether a township can negotiate private land use restrictions or limitations, the answer is probably “no”. Lease “stipulations” are negotiated by private agreement. However, if “stipulations” is meant to include “conditions” that limit certain aspects of the siting or regulation of wind energy systems, townships are authorized to impose reasonable conditions on special land use permits or site plans.

- D9. Will our townships be able to defend against intimidation tactics by wind developers? Are there funds available on the state or federal level to defend our enacted ordinances?

Response: Most local units of government carry insurance policies that include coverage for zoning lawsuits. These contracts obligate the insurance carrier to provide the township with defense counsel, and to pay any settlement or judgment against the township, up to the policy limits. Cases are covered by these contracts if the plaintiff requests monetary relief in addition to requesting court orders barring enforcement of the challenged ordinance. If no money damages are requested, the policies do not provide coverage. There are some limited legal defense funds and assistance for local units of government nationally, but their work is limited to extraordinary cases and issues, and we are not familiar with such a fund becoming involved in zoning litigation involving wind energy generating facilities.

- D10. What kind of language can be put in the township ordinance to protect itself from an applicant going bankrupt during the lease/install, etc.?

Response: Before the township approves a special permit or other approval for construction of a wind generation system, in order to ensure compliance with the zoning ordinance and any conditions imposed under the zoning ordinance, the township can require that landowner/wind generator operator to deposit with the township clerk a cash deposit, certified check, irrevocable letter of credit, or surety bond that covers the cost of faithful completion of the proposed wind farm, compliance with conditions, including those that might be imposed for purposes of remediation or correction should a company fail to comply with a condition. If the township requires a cash deposit, it should establish procedures for refunding the deposit according to the percentage of the project that has been completed. If the project is not completed, the township would retain the remainder of the money.

D13. How do townships protect themselves legally from liability if a participating land owner's home is too close to a wind turbine and it results in sleep disturbance and eventually health effects?

Response: Townships are legally immune from tort liability, with a limited number of specific exceptions set forth in the governmental immunity statute. There is no exception in the governmental immunity statute for actions claiming that a local unit of government granted a permit to a third party, and the third party's activity under that permit caused harm. Therefore, townships would have no liability in the hypothetical case posed by the question. Health effects and disturbances to use of a home and property should be considered at the outset in the careful planning for and enactment of zoning amendments that regulate wind generation facilities.

D16. Who in the townships is qualified and who will work with the energy company and stand up to it/negotiate as need be on behalf of the township? Is this job too big for the people we have available now. Will the township have to spend money on more lawyers, consultants, etc.?

Response: Ensuring that townships have qualified individuals to deal with applications for Wind Energy Systems is very helpful in making sure that the project receives the appropriate attention to detail and correctly proceeds through the review process. While townships have dedicated volunteers that work tirelessly on the issues pertaining to their community, it would be advisable to hire professionals to work with the Township Boards and Planning Commissions on an application the size and scope of a Wind Energy System.

A thorough review of the Township Fee Schedules may help in understanding if the current fee schedule is set at levels that will cover the cost of hiring the professionals, if they are not already on staff, necessary to process a Wind Energy System application. Arcadia Township currently has a fee schedule that utilizes escrow accounts which are established, among other reasons, to be used to pay for the professionals needed to work with applicants and review submittals. The applicant is required to maintain the escrow account at certain levels. Conversely, the applicant will be reimbursed for any monies not spent in the escrow account once the project has concluded. This method ensures that the community has the resources to hire the appropriate consultants to deal with projects as needed.

Another approach is to work into the approval process a stipulation that the applicant pays for the professionals, whose hiring is determined by the Township Board or Planning Commission, necessary to help the community process a land use/zoning application. If a community doesn't have a zoning ordinance or doesn't have an ordinance dealing with wind energy, they may chose to enter into a Development Agreement with the applicant regarding the entire project at which point a stipulation would be made that the applicant agrees to pay all fees associated with their application. The Township Board, or oversight committee, is then responsible to determining the fees necessary based on the experts they had to hire to deal with the application.

D18. Should townships go to other communities for best practices?

Response: Yes, townships can certainly learn from other communities, both within Michigan and in other states. However, the specific contexts – political, economic, environmental, and social – in one township may vary greatly from another. Each wind energy development proposal is also unique. Therefore, while townships can learn from each other regarding the best practices of wind energy development, best practices can also be specific to certain communities and not apply to others. See the AES document repository for the file "Ordinances".

D19. Are we allowed to enact ordinances that hold to a specific vision of our townships even if it does not include industrial wind energy generation facilities?

Response: Township planning and zoning is often guided by a master planning process that takes into account the unique character and assets of a community. Townships can create restrictive zoning that limit forms of utility scale wind development. See D1 for more information about ordinance formation.

D20. Should township officials be allowed to be leaseholders, people who benefit from the decisions made about wind energy, can they hold leases and earn direct money from them when they are overseeing them? What are the safeguards against corruption, if that is what the above is? We should define "corruption" first.

Response: Under Michigan law, "corruption" means intentional or purposeful misbehavior or wrongful conduct pertaining to the requirements and duties of office by an officer. It is a crime punishable by up to five years in prison. A public official who corruptly accepts a gift or act beneficial to the officer in return for voting a particular way is also guilty of a crime, punishable by up to ten years in prison and being forever disqualified to hold public office.

Corruption therefore needs to be distinguished from a conflict of interest. A conflict of interest is a situation in which a person's regard for a duty leads or might reasonably be expected to lead him or her to disregard another duty. The issue that can arise in some zoning scenarios is a conflict of interest, or the appearance of a conflict of interest.

Michigan law states that government decision-makers must avoid a conflict of interest or the appearance of a conflict in all administrative decisions. A conflict may arise when a decision-maker (1) has a financial interest in the outcome; (2) has been the target of personal abuse or criticism from a party; (3) is enmeshed in other matters involving a party; or (4) might have prejudged the case because of prior participation as an accuser, investigator, fact finder, or initial decision-maker.

Under these principles, a township board or planning commission member who had leased property to a wind developer would have at least the appearance of a conflict of interest, because the member would have a financial interest in the outcome and because he or she would be enmeshed in other matters involving the wind developer. This situation would require the member to recuse from participating in any administrative proceeding involving a wind energy project - such as approval of a special use permit or site plan.

The conflicts doctrine applies slightly differently to the process of amending a zoning ordinance, but the likely result is the same. Amending a zoning ordinance is a legislative decision. Judicial review of a legislative enactment is limited to a consideration of the legislation and documented legislative history, and the motive of the legislators may only be examined for fraud, personal interest or corruption. A zoning ordinance amendment may only be struck down if it is arbitrary in a constitutional sense. To be arbitrary in that sense, the local government's action must "shock the conscience." While shocking the conscience is a very high standard, a personal financial interest in the subject matter by local officials is at least a relevant consideration. Therefore, recusal of a township board or planning commission member who had leased property to a wind developer is at least advisable, out of an abundance of caution if for no other reason.

D22 (formerly G10). Can the township restrict already conserved property in any way?

Response: This answer assumes that the question refers to property that is subject to a conservation easement or similar conservation mechanism. In short, yes. All uses of property in the township, including property that is already subject to conservation easements, must comply with any applicable township ordinances. If a conservation easement is less restrictive than the applicable township ordinance, then the more restrictive provisions of the township ordinance would still apply. In addition, conservation easements area voluntary agreements between a landowner and a township and/or non profit conservancy. These easements can be used to address wind generation. For the township to engage in such an effort would require planning, carefully drafted and enacted ordinances, and a bond or other source of funding.