

JUDGE DENNIS KOLENDA
ON EXCLUSIONARY ZONING IN MICHIGAN

On Monday, November 1, 2021, the Pine Township Planning Commission hosted a presentation by retired Kent County Circuit Court Judge Dennis Kolenda. Most of Judge Kolenda's comments focused on the following provision of the Michigan Zoning Enabling Act:

"A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a local unit of government in the presence of a demonstrated need for that land use within either that local unit of government or the surrounding area within the state, unless a location within the local unit of government does not exist where the use may be appropriately located or the use is unlawful." — MCL 125.3207.

Here is a very brief summary of what Judge Kolenda had to say:

1. While federal court decisions applying Michigan law are not binding on Michigan courts, Michigan courts are not allowed to ignore them. Federal court decisions are at least considered persuasive to Michigan judges, and Michigan courts are supposed to follow them unless there is good reason not to. This would apply to the recent U.S. District Court decision of Tuscola Wind III LLC vs Almer Charter Township. (In that case a federal judge upheld a "restrictive" township wind ordinance based on the fact that there was no "demonstrated need" for wind turbines in Almer Township. Quoting Judge Ludington: "Tuscola cannot reasonably argue that the Township will have inadequate access to energy absent the wind energy project.") The Almer Township decision is necessarily persuasive and deserves to be followed because it tracks the language of the Michigan statute on exclusionary zoning and obeying unambiguous statutory language is a cardinal principle of Michigan law.
2. Section 3207 of the Michigan Zoning Enabling Act (see above) created a four-part test, ALL of which must be met before a claim of exclusionary zoning can prevail against a township:
 - a. The zoning ordinance must totally prohibit an entire class of uses within the township, not just a particular use within that class. (This part of the test would only be satisfied if all wind turbines are excluded, not just some.)

- b. There must be a demonstrated need for the use, but that need can be met by looking to the surrounding areas within the State of Michigan. For example, the need for a septic waste dump in a township can be met if there are adequate facilities in an adjacent county, and the need for billboards in a city can be met if billboards are allowed in neighboring municipalities. (Similarly, a township does not have a demonstrated need for wind turbines if there are adequate sources of electricity from areas outside the township.)
 - c. There must be a location within the township where the use can be appropriately located.
 - d. The use must be lawful.
3. Aesthetics, how things look, can provide a reasonable basis for zoning regulations.

So, now everyone knows that pretty much everything pro-wind attorneys have been telling townships in Montcalm County about exclusionary zoning and the impact of federal court decisions is wrong. The members of every board and planning commission in Montcalm County should pay attention to what Judge Kolenda had to say and stop claiming that “We’ll get sued” if they adopt a protective wind ordinance.

Brief Bio: Judge Kolenda is a graduate of the University of Michigan and Harvard Law School. He served as a law clerk to the Hon. Robert B. Burns of the Michigan Court of Appeals, was the chief trial attorney for the Kent County Office of the Defender, and then became a partner in the Grand Rapids law firm of Varnum, Riddering, Schmidt & Howlett, where he was a commercial trial attorney. Judge Kolenda was elected to the Kent County Circuit Court in November 1988 and continued in that role until his retirement in 2008. He was Chief Judge of the Kent County Circuit Court from January 1994, through December 1999. On several occasions, Judge Kolenda also served by appointment on the Michigan Court of Appeals. After his retirement from the court, Judge Kolenda returned to private practice and was with the law firm of Dickinson Wright until 2018.