

A Right to Wind? Promoting Wind Energy by Limiting the Possibility of Nuisance Litigation

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Sherman County is a small rural county in north-central Oregon, bordering the Columbia River.¹ Its economy, fueled by fewer than 1,800 residents, is based primarily on winter wheat farming.² Because its farmers do not use irrigation, and because the county is relatively dry,³ the county's wheat output is hardly sufficient to sustain its economy.⁴

Although the county receives little rainfall, it is flush with wind because of its proximity to the Columbia River Gorge.⁵ Thus, in 2000, Northwestern Wind Power ("NWP") selected Sherman County as a host site for a proposed twenty-four-megawatt wind farm, eventually named the Klondike Wind Farm.⁶

NWP invested \$26 million in the Klondike Wind Farm,⁷ which created significant benefits for companies and workers in both Sherman County and throughout the region.⁸ More than 32,000 labor hours were expended during the construction phase of the project.⁹ The project also brought with it significant benefits to the community; workers on the project made use of the county's restaurants, stores, and hotels.¹⁰ Over the following decade, the project has generated roughly \$15,000 per year for each landowner on whose land turbines were constructed.¹¹ Countywide, the property-

tax revenues raised from the turbines in their first year of operation totaled roughly \$321,000, a ten percent increase in county revenue from the previous year.¹² Over a period of 2.5 years, the Klondike Wind Farm averted 90,000 tons of carbon dioxide from being released into the atmosphere that would have otherwise been discharged during energy generation from traditional energy sources.¹³ Looking forward, the owner of the project announced a second phase of the project that would expand the Klondike Wind Farm by seventy-five megawatts, creating additional full-time jobs and a new operating center, generating \$930,000 in annual tax revenues for the county, and involving six to eight new landowners.¹⁴

Not all communities, however, have experienced the good fortune of Sherman County.¹⁵ In Vinalhaven, Maine, for example, residents were shocked at the noise emitted from a \$15 million wind farm, claiming that it has made their lives "unbearable."¹⁶ In other communities, those living close to wind turbines have cited concerns over the physical effects from turbine noise.¹⁷ In many communities, those who would be neighboring landowners to wind farms are bringing lawsuits, attempting to enjoin proponents from completing the projects.¹⁸ Such lawsuits are not inexpensive affairs, and whether a wind-energy developer will have to litigate over a particular project can substantially effect whether it will choose to dedicate its resources to developing a project in a given area.¹⁹

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1. BRAD OUDERKIRK & MEGHAN PEDDEN, RENEWABLE NW. PROJECT, WINDFALL FROM THE WIND FARM: SHERMAN COUNTY, OREGON 4 (2004), available at <http://www.rnp.org/sites/default/files/pdfs/Klondike%20Paper.pdf>.

2. *Id.*

3. Sherman County averages only eleven inches of rainfall per year. *Id.*

4. *Id.*

5. *Id.* at 6.

6. *Id.* at 4, 6.

7. *Id.* at 8.

8. See *id.* at 8–11.

9. *Id.* at 11.

10. *Id.* at 12.

11. *Id.* at 13.

12. *Id.*

13. *Id.* at 8.

14. *Id.* at 14.

15. See, e.g., Tom Zeller, Jr., *For Those Near, the Miserable Hum of Clean Energy*, N.Y. TIMES, Oct. 6, 2010, at A1 (discussing the negative impact a wind energy project had on Vinalhaven, Maine).

16. *Id.*

17. See Christopher Kazarian, *Falmouth Municipal Turbine Noise Within Acceptable Range*, CAPENEWS.NET (Sept. 28, 2010), <http://www.capenews.net/communities/falmouth/news/540> (explaining that one resident living near a 1.65-megawatt wind turbine said, "You feel it on your chest. . . . We are getting no relief from it."); see also Zeller, *supra* note 15.

18. Brit T. Brown & Benjamin A. Escobar, *Wind Power: Generating Electricity and Lawsuits*, 28 ENERGY L.J. 489, 493–95 (2007).

19. Cf. IND. CODE § 32-30-6-9(b) (2011) (stating that the legislature found that nuisance suits against farmers forced farmers to "cease operations," and discouraged them from "making investments in farm improvements").

Thus, if states wish to reap the benefits of wind-energy development, it is in their best interest to reduce the potential litigation over wind turbines.²⁰ To this end, states have taken action to limit the negative effects of wind-energy projects—notably, by implementing comprehensive zoning regulations.²¹ These zoning regulations, however, do not necessarily prevent nuisance suits, and states cannot rely on them alone to reduce litigation over wind turbines.²² As another means to reduce potential conflict, many communities have entered into host-community agreements (“HCA”) with wind-energy developers, by which the communities can more evenly distribute the benefits of hosting wind-energy projects.²³

In light of these efforts, this Note proposes that states should statutorily grant wind-energy developers immunity from nuisance suits, provided that they comply with all relevant zoning regulations. This would avoid costly litigation that may limit wind-energy development while still compensating property owners for real damage caused by wind-energy projects. States should further require wind-energy developers to enter into HCAs or similar revenue-sharing programs to help account for consequential damage to neighboring landowners caused by particular wind-energy projects.

In Part I, this Note outlines the benefits and risks associated with wind energy, discusses zoning regulations designed to address the dangers of wind-energy projects, and provides an overview of HCAs. Part II takes a closer look at the limitations of local zoning commissions, provides a general overview of nuisance law, and discusses how zoning regulations impact legal analysis in nuisance lawsuits. Part II also examines how some states have limited nuisance liability for agricultural operators through “right to farm” statutes, which provide a helpful framework through which to examine limitations on nuisance suits involving wind turbines. Finally, Part III discusses how the “right to farm” framework should be applied to limit wind-turbine nuisance cases, the role of local zoning commissions in that process, and how HCAs can help alleviate the consequential limitations on remedies for aggrieved landowners neighboring wind energy projects.

I. Wind Energy and Mitigation of Land-Use Conflict

Before reviewing the legal issues of nuisance and zoning as they relate to wind turbines, it is important to identify the benefits and costs of wind energy. A review of the benefits and costs of wind energy will reveal why a state has an interest in promoting the growth of wind energy, in spite of the risks associated with it. Additionally, it is helpful to observe measures that local governments have taken to mitigate the danger of wind turbines and ward off nuisance litigation.

A. The Benefits of Wind Energy

As the experience in Sherman County demonstrates,²⁴ the benefits of wind energy are varied, yet substantial. Approximately 85,000 Americans are employed in the wind industry.²⁵ Furthermore, there is some evidence that supports the existence of a correlation between a state’s electrical output from renewable wind energy and its quantity of manufacturing jobs.²⁶ Iowa, for example, receives fourteen percent of its electricity from wind power, the largest percentage in the country, and has the largest number of jobs in the U.S. manufacturing sector.²⁷ Wind energy is also a valuable tax base for rural areas.²⁸ The Sustainable Energy and Economic Development Coalition estimated that Texas counties, after adding 912 megawatts of new wind power in 2001, raised an additional \$13.3 million in tax revenues in 2002 from their wind-energy endeavors.²⁹ In addition to direct benefits from boosts in employment and tax revenues, wind-energy projects generally have large incidental effects on communities—providing at least temporary support to local establishments during the construction of those projects.³⁰

The benefits of wind energy, however, are not strictly economic. Wind energy also has a significant environmental benefit.³¹ America’s current wind-energy use avoids approximately sixty two million tons of carbon dioxide annually.³² American wind energy also conserves roughly twenty billion gallons of water that would otherwise be used for electric-

20. As an example of the relationship between particular beneficial land uses and nuisance suits, states have enacted Right to Farm Acts (“RTFA”), many of which begin with findings that nuisance suits threaten the continuing vitality of agriculture in that particular state. *See, e.g., id.* For more information on RTFAs, see discussion *infra* Part II.D.
21. *See, e.g.,* Wyo. STAT. ANN. § 18-5-504 (2011) (setting forth minimum setback distance for wind turbines throughout Wyoming); *cf.* MINN. MODEL WIND ENERGY CONVERSION ORDINANCE (John Biren et al. 2005), *available at* <http://www.ecowerc.com/downloads/MN-model-ordinance-wind.pdf>.
22. *See, e.g.,* Burch v. NedPower Mount Storm, LLC, 647 S.E.2d 879, 889 (W. Va. 2007) (allowing a nuisance suit to enjoin a wind-energy project from proceeding despite the fact that West Virginia Public Services Commission had approved the project).
23. *See* Host Cmty. Agreement Between Canadaigua Power Partners, LLC and Town of Cohocton (Aug. 10, 2007) [hereinafter Cohocton HCA], *available at* <http://www.cohoctonfree.com/UPC/HostAgreement082407.pdf>.

24. *See supra* notes 1–14 and accompanying text.
25. AM. WIND ENERGY ASS’N, MARKET UPDATE: RECORD 2009 LEADS TO SLOW START IN 2010, at 2 (2010), *available at* http://archive.awea.org/pubs/factsheets/Market_Update_Factsheet.pdf.
26. *See id.*
27. *Id.*
28. NAT’L RENEWABLE ENERGY LAB., U.S. DEP’T OF ENERGY, DOE/GO-102005-2123, WIND ENERGY BENEFITS 1 (2005), *available at* http://vwec.cisat.jmu.edu/Fact%20Sheets%20&c%20Presentations/Fact%20Sheets/wpa_factsheet_series.pdf.
29. SUSTAINABLE ENERGY & ECON. DEV. COAL. & PUB. CITIZEN, RENEWABLE RESOURCES: THE NEW TEXAS ENERGY POWERHOUSE executive summary (2002), *available at* <http://www.citizen.org/documents/Tx%20Energy%20Powerhouse.pdf>.
30. OUDERKIRK & PEDDEN, *supra* note 1, at 12.
31. *See* AM. WIND ENERGY ASS’N, *supra* note 25, at 1.
32. *Id.*

ity generation in conventional power plants.³³ Indeed, thermal electric generation, combined with irrigation, accounts for over seventy-seven percent of the United States' annual freshwater use.³⁴ Also, unlike fossil fuels such as coal and oil, the wind-energy supply is unlimited.³⁵ In addition to being renewable, wind energy can be produced in the United States, and thus reduces America's dependence on foreign exporters of fossil fuels.³⁶ It has been generally recognized that reducing dependence on foreign sources of energy is in the national security interest of the United States.³⁷

B. The Costs of Wind Energy

Wind energy, however, is not without disadvantages. Critics of wind energy, especially individuals in communities that have implemented various wind-energy projects, often cite wind projects' adverse aesthetic effects on the community.³⁸ The American Wind Energy Association ("AWEA") defines an adverse visual impact as "an unwelcome visual intrusion that diminishes the visual quality of an existing landscape."³⁹ AWEA explains that "[c]hanges that can be perceived as visual intrusions generally result from the introduction of visual contrast to the existing scene, based on differences in form, line, color, and/or texture."⁴⁰ Aesthetic concerns can evoke powerful emotions in aggrieved landowners.⁴¹ In one wind-turbine nuisance case, a plaintiff-homeowner, deeply concerned that a neighboring wind-energy project would make it impossible to operate a bed-and-breakfast on her property, branded the nearby wind turbines "the death of hope."⁴²

Wind turbines can also cause a variety of physical ailments. The rotating blades of a turbine can cause a disorienting shadow flicker or strobe effect.⁴³ This effect usually only occurs when the sun is at low angles, typically just after sunrise and just before sunset, and normally does not last longer than twenty minutes.⁴⁴ Nevertheless, the strobe effect can cause nausea, balance problems, and, for those with epilepsy, seizures.⁴⁵

Additionally, the sound from wind turbines can cause discomfort. Wind turbines produce two types of sound: the "whooshing" sound of the turbine blades cutting through air, and the mechanical noise caused by the turbine motors.⁴⁶ Some individuals living near wind turbines have complained of "direct physiological impacts like rapid heartbeat, nausea, and blurred vision caused by the ultra-low frequency of sound and vibrations from the machines."⁴⁷ Wind-turbine noise is a major point of contention between wind-energy developers and the residents in host communities.⁴⁸

In addition to aesthetic and ambient concerns, wind turbines can cause physical invasions and dangers. Wind turbines, under certain weather conditions, can accumulate ice on their blades, which can subsequently be thrown great distances, with the potential to damage property or injure people.⁴⁹ Additionally, as a consequence of mechanical error, negligent assembly, or sabotage, blades can detach from turbines and be hurled.⁵⁰ Wind turbines have also caused damage when they have unexpectedly collapsed.⁵¹

Complaints and legal action over wind turbines are on the rise.⁵² To the extent that these suits represent the fears and concerns of members of communities hosting wind farms, state and local governments should assess the risks to people and property described above and work to minimize them. Such attempts can be seen in local zoning ordinances, discussed in more detail in the next section.

C. Conflict Aversion: Zoning and Host-Community Agreements

Although wind energy developers are subject to state and federal environmental regulations,⁵³ state and local governments have also addressed the risks associated with wind energy

33. *Id.*

34. NAT'L RENEWABLE ENERGY LAB., U.S. DEP'T OF ENERGY, *supra* note 28, at 1.

35. *Id.* at 2.

36. *See id.* at 1.

37. *See id.*

38. *See generally* AM. WIND ENERGY ASS'N, WIND ENERGY SITING HANDBOOK 5-27 to -28 (2008) available at <http://www.awea.org/sitinghandbook/> (check the box to agree with terms of use and select "continue" to view document) (discussing adverse visual impacts of wind turbines).

39. *Id.* at 5-27.

40. *Id.* at 5-27 to -28.

41. *See, e.g.,* Rankin v. FPL Energy, LLC, 266 S.W.3d 506, 512 (Tex. App. 2008). As the Texas Court of Appeals noted in one recent wind turbine nuisance suit, "[u]nobstructed sunsets, panoramic landscapes, and starlit skies have inspired countless artists and authors and have brought great pleasure to those fortunate enough to live in scenic rural settings. The loss of this view has undoubtedly impacted Plaintiffs." *Id.*

42. *Id.* at 511.

43. *See* #8: Wind Technology Is Noiseless and Creates Few Disturbances, STOPILLWIND.ORG (2010), http://www.stopillwind.org/lowerlevel.php?content=topten_8.

44. *See* AM. WIND ENERGY ASS'N, *supra* note 38, at 5-33.

45. *See* #8: Wind Technology Is Noiseless and Creates Few Disturbances, *supra* note 43. It should be noted, however, that the scientific community is legitimately divided over the extent to which wind turbines can cause physical ailments. Compare Ian Johnston, *Wind Turbines Cause Heart Problems, Headaches and*

Nausea, Claims Doctor, THE TELEGRAPH, Aug. 3, 2009, <http://www.telegraph.co.uk/health/healthnews/5963049/Wind-turbines-cause-heart-problems-headaches-and-nausea-claims-doctor.html> (identifying a "Wind Turbine Syndrome" in certain individuals living close to wind turbines, marked by abnormal heartbeat, "sleep disturbance, headaches, tinnitus, nausea, visual blurring, panic attacks with sensations of internal quivering to more general irritability"), with Louise Gray, *Wind Farms Can Cause Noise Problems Finds Study*, THE TELEGRAPH, Jan. 28, 2010, <http://www.telegraph.co.uk/earth/earthnews/7085086/Wind-farms-can-cause-noise-problems-finds-study.html> (rejecting Wind Turbine Syndrome, but noting that the noise from wind turbines can cause annoyance and psychological problems on account of the resulting stress).

46. *See* AM. WIND ENERGY ASS'N, *supra* note 38, at 5-34 to -35.

47. Zeller, *supra* note 15.

48. *See id.*; *see also* Kazarian, *supra* note 17.

49. *See* AM. WIND ENERGY ASS'N, *supra* note 38, at 5-47.

50. *See id.* at 5-48.

51. *See* Dave Tyler, *Officials Looking for Answers After Wind Turbine Collapse*, CLEAN TECHNICA (Mar. 12, 2009), <http://cleantechnica.com/2009/03/12/officials-looking-for-answers-after-wind-turbine-collapse/> (discussing collapse of wind turbine in upstate New York, but also noting that "[t]urbine damage is relatively rare"); *see also* Quinton Smith, *Wasco Wind Turbine Collapse Kills Maintenance Worker*, OREGONLIVE.COM (Aug. 27, 2007, 6:38 AM), http://blog.oregonlive.com/breakingnews/2007/08/wasco_wind_turbine_collapse_ki.html (discussing turbine collapse in Oregon, and referencing several other turbine collapses in other locations, but also noting that, "While fire, ice and storms can damage turbines, they rarely fall over.").

52. Zeller, *supra* note 15.

53. *See* AM. WIND ENERGY ASS'N, *supra* note 38, at 4-1 to 4-41. Although these regulatory considerations are important to the development of wind energy, they are outside the scope of this article.

through zoning regulations.⁵⁴ State legislatures or agencies generally set forth the minimum requirements for any turbine zoning regulation.⁵⁵ Some state legislatures do not set a minimum standard, opting instead to set maximum restrictions on turbine zoning regulations and allow local zoning commissions to tailor the minimum requirements to fit the needs of the particular community.⁵⁶

Turbine-zoning regulations are thorough, targeting most, if not all, of the risks associated with wind turbines.⁵⁷ Many zoning ordinances distinguish between commercial and non-commercial wind turbines based on their electrical output.⁵⁸

Commercial turbines are usually limited to agricultural zones, which are less densely populated, and industrial zones, where ambient noise and lighting would cause minimal disturbance relative to other activities in those areas.⁵⁹ On the other hand, zoning ordinances would not necessarily bar noncommercial turbines from residential zoning districts, provided the turbines complied with other zoning limitations.⁶⁰ In some ordinances, the designation of a turbine as commercial or noncommercial can affect the required setback distance,⁶¹ which may also be determined based on a minimum distance from particular objects,⁶² or based on the height of a particular turbine.⁶³

Many zoning ordinances have addressed the aesthetic concerns surrounding wind turbines as well.⁶⁴ Some ordinances mandate certain design standards covering the shape and color of towers, aviation warnings, warnings displayed on the turbines or property, advertising, and whether power lines must be buried.⁶⁵ Also addressing the aesthetic prob-

lems of wind turbines, some ordinances require that wind turbines be placed so as to reduce the effect on the view of neighboring property owners.⁶⁶

Zoning ordinances respond to the strobe effect and noise emitted from wind turbines.⁶⁷ Zoning ordinances address the strobe effect by limiting the hours per year the effect may occur on a particular object.⁶⁸ Additionally, wind turbines may only make a certain amount of noise, as measured from the nearest occupied building of a landowner not participating in the development of the project.⁶⁹

Zoning ordinances also account for the infrastructure of the host communities and the long-term effects the turbines will have on those communities.⁷⁰ Many ordinances place limits on damage that developers can do to local roads and drainage systems during installation.⁷¹ Zoning ordinances also require developers to take certain steps when wind turbines cease to be operational.⁷² For example, many ordinances require owners to remove turbines after they have been decommissioned or have failed to produce a requisite amount of electricity for a prescribed period of time.⁷³ Some ordinances go so far as to require turbine owners to grade and reseed land following the removal of a decommissioned turbine.⁷⁴

In addition to zoning ordinances designed to reduce land-use conflicts, some communities have relied on HCAs, which offer a framework through which local officials can more fairly distribute the economic benefits of wind-energy projects to those citizens more directly affected by a wind-energy project.⁷⁵ In these agreements, the project developer makes periodic payments to a single entity that acts on behalf of the entire community.⁷⁶ The developer pays this amount in addition to compensation pursuant to payment-in-lieu-of-taxes agreements or property taxes that are owed under relevant state and municipal laws.⁷⁷ Under HCAs, a local governing body identifies certain segments of the community that

54. See, e.g., DEL. CODE ANN. tit. 29, § 8060(b) (Lexis 2010) (setting forth maximum restrictions on wind turbines); see also Shaun Dunlap, *Union Township Trustees Accept Wind Turbine Zoning Regulations*, URBANA DAILY CITIZEN, Jan. 18, 2008, <http://www.urbanadaily.com/main.asp?SectionID=3&SubSectionID=5&ArticleID=146605&TM=33839.78>.

55. Compare WYO. STAT. ANN. § 18-5-504 (2011) (identifying minimum setback requirements for turbines throughout the state), with WIS. STAT. § 196.378(4g) (b) (2011) (requiring Public Service Commission to develop maximum restrictions on turbines).

56. See WIS. STAT. § 66.0401(1m) (2011).

57. See *id.* § 196.378(4g)(b) (“The [public service] commission shall . . . promulgate . . . setback requirements that provide protection from any health effects, including health effects from noise and shadow flicker The subject matter of these rules shall also include decommissioning and may include visual appearance, lighting, electrical connections to the power grid, setback distances, maximum audible sound levels, shadow flicker, proper means of measuring noise, interference with radio, telephone, or television signals or other matters.”).

58. See MINN. MODEL WIND ENERGY CONVERSION ORDINANCE 5–7 (John Biren et al. 2005), available at <http://www.ecowerc.com/downloads/MN-model-ordinance-wind.pdf>.

59. *Id.* at 5.

60. See *id.* at 5.

61. See *id.* at 6–7.

62. See *id.* at 6 (requiring commercial turbines to be set back at least 750 feet from homes).

63. See MODEL WIND ORDINANCE FOR WIND ENERGY FACILITIES IN N.C. § 7 (N.C. Wind Working Grp. 2008), available at <http://www.dsireusa.org/documents/Incentives/NC18R.pdf> (setback distance determined by multiplying a turbine’s height by a designated “setback number”).

64. See MINN. MODEL WIND ENERGY CONVERSION ORDINANCE 8–9 (John Biren et al. 2005).

65. *Id.*; see also MODEL AS-OF-RIGHT ZONING ORDINANCE OR BYLAW: ALLOWING USE OF WIND ENERGY FACILITIES § 3.9 (Dep’t of Energy Res., Mass. Exec. Office of Env’tl. Affairs 2009), available at <http://www.mass.gov/eea/docs/doer/green-communities/grant-program/model-wind-by-law-jun22-2011.pdf>.

66. See, e.g., Lebanon, N.Y., WindPower Facility Application and Regulations § III(I) (Aug. 23, 2004), available at <http://www.nyserda.ny.gov/en/Page-Sections/Renewables/Large-Wind/-/media/Files/EERP/Renewables/town-lebanon-wind-law-final.ashx> (“Clustering of windpower facilities within a project should be done so as to limit the angular viewshed to 20 degrees as viewed one mile from the closest facility.”).

67. See MODEL WIND ORDINANCE FOR WIND ENERGY FACILITIES IN N.C. § 8 (N.C. Wind Working Grp. 2008).

68. *Id.*

69. *Id.*

70. See MINN. MODEL WIND ENERGY CONVERSION ORDINANCE 9–11 (John Biren et al. 2005), available at <http://www.ecowerc.com/downloads/MN-model-ordinance-wind.pdf> (requiring decommissioning and waste-disposal plans).

71. See *id.* at 11.

72. See *id.* at 9–10.

73. See MODEL WIND ORDINANCE FOR WIND ENERGY FACILITIES IN N.C. § 10 (N.C. Wind Working Grp. 2008); see also MODEL AS-OF-RIGHT ZONING ORDINANCE OR BYLAW: ALLOWING USE OF WIND ENERGY FACILITIES § 3.12 (Dep’t of Energy Res., Mass. Exec. Office of Env’tl. Affairs 2009), available at <http://www.mass.gov/eea/docs/doer/green-communities/grant-program/model-wind-by-law-jun22-2011.pdf>.

74. See MODEL WIND ORDINANCE FOR WIND ENERGY FACILITIES IN N.C. § 10(C) (N.C. Wind Working Grp. 2008).

75. Daniel A. Spitzer et al., *Host Community Agreements for Wind Farm Development*, N.Y. ZONING L. & PRAC. REP., Mar./Apr. 2009, at 1.

76. See Cohocton HCA, *supra* note 23, at 1–2 (referring to these payments as “Annual Payments”).

77. See *id.* at 11–12; see also Spitzer et al., *supra* note 75.

are subject to “potential impacts associated with the [wind] Project.”⁷⁸ Those identified segments of the community receive additional funding to compensate for those impacts.⁷⁹ An HCA does not serve to limit a developer’s nuisance liability to an aggrieved landowner in a legal sense,⁸⁰ but an HCA does engage the host community in a positive way and helps a greater cross section of the community reap the benefits, and more evenly share the costs, of a wind-energy project.⁸¹

Through zoning laws, states have taken steps to help reduce the occurrence of land-use conflicts, and thus litigation, between wind-energy developers and neighboring landowners.⁸² States, however, through their legislative branches, should take greater steps, consistent with these efforts, to reduce litigation even further and place greater emphasis on the political process within local communities. The overview of zoning and nuisance law in the next section, as well as a look at how states have attempted to advance certain interests by limiting nuisance suits, lend support to this proposition.

II. At the Intersection of Zoning and Nuisance

Nuisance suits arise when two neighboring landowners want to use their lands in ways that are incompatible with one another.⁸³ Zoning ordinances are designed to systematically prevent land-use disputes by relegating specific land uses to areas where those uses cannot interfere with neighboring land uses.⁸⁴ Zoning ordinances are not perfect and usually cannot resolve all land-use conflicts. This section addresses what happens when zoning regulations cannot prevent nuisance suits. It then looks at how some states have changed their nuisance laws to give greater validity to zoning regulations and to protect special interests, using right-to-farm acts as a case study.

A. Nuisance, Generally

As previously stated, a nuisance arises when two landowners litigate over their incompatible land uses.⁸⁵ The Restatement (Second) of Torts defines a private nuisance as “a nontrespassory invasion of another’s interest in the private use and

enjoyment of land.”⁸⁶ These “nontrespassory invasions” can vary depending on the circumstances of a case.⁸⁷ In order to be actionable, however, such invasions must cause “significant” harm,⁸⁸ and the invasion must either be “(a) intentional and unreasonable, or . . . (b) unintentional and otherwise . . . negligent or reckless . . . or . . . abnormally dangerous”⁸⁹

Thus, some nontrespassory invasions of property do not legally constitute a nuisance unless they are unreasonable.⁹⁰ The reasonableness of a particular land use is a highly fact-specific inquiry that involves many factors, including the benefits and harms of the use,⁹¹ the appropriateness of the use for the particular location,⁹² and the level of care shown when the land is put to the use.⁹³

It is helpful to see how courts have previously applied nuisance law to wind turbines. In *Rose v. Chaikin*, the New Jersey Superior Court ruled that a landowner’s private wind turbine, which stood atop a sixty-foot tower on his property ten feet from his neighbor’s property line, was a nuisance.⁹⁴ The turbine emitted noise at decibel levels that were always at least six decibels above those allowed by local zoning regulations.⁹⁵ Additionally, the court stressed that the noise was incessant and alien to the community.⁹⁶ The plaintiffs established, to the satisfaction of the court, that they suffered from “nervousness, dizziness, loss of sleep and fatigue” on account of the turbine, and that “[t]he sounds disturbed many of the activities associated with the normal enjoyment of one’s home, including reading, eating, watching television and general relaxation.”⁹⁷

The test for nuisance in New Jersey required the court to inquire whether the “annoyance or disturbance” that caused the interference with the plaintiffs’ “use and enjoyment of land” arose “from an unreasonable use of the [defendant’s] land.”⁹⁸ Reasonableness, the court said, was judged “according to the simple tastes and unaffected notions generally prevailing among plain people.”⁹⁹ Applying these rules to the

86. RESTATEMENT (SECOND) OF TORTS § 821D (1979).

87. See, e.g., *Gumz v. N. States Power Co.*, 721 N.W.2d 515, 521 (Wis. Ct. App. 2006) (citing *Vogel v. Grant-Lafayette Elec. Coop.*, 548 N.W.2d 829 (1996) (finding that stray voltage killing cattle was a nontrespassory invasion)); see also *Whaley v. Park City Mun. Corp.*, 190 P.3d 1, 8–10 (Utah Ct. App. 2008) (finding that sound from outdoor music venue considered to be a nontrespassory invasion).

88. RESTATEMENT (SECOND) OF TORTS § 821F.

89. *Id.* § 822.

90. See *Rassier v. Houim*, 488 N.W.2d 635, 638–39 (N.D. 1992) (upholding the finding that private landowner’s use of personal wind turbine on property did not constitute a nuisance because it was not unreasonable).

91. See RESTATEMENT (SECOND) OF TORTS §§ 826, 828.

92. See *id.* § 828; see also *Patterson v. Peabody Coal Co.*, 122 N.E.2d 48, 52 (Ill. 1954) (citing *Gardner v. Int’l Shoe Co.*, 54 N.E.2d 482 (Ill. 1944)).

93. See RESTATEMENT (SECOND) OF TORTS § 828; see also *Patterson*, 122 N.E.2d at 52 (finding that plaintiff could not be found to have committed a nuisance unless he operated the coal washer and dryer on his property negligently, because he took all precautions available to him to prevent noxious fumes that disturbed plaintiff).

94. *Rose v. Chaikin*, 453 A.2d 1378, 1380, 1382 (N.J. Super. Ct. Ch. Div. 1982).

95. *Id.* at 1380.

96. *Id.*

97. *Id.* at 1380–81.

98. *Id.* at 1381 (citing *Sans v. Ramsey Golf & Country Club*, 149 A.2d 599 (N.J. 1959)).

99. *Id.* (citing *Sans v. Ramsey Golf & Country Club*, 141 A.2d 335 (N.J. Super. Ct. App. Div. 1958)).

78. Cohocton HCA, *supra* note 23, at 2; see Spitzer et al., *supra* note 75.

79. See Cohocton HCA, *supra* note 23, at 1–2; see also Spitzer et al., *supra* note 75.

80. See Cohocton HCA, *supra* note 23, at 33–36 (allowing the company to perform to the extent permitted by applicable law and indemnifying the town in event of a lawsuit against the company).

81. See Spitzer et al., *supra* note 75 (discussing the benefits of HCAs for communities affected by wind-farm developments).

82. Cf. THE MINN. PROJECT, COMPANION DOCUMENT TO THE MINNESOTA MODEL WIND ENERGY CONVERSION ORDINANCE—2005, at 7 (2005) (“The first and foremost responsibility of government in regulating land use is the protection of the public’s health and safety. . . . Reasonable safeguards will continue to ensure that [wind energy’s] exemplary record continues.”).

83. E.g., *Graham Oil Co. v. BP Oil Co.*, 885 F. Supp. 716, 724 (W.D. Pa. 1994) (“[I]t is a general rule that the law of private nuisance is designed to resolve conflicts between neighboring landowners . . .”).

84. See, e.g., Kim R. York & Richard L. Settle, *Potential Legal Facilitation or Impediment of Wind Energy Conversion System Siting*, 58 WASH. L. REV. 387, 398 (1983) (discussing how setback requirements ensure wind access, but also ensure the “safety of neighbors”).

85. See *Graham Oil Co.*, 885 F. Supp. at 724.

facts of the case, the court found the defendant's wind turbine to be an actionable nuisance:

[T]he noise produced is offensive because of its character, volume and duration. It is a sound which is not only distinctive, but one which is louder than others and is more or less constant. Its intrusive quality is heightened because of the locality. The neighborhood is quiet and residential. It is well separated, not only from commercial sounds, but from the heavier residential traffic as well. Plaintiffs specifically chose the area because of these qualities and the proximity to the ocean. Sounds which are natural to this area—the sea, the shore birds, the ocean breeze—are soothing and welcome. The noise of the windmill, which would be unwelcome in most neighborhoods, is particularly alien here.¹⁰⁰

Because the court believed that defendant could achieve his goal of saving electricity through more reasonable alternatives, and because the court found there to be little social utility in defendant's wind turbine relative to the substantial harm it caused, the court granted plaintiffs' request to enjoin the operation of defendant's turbine.¹⁰¹

Rose v. Chaikin also implicated a local zoning board, which set the noise limitations for wind turbines in that community.¹⁰² Whether plaintiffs would have been able to acquire judicial relief by challenging the validity of the zoning ordinance depends on several factors, discussed in greater detail below.

B. Zoning, Generally, and Associated Remedies

A state may prescribe zoning laws under its inherent police powers to promote the "health, safety, morals, or the general welfare" of its citizens.¹⁰³ A municipality, on the other hand, derives its power to enact zoning regulations from the state legislature itself.¹⁰⁴ States have adopted, with minor variations, the Standard State Zoning Enabling Act.¹⁰⁵ Zoning enabling acts generally grant municipal governments freedom to determine how best to design, implement, and amend zoning regulations.¹⁰⁶

To this end, the enabling acts require local governments to appoint zoning commissions to determine the manner in which particular localities will be zoned.¹⁰⁷ For the purposes of this article, it is important to understand those features of zoning regulations through which parties that are adversely affected can seek relief.

Landowners opposing a particular zoning decision have various means to challenge specific ordinances.¹⁰⁸ Before any zoning ordinance is adopted or altered, the zoning commission must hold a public hearing at which affected landowners can voice their objections and concerns about a particular ordinance.¹⁰⁹ Landowners may also appeal zoning-commission decisions to a board of adjustment that is empowered to grant variances and overrule errors by a zoning commission.¹¹⁰ Additionally, some states' wind-energy-zoning statutes require local zoning commissions to conduct public hearings when they receive applications for wind-energy facility.¹¹¹

Landowners may also bring legal challenges to particular zoning regulations.¹¹² Aggrieved landowners can challenge a zoning regulation in state court on the ground that it was adopted without adherence to the procedural requirements set forth in the enabling act.¹¹³ Landowners can also challenge zoning regulations on various constitutional grounds.¹¹⁴ For example, the Due Process Clause of the Fourteenth Amendment prohibits a state or locality from enacting a zoning regulation if it "fails to advance a legitimate governmental interest or if it is an unreasonable means of advancing a legitimate governmental interest."¹¹⁵ The range of appropriate state governmental interests is quite broad.¹¹⁶ As one court noted, "As long as reasons for the legislative classification may have been considered to be true, and the relationship between the classification and the goal is not so attenuated as to render the distinction arbitrary or irrational, the legislation survives rational-basis scrutiny."¹¹⁷ The state exercises similarly broad discretion to enact zoning ordinances that may affect some

108. See, e.g., A STANDARD STATE ZONING ENABLING ACT § 7 (allowing municipal governments to provide a board of adjustment to hear appeals of zoning commission decisions and grant exceptions when appropriate).

109. *Id.* § 6.

110. *Id.* § 7.

111. See WYO. STAT. ANN. § 18-5-506 (2011).

112. See *Tiley Prop., Inc. v. Bartow Co.*, 401 S.E.2d 527, 528–29 (Ga. 1991) (challenging a zoning regulation on the grounds that the county did not follow the proper procedure to enact the regulation).

113. See *id.*; see also *Riggs v. Long Beach Twp.*, 538 A.2d 808, 814–16 (N.J. 1988) (striking down zoning ordinance that was designed to lower property values so as to facilitate lower cost to the government in subsequent condemnation proceedings); cf. WYO. STAT. ANN. § 18-5-508(a) ("Any party aggrieved by the final decision of the board of county commissioners may have the decision reviewed by the district court . . .").

114. See, e.g., *Curto v. City of Harper Woods*, 954 F.2d 1237, 1243 (6th Cir. 1992).

115. *Id.*

116. See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (zoning ordinance not unconstitutional unless it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare"); see also *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974) (finding legitimate state interest in "family values, youth values, and the blessings of quiet seclusion"); *City of Memphis v. Greene*, 451 U.S. 100, 126 (1981) (finding state interest in the regulation of traffic); cf. *Grayned v. City of Rockford*, 408 U.S. 104, 119 (1972) (finding state interest in the regulation of noise around school while school is in session).

117. *Ga. Manufactured Hous. Ass'n, Inc. v. Spalding Cnty., Ga.* 148 F.3d 1304, 1307 (11th Cir. 1998) (quoting *Haves v. City of Miami*, 52 F.3d 918, 921–22 (11th Cir. 1995)) (internal quotations omitted). But see *Berger v. City of Mayfield Heights*, 154 F.3d 621, 625 (6th Cir. 1998) (finding that city zoning ordinance limiting height of all vegetation on vacant lots to be no higher than eight inches was arbitrary and capricious).

100. *Id.* at 1382.

101. *Id.* at 1382–83.

102. *Id.* at 1383.

103. A STANDARD STATE ZONING ENABLING ACT § 1 (Advisory Comm. on Zoning, U.S. Dep't of Commerce 1926), available at <http://www.smrpc.org/workshops/ZBA%20Workshop%20April%2029%202009/A%20Standard%20State%20Zoning%20Enabling%20Act,%201926.pdf>.

104. See *Taxpayers Ass'n of Weymouth Twp., Inc. v. Weymouth Twp.*, 364 A.2d 1016, 1024 (N.J. 1976).

105. 1 PATRICIA E. SALKIN, AM. LAW. OF ZONING § 8:2 (5th ed., release 4 2011).

106. *Id.* § 4:5.

107. *Id.* § 6:3.

citizens differently from others, before running afoul of the Equal Protection Clause.¹¹⁸

In certain circumstances, a zoning regulation may alter the nature and use of property in such a way that it constitutes a regulatory taking without compensation under the Fifth and Fourteenth Amendments.¹¹⁹ For example, there are categories of per se takings that occur when a regulation results in a physical invasion¹²⁰ or when a particular zoning ordinance reduces the value of a property to zero.¹²¹ When a local governing body passes a zoning regulation that results in a partial reduction of property value, as identified by the U.S. Supreme Court in *Penn Central Transportation Co. v. City of New York*, there are three factors relevant to the question of whether the regulation amounts to a regulatory taking: (1) whether the regulation has an adverse economic impact; (2) whether the regulation has interfered with “distinct investment-backed expectations;” and (3) whether the regulation was one that “adjust[ed] the benefits and burdens of economic life to promote the common good.”¹²² The Court has noted that courts should review these factors in an effort to “identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.”¹²³ The Court has explained that “physical takings require compensation because of the unique burden they impose” and that the “*Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation’s economic impact and the degree to which it interferes with legitimate property interests.”¹²⁴

Ultimately, then, landowners have several avenues through which they can challenge a zoning regulation that interferes with the use and enjoyment of their land. If a legislature were to provide a limitation on nuisance suits, conditioning that limitation on a landowner’s compliance with relevant zoning regulations, aggrieved landowners would not necessarily be deprived of legal remedies for a consequential deprivation of the use and enjoyment of their land.

C. When Zoning Meets Nuisance

Courts have approached the relationship between zoning regulations and nuisance suits in different ways.¹²⁵ Without specific instruction from the legislature, courts have considered the presence of a zoning ordinance to be just one factor contributing to the reasonableness of the land use at issue.¹²⁶

118. See *City of Cleburne, Tex. v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (finding that courts should apply rational-basis review where a zoning ordinance treats differently landowners in otherwise like circumstances, provided the distinction is not based on “race, alienage, or national origin”).

119. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 419 (1982).

120. See *id.* at 419–20.

121. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1004 (1992).

122. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

123. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005).

124. *Id.* at 539–40.

125. See, e.g., *Bove v. Donner-Hanna Coke Corp.*, 258 N.Y.S. 229, 235–36 (App. Div. 1932).

126. See *id.* at 236 (distinguishing case from other nuisance cases where industrial dust and smoke fell on a plaintiff’s residence by fact that area in which plaintiff

lived was zoned for industrial use, and had been predominantly used for industrial use for years before plaintiff moved into the area; court upheld lower court’s denial of nuisance recovery because defendant operated smoke stack in an “approved and expert manner, at the very spot where the council said that it might be located”).

In one recent nuisance action over wind turbines, the court took just that approach. In *Burch v. NedPower Mount Storm, LLC*, property owners sued to enjoin the construction of a 200-turbine wind farm, citing a litany of potentially negative impacts.¹²⁷ Although the Public Services Commission (“PSC”) of West Virginia approved the project,¹²⁸ the *Burch* court held that because the West Virginia legislature did not expressly provide that PSC approval abrogated related nuisance claims, PSC approval did not block plaintiffs’ nuisance claim.¹²⁹ The court also held that PSC approval did not bar a lower court from enjoining the project if the plaintiffs succeeded.¹³⁰

Many statutes, however, require a court to grant some degree of deference to local zoning boards in related nuisance actions.¹³¹ These statutes generally acknowledge the legality of conducting the activity itself on the land, but allow an injured landowner to seek relief in nuisance if the defendant conducts the contentious activity in an unreasonable manner.¹³² Thus, in *Gelfand v. O’Haver*, the plaintiff brought suit against the defendant for operating a music studio that “disturb[ed] and offend[ed]” the plaintiff’s businesses.¹³³ California law provided that activity sanctioned by a zoning ordinance could not be enjoined without “evidence of the employment of unnecessary and injurious methods of operation.”¹³⁴ Because the defendant’s studio was located within a residence, the defendant made no attempt to soundproof the studio, and the studio was in operation “day and night,”¹³⁵ the court concluded that the defendant operated his studio in an “unnecessary and injurious” manner.¹³⁶

As *Burch* and *Gelfand* demonstrate, although courts in different states treat zoning ordinances in different ways when it comes to nuisance suits, it takes a more affirmative step by a legislature than laying out careful zoning structures to protect a given industry from nuisance liability. An example of such a step can be seen in the right-to-farm acts (“RTFA”), enacted by several states to prevent farmers from facing nuisance suits in certain situations. A discussion of these acts is taken up in the following section.

D. Right to Farm: A Tougher Stance

Every state has enacted RTFAs that limit the situations in which a landowner conducting agricultural operations on

lived was zoned for industrial use, and had been predominantly used for industrial use for years before plaintiff moved into the area; court upheld lower court’s denial of nuisance recovery because defendant operated smoke stack in an “approved and expert manner, at the very spot where the council said that it might be located”).

127. *Burch v. NedPower Mount Storm, LLC*, 647 S.E.2d 879, 885 (W. Va. 2007). These included excessive noise, strobe effects, ice throws, broken blades, collapsing towers, and the consequential decrease in property values. *Id.*

128. *Id.*

129. *Id.* at 889.

130. *Id.* at 893–94.

131. *Gelfand v. O’Haver*, 200 P.2d 790, 791 (Cal. 1948) (quoting CAL. CIV. PROC. CODE § 731a (West 2011)).

132. *Id.*

133. *Id.* at 790–91.

134. *Id.* at 791 (quoting CIV. PROC. § 731a).

135. *Id.* at 792.

136. *Id.*

her land is subject to nuisance suits by neighboring landowners.¹³⁷ As an example, the Indiana General Assembly has provided:

An agricultural or industrial operation or any of its appurtenances is not and does not become a nuisance, private or public, by any changed conditions in the vicinity of the locality after the agricultural or industrial operation, as the case may be, has been in operation continuously on the locality for more than one (1) year¹³⁸

This particular law, however, is not absolute; it is limited to situations in which: (1) there has been “no significant change” in the operations in question; and (2) the operations would not have been a nuisance when they were first initiated.¹³⁹ The Indiana law also contains an important limit on the operational rights of agricultural landowners, and a protection for their neighbors; the limitations on nuisance suits do not apply if the agricultural operation is conducted negligently.¹⁴⁰ Other states, while providing immunity to agricultural projects in operation for a certain amount of time, also provide immunity from nuisance suits to agricultural projects conducted in an area zoned for agricultural use, regardless of how long the project has been in operation.¹⁴¹

Some states also allow for fee-shifting in nuisance cases to help dissuade potential plaintiffs from bringing suit.¹⁴² As an example, Texas’s RTFA prevents nuisance suits against agricultural landowners whose farms have been in operation for a year before the suit, and “if the conditions or circumstances complained of as constituting the basis for the nuisance action have existed substantially unchanged since the established date of operation.”¹⁴³ Texas, however, takes an extra step and makes plaintiffs in nuisance actions liable to the defendant “for all costs and expenses incurred in defense of the action, including but not limited to attorney’s fees, court costs, travel, and other related incidental expenses incurred in the defense” when the RTFA applies.¹⁴⁴

It should be clear that these types of nuisance-barring laws contain three basic elements: (1) the operation must have existed for a certain period of time to become eligible for the protection the law offers; (2) the operation must not have changed in any significant way; and (3) the protection does not apply when the operation is conducted in a way that violates federal or state law, including other state tort laws. These laws amount to a statutory “coming to the nuisance”

defense;¹⁴⁵ they send a message to landowners that they cannot move next door to a particular land-use operation and expect the courts to tell the neighbor to cease the activity.

Highlighting the benefits of RTFAs, the Indiana General Assembly emphasized that the Indiana RTFA furthered “the policy of the state to conserve, protect, and encourage the development and improvement of its agricultural land.”¹⁴⁶ The Indiana General Assembly passed the RTFA after finding that nuisance suits caused farmers “to cease operations,” and “discouraged [farmers] from making investments in farm improvements.”¹⁴⁷

Although RTFAs serve to protect preexisting “nuisances,” the RTFA framework can be faithfully applied to the erection of new wind-energy facilities. The possibility of nuisance suits poses threats to wind-energy developers,¹⁴⁸ and it logically follows that protection from those suits would encourage development. As will be discussed further below, however, a statute barring nuisance suits against wind-energy developers would have to include certain provisions to ensure that the statute does not run afoul of the Takings Clauses of the Fifth and Fourteenth Amendments.¹⁴⁹

III. RTFAs Applied: A Framework to Prevent Turbine Nuisance Suits

In order to prevent wind-turbine nuisance suits, states should grant similar immunity to wind-energy-development projects as states have to agricultural land uses. Broadly stated, states should mandate comprehensive zoning ordinances addressing the potential risks of wind-energy projects, provide wind-energy developers conditional immunity from nuisance suits, and require wind-energy developers to enter into HCAs. Each element of this solution is addressed in the sections below.

A. Zoning and Nuisance Immunity

As a prerequisite to any statutory protection from nuisance suits, states and local zoning commissions should require, and subsequently promulgate, comprehensive zoning regulations that address and curtail the risks associated with wind turbines.¹⁵⁰ States have a good deal of flexibility as to the extent of discretion they give local zoning commissions, but as a practical matter, states should set both minimum and maximum zoning requirements that local zoning commissions can establish. By doing so, states can help ensure a threshold level of protection for potentially aggrieved land-

137. See Elizabeth R. Springsteen, *States’ Right-to-Farm Statutes*, NAT’L AGRIC. L. CENTER, <http://www.nationalaglawcenter.org/assets/righttofarm/index.html> (last visited Jan. 26, 2012).

138. IND. CODE § 32-30-6-9(d) (2010).

139. *Id.* The statute also identifies a range of actions that do not constitute a significant change in operations, including changing types of agricultural operations, transferring ownership of the operation, altering involvement in a government sponsored agricultural program, and adopting new technology. *Id.* § 32-30-6-9(d)(1)(A)–(D).

140. *Id.* § 32-30-6-9(a).

141. See OR. REV. STAT. §§ 30.936–.937 (2009); see also N.Y. AGRIC. & MKTS. LAW § 308(3) (McKinney 2011) (within designated agricultural zones, farms using “sound agricultural practices” are immune from nuisance suits).

142. TEX. AGRIC. CODE ANN. § 251.004(a)–(b) (West 2011).

143. *Id.* § 251.004(a).

144. *Id.* § 251.004(b).

145. For a discussion of the “coming to the nuisance” defense, see Margaret Rosso Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95, 107–09.

146. IND. CODE § 32-30-6-9(b) (2010).

147. *Id.*

148. See Stephen Harland Butler, *Headwinds to a Clean Energy Future: Nuisance Suits Against Wind Energy Projects in the United States*, 97 CALIF. L. REV. 1337, 1342 (2009) (noting a trend in nuisance suits aimed to halt wind-energy development).

149. See discussion *infra* Part III.A.

150. For a discussion of these risks, and ways zoning ordinances have been drafted to address them, see *supra* Part I.B–C.

owners, while also ensuring that local zoning commissions cannot set standards so high as to effectively bar any and all wind-energy projects in those communities.

As an added means of providing protection to landowners through the zoning process, states should require local zoning commissions to provide public hearings before approving any wind-energy project, thus allowing potentially aggrieved landowners to publicly voice complaints.¹⁵¹ Furthermore, states should provide an avenue by which potentially aggrieved landowners may appeal a zoning-commission decision, whether through another state agency or the courts.¹⁵² Such a means of appeal would provide oversight to local zoning boards, ensuring that they at least follow all procedural guidelines.

Comprehensive zoning regulations could help to address the major difference between the circumstances supporting RTFAs and the circumstances that have instigated wind-turbine nuisance actions. Notably, RTFAs only apply when an agricultural operation has been in place for a certain amount of time and has not undergone significant change.¹⁵³ In contrast, most wind-turbine nuisance suits are filed as a result of turbines being newly constructed near extant residences.¹⁵⁴

To account for this difference, states should allow nuisance actions against wind-energy projects to proceed only in instances where the project developer or turbine operator failed to abide by the appropriate zoning regulations. Such a violation would not be a nuisance per se, but would instead allow a plaintiff to avoid summary judgment and attempt to convince a jury that the wind-energy project constitutes a nuisance.

Under such a scheme, the protection of well-designed wind-turbine zoning ordinances would mitigate the potential inequities of preventing a first-in-time landowner from litigating to either stop or prevent a later-in-time nuisance from settling next door. Zoning commissions design wind-turbine zoning regulations to minimize the negative impact of wind turbines on both neighboring landowners and the community at large.¹⁵⁵ Thus, a wind project's compliance with a well-designed zoning regulation would ensure, in theory, that it would *not* constitute a nuisance to neighboring landowners.

As an additional measure to discourage wind-power nuisance suits, states should provide a fee-shifting structure in any wind-power nuisance litigation, similar to the fee-shifting structure in the Texas RTFA.¹⁵⁶ Because a plaintiff would only be able to sustain a nuisance suit if she could show that the wind project ran afoul of local zoning regulations, it follows that in order to survive a motion for summary judgment, the plaintiff would have to provide evidence that the defendant did, in fact, violate the applicable zoning regula-

tions.¹⁵⁷ To further deter frivolous litigation, states should impose a fee-shifting structure in which a plaintiff who loses a motion for summary judgment must pay the fees and costs of the defendant. In addition to helping limit frivolous lawsuits, such a structure would send a clear signal to the developers that would allow them to accurately predict the costs of a particular project; if they complied with all regulations, they would not have to spend any extra money on unexpected litigation. If, however, a plaintiff could prove that the defendant did not abide by the zoning regulations, then summary judgment would not be appropriate, the plaintiff could try her nuisance claim, and each side would pay its own fees and costs. Although this would not necessarily benefit plaintiffs, the purpose of the fee-shifting arrangement would be to discourage frivolous lawsuits. From a state's perspective, a wind-turbine nuisance suit would be frivolous because of the steps taken by the local zoning commission to ensure that the wind-energy project at issue did not impede the enjoyment and use of others' land. By violating state and local zoning laws, a wind-energy developer would abrogate the protection those laws provide local residents. Under such circumstances, wind-energy developers should not benefit from the statutory presumption or the fee-shifting arrangement.

It is important to make clear that the scheme proposed in this Note would by no means preclude *negligence* claims that arise either during or after the construction of wind-energy projects. Under the proposed scheme, the duty to abide by local zoning ordinances when siting and constructing a wind-energy project is wholly independent of the duty to exercise reasonable care. Thus, for example, if a wind-turbine operator negligently maintains a wind turbine after its construction, and this negligence causes the turbine to collapse and damage a neighboring landowner's property, that landowner would not be precluded from asserting a negligence claim against the turbine operator, despite the fact that the turbine was constructed in accordance with local zoning ordinances.

B. Motivated by Basic Fairness: Host-Community Agreements

A law that limits the scenarios in which a plaintiff could survive a summary-judgment motion in a nuisance action against a wind-power developer to those situations in which the project violated zoning regulations has one serious flaw; it would perhaps too harshly deny most aggrieved landowners any form of relief. In the first instance, zoning commissions are not perfect and may draw incorrect conclusions from incorrect assumptions or premises.¹⁵⁸ Despite the care

151. See WYO. STAT. ANN. § 18-5-506 (2011).

152. See *id.* § 18-5-508; see also WIS. STAT. § 66.0401(5)(b) (2010).

153. IND. CODE § 32-30-6-9(d) (2010).

154. See Zeller, *supra* note 15.

155. See discussion *supra* Part I.C.

156. TEX. AGRIC. CODE ANN. § 251.004(b) (West 2004).

157. See, e.g., FED. R. CIV. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

158. See, e.g., A STANDARD STATE ZONING ENABLING ACT § 7 (Advisory Comm. on Zoning, U.S. Dep't of Commerce 1926), available at <http://www.smrpc.org/workshops/ZBA%20Workshop%20April%2029%202009/A%20Standard%20State%20Zoning%20Enabling%20Act,%201926.pdf>; 1 SALKIN, *supra* note 105, § 6:11. This is just one of several possible concerns. It is also possible that through lobbying by wind-energy developers, or even simply through bias or personal preference, zoning commissions may unfairly seek to promote the interests of wind-energy developers over those of local residents.

that local zoning commissions take when delineating certain necessary attributes of wind turbines and whether to approve a given project, citizen complaints have cast doubt upon the validity of a zoning commission's determination as to what is reasonable in a given community and how best to address conflicting reports.

For example, in Vinalhaven, where the citizens voiced alarm over the noise emitted from the 4.5-megawatt wind farm, the developer of the wind farm contested a finding by the Maine Department of Environmental Protection that the wind farm exceeded the allowable decibel limit.¹⁵⁹ Even if the wind farm were in compliance, the citizens have complained that they feel like they were misinformed about the effect that the turbines would have on their lives.¹⁶⁰ Similarly, in Falmouth, Massachusetts, where the municipal government is considering whether to add a second wind turbine, two studies, one commissioned by concerned local citizens, came to different conclusions as to whether a second turbine would exceed the local government's limit on the total decibel level that could be attributable to wind turbines.¹⁶¹

Without a remedy in nuisance, it is unlikely that aggrieved landowners would be able to receive any compensation for their lost use and enjoyment of their property. Aggrieved landowners could attempt to appeal any zoning-board decision that they felt were based on faulty information, but if such an appeal failed, it is unlikely that they would find any redress in the courts, for reasons described below. A state court could strike down a zoning regulation or the approval of an individual project if the zoning commission had not properly followed the necessary procedures, such as allowing a public hearing.¹⁶² Yet, absent procedural error by the zoning commission, potential judicial remedy would be limited to constitutional challenges.¹⁶³

An aggrieved landowner's constitutional remedies would also be limited in light of the state interests inherent in wind-energy development, and the deference courts give the state under rational-basis review.¹⁶⁴ As has been previously noted, creating alternative sources of energy, raising tax revenues that go to various state functions, and creating jobs are all legitimate state interests.¹⁶⁵ Additionally, assuming that a zoning commission made a legitimate attempt to mitigate to the greatest extent possible the adverse effects of wind turbines, it is unlikely that any court would find that a wind-energy project is an unreasonable way to achieve those legitimate state interests.¹⁶⁶ Thus, because a zoning commission's good-faith

regulation would sustain a rational-basis review,¹⁶⁷ a court would likely deny an aggrieved landowner relief under the Due Process and Equal Protection clauses of the Fourteenth Amendment. It is also questionable whether a particular zoning ordinance would constitute a taking, considering that the ordinance itself would be designed to limit the impact of a wind-energy project and in light of the overall benefit such a project would provide to a community.¹⁶⁸ To account for this, states should require wind energy developers and host communities to enter into HCAs, or similar benefit-sharing arrangements, whereby the benefits of the wind-energy projects can be distributed more fairly to those members of the community who, for one reason or another, are adversely affected by the projects.¹⁶⁹ Ideally, the HCA would require the wind-energy developer to provide ongoing payments to the community.¹⁷⁰ To ease the financial burden on wind-energy developers, the payments could be required in lieu of taxes, at least partially.¹⁷¹ The HCA could also provide that the annual payment decrease over time, assuming that most complaints would arise when the wind-energy project were in its infancy.¹⁷²

Under the HCA, the municipality should direct the payments to landowners most likely to be affected by the particular wind-energy project, including those in close proximity to a particular project, or whose view would be particularly affected by a wind-energy project. By proactively allocating funding to potentially aggrieved landowners, municipalities could mollify potential conflicts arising from a wind-energy project.¹⁷³ The compensation under the HCA would offset the aggrieved landowner's potential loss, thus reducing the need for litigation. Additionally, municipalities should set aside funds for local residents who may suffer uniquely from the effects of wind turbines, such as individuals that are sensitive to the vibrations of wind-turbine motors, or those that are particularly susceptible to seizures caused by a wind turbine's strobing effect.¹⁷⁴ Such methods of compensation would help to address the potential inequities caused by the law limiting nuisance suits against wind-energy projects.

placed fairly low, requiring only the identification of a legitimate goal that the government "could have been pursuing" (citing *Haves v. City of Miami*, 52 F.3d 918, 921–22 (11th Cir. 1995)).

167. *See id.*

168. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (noting that a taking is less likely to be found where "interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good").

169. *See discussion supra* Part I.C.

170. *Cf. Cohocton HCA, supra* note 23, at 1–2. For a discussion on various types of compensation methods under HCAs, see Vicki Been, *Compensated Siting Proposals: Is It Time to Pay Attention?*, 21 *FORDHAM URB. L.J.* 787, 792–96 (1994).

171. *Cf. Cohocton HCA, supra* note 23, at 1–2.

172. *Id.* at exhibit A.

173. *See Spitzer et al., supra* note 75, at 2 (noting that the purpose of HCAs is to "mitigate the unavoidable adverse impacts that certain types of developments can impose on communities").

174. *Cf. Cohocton HCA, supra* note 23, at 1–2 (setting aside funds for "potential impacts" associated with a given wind-energy project).

159. *See Zeller, supra* note 15.

160. *Id.*

161. *See Kazarian, supra* note 17.

162. *See discussion supra* Part II.B.

163. *Id.*

164. *See City of Cleburne, Tex. v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.") (citations omitted); *supra* Part II.B.

165. *See supra* Part II.B.

166. *See Ga. Manufactured Hous. Ass'n, Inc. v. Spalding Cnty.*, 148 F.3d 1304, 1307 (11th Cir. 1998) (noting that the bar to establish a rational basis has been

C. The Constitutionality of a Right-to-Wind Act

One state has found that its RTFA violates the Takings Clause of the Fifth and Fourteenth Amendments.¹⁷⁵ Thus, one might argue that this Note's proposal, which relies heavily on the RTFA framework, is similarly unconstitutional. As will be discussed below, however, no other state has found its RTFA to be unconstitutional, and this Note's proposal withstands scrutiny under the Supreme Court's regulatory-takings test set forth in *Penn Central*.¹⁷⁶

The Supreme Court considered the constitutional validity of legislative legalization of nuisances (such as RTFAs) in its decision in *Richards v. Washington Terminal Co.*¹⁷⁷ In *Richards*, the Court held that Congress committed a taking without just compensation by authorizing the defendant to construct a railroad and tunnel that opened up facing the rear side of the plaintiff's property.¹⁷⁸ The fanning system within the tunnel caused air contamination on the plaintiff's property by forcing out gas and smoke emitted from engines while in the tunnel, and this in turn caused a significant diminution in the value of the plaintiff's property.¹⁷⁹ The Court found that Congress could not impose "so direct and peculiar and substantial a burden upon plaintiff's property without compensation to him," and that if the damage was not preventable by implementing some other means to ventilate the tunnel, then the damage was necessary and Congress owed the plaintiff compensation.¹⁸⁰ Congress could not immunize a private nuisance if it amounted to the "taking of private property."¹⁸¹

Only Iowa has found an RTFA to be a constitutional taking. The Iowa Supreme Court in *Bormann v. Board of Supervisors* addressed a takings challenge to an Iowa statute that granted immunity to nuisance suits for any "farm or farm operation located in an agricultural area."¹⁸² In light of state common law providing that the right to bring a nuisance action is an easement,¹⁸³ the court held that the law in question was a restriction on that property right, and was thus an unconstitutional taking.¹⁸⁴

Some states do not have similar common-law rulings that the right to bring a nuisance action constitutes an easement, and those courts subsequently rejected plaintiffs' takings claims.¹⁸⁵ Addressing a takings challenge to Texas's RTFA,

the Court of Appeals of Texas in *Barrera v. Hondo Creek Cattle Co.* distinguished the state legislature's action in passing the RTFA from the defendant's action, which limited the plaintiff's use and enjoyment of land.¹⁸⁶ Noting that a taking is "(1) an intentional act of a government entity; (2) accomplished for a public purpose; (3) that damages or takes property from a private citizen,"¹⁸⁷ the court found that the plaintiff had not satisfied the first two factors.¹⁸⁸

Because the legislative scheme proposed in this Note grants a rebuttable presumption conditioned on compliance with local zoning regulations, and because the scheme would additionally require wind-energy developers to compensate aggrieved landowners through HCAs, this Note's proposal withstands scrutiny under the Supreme Court's *Penn Central* analysis. The *Penn Central* analysis has three relevant factors: (1) whether the regulation has an adverse economic impact; (2) whether the regulation has interfered with "distinct investment-backed expectations;" and (3) whether the regulation was one that "adjust[ed] the benefits and burdens of economic life to promote the common good."¹⁸⁹ Because the wind-energy developer would only be absolutely protected from a nuisance suit if it abided by all relevant zoning regulations, and because those zoning regulations, if properly drawn, would limit a wind project's adverse economic impacts, the first *Penn Central* factor would weigh in a state's favor. The second *Penn Central* factor is more tenuously addressed by the scheme's reliance on adherence to zoning regulations, but because wind-energy developers would compensate aggrieved landowners through an HCA, any negative effect to investment-backed expectations should be minimal. Finally, the third factor should tip in favor of the state because by promoting wind energy, the state promotes a legitimate state interest that benefits the entire community.¹⁹⁰ Consequently, the legislative scheme proposed by this Note would only be subject to a takings claim in a state such as Iowa, where the right to bring a nuisance suit is a recognized property right.¹⁹¹

IV. Conclusion

Wind energy has numerous benefits that a state would find appealing and wish to pursue. Despite state efforts to implement carefully considered wind-energy programs thorough zoning regulations, for some members of host communities, wind energy represents a severe obstacle to the use and enjoyment of their property. Nuisance litigation is expensive, and the effect that wind-energy projects will have on a community varies based on the community itself. In order to help promote wind energy, states should pass legislation declaring that a wind-energy project that adheres to the regulations

175. *Bormann v. Kossuth Cnty. Bd. of Supervisors*, 584 N.W.2d 309, 313, 321 (Iowa 1998).

176. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

177. 233 U.S. 546, 553 (1914).

178. *Id.* at 548, 556.

179. *Id.* at 549–50.

180. *Id.* at 557.

181. *Id.* at 553.

182. *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 314 (Iowa 1998) (quoting IOWA CODE § 352.11(1)(a) (1997)).

183. *Id.* at 315.

184. *Id.* at 321.

185. See, e.g., *Moon v. N. Idaho Farmers Ass'n*, 96 P.3d 637, 644–46 (Idaho 2004) (dismissing takings claim related to Idaho RTFA after finding that no Idaho authority supported the proposition that the right to sue in nuisance is an easement); *Lindsey v. DeGroot*, 898 N.E.2d 1251, 1257–59 (Ind. Ct. App. 2009) (declining to adopt the ruling in *Bormann* that the right to bring a nuisance claim constituted an easement, and thus deciding that the elements of a takings claim were not satisfied).

186. *Barrera v. Hondo Creek Cattle Co.*, 132 S.W.3d 544, 546–49 (Tex. App. 2004).

187. *Id.* at 549 (quoting *Domel v. City of Georgetown*, 6 S.W.3d 349, 357 (Tex. App. 1999)) (internal quotation marks omitted).

188. *Id.*

189. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

190. See discussion *supra* Part II.A.

191. *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 313, 321 (Iowa 1998).

promulgated by a local zoning authority is not a nuisance. States should also require wind-energy developers to enter into HCAs, or other benefit-sharing arrangements, whereby local communities can target and compensate those land-owners that are most severely adversely affected by a wind-energy project in that community. Such a plan would send a clear message to wind-energy developers that they are wanted and welcomed in the state, while also helping to ensure that the benefits of wind power are more fairly shared within the communities that host wind-energy projects.