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Prairie Winds: A Look at Commercial Wind Farm Regulation Within Kansas. Zimmerman v. Board of County Commissioners of Wabaunsee County

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Prairie Winds: A Look at Commercial Wind Farm Regulation Within Kansas

Zimmerman v. Board of County Commissioners of Wabaunsee County[1]

I. INTRODUCTION

Zimmerman v. Board of County Commissioners of Wabaunsee County presented an interesting dilemma, as green technology was put at odds with a community's desire to protect a unique habitat located within their county. Zimmerman, along with several other landowners, sought a zoning permit from the Wabaunsee County Board of Commissioners ("the Board") in order to erect Commercial Wind Energy Conversion Systems ("CWECS").[2] The Board had not previously considered such systems, but after several delays and hearings, the Board found CWECS contrary to the interest of the county and community as a whole. Consequently, the Board prohibited the systems throughout the county.

Subsequently, Zimmerman sought to declare the Board's actions invalid. The District Court of Wabaunsee initially held that the Board acted lawfully and reasonably. Zimmerman appealed, claiming that the Board failed to conform to the procedures required in the zoning statute[3]and that the Board's decision to prohibit CWECS was unreasonable. This Note explores the Kansas Supreme Court's decision, as it considered what procedure a governing body must follow when enacting a zoning amendment, the deference to be afforded to such governing bodies, and what constitutes a reasonable zoning decision. Ultimately, this Note reaffirms the Kansas Supreme Court's decision, as the court properly held that the Board acted reasonably in its decision to ban CWECS within the county.

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[1]218 P.3d 400 (Kan. 2009).
[2]*Id.* at 405.
[3]KAN. STAT. ANN. § 12-757 (2008).

II. FACTS AND HOLDING

In 2002, a company looking to develop commercial wind farms in Kansas contacted the Wabaunsee County zoning administrator.[4] The zoning administrator relayed this message to the three-member Board in October of that same year. The county had no specific zoning regulations regarding wind farms, but upon hearing the news, the Board placed a temporary moratorium on the acceptance of zoning applications for conditional use permits regarding wind farms.[5] In December 2002, the Wabaunsee County Planning Commission held a public meeting to discuss the zoning regulations regarding commercial wind farms and gauge public opinion about the farms.[6] No direct action resulted from this meeting, and the Board extended the temporary moratorium.[7]

In August 2003, the Board, citing various changes throughout the county, directed the planning commission to look at the 1974 Wabaunsee County Comprehensive Plan[8] (the "Plan") and recommend updates to the Plan. After public input, the planning commission recommended that the Board adopt this revised plan, Comprehensive Plan 2004,[9] which the Board did in April of 2004. In May 2004, the planning commission turned its attention to zoning regulations specifically related to small and commercial wind farms.[10] The Board voted 2-1 against the planning

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[4] *Zimmerman*, 218 P.3d at 405.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] The original Comprehensive Plan was a report or memo commissioned by the county which laid out the county's economic, social, and environmental plans and goals for the future. *Id.* at 406.

[9] "The Comprehensive Plan 2004 provides in relevant part that the county would endeavor to: A. Establish an organized pattern of land use with controlled and smart growth that brings prosperity to the county while also respecting its rural character. B. Maintain the rural character of the county with respect to its landscape, open spaces, scenery, peace, tranquility, and solitude. . . . H. Develop tourism programs involving historic properties, nature of rural character, and scenic landscape." *Id.*

[10] *Id.* The planning commission voted 8-2 to recommend that the Board approvethe new zoning regulations, which would allow commercial wind farms, on a conditional basis. *Id.*

commission's recommendations and banned CWECS[11] throughout the county, while accepting the planning commission's recommendations for Small Wind Energy Conversion Systems ("SWECS").[12]

Appellants, several different individuals who had entered into contracts for the development of CWECS on their land within Wabaunsee County, filed suit against the Board alleging that the Board's adoption of the Resolution was null and void.[13] Other individuals, who owned the wind rights of properties throughout the county[14], sought and were granted the right to intervene in the lawsuit; the intervenors replicated all of the plaintiffs' claims, with an additional inverse condemnation claim.[15]

First, Appellants contended that the Board's decision was not wholly legislative, and the Board did not provide sufficient facts to support the district court's finding of reasonableness.[16] Appellants argued that such factors as history, culture, and aesthetics do not provide the requisite level of reasonableness needed to uphold the Board's decision.[17] Second, Appellants maintained that the district court incorrectly ruled that the Board's decision to adopt, revise, and override parts of the Planning Commission's recommendations was lawful, because Kansas law only allows the Board to adopt the Plan in its entirety.[18] However, the Kansas Supreme Court sided with the appellees and upheld each of the district court's rulings; additionally, the court determined that the intervenors' motions to join the suit were filed in a timely manner.[19]

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[11] *Id.* at 406. The Board defined CWECS as "A Wind Energy Conversion System exceeding 100 kilowatt or exceeding 120 feet in height above grade, or more than one Wind Energy Conversion System of any size proposed and/or constructed by the same person or group of persons on the same or adjoining parcels or as a unified or single generating system." *Id.* at 407.

[12] *Id.* at 406.The Board drafted Resolution No. 4-18 formally rejecting CWECS, stating the CWECS would go against the "historical ... rural, agricultural, and scenic character of the County ... [and] would be detrimental to property values and opportunities for agricultural and nature based tourism." *Id.*

[13] *Id.*

[14] *Id.* at 405.

[15] *Id.* at 408.

[16] *Id.*

[17] *Id.* at 408-09.

[18] *Id.* at 410; KAN. STAT. ANN. § 12-757(d) (2008).

[19] *Zimmerman*, 218 P.3d at 405.

III. LEGAL BACKGROUND

As enacted by the Kansas Legislature, section 12-757 governs the authority of a city or county to rezone land and amend the zoning amendments within the municipality.[20] The governing body of a municipality (usually the Board of County Commissioners) or the planning commission may propose an amendment.[21] "The governing body shall establish in its zoning regulations the matters to be considered when approving or disapproving a rezoning request."[22]

Before any amendments are approved, the board must submit its recommendations to a planning commission.[23] It is the planning commission's responsibility to provide notice to the public about the proposed amendments and conduct public hearings concerning the proposed zoning amendments.[24] After such hearings have been conducted, the planning commissioners vote by simple majority to recommend approval or disapproval by the governing body.[25]

Recommendation of approval for the zoning amendment by the planning commission is not an adoption of the amendment. After the planning commission submits its recommendation, the municipality's governing body may:

> (1) adopt such recommendation by ... resolution in a county; (2) override the planning commission's recommendation by a 2/3 majority vote of the membership of the governing body; or (3) return such recommendation to the planning commission with a statement specifying the basis for the governing body's failure to approve or disapprove.[26]

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[20]KAN. STAT. ANN. § 12-757.
[21]*Id.* § 12-757(a).
[22]*Id.*
[23]*Id.* § 12-757(b).
[24]*Id.*
[25]*Id.* § 12-757(d).
[26]*Id.*

If the recommendation is returned to the planning commission, the planning commission may consider the governing body's reasons for returning the proposal without a vote for approval or disapproval, and, after considering such reasons, may resubmit their original recommendation, with an explanation why they chose to resubmit the original recommendation, or resubmit a new recommendation.[27] After receiving this second recommendation from the planning commission, the board "by a simple majority may adopt, revise, or amend and adopt such recommendation by the respective ... resolution."[28]

There are several Kansas cases that lay out the standards of review that district and appellate courts should look to when determining the appropriateness of a county board's zoning decision. First, in *Genesis Health Club, Inc. v. City of Wichita*,[29] the Kansas Supreme Court held that "the power of a city government to change the zoning of property ... can only be exercised in conformity with the statute which authorizes the zoning."[30] Therefore, if a municipality fails to properly follow the procedures laid out in the state zoning laws, the municipality's subsequent decision is invalid.[31] A reviewing court will look to see if the municipality properly followed the procedures laid out in the statutes. Although the statute seems to clearly provide what a municipality may do when passing zoning regulations, the court has had to interpret several provisions within the statute.

When interpreting a statute, the appellate court is not bound by the trial court's initial interpretation because statutory interpretation is a question of law.[32] Additionally, the court must give "words of common usage" within the statute their natural and ordinary usage.[33] If ascertainable, the intent of the legislature governs, and, if the statute's

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[27] *Id.*
[28] *Id.*
[29] 181 P.3d 549 (Kan. 2008).
[30] *Id.* at 558 (quoting Crumbaker v. Hunt Midwest Mining Co., 69 P.3d 601, 611 (Kan. 2003)).
[31] *Id.* (citing *Crumbaker*, 69 P.3d at 611).
[32] Schmidtlien Elec., Inc. v. Greathouse, 104 P.3d 378, 385 (Kan. 2005).
[33] *Id.* at 387 (quoting Sawyer v. Oldham's Farm Sausage Co., 787 P.2d 697, 700 (Kan. 1990)).

language is plain and unambiguous, the court should refrain from reading language into the statute not readily found therein.[34]

The Kansas Supreme Court previously addressed the interpretation of section 12-757(d) in *Manly v. City of Shawnee*.[35] *Manly* involved a special zoning request made by the local school board.[36] The Kansas Supreme Court addressed the three options available to a governing body when deciding to adopt a zoning amendment and, more specifically, whether the governing body could reject a planning commission's second recommendation by a simple majority. The court found that the language "the governing body, by a simple majority thereof, may adopt or may revise or amend and adopt such recommendation" did allow for a governing body to adopt, reject in whole, or reject in part the planning commission's second recommendation.[37]

Even if a governing body followed the proper procedures in making its zoning determination, there is still a possibility that a court could strike down such action if it found that the governing board acted unreasonably.[38] *Combined Investment Co. v. Board of County Commissioners* dealt with a county board's refusal to rezone a parcel of land.[39] Plaintiffs argued the decision was based on one board member acting arbitrarily. The Kansas Supreme Court held that a district court's power in reviewing the board's decision is limited to "the lawfulness of the action, and the reasonableness of such action."[40] The court held that

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[34]Steffes v. City of Lawrence, 160 P.3d 843, 849 (Kan. 2007) (citing Bd. of Leavenworth County Comm'rs v. Whitson, 132 P.3d 920, 926 (2006)).

[35]194 P.3d 1 (Kan. 2008).

[36]*Id.* at 4.

[37]*Id.* at 6-8."As noted, 12-757(d) plainly gives the city the authority to 'revise or amend and adopt' a planning commission [renewed/resubmitted] recommendation by a simple majority vote. To circumvent that plain language, the Manlys attempt to convince us that the City's authority to revise or amend a recommendation does not include the right to reject or overrule the recommendation. However, that contention defies logic. Obviously, when the City revises or amends a recommendation before taking action, it has implicitly rejected or overruled that part of the recommended action which was not followed." *Id.* at 8.

[38]*See* Combined Inv. Co. v. Bd. of County Comm'rs, 605 P.2d 533 (Kan. 1980).

[39]*Id.* at 535.

[40]*Id.* at 543;*see* Golden v. City of Overland Park, 584 P.2d 130, 134 (Kan. 1978).

the board's decision was presumptively reasonable, and that the court should not overrule such an action unless a preponderance of the evidence showed that the action was "so arbitrary that it can be said it was taken without regard to the benefit or harm involved to the community at large, including all interested parties, and was so wide of the mark that its unreasonableness lies outside the realm of fair debate."[41]

Although courts are reluctant to overturn a governing body's zoning decision, courts from time to time will apply the factors laid out in *Golden v. City of Overland Park*[42] to legislative decisions that are considered quasi-judicial.[43] *Golden* also involved a city council's refusal to rezone a landowner's piece of property. The Kansas Supreme Court identified six different factors to be considered in determining the reasonableness of the board's decision:

- First, what is the character of the neighborhood and how does the zoning regulation fit such character?;
- Second, how are the properties nearby used and zoned?;
- Third, how suitable is the property for its current zoning restrictions?;
- Fourth, if these zoning restrictions are removed, to what extent will the surrounding properties be detrimentally affected?;
- Fifth, how long has the subject property remained vacant during its current zoning scheme?; and
- Finally, who will gain or lose more, the individual landowner (as to the value of the property) or the public (as to health, safety and welfare)?[44]

The *Golden* court added two other factors, besides the six listed by the trial court, to be considered.[45] First, "the recommendations of a permanent

[41] *Combined Inv.*, 605 P.2d at 544.
[42] 584 P.2d 130 (Kan. 1978).
[43] *Id.* at 135 ("When ... the focus shifts from the entire city to one specific tract of land for which a zoning change is urged, the function becomes more quasi-judicial than legislative.").
[44] *Id.*at 136 (looking at and expounding upon the factors laid out by the trial court).
[45] *Id.*

or professional planning staff; and [second,] the conformance of the requested change to the adopted or recognized master plan being utilized by the city."[46]

IV. INSTANT DECISION

Chief Justice Nuss delivered the opinion of the court. The court noted that the parties introduced several different legal issues within their briefs, but at oral arguments both Appellants and Intervenors conceded that their strongest claims were that the Board's amendments of the county zoning regulations were unlawful and unreasonable.[47]

The court first addressed whether the Board unlawfully amended the zoning regulation recommendations regarding wind farms first submitted by the planning commission.[48] According to the court, a city government can only amend or pass zoning regulations for a property in conformity with section 12-757(d) and failure to comply with the statute's procedures invalidates the municipality's actions.[49] The court noted that because it was reviewing and interpreting a statute, the issue presented was a question of law and, consequently, it was not bound by the trial court's interpretation.[50]

The court emphasized that, in interpreting a statute, the intent of the legislature is controlling and takes precedence over other rules.[51] If the language of the statute is plain and unambiguous, the court stated they need only interpret the language as it appears.[52] As such, an appellate court "cannot read into the statute language not readily found."[53] The court then addressed whether the Board had the power to adopt in part the planning commission's resubmitted proposal, as the Appellants argued the word "override" in the statute meant the Board had to completely reject or

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[46] *Id.*
[47] Zimmerman v. Bd. of County Comm'rs, 218 P.3d 400, 409 (Kan. 2009).
[48] *Id.*
[49] *Id.* at 410; *see also* KAN. STAT. ANN. § 12-757(d) (2008).
[50] *Zimmerman*, 218 P.3d at 410.
[51] *Id.*
[58] *Id.* (citing Steffes v. City of Lawrence, 160 P.3d 843 (Kan. 2007)).
[53] *Id.*

accept the proposal.[54] Previously, this court had addressed a similar issue in *Manly v. City of Shawnee*;[55] in that decision, the court provided three options for the governing body after receiving from the planning commission a recommendation for a zoning amendment.[56] The court held that the statute permitted a governing body to(1) approve the recommended action by a simple majority,(2) "take action *contrary* to the recommendation by a two-thirds majority vote," or (3) resubmit the recommendation to the planning commission with its reasons for approving or disapproving the action.[57]

Based on the court's earlier decision in *Manly*, which had equated "reject," "overrule," and "override to some extent" with "revise or amend," the court concluded that the Board did have the power to accept or reject in part the planning commission's recommendations.[58] Additionally, the court addressed the legislative history of section 12-757(d) and its earlier counterpart, K.S.A. 12-708.[59] The court noted that the previous statute lacked the second option to "take action *contrary* to the recommendation by a two-thirds majority vote."[60] Accordingly, the court, looking to *Manly*, determined that the legislature gave city boards the power to avoid pointless remands if they felt no other input or action was needed.[61]

The instant court next addressed whether the district court erred in determining that the Board's decision was reasonable. The court first articulated "rules governing the scope of judicial review of zoning matter."[62] It concluded it could only overturn an administrative body's decision when the action was clearly unreasonable on the facts presented to the zoning authority.[63] However, before determining whether the zoning board's decision was reasonable, the court looked to whether the

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[54] *Id.* at 411.
[55] 194 P.3d 1 (Kan. 2008).
[56] *Id.* at 6.
[57] *Zimmerman*, 218 P.3d at 411 (quoting *Manly,* 194 P.3d at 8).
[58] *Id.* at 412-13(quoting *Manly,* 194 P.3d at 8).
[59] *Id.*
[60] *Id.* at 412(quoting *Manly,* 194 P.3d at 8).
[61] *Id.* at 413.
[62] *Id.*
[63] *Id.*

zoning board's decision should be considered quasi-judicial rather than legislative.[64]

The Appellants sought a quasi-judicial characterization of the zoning board's actions because then eight factors from *Golden v. City of Overland Park* would control. The instant court noted that the Board acknowledged such characterization would not benefit them, but did not necessarily invalidate their claims.[65] The court noted there were several benefits to Appellants if the Board's decision was characterized as quasi-judicial rather than legislative, and why Appellants would seek such characterization.[66] First, "the greatest benefit of the quasi-judicial approach to rezonings is that it requires local governments. . . to engage in reasoned decision making based on articulated standards" and to "afford enhanced procedural rights to the proponents and opponents of a rezoning."[67] Second, the court noted that such characterization allows for closer judicial scrutiny.[68] However, if the Board's decision was characterized as legislative, then the court would apply a highly deferential standard.[69]

The court noted, however, that even when an action is considered quasi-judicial, Kansas courts have been reluctant to apply anything but the highly deferential standard.[70] Even specific tract zoning, which is usually labeled quasi-judicial, cannot really be considered such.[71] Under this reasoning the court concluded that the Board's actions were in fact legislative.[72]

Additionally, even though it was not required, the court applied the "reasonableness factors" from quasi-judicial cases (known as the *Golden*

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[64] *Id.* at 413.
[65] *Id.* at 414.
[66] *Id.* at 414-15.
[67] *Id.* at 414-15 (quoting 3 EDWARD H. ZIEGLER ET AL., RATHKOPF'S LAW OF ZONING AND PLANNING § 40.18 (4th ed. 2005)).
[68] *Id.* at 415.
[69] *Id.* (quoting 3 EDWARD H. ZIEGLER ET AL., RATHKOPF'S LAW OF ZONING AND PLANNING § 40.25 (4th ed. 2005)).
[70] *Id.*
[71] *Id.* at 416.
[72] *Id.*

factors) and found the Board acted reasonably.[73] The court looked at three factors to determine whether the board acted reasonably: first, whether aesthetics could be considered in determining zoning regulation; second, whether the Board's decision comported with the "county's Comprehensive Plan 2004;" and finally, whether the Board considered the wishes of the county's residents.[74]

First, the court addressed whether aesthetics could be considered in determining zoning regulations.[75] The court pointed out that case law has routinely permitted aesthetics to be considered in zoning regulations.[76] Additionally, the Kansas statute also expressly permits aesthetics to be considered.[77] The Board had presented sufficient findings of fact involving aesthetics, from their fears over the sheer size of the proposed wind farms and the height of the proposed windmills and generators, to maintaining the Tallgrass Prairie and keeping a rural aesthetic look for the county.[78]

Second, the court examined the Board's consideration of the wind farms in conjunction with the "county's comprehensive plans."[79] The court agreed with the district court's assessment that it was reasonable for the Board to conclude that such wind farms would not fit within the general goals and welfare determinations contained in the "comprehensive plan."[80]

Third, the court examined the Board's consideration of the wishes of the county's residents. Upon reviewing the Board's findings of facts, the court noted that the planning commission held several well attended public meetings concerning the zoning regulations for wind farms, and that a majority of those who attended voiced their opposition to such wind

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[73] *Id.*
[74] *Id.* at 418-19.
[75] *Id.* at 417.
[76] *Id.*
[77] *Id.* (noting statute provides that "[t]he governing body may adopt zoning regulations which may include, but not be limited to, provisions which: . . . (4) control the aesthetics of redevelopment or new development." (quotingKAN. STAT. ANN. § 12-755(a) (2008))).
[78] *Id.* at 417-19.
[79] *Id.* at 418.
[80] *Id.* at 419.

farms.[81] The court concluded that the residents' wishes, along with the aesthetics of the wind farms and their conformity with the "county's comprehensive plan," were all reasonable factors that the Board could consider and use to justify its decision to ban commercial wind farms.

The court next addressed whether the district court erred in precluding Plaintiffs and Intervenors from conducting discovery or submitting evidence.[82] First, the court concluded the district court did not err when it refused to allow the Board to be deposed.[83] The court concluded that such depositions could arguably violate the separation of powers.[84] As such, since discovery orders are under the discretion of the district court, it was reasonable for the judge to determine that such actions might violate the separation of powers doctrine and to refuse to require the Board to submit to deposition.[85]

The court next addressed whether the zoning regulation violated the Contract Clause of the United States Constitution.[86] First, the court delineated the standard for determining if a state law violated the Contract Clause:

> (1)[W]hether the state law has, in fact, operated as a substantial impairment of a contractual relationship; (2) whether there is a significant and legitimate public purpose behind the legislation[;] and (3) whether the adjustment of the contracting parties' rights and responsibilities is based upon reasonable conditions and is of appropriate character to the public purpose justifying the legislation's adoption.[87]

The court stated that in considering whether a substantial impairment had occurred, a court should consider whether the industry has

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[81] *Id.*
[82] *Id.* at 423.
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.* at 425; *see* U.S. CONST. art.I, § 10, cl.1.
[87] *Id.* at 425-26 (quoting Unified Sch. Dist. No. 443 v. Kan. State Bd. of Educ., 966 P.2d 68, 77 (1998)).

been regulated in the past.[88] The court concluded that land development and the commercial power generation industry are both heavily regulated, and "when regulation already exists it is foreseeable that changes in the law may alter contractual obligations."[89] Therefore, the court found that no substantial impairment occurred. [90] Additionally, the court noted that these contracts were formed after the Board first put a moratorium on wind farm permits and the Plaintiffs should have foreseen this possibility.[91] Even though the court found that no substantial impairment existed, the court noted that if such impairment had existed, the court still would have ruled in favor of the Board because the Board presented legitimate and significant purposes for the restriction that were reasonable and necessary.[92]

The Intervenors additionally argued that the Kansas Electric Public Act ("KEPUA") prevented the county from passing a zoning regulation like the one at issue in this case.[93] The court, however, adopted the view articulated by the district court.[94] The court noted that in the absence of an express, clear statement that the state legislature intended to preempt the regulation of a field, a county may adopt zoning regulations that affect that field.[95] The court concluded that the legislature only provided two instances, the placement of nuclear power plants and the placement of electrical lines over a certain size, which prevented local zoning boards from affecting electrical regulation and would not imply that they intended to include any others besides these two specific limitations.[96] Therefore, the Board could pass a regulation that indirectly affected the electrical field.[97]

Next addressed was Intervenors' contention that Congress preempted zoning regulations through the Public Utility Regulatory

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[88] *Id.* at 426.
[89] *Id.* at 427.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.* at 429; KAN. STAT. ANN. §§ 66-101 to -104 (2008).
[94] *Id.* at 429-30.
[95] *Id.* at 429.
[96] *Id.* at 430.
[97] *Id.*

Policies Act of 1978 (PURPA).[98] The court, similar to above, held that there is a strong presumption that Congress did not intend to displace state law because it did not expressly preempt the field.[99] Not agreeing with Intervenors' arguments, the court held that federal law regulating wind energy is so pervasive, it can reasonably be inferred that Congress did not leave room for the states to supplement it.[100] Intervenors cited five laws to demonstrate their contention, but the court concluded they failed to explain how these cases prevented the states from regulating wind energy and therefore dismissed the claim.[101]

After addressing and ruling on the merits of the case, the court briefly addressed whether the Intervenors' action was commenced within a timely manner and briefly concluded that the district court did have jurisdiction "to determine whether to allow intervention and [that it was] within its discretion [when it] chose to permit it."[102]

V. COMMENT

A. *A Policy Perspective*

A person's initial gut reaction to the decision in *Zimmerman* might be that the Kansas Supreme Court somehow got this wrong because the court upheld a ban on a green energy source. People might feel more inclined to support this decision if the activity being prohibited were a coal or a nuclear power plant. However, the situation that arose in *Zimmerman* placed a technology usually equated with environmentalism at odds with direct conservation of a dwindling natural habitat.

As noted earlier in this casenote, Wabaunsee County is located within the Flint Hills of Kansas, an area that contains the majority of the once vast Tallgrass Prairie.[103] This natural habitat has slowly been disappearing. The former governor of Kansas, Kathleen Sebelius,

[98] *Id.*; 16 U.S.C. §§ 2601-45 (2006).
[99] *Id.*
[100] *Id.* at 430-31.
[101] *Id.*
[102] *Id.* at 431-32.
[103] *Id.* at 405.

commissioned a special task force in 2003 to examine wind development within this area and, based on the task force's recommendations, discouraged such development.[104] Along with Governor Sibelius's recommendations, several other steps were taken to ensure the protection of this region, such as local landowners donating some 10,000 acres of the region to the Kansas Chapter of The Nature Conservancy.[105]

Although the Wabaunsee County Board of Commissioners' actions to prohibit commercial wind farms occurred nearly two years before the generosity of those local landowners, one can clearly see that preservation was on the mind of the lawmakers.[106] Given this perspective, it should come as no surprise that the Kansas Supreme Court voted unanimously to uphold the Board of Commissioners' prohibition of CWECS. From a purely policy perspective, this decision seems properly decided. Opponents of the Board's actions and the Kansas Supreme Court's decision might argue their actions have crippled Kansas's own mandates, which require 20 percent of their electricity to come from renewable energy sources by the year 2020.[107] However, Kansas ranks third in measured annual wind energy potential, at 1,070 billions of kWhs.[108] This position makes the most sense. With the state's vast amount of wind energy potential, there exist numerous other areas, which are not endangered habitats, where such CWECS can be developed to help meet Kansas's energy goals.

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[104] Brent Stahl et al., *Wind Energy Laws And Incentives: A Survey of Selected State Rules*, 49 WASHBURN L.J. 99, 110 (2009). The task force delivered its final report in 2004. *Id.*

[105] *Id.* These donations placed a conservation easement on the land that precludes development on the land if harmful to the tall grass prairie. *Id.*

[106] *Zimmerman*, 218 P.3d at 405-06 (noting that one goal in the Comprehensive Plan 2004 was to "[d]evelop realistic plans to protect natural resources such as the agricultural land, landscape, scenic views, and Flint Hills through regulatory policies.").

[107] Stahl et al., *supra* note 104, at 112 (citing H.B. 2369, Kan. Reg. Sess. (2009)).

[108] David Mears, Note, *Feasibility of Residential Wind Energy: The Lack of Regulatory Integration for Local Communities*, 37 REAL EST. L.J. 133, 136 (2008) (citing PACIFIC NORTHWEST LABORATORY, U.S. DEPT. OF ENERGY, AN ASSESSMENT OF THE AVAILABLE WINDY LAND AREA AND WIND ENERGY POTENTIAL IN THE CONTIGUOUS UNITED STATES 1 (1991), *available at* http://www.awea.org/newsroom/pdf/Top_20_States_with_Wind_Energy_Potential.pdf).

B. *A Legal Perspective*

From a legal standpoint, it is hard to argue with the court's interpretation of section 12-757(d). As the court noted, prior to the statute's adoption, a governing body, such as a county board of commissioners, did not have the authority to "override" the planning commission's recommendations.[109] A governing body, like the Wabaunsee County Board of Commissioners, could only adopt or return such recommendation.[110] As the *Manly* court noted in its interpretation of the statute, this additional authority (the "override" provision) was plainly added to give a governing body more freedom in its adoption, in parts or whole, of recommended zoning amendments, rather than requiring unnecessary remands and re-votes.[111] The *Zimmerman* court properly followed precedent when it allowed the Board to adopt the planning commission's recommendations in part. Following prior precedent provides clear and consistent guidelines for future county boards.

Additionally, based on well-developed case law, it would have been an improper departure from precedent had the court failed to recognize the reasonableness of the Board's actions. *Combined Investment*[112] and *Golden*[113] clarified that the district court's scope of review was limited to determining the lawfulness and reasonableness of the governing body's actions.[114] Interestingly, the Plaintiffs and Intervenors were the ones stressing the importance of the *Golden* factors,[115] while defendants sought a more deferential standard and favorable view from pre-*Golden* cases.[116] As noted in the instant decision,

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[109]*Zimmerman*,218 P.3d at 411.
[110]*Id.* at 410.
[111]*Id.* at 411 (citing Manly v. City of Shawnee, 194 P.3d 1 (Kan. 2008)).
[112]Combined Inv. Co. v. Bd. of County Comm'rs, 605 P.2d 533 (Kan. 1980).
[113]Golden v. City of Overland Park, 584 P.2d 130 (Kan. 1978).
[114]*Zimmerman*, 218 P.3d at 416.
[115]*Id.* at 414.The *Golden* factors are, in part: 1) the character of the neighborhood; 2) the zoning and uses of properties nearby; 3) the suitability of the subject property ... 7) the recommendations of a permanent or professional planning staff; and 8) the conformance of the requested change to the city's master or comprehensive plan."*Id.* (citing Bd. of Johnson County Comm'rs v. City of Olathe, 952 P.2d 1302, 1309-10 (1998)).
[116]*Id.*

the court recognized the Kansas appellate court's highly deferential standard toward the governing body's decisions, and held that from this standard the governing body only had to present facts that were reasonably related to its decision.[117] Although the court felt it was unnecessary, it still applied the *Golden* factors and held that the Board of Commissioners still acted reasonably.[118]

The court correctly concluded that aesthetics were an appropriate factor to consider in a governing body's decisions. Both case law and statute support this result.[119] *Gump*, *Ware v. City of Wichita*[120], *Robert L. Rieke Bldg. Co. v. City of Overland Park*[121], *Metromedia, Inc. v. San Diego*[122], all stand for the proposition that a governing body can consider aesthetics when they make zoning decisions and Kansas law even specifically provides that a governing body can consider aesthetics, along with other factors, in making zoning regulations.[123] Additionally, the governing body consulted the county comprehensive plan (something identified as a *Golden* factor), which specifically sought to preserve the scenic nature of the Flint Hills.[124] Also, the court properly noted that the wishes of county residents were correctly considered by the Board in their decision.[125]

It is important to note that the Kansas Supreme Court never conclusively stated that the Wabaunsee Board had to deny or accept Plaintiffs' zoning requests; it merely stated that the Board's decision was reasonable. This distinction stresses the highly deferential stance courts will take on zoning matters and other legislative actions. Ideally and correctly, the court would have taken the same view and analyzed the

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[117] *Id.* at 416.
[118] *Id.*
[119] *Id.* at 416-18.*See, e.g.*, R.H. Gump Revocable Trust v. City of Wichita, 131 P.3d 1268, 1274 (Kan. Ct. App. 2006); KAN.STAT. ANN. § 12-755(4) (2008).
[120] 214 P. 99 (Kan. 1923).
[121] 657 P.2d 1121 (Kan. 1983).
[122] 453 U.S. 490 (1981).
[123] *See* Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981); Ware v. City of Wichita, 214 P. 99 (Kan. 1923); Robert L. Rieke Bldg. Co. vs. City of Overland Park, 657 P.2d 1121 (Kan. 1983); KAN. STAT. ANN. § 12-755(4) (2008).
[124] *Id.* at 419.
[125] *Id.* at 421 (a factor identified in R.H. Gump Revocable Trust v. City of Wichita, 131 P.3d 1268, 1274 (Kan. Ct. App. 2006)).

Board's decision in the same way if it had approved CWECS. As long as the Board provides reasonable findings of facts to support its decision,[126] the court should uphold this decision, as well. This is a desirable result because it vests the power to the people of Wabaunsee County. If residents feel the Board made the wrong zoning decision, they can always express their disfavor through the democratic process and elect commissioners who would allow the construction of CWECS.

VI. CONCLUSION

The Kansas Supreme Court came to the correct decision in *Zimmerman*. Clearly, the factors that the Board considered in its decision were reasonable. Additionally, the court reaffirmed the tradition of Kansas courts in taking a highly deferential approach to such decisions. This approach is important because the people retain the power change such decisions by electing county board members who would make zoning decisions the people support. Although Wabaunsee County residents likely will not take action to ensure CWECS is allowed because of the delicate habitat in which their county is located, residents from other counties may take notice that the zoning board's decisions are likely to be upheld, and if they would like such systems, they will vote for members who share the same ideals. Additionally, the Court's decision might spur the Kansas Legislature to take such regulation of wind systems out of the jurisdiction of individual counties in order to ensure uniformity throughout the state and promote the overall welfare of the state. Whether this is a good thing is debatable. However, what is certain is that the Flint Hills and Tallgrass Prairies are habitats that people are willing to protect and that Kansas courts are unlikely to overrule zoning decisions.

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[126]Which, in this case, could have been as simple as concluding that CWECS would not harm the Tallgrass Prairies or affect the aesthetics of the Flint Hills because of some speculative reason.