# Wind Energy/Wind Turbines: United States District Court Addresses Nuisance Claim



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A United States District Court (W.D. New York) ("Court") addressed in a July 14th decision and order ("Order") an issue arising out of the operation of wind turbines. See *Andre, et al. v. Invenergy LLC*, 2022 WL 2759249.

The wind turbines were the subject of a common law nuisance action.

Invenergy LLC ("Invenergy") operates wind turbines in Wyoming County, New York. Plaintiff Mark Andre and others (collectively, "Plaintiffs") filed a common law action alleging the operation of the wind turbines constituted both a nuisance and negligence.

Invenergy filed a motion for summary judgment to dismiss the claims.

The Court determined that Invenergy's motion did not "meaningfully distinguish between the two theories" and as a result focused on the Plaintiffs' nuisance claim. It noted the elements of a claim for private nuisance include:

- an interference substantial in nature,
- intentional in origin,
- unreasonable in character,
- with a person's property right to use and enjoy land, and
- caused by another's conduct in acting or failure to act.

Invenergy's motion focused on:

. . . the reasonableness and substantiality of the alleged interference with Plaintiffs' use and enjoyment of their property. . .

Invenergy carried the initial burden of demonstrating that no material factual issues exist with regard to these elements.

The Court stated that an interference with the private use and enjoyment of another's land is unreasonable when the gravity of the harm outweighs the social value of the activity alleged to cause the harm.

Invenergy argued that its windfarm (i.e., the wind turbines) was not encompassed because:

- It is part of an overall plan adopted in New York at the state and local levels
- There is no evidence to support a finding that it violates the terms of its special use permit or any other relevant regulations

The Court responded that the fact a defendant is in compliance with all relevant laws will not necessarily provide a defense to a nuisance claim.

Cited as an example by the Court was its belief that, despite the fact that Invenergy was in compliance with a local noise ordinance, the Court could still consider the noise in terms of:

- Character
- Volume
- Frequency
- Duration
- Time
- Locality

A New York case was cited in which it held that noise alone could create a nuisance if it prevents sleep or otherwise disturbs materially the rest and comfort of the residents.

Invenergy's failure to contend that its wind turbines were silent during sleeping hours was held to undercut its reliance upon a case involving a landfill and a related issue. See *Chenango, Inc. v. County of Chenango*, 256 A.D. 3d 793 (3d Dept. 1998).

The Court also distinguished case law cited by Invenergy in which the federal Telecommunication Act of 1996 provided a preemption argument in regard to claims of nuisance arising from the installation of wireless telecommunications equipment.

An argument that the evidence developed by the Plaintiffs did not support a finding that the effects alleged are substantial were rejected. Testimony from a Plaintiff regarding noise from the wind turbines causing her to get in her car and drive away in the middle of the night was noted by the Court. It held that arguments regarding whether such effects are substantial go to the weight of the evidence. Further, the cited testimony of others was held to create a reasonable inference that interference with Plaintiffs' use and enjoyment of their property was more than "fanciful, slight, or theoretical."

Therefore, Invenergy was held to have failed to demonstrate there is no issue of fact as to the substantiality of the interference and its motion for summary judgment was denied.

A copy of the Order can be downloaded here.