

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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TUSCOLA AREA AIRPORT ZONING BOARD OF  
APPEALS,

Appellant,

v

MICHIGAN AERONAUTICS COMMISSION,  
DEPARTMENT OF TRANSPORTATION, and  
PEGASUS WIND, LLC,

Appellees.

FOR PUBLICATION  
February 24, 2022

No. 357209  
Ingham Circuit Court  
LC No. 20-000206-AA

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TUSCOLA AREA AIRPORT AUTHORITY,

Appellant,

v

MICHIGAN AERONAUTICS COMMISSION,  
DEPARTMENT OF TRANSPORTATION, and  
PEGASUS WIND, LLC,

Appellees.

No. 357210  
Ingham Circuit Court  
LC No. 20-000207-AA

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Before: RICK, P.J., and MURRAY and SHAPIRO, JJ.

MURRAY, J. (*concurring in part, dissenting in part*).

The majority opinion correctly concludes that the Tuscola Area Airport Zoning Board of Appeals is not an “aggrieved party” under the tall structure act, MCL 259.489, and MCR 7.103(A). However, for the reasons briefly set out below, I depart from the conclusion that the Tuscola Area Airport Authority (Airport Authority) is not an aggrieved party, and therefore would reverse in Dkt. No. 357210.

As the majority notes, an “aggrieved party” for purposes of this statute and court rule requires that a party “have some interest of a pecuniary nature in the outcome of the case and not

a mere possibility arising from some unknown future contingency.” *Olsen v Chikaming Twp*, 325 Mich App 170, 180-181; 924 NW2d 889 (2018), quoting *Federated Ins Co v Oakland Co Road Comm’n*, 475 Mich 286, 291; 715 NW2d 846 (2006). As the *Federated Ins Co* Court stated:

[T]o have standing on appeal, a litigant must have suffered a concrete and particularized injury, as would a party plaintiff initially invoking the court’s power. The only difference is a litigant on appeal must demonstrate an injury arising from either the actions of the trial court or the appellate court judgment rather than an injury arising from the underlying facts of the case. [*Id.* at 291-292.]

Here, the Airport Authority is an aggrieved party because (1) the airport and its customers are the exclusive groups the permitting decision is concerned with, and the Airport Authorities statutory duties could be impacted by the decision to allow the wind turbines to be built, (2) record evidence shows the high likelihood that the issuance of the permits will cause the Airport Authority to lose revenue, and (3) the combination of (1) and (2) show that the Airport Authority will suffer damage in a way unlike others in the community.

First, with respect to the Airport Authority’s duties, there is no doubt that it has broad statutory responsibility over all aspects of the airport, including the landing facilities. MCL 259.622. It also has the power to sue, tax, and otherwise control the entirety of airport operations. *Id.* The safety of planes landing and taking off from the airfield governed by the Airport Authority is of paramount concern to the Airport Authority. Thus, the decision to issue a tall building permit that allows for the placement of wind turbines in the immediate vicinity of the airport, and which may have real consequences to certain planes seeking to use the airport, causes the Airport Authority a particularized injury. Evidence from the administrative record presented to the circuit court shows that with the placement of these wind turbines, certain planes seeking to use the airport will be required to enter a higher airspace, which in turn requires those planes to utilize a steeper decline to land at the airport, and a steeper incline to take-off. This change in flight patterns causes actual, particularized safety issues for the Airport Authority.

Indeed, tied directly to the issues of airspace and airplane descents to, and take-offs from, airports, and the placement of tall structures that could affect those descents and ascents, is the tall structure act. MCL 259.481 *et seq.* The stated purpose of the tall structures act is in part to “promote the safety, welfare, and protection of persons and property in the air *and on the ground* by regulating the height, location, and visual and aural identification characteristics of certain structures.” 1959 PA 259 (emphasis added). Because of that purpose, the act contains detailed guidelines on what the Michigan Aeronautics Commission (MAC) must evaluate to determine the effect, if any, a tall structure will have on airspace around airports, including alterations to descents and ascents. See MCL 259.482a(b), (g), and MCL 259.481(e). Thus, the legislature has recognized that there is a direct corollary between the permitting of tall structures near airports and “the safety, welfare, and protection of persons and property in the air and on the ground.” This alone shows that the Airport Authority’s concern for safety on the grounds it has jurisdiction to

oversee, and for the planes and passengers flying into the airport, is real, particularized, and substantial.<sup>1</sup>

Second, the likely potential that some planes may no longer use the airport because of the undisputed need to enter higher airspace and then engage in a steeper descent to land (and steeper incline to take-off), will cause the airport to lose revenue. Evidence presented showed that on average each plane landing at the airport spends \$262.00. Thus, even if one less plane that would have otherwise used the airport diverts to another, the airport will have suffered a pecuniary loss. Because it is not the amount of pecuniary loss, but the fact of it occurring that counts, the Airport Authority established a pecuniary loss.<sup>2</sup>

These two factors together establish that the Airport Authority also has “special damages different from those of others within the community.” *Olsen*, 325 Mich App at 193. Quite simply, Congress and the Michigan Legislature required these statutory investigations by the FAA and MAC regarding these wind turbines precisely to ensure that the safety of *the airport*, and the planes and passengers that use it, is not jeopardized. Because the Airport Authority is *the* legal entity charged with control over the airport, and a decision to grant these permits only impacts the airport and the customers that use it, I would hold that the Airport Authority is an aggrieved party and the circuit court erred in not addressing the merits of the Airport Authorities appeal.

/s/ Christopher M. Murray

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<sup>1</sup> Supporting the legislative determination that tall structures can have an effect on safety in the air and on the ground was public comments from several experienced pilots who have used the airport. That evidence showed that a new decline for landings (and inclines for take-offs) resulting from the use of a higher airspace, and the likely need to circumnavigate the wind turbines by certain planes, may either decrease the safety of landing on the airport runway or cause planes to divert to another airport to avoid these concerns. There was also undisputed evidence that the airport’s radar would be impacted if and when certain planes flew over the turbines. Additionally, the Federal Aviation Administration (FAA) determined that the wind turbines would interfere with air navigation and the use of instrument flight rule procedures, but concluded the interference would not be substantial.

<sup>2</sup> It is true that, unlike in a typical case where a money judgment is entered against a party, there is no absolute certainty as to the extent of any pecuniary loss the Airport Authority may experience. But under these circumstances, where the challenge is to permits that would allow future development of the turbines, it would be impossible to prove with absolute certainty a pecuniary loss.