

Access to Wind/Windfarm: Maryland Appellate Court Addresses Dispute Between Adjacent Landowners



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A Court of Appeals of Maryland (“Court”) addressed in an August 16th Opinion a dispute between a windfarm owner and neighboring coal cleaning operation. See *Gestamp Wind North America, Inc., et al. v. Alliance Coal, LLC, et al.*, WL 3612747.

Windfarm owner Gestamp Wind North America, Inc., and its affiliates (collectively “Gestamp”), sued Mettiki Coal, LLC and its affiliates (collectively “Mettiki”), claiming that the Mettiki’s coal cleaning operation was liable for:

- Obstructing the flow of air across the windfarm which allegedly created a nuisance and violated the duties of a shared easement, and
- Creating coal dust that damaged the turbines and blades allegedly resulting in increased maintenance, cleaning costs, and future remedial upgrades to mitigate the damage.

Mettiki has operated a coal cleaning and processing plant near Oakland, Maryland, since 1977. The process includes separation of coal from other materials. Refuse is generated that has been stored permanently on-site in large piles. The Maryland Department of the Environment (“MDE”) had by 2012 approved refuse piles to a height of 3,285 feet.

Gestamp applied to the Maryland Public Service Commission (“MPSC”) for a Certificate of Public Convenience and Necessity in 2009 for construction of a windfarm located adjacent to Mettiki’s operations. Gestamp referenced the Mettiki piles in its application and noted “some of which have reached heights of 3000 [feet].”

In 2017 Mettiki applied to MDE for a 37-foot increase in the height limitation. Gestamp opposed the increase. It subsequently filed an action alleging Mettiki’s refuse piles resulted in interference that amounted to nuisance, breached an agreed easement, and caused damage to the windfarm.

Interference with Air Flow

Gestamp alleged that the refuse piles created a nuisance by reducing the velocity of the wind crossing the properties. This was alleged to reduce the performance of the turbines, thereby substantially interfering with Gestamp’s ability to use the property to generate electricity.

In analyzing the issue, the Court rejected applying a common law rule allowing a property owner to prevent a neighbor from obstructing the air or light. It noted that since at least 1857, Maryland has

avored civic development and rejected allowing property owners from enforcing air and light easements of their neighbors that could interfere with growing towns.

The Court states no restrictions are imposed on a property owner regarding air flow available to neighbors if applicable rules (such as zoning) are followed. Gestamp did not dispute Mettiki's compliance with applicable permits and rules. Therefore, the fact that the piles did or did not block the wind was irrelevant.

Gestamp also attempted to claim a right-of-way easement that had been provided by Mettiki to access the windfarm imposed a duty on Mettiki to do nothing that would interfere with the efficiency of the windfarm turbines. This claim was based on a section of the easement agreement that stated Mettiki:

. . . shall not interfere with [Gestamp's] use of the Premises or allow any uses of the Property immediately adjacent to the Premises that would interfere with its use by [Gestamp] as contemplated herein.

The Court found that scope of "property" here was limited to the use of the easements themselves. Nothing in the agreement restricted Mettiki's ability to make use of the remainder of its property. Therefore, Gestamp had no basis to claim Mettiki had a duty to restrict its operations from affecting air flow across the rest of the property.

Coal Dust

Gestamp raised several allegations regarding the coal dust associated with the Mettiki property. They included:

- Future revenue losses resulting from additional maintenance and repairs,
- Increased maintenance expenses cause by coal dust from Mettiki's property,
- Future damage to the control mechanisms of the wind turbines, and
- Future expenses related to cleaning and maintaining the turbine blades to alleviate coal dust damage.

Only the final issue survived until trial. Gestamp either withdrew or conceded that it could not actually prove the other claims. Accordingly, the only issue the trial court considered was the increased costs related to the turbine blade maintenance and cleaning.

Gestamp premised its argument on a theory that the coal dust present resulted in increased particulate matter adhering to the turbine blades. Because of this, Gestamp claimed it was suffering increased cleaning and downtime costs when the turbines were taken offline to clean.

Complicating this claim, Gestamp also sought future costs to apply a hydrophobic coating to the blades. The coating was alleged to reduce the future impacts of the coal dust and therefore cleaning costs.

To support the claim, Gestamp's witness would have testified to the regularity of windfarm maintenance and cleaning, and the effectiveness of the hydrophobic coating preventing particulate accumulation. However, Gestamp never disclosed the witness as an expert before trial. Further, Gestamp is stated to have not offered any educational or professional experience to the trial court supporting the witness's qualifications.

Apparently, no hydrophobic coating manufacturer recommended using the product for the purpose of reducing particulate accumulation. Only the witness's unqualified personal observations supported the claim that the hydrophobic coating would reduce coal dust accumulation. Similarly, the witness's definition of "regular" cleaning was derived solely from his personal review of technical manuals and experiences with Gestamp's two other windfarms (as opposed to an industry recognized standard).

Both matters were held to include the type of information on which only an expert could opine. The Court agreed with the reasoning of the trial court in finding that the lack of qualifications disqualified the witness from testifying as to either matter. Thus, Mettiki's effort to bar Gestamp's witness from testifying

as an unqualified expert was meritorious. Consequently, Gestamp lost its critical witness supporting its sole remaining coal dust claim and any chance on prevailing on the coal dust issue.

Conclusion

The Court affirmed the judgment of the trial court in favor of Mettiki.

A copy of the Opinion can be downloaded [here](#).