In the Supreme Court of Iowa

NO: 18-1431

BERTHA MATHIS, STEPHEN MATHIS,
TILLFORD EGLAND, THOMAS STILLMAN,
LOIS STILLMAN, MICHAEL REDING,
and SUZANNE REDING,

Plaintiffs-Appellants,

vs.

PALO ALTO COUNTY BOARD OF
SUPERVISORS,

Defendant-Appellee

and

PALO ALTO WIND ENERGY LLC and
MIDAMERICAN ENERGY COMPANY,

Intervenors-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT FOR PALO ALTO COUNTY
HONORABLE NANCY L. WHITTENBURG, JUDGE

AMENDED APPELLANTS' BRIEF AND ARGUMENT

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STATEMENT OF THE CASE

1. Nature of the Case

Plaintiffs filed an Amended Petition for Declaratory Judgment and Writ of Certiorari (Amended Petition)(App. Vol. 1, p. 71), challenging the actions of the Palo Alto County Board of Supervisors in adopting a wind energy ordinance and approving an application for construction of a wind energy project. Palo Alto Wind Energy LLC and MidAmerican Energy Company intervened (Motion to Intervene)(App. Vol. 1, p. 51).

The Intervenors filed a Motion for Summary Judgment (Motion for Summary Judgment)(App. Vol. 1, p. 448). The district court granted the Motion for Summary Judgment on July 25, 2018 (Ruling)(App. Vol 2, p. 1248).

Plaintiffs filed a Notice of Appeal on August 20, 2018 (Notice of Appeal)(App. Vol. 2, p. 1261).

2. Statement of the Facts

In 2015, Invenergy LLC, the parent company of Intervenor, Palo Alto Wind Energy LLC, approached Palo Alto County officials with a plan to construct a wind energy project in the county. It was anticipated that, after preliminary development activity, MidAmerican Energy Company would own, construct and operate the project.

Beginning in late 2015 and continuing until September 27, 2016, Palo Alto County officials, primarily County Attorney Peter Hart, worked with Invenergy and MidAmerican to craft a wind energy ordinance that would be acceptable to Invenergy

and MidAmerican. The Palo Alto County Board of Supervisors formally adopted the ordinance on September 27, 2016 (Exhibit 128)(App. Vol. 1, p. 345).

In August of 2017, Palo Alto Wind Energy applied for a permit pursuant to the wind energy ordinance to construct a wind energy project in Palo Alto County. The wind energy ordinance requires that the entity that intends to own and operate the wind energy project must be the entity to submit the application for a permit (Exhibit 128)(App. Vol. 1, p. 345). At the time the application was submitted it was MidAmerican that intended to own and operate the project (Fehr deposition, p. 22-24; Kunert e-mail, Ex. 6; Fehr public meeting statement, Ex. 7)(App. Vol. 1, p. 96; Vol. 2, p 1241; Vol. 2, p. 1244).

During their consideration of the application submitted by Palo Alto Wind Energy the supervisors were presented with letters from the Iowa Department of Natural Resources and the Iowa State Archaeologist (Ex. 122, 123, 124)(App. Vol. 1, p. 325,331,337), recommending that certain measures be undertaken to avoid or mitigate environmental and cultural impacts from the wind energy project. The supervisors also received a report from acoustic expert Richard James, expressing the opinion that the noise from the project would

likely violate the county's ordinance (James report, Ex. 125)(App. Vol. 1, p. 339).

Notwithstanding the foregoing, the supervisors passed a resolution approving the application to construct the wind energy project (Construction Resolution)(App. Vol. 1, p. 36).

Other facts will be developed during the argument sections of this Brief.

ROUTING STATEMENT

Pursuant to Iowa Rule of Appellate Procedure 6.1101(3), this case may be transferred to the Iowa Court of Appeals.

STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Summary judgment is appropriate only if there is "no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Iowa Rule of Civil Procedure 1.981(3). The party seeking the summary judgment has the burden of proof, and the court considering a motion for summary judgment must view the evidence in the light most favorable to the nonmoving party. Clinkscales v. Nelson Sec., Inc., 697 N.W.2d 836, 841 (Iowa 2005).

A fact question exists unless "no reasonable minds can differ on how the issue should be resolved." Walker v. Gribble, 689 N.W.2d 104, 108 (Iowa 2004). The court must accord to the nonmoving party every legitimate inference that can be reasonably deduced from the record. An inference is legitimate

if it is rational, reasonable, and otherwise permissible under the governing substantive law, and not based on speculation or conjecture. Phillips v. Covenant Clinic, 625 N.W.2d 714 (Iowa 2001). Summary judgment is proper when the record reveals only a conflict over the legal consequences of undisputed facts. The moving party is required to affirmatively establish that the undisputed facts support judgment under the controlling law. Castro v. State, 795 N.W.2d 789 (Iowa 2011).

Even if the facts are undisputed, summary judgment is not proper if reasonable minds could draw different inferences from them and reach different conclusions. Clinkscales, 697 N.W.2d at 841. A court deciding a motion for summary judgment must not weigh the evidence, but rather simply inquire whether a reasonable factfinder at trial faced with the evidence presented could return a verdict for the nonmoving party. Mere skepticism of a plaintiff's claim is not sufficient reason to prevent the plaintiff's claims from being tried. Id.

Questions of negligence are ordinarily for the fact-finder at trial, and "only in exceptional cases should they be decided as a matter of law." Clinkscales, 697 N.W.2d at 841. This is because negligence is a concept subject to interpretation that depends on the specific facts of the case.

Daboll v. Hoden, 222 N.W.2d 727 (Iowa 1974). This same standard should apply to the question of whether government action is arbitrary, capricious, or unreasonable.

Action is arbitrary and capricious when it is taken without regard to the law or facts of the case. Soo Line R.R. v. Ia. Dept. of Transp., 521 N.W.2d 685 (Iowa 1994). An action is unreasonable when it is clearly against reason and evidence. Id.

ARGUMENT

I. THE DEFENDANT'S ADOPTION OF THE WIND ENERGY ORDINANCE IN THIS CASE WAS ARBITRARY, CAPRICIOUS, AND UNREASONABLE.

The power to adopt an ordinance must be exercised reasonably or the ordinance is void. McQuillin, Municipal Corporations, § 18:4. The courts have the task of determining whether an act is so unreasonable and arbitrary as to be illegal, void and unenforceable. Bushby v. Washington County Conservation Bd., 654 N.W.2d 494 (Iowa 2002). An illegality is established if the governing body has not acted in accordance with a statute; or if its actions were unreasonable, arbitrary, or capricious. Perkins v. County. Bd. of Supervisors, 636 N.W.2d 58 (Iowa 2001). Indeed, the authority of a board of supervisors is not unlimited, but rather, there are procedural and substantive limitations on the actions a board may take. Id. at 65. Substantively, a board of

supervisors may not enact ordinances which are unreasonable, arbitrary and capricious, or inconsistent with the spirit or design of the governing statutes. Id.

In this case the wind energy ordinance was essentially written by Invenergy and MidAmerican. This conclusion is based on the following facts:

a. In late 2015, Invenergy, through Mark Zaccone, approached Palo Alto County Zoning Administrator, Joe Neary, and the County Supervisors, to describe a wind energy project that Invenergy and MidAmerican planned to develop and construct in Palo Alto County. Mr. Zaccone asked Mr. Neary if the county had a wind energy ordinance (Zaccone Depo. p. 8)(App. Vol. 1, p. 180). Mr. Zaccone then provided samples of wind energy ordinances from other counties (Zaccone Depo. p. 10)(App. Vol. 1, p. 181).

b. Mr. Zaccone attended a meeting of the Palo Alto County Planning and Zoning Commission concerning the creation of the wind energy ordinance for the county (Zaccone Depo. p. 16)(App. Vol. 1, p. 182). At that meeting, as Mr. Zaccone described it, "Planning and Zoning obviously was not prepared, didn't understand wind ordinances, and they made a very quick vote with some parameters. We - "we" meaning Invenergy – explained what those parameters could lead to, ... And it appeared one or two on the P & Z board kind of took control and put

out some rather onerous setbacks, and that's when we explained to them what that would do to a project or to any development in the county." (Zaccone Depo. p. 16-17)(App. Vol. 1, p. 182-183).

c. Mr. Zaccone then gave the following testimony in his deposition (Zaccone Depo. p. 18-19)(App. Vol. 1, p. 183):

> Q. Do you think that the planning and zoning commission has an obligation to make [the parameters within the ordinance] not onerous for the project?
> A. I think the planning and zoning commission has an obligation to allow development in their community that protects the citizens but yet lets the development happen.
> Q. Is it your opinion or your position that a county should always allow a wind energy project to proceed?
> A. If it benefits the county, yes.
> Q. In your opinion, would a wind energy project always benefit the county?
> A. I don't see any reason where it would not benefit a county.

d. Mr. Zaccone was then asked in his deposition about the April 14, 2016, meeting of the Planning and Zoning Commission, where the Commission made recommendations, as follows (Zaccone Depo. p. 20-22)(App. Vol. 1, p. 183-184):

> Q. Did you do anything in response to the actions taken at that meeting with respect to those recommendations made by the planning and zoning commission?
> A. Yes.
> Q. What did you do?
> A. I tried to educate the supervisors on what those – what setbacks would do if enacted, that – the setbacks that the P & Z were suggesting, what it would do to wind development.
> Q. And how and when did you talk to the supervisors?
> A. Would have been in either individual meetings or meetings two at a time, explaining to them exactly what

each setback or each parameter does, and what are industry-in-Iowa accepted parameters, giving them examples of those as well.
Q. So is it fair to say that you were trying to persuade the supervisors not to accept the recommendations from Planning and Zoning?
A. I don't think it's fair to say that. I think I was trying to educate them so they could make an informed decision.
Q. But you did that so that they would not accept the planning and zoning recommendations?
A. I did it so they would understand what accepting and not accepting it would do.
Q. But, of course, you wanted them not to accept the recommendations, correct?
A. Correct.

e. Kevin Parzyck, Invenergy Vice-President, was questioned at his deposition, concerning Depo. Ex. 113 (App. Vol. 1, p. 281), as follows (Parzyck Depo. p. 23-27)(App. Vol. 1, p. 147-148):

Q. There it is, Exhibit 113 [letter dated 8-26-16]. Have you seen this before?
A. I have.
Q. In fact, I think you signed it.
A. I did. Yes, I signed it.
Q. And that's a letter from Invenergy to each of the individual county supervisors; is that correct?
A. Yes.
Q. What caused that letter to be written?
A. My recollection is that at the time there was a draft wind ordinance that had been circulated, and we wished to put into writing the perspective we had as a developer as to the impact of that ordinance on the ability to build a cost-effective project in the county.
Q. Looking at page 9 of that letter, toward the middle of the page in bold letters, it says, "Without the incorporation of the changes recommended above for the specific sections referenced immediately below, Invenergy will not be able to continue to progress to development of the proposed 340 megawatt Palo Alto Wind Energy project in Palo Alto County." Obviously, you wrote that or at least signed that language.

A. That's right.
Q. Why did you think that stating that the project would not be able to go forward would have an impact on the supervisors?
A. The desire of our comments in this letter was to inform the board as to the commercial implications. As a seasoned wind developer, we wanted to give them our perspective as to the ability to build a cost-effective project. Obviously we also had an interest to have something that was workable within the constraints of our project.
Q. I guess my question is, that seems like pretty strong language, and I'm wondering why – or why you thought that strong language would influence the supervisors to accept your position.
A. I can't speak to the supervisors' position. We wanted to make it very clear, though, that there are parameters within ordinances, wind ordinances, that can be extremely detrimental to the development of a wind project. And if the desire of the county was to develop wind in a cost-effective way, we wanted to be very clear as to what that was. So, it's strong. It's still up to the supervisors to make the call as to what they would like the constraints to be.

****

Q. Did anybody give you or the folks at Invenergy any indication that you could make revisions to the proposed ordinance?
A. I don't recall – I don't know.
Q. Okay. So why did you think you could?
A. We wanted to make sure that the perspective of a developer was part of the process. And as we participated in ongoing board and planning commission meetings, there were discussions about what is – what's viable. There was a lot of discussion within the community. So we wanted to put our perspective into the mix, because we were investing in the area and thought that the commercial aspect needed to be incorporated into this ordinance process.

f. On August 26, 2016, representatives of Invenergy and MidAmerican sent a letter to the Palo Alto County Supervisors (Depo. Ex. 113)(App. Vol. 1, p. 281). The letter expressed

concerns about the draft ordinance as recommended by the Planning and Zoning Commission. On page 9 of Ex. 113, the following language appears:

> Without the incorporation of the changes recommended above for the specific sections referenced immediately below, Invenergy will not be able to continue to progress the development of the proposed 340-megawatt Palo Alto wind energy project in Palo Alto County.

The "specific sections" referred to in the above quote pertained to protection of drainage tile, setback distances, and shadow flicker.

When Adam Jablonski, the MidAmerican project manager who co-signed Ex. 113, was asked whether the final ordinance adopted by the supervisors acceded to the demands in the above-quoted language from Ex. 113, he testified as follows (Jablonski Depo. p. 37-39)(App. Vol. 1, p. 117):

> Q. I'm asking whether or not you know whether those six items that were set out on page 9 of the August 26th letter were adopted by the county in the final ordinance, as you requested.
> A. Okay. I'd like to go through them one by one and answer each one individually, if that's okay -
> Q. Sure.
> A. - which may take some time.
> The section numbers don't line up the same, so I'm going to have to -
> Regarding the first bullet item, which is referenced in the letter as Section 4.e, which relates to the drainage tile, it looks like they did incorporate the public part of that.
> Regarding Section 5.b, our recommendation of between 1,000 and 1,320 feet, they did not incorporate, but they did incorporate the 1,500 foot, which Invenergy thought they could do, that 1,500 foot. So that is incorporated into 5.b.

> Regarding the third bullet,5.c, the final ordinance did adopt the recommendation in the letter of 120 percent of total tip height setback.
>
> Regarding the fourth bullet in the letter where it references Section 5.o, the ordinance did implement the recommendation of the 1,000-foot setback for wind energy accessory buildings or structures.
>
> Regarding the fifth bullet in the letter, where it references Section 5.p regarding the shadow flicker, you know, not word for word, but generally they adopted a 30-hour-per-year on a non-participating permanent residential dwelling limit.
>
> Q. And that was Option Two in your letter; is that right?
>
> A. They don't line up word for word, but generally it lines up with the stated recommendation of 30 hours.
>
> Q. Yes. Okay.
>
> A. Regarding the last bullet in the letter, in regards to Section 6.a.iii, the ordinance did incorporate the public part of the drainage tile recommendation.

So the record is clear that every one of the demands imposed by Invenergy and MidAmerican were satisfied by the supervisors.

The Planning and Zoning Commission met on September 11, 2016, and submitted recommendations for the proposed ordinance to the supervisors (Depo Ex. 111)(App. Vol. 1, p. 246). It was apparently that draft of the ordinance, incorporating the recommendations of the Planning and Zoning Commission that triggered the August 26, 2016, letter from Invenergy to the supervisors (Depo. Ex. 113)(App. Vol. 1, p. 281). And, as explained previously, the supervisors acceded to the demands of Invenergy.

In summary, then, the supervisors essentially let Invenergy and MidAmerican write the ordinance. The supervisors arbitrarily rejected the recommendations of their own Planning and Zoning Commission, and adopted what Invenergy and MidAmerican wanted.

g. County Supervisor Linus Solberg testified in his deposition (Solberg Depo. p. 17-19)(App. Vol. 1, p. 159) as follows:

> Q. I'm going to show you Exhibit 113. Have you seen this before?
> A. Yeah, I think so. Yep.
> Q. What do you recall about that letter?
> A. That they didn't want to put it at a half a mile, or whatever, and they said that they couldn't, you know -
> Q. How did you -
> Let me put it this way: What was your response to that letter?
> A. Well, I didn't think that they were trying very hard to -
> I didn't think they wanted to do any work, that if they wanted – if they - that they should have them a half mile and they should go out and try and get a waiver.
> I didn't think Invenergy -
> You know, the problem here is Invenergy and MidAmerican. Invenergy gets more money the more windmills they put up, so – you know.
>
> **********
>
> Q. If you look at page 9 of that letter [Depo. Ex. 113] -
> A. Okay.
> Q. - in the middle of the page in bold, it says, "Without the incorporation of the changes recommended above for the specific sections referenced above for the specific sections referenced immediately below, Invenergy will not be able to continue to progress the

development of the proposed 340 megawatt Palo Alto Wind Energy project in Palo Alto County."
A. Yeah. They threatened us that all the time, from the very beginning.
Q. How else -
A. And some people bought it.
Q. Of the supervisors, you mean, or -
A. I think that maybe some supervisors. Maybe people in town, you know. They thought they'd leave. Yeah.
Q. Did the supervisors discuss this letter?
A. I think we discussed it, yeah. I think that -
Me, I'd like to have – if a vote on a corporation goes one way, that, you know, everybody else on the board is supposed to support it. So I think that we discussed it, but I – You know, I didn't think we were doing due diligence.

h. Deposition Exhibit 114 (App. Vol. 1, p. 291) is an e-mail from County Attorney Peter Hart dated August 28, 2016 (two days after the letter from Invenergy and MidAmerican, Depo. Ex. 113)(App. Vol. 1, p. 281), stating in part, "The attached second ordinance is the Palo Alto County draft setting out the agreed distances and definitions with Invenergy in preparation for the Supervisors meeting Tuesday August 30th, 2016. . . . The Supervisors intend to set out the proposed ordinance containing the agreed input from Invenergy (MidAmerica)." This e-mail appears to indicate that as a result of the August 26, 2016, letter from Invenergy and MidAmerican, there was an agreement with Invenergy and MidAmerican to include in the ordinance the terms that Invenergy and MidAmerican wanted.

i. Deposition Exhibit 118 (App. Vol. 1, p. 323) is an e-mail from County Attorney Peter Hart dated 9-17-16, stating in part, "I was contacted this morning (9/17/2016) and was requested to now present two possible versions of the Palo Alto Wind Energy Conversion Systems Ordinance. . . . 1) The first alternative uses the 'Standalone' version of the ordinance with the application submitted directly to the Board of Supervisors but with an 1,800 foot setback and a willingness to increase from '30' hour provision on the 'flicker' limitation. 2) The second alternative uses the 'P & Z' language with the CUP application submitted first to the Planning and Zoning Commission and then to the BOS, using a 1,500 foot setback and a '30' hour provision on the 'flicker' limitation." This e-mail was sent to various representatives of the wind project developers, and Mr. Hart asked those persons to give him their thoughts on the two alternatives.

County Supervisor Craig Merrill testified in his deposition (Merrill Depo. p. 32-34)(App. Vol. 1, p. 134-135) as follows:

> Q. I'm going to show you Exhibit 118. That appears to be an e-mail from Peter Hart saying that he had been contacted about presenting two versions of the ordinance. Is that how you interpret that?
> A. Yeah. Yes.

****

Q. Are you aware of where the idea of two versions came from?
A. No.
Q. Do you recall if – the meeting where the second reading of the ordinance was conducted, that two were presented to the supervisors, a stand-alone version, as it's called here, and another one that refers to a conditional use permit?
A. I do not remember if that was specifically talked about at the second reading. I don't remember that. I mean, I remember the stand-alone thing, you know, but I don't remember if it was at that particular meeting, . . .
Q. What do you recall about the stand-alone issue?
A. Well, the supervisors – I mean, if it's a stand-alone, my understanding is that the – the supervisors are responsible for the project, you know, all the way through, as compared to going to the board of adjustment.

It is clear that Mr. Merrill did not have an understanding whether two versions of the proposed ordinance were presented to the supervisors at the second reading of the ordinance on September 20, 2016. It is significant that Mr. Hart's e-mail was only sent to representatives of the wind energy developers, asking for their thoughts.

The record shows that representatives from Invenergy and MidAmerican were actively involved in pressing for the terms they wanted in the proposed wind energy ordinance throughout the process of creating the ordinance. The record further shows that the various drafts of the proposed ordinance were the result of the changes sought by Invenergy and MidAmerican. This is shown by Depo. Ex. 133, 135, 136, 137, 107, 108, 110, 111, 112, 115, 138, 116, 139, 118, and Pl. Ex. 1, 2, 3, and

4(App. Vol. 1, p. 362; Vol. 1, p. 375; Vol. 1, p. 392; Vol. 1, p. 406; Vol. 1, p. 197; Vol. 1, p. 216; Vol. 1, p. 231; Vol. 1, p. 246; Vol. 1, p. 261; Vol. 1, p. 294; Vol. 1, p. 408; Vol. 1, p. 306; Vol. 1, p. 424; Vol. 1, p. 323; Vol. 2, p. 1179; Vol. 2, p. 1193; Vol. 2, p. 1208; Vol. 2, p. 1223).

Ultimately, the final ordinance adopted by the supervisors was the ordinance that Invenergy and MidAmerican wanted.

The influence of Invenergy and MidAmerican on the creation of the wind energy ordinance is further established by the affidavit of Dean Gunderson (Pl. Ex. 5)(App. Vol. 2, p. 1239). It is clear from Mr. Gunderson's affidavit that Invenergy and MidAmerican were demanding what must be in the ordinance and the county officials were yielding to those demands, contrary to the recommendations of the Planning and Zoning Commission.

It is also significant that the Intervenors' Brief in support of the Motion for Summary Judgment made no real attempt to deny the Plaintiffs' facts, but rather argued that under any set of facts, summary judgment should be entered. Thus, the Intervenors' Motion for Summary Judgment is essentially a Motion to Dismiss. However, the district court had already ruled against the Defendant and Intervenors on a Motion to Dismiss (Dismissal ruling)(App. Vol. 1, p. 59).

In ruling on this aspect of the Plaintiffs' case, the district court made several errors. First, the court characterized this ordinance as a zoning ordinance. But it is not a zoning ordinance. In fact, the county officials were very explicit that this was what they termed a "standalone" ordinance. So the district court's reliance on zoning cases was misplaced. The zoning law requires a public hearing before the governing body makes a decision on a zoning ordinance. In this case, there was not public hearing prior to the supervisors considering the adoption of the ordinance. The fact that there were three readings, as noted by the district court, does not substitute for notice of and opportunity for a public hearing.

Second, the district court, relying on Montgomery v. Bremer Co. Bd. of Supervisors, 299 N.W.2d 687, 695 (Iowa 1980), said that inquiries from the wind developers did not have any bearing on the validity of the ordinance. The record in this case shows, however, that Invenergy and MidAmerican did far more than simply inquire about the county's ordinances. Invenergy and MidAmerican were directly and significantly involved in drafting and ensuring that the ordinance was adopted to their satisfaction, to the point of demanding their terms or the project would not go forward.

Third, the district court said that the supervisors knew of the bias of Invenergy and MidAmerican. That is not the point. The point is that the supervisors essentially let MidAmerican write the ordinance.

Finally, the district court claimed there were no material facts in dispute. The record and the argument presented above clearly contradict that assessment. That is especially true when summary judgment is not proper if reasonable minds could draw different inferences from the facts and reach different conclusions. Clinkscales, 697 N.W.2d at 841.

In summary, the facts and the law precluded summary judgment on the claim involving the adoption of the wind energy ordinance, and the district court erred in granting summary judgment.

II. THE DEFENDANT'S APPROVAL OF THE APPLICATION FOR CONSTRUCTION OF THE WIND ENERGY PROJECT WAS ARBITRARY, CAPRICIOUS, UNREASONABLE, AND IN VIOLATION OF THE COUNTY'S WIND ENERGY ORDINANCE.

Palo Alto Wind Energy LLC was created on October 26, 2016 (Depo. Ex. 131)(App. Vol. 1, p. 359), as a subsidiary of Invenergy (Return on Writ, Ex. 4, p. 1)(App. Vol. 1, p. 501). Palo Alto Wind Energy, on August 31, 2017, filed an Application for Site Plan Review and Approval Permit, pursuant

to the wind energy ordinance discussed above (Return on Writ, Ex. 4)(App. Vol. 1, p. 501).

The record in this case clearly shows that when the Application was filed on August 31, 2017, MidAmerican Energy Company intended to own and operate the wind energy project. Deposition Ex. 132 is the agreement by which Palo Alto Wind Energy agreed to sell the development assets of the Palo Alto wind project to MidAmerican. That agreement was executed on March 23, 2017, five months before the application for county approval was filed. Michael Fehr, MidAmerican vice-president, testified in his deposition that the agreement (Depo. Ex. 132)(App. Vol. 3, p. 15) states that Palo Alto Wind Energy shall sell and MidAmerican shall purchase the development assets (Fehr Depo. p. 22-23)(App. Vol. 1, p. 96). Although the agreement also provides that MidAmerican can terminate the agreement for MidAmerican's convenience at any time, Mr. Fehr testified that he was not aware of any reason at this time that MidAmerican would terminate the agreement (Fehr Depo. p. 23-24)(App. Vol. 1, p. 96).

In addition, Kathryn Kunert, a MidAmerican employee who responded to an inquiry from Plaintiff, Bertha Mathis, stated in an e-mail on October 10, 2017 (Pl. Ex 6)(App. Vol. 2, p. 1241):

> While MidAmerican is not the owner of the project at this time, it is our intention to purchase the development assets from Invenergy after development activities are complete, then following the purchase construct and operate the project.

Ms. Kunert's e-mail makes it clear that MidAmerican intended to own and operate the Palo Alto wind energy project.

Also, at a public meeting in Emmetsburg on October 5, 2017, Supervisor Linus Solberg asked Mike Fehr what MidAmerican's role in the project was and Mr. Fehr responded (Pl. Ex. 7)(App. Vol. 2, p. 1244):

> MR. FEHR: Yeah. My name is Mike Fehr. I'm a vice president of MidAmerican. I'm also actually an absentee landowner. Not my choice, but that's the way it went for me. At MidAmerican the way this works – and I also want to thank the board and even those of you I know that are opposed. A lot of you are customers, so I appreciate the passion on both sides of this. Invenergy develops these projects, and we purchase the development once it's complete from Invenergy. And then we manage the construction. MidAmerican will own the project while it's being constructed. Invenergy will close on the transfer of those assets to MidAmerican, and we will own it and we will manage the construction. The development and construction are both managed in the department that I'm in charge of at MidAmerican. So I personally am pretty closely involved the whole way through.

So again, a representative of MidAmerican admitted that MidAmerican intends to own and operate the project.

The fact that MidAmerican intends to own and operate the wind energy project is important because the wind energy ordinance (Depo. Ex. 128)(App. Vol. 1, p. 345), Section 4, states that "[a] request for a Site Plan Review and Approval

Permit may be initiated by an Owner/Developer by filing an application with the Administrator . . . .” By those terms, only an “Owner/Developer” may apply for approval to construct a wind energy project.

Section 3 of the wind energy ordinance defines “Owner/Developer” as “the individual, firm, business or entity that intends to own and operate a Wind Energy Conversion System in accordance with this Ordinance.” So only the entity that intends to own and operate the project may file an application.

Nor is it sufficient that the applicant might own certain preliminary assets, e.g., easements, preliminary permits, interconnection rights, etc. The “Owner/Developer” must intend to own and operate the Wind Energy Conversion System. Section 3 of the ordinance defines Wind Energy Conversion System as “an electrical generating facility comprised of one or more Wind Energy Devices [i.e. the wind turbines] and accessory facilities, ...” So ownership of preliminary assets, such as Palo Alto Wind Energy owned, would not be sufficient to make Palo Alto Wind Energy an Owner/Developer as defined in the ordinance.

Based on the foregoing, MidAmerican was the Owner/Developer of the Palo Alto wind project and was the only entity that could apply for approval to construct the

project. The action of the Defendant in granting authority to Palo Alto Wind Energy to construct and operate the wind energy project therefore was in violation of the county's own ordinance. At this point, it is important to clarify that MidAmerican has no direct legal obligation to the county, even though MidAmerican is the actual intended owner and operator of the project. The intent of the ordinance was that the entity that would own and operate the project and that would be responsible to the county must be the entity to file the application.

As part of the application for site approval, Palo Alto Wind Energy attached two letters from the Iowa Department of Natural Resources and one letter from the State Archaeologist (Depo. Ex. 122, 123, 124)(App. Vol. 1, p. 325; Vol. 1, p. 331; Vol. 1, p. 337). These letters made specific recommendations as to steps that should be taken to protect environmental amenities, wildlife, and historic resources before the wind energy project would be approved. In their depositions the supervisors all emphasized that these letters were recommendations, not requirements. But the supervisors gave no justification for not following those recommendations (Wirtz Depo. p. 27-30; Graettinger Depo. p. 51-53; Merrill Depo. p. 39-42; Faulstick Depo. p. 9-11)(App. Vol. 1, p. 175-176; Vol. 1, p. 107-108; Vol. 1, p. 136-137; Vol. 1, p. 92).

The supervisors' failure to consider the Iowa DNR and State Archaeologist's recommendations is confirmed by the deposition testimony of Palo Alto County Attorney Peter Hart that he did not believe it was necessary to give any consideration to those issues; the county just needed to confirm notice was given to the agencies (Hart depo. p. 60-61)(App. Vol. 1, p. 114-115).

Therefore, the rejection of the recommendations of the Iowa DNR and the State Archaeologist was arbitrary, capricious and unreasonable.

Prior to voting on the application filed by Palo Alto Wind Energy, the supervisors were presented with a report by Richard James (Depo. Ex. 125)(App. Vol. 1, p. 339) calling into question the noise analysis presented by Palo Alto Wind Energy (Return on Writ Ex. 38-C)(App. Vol. 1, p. 564). Section 6(d) of the wind energy ordinance states that sound from the wind turbines shall not exceed 50 dBA. Mr. James pointed out in his report that the Palo Alto Wind Energy sound study used an average over a period of time, which meant that an average of close to 50 dBA, which the study estimated, would have to assume that there were times when the sound level would exceed 50 dBA. Therefore, the sound level from the project would violate the ordinance, and the application should have been denied as being in violation of the ordinance.

Just as with the concerns expressed in the letters from the Iowa DNR and State Archaeologist, the supervisors refused to give any consideration to Mr. James' report (Wirtz Depo. p. 30-32); Graettinger Depo. p. 56-59; Merrill Depo. p. 42-47; Faulstick Depo. p. 13-14)(App. Vol. 1, p. 176; Vol. 1, p. 108-109; Vol. 1, p. 137-138; Vol. 1, p. 93). It appears they did not even read it. It was arbitrary, capricious, and unreasonable for the supervisors to approve a project that would violate the county's own ordinance.

On November 26, 2015, the supervisors received an e-mail from Terry McGovern, a professor at Clarke University in Dubuque (Depo. Ex. 102, 103)(App. Vol. 1, p. 185; Vol. 1, p. 187), explaining what customary decommissioning costs would be with respect to wind energy projects. He advised that the cost would be close to $200,000 per turbine. The decommissioning plan set forth in the Palo Alto Wind Energy application estimates $33,480 per turbine. Therefore, the decommissioning plan proposed by Palo Alto Wind Energy would disastrously underfund decommissioning activities. The decommissioning agreement ultimately approved by the supervisors (Depo. Ex. 141)(App. Vol. 1, p. 442), simply approved the decommissioning plan proposed by Palo Alto Wind Energy. The supervisors gave no consideration to the probability that the decommissioning would be underfunded.

The deposition testimony of Supervisor Keith Wirtz was as follows (Wirtz depo. p. 36-37)(App. Vol. 1, p. 177-178);

> Q. Did you compare the estimated decommissioning cost that was in the application for a permit with the decommissioning costs that were set forth in Exhibit 103?
> A. Did I compare those two just now?
> Q. No. No. No. At the time you were considering the application
> A. We looked at -- It's kind of all over the place. There wasn't a lot of agreement in how much it was. I believe we agreed that they've got to review, you know, every couple, three years. I remember somebody bringing in, you know, -- People brought in stuff that it was going to cost X or more amounts and some not as much. So we listened to, again, a lot of sides.
> Q. But, the bottom line is that you accepted Palo Alto Wind's decommissioning cost estimate; is that correct?
> A. If it's in our ordinance, that would mean that we accepted what is -- that we agreed that was what it should be.

What the record shows is that the supervisors were confronted with evidence from Professor McGovern at the very beginning of the process to draft the wind energy ordinance and approve the permit application that the decommissioning costs in the permit application were likely insufficient and the supervisors made no effort to determine what the costs would actually be. The supervisors essentially ignored Professor McGovern and made no effort to determine the sufficiency of the decommissioning plan presented by Palo Alto Wind Energy.

It is also worth noting that an early draft of the decommissioning agreement (Depo. Ex. 105)(App. Vol. 1, p. 191)

listed both Invenergy and MidAmerican as guarantors, but the final decommissioning agreement listed only Palo Alto Wind Energy. This shows that the county knew MidAmerican would own and operate the project, but that the county removed MidAmerican from the agreement to give the impression that MidAmerican would not own and operate the project after the supervisors were advised that Palo Alto Wind Energy had no authority to submit the application (Pl. Ex. 8)(App. Vol. 2, p. 1246).

Because the decision to approve Palo Alto Wind Energy's application was a quasi-judicial action, rather than a legislative action, the supervisors were required to base their decision on substantial evidence. Montgomery v. Bremer Co. Bd. of Supervisors, 299 N.W.2d 687 (Iowa 1980). An illegality is established if the board has not acted in accordance with a statute; if its decision was not supported by substantial evidence; or if its actions were unreasonable, arbitrary, or capricious. Perkins v. County Bd. of Supervisors, 636 N.W.2d 58 (Iowa 2001).

The district court stated that because the term "owner/developer" was used both in the section of the ordinance describing the entity that was authorized to apply for a permit and in the section regarding the transfer of a wind energy conversion system, the term must have the same

meaning in each section. The district court was correct that the term should have the same meaning throughout. That is exactly what the Plaintiffs are saying. Section 4 of the ordinance says that the entity that intends to own and operate the completed wind energy project must apply for the permit. That would be MidAmerican. Section 9 of the ordinance says that ownership of the wind energy conversion system, i.e., the completed project, not the permits and development assets, may be transferred. The facts are clear that Palo Alto Wind Energy never intended to own and operate the completed project. Therefore, Palo Alto Wind Energy could not transfer the completed project pursuant to section 9 of the ordinance. So the district court's reasoning on this point was flawed.

Likewise, the district court erred in its statement that if the Plaintiffs' interpretation of owner/developer is correct, an entity such as Palo Alto Wind Energy could obscure the fact that it did not intend to own and operate the completed project. That is why the county officials would need to undertake due diligence to ensure that the proper entity is submitting the permit application. In any event, that possibility would not change the clear definition of owner/developer in the ordinance. Furthermore, in this case the facts are that all county officials, including the supervisors, knew from the outset that MidAmerican was the

intended owner and operator of the completed wind energy project.

The district court overlooked the point that the importance of having the owner/operator, as defined in the ordinance, be the entity submitting the permit application is that it is the owner/operator (in this case, MidAmerican) that should be obligated to the county to be responsible for the requirements of the permit. MidAmerican has been able to completely avoid that responsibility.

The district court next addressed the supervisors' failure to consider the recommendations of the Iowa DNR and the State Archaeologist. The court's error was in addressing the merits of the issue, rather than recognizing that the court was considering a motion for summary judgment. The cases relied upon by the court, U.S. Cellular Corp. v. Bd. of Adjustment of City of Des Moines, 589 N.W.2d 712 (Iowa 1999) and Baugh v. Waterloo Bd. of Adjustment, Ia. Ct. of App. (2008), were cases in which the district court had rendered judgment after a trial. So, in those cases, the court had made a judgment after hearing all of the evidence and deciding the merits, that there was substantial evidence supporting the decision of the local governmental body.

In this case, on the other hand, if there was an issue of material fact, granting to the Plaintiffs all inferences,

summary judgment was not appropriate. The district court claimed there was no dispute of material facts. On the contrary, the facts were that the wind energy ordinance required that the state agencies be notified of the pending permit application so the agencies could comment. If the supervisors had no obligation to consider agency comments, and in fact did not consider the comments, there would be no point in giving the agencies notice of the permit application.

So, this being a decision on a motion for summary judgment, the district court erred in relying on the substantial evidence standard and determining that there were no issued of material fact.

Next, the district court addressed the supervisors' failure to consider the report of Plaintiffs' expert regarding the noise from the wind turbines. The district court made two errors in addressing this issue. First, the court engaged in an evaluation of the facts. The court discussed possibilities and assumptions in the noise study submitted by Palo Alto Wind Energy. However, the district court did not seriously discuss the report of Plaintiffs' expert, Richard James. What the district court did was weigh the evidence. That is inappropriate in considering a summary judgment motion.

Finally, the district court addressed the Plaintiffs' argument that the decommissioning plan approved by the

supervisors would drastically underfund decommissioning. The court erred, however, in finding that there were no issues of material fact. The factual issues were whether the decommissioning costs in Ex. 103 (App. Vol. 1, p. 187) were correct or whether the decommissioning costs in the permit application were correct. There is also, as shown by the deposition testimony of Keith Wirtz set out above, a factual dispute as to whether the supervisors did actually consider what the actual decommissioning costs would be. What the district court did was decide the factual issues, which is inappropriate in a summary judgment proceeding.

In summary, what the district court did was to treat this summary judgment proceeding as a trial on the merits, in which the court decided factual issues. The Plaintiffs clearly raised factual issues that called for a trial on the merits.

CONCLUSION

There were clearly disputed issues of material fact in this case that precluded summary judgment. Therefore, this case should be reversed and remanded for a trial on the merits.

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REQUEST FOR ORAL ARGUMENT

The Plaintiffs-Appellants respectfully request oral argument on all of the issues in this appeal.

/s/ Wallace L. Taylor
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R.App. Vol. I,P.6.903(1)(g)(1) or (2) because this brief contains 848 lines, excluding the parts of the brief exempted by Iowa R.App. Vol. I,P.6.903(1)(g)(1).
2. This brief complies with the typeface requirements of Iowa R.App. Vol. I,P.6.903(1)(e) and the type-style requirements of Iowa R.App. Vol. I,P.6.903(1)(f) because this brief has been prepared in a monospaced typeface using Microsoft Word 2000 in Courier New font, size 12.

___January 19, 2019_____ /s/ *Wallace L. Taylor*

DATE WALLACE L. TAYLOR

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of January, 2019, I electronically filed the Amended Appellant's Brief with the Supreme Court of Iowa, and that a copy was served electronically on:

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