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
v.
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
THE HONORABLE NANCY L. WHITTENBURG
DISTRICT COURT JUDGE
CASE NO. EQCV025601

DEFENDANT-APPELLEE PALO ALTO COUNTY BOARD OF SUPERVISORS' FINAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules and Statutes

Other

ISSUES PRESENTED

I. The District Court Correctly Determined the Supervisors' Adoption of the Ordinance was Lawful.

Cases

Bd. of Dirs. of Indep. Sch. Dist. of Waterloo v. Green, 147 N.W.2d 854 (Iowa 1967)

Bushby v. Washington County Conservation Bd., 654 N.W.2d 494 (Iowa 2002)

Des Moines Metropolitan Area Solid Waste Agency v. City of Grimes, 495 N.W.2d 746 (Iowa 1993)

Dilly v. City of Des Moines, 247 N.W.2d 187 (Iowa 1976)

Douglass v. City of Iowa City, 218 N.W.2d 908 (Iowa 1974)

Goodell v. Humboldt County, 575 N.W.2d 486 (Iowa 1998)

Iowa City v. Nolan, 239 N.W.2d 102 (Iowa 1976)

Jaffe v. City of Davenport, 179 N.W.2d 554 (Iowa 1970)

Johnson Propane, Heating & Cooling, Inc. v. Iowa Dep't of Transp., 891 N.W.2d 220 (Iowa 2017)

Keller v. City of Council Bluffs, 66 N.W.2d 113 (Iowa 1954)

Meier v. Senecaut, 641 N.W.2d 532 (Iowa 2002)

Montgomery v. Bremer County Bd. of Sup'rs, 299 N.W.2d 687 (Iowa 1980)

Pell v. City of Marshalltown, 40 N.W.2d 53 (Iowa 1949)

Perkins v. County Bd. of Supervisors, 636 N.W.2d 58 (Iowa 2001)

Sutton v. Dubuque City Council, 729 N.W.2d 796 (Iowa 2006)

Rules and Statutes

Iowa Code § 331.301(1)

Iowa Code § 335.3

Other Authorities

Bonfield, The Iowa Administrative Procedure Act: Background Construction, Applicability, Public Access to Agency Law, the Rulemaking Process, 60 Iowa L. Rev. 731, 853 (1975)

II. The District Court Correctly Determined the Supervisors' Approval of the Permit was Lawful.

Cases

Buechele v. Ray, 219 N.W.2d 679 (Iowa 1974)

Bush v. Board of Trs., 522 N.W.2d 864 (Iowa Ct. App. 1994)

Carstensen v. Board of Trustees, 253 N.W.2d 560 (1977)

Civil Service Commission v. Iowa Civil Rights Commission, 522 N.W.2d 82, (Iowa 1994)

Curtis v. Board of Sup'rs of Clinton County, 270 N.W.2d 447(Iowa 1978)

Johnson Propane, Heating & Cooling, Inc. v. Iowa Dep't of Transp., 891 N.W.2d 220 (Iowa 2017)

Montgomery v. Bremer County Bd. of Sup'rs, 299 N.W.2d 687 (Iowa 1980)

Perkins v. County Bd. of Supervisors, 636 N.W.2d 58 (Iowa 2001)

State v. Richardson, 890 N.W.2d 609 (Iowa 2017)

Willett v. Cerro Gordo County Zoning Board of Adjustment, 490 N.W.2d 556 (Iowa 1992)

Rules and Statutes

Iowa Code § 4.4(2)

Iowa Code § 4.4(3)

ROUTING STATEMENT

In light of the Supreme Court's retention of the Case No. 18-1184, which involves the same proposed wind development, this case should be retained by the Supreme Court.

STATEMENT OF THE CASE

The case involves the District Court's determination that the Plaintiffs failed to raise an issue of material fact in their challenge to the Palo Alto County Board of Supervisors' (the "Supervisors") September 2016 adoption of a Wind Energy Conversion System Ordinance (the "Ordinance") and October 2017 approval of a permit (the "Permit") pursuant to the Ordinance. App. Vol. 2, pp. 1248-1260. The Permit allows Palo Alto Wind Energy LLC ("PAWE") to construct a wind project in the county. App. Vol. 2, p. 1259; Vol. 1, pp. 36-43.

Unhappy with the possibility of large-scale wind development in the county, the Plaintiffs lodged a series of conclusory allegations hoping to stop the development of the project. App. Vol. 1, pp. 71-78. While the Plaintiffs opposed the county's actions, there was no allegation or argument made that the Supervisors lacked authority, failed to follow proper procedure or violated any law in adopting the Ordinance and issuing the Permit. App. Vol. 1, pp. 71-78. Thus, the District Court's review was limited to determining whether the Supervisors had somehow improperly discharged their authority. App. Vol. 2, p. 1259. Ultimately, the District Court correctly determined that Plaintiffs failed to state a cognizable claim. *Id.*

The case began on November 22, 2017, when the Plaintiffs filed a Petition for Declaratory Judgment and Writ of Certiorari, challenging the Ordinance and Permit. App. Vol. 1, pp. 44-50. On November 30, 2017, PAWE and MidAmerican Energy Company ("MidAmerican"), the potential purchaser of the project, moved to intervene. App. Vol. 1, pp. 51-54. The Supervisors filed a Motion to Dismiss, or in the Alternative Motion for More Specific Statement on December 20, 2017. App. Vol. 1, pp. 55-58. On February 21, 2018, the District Court granted the Motion for More Specific Statement and denied the Motion to Dismiss. App. Vol. 1, pp. 59-70.

Thereafter, the Plaintiffs filed an Amended Petition for Declaratory Judgment and Writ of Certiorari on February 25, 2018, which clarified that the declaratory judgment claim challenged only the Ordinance, and the Writ of Certiorari claim challenged only the Permit. App. Vol. 1, pp. 71-78. Following discovery, the Intervenors (PAWE and MidAmerican) filed a Motion for Summary Judgment, which was joined by the Supervisors. App. Vol. 1, pp. 448-449; 481-483. The Defendants argued that Plaintiffs were required to provide more than mere allegations, and that the factual allegations made by Plaintiffs, even if believed, did not entitle them to relief. *Id.* On July 25, 2018, the District Court correctly determined that the Intervenors and Supervisors were entitled to judgment as a matter of law and

granted the Motion. App. Vol. 2, p. 1259. In reaching its decision, the District Court noted the strong presumption of validity attached to ordinances and found that since the reasonableness of the Ordinance was fairly debatable it would not substitute its judgment for that of the Supervisors. App. Vol. 2, p. 1259. The District Court also construed the Ordinance, finding that PAWE was the proper applicant and determined that the Permit was supported by substantial evidence. This appeal followed.

STATEMENT OF THE FACTS

Like many counties in Iowa, Palo Alto County has been the subject of interest regarding wind development. In July of 2015, the county's Zoning Administration, Joseph Neary, was contacted by Jeff Jackson from Renewable Energy System ("RES"), a wind developer unrelated to PAWE, regarding the county's then-existing ordinances related to wind energy systems. App. Vol. 1, p. 141 (Deposition of Joseph Neary, pp. 10-11). Jackson indicated that RES was considering a wind development in Palo Alto County. App. Vol. 1, p. 141 (Deposition of Joseph Neary, p. 11). Jackson indicated that RES was considering a project of between 80 to 110 turbines. App. Vol. 1, p. 142 (Deposition of Joseph Neary, p. 14).

Because the existing county ordinance contained very limited language regarding wind turbines[1], the discussion with RES started larger discussions at the county about the need for a comprehensive wind ordinance. App. Vol. 1, pp. 141, 128, 156, 170-171 (Depositions of Joseph Neary, p. 11, Craig Merrill, pp. 5-8, Linus Solberg, pp. 6-8, Keith Wirtz, pp. 8-10). Before any large-scale wind projects were commenced, the county

[1] Conditional uses in the county included "Wind turbines and associated structures, including any device, including but not limited to, a wind charger, windmill, wind turbine, tower and electrical equipment, pad mount transformers, power lines and substation, all of which can be used to convert wind energy to a form of usable electrical energy." Zoning Ordinance for Palo Alto County, Art. 5, § 2.1.11.

wanted a comprehensive ordinance in place to address things like road use, decommissioning, tile repair, shadow flicker, sound and other issues. App. Vol. 1, pp. 141-142 (Deposition of Joseph Neary, pp. 12-13). County officials were aware that counties near Palo Alto County had adopted wind ordinances and received O'Brien County's ordinance for use as a template. App. Vol. 1, pp. 141-142 (Deposition of Joseph Neary, pp. 11, 14). Neary and County Attorney Peter Hart started drafting an ordinance to get the legislative process started. App. Vol. 1, p.142 (Deposition of Joseph Neary, p. 16).

In December of 2015, the county received an additional wind energy inquiry, when Mark Zaccone of Invenergy (an affiliate of PAWE), attended a December 8, 2015 Supervisors meeting. App. Vol. 1, p. 142 (Deposition of Joseph Neary, pp. 15-16). Zaccone introduced himself and described how Invenergy developed wind farms. App. Vol. 1, p. 142 (Deposition of Joseph Neary, p. 16).

In response to all of these developments, Neary, Hart and members of the Planning and Zoning Commission began studying various wind ordinances of other counties (Clay, Emmet, Dickinson, Ida, O'Brien, Polk, Webster, Sioux, Delaware, Cedar, Pocahontas and Cass) and drafting a proposed ordinance to recommend to the Supervisors. App. Vol. 1, pp.143

(Deposition of Joseph Neary, p. 17); 458, 463-464. Portions and concepts from these ordinances were incorporated into a draft ordinance. App. Vol. 1, p. 464. The group gathered input from various stakeholders, and considered various factors, including the need to protect local residences from impacts, the desire of the county for economic development and tax revenues, good land use practices, and others. App. Vol. 1, pp. 450-452. This group engaged in a months' long process of gathering information to utilize in making recommendations to the Supervisors. App. Vol. 1, pp. 450-452. Planning and Zoning had public meetings, including on April 14, 2016 and August 11, 2016, in order to allow for public input into the drafting process. App. Vol. 1, pp. 144-145 (Deposition of Joseph Neary, pp. 22-24, 29).

After receiving a draft ordinance from Planning and Zoning, the Supervisors engaged in a process of considering the ordinance and seeking feedback. App. Vol. 1, p. 101 (Deposition of Ronald Graettinger, pp. 14-16). Several public meeting were held. In order to allow for maximum participation, the Supervisors elected to hold three public readings of the Ordinance on September 13, 2016, September 20, 2016 and September 27, 2016. App. Vol. 1, pp. 111-112 (Deposition of Peter Hart, pp. 28-29). Various aspects of the Ordinance were commented upon, considered and

compared with similar ordinances in other counties, and like any piece of legislation, the Supervisors weighed various factors in determining whether to approve the Ordinance. App. Vol. 1, pp. 170-172, 157-158, 130-131 (Depositions of Keith Wirtz, pp. 6-16, Linus Solberg, pp. 9-14, Craig Merrill, pp. 13-18). The Supervisors understood that PAWE and MidAmerican, like all participants in the legislative process, were advocating for terms favorable their position, which in their cases was wind development. App. Vol. 1, pp. 173, 161, 131-132, 102-103 (Depositions of Keith Wirtz, pp. 17-20, Linus Solberg, pp. 29-30, Craig Merrill, pp. 20-21, Ronald Graettinger, pp. 24-26). The Ordinance was ultimately adopted on September 27, 2017. App. Vol. 1, pp. 345-358. The Ordinance is not contained in the county's zoning ordinance and was passed pursuant to the county' home rule authority. App. Vol. 1, p. 113 (Deposition of Peter Hart, pp. 37-40).

The adopted Ordinance contained a procedure allowing interested parties to file an application seeking approval to construct a wind project in the county. App. Vol. 1, pp. 345-358. Pursuant to that procedure, PAWE held a pre-application informational meeting on June 20, 2017. App. Vol. 1, pp. 484-500.

Then, on August 31, 2017, PAWE submitted its Application for Site Plan Review and Approval Permit ("Application"). App. Vol. 1, pp. 501-524, 542-782; Vol. 2, pp. 11-1178. At the time the Application was submitted, PAWE owned all of the assets associated with the project. App. Vol. 1, pp. 475, 96 (Deposition of Michael Fehr, pp. 22-23). While MidAmerican had an option to purchase the project, it had not yet done so. *Id.* Thereafter, county officials including Neary, Hart and the Supervisors reviewed the Application and its appendices. App. Vol. 1, pp. 450-452; 107 (Deposition of Ronald Graettinger, pp. 50-51). The Supervisors believed that PAWE was the proper applicant and at the time the Application was filed and before, the Supervisors were aware that MidAmerican might someday acquire the project from PAWE. App. Vol. 1, pp. 170, 129, 160-162, 106 (Depositions of Keith Wirtz, p. 7, Craig Merrill, p. 10, Linus Solberg, pp. 21, 32-33, Ronald Graettinger, pp. 46-47).

The Application contained detailed information regarding a variety of topics, including a sound study procured by PAWE. App. Vol. 1, pp. 501-524, 542-782; Vol. 2, pp. 11-1178. The Supervisors received input regarding the Application, including letters from the Iowa Department of Natural Resources and State Archeologist which contained recommendations. App. Vol. 1, pp. 107-108, 136-137 (Depositions of

Ronald Graettinger, pp. 51-53, Craig Merrill, pp. 39-41). The Supervisors were also presented with a separate noise study prepared by Richard James which was procured by the Plaintiffs. App. Vol. 1, pp. 339-344.

During this time period, the Supervisors were also engaged in discussions with PAWE about the costs of decommissioning and a potential decommissioning agreement for any turbines constructed as part of the project. App. Vol. 1, pp. 138-139, 177 (Depositions of Craig Merrill, pp. 48-49, Keith Wirtz, pp. 34-35). Like the Application, the Supervisors received information from various sources regarding decommissioning. App. Vol. 1, pp. 442-447.

While the Ordinance requires only one public meeting to approve the Application, the issue was on the Supervisors' agenda and/or discussed at nine separate public meetings occurring on September 12, 19, 21 and 26, and October 3, 5, 10, 17 and 24. App. Vol. 1, pp. 450-452. The Resolution Conditionally Adopting the Wind Energy Conversion System Site Plan Review and Approval Application Permit was ultimately adopted on October 24, 2017. App. Vol. 1, pp. 36-43. The Decommissioning Agreement was approved the same day. App. Vol. 1, pp. 442-447.

ARGUMENT

I. The District Court Correctly Determined the Supervisors' Adoption of the Ordinance was Lawful.

Preservation. The Supervisors agree that error has been preserved, except to the extent the Plaintiffs are now making a procedural argument. Plaintiff's Brief, pp. 20-21 ("The zoning law requires a public hearing before the governing body makes a decision on a zoning ordinance. In this case, there was not a public hearing prior to the Supervisors considering the adoption of the ordinance."). As detailed below, if Plaintiffs are now making a procedural argument, then error has not been preserved because no such claim was presented to the District Court. App. Vol. 1, pp. 71-78; Vol. 2, p. 1252; *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (citation omitted) (Issues must "be both raised and decided by the district court before we will decide them on appeal.").

Standard of Review. Summary judgment decisions are reviewed for correction for errors at law. *Johnson Propane, Heating & Cooling, Inc. v. Iowa Dep't of Transp.*, 891 N.W.2d 220, 224 (Iowa 2017).

The District Court correctly determined that Plaintiffs' declaratory judgment claim attacking the Ordinance failed as a matter of law. App. Vol. 2, p. 1259. The Plaintiffs believe that summary judgment was inappropriate, and in an attempt to salvage their case, suggest this case should be reviewed

like a negligence action which should only be decided as a matter of law "in exceptional cases." Plaintiffs' Brief, p. 8. Unfortunately for the Plaintiffs, however, to the extent they have even made an actionable claim, it is not a negligence claim and instead involves a very deferential standard of judicial review making summary judgment appropriate and inescapable.

The Plaintiffs' "claim" regarding the Ordinance is noteworthy both for what it does and does not contain. It does not contain a procedural, statutory or Constitutional challenge, nor does it question the Supervisors' authority to pass the Ordinance. App. Vol. 1, pp. 71-78. Instead, the most the Plaintiffs can muster is a suggestion that the Ordinance was arbitrary, capricious and unreasonable because it contains language advocated for by PAWE and MidAmerican.

This "claim" is not cognizable under law. While a *zoning* ordinance may be examined under an arbitrary/capricious/unreasonableness standard to determine whether it was constitutionally valid or exercised in conformity with Iowa Code section 335.3[2], the Plaintiffs are not making a Constitutional claim, nor is the Ordinance an exercise of the county's zoning power.

[2]"The governing body of a municipality may amend its zoning ordinances any time it deems circumstances and conditions warrant such action, and such an amendment is valid of the procedural requirements of the statute are followed and it is not unreasonable or capricious nor inconsistent with the spirit and design of the zoning statute." *Keller v. City of Council Bluffs*, 66 N.W.2d 113, 116 (Iowa 1954).

Instead, Palo Alto's Ordinance is a creature of its home rule authority because it regulates an activity and applies uniformly across the county, and is thus an exercise of its general police power rather than its zoning power. *Goodell v. Humboldt County*, 575 N.W.2d 486, 496 (Iowa 1998). The county's home rule authority is broad:

> A county may, except as expressly limited by the Constitution, and if not inconsistent with the laws of the general assembly, exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges, and property of the county or its residents, and to preserve and improve the peace, safety, health, welfare, comfort and convenience of its residents.

Iowa Code § 331.301(1).

Thus, the Plaintiffs have borrowed a recognized standard for other types of cases and claims and have insisted that third party input into the Ordinance (a common and perfectly legal phenomenon) renders it void pursuant to that standard. In support of their argument, the Plaintiffs cite two cases, neither of which stands for the propositions cited by Plaintiffs. Plaintiffs' Brief, p. 9.

The Plaintiffs first cite *Bushby v. Washington County Conservation Bd.*, which involved a challenge to a decision by a county conservation board and board of supervisors to remove trees from a public park. 654 N.W.2d 494, 495 (Iowa 2002). In discussing the claim, the Iowa Supreme

Court noted the disagreement between the parties as to the standard applicable in reviewing the boards' action. *Id.* at 498. The county cited a 1974 case which held that actions of a municipal corporation would only be restrained if "illegal, fraudulent or clearly oppressive." *Id.* (citing *Douglass v. City of Iowa City*, 218 N.W.2d 908, 913 (Iowa 1974)). In retort, the plaintiffs cited a 1967 case involving school districts which invoked a "clearly arbitrary and unreasonable" standard for school board action. *Id.* (citing *Bd. of Dirs. of Indep. Sch. Dist. of Waterloo v. Green*, 147 N.W.2d 854, 858 (Iowa 1967)). Without determining which standard controlled, the Iowa Supreme Court upheld the District Court's grant of summary judgment against the plaintiffs finding that even under their preferred standard, their claim failed.

The Plaintiffs also cite *Perkins v. County Bd. of Supervisors*, 636 N.W.2d 58 (Iowa 2001) in support of their argument that an arbitrary/capricious/unreasonableness standard should be used to evaluate their "claim." *Perkins*, however, does not support the argument that Plaintiffs have, in fact, actually made a cognizable claim. Unlike this case, *Perkins* was a writ of certiorari case involving actual constitutional and statutory claims (none of which have been made by Plaintiffs in this case).

Perkins, 636 N.W.2d at 62-64. As a result, the Plaintiffs have failed to state a claim.

Further, even if the Plaintiffs' vague theory was actionable, an Ordinance may not be invalidated because it contains language advocated for by stakeholders in a legislative process. In passing the Ordinance, the Supervisors were acting in their legislative capacity. *Sutton v. Dubuque City Council*, 729 N.W.2d 796, 797-98 (Iowa 2006). Once passed, county ordinances are entitled to a presumption of validity and a challenger must negate every reasonable basis for the ordinance. *See, e.g. Dilly v. City of Des Moines*, 247 N.W.2d 187, 190 (Iowa 1976) (citations omitted) (ordinances "are presumed to be reasonable, valid and constitutional. And it is not for the judicial branch of government to pass upon the wisdom of a local law enacted by a municipal council."); *Iowa City v. Nolan*, 239 N.W.2d 102, 103 (Iowa 1976) (citation omitted) (" . . . [a] challenger must overcome a strong presumption of constitutionality and negate every reasonable basis upon which the enactment might be upheld."). Thus, even actual claims face a very stringent standard.

Further, while the Plaintiffs' core argument is that the Ordinance is a product of PAWE and MidAmerican's influence, it is not the job of the Court to interrogate the motives of the Supervisors since there has been no

allegation of fraud, corruption or oppression. *See, e.g. Pell v. City of Marshalltown*, 40 N.W.2d 53, 56 (Iowa 1949) (citation omitted) ("As a general rule, the acts of a municipal corporation, which are within its power, are not subject to judicial review unless there is a manifest and palpable abuse of power, and it is well established that the motives of the council acting in its legislative capacity cannot be inquired into."); *Des Moines Metropolitan Area Solid Waste Agency v. City of Grimes*, 495 N.W.2d 746, 749 (Iowa 1993) (internal citations omitted) ("Courts generally will not inquire into a municipal council's motives to determine the validity of an ordinance enacted by them in the absence of fraud, corruption or oppression. As long as a rational basis exists for passing an ordinance, it need not be the real reason for the government's action in order to satisfy substantive due process."). It is simply not the role of the Courts to second-guess a board's policy judgments:

> In accordance with general principles applicable to legislation, the rule is well settled that the courts have nothing to do with and are not concerned with the wisdom of municipal ordinances, such as police power measures. If a municipality has the power to enact an ordinance, the wisdom of such action is not subject to review in the courts. Moreover, whatever may be thought or said of the wisdom of an ordinance is immaterial in determining whether it is reasonable or unreasonable. Although the court may disagree as to the propriety of the legislation, unless it plainly and beyond all question exceeds the power there should be no judicial interference.

Pell, 40 N.W.2d at 56 (citation omitted). The Supervisors believe the Ordinance was good for the county; the fact that Plaintiffs disagree does not create a claim. The District Court recognized as much when it found that there was ample support for the proposition that the Ordinance was reasonably debatable, highlighting the process and input gathered by the county in drafting the Ordinance. App. Vol. 2, pp. 1252-1253.

However, even in light of this exacting standard and the ample evidence of reasonableness, the Plaintiffs argue the District Court erred in reaching its decision. First, the Plaintiffs argue that the District Court improperly relied upon zoning cases. Plaintiffs' Brief, p. 20. According to the Plaintiffs, since the District Court cited some zoning cases, then that somehow means this case is converted to a zoning case subject to zoning procedures, including an undefined "public hearing" they suggest they did not receive. While the District Court relied upon various authorities, including decisions in the zoning context, it did so in order to cite the generally applicable rule that county ordinances are presumed valid and are subject to deference. The Plaintiffs then make the nonsensical argument they were denied a public hearing, while at the same time acknowledging that there were three readings of the Ordinance at which members of the public were allowed to speak and voice their opinions. Plaintiffs' Brief, p.

21; App. Vol. 1, pp. 111-112, 171 (Depositions of Peter Hart, pp. 28-29, Keith Wirtz, pp. 10-12).

As set forth above, this case is not a zoning case. Further, even if it were, all that a Board is required to do in the zoning context is hold a "comment-argument type" hearing which "involves 'an opportunity for persons to present data and arguments orally to the (Board) in an effort to communicate their views more effectively than they could in writing.'" *Montgomery v. Bremer County Bd. of Sup'rs*, 299 N.W.2d 687, 693 (Iowa 1980) (quoting Bonfield, The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process, 60 Iowa L. Rev. 731, 853 (1975)). No evidentiary hearing is required. *Id.* Plaintiffs were given that opportunity on multiple occasions. App. Vol. 1, pp. 111-112, 171 (Depositions of Peter Hart, pp. 28-29, Keith Wirtz, pp. 10-12). Further, the Plaintiffs never argued that there was any procedural infirmity to the Supervisors' passage of the Ordinance and cannot do so now.

The Plaintiffs also argue that the District's Court citation to *Montgomery v. Bremer County Bd. of Sup'rs* was misplaced because the Intervenors did more than "inquire" as to the Ordinance. The Plaintiffs misapprehend the District Court's citation to *Montgomery* which focused on

the general rule that in "reviewing amendments to zoning ordinances, [courts] presume they are valid and if their reasonableness is fairly debatable, [courts] will not substitute our judgment for that of the legislative body." *Montgomery*, 299 N.W.2d at 692 (Iowa 1980) (citing *Jaffe v. City of Davenport*, 179 N.W.2d 554, 555 (Iowa 1970)). In addition, the District Court noted that both *Montgomery* and this case involved arguments that county action was being taken because of a third party's request. App. Vol. 2, p. 1251. However, like was the case in *Montgomery*, since there was uncontested evidence of a rational basis for the county's decision, it was not the place of the Court to interfere. App. Vol. 2, pp. 1251-1252.

Next, the Plaintiffs argue that the Supervisors' awareness of the Intervenors' bias "missed the point." Plaintiffs' Brief, p. 21. This is simply another retread of Plaintiffs' core argument that advocacy for certain legislative terms is somehow fatal to the adoption of the Ordinance. As set forth above, it is not, nor have the Plaintiffs identified any case law in support of their position. Again, the fact that the Supervisors were aware that MidAmerican and PAWE had a view of the Ordinance that favored wind development is just one of many uncontested facts demonstrating that the Ordinance was rational and fairly debatable.

Finally, the Plaintiffs disagree with the District Court's finding that there were no material facts in dispute. Plaintiffs' Brief, pp. 21-22. However, the Plaintiffs make no attempt to identify with any specificity exactly which *material facts* they are contesting. Thus, the District Court's decision should be affirmed.

II. The District Court Correctly Determined the Supervisors' Approval of the Permit was Lawful.

Preservation. The Supervisors agree that error has been preserved.

Standard of Review. Summary judgment decisions are reviewed for correction for errors at law. *Johnson Propane, Heating & Cooling, Inc.*, 891 N.W.2d at 224.

The District Court correctly determined that PAWE was the proper applicant and the Supervisors' grant of the Permit was not arbitrary, capricious or unreasonable and was supported by substantial evidence. In approving the Permit, the Supervisors were acting in a quasi-judicial capacity. *See Curtis v. Board of Sup'rs of Clinton County*, 270 N.W.2d 447, 449 (Iowa 1978) (citing *Buechele v. Ray*, 219 N.W.2d 679, 681 (Iowa 1974) ("An inferior tribunal exercises a judicial function when (1) the questioned act involves a proceeding in which notice and opportunity to be heard are required, or (2) a determination of rights of parties is made which requires the exercise of discretion in finding facts and applying the law.").

The Plaintiffs make several arguments in an attempt to invalidate the Permit. The Plaintiffs first suggest that MidAmerican, rather than PAWE, should have been the applicant for the Permit. Plaintiffs' Brief, pp. 22-25. In evaluating this argument, the District Court engaged in statutory interpretation. App. Vol. 1, p. 1253.

In support of their argument, the Plaintiffs cite the definition of "Owner/Developer" which means "the individual, firm, business or entity that intends to own and operate a Wind Energy Conversion System in accordance with this Ordinance." App. Vol. 1, p. 346 (Ordinance, § 3). An "Owner/Developer" may request permit approval. App. Vol. 1, p. 348 (Ordinance, § 4). The Plaintiffs argue that MidAmerican should have been the applicant, because PAWE intended to sell the project to MidAmerican. Plaintiffs' Brief, pp. 22-25. Plaintiffs' argument fails for several reasons.

At the time of the Application and issuance of the Permit, MidAmerican had no ownership issue in the project. App. Vol. 1, pp. 475, 96 (Deposition of Michael Fehr, pp. 22-23). While MidAmerican had an agreement with PAWE under which it might someday acquire the project, it had not yet done so. App. Vol. 1, pp. 475, 96 (Deposition of Michael Fehr, pp. 22-23). This was well-known by the Supervisors. App. Vol. 1, pp. 170, 129 (Depositions of Keith Wirtz, p. 7, Craig Merrill, p. 10). At the outset,

requiring an entity that has no ownership interest in a project to apply for a permit is an absurd result, and is not consistent with the rest of the Ordinance, which explicitly contemplated project transfers in Section 9. App. Vol. 1, p. 357 (Ordinance, § 9).

In analyzing the Ordinance, the District Court noted the term "Owner/Developer" appeared multiple times in the Ordinance, both in Section 4 – the "Application section" – and in Section 9 -- the "Change of Ownership" section. App. Vol. 2, p. 1254. The "Change of Ownership" section provides that "The Owner/Developer shall submit notification to the Administrator upon change of ownership of all or part of any WECS. The ownership of a WECS shall not be assigned without the written consent of the Palo Alto County Board of Supervisors and such consent shall not be unreasonably withheld." App. Vol. 1, p. 357 (Ordinance, § 9). The District Court further noted that under Iowa law, citing *State v. Richardson*, 890 N.W.2d 609, 619 (Iowa 2017), a term used multiple times in an ordinance has the same meaning each time it is used. App. Vol. 2, p. 1254.

In light of *Richardson*, the District Court's determined that giving "Owner/Developer" the Plaintiffs' construction would negate the "Change of Ownership" section completely and did not make sense in the context of the Ordinance which clearly contemplated that an original applicant could

transfer the project. App. Vol. 2, p. 1254. As the District Court correctly pointed out, if the owner of a WECS is requesting permission to transfer their interest in the project, then they no longer *intend to own or operate the WECS* and could no longer be an "Owner/Developer," thus negating Section 9 of the Ordinance. While the Plaintiffs reference the District Court's argument, they fail to actually explain how an entity that wants to transfer a project can still, to the Plaintiffs' understanding, intend to "own and operate" it.

The Plaintiffs' understanding is contrary to rules of statutory construction, which prohibit construing a statute in such a way as to make another section superfluous. Iowa Code § 4.4(2); *Civil Service Commission v. Iowa Civil Rights Commission*, 522 N.W.2d 82, 86 (Iowa 1994). Further, since the Ordinance specifically references that its purpose is to regulate project development while protecting public health and safety "without significantly increasing the cost or decreasing the efficiency of these systems and associated structures." App. Vol. 1, p. 345 (Ordinance, § 1). Thus, eviscerating a transfer provision would not be in accord with the intent of the Supervisors. Iowa Code § 4.4(3) ("In enacting a statute, it is presumed that . . . a just and reasonable result is intended.").

The District Court also noted that Plaintiffs' understanding would punish entities, like MidAmerican and PAWE, who were open with the county about their development intentions. App. Vol. 2, p. 1254. Plaintiffs' response is that due diligence needs to be done to adduce the "proper entity" which should submit an application so that the proper party is "obligated to the county to be responsible for the requirements of the Permit." Plaintiffs' Brief, p. 31. This argument fails because only the permit-holder can build the project and once a Permit is assigned, the assignee is responsible for meeting all obligations under the Permit and Ordinance. App. Vol. 1, pp. 345-358, 36-43. Further, no argument has been made that the Application failed to include any required information under the Ordinance. App. Vol. 1, pp. 450-452, 501-524, 542-782; Vol. 2, pp. 11-1178. Thus, in approving the Permit, the county received all required information and the obligations of the Permit are transferred to any assignee.[3]

The Plaintiffs also argue that Supervisors' grant of the Permit was flawed because they did not incorporate *recommendations* from the Iowa Department of Natural Resources and State Archeologist, and allegedly

[3] Because the main statutory objective of the Permit has been satisfied – providing the county with adequate information to evaluate the Application, any contrary reading of the "Owner/Developer" language does not invalidate the Permit because requiring MidAmerican to be the applicant was "not essential to the main statutory objective." *Willett v. Cerro Gordo County Zoning Board of Adjustment*, 490 N.W.2d 556, 559-560 (Iowa 1992).

failed to consider certain information regarding decommissioning costs and noise studies. The District Court correctly determined that none of these arguments were enough to survive summary judgment.

In order to make a successful writ of certiorari claim, the Plaintiffs must show that the Supervisors' decision "was not supported by substantial evidence; or [that] its actions were unreasonable, arbitrary, or capricious." *Perkins*, 636 N.W.2d at 64. Further, "[i]n a certiorari proceeding . . . a court's scope of review is limited [and a] board's action must be upheld if supported by any competent or substantial evidence." *Montgomery*, 299 N.W.2d at 692 (citing *Carstensen v. Board of Trustees*, 253 N.W.2d 560 (1977)). "Evidence is substantial if a reasonable person would find it adequate to reach the given conclusion, even if a reviewing court might draw a contrary inference." *Bush v. Board of Trs.*, 522 N.W.2d 864, 866 (Iowa Ct. App. 1994).

In reaching its decision, the District Court noted that it was unaware of any authority requiring that a board include additional requirements in a permit based upon recommendations. App. Vol. 2, p. 1256. Plaintiffs failed to provide any authority at the District Court level, and have failed to do so now. Simply put, there is no legal requirement for the Supervisors to act upon recommendations they considered. The Plaintiffs find fault, however,

with the District Court's determination of this case at the summary judgment stage and indicate that the cases cited by the District Court involved matters tried to the Court. Plaintiffs' Brief, p. 32. However, since the Supervisors determined the Application met the substantive requirements of the Ordinance, the District Court's only job was review the Supervisors' determination under a substantial evidence standard. App. Vol. 2, pp. 1256. There is ample evidence in this record for the District Court to conclude that the Permit's approval was supported by substantial evidence. App. Vol. 2, pp. 1257-1259.

The Plaintiffs also argue that the District Court impermissibly weighed evidence and found facts regarding a report prepared by the Plaintiffs' expert regarding noise from the turbines and the Supervisors' approved decommissioning plan. Plaintiffs' Brief, pp. 32-33. However, Plaintiffs misapprehend the District Court's findings and its role in reviewing the approval of the Permit.

As set forth above, the District Court's only role was to determine whether the Supervisors' approval of the Permit was supported by substantial evidence. In doing so, the District Court considered that contrary information from various sources was provided to the Supervisors regarding both noise studies (i.e. whether noise levels of the project would exceed the

limitation in the Ordinance) and decommissioning (i.e. what decommissioning would cost).[4] App. Vol. 2, pp. 1257-1259.

The District Court then correctly determined that based upon the uncontested facts in the record, there was substantial evidence available to support the Supervisors' decision. Thus, the District Court did not impermissibly "weigh" evidence; rather, it did exactly what it was supposed to do under its limited review – it determined whether the Supervisor's course of action was supported by substantial evidence, even if the District Court, or anyone else, might have reached a "contrary" conclusion. *Bush*, 522 N.W.2d at 866. As a result, the District Court's grant of summary judgment should be upheld.

CONCLUSION

The Supervisors respectfully request that this Court affirm Palo Alto County District Court's decision granting summary judgment.

[4] The Plaintiffs must also recognize that the project has not yet been built and that all noise studies were based on projections. The Supervisors consistently testified that they would expect any project, once built, to comply with all noise limitations in the Ordinance. App. Vol. 1, p. 138 (Deposition of Craig Merrill, pp. 46-47). Similarly, while there was debate about the cost of decommissioning, it is uncontested that the Decommissioning Agreement requires that PAWE, or MidAmerican if the project is assigned, are responsible for all decommissioning costs, whatever they might ultimately be. (Decommissioning Agreement).

REQUEST FOR ORAL ARGUMENT

While the Supervisors do not believe that oral argument is necessary in this case, the Supervisors request the opportunity to present oral argument on all issues in this appeal if oral argument is granted.

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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION,
TYPEFACE REQUIREMENTS, AND
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1. The brief complies with the type-volume limitation of Iowa Rule of Appellate Procedure 6.903(1)(g)(1) or (2) because this brief contains 5,673 words, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa Rule of Appellate Procedure 6.903(1)(e) and the type-style requirements of Iowa Rule of Appellate Procedure 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

/s/ Haley R. Van Loon — January 28, 2019
Haley R. Van Loon — Date