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' REPLY BRIEF

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State v. Wiederien, 709 N.W.2d 538 (Iowa 2006)

STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Appellees contend that Plaintiffs' reference in their discussion of the standard of review for summary judgments comparing the treatment of negligence issues in a summary judgment proceeding to the issues in this case concerning allegations that the actions of the Defendant were arbitrary, capricious, and unreasonable is inapplicable because this is not a negligence case. Appellees are misconstruing the Plaintiffs' argument.

Of course this is not a negligence case. Plaintiffs' point is that the concepts of arbitrary, capricious and unreasonable conduct are subject to interpretation and depend on the specific facts of a case, just as in a negligence case. Because of that, summary judgment should be granted only in exceptional cases alleging arbitrary, capricious and unreasonable conduct, just as in a negligence case.

In an attempt to further misconstrue the Plaintiffs' argument, the Intervenors cite several cases they claim show that summary judgment was granted in cases involving arbitrary, capricious and unreasonable conduct (Intervenors' Br. p. 18, n. 22). But a review of those cases reveal that those cases do not support the Intervenors' argument.

Worth County Friends of Agric. v. Worth County, 688 N.W.2d 257 (Iowa 2004), involved only the issue of whether state law preempted a county ordinance. There was absolutely no discussion of whether the county's action was arbitrary, capricious or unreasonable.

Willett v. Cerro Gordo County Zoning Bd. of Adjustment, 490 N.W.2d 556 (Iowa 1992), involved a question of statutory construction and the county's authority under the statute. Again, there was absolutely no discussion of whether the county's action was arbitrary, capricious or unreasonable.

Kramer v. Bd. of Adjustment for Sioux County, 795 N.W.2d 86 (Iowa App. 2010), as in Willett, pertained to the issue of statutory construction. There was absolutely no discussion of whether the county's action was arbitrary, capricious or unreasonable.

Vanwyk Farms LC v. Poweshiek County Bd. of Supervisors, 2009 WL 778086 (Iowa App. 2009), is an unpublished decision of the Iowa Court of Appeals. The case involved the county's approval of an agreement that did not yet exist. In upholding the county's approval of the agreement, there was no discussion of whether the county's action was arbitrary, capricious or unreasonable.

ARGUMENT

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

Contrary to the Defendant's assertion that the concept of arbitrary and capricious action applies only to a county's action in adopting a zoning ordinance, a case cited by the Appellees, Bushby v. Washington Co. Conservation Bd., 654 N.W.2d 494 (Iowa 2002), was not a zoning case and the court applied a standard of arbitrary, capricious and unreasonable to the decision in the case. So the Defendant's argument fails based on its own cited authority.

Defendant contends that the Bushby court did not make clear whether it was using a standard of illegal, fraudulent or clearly oppressive, or a standard of arbitrary, capricious or unreasonable. But those two standards are not at odds. The Bushby court referred to the case of Douglass v. Iowa City, 218 N.W.2d 908 (Iowa 1974), for the illegal, fraudulent or clearly oppressive standard. And Douglass in turn referred to the decision in Scott v. City of Waterloo, 223 Iowa 1169, 274 N.W. 897 (1937). The opinion in Scott clearly applied the arbitrary, capricious and unreasonable standard to the city's action in that case.

The answer to this issue is that a governmental act is illegal if, inter alia, it is arbitrary, capricious or unreasonable. Perkins v. Bd. of Supervisors, 636 N.W.2d 58, 64 (Iowa 2001). An illegality is one of the grounds for challenging a governmental action described in Douglass, 218 N.W.2d 908 (Iowa 1974). So the Plaintiffs in this case have appropriately alleged that the actions of the Defendant were arbitrary, capricious or unreasonable, and thus, illegal.

Nor does the county's home rule authority protect it from challenges alleging that governmental actions were arbitrary, capricious or unreasonable. The cases cited above establish that fact. If home rule were the defense the Defendant claims it is, those cases would not have been decided on the basis

of whether the governmental actions were arbitrary, capricious or unreasonable.

Next, Defendant claims that the Plaintiffs' reliance on Perkins, 636 N.W.2d 58 (Iowa 2001), is misplaced. Defendant claims that Perkins involved only statutory and constitutional claims. On the contrary, the court's opinion held, "However, the property owners have failed to show the Board of Supervisors acted unreasonably, arbitrarily, or capriciously in enacting the amendment." Id. at 69. It is clear, therefore, that the Plaintiffs' reliance on Perkins is squarely supported by the specific holding in the Perkins opinion.

Defendant contends that the fact that Invenergy and MidAmerican essentially wrote the ordinance and pressured the Supervisors to adopt it does not support the Plaintiffs' case. Defendant claims that the Plaintiffs are challenging the Supervisors' motives in adopting the ordinance. But the Plaintiffs are not challenging the Supervisors' motives. The involvement of Invenergy and MidAmerican in the drafting and adoption of the ordinance and the surrounding circumstances clearly show that the Supervisors did not have a rational basis for adopting the ordinance as drafted. The ordinance was adopted as it was drafted because that is what Invenergy and MidAmerican wanted.

In Des Moines Metropolitan Area Solid Waste Agency v. City of Grimes, 495 N.W.2d 746 (Iowa 1993), it was alleged that the City of Grimes adopted an ordinance for an improper purpose. The courts declined to examine the council's motives in adopting the ordinance. The question was whether there was a rational basis for adopting the ordinance. In this case the Plaintiffs are not alleging an improper purpose, but rather that the Supervisors' unquestioning acquiescence in the demands of Invenergy and MidAmerican show a lack of a rational basis for adopting the ordinance.

The foregoing shows that there were disputed facts on this issue that preclude summary judgment, and that should be litigated on the merits at a trial.

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.

The first issue regarding approval of the application to construct the wind energy project is that Palo Alto Wind Energy was not the proper entity under the wind energy ordinance to make the application. As explained in Plaintiffs' opening Brief, pursuant to the wind energy ordinance, only the owner/developer, as defined in the ordinance may apply for approval to construct the wind energy project. As defined in the ordinance, the owner/developer is the entity that

intends to own and operate the completed wind energy project. In this case, there was no question that it was MidAmerican that intended to own and operate the completed project.

So it does not matter that Palo Alto Wind Energy, at the time of the application, owned the easements and had undertaken some preliminary work to move the project forward. Defendant argues that only the permit holder can build the project. That is exactly the Plaintiffs' point. Palo Alto Wind Energy never intended to build the project. MidAmerican intended to build the project. Mike Fehr of MidAmerican made this clear at a public hearing on October 5, 2017 (Pl. Ex. 7)(App. Vol. 2, p. 1244).

The primary focus of Defendant's argument seems to be a tortured interpretation of Section 9 in the wind energy ordinance (Depo. Ex. 128)(App. Vol. 1, p. 345). Section 9 allows the completed wind energy project to be transferred to another entity. As was explained in Plaintiffs' opening Brief, this section refers to transferring the completed project. Defendant claims that Section 9 allows Palo Alto Wind Energy to transfer the development assets to another entity. Therefore, argues the Defendant, the ordinance allows Palo Alto Wind Energy to apply for construction approval because it could transfer its assets to MidAmerican later. But, again,

it is the final completed project that can be transferred, not the development assets.

Allowing the wrong entity to submit the application to construct and operate the wind energy project is not an unimportant technicality, as suggested by the Intervenors. First, allowing Palo Alto Wind Energy, an entity that never intended to own or operate the wind energy project, to submit the application directly violated the terms of the wind energy ordinance that the Supervisors themselves adopted. More importantly, the purpose of requiring the entity that intends to own and operate the project to be the entity submitting the application ensures that the entity that will be responsible to the county for the operation of the project will be the entity making the application. There was obviously a purpose in specifically defining the term "owner/developer" in the ordinance as the entity that intended to actually own and operate the project. Each provision of a statute, such as the wind energy ordinance, must be read so as to give effect to all provisions of the statute. State v. Wiederien, 709 N.W.2d 538 (Iowa 2006).

The second issue regarding approval of the application is the Defendant's failure to consider the concerns and recommendations in the letters from the Iowa Department of Natural Resources and the State Archaeologist. Defendant

claims that because these were recommendations, Defendant did not have to consider them. But the wind energy ordinance is clear that these agencies must be notified of the pending application for construction approval so the agencies can provide comments. That provision of the ordinance would be meaningless if the Supervisors can just ignore any input from the agencies.

Defendant claims the Plaintiffs have cited no authority to support this point and that there is no legal requirement for the Supervisors to consider the comments of the state agencies. On the contrary, the cases cited throughout the briefing herein impose an arbitrary, capricious and unreasonable standard on governmental actions. In this case it was arbitrary, capricious and unreasonable for the Supervisors to essentially request comments from the agencies in the ordinance and then completely ignore those comments.

Another issue is the Supervisors' failure to consider the report on noise by Richard James. Contrary to the Defendant's argument, the point is not that all the sound studies before a project is built are projections. The point is that Mr. James showed that the noise study in the application did not apply the standard established in the wind energy ordinance. So this was not a question of which

projection was correct. The point is that the noise study in the application used the wrong basis for making a projection.

In summary, the Defendant has presented no valid argument challenging the evidence that the Defendant's approval of the application for a wind energy project was arbitrary, capricious, unreasonable and a violation of the wind energy ordinance.

CONCLUSION

Based on the foregoing, this case should be reversed and remanded for a trial on the merits.

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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 212 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 Reply Brief with the Supreme Court of Iowa, and that a copy was served electronically on:

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