

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT

2 :SS

3 COUNTY OF CLARK) THIRD JUDICIAL CIRCUIT

4 * * * * *

5 Crocker Wind Farm, LLC,

6 Petitioner, 17-0017

7 v.

8 The Clark County Commission Hearing on Motion
and the Clark County Commission for Summary Judgment
9 acting as the Clark County
Board of Adjustment,
10 Respondent.

11 * * * * *

12 BEFORE: The Honorable Carmen Means,
13 Circuit Court Judge in and for the
14 Third Circuit, State of South Dakota,
Clark, South Dakota.

15

16 APPEARANCES:

17

18 Mr. Brian Donahoe
Donahoe Law Firm
401 East 8th St., Suite 215
19 Sioux Falls, SD 57103

20 Mr. Brett Koenecke
May, Adam, Gerdes & Thompson
21 PO Box 160
Pierre, SD 57501

22

23 For the Petitioner

24

25

1 Mr. Jack Hieb
2 Richardson, Wyly, Wise, Sauck & Hieb
3 PO Box 1030
4 Aberdeen, SD 57402

5 For the respondents

6 Proceedings were held August 14, 2017
7 Clark County Courthouse

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 THE COURT: This is the time and place scheduled
2 for a hearing on a motion for partial summary judgment in the
3 case of Crocker Wind Farm, LLC versus Clark County Board of
4 Adjustment and Clark County Commission, I'd have attorneys
5 note their appearances here today.

6 MR. KOENECKE: Brett Koenecke for the petitioner.

7 MR. DONAHOE: Brian Donahoe also for the
8 petitioner.

9 MR. HIEB: Jack Hieb on behalf of the Clark County
10 entities.

11 THE COURT: All right. This is your motion Mr.
12 Koenecke and Mr. Donahoe, I'd hear brief argument from you,
13 I've reviewed your submissions.

14 MR. DONAHOE: Thank you, your Honor, I'll be
15 speaking to the issues. In regard to this particular matter
16 as we pointed out in our reply brief, the principal case
17 relied upon by the County is one from Indiana that applies a
18 different standard than our South Dakota Supreme Court has
19 applied to the issues relating to interpretation of a zoning
20 ordinance in a county like Clark County. In our particular
21 case we've got a situation where there are some minimum
22 setbacks and those are decided legislatively through the
23 process of adopting the initial zoning ordinance and then any
24 amendments to that ordinance, and it's important to draw this
25 distinction because in our system here in South Dakota

1 there's a significant due process right to land owners and
2 others who are going to be subject to these restrictions in a
3 zoning ordinance and that due process requirement is set
4 forth in our statutes for a very specific process by which
5 the public good and public welfare that's protected by a
6 zoning ordinance is going to be decided by the county
7 planning commission and then they make a recommendation to
8 the county commission and the county commission can adopt
9 that particular set of recommendations or they can send it
10 back down and go through that process and come back up and
11 when they finally have a zoning ordinance then any amendments
12 to that are also going to go through that same process. And
13 I draw that distinction because when you have language in a
14 zoning ordinance like we have here that say the wind turbines
15 shall be at least 1,000 feet from a residence or a church or
16 a business or a government owned building you set forth a
17 list and you exclude others that could be included in that
18 list by implication and that's a statutory interpretation
19 canon that has been recognized in this state for a long time.
20 Here they excluded cemeteries or implicitly they were
21 included with churches, either way they're not on the list
22 and when they're not on the list they're recognized as being
23 excluded. And when a party like Crocker Wind Farm is looking
24 at the potential for the development of a business that's
25 allowed as a conditional use in a Clark County or other

1 county situation like this they take into account those
2 things that set forth minimum setbacks and they understand
3 that they as the potential owner and operator of that
4 business can make a greater distance work, they can increase
5 that or if there are specific provisions in the ordinance
6 that set forth a process and then criteria for a
7 determination on an individual or sight by sight or ad-hoc
8 basis that those should be spelled out in the ordinance and
9 here Clark County knew how to do that and they knew how to do
10 it right and they do so but in a completely different part of
11 their ordinance and that's one that deals with concentrated
12 animal feeding operations. That process spells out the ways
13 in which setbacks can be increased from their minimums and
14 sets out the criteria they would look at in determining that.
15 They also set out a way in which those can be reduced. Here
16 Clark County doesn't do that here for what they call Wind
17 Energy Systems or WES types of applications and so Crocker
18 Wind Farm goes into this process expecting that the only
19 thing that they'd have to establish is what's called general
20 compatibility with adjacent properties or uses and in that
21 particular area Clark County even goes so far as to say we're
22 not going to deny a conditional use unless there are specific
23 enumerated or spelled out criteria, and I'm paraphrasing, but
24 they say we're going to list the criteria for you because you
25 need to know what it is that would cause you to deny that

1 type of application. When they use that language even though
2 they didn't deny our application here they also can't then
3 turn around and use additional criteria or additional
4 processes to decide how to approve a conditional use. In
5 other words when they say we're not going to deny you based
6 on anything that's not spelled out here they can't then
7 change what's spelled out, move the goal post so to speak in
8 the middle of the game, and make you go further. I'll just
9 wrap up here, your Honor, by saying when they have all these
10 things set out it's clear the intention is they're going to
11 decide these as minimums, they're not going to include
12 cemeteries or other things that aren't listed, and when they
13 do that's a violation of due process, it's also unlawful and
14 unauthorized or an act that's exceeding the authority of the
15 Clark County Board of Adjustment. And all that is because
16 it's supposed to be decided in open debate about the general
17 legislative and the terms that are going to be imposed upon
18 an applicant or a land owner as a matter of public policy
19 through that legislative process that we talked about earlier
20 when you adopt or amend these ordinances. And when you do it
21 in that circumstance or situation you do it in a way that's
22 open and has all of the facts set forth that should apply to
23 these things in general and when you are able to address it
24 in that way you don't come up with problems like we have here
25 where there's absolutely no evidence in the record that there

1 was a specific objective criteria or basis for the increase
2 in the setbacks and when we look at that increase, when we
3 see it goes from what was 1,000 feet to almost 4,000 feet in
4 the case of residences and then goes to 1 mile or 5,280 feet,
5 more than 5 times what had been previously determined to be
6 adequate in that legislative process for churches, often
7 times churches will have cemeteries so it wouldn't make sense
8 for this to be separate for cemeteries whereas my co-counsel
9 mentioned at the time this was proceeding with the county, it
10 seems like there are rights here being extended to those that
11 are deceased that aren't being given to those that are
12 living. It doesn't make sense. So all that comes back to us
13 here and it's clear the evidence in this case that the
14 decision was made solely on the basis of an arbitrary
15 reaction or a capricious reaction to the political pressure
16 brought by those opposed without application of the
17 appropriate criteria in this case. Based on that there are
18 several South Dakota Supreme Court cases that say that that
19 type of a decision is improper, the Hines case versus City of
20 Miller is one of the key cases that goes through that
21 analysis, there are others. The bottom line is that the
22 County can't do what they did here and the sheer magnitude of
23 the increase here is clear evidence that it was arbitrary and
24 capricious or at a minimum unlawful because the County board
25 exceeded their authority. And the one last thing I'll

1 mention is that the final distinction I would make with the
2 Indiana case that's relied upon by the County is the fact
3 that the decibel balance levels for noise are completely
4 different in that county and there was a lot of room for the
5 County board to address that and the standard in Indiana is
6 just whether it was reasonable or not for an applicant to
7 know that they would be subject to additional restrictions,
8 that's not our standard in South Dakota. But even if it was
9 it wouldn't be reasonable for us to expect as applicants in
10 Clark County that Crocker Wind Farm would be subjected to
11 this significantly greater distance, even greater than what
12 they thought was appropriate in Indiana and in fact even
13 greater than what's recently been determined to be the
14 appropriate level of setback by vote in Lincoln county, if
15 you're watching the news you may have seen it, they recently
16 had a referendum or initiated measure, I may be mixing that
17 up but there was a vote by the citizens of Lincoln County,
18 South Dakota and they decided a half mile and here we're at
19 three quarters of a mile with no basis for it and the County
20 doesn't even try to justify it through facts. So with all
21 that said, your Honor, we'd ask for a decision by the Court
22 that strikes that decision as exceeding the Clark County
23 Board's authority. Unless you have questions that would be
24 my argument.

25 THE COURT: Mr. Hieb, I'd hear from you.

1 MR. HIEB: Thank you, your Honor. I'm going to
2 start with where he left off. First of all there's nothing
3 in the record about what happened in Lincoln County all
4 though I will point out to the Court that the fact that
5 Lincoln County can do what it wants with respect to setbacks
6 for wind turbines is how our system is set up, it's a county
7 by county situation. There are counties in South Dakota that
8 still don't have zoning ordinances at all which would allow
9 for you to put a wind turbine up wherever you wanted to as
10 long as you either own the land or have the permission who
11 did to put it up. There are counties like Clark County that
12 have passed zoning ordinances which tell you in order to do
13 that you need to meet certain criteria. What Mr. Donahoe
14 seems to be arguing to this Court is this, we're not arguing
15 with the proposition that Clark County can create a larger
16 setback, we are simply saying that in order for them to do it
17 effectively they need to amend their ordinance to do that and
18 what he's essentially accusing the Board of Adjustment of
19 doing is exactly that by requiring setback greater than 1,000
20 feet in this case. And the case that I think is probably the
21 most telling for the Court on that issue is the not the Hines
22 case, it's the Meier case which was cited in our brief. The
23 argument that was made in that case by the people that were
24 upset over the denial of their permit for a hog operation in
25 advance of the hearing basically argued to the Court that you

1 should not allow the County to present any evidence of things
2 that are not specifically listed in the conditional use
3 section associated with CAFOs and that was section 515 in
4 that ordinance and the trial court disagreed with that and
5 the trial court allowed them to present evidence under
6 section 1107 which was the general compatibility section. So
7 it went to the Supreme Court primarily on that issue which is
8 look, if they're going to give us reasons for denying our
9 permit, the only reasons that they can give us have to be
10 contained in the section on CAFOs and the Supreme Court
11 disagreed, the Supreme Court said no, you read this ordinance
12 as a whole and the ordinance in that case talked about, in
13 fact I'll just quote from the Supreme Court, it says our
14 conclusions are supported by the very concept of a
15 conditional use which is a land use which because of its
16 unique nature is compatible with the permitted land unit uses
17 in a given zoning district only upon a determination that the
18 external effects of the use in relation to the existing and
19 planned uses of adjoining property and the neighborhood can
20 be mitigated through imposition of standards and conditions,
21 and they go back and cite to the fact that the zoning
22 ordinance, the general zoning ordinance, the general language
23 of it talked about the morals, standards, health, safety of
24 the community which is exactly what the Clark County
25 ordinance does. It's almost the same language in Clark

1 County, it's the promotion of the public health, safety,
2 morals, or general welfare. And so in the Meier case what
3 the Supreme Court was faced with was can we allow the Board
4 to have discretion to look at the public health, safety,
5 morals, or general welfare when considering an application
6 for a conditional use permit? Or are we limited to the list
7 of things that the County put into the ordinance relating to
8 CAFOS? And what the Supreme Court said was you're not
9 limited. You can look at the public health, safety, morals,
10 and general welfare and the reason that you can is that a
11 conditional use is not a use permitted by right, it's a use
12 that is only permitted when the Board whose been entrusted
13 with the responsibility for determining whether that use can
14 happen or not decides that it's -- that it fits, and in this
15 particular case Mr. Donahoe has somewhat conceded the point,
16 but the Board did not deny their permit request, you know, he
17 talked about how the ordinance says if you're going to deny
18 somebody you've got to provide some objective list of
19 criteria. They didn't deny them. What they said was we're
20 looking at the footprint of this, it's right in their
21 findings, the footprint being what's the landscape going to
22 look like given the number of towers, the size of the towers,
23 and where those towers are going to be situated and we have
24 to decide given that what setback is appropriate in order to
25 protect the public health, safety, and general welfare of the

1 people of the county. His argument is they can't do that.
2 If they say -- to take his argument to its logical
3 conclusion, your Honor, what he's saying is if you were to
4 agree with him, you're going to issue an order telling the
5 Board that you can never require a setback greater than a
6 thousand feet where a residence is concerned, you can never
7 require a setback for a cemetery at all because it's not
8 specifically listed in the ordinance, so you would remand
9 this to the Board and basically tell them you must approve
10 this as long as their footprint is at least 1,000 feet away
11 from this or that or in the case of cemeteries, you can't put
12 a setback there at all. And I think that runs directly
13 contrary to what the Supreme Court said in Meier, what they
14 said in Meier is that's the Board's job, the Board's job is
15 to look at the overall health, safety, and welfare of the
16 County and they can make whatever, you know, restrictions
17 they want to in that regard as long as they're not
18 inconsistent with the ordinance. And that takes me to my
19 second point, they said we've seized on the word minimum.
20 Well we've seized on the word minimum because that's what the
21 ordinance says right essentially in the preamble is these are
22 minimum standards, and then in the more specific part of the
23 code that talks about wind towers specifically they used the
24 word at least. So in both cases the ordinance very clearly
25 tells an applicant you're not going to get any closer than

1 1,000 feet to a residence. Even if the Board wanted to,
2 under this ordinance they can't do it without a written
3 agreement from the affected land owner I think is the way
4 that you might be able to do it. He points out that the
5 standard is different for CAFOs. Yes it is, for CAFOs you can
6 decrease that setback under the ordinance, the people of
7 Clark County have given their Board the authority to decrease
8 that under certain circumstances. They haven't given it to
9 them where wind towers are concerned. Under that legislation
10 that they passed they said 1,000 feet is the closest you're
11 going to get without certain specific circumstances being met
12 which aren't met in this case. Finally, your Honor, he talks
13 about an Indiana case is a different ordinance. Well, we
14 don't have the entire Indiana ordinance, but we cite that
15 case because we don't have a case directly on point in South
16 Dakota, however I would suggest that when you look at that
17 Indiana case, it is on all 4's in the areas that matter, I
18 mean it's the very same issue in that case that we're dealing
19 with here and there the Indiana court issued a decision that
20 seems to me to be very similar in what our Supreme Court said
21 in Meier with respect to the Board's authority in these
22 areas. My last point in conclusion, he talks about how this
23 was arbitrary and capricious. Well, as the Court is well
24 aware because the Court has sat on these cases now, that was
25 the standard before the writ of cert standard got imposed,

1 that's the coyote flat standard and the arbitrary and
2 capricious argument they're making is truly an argument to
3 ask this Court to say go and look at the reasons why the
4 Board did what they did and declare the reasons to be
5 invalid, and as the Court has heard on previous occasions, I
6 think that is beyond the Court's purview. It's certainly
7 beyond the Court's purview at this point in this case when
8 they're asking for a summary judgment from the Court on this
9 issue. Thank you.

10 THE COURT: Well, I have to agree with what
11 Mr. Hieb said in the closing of his argument, essentially my
12 job at this point is to decide whether the Board acted within
13 its authority in setting the setbacks in which they did and
14 under the ordinances with which they proceeded. I can't find
15 that based on my review of the submissions of counsel and
16 based on my review of this case. I believe that summary
17 judgment should be denied, I agree that the setbacks that
18 were prescribed by statute are minimum setbacks and I don't
19 find that the Board exceeded its authority at least under the
20 summary judgment standard in setting the setbacks as they
21 did. So I'm going to deny the motion for summary judgment,
22 partial summary judgment that's before the Court today.
23 Mr. Hieb, you may prepare an order consistent with this
24 decision.

25 MR. HIEB: Thank you, your Honor.