

IN THE IOWA DISTRICT COURT FOR CLINTON COUNTY

<p>RICK WHITE, RICHARD J. KROGMANN, KENNETH O’CONNOR, TOM STEVENSON, BRENT BUECH and ELIZABETH BUECH,</p> <p>Plaintiffs,</p> <p>v.</p> <p>BOARD OF SUPERVISORS OF CLINTON COUNTY, IOWA,</p> <p>Defendant.</p>	<p>Case Number CVCV051285</p> <p>BRIEF ON HEARING PURUSANT TO IOWA RULE OF CIVIL PROCEDURE 1.1406</p>
---	--

COMES NOW the Defendant Board of Supervisors of Clinton County, Iowa and submits its motion for a hearing pursuant to Iowa Rule of Civil Procedure 1.1406. In support of it states the following:

I. BACKGROUND

On January 26, 2026, the Plaintiffs, Rick White, Richard J. Korgmann, Kenneth O’Connor, Tom Stevenson, Brent Buech and Elizabeth Buech, filed a petition for writ of certiorari challenging the Defendant’s actions in passing local legislation regulating commercial wind turbines. The petition contends that Defendant’s legislation adopted on December 15, 2025, is illegal. The petition, at various points, alleges:

- (1) Failure to follow procedures for adopting the ordinance (Paragraph 22(a));
- (2) State law preemption (Paragraph 22(b));
- (3) The ordinance is bad policy based on science-based studies (Paragraph 22(c));
- (4) The ordinance is bad policy based on “best practices and standards related to some of the terms” (Paragraph 22(d));

- (5) The ordinance is bad policy based on recommendations from other governmental entities (Paragraph 22(e));
- (6) The ordinance is bad policy based on “reasonable evidence-based terms from the Amendment” (Paragraph 22(f));
- (7) The ordinance is bad policy based on “Public Comment” (Paragraph 22(g)); and
- (8) The ordinance violates the rights of property owners that signed voluntary easements (Paragraph 22(h)).

A significant portion of these complaints are simply Plaintiffs airing their disagreements with the legislative policies adopted by the Defendant. For example, the Petition alleges that:

24. The Amendment also contains additional setbacks from riparian corridors, wetlands, conversation areas, and eagle nests, which further diminishes the area available for commercial wind development.

25. These setbacks are substantially more restrictive than those recommended by the Corps, the DNR, and the USFW.

(Petition paragraphs 24 and 25).

Plaintiffs’ petition includes further criticism of the legislative policy decision in paragraph 30(a)-(e).

II. STANDARD OF REVIEW

Iowa Rule of Civil Procedure 1.1406 empowers a district court to conduct a hearing concerning the contents of a writ of certiorari, specifically the sufficiency of the petition. I.R.C.P. 1.1406. A Rule 1.1406 hearing must be confined to the sufficiency of the petition, what records or proceedings shall be certified, and the terms of any bond to be given. I.R.C.P. 1.1406.

The comment to Rule 1.1406 states that “[t]he hearing contemplated being in the nature of a preliminary examination and not going to the merits of a petition, it should be limited to the sufficiency of the petition, the necessity and requirements of the bond, or stay and the contents of the proposed writ.” I.R.C.P. 1.1406 cmt.

The Iowa Supreme Court previously endorsed the consideration of whether a petition for writ of certiorari “failed to state a claim on which any relief could be granted.” *Burd v. Board of Ed. Of Audubon County*, 260 Iowa 846, 848, 151 N.W.2d 457, 459 (Iowa 1967). The Iowa Supreme Court then applied the standards for a motion to dismiss for failure to state a claim. *Id.* at 855.

The Iowa Court of Appeals adopted such a procedure in an unpublished decision in 2013. *Residential and Agr. Advisory Committee, LLC v. Dyserville City Council*, 841 N.W.2d 356 (Iowa App. 2013). The Court found that a district court should “address the issue of whether the petition alleged facts which, if proven, would justify a finding that the city council had acted illegally—which was the only issue before the court.” *Id.*

A motion to dismiss tests the legal sufficiency of a plaintiff’s claims. *Schaffer v. Frank Moyer Constr., Inc.*, 563 N.W.2d 605, 607 (Iowa 1997). Generally, a district court may grant a motion to dismiss only when the petition on its face shows no right of recovery under any state of facts. *Tate v. Derifield*, 510 N.W.2d 885, 887 (Iowa 1994). A motion to dismiss admits the well-pleaded facts in the petition and waives any ambiguity or uncertainty. *Id.* A court views the allegations of the petition in the light most favorable to the plaintiff. *Id.*

III. ANALYSIS

Certiorari is an extraordinary remedy; the court reviews only for illegality—not mere error; the Board’s discretionary decisions are not subject to substitution of judgment; and if any

reasonable basis exists for the Board’s action, the writ must fail. Specifically, the Petition repeatedly characterizes disagreement with the Board’s policy judgment as “illegality.” The Court should know that even assuming *arguendo* that Petitioners disagree with the Board’s policy determinations, disagreement is not illegality for purposes of certiorari. The Board had statutory authority under Chapter 335 to amend the ordinance. The challenge goes to how it exercised discretion—not whether it lacked authority to act.

A. The Court does not have jurisdiction to overturn legislative policy through a petition for writ of certiorari or any other cause of action.

“A writ of certiorari will not lie against the City if it was exercising a legislative function at the time it enacted the moratorium, such actions are not reviewable by the courts.” *Geisler v. City Council of City of Cedar Falls*, 769 N.W.2d 162, 166 (Iowa 2009). “This rule arises from the traditional separation of powers between the three branches of government.” *Id.* The chief characteristic of a legislative function is that it involves “determination of broad policies or principles for the conduct of society’s affairs.” *Id.* “We have long held that an amendment of a zoning ordinance is a legislative function.” *Geisler* at 166. (citing *Boomhower v. Cerro Gordo Bd. of Adjustment*, 163 N.W.2d 75, 77 (Iowa 1968)). The Court can dismiss those portions of the petition for writ of certiorari that challenge the substance of legislative action.

1. Land Use regulations can be legislative functions.

The Iowa Supreme Court explained that municipal planning is a legislative task when it stated “[a] moratorium aids a governing body in performing the legislative task of municipal planning.” The Court cited *Schafer v. City of New Orleans*, 743 F.2d 1086, 1090 (5th Cir.1984) for the following propositions:

“Interim development controls such as this moratorium have been found to play an important role in municipal planning. They aid in ‘bridging the gap between planning and its implementation into legal measures.’ They may, as here, be used

to preserve the status quo while study of the area and its needs is completed. This moratorium on land use serves a significant public purpose.”

Geisler at 166.

However, this does not end the inquiry.

There is a difference between municipal planning and adjusting zoning laws on a parcel-by-parcel basis. The Iowa Supreme Court highlighted the difference between a general land use ordinance (legislative function) and rezoning particular parcels in *Residential and Agricultural Advisory Committee, LLC v. Dyersville City Council*, 888 N.W.2d 24, 40-43. The Court explained:

We also discussed the standards for determining whether a zoning decision has remained a legislative function or evolved into a quasi-judicial function. *Id.* at 798. We expanded on the two-part test from *Buechele* by citing to factors identified by the Washington Supreme Court in determining whether zoning activities are quasi-judicial in nature or legislative in nature:

(1) rezoning ordinarily occurs in response to a citizen application followed by a statutorily mandated public hearing; (2) as a result of such applications, readily identifiable proponents and opponents weigh in on the process; and (3) the decision is localized in its application affecting a particular group of citizens more acutely than the public at large.

Id.; see also *Fleming v. Tacoma*, 81 Wash.2d 292, 502 P.2d 327, 331 (1972) (en banc).

While we cited these factors with approval, we had the opportunity to review the entirety of the *Fleming* case and did not choose to adopt the Washington court's holding in that case that all public zoning hearings should be classified as adjudicatory.¹¹ *Sutton*, 729 N.W.2d at 798; see also *Fleming*, 502 P.2d at 331.

Residential & Agric. Advisory Comm., LLC v. Dyersville City Council, 888 N.W.2d 24, 42 (Iowa 2016)

The Iowa Court discussed a similar issue in *Sutton* stating that:

Although municipal zoning ordinarily involves the enactment of an ordinance, an action that on first blush appears to be legislative in nature, rezoning often takes on a quasi-judicial character by reason of the process by which it is carried out. We defined the nature of a quasi-judicial function in *Buechele v. Ray*, 219 N.W.2d 679 (Iowa 1974). We stated in that case that a quasi-judicial function is involved if the

activity (1) involves proceedings in which notice and an 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 thereto.” *Buechele*, 219 N.W.2d at 681.

Sutton v. Dubuque City Council, 729 N.W.2d 796, 798 (Iowa 2006)

The Court clarified this distinction in 2016, stating:

We discussed the distinction between traditional rezoning and PUD zoning:

[Creating] zoning districts and rezoning land are legislative actions, and ... trial courts are not permitted to sit as “super zoning boards” and overturn a board’s legislative efforts.

....

The planned unit development concept varies from the traditional concept of zoning classifications. It permits a flexible approach to the regulation of land uses. Compliance must be measured against certain stated standards....

... [S]ince the Board was called upon to review an interpretation and application of an ordinance ... and the ordinance was not challenged per se, the Board’s decision was “clearly quasi-judicial.”

Id. (quoting *Hirt v. Polk Cty. Bd. of Cty. Comm’rs*, 578 So.2d 415, 417 (Fla. Dist. Ct. App. 1991) (citation omitted) (emphasis added)).

Residential & Agric. Advisory Comm., LLC v. Dyersville City Council, 888 N.W.2d 24, 42–43 (Iowa 2016).

Thus, the determination of whether a district court has subject matter jurisdiction over a board of supervisor’s action to amend a zoning ordinance depends on the nature of the ordinance being challenged.

The key difference between a zoning decision and general police powers legislation is whether the government action regulates by district. “Historically, zoning regulations took the form of separating geographic areas according to zoning districts and specifying the uses permitted in each district.” *Goodell v. Humboldt Cnty.*, 575 N.W.2d 486, 496 (Iowa 1998). The Court explained:

Despite expansion in the type of regulation imposed by zoning ordinances, the fundamental attribute of use regulation *by district* remains. *See, e.g.*, 83 Am.Jur.2d *Zoning* § 2, at 36 (1992) (“The very essence of zoning is the territorial *division of land into use districts* according to the character of the land and buildings, the suitability of land and buildings for particular uses, and uniformity of use.”) (emphasis added); *Black’s Law Dictionary* 1618 (6th ed.1990) (defining “zoning,” in part, as “[d]ivision of land into zones, and *within those zones*, regulation of both the nature of land usage and the physical dimension of uses including height[,] setbacks and minimum area”) (emphasis added); 8 J. Jeffrey Reinholtz & Timothy P. Bjur, *McQuillin Municipal Corporations* § 25.07, at 27 (3d ed.1991 rev. vol.) (“‘Zoning’ has been defined as the legislative division of a community into areas in which only certain designated uses of land or structures are permitted. The term ... infers governmental regulation of the uses of land and buildings *according to districts or defined areas.*”) (emphasis added); *id.* § 25.53, at 172 (“A zoning ordinance is one the nature and purpose of which is to regulate uses of lands and buildings *according to districts, areas, or locations.*”) (emphasis added); 1 *Zoning and Land Use Controls* § 1.02[1], at 1–6 (“Zoning ordinances are adopted *to divide the land into different districts*, and to permit only certain uses *within each zoning district.*”) (emphasis added); 6 *Zoning and Land Use Controls* § 40.01[1][a], at 40–03 (“The central thesis of zoning is that there is a proper *place* for every use.”) (emphasis added).

Goodell v. Humboldt Cnty., 575 N.W.2d 486, 496 (Iowa 1998)

The Court rejected a challenge to a local ordinance as “zoning” because “It is this fundamental attribute that is missing in the challenged ordinances; they regulate an activity irrespective of the location of that activity within the county.” *Goodell* at 496. (“Thus, although the ordinances may advance the health and welfare of the community, they do not do so by regulating the usage of land by district.”). This is not an easy concept to grasp and hold on to, but the Iowa Supreme Court aptly explained the difference:

We note a contrary conclusion would lead to an absurd result. *See Hagen v. Texaco Refining & Mktg., Inc.*, 526 N.W.2d 531, 543 (Iowa 1995) (stating court seeks a reasonable construction of a statute that will “avoid absurd results”). The plaintiffs argue the county's ordinances substantially restrict the use of land and hence are zoning regulations. But that could be said of any regulation of human activity because human activity customarily occurs *on land or in a structure on land*. *See Town of Islip*, 566 N.Y.S.2d at 311 (noting a law is not a zoning ordinance “merely because it touches the use of land”). Because any regulation of human activity could be characterized as a regulation of the use of one's land, the classification of an ordinance as zoning on the basis that the regulation affects the use of land would

make every city or county ordinance a zoning ordinance, subject to the restrictions and procedures of chapter 335.

Goodell v. Humboldt Cnty., 575 N.W.2d 486, 497 (Iowa 1998)

A general police power ordinance is legislative in nature. It is not simple zoning by district.

Plaintiffs' challenge is undoubtedly a challenge to general police powers legislation. The ordinances at issue in this case are not the type of zoning amendments, referred to as rezoning, that are subject to judicial scrutiny under Iowa Chapter 335. *Montgomery v. Bremer County Bd. of Sup'rs*, 299 N.W.2d 687, 694 (Iowa 1980). (considering rezoning specific parcels from agricultural to industrial.) See also *Robinson v. Linn Cnty. Bd. of Supervisors*, 10 N.W.3d 251 (Iowa Ct. App. 2024). ("In considering those factors, in a case in which a decision was made 'to determine whether rezoning was in the best interest of the city as a whole,' rather than to weigh the legal rights of one party against another, the court has determined the zoning actions in question were legislative, not quasi-judicial.")

The petition for writ of certiorari demonstrates that it is challenging a legislative decision as opposed to a quasi-judicial one. Petitioners' complaints are based on disagreements about the policy decisions of the Board of Supervisors and challenge the ordinance *per se*. Petitioners allege that the Court should overrule the zoning amendment legislation based on: (1) prevention of any new commercial wind development "in the County"; (2) science-based studies conducted by industry experts in their respective fields provided by CCW to the Board; (3) recommendations and parameters for environmentally-safe wind development from the Federal Aviation Administration (the "FAA"); (4) recommendations and parameters for environmentally-safe wind development from the U.S. Army Corps of Engineers (the "Corps"); (5) recommendations and parameters for environmentally-safe wind development from U.S. Fish and Wildlife Service ("USFW"); recommendations and parameters for environmentally-safe wind development from

the Iowa Department of Natural Resources (the “DNR”); and (6) the adoption of reasonable evidenced based terms for the Amendment. (Petition pp. 3-4). Petitioners continue with allegations about the substance of the setbacks and other restrictions. (Petition pp. 4-5). It specifically criticizes county-wide land use regulations related to: (a) operation and maintenance plans; (b) participating and non-participating setbacks; (c) sound limits; (d) shadow flicker limit; and (e) catastrophic events. (Petition pp. 5-6).

Petitioners’ petition for writ of certiorari includes these numerous complaints to challenge the ordinance on its face. Petitioners are not contending that a decision about their parcels should be overturned. They ask the Court to determine that “the Amendment placed up on the record is illegal and void” and overturn its provisions on a county wide basis. (Petition p. 8). Plaintiffs’ petition does not seek a ruling related to their individual properties. Instead, they seek to remove the ordinance altogether. This is not to say that the Petitioners do not raise procedural issues in their petition. *See Geisler* at 166. (drawing a distinction for claim related to procedural complaints as opposed to substantive complaints). However, it is beyond dispute that at least part of the petition is a direct challenge to the substantive legislative judgment of the Board of Supervisors.

The correct avenue for challenging the policy decisions of a legislative body is through the election of government officials. *See Stream v. Gordy*, 716 N.W.2d 187, 192 (Iowa 2006). (stating “Under the separation-of-powers doctrine, ‘electoral control [is] an important restraint on legislative conduct.’”). A district court is not permitted to overturn the policy of a legislative body. A district court’s review of legislation is limited to constitutional limitations or preemption analysis under Home Rule principles. Petitioners cannot remedy this infirmity simply by attempting to change the title of their challenge. The separation of powers doctrine also applies to declaratory judgment actions or other lawsuits that seek to overturn the policy determinations of a legislative

body. The language in *Geisler* makes it clear that “To the extent Geisler disagrees with the City’s exercise of this legislative function, his recourse is ‘review by the electorate at the next election.’” *Geisler v. City Council of City of Cedar Falls*, 769 N.W.2d 162, 166 (Iowa 2009). (quoting *Stream*, 716 N.W.2d at 192.)).

The case might be different if Petitioners were challenging the constitutionality of the local ordinance. The judiciary has the power to determine that legislation is unconstitutional or otherwise not within the power of the legislative body. This has been true since the founding of the Republic and is embodied in historic cases such as *Marbury v. Madison*. However, the complaints described above are not constitutional challenges. They are challenges to the substance of the policy that is clearly within the purview of the Board of Supervisors exercising its constitutional powers.

The Court should dismiss the Petitioners’ petition for writ of certiorari to the extent it seeks to overturn the legislative policy of the Board of Supervisors. A district court is not a “Super Zoning” department tasked with writing its own version of local ordinances. A district court is not responsible for deciding the best legislative policy for wind turbine projects in Clinton County.

B. State law does not preempt the county’s ordinance

The Court should dismiss the Plaintiffs’ petition to the extent it claims that the county ordinance is in contravention of state law. Iowa Code Section 331.301 sets out the general powers of a county and its board of supervisors. Iowa Code Section 331.301(1). It states that:

A county may, except as expressly limited by the Constitution of the State of Iowa, 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 of its residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents.

Iowa Code Ann. § 331.301(1)

The statute explains:

The enumeration of a specific power of a county, the repeal of a grant of power, or the failure to state a specific power does not limit or restrict the general grant of home rule power conferred by the Constitution and this section. A county may exercise its general powers subject only to limitations expressly imposed by a state law.

Iowa Code Ann. § 331.301(3).

These principles are consistent with the Home Rule principles contained in Iowa's constitution. Iowa Const. art. III, § 39A. ("Counties or joint county-municipal corporation governments are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government, except that they shall not have power to levy any tax unless expressly authorized by the general assembly.")

There are no explicit state laws that prohibit counties from regulating commercial wind turbines. Section 331.301 sets out explicit limitations on counties' Home Rule authority. Iowa Code Section 331.301(6), (7), (17), (18), (19), (20), (21), (22), (23), (24), (25), (26) and (27). There is no explicit limitation on county power enumerated in those sections related to commercial wind turbines. There are no other state statutes that expressly limit a county's Home Rule powers when it comes to regulating wind turbine projects. In fact, members of the Iowa Legislature proposed an amendment to the statute that would create just such a limitation.¹ The proposed legislation would have created limits on local government regulation of shadow flicker, sound, setbacks from buildings, requirements for repair or replace drainage infrastructure, height requirements for wind turbines, limits on fees for approving wind turbine projects, limits on decommissioning costs and other substantive provisions. The legislation would have amended Iowa Code Section 476.53A. After the Bill's failure to pass, the only effective portion of Section

¹ <https://www.legis.iowa.gov/legislation/BillBook?ga=91&ba=SF%20376>

476.53A are the statements of intent from the general assembly to encourage development. Iowa Code Section 476.53A.

A statement of intent to encourage development is not sufficient to act as a limitation on a county's Home Rule powers under the Iowa constitution. "A county may exercise its general powers subject only to limitations expressly imposed by a state law." Iowa Code Ann. § 331.301(3). A statement of intent to encourage wind turbines does not *expressly* impose a limitation of local governance.

The Court should dismiss the Plaintiffs' petition to the extent that it claims state statute's preempt Clinton County's Home Rule authority to regulate commercial wind projects. The law does not set out an express limitation. Attempts to create such a limitation failed in last year's legislative session. A statement of intent to encourage development does not constitute a limitation on local authority.

C. Contents of the Record Return (if any)

At the Rule 1.1406 hearing the Court is permitted to determine the scope of the record return if it chooses to issue a writ of certiorari to the Board of Supervisors. The Court should conduct a Rule 1.1406 hearing to determine the appropriate scope of the record return in this case.

1. Extent of the certification

The Court should conduct a hearing to determine what records should be certified and set out the types of records to be included in the record return given the nature of this petition for writ of certiorari. If the petition challenges a "zoning action," then the record return will need to include documents pertinent to a substantial evidence review. If the petition is properly limited to procedural issues and legal issues, then, the record return can be of a much more limited nature.

The process of certification simply highlights the same issue described above. A writ of certiorari involves commanding the lower tribunal to certify a record of its quasi-judicial proceedings. Typically, this involves exhibits, transcripts of hearings, and written findings of fact and conclusions at law. The “written findings of fact and conclusions at law” document is mandatory for a quasi-judicial action. However, no such document is created when a legislative body passes a new countywide ordinance because a county is not applying the law to individual cases in a quasi-judicial fashion. Instead, a county passing a legislative act is determining policy on a general, county-wide basis. As a result, the Court must consider the scope of the record return given the improper contours of this petition for writ of certiorari.

It is important that Court ascertain the exact nature of the petition’s allegations in order to appropriately tailor the record return to the petition. A writ commands “the defendant to certify to that court, at a specified time and place, a transcript of so much of the defendant’s records and proceedings as are pertinent to the petition, together with the facts of the case, described with reasonable certainty.” I.R.C.P. 1.1404. The operative phrase for including records and proceedings is “so much...as are pertinent to the petition...” I.R.C.P. 1.1404. The phrase “pertinent to the petition” is not defined in any legal case in Iowa law. It is also abundantly clear that “pertinent to the petition” might mean different things in regards to different petitions. Finally, anyone reasonably experienced in writ of certiorari cases is aware that petitioners often change the content of their petitions as circumstances evolve.

If the Court determines that this challenge is quasi-judicial in nature, then, the writ must command return of documents necessary to conduct a substantial evidence review. “If the reasonableness of the amendment is fairly debatable, we will not substitute our judgment for that of the Board of Supervisors.” *Perkins v. Bd. of Supervisors of Madison Cnty.*, 636 N.W.2d 58, 67

(Iowa 2001). (discussing the same issue raised here “All of the property owners' arguments are based on the assumption the amendment is in fact a form of zoning. Zoning is the division of land into distinct districts and the regulation of certain uses and developments within those districts.”). “We will uphold the action of the Board of Supervisors if it is supported by competent and substantial evidence.” *Id.* “The court should not interfere with the zoning decisions of the Board of Supervisors unless there is a clear abuse of discretion.” *Id.* “The property owners, as challengers of the amendment, have the burden to show the amendment is arbitrary, capricious, and discriminatory.” *Id.* A court may only find a lack of substantial evidence if a determination “is not supported by substantial evidence in the record before the court when that record is reviewed as a whole.” *Arndt v. City of Le Claire*, 728 N.W.2d 389, 393 (Iowa 2007). A court cannot find a lack of substantial evidence “[j]ust because the interpretation of the evidence is open to a fair difference of opinion...” *Id.* A court should not consider evidence “insubstantial” “merely because the court may draw different conclusions from the record.” *Id.*

In essence, a substantial evidence review is an objective endeavor. A reviewing court determines whether there is sufficient evidence that an objective, meaning a “neutral, detached, and reasonable,” person would rely on such evidence. This substantial evidence standard exists for purposes of appellate review of all sorts of legal matters such as: (1) civil jury verdicts, *Crow v. Simpson*, 871 N.W.2d 98, 105 (Iowa 2015); (2) criminal jury verdicts, *State v. Crawford*, 972 N.W.2d 189, 201 (Iowa 2022); and (3) judicial findings of fact and rulings at law, *Hendricks v. Great Plains Supply Co.*, 609 N.W.2d 486, 490 (Iowa 2000). The substantial evidence standard is designed to be “highly deferential” to a judicial verdict. *Crawford* at 201. The Iowa Supreme Court set out the requirement that the same sort of deference should be paid to board of adjustment decisions in *Bontrager*. *Bontrager* at 495. (discussing “our traditional deference to the fact-

finding role of the local tribunal with respect to the issues of fact essential to its decision by preserving the substantial-evidence rule in the review of board decisions”). The Iowa Supreme Court then approved the “substantial evidence” standard based on the traditional deference to fact finders. *Id.*

If the Court determines the petition for writ of certiorari is improperly challenging a legislative action beyond the scope of judicial review, then, a more limited record return is appropriate. In that circumstance, the Court could order a return of documents related only to the procedures for passing the ordinance and the legal issues related to jurisdiction. The Court could forego wading through conflicting studies on the risks and benefits of commercial wind projects. It could forego weighing the risks of these types of projects to the general health and welfare versus the economic benefits to landowners and taxpayers. It could forego weighing the environmental issues related to commercial wind turbine projects at controversy related to these projects. In fact, the constitutional separation of powers dictates that the Court should forego making such policy determinations for countywide legislation as described above.

2. Discovery and the record return

The issue of discovery in a writ of certiorari cases is regularly a matter of some controversy among litigants. The Court should resolve the issue as soon as possible in a writ of certiorari action.

Many petitioners envision a petition for writ of certiorari like a civil lawsuit with free ranging discovery. However, “[w]hile subject to the rules of civil procedure, the petition for writ of certiorari is more analogous to a notice of appeal or petition for judicial review than the initiation of a civil lawsuit.” *Hilkemann v. City of Carter Lake*, 939 NW2d 643(Table)(Ia. App. 2019). A writ of certiorari entitles a party to a record review by the District Court to determine whether a

judicial or quasi-judicial board acted illegally or in excess of its jurisdiction. Iowa Rule of Civil Procedure 1.1410; *Bontrager v. Iowa City*, 748 N.W.2d 485 (Iowa 2008).

In a writ of certiorari, discovery is generally not permitted because of the district court's limited role. The Iowa Supreme Court has said it is only in the most extraordinary of cases that a court may take additional evidence in a certiorari matter. *Bontrager* at 494. The Court explained that:

“[t]hus, with respect to the district court's proper role in taking additional evidence, this authority distinguishes between illegalities that appear in the record made before the board, e.g., insufficiency of the evidence to support the board's findings, and illegalities that are outside the record, e.g., a board member's conflict of interest. Only when the illegality does not appear in the record made before the board should the district court take additional evidence.”).

Id.

As a result, discovery is only appropriate in a writ of certiorari when a petitioner alleges an illegality outside of the record return.

A substantial evidence review's reliance on an objective standard means that litigants cannot use the judicial process to harass or annoy finders of fact. Every litigated case could spiral out of control if a scorned litigant could instigate discovery to question individual jurors or even judges on their mental process for reaching the conclusion. The Iowa Rules of Evidence recognize this obvious problem and specifically prohibit testimony on these subjects. Iowa Rule of Evidence 5.606 prohibits testimony during an inquiry into the validity of a verdict or indictment. I.R.E. 5.606(b)(1). A juror may not testify “about any statement made or incident that occurred during the jury's deliberations; the effect of anything upon that juror's or another juror's vote; or any juror's *mental processes concerning the verdict or indictment.*” I.R.E. 5.606(b)(1). (emphasis added) (explaining “a court may not receive a juror's affidavit or evidence or a juror's statement on these matters.”).

The federal rules of evidence have substantially the same rule and commentary on that rule is helpful in the evaluation of discovery on the mental impressions of board of adjustment

members. F.R.E. 606. The comments to that rule explain that “[t]he values sought to be promoted by excluding the evidence include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment.” F.R.E. 606, note to subdivision b. The commentary explains that “mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment.” F.R.E. 606, note to subdivision b. (stating “[t]he authorities are in virtually complete accord in excluding the evidence.”). The comment explains that: “under the federal decisions the central focus has been upon insulation of the manner in which the jury reached its verdict, and this protection extends to each of the components of deliberation, including arguments, statements, discussions, mental and emotional reactions, votes, and any other feature of the process.” F.R.E. 606, note to subdivision b.

Many of the same considerations apply to a board of adjustment decision. A board of supervisors reaches a result through a vote of multiple members. Those multiple members may have different subjective reasons for their vote. An attempt to submit evidence on each member’s subjective reasoning only serves to undermine the “stability and finality” of board decisions. Additionally, discovery on those issues invites the same “tampering and harassment” of board members that would put board decisions at the mercy of individual members. Finally, a determination that one or more Board members subjectively disagree on the reasons for the decision is irrelevant to substantial evidence review. The standard is an objective standard because the court’s inquiry goes no further than determining whether a reasonable person could reach the same ultimate decision.

An inquiry into the extent that each member weighed the evidence suffers from a similar problem. The standard is to review all of the evidence to determine if a reasonable person could

rely on the evidence. The standard includes giving all reasonable inferences to the decision. The purpose of such a standard is to avoid litigants harassing and annoying volunteer board members by dragging them into depositions or court appearances for zoning decision they render. In short, there is no impropriety if a reasonable person could have reached the same decision regardless of any defect in an individual's subjective mental deliberations. *Bontrager* at 495.

The only relevant subjective inquiries would be if there was relevant evidence to prove some sort of conflict of interest or illegal motive on the part of the Board members. Petitioners' challenge does not include such illegalities. A petition for writ of certiorari challenging zoning decisions, as Petitioners claim they are doing here, must specify the grounds of the illegality. Iowa Code Section 335.18. (stating "Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment under the provisions of this chapter, or any taxpayer, or any officer, department, board, or bureau of the county, may present to a court of record a petition, duly verified, setting forth that such decision is illegal, in whole or in part, *specifying the grounds of the illegality.*" (emphasis added)). The purpose of requiring that specificity is to allow the Court to properly limit the record return to the information pertinent to those alleged illegalities.

The Court should enter an order limiting discovery related to the substance of the decision challenged in the petition. Discovery is not appropriate unless the Petitioners can point to some illegality beyond the scope of a typical appeal.

D. Briefing Schedule

The Court should enter an order setting out a briefing schedule for legal and procedural issues raised in the petition. A writ of certiorari is governed by Iowa Rule of Civil Procedure 1.1401. An action for certiorari review may be commenced when a party claims an inferior tribunal exceeds its proper jurisdiction or otherwise acted illegally. I.R.C.P. 1.1401. There are

two types of review in a writ of certiorari case: (1) substantial evidence claims; and (2) issues of illegality. The writ of certiorari is proper when a lower tribunal exercises judicial functions in a manner that is illegal. *Perkins v. Board of Supervisors of Madison County*, 636 N.W.2d 58, 64 (Iowa 2001). A board’s decision is illegal if: (1) the board has not acted in accordance with a statute; (2) if its decision was not supported by substantial evidence; or (3) if its actions were unreasonable, arbitrary or capricious. *Perkins* at 64. (citing *Norland v. Worth County Compensation Bd.*, 323 N.W.2d 251, 253 (Iowa 1982)). A writ of certiorari culminates in a hearing but often that hearing is limited to argumentation on legal issues and substantial evidence issues as opposed to the *de novo* presentation of evidence. It is often beneficial for the Court to have briefing on the appellate issues significantly in advance of the hearing on the writ of certiorari.

Respectfully submitted,
HOPKINS & HUEBNER, P.C.
By /s/ Eric M. Updegraff
Eric M. Updegraff, AT0008025
By /s/ James J. Theobald
James J. Theobald, AT0015334
2700 Grand Avenue, Suite 111
Des Moines, IA 50312
Telephone: 515-244-0111
eupdegraff@hhlawpc.com
jtheobald@hhlawpc.com

ATTORNEYS FOR DEFENDANT

Original filed.

Copy to:

Michell R. Kunert
Nyemaster Goode, P.C.
700 Walnut Street, Suite 1300
Des Moines, Iowa 50309-3899
ATTORNEYS FOR PLAINTIFFS

<u>CERTIFICATE OF SERVICE</u>	
The undersigned certifies that the foregoing instrument was served upon each of the attorneys of record of all parties to the above-entitled cause herein at their respective addresses disclosed on the pleadings of record on the February 17, 2026.	
By	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Fax
	<input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Electronically through CM-ECF
	<input type="checkbox"/> Private Carrier <input type="checkbox"/> Other: _____
Signature <u>/s/ Eric Updegraff</u>	