

IN THE IOWA DISTRICT COURT FOR HARDIN COUNTY

<p>RWE RENEWABLES DEVELOPMENT, LLC,</p> <p>Plaintiff,</p> <p>v.</p> <p>HARDIN COUNTY BOARD OF SUPERVISORS,</p> <p>Defendant.</p>	<p>CASE NO.</p> <p>PETITION FOR DECLARATORY JUDGMENT AND WRIT OF CERTIORARI</p>
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Plaintiff RWE Renewables Development, LLC (“RWE”), having spent three years and millions of dollars investing in a state-of-the-art wind energy project in Hardin County, Iowa, brings this action under Iowa Rules of Civil Procedure 1.401, 1.1101 and 1.1401 to stop defendant Hardin County Board of Supervisors (“the County”) from arbitrarily, improperly and unfairly changing the rules in the middle of the project. As is demonstrated below, the County’s recent change in its Ordinance, adopted August 19, 2020 – directed specifically at RWE -- threatens RWE’s substantial investment made in reliance on the prior Ordinance. Because this violates Iowa law and RWE’s rights, the Court should find that the recent amendments do not apply to RWE’s pre-existing project, or alternatively the Court should vacate the amendments in their entirety.

PARTIES AND VENUE

1. Plaintiff RWE, a Delaware limited liability company authorized to do business in Iowa, is an experienced and leading developer of renewable energy in the United States. RWE (and its predecessor E.ON Climate and Renewables) has built 23 projects with a capacity of over

3,800 Megawatts (“MW”) of wind energy capacity in the United States and an additional 1,125 MW currently under construction.

2. Defendant Hardin County Board of Supervisors is the body constituted under Iowa Code chapter 331 to perform certain prescribed governing duties on behalf of Hardin County, Iowa, including the adoption of county ordinances.

3. Venue is proper in this Court as the defendant resides here and the actions described herein occurred and are occurring in Hardin County.

FACTUAL BACKGROUND

4. In or about April 2012, the County adopted a form of Ordinance 29, which sets forth zoning standards for Commercial Wind Energy Conversion Systems (“C-WECS”) as a conditional use. [**Attachment A**]

5. In 2017, RWE identified an area, primarily in the northwest quarter of Hardin County, as a site to develop a 200 MW C-WECS project. This location was based on four factors: (a) estimated wind resources; (b) proximity to the electrical transmission “grid” to carry the output of the project; (c) a workable local regulatory framework – the 2012 Ordinance; and (d) reason to believe there would be willing landowners (in part, in this case, due to the existence of a competitor’s wind farm in the County near Garden City that had been constructed in or about 2009, and also by the County’s adoption of favorable tax treatment for wind energy under Iowa Code § 427B.26.)

6. In May 2017, RWE began development efforts for the Hardin County location. The project, if completed, would provide approximately 150 construction jobs, 6-10 long-term jobs, over \$40,000,000 in new tax revenue to Hardin County, and approximately \$20,000,000 in direct payments to Hardin County landowners (resulting in further indirect tax benefits for

Hardin County), and would generate enough carbon-free, zero-fuel-cost energy to power approximately 60,000 average-sized homes.

7. To date, RWE has already invested more than \$2,000,000 in the project. While not exhaustive, key development activities since May 2017 include:

- a. June 2017, RWE filed a “queue position” with the Midcontinent Independent System Operator (“MISO”)¹, requiring a \$425,000 deposit and posting an \$800,000 letter of credit;
- b. October 2017, RWE began signing land leases with Hardin County landowners;
- c. October 2017, RWE submitted a permit application for a meteorological tower (“met tower”)² to the Hardin County Zoning Administrator;
- d. November 2017, first payments to Hardin County landowners were made;
- e. November 2017, an informational meeting about the project was held in Hardin County with over 500 interested parties invited;
- f. November 2017, RWE commissioned a third-party aviation/Federal Aviation Administration study for the project;
- g. November 2017, Hardin County granted the permit for RWE’s met tower;
- h. December 2017, RWE constructed the met tower and it became operational;
- i. Throughout 2018, data collection from the met tower continued, obtaining land rights (and the payments to local landowners) continued, and various required studies (such as aviation) continued (and such data collection, land acquisition, and payments to landowners have continued consistently through today);
- j. March 2019, RWE submitted a permit application for a second met tower;
- k. April 2019, RWE met with the Hardin County Board of Adjustment regarding the met tower and the permit for the second met tower was approved;
- l. June 2019, the second met tower was erected and began operations;
- m. Also in June 2019, MISO interconnection studies begin;

¹ The Midcontinent Independent System Operator (MISO) is an independent, not-for-profit organization that operates under the regulatory authority of the Federal Energy Regulatory Commission. It coordinates and manages the interconnected regional high-voltage transmission network, organizes and supervises regional wholesale electricity markets, and as a by-product of those two functions has significant impact on electricity system planning and operation. MISO oversees the electric power delivery grid across 15 U.S. states, mainly in the center of the country and including Iowa, as well as in the Canadian province of Manitoba.

² A met tower is a tower that holds one or more cup anemometers (a device to measure wind speed) and other weather-measuring equipment and transmitters to send the recorded data to the developer. It is used to learn more about the potential for wind energy generation in a specific geographic area.

- n. Between June and October 2019, numerous studies, including engineering, environmental, avian, and communications, started to narrow potential locations for specific facilities;
 - o. October 2019, the initial MISO System Impact Study for the project was completed and a second MISO payment made in form of an approximately \$775,000 letter of credit to hold queue position and continue additional required interconnection studies;
 - p. December 2019, Light Detection and Ranging (“LiDAR”) equipment installed to provide additional measurements and analysis of wind resources.
8. On or about December 11, 2019, the County passed Resolution 2019-46, a

“Moratorium on C-WEC Construction Permits.” [Attachment B] As one of the reasons for a moratorium, the Resolution expressly states:

WHEREAS, the Board of Supervisors recently has learned that a wind energy company has obtained easement rights from over 100 land owners in a region of Hardin County predominately within drainage districts...

The “wind energy company” referred to is RWE.

9. On or about March 17, 2020, the Hardin County Planning and Zoning Commission recommended certain amendments to the C-WECS ordinance. One of the members of that Commission, Curt Groen, was and is also the administrator of a Facebook page, “Hardin County Iowa Citizens Against Wind Turbines.” Notwithstanding this clear conflict of interest and prejudgment of the issue before the Commission, Groen participated in his official role in the recommendations of the amendments.

10. In April 2020, RWE learned that a draft of amendments to the C-WECS ordinance was circulating and was going to be considered by the County. Counsel for RWE sent a letter to the County Attorney on April 27, 2020, explaining the extraordinary harm that would befall RWE’s project were the new proposed terms adopted, and explaining RWE’s position that under Iowa law, RWE’s project has vested rights in the 2012 version of the Ordinance.

[Attachment C]

11. From April 2020 through the County’s adoption of the amendments to the Ordinance on August 19, 2020, RWE continued to correspond with and meet with the County regarding its objections, and provided the County with numerous diagrams and maps showing the harm that would be caused by the amendments. RWE also responded to written questions from the County about its project, even though the issue before the County was allegedly a general ordinance, not a project-specific permit application from RWE. [Attachment D]

THE 2020 AMENDMENTS

12. On August 19, 2020, the County adopted amendments to the C-WEC ordinance, Ordinance 29. [Attachment E] Those amendments materially increased the burden on wind projects, and made them much more difficult procedurally, financially, and physically. The requirements reflected in those amendments are onerous and are extreme when compared both to Hardin County’s prior wind ordinance and to similar ordinances in other counties in the state of Iowa. The most obvious example is with regard to setbacks. The changes in the key setbacks are shown in this table:

Feature	2012 Distance	2020 Distance
Dwelling Units ³	Greater of 2x total height or 1,000 feet	Greater of 3x total height or manufacturer’s recommendation
Property Lines	Cannot overhang	1.3x total height
Public Right of Way	1.1x total height	2x total height
Communication and Electrical Lines	1.1x total height	2x total height
Non-Dwelling Units ⁴	None	2x total height
Private Parks ⁵	None	2x total height

³ “Dwelling unit” is defined as any building, including attached structures, “used as a place of habitation for humans on a permanent and frequent basis.”

⁴ “Non-Dwelling Unit” includes essentially any building requiring a building permit other than dwelling units, and can include garages, sheds, animal confinements, gran bins, etc.

⁵ “Private Park” is an unusual term with a complicated definition:

These new setbacks are out of step with other counties in Iowa. Among the materials the County reviewed in reaching its new setback numbers was a survey of Iowa county ordinances from the Iowa Environmental Council that showed the overwhelming majority of counties have setbacks for non-participating dwelling units more in line with the County's own pre-amendment setbacks. RWE believes the larger setbacks the County chose to adopt may have been based in part on a report from the National Renewable Energy Laboratory ("NREL"), which NREL has since withdrawn specifically because it was being used improperly and inaccurately, and which therefore no longer constituted valid evidence at the time the County entered it into the record.

13. RWE has approximately 20,000 acres of land presently under contract in Hardin County through contracts with approximately 125 taxpaying Hardin County landowners.

14. Applying the 2012 setbacks in place when RWE began investing in this project, approximately 5,300 of those acres would be eligible for wind turbines. Applying the 2020 amendment setbacks, this number drops to approximately 600 acres – an 89% loss of use of parcels RWE has already contracted and is already paying for.

15. This 89% figure is very conservative for several reasons; in practice, the damage will be worse. Among other things, no setbacks were applied in the 2020 calculations for "Private Parks" because their whereabouts could not be ascertained. Also, the remaining 600 acres is not evenly distributed; much of it is on a few large parcels. But the 2020 amendments also introduce, for the first time, spacing requirements between wind turbines such that the planned number of turbines for the project could not all be squeezed into the handful of

[A]ny taxable portion of the property, not within the setback for dwellings. . . not used for agricultural purposes in the 18 months preceding. . . and not enrolled in any government program.

One particular problem posed by this setback is it would be almost impossible for a developer to know where such a setback may arise – there is no registry or recording for "private parks."

remaining parcels. Finally, there are other factors besides just the legal setbacks that determine placement of turbines – some are other legal requirements, some are technical issues like soil studies, constructability, and accessibility, as well as the specifics of the wind resource available at very specific sites. Less legally-eligible area means less flexibility to address these other issues, meaning additional sites will be ruled out that would have been possible with the additional flexibility under the 2012 setbacks.

16. This extreme reduction in the ability of RWE to use its existing contracts will result in many of those easements being entirely useless, and without relief the extreme reduction in buildable area effectively ends the viability of the entire project.

STATE POLICY REGARDING WIND ENERGY

17. It is the explicit policy of the State of Iowa to encourage the development of wind energy. *See* Iowa Code §§ 476.41-.43, .53, .53A.

18. This policy extends to the planning and zoning decisions made by counties. *See* Iowa Code § 18B.1(3). The Hardin County Comprehensive Plan purports to adopt these principles.

19. There is no evidence that these state policies were ever taken into account in the decision to adopt the 2020 C-WECS amendments.

CLAIMS FOR RELIEF

Count I: Declaratory Judgment – Vested Rights

20. The above-pleaded paragraphs are incorporated and adopted as if restated herein.

21. Under Iowa law, “a developer may acquire a vested right because of substantial expenditures made in reliance on the previously existing ordinance, thereby precluding application of the

new ordinance.” See, e.g., *Geisler v. City Council of City of Cedar Falls*, 769 N.W.2d 162, 167 (Iowa 2009). The vested rights doctrine applies where the developer: (a) makes substantial expenditures prior to the zoning change; and (b) the expenditures were lawfully made. *Id.*

22. RWE has made substantial expenditures and committed substantial resources, in a wind energy project in Hardin County, Iowa.

23. RWE’s efforts have included the physical construction of met towers under lawfully granted county permits.

24. RWE’s expenditures, investments and activities in furtherance of the Hardin County wind project have all been lawful.

25. RWE’s expenditures, investments and activities in furtherance of the Hardin County wind project have been consistent with and in reliance on the terms of the Ordinance in effect in 2017 when the project began.

26. Prior to the adoption of the 2020 amendments, the County was aware of the RWE project, and of the more than 100 existing agreements with landowners.

27. The process of suspending and then amending the 2012 C-WECS provisions was directly aimed at RWE, performed in bad faith, and designed to frustrate RWE’s planned project.

28. Accordingly, RWE’s rights are vested under Iowa law in the 2012 Ordinance provisions.

Count II: Declaratory Judgment – The Ordinance Is Unconstitutional as a Regulatory Taking and as a Violation of the Contracts Clause

29. The above-pleaded paragraphs are incorporated and adopted as if restated herein.

30. Under Iowa and federal law, a per se regulatory taking occurs where a regulation denies an owner all economically beneficial ownership of the property. *Bormann v. Bd. of Sup'rs In and For Kossuth County*, 584 N.W.2d 309, 316 (Iowa 1998).

31. Under Iowa and federal law, a regulatory taking occurs where a regulation “so frustrate[s] distinct investment-backed expectations as to amount to a taking,” or where the regulation destroys the “primary expectation” of the owners of and investors in the parcel. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127, 136 (1978).

32. Under Iowa and federal law, a regulation that constitutes a substantial impairment to a previously existing contractual relationship may violate the Contracts Clause of the Iowa and United State Constitutions. See *McDonald's Corp. v. Nelson*, 822 F. Supp. 597, 605 (S.D. Iowa 1993), *aff'd sub nom. Holiday Inns Fran., Inc. v. Branstad*, 29 F.3d 383 (8th Cir. 1994).

33. The 2020 amendments adopted by the County severely impact the economics of the RWE project, frustrate RWE’s investment-backed expectations, and destroy the primary expectations of RWE in investing in the properties at issue.

34. The 2020 amendments adopted by the County impose government regulations that impair RWE’s use of its property interests by approximately 90%, and render some of RWE’s property rights – legally-obtained for the purpose of building a wind farm compliant with the existing Ordinance -- entirely useless.

35. The 2020 amendments adopted by the County operate as a substantial impairment to RWE’s existing contracts with Hardin County landowners.

36. Accordingly, the 2020 amendments violate Art. 1, Section 18 and 21 of the Iowa Constitution, and Article I, Section 10, Clause 1 of the United States Constitution as well as the 5th Amendment to the United States Constitution.

Count III: Declaratory Judgment – Ordinance Is Arbitrary, Capricious, Unreasonable and Contrary to Public Policy.

37. The above-pleaded paragraphs are incorporated and adopted as if restated herein.

38. A county board's action is illegal if the board's "decision was not supported by substantial evidence; or if its actions were unreasonable, arbitrary, or capricious." *Geisler*, 769 N.W.2d at 168 (citations omitted).

39. The 2020 amendments fail to promote the express state policy favoring wind energy development and the incorporation of those pro-wind policies into the Hardin County Comprehensive Plan, as the amendments make it effectively impossible to develop wind energy facilities as compared to the prior county provisions.

40. The 2020 amendments are arbitrary and unreasonable. Among other reasons, the specific setbacks adopted are themselves arbitrary and unreasonable as there is no basis for the specific setbacks adopted, and they are significantly more restrictive than those of other Iowa counties.

Count IV: Certiorari

41. The above-pleaded paragraphs are incorporated and adopted as if restated herein.

42. A county board's action is illegal if the board's "decision was not supported by substantial evidence; or if its actions were unreasonable, arbitrary, or capricious." *Geisler*, 769 N.W.2d at 168 (citations omitted).

43. The specific act of adopting the 2020 amendments was improper as the County failed to properly consider the express state policy favoring wind energy development when it adopted amendments making it substantially harder to develop wind energy facilities than the prior ordinance provisions, and substantially harder than most other Iowa counties.

44. There is no public record of substantial evidence to support the amendments the County adopted, and there is reason to believe the County relied on evidence, in particular a

report from the NREL, that was no longer valid or applicable as it had been withdrawn by its source.

45. The proposed amendments adopted by the County were fatally flawed by the direct involvement and non-recusal of an anti-wind activist on the Planning and Zoning Commission that recommended the amendments.

46. As a result, the action of the subdivision below is improper and must be vacated by sustaining the writ.

RELIEF REQUESTED

1. Plaintiff RWE requests that the Court order the Clerk of Court to issue a writ under Iowa Rule of Civil Procedure 1.1404 requiring the defendant to make a return on the writ by certifying and filing with the court and serve on the Plaintiff within a reasonable time not to exceed 60 days, a transcript of so much of the defendant's records and proceedings as are pertinent to the petition.
2. Plaintiff RWE further requests that the Court issue an order declaring that the 2020 amendments to Hardin County Ordinance 29 do not apply to the RWE project as RWE's rights in the 2012 regulations of C-WECS are vested under Iowa law.
3. Plaintiff RWE further requests that the Court issue an order declaring that the 2020 amendments to Hardin County Ordinance 29 are invalid as applied to RWE as violative of RWE's rights under the Iowa Constitution against takings of property and against interference with existing contracts.
4. Plaintiff RWE further requests that the Court issue an order declaring that the 2020 amendments to Hardin County Ordinance 29 are invalid in their entirety as an arbitrary, capricious, and unreasonable regulation.

5. Plaintiff RWE requests that the Court sustain the writ, finding the actions of the County below unlawful and annulling the adoption of the amendments to Hardin County Ordinance 29.
6. Finally, Plaintiff RWE requests that any costs be taxed to Defendant, and respectfully requests the Court grant such other relief as it deems just and reasonable.

Filed this 18th day of September, 2020

By: /s/ Bret A. Dublinske

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