

IN THE SUPREME COURT OF IOWA
No. 17-0090
FAYETTE CO CVCV054435

RON WOODS, JOHN WOODS, JAMES COSTELLO, C&W FARMS
AND WOODS CONSTRUCTION, INC.
Petitioners-Appellees.

vs.

FAYETTE COUNTY ZONING BOARD OF ADJUSTMENT,
CATHERINE MILLER AS FAYETTE COUNTY ZONING
ADMINISTRATOR,
DANTE WIND 6, LLC, GALILEO WIND 1 LLC, VENUS WIND 4 LLC,
MASON WIND LLC, OPTIMUM RENEWABLES LLC,
and THOMAS G. ROURKE AND
KIMBERLY K. ROURKE,
Respondents-Appellants. .

ON APPEAL FROM THE IOWA DISTRICT COURT
FOR FAYETTE COUNTY
THE HONORABLE JOHN BAURCAMPER

CASE NO. CVCV054435 and CVCV054436

APPELLEE RON WOODS, JOHN WOODS, JAMES COSTELLO, C&W
FARMS, and WOODS CONSTRUCTION, INC
PROOF BRIEF

Patrick B Dillon
ICIS PIN #AT001973
DILLON LAW, P.C.
209 E 1st Street
Sumner, IA 506764
Phone: (563) 578-1850

Fax: (563) 578-1312

E-mail:

patdillon@dillonlawpc.com

Attorney for RON WOODS,
JOHN WOODS, JAMES
COSTELLO, C&W FARMS,
and WOODS
CONSTRUCTION, INC

TABLE OF CONTENTS

	<u>Page No.</u>
Table of Authorities.....	4
Statement of Issues Presented for Review.....	6
Routing Statement.....	6
Statement of Case.....	6
Statement of Facts.....	8
Argument.....	15
Conclusion.....	37
Request for Oral Argument.....	38
Certificate of Compliance with Type-Volume Limitation, Typeface Requirements and Type-Style Requirements.....	39
Certificate of Filing.....	40
Attorneys Cost Certificate.....	40

TABLE OF AUTHORITIES

Cases

FPC v. So Cal Edison. 376 U.S. 205 (1964).....17

Crow v. Bd. of Adjustment of Iowa City, 227 Iowa 324, 288 N.W. 145 (1939)
.....16

In Re Promoting Wholesale Competition by Pub. Utilities, 168 P.U.R.4th 590
(F.E.R.C. Apr. 24, 1996)17

Johnson v. Bd. of Adjustment, City of W. Des Moines, 239 N.W.2d 873 (Iowa
1976)24

Kay-Decker v. Iowa State Bd. of Tax Review, 857 N.W.2d 216 (Iowa 2014).....15

Livingston v. Davis, 243 Iowa 21, 50 N.W.2d 592 (1951).....16

Meduna v. City of Crescent, 761 N.W.2d 77 (Iowa Ct. App. 2008).....16

People v. Island Wide Ins. Brokerage, Inc., 177 Misc. 2d 668, 676 N.Y.S.2d 860
(Dist. Ct. 1998)22

Perkins v. Bd. of Supervisors of Madison Cty., 636 N.W.2d 58 (Iowa 2001).....21

Searles v. Darling, 46 Del. 263, 83 A.2d 96 (1951).....22

State v. Dist. Court of Jefferson Cty., 213 Iowa 822, 238 N.W. 290 (1931)26

Steeves v. Town of New Mkt., 225 Iowa 618, 281 N.W. 162 (1938).....25

Wolf v. City of Ely, 493 N.W.2d 846 (Iowa 1992)22

Statutes

16 U.S.C.A. § 824d - 824e (2000) (West)17

Iowa Code Section 358A22

OTHER AUTHORTIES

www.dictionary.com15

Black’s Law Dictionary 1505 Bryan Gardner, Ed. 7th Edition (1999).....15

Order 888, In Re Promoting Wholesale Competition by Pub. Utilities, 168
P.U.R.4th 590 (F.E.R.C. Apr. 24, 1996)..... 17

Order 2000, In Re: Regional Transmission Organizations,
89 FERC ¶ 61,285, 18 CFR Part 35
.....17

FERC WEBSITE:

<http://www.ferc.gov/industries/electric/enviro.asp>. 15

Department of Energy Website:

<https://energy.gov/articles/infographic-understanding-grid>18

US Energy Information Service website:

https://www.eia.gov/Energyexplained/index.cfm?page=electricity_delivery. ...18

The North American Electrical Reliability Corporation website:

http://www.nerc.com/files/glossary_of_terms.pdf.....18

*Transmission and Wind Energy: Capturing the Prevailing Winds for the Benefit of
the Customers. Page 1 and 16; National Grid, Published 2006*

www.nationalgridus.com. https://www9.nationalgridus.com/non_html/c3-3_NG_wind_policy.pdf 19

American Planning Association, *Modernizing State Planning Statutes: The
Growing Smart Working Papers, Vol. 1*, Planning Advisory Service Report No.
462/463 (1996).....22

STATEMENT OF THE ISSUES

I. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE FAYETTE COUNTY ZONING BOARD OF ADJUSTMENT ACTED ILLEGALLY WHEN IT ALLOWED CONSTRUCTION OF WIND POWER GENERATION FACILITIES IN AG ZONED PORTIONS OF THE COUNTY AS A MATTER OF RIGHT USE.

FPC v. So Cal Edison, 376 U.S. 205 (1964)

Crow v. Bd. of Adjustment of Iowa City, 227 Iowa 324, 288 N.W. 145 (1939)

In Re Promoting Wholesale Competition by Pub. Utilities, 168 P.U.R.4th 590 (F.E.R.C. Apr. 24, 1996)

Johnson v. Bd. of Adjustment, City of W. Des Moines, 239 N.W.2d 873 (Iowa 1976)

Kay-Decker v. Iowa State Bd. of Tax Review, 857 N.W.2d 216 (Iowa 2014)

Livingston v. Davis, 243 Iowa 21, 50 N.W.2d 592 (1951)

Meduna v. City of Crescent, 761 N.W.2d 77 (Iowa Ct. App. 2008)

People v. Island Wide Ins. Brokerage, Inc., 177 Misc. 2d 668, 676 N.Y.S.2d 860 (Dist. Ct. 1998)

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

Searles v. Darling, 46 Del. 263, 83 A.2d 96 (1951)

Wolf v. City of Ely, 493 N.W.2d 846 (Iowa 1992)

Statutes

16 U.S.C.A. § 824d - 824e (2000) (West)

Iowa Code Section 358A

OTHER AUTHORTIES

www.dictionary.com

Black's Law Dictionary 1505 Bryan Gardner, Ed. 7th Edition (1999)

Order 888, In Re Promoting Wholesale Competition by Pub. Utilities, 168 P.U.R.4th 590 (F.E.R.C. Apr. 24, 1996)

Order 2000, In Re: *Regional Transmission Organizations*,
89 FERC ¶ 61,285, 18 CFR Part 35

FERC WEBSITE:

<http://www.ferc.gov/industries/electric/enviro.asp>.

Department of Energy Website:

<https://energy.gov/articles/infographic-understanding-grid>

US Energy Information Service website:

https://www.eia.gov/Energyexplained/index.cfm?page=electricity_delivery.17

The North American Electrical Reliability Corporation website:

http://www.nerc.com/files/glossary_of_terms.pdf.

Transmission and Wind Energy: Capturing the Prevailing Winds for the Benefit of the Customers. Page 1 and 16; National Grid, Published 2006

www.nationalgridus.com. https://www9.nationalgridus.com/non_html/c3-3_NG_wind_policy.pdf .

American Planning Association, *Modernizing State Planning Statutes: The Growing Smart Working Papers, Vol. 1*, Planning Advisory Service Report No. 462/463 (1996)

**II. THE DISTRICT COURT CORRECTLY CONSIDERED
ADDITIONAL EVIDENCE REGARDING WIND POWER
GENERATION FACILITIES WHEN DETERMINING THE BOARD
OF ADJUSTMENT ACTED ILLEGALLY.**

State v. Dist. Court of Jefferson Cty., 213 Iowa 822, 238 N.W. 290 (1931)

Steeves v. Town of New Mkt., 225 Iowa 618, 281 N.W. 162 (1938)

ROUTING STATEMENT

This case should be transferred to the Court of Appeals because it does not meet the criteria for retention in the Supreme Court under Iowa R. App. P. 6.1101. Further, this case should be transferred to the Court of Appeals because it involves questions that can be resolved by applying existing legal principles. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

This case involved the District Court correctly determining that the Fayette County Zoning Board of Adjustment (herein “Board”) illegally sustained the issue of building permits allowing wind power generation facilities to be constructed as a matter of right in the ag zoning district of Fayette County.

Following the Board’s initial rejection of special use permit application by the non-government Appellants, the Zoning Administrator issued building permits as a permitted use under Section 9, subparagraph A, as a permitted use as an electrical transmission and regulating facility. Appellee’s appealed this permit being issued to the Board of Adjustment, which upheld the permit issue. An application for a writ of Certiorari was ultimately sustained by the District court declaring the permits void and an order was issued directing the Board of Adjustment to take all acts necessary to enforce the court’s decision.

RON WOODS,JOHN WOODS,JAMES COSTELLO, C&W FARMS, and WOODS CONSTRUCTION, INC (herein “Woods”) agree with the district court ruling and resists the appellant’s attempt to define the board’s action as legal, when the plain meaning of the transmission and regulating facilities do not encompass

electrical power generation. Further, Woods contend that the district court was within its authority to consider additional evidence regarding wind power generation as applied in general zoning applications.

Course of Proceedings and Disposition in District Court

The Petition for writ of certiorari was filed on November 11, 2015 in the Iowa District court for Fayette County by the appellees. Appellants) objected to the writ on December 2, 2015. The district court ordered the writ and the return was filed. Trial was held before the Honorable Judge John Bauercamper on August 24, 2016. The trial court sustained the writ on November 2, 2016 and declared the actions of the Board illegal. (Order for Judgment. p. 4). The trial court ruled on the post-trial motions on 30 Dec 2016. Appellants timely filed a Notice of Appeal .

Disposition:

Zoning Permits are remanded to the Fayette County Zoning Board of Adjustment to take all actions required by law to implement the District Court's ruling declaring the permits are void, including removal of all structures erected without a valid permit.

STATEMENT OF FACTS

The Woods are property owners in and around the city of Fairbank, Iowa in Fayette County, Iowa. (Order for Judgment. p. 1). Their property lies near property being developed and owned by the non-government Appellants. (Order for Judgment. p. 2) The use is for commercial energy generation by virtue of large industrial scale wind power generators.(Trial exhibit A, 2)

The Fayette County Zoning Administrator issued building permits under the premise that wind turbines are a principle permitted use under § 9 of the Fayette County Zoning ordinances. Woods appealed this decision to the board of adjustment. (Writ. p. 49). The zoning board was presented with evidence that transmission lines are separate and distinct from power generation. Trial Exhibit A , 10) Woods provided information outlining the definition of transmission and generation. (Trial exhibit A, 10)Citizens questioned the definition of transmission versus generation. (Writ. p. 63-66). The Board relied upon its special counsel's opinion letter which indicated "to the extent they can be determined to transmit electrical power" the power generation turbines would be placed in an Ag District. Trial exhibit A, 5. The board's attorney at the time of hearing provided three points to consider

1. Ag zoning use allows farmers to do what they want

2. Spot Zoning.
3. The board should consider the arguments about transmission versus generation as a red herring.

(Writ. p. 41)

The board in discussing the matter expressed concerns about “being in trouble” if the use is not permitted and then votes to allow the use. (Writ. p. 68). The board of adjustment upheld the decision of the Zoning Administrator. (Writ. p.68). The zoning board largely was worried about legal liability and did not focus on determining what was authorized in the district under its own ordinance. No board member discussed the definition of transmission line. The board did not define the term transmission or generation. The board made no findings that the transmission line use was the same as the power generation use proposed by the Appellants. The board allowed the permits to stand.

The Woods filed for a Writ of Certiorari to the District Court and it was returned and set for hearing. At hearing, evidence was offered and admitted from a land use lawyer/professor. (Order for Judgment. p. 2). The offered testimony was limited to when and where wind power generators are generally handled under zoning ordinances. Trial Transcript generally _--____. Following hearing, the District Court declared the action of the Fayette County Board of Adjustment

illegal and void. (Order for Judgment. p. 4).

The zoning ordinance is found in Fayette County Zoning ordinance, § 9. AG District Regulations (Agricultural Districts), which states:

“Statement of Intent: The AG District is intended and designed to preserve agricultural resources and protect agricultural land from encroachment of urban land uses.”

Principal Permitted Uses: Only the use of structures or land listed in this section shall be permitted in the AG District.

(A1-11 omitted)

- A. 12 Electrical and Natural Gas transmission and regulating facilities.

ARGUMENT

THE BOARD INCORRECTLY CONSIDERED A MULTI-STORY WIND POWER GENERATOR AN ELECTRICAL TRANSMISSION FACILITY WHEN IT IS CLEARLY A GENERATOR OF ELECTRICITY.

Preservation of Error

Appellee concedes that the Appellant has preserved all issues for review.

Standard of Review

Review of writs for Certiorari are reviewed for correction of errors at law. The petitioner has the burden of proving illegal action. The board's finding of fact, if supported by substantial evidence, are binding.

I. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE BOARD'S DECISION WAS UNREASONABLE AND NOT SUBJECT TO A FAIR DIFFERENCE IN OPINION AND AS A RESULT, ILLEGAL.

It is clear that the generation of power is a separate and distinct from the transmission of that power. Much like the difference between harvesting corn and transporting corn, the two activities, while intertwined, are separate and distinct activities.

a. The District court, by declaring the action of the board void, found the board failed to apply the correct meaning to transmission and generation.

“[W]e must read a statute as a whole and give it ‘it’s plain and obvious meaning, a sensible and logical construction. Generally, we presume words used in a statute have their ordinary and commonly understood meaning.” Kay-Decker v. Iowa State Bd. of Tax Review, 857 N.W.2d 216, 223 (Iowa 2014) (citations omitted)

Transmission facilities are authorized under the zoning ordinance, generation of power in the zoning district is not. Electrical transmission facilities are not electrical generation facilities. The common usage of these words demonstrates transmission and generation are different. The board had access to several sources of information to support this distinction. The Board’s failure to make this distinction was correctly identified by the district court when it declared the permits void.

Neither the dictionary nor the federal government nor the power industry consider generation and transmission the same. The district court was correct in declining the board’s attempt to comingle generation and transmission.

The Dictionary.

A clear reading of any dictionary available to the general public will lead the reader to understand generation and transmission are different.

Generate is defined as “to bring into existence; cause to be; to produce.”

www.dictionary.com . (accessed May 17, 2017). Transmit “is to send or transfer a thing from one person or place to another.” (Black’s Law Dictionary 1505 Bryan Gardner, Ed. 7th Edition (1999)). The difference is striking and plain.

Using the dictionary to resolve a concern in a legal context is not a novel concept. This comports with the Court’s use of the dictionary to define the regular meaning of words. See Livingston v. Davis, 243 Iowa 21, 50 N.W.2d 592, 596 (1951) (turning to Webster’s dictionary to define school), Meduna v. City of Crescent, 761 N.W.2d 77, 82 (Iowa Ct. App. 2008) (noting the trial court turned to the dictionary for definitions of rooming house). Indeed, the appellants point to the Crow case, another use of the dictionary case to resolve definition issues. Crow v. Bd. of Adjustment of Iowa City, 227 Iowa 324, 288 N.W. 145 (1939). The key issue in that case turned on the city finding a clear definition from a reliable source (Webster’s dictionary) and relying upon the same. Id. at 146. Crow was a case of a city determining that “hospital” encompassed animal and human treatment by virtue of its definition in a source it deemed reliable. Id. at 147. In the present case, the board had to not determine what a word meant, but rather if an activity was inside of a term.

The record before the court largely focused on what the meaning of the word transmission line was and whether a wind power generator, which GENERATES electricity falls into the definition of transmission line.

The Federal Government

The federal government handles transmission and generation differently. The federal Power Act of 1935 established a federal power commission to regulate the sale and transportation electricity. 16 U.S.C.A. § 824d - 824e (2000) (West). Further the commission power to regulate transmission of energy across state lines were established in FPC v. So Cal Edison. 376 U.S. 205 (1964).

The Federal Energy Regulatory Commission (FERC) treats transmission different from generation. The FERC issued order 888 which mandated the separation of sales and transportation of electricity. Order 888, In Re Promoting Wholesale Competition by Pub. Utilities, 168 P.U.R.4th 590 (F.E.R.C. Apr. 24, 1996). Order 888 requires open access across a transmission system between generators of power. *Id.* FERC addresses transmission as a separate sphere of its function. The FERC issued order 2000, establishing guidelines to foster participation in regional transmission organizations and independent system operators to decrease costs of transmission of electricity. Order 2000, In Re: *Regional Transmission Organizations*, 89 FERC ¶ 61,285, 18 CFR Part 35

It is of note that FERC controls transmission line construction permits while power generation is a public utilities board function.

<http://www.ferc.gov/industries/electric/enviro.asp>. (accessed May 17, 2017)

U.S. Department of Energy Office of Electricity Delivery and Energy Reliability defines transmission and generation as separate concepts. It is clearly articulated in its graphic to educate the public, including placing wind power generators in the generation not transportation category. <https://energy.gov/articles/infographic-understanding-grid> (accessed May 17, 2017). (Graphic attached as Exhibit 1 to the Brief)

Likewise, another government agency, the US Energy Information Service, provides the graphical display which clearly articulates the difference between generation and transmission.

https://www.eia.gov/Energyexplained/index.cfm?page=electricity_delivery. (accessed May 17, 2017). (Graphic attached as Exhibit 2 to the Brief.)

Distinctions made by the government are clear indicators to support the position that transmission is a separate and distinct concept from generation. If transmission is the same as generation, the various categorizations would be superfluous.

The Industry

Within the industry, the definitions are separate and distinct. The North American Electrical Reliability Corporation (NERC), is a not for profit international regulatory authority whose mission to assure reliability and security

of the power system of North America agreed upon definition of transmission is:

Transmission: An interconnected group of lines and associated equipment for the movement or transfer of electric energy between points of supply and points at which it is transformed for delivery to customers or is delivered to other electric systems.

http://www.nerc.com/files/glossary_of_terms.pdf.

This term was approved by the FERC on 3/16/2007. *Id.*

The industry identifies for-profit independent transmission companies (Transcos) whose focus is on delivering low cost energy to consumers by providing transmission access to new generation sources. *Transmission and Wind Energy: Capturing the Prevailing Winds for the Benefit of the Customers*. Page 1 and 16; National Grid, Published 2006, www.nationalgridus.com.

https://www9.nationalgridus.com/non_html/c3-3_NG_wind_policy.pdf .

Tellingly, this industry publication goes on to lament the disconnect between Dakota states, the "Saudi Arabia of Wind", and the heavy population and commercial centers of the Twin Cities, Milwaukee, Chicago, and Denver. *Id.* at 9. Specifically, the publication notes the lack of transmission lines to move the power generated to the consumer. *Id.* citing John Kraejewski, on behalf of the Transmission Access Policy Group, FERC Technical conference Transcript, Dec 1, 2004 p.113)

It is clear that the industry views transmission as a separate component from generation, citing investment in transmission projects in terms of how many Kilovolts and miles of transmission lines are being established in a region when discussing transmission issues. The industry publication doesn't mention wind turbine installation when considering or discussing transmission issues. *Id. P. 10.*

- c. The board acted upon inaccurate, unreasonable information when making its decision to allow the power generation turbines in the ag district as a use of right.

The board received information from the Fayette county attorney's office, which brought the board's attention to unreasonable and irrelevant concepts that further erodes any contention that the board's decision was sound. Those concepts were:

1. Ag zoning use allows farmers to do what they want.

The power generation turbine installation was not a farm use matter and the county attorney's office misstated the implications of granting or denying the appeal to of farm use in the Ag zone. This erodes any assertion that the board's action was based on sound reasoning.

2. Spot Zoning.

No attempt to reclassify land into another zoning district was before the board. Spot zoning results when a zoning ordinance creates a small island of property with restrictions on its use different from those imposed on surrounding property. Perkins v. Bd. of Supervisors of Madison Cty., 636 N.W.2d 58, 67 (Iowa 2001). The board was supposed to determine whether installation of a wind power generator was a permitted use in the Ag District. Spot zoning has nothing to do with the issue the board was determining and its inclusion in its deliberation by its counsel was erroneous.

3. The board should not consider the transmission versus generation concerns as they were a red herring.

The county attorney's office dismissed the entire transmission versus generation argument. A hypothetical was given that if power generation turbines are transmission lines under the ordinance then nuclear power plants would also be allowed. Instead of addressing the merits of defining transmission and generation, the county attorney's only advice was indicating that federal regulation would prevent the installation of the nuclear plant. The county attorney's office went on to classify the discussion as a red herring. Far from being a red herring, it was the main crux of the issue and incorrectly determined by the board when they approved the issuance of the permit.

These actions further support the District court's determination that that the board acted unreasonably in allowing the power generation turbines as a permitted use under the Ag district zoning.

- b. As generators of electricity, wind power generation turbines are not authorized in the zoning ordinance.

It is not disputed that the zoning ordinance permits ONLY the use of structures or land listed in the section. It is a closed list of authorized uses by right. A zoning ordinance which lists permitted uses excludes any uses that are not listed. People v. Island Wide Ins. Brokerage, Inc., 177 Misc. 2d 668, 676 N.Y.S.2d 860 (Dist. Ct. 1998).

The specific authority for zoning is established by state laws known as “zoning enabling legislation.” When zoning was first implemented in the 1920s, the U.S. Department of Commerce published the Standard State Zoning Enabling Act as a template for zoning enabling legislation. Standard State Zoning Enabling Act (United States Department of Commerce (1922), this standard that was adopted by most states by the 1950s. Searles v. Darling, 46 Del. 263, 83 A.2d 96, 98 (1951). Eventually, Iowa adopted the Standard State Zoning Enabling Act for all counties. Iowa Code Section 358A. *See* Wolf v. City of Ely, 493 N.W.2d 846, 849 (Iowa 1992)

As a result, zoning is addressed in a somewhat similar homogeneous manner in the various states. American Planning Association, *Modernizing State Planning Statutes: The Growing Smart Working Papers, Vol. 1*, Planning Advisory Service Report No. 462/463 (1996).

The use by right list in the zoning ordinance in Fayette county does not allow for the installation of electrical generation platforms. Use by right applications are allowed, without the need for major detailed local government review, so long as they meet the district standards and requirements specified in the zoning ordinance. A ‘use by right’ is distinctly different than a special exception use or conditional use, which is only allowed after a review and approval by the appropriate local government board or commission. The Appellants interpretation transmission facilities, if adopted, allows the district to be littered with power generators of every type so long as it is connected to a line, which is at odds with an agricultural district zoning and the stated intent of the zoning ordinance.

The board never explicitly made a finding that power generators were transmission lines under the zoning ordinance. It is clear, however, from the conduct and the denial of the appeal to the board, that the board must consider power generation turbines as transmission lines. This determination is quite clearly inaccurate at best and blatantly wrong at worst. Power generation turbines are not the same as transmission facilities. This is not a matter of extending a zoning

ordinance by implication to prevent a use, rather it is an attempt by implication to allow use that otherwise prohibited. The board's actions and extension of the transmission line use to allow power generation is a misapplication of zoning principles. It is true that restrictions of a zoning ordinance should not be extended by implication likewise allowing a use should not be extended by implication. *See Johnson v. Bd. of Adjustment, City of W. Des Moines*, 239 N.W.2d 873, 881 (Iowa 1976) (citations omitted).

The board's decision contained no substantial evidence to support its' implicit determination that power generation is allowed under the permitted use of transmission line in the zoning regulation. The board's own outside counsel's letter cautions the board that "to the extent they (wind turbines) can be determined to transmit electrical power" would the use be allowed in the Ag district. Such extent was never made. The board was presented with evidence that transmission lines are separate and distinct from power generation. Woods provided information outlining the definition of transmission and generation. Citizens questioned the definition of transmission versus generation. These salient questions and facts fell on deaf ears.

The district court was correct in finding that the board's implicit classification of power generation turbines as a transmission facility was unreasonable a use by right under the zoning ordinance.

II. THE DISTRICT COURT CORRECTLY CONSIDERED
ADDITIONAL EVIDENCE REGARDING WIND DRIVING
POWER GENERATION FACILITIES IN RELATIONSHIP TO
ZONING

The district court correctly considered the limited testimony of a land use attorney and professor to understand the nature of the wind power generators and their usual and customary place in zoning ordinances. The rules allow for the additional information and the information was of use to the court.

The offered testimony was limited to show when and where wind power generators are generally handled under zoning ordinances. This limited information was of aid to the trial court in determining that the actions of the board of adjustment were unreasonable and not subject to a mere difference of opinion. The court is well with its purview to make this decision to allow the evidence. The district court in making its determination may determine that other evidence may be permitted in these types of actions and is not limited to the return itself. Steeves v. Town of New Mkt., 225 Iowa 618, 281 N.W. 162, 163 (1938). The court may receive such other oral or written evidence explaining the matters contained in the return and can be used consider the sufficiency of the acts of lower body. Iowa R. Civ. P. 1.1410. The Iowa Supreme Court has found the district court was justified in other similar situations, allowing additional testimony. For example, on certiorari proceeding to review denial of state's applications for change of venue,

Iowa Supreme Court found that it was proper to consider transcript of evidence in other cases in which the same defendants were acquitted to ascertain a change of venue question even without the evidence contained record below. State v. Dist. Court of Jefferson Cty., 213 Iowa 822, 238 N.W. 290, 295–96 (1931).

In the present case, the professor's information served as a bench mark of the board's action. It did not provide additional facts, but here, the testimony of the professor demonstrated the great care and concern that is normally undertaken regarding wind power generation and placement in a zoning plan. This information serves as sharp contrast to the absolute lack of foundation for action of the Board by allowing the wind power generators as primary use under the zoning ordinance had the effect determining that electric power generation is the same as electric power transmission

CONCLUSION

The District court's conclusion is appropriate, well-reasoned and grounded in fact and the law. The Board acted illegally when it authorized the building permit to allow wind power generators in the Ag district as primary permitted use. The District court was well within its purview to take additional testimony regarding the general application of wind power generators in zoning schemes to support its decision that the Board acted illegally.

NO REQUEST FOR ORAL ARGUMENT

Appellee does not request to be heard in oral argument unless the Court feels oral argument is necessary or appropriate. In that event, 30 minutes would be sufficient time for the parties to present each of their positions to the Court.

Respectfully Submitted:

Patrick B Dillon
Dillon Law, PC
209 E 1st Street
Sumner, IA 50674
563-578-1850
(Fax) 563-578-1312
patdillon@dillonlawpc.com

Attorney for Appellee
RON WOODS, JOHN WOODS, JAMES COSTELLO, C&W FARMS, and
WOODS CONSTRUCTION, INC

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1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 3,632 words, excluding the parts of the brief exempted by Iowa R. Civ. P. 6.903(1)(g)(1).

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

Signature

Date

CERTIFICATE OF SERVICE

The undersigned certifies a copy of this Proof Brief was served on the

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STEVENS, CARTER J. for CITY OF FAIRBANK, IOWA

LEIN, NATHAN JAMES for FAYETTE CO ZONING BOARD OF ADJ

HOSACK, DAVID WILLIAM for CITY OF FAIRBANK, IOWA

PRENDERGAST, HEATHER for CITY OF FAIRBANK, IOWA

VANDIKE, ADAM CHARLES for ROURKE, KIMBERLY K, GALILEO WIND
1 LLC, MASON WIND LLC, ROURKE, THOMAS G, OPTIMUM
RENEWABLES LLC, VENUS WIND 4 LLC, DANTE WIND 6 LLC

JOHNSON, ALEXANDER MICHAEL for ROURKE, KIMBERLY K, GALILEO
WIND 1 LLC, MASON WIND LLC, ROURKE, THOMAS G, OPTIMUM
RENEWABLES LLC, VENUS WIND 4 LLC, DANTE WIND 6 LLC

BURNS, JAMES JAY for MILLER, CATHERINE MARIE, FAYETTE CO
ZONING BOARD OF ADJ, FAYETTE COUNTY ZONING ADMINIST RATOR

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I hereby certify that the cost of printing the foregoing Appellee’s Brief
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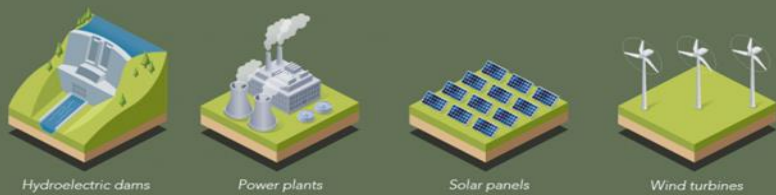
UNDERSTANDING THE GRID

How does electricity get from a power plant to your home? The basic functions of your home or business are powered by energy sources that may be hundreds of miles away. Here's how that energy gets from the source to the electrical outlets in your home or office.



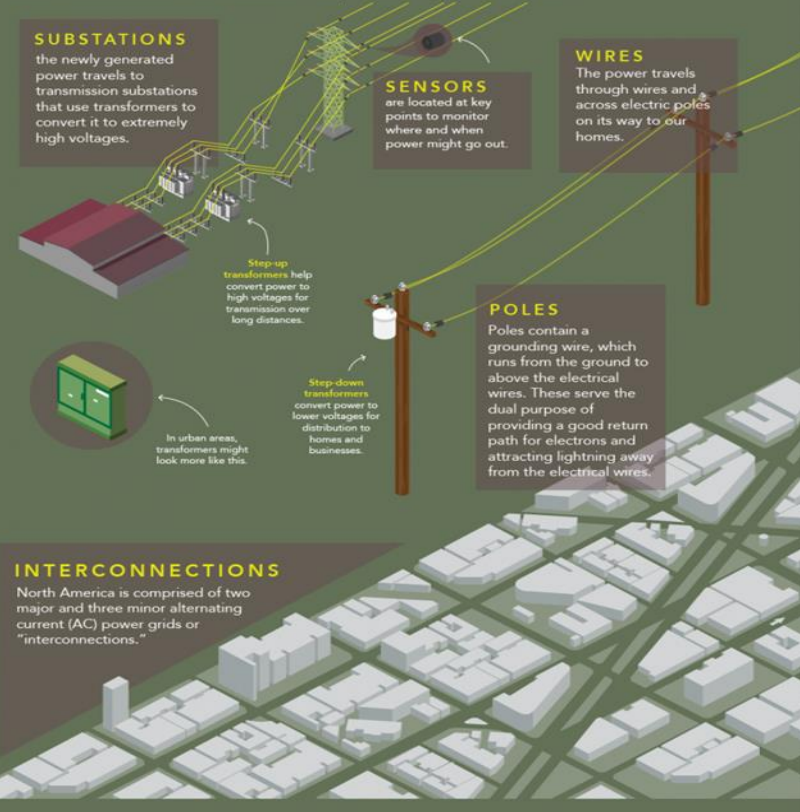
GENERATION

Electricity starts at a generator, which can be powered by burning fossil fuels, collecting wind, solar or water energy, or from nuclear reactions.



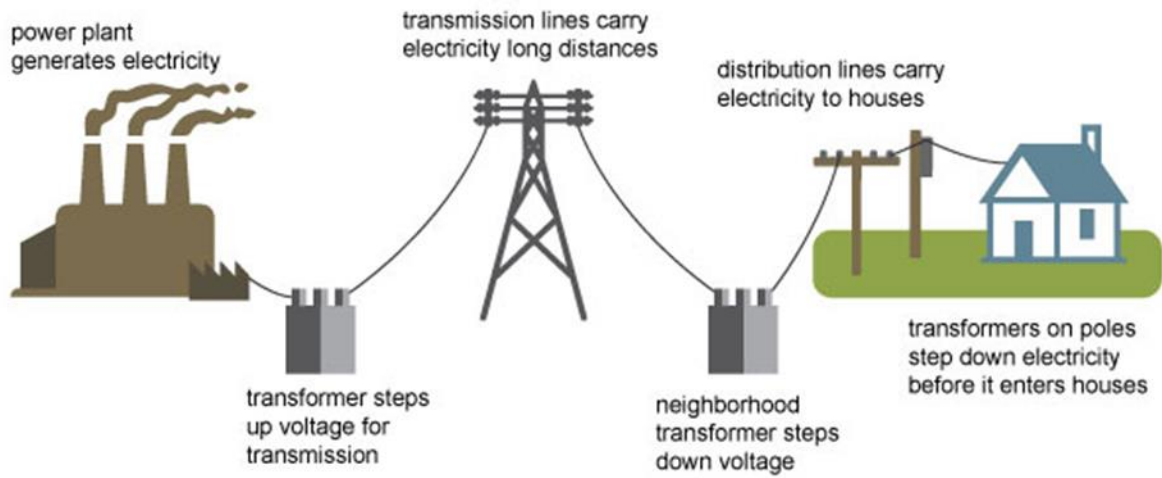
TRANSMISSION & DISTRIBUTION

After it's generated, the power needs to travel from the power plant to homes, businesses and other facilities. This process is called transmission.



Graphic 1

Electricity generation, transmission, and distribution



Source: Adapted from National Energy Education Development Project (public domain)

Graphic 2