

April 27, 2020

VIA EMAIL ONLY

Darrell Meyer
Hardin County Attorney
Hardin County Office Building
1201 14th Avenue
Eldora, IA 50627

Re: Proposed Hardin County Wind Ordinance Amendments

Dear Mr. Meyer:

Thank you for taking the time to bring me up to date on the status of the proposed wind ordinance amendments and the pending hearing. As we discussed, I represent RWE Renewables. As I believe you are aware, RWE is already well into development of a project in Hardin County that has been ongoing since 2017 that is expected to bring over \$40 million in new tax revenue to the county, over \$20 million in payments to property owners, 150 construction jobs, and an additional 6-10 new full-time jobs as well as 200 MW of additional clean, renewable, zero-fuel-cost energy to Iowa. RWE's investment in Hardin County to date has been considerable: over \$2 million in development costs have already been incurred; a public meeting was held in late 2017 where over 500 landowners in the county were invited; the county approved the erection of two meteorological towers (one in 2017, the other in 2019) to assist with planning the wind farm, which remain in operation; and memoranda of leases with nearly 100 landowners have been filed and recorded with the county.

We are concerned, however, that the proposed wind ordinance amendments, if applied to the RWE project, could jeopardize these extensive benefits. I am writing to you to specifically address some legal concerns we have with the substance and process of the proposed amendments in the hope that you can advise your client, Board of Supervisors, in a way that lets the county steer clear of legal issues with any amendments it adopts.

The biggest concern is with the setbacks, as the proposed setback from any property line would be much larger than what is common in other Iowa counties. To give a sense of the impact of this change, RWE currently has leases (for which it is paying landowners) covering approximately 20,000 acres, which would include approximately 2,000 buildable acres suitable for wind turbines. Under the proposed amendments, applying all new setbacks would decrease the available acreage from 2,000 to just 67 acres where it is certain RWE could build – a roughly

97% reduction in the buildable areas in the leases RWE already have. (The limited waivers of the property line setback allowed under the ordinance would increase this, but we estimate the buildable land would still be less than 200 acres – a reduction of 90% in buildable land.)

While we have other concerns with the proposed amendments¹, this one example is useful to address the various legal concerns we have with the adoption of the proposed amendments. We do not believe the proposed amendments meet the threshold requirements of not being arbitrary, unreasonable, capricious, or discriminatory; we believe that they would amount to a regulatory taking of RWE’s existing property rights; and, most important, we believe that while the county can certainly amend its wind ordinance on a going forward basis, the amendments cannot apply to the RWE project as enough investment has been made that RWE’s rights are already vested in the existing wind ordinance.

There are numerous reasons we believe the amendments would fail the arbitrary, unreasonable, capricious or discriminatory test applied by Iowa courts. First, we believe they are contrary to public policy. The Iowa legislature has made it the explicit policy of Iowa, by statute, to encourage wind energy. *See* Iowa Code §§ 476.41-43; .53, .53A. This policy, the promotion of wind energy, has also been incorporated into the policy of Hardin County, as expressed in its comprehensive plan. Iowa Code § 18B.1(3) provides that “planning, zoning, development, and resource management should be undertaken to promote clean and renewable energy use and increased energy efficiency.” The Hardin County comprehensive plan references and incorporates this smart planning principle. Here, amending the zoning ordinance to make it harder to site wind facilities – both harder than the existing ordinance and harder than most other counties in Iowa – is contrary to both state and local public policy. *See Webb v. Giltner*, 468 N.W.2d 838 (Ia. Ct. App. 1991) (requiring zoning decisions to consider comprehensive plan); *see also Ecker Bros. v. Calumet County*, 772 N.W.2d 240 (Wisc. Ct. App. 2009) (wind regulation was *ultra vires* where it was contrary to state policy). Second, it is our understanding that the basis for the proposed two-times maximum height setback from property lines is a report from the National Renewable Energy Laboratories (“NREL”) which was withdrawn and is of no effect.² RWE has never been provided with any reasoning or supporting materials for the proposed changes, which itself is concerning given the direct (and intended) impact on RWE’s

¹ For example, the potential for delay and mischief created by the extraordinarily large number of local committees, commissions and other groups who have would have review over an application.

² A discussion of the withdrawal of the article is at: <https://www.nrel.gov/wind/publications.html>. As NREL explains, the analysis was based on 13-year old technology, and was highly site and use specific.

project.³ If it is indeed accurate that the proposed setbacks were based on the NREL information, that cannot form a rational basis for the selected setback. Finally (although this list of examples is not intended to be exhaustive), we are troubled by the conflict of interest at the heart of the creation of the amendments. Curt Groen is a member of and participated in the Planning and Zoning Commission's recommendations of the amendments. As you may or may not be aware, Groen is also the Administrator of the Facebook page "Hardin County Iowa Citizens Against Wind Turbines." He certainly was not giving a fair and open-minded review to the ordinance. A very similar set of circumstances arose in Madison County, Iowa, where a member of a coalition who sued the Board of Supervisors over a WECS permit was also a member of the county Board of Health when wind opponents attempted to get the Board of Health to weigh in on wind setbacks. Madison County Attorney Matt Schultz issued the attached opinion letter, finding it would be a conflict and therefore inappropriate for the member to participate in the decision making. Just as in Madison County, the proposed amendments here have been fatally tainted by Groen's clear conflict while participating in the recommendation by the Planning and Zoning Commission.

We also believe the unusually strict setbacks, if adopted after RWE's reasonable investments in property rights in Hardin County, would constitute a regulatory taking. Government regulation taking away 97% of the useful land within RWE's leases/easements without just compensation would constitute an unlawful condemnation of RWE's property.⁴

These concerns raise significant questions about the legal enforceability of the proposed updated wind ordinance. That said, we ultimately believe that, because RWE's project is properly grandfathered in under the currently-existing regulations, the proposed amendments, even if upheld, would apply only to future wind project developments in the county, and not to RWE's existing project. In this regard, while we have an interest in the county adopting a workable ordinance, we believe any actual dispute with the project is avoided. **We would ask that the county confirm that any new wind ordinance amendments will apply only to projects that were not already underway prior to their adoption, and specifically that RWE's project is**

³ We would request and appreciate obtaining copies of any materials submitted to the record for the Board's decision, either from internal or external sources, prior to the public hearing. I believe given the intent to impact RWE's interests, it is simply a matter of due process to do so.

⁴ Leaseholds are a sufficient interest to require just compensation when condemned. *See Skaff v. Sioux City*, 120 N.W.2d 439, 441 (Iowa 1963) ("A tenant for years is the owner of an estate; a leasehold is property subject to condemnation upon the payment of just compensation."); *Nidy & Co. v. State*, 189 N.W.2d 583, 584 (Iowa 1971) ("A lessee, of course, is entitled to damages for the condemnation of his leasehold. ").

already vested in the existing regulations. Iowa courts hold that, “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.” *Geisler v. City Council of City of Cedar Falls*, 769 N.W.2d 162, 167 (Iowa 2009). To determine whether the vested rights exception applies, Iowa courts engage in a two-part analysis: “(1) did the property owner make substantial expenditures toward the use in question prior to the zoning change; and (2) were the expenditures made by the property owner lawful.” *Id.* (quoting *Quality Refrigerated Servs., Inc. v. City of Spencer*, 586 N.W.2d 202, 206 (Iowa 1998)).

As preparatory work, including engineering planning, land acquisition, obtaining a position in the Midcontinent Independent System Operator (MISO) interconnection queue, and the building and operation of meteorological towers, has been going on for several years in reliance on the specific regulations of the land where the project is being developed, there have already been substantial expenditures, totaling over two million dollars. The amount vastly exceeds what has been found sufficient in prior cases to create a vested right. *See, e.g., City of New Hampton v. Blayne-Martin Corp.*, 594 N.W.2d 40, 42 (Iowa 1999) (focusing on illegality prong but impliedly finding that substantial expenditures prong had been met where \$19,000 had been expended on materials and labor toward the construction of a parking garage); *Nemmers, v. City of Dubuque, Iowa*, 716 F.2d 1194, 1196 (8th Cir. 1983) (applying vested rights doctrine where landowner spent approximately \$140,000 on grading and pre-construction professional fees).

The second prong here is also unquestionably met: RWE properly obtained permits for the two meteorological towers, and none of its other expenditures has required a county permit of any kind to lawfully proceed (and RWE has followed all other applicable rules for, as an example, the MISO interconnection process).

Finally, Iowa courts have also found that a developer’s rights can vest where a new ordinance is enacted in bad faith. For this purpose, Iowa courts have

found bad faith when municipalities attempt “to zone out a use” or stop a particular project. . . . From these cases, it can be discerned that an improper purpose exists when a zoning authority adopts a new zoning regulation designed to frustrate a particular applicant’s plans for development.

Geisler, 769 N.W.2d at 169; *see also TSB Holdings, L.L.C. v. Bd. Of Adjustment for Iowa City*, 913 N.W.2d 1, 15 (Iowa 2018) (“When a zoning authority adopts a new zoning regulation designed to frustrate a particular applicant’s plans for development, it can be discerned that an improper purpose exists.”); *U.S. Cellular Corp. v. Bd. Of Adjustment of City of Des Moines*, 589 N.W.2d 712, 718 (Iowa 1999). In this case, the analysis under Iowa law is more straightforward than usual: the December 11, 2019 moratorium resolution on its face states that it is in response to RWE having obtained 100 leases in the county. It clearly was an effort to “frustrate a

particular applicant’s plans” (and we believe the unusual strictness of the ordinance suggests an effort to “zone out a use” – as shown by the 97% reduction in useable area for RWE’s leases, the new ordinance in terms of economic practicability may effectively be a permanent moratorium.)

It may be, and we hope this is the case, that such drastic results were not the county’s intent, and that this is an unintended result of county officials trying to engage in a fair balance of protections between county residents who wish to use their land for wind energy, developers investing in the county, and other non-participating land uses, without the adequate expertise in the area to strike the balance correctly. To that end, while RWE believes its current project is vested under the existing ordinance, this letter is also to offer our expertise and assistance to the county should it seek to appropriately amend its ordinance for *future* projects. RWE is an experienced wind developer, with projects in multiple counties in Iowa, and throughout other states. RWE is familiar with how other jurisdictions have structured their regulations, and how they have struck an appropriate balance in their regulations to allow for successful yet safe development of wind energy with its benefits to the county, the state, and the country.

RWE looks forward to continuing to work with, and invest in, Hardin County; being a good neighbor; and providing good jobs and a substantial revenue stream to help with roads, bridges, schools, emergency responders, parks and recreational areas. The proposed wind ordinance amendments, however, would make that difficult, given the planning and investment already made under the existing regulations. I appreciate the opportunity to share our concerns with you and with the county, and our position that RWE’s rights are vested in the existing ordinance. I am optimistic that the county would rather move forward on a cooperative path that encourages investment and allows landowners in these challenging times to bring additional revenue streams to their farms, than on a contentious path with its flawed amendments. I hope that the information we have provided is useful in advising your client in that regard. And I reiterate our offer to partner with the county as a stakeholder in developing an ordinance that would strike a better balance and avoid the potential legal issues we believe the proposed amendments raise.

Should you have any questions, or if you would like to discuss these concerns further, please do not hesitate to contact me. I look forward to working with you, and remain hopeful we can reach a result that works well for both your client and mine.

Respectfully,

/s/ Bret A. Dublinske

Bret A. Dublinske

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