NO. A11-2229

State of Minnesota

In Court of Appeals

In the Matter of the Application of
AWA Goodhue Wind, LLC for a Large Wind Energy
Conversion System Site Permit for the
78 MW Goodhue Wind Project in Goodhue County

BRIEF OF APPELLANT COALITION FOR SENSIBLE SITING

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SUMMARY OF THE ARGUMENT

The Minnesota Public Utilities Commission ("MPUC") erred as a matter of law in failing to properly apply the "good cause" standard set forth in Minnesota Statutes § 216F.081. That law requires the MPUC to adopt stricter county standards when issuing permits for Large Wind Energy Conversion Systems ("LWECS") unless "good cause" exists to use its own, less stringent standards. In finding that "good cause" existed to not use Goodhue County's stricter standards, the MPUC improperly shifted the burden to the County to substantiate its standards as necessary and not overly stringent rather than finding good cause for its decision to ignore those standards. Furthermore, the MPUC is imposing public policy favoring developer profits and renewable energy over local zoning and land use control, which directly contradicts the public policy expressed in Chapter 216F.

The MPUC's decision to disregard the County's stricter standards in the AWA permit constituted legal error, fell outside the MPUC's statutory authority, and was arbitrary and capricious. Its decision should be reversed.

ARGUMENT

I. THE MPUC'S FAILURE TO PROPERLY APPLY THE "GOOD CAUSE" STANDARD REQUIRES REVERSAL.

The MPUC's interpretation and application of the good cause standard was an error of law. The MPUC improperly shifted the burden of proof by attacking Goodhue County's reasons for adopting the Ordinance rather than finding good cause to ignore it.

As a general matter, decisions made by administrative agencies such as the MPUC are reversed only when they reflect an error of law, the findings are arbitrary and capricious, or their findings are unsupported by substantial evidence. *Sunstar Foods, Inc. v. Uhlendorf,* 310 N.W.2d 80, 84 (Minn. 1981); *Crookston Cattle Co. v. Minnesota Dep't of Natural Resources,* 300 N.W.2d 769, 777 (Minn. 1980); *Signal Delivery Service, Inc. v. Brynwood Transfer Co.*, 288 N.W.2d 707, 710 (Minn. 1980). Here, the decision made by the MPUC reflects an error in law and was arbitrary and capricious.

A. The MPUC Erred As A Matter Of Law When Applying The "Good Cause" Standard.

The MPUC's permit order concerned a matter of straightforward legal analysis—construing the words of the statute—and as such, is not entitled to any deference. *In re Denial of Eller Media Company's Applications,* 664 N.W.2d 1, 7 (Minn. 2003) ("We retain the authority to review de novo errors of law which arise when an agency decision is based upon the meaning of words in a statute."). Moreover, when an agency construes the statutes that it regulates, no deference is due to an interpretation "that is in conflict with the express purpose of the Act and the intention of the legislature." *Geo. A. Hormel & Co. v. Asper,* 428 N.W.2d 47, 50 (Minn. 1988). When a statute is unambiguous, its wording controls over agency interpretations. *Id*.; *Matter of Kern Grain Co.,* 369 N.W.2d 565, 570 (Minn. Ct. App. 1985). In the present case, the MPUC's approach failed to follow the express regulatory scheme and merits no deference.

Minnesota Statute § 216F.081 creates a rebuttable presumption that the more restrictive county standards must apply, absent the MPUC's ability to prove that it has "good cause" to ignore them.

> A county may adopt by ordinance standards for LWECS that are more stringent than standards in commission rules or in the commission's permit standards. The commission, in considering a permit application for LWECS in a county that has adopted more stringent standards, ***shall consider and apply those more stringent standards,*** unless the commission finds good cause not to apply the standards.
>
> (emphasis added)

Therefore, this Court should examine "the purpose and intent of the statute to determine when good cause could be found." *Matter of Welfare of D.C.M.*, 443 N.W.2d 853, 854 (Minn. Ct. App. 1989). Here, the purpose and intent of the statute was to give deference to counties. Had the legislature intended to not give deference to counties, it would not have included such language. The legislature is presumed to intend the ***entire statute*** to be effective and certain. Minn. Stat. § 645.17.

Further, when interpreting other statutes containing this phrase, courts have defined "good cause" as "a reason which is compelling—not imaginary, trifling or capricious—must be substantial/ reasonable..." *Ferguson v. Department of Employment Servs.*, 311 Minn. 34, 44 n. 5, 247 N.W.2d 895, 900 n. 5 (1976). Therefore, the MPUC was required to provide compelling reasons and substantial evidence why it was not required to defer to Goodhue County's stricter standards when issuing a permit to AWA.

Rather than doing so, the MPUC chose to assess the application of the County's setback requirements by deciding "whether applying the County's standards to this

Project is necessary and whether less stringent standards are sufficient to effectively address the concerns raised." (See Relator Brief at 13, Add 0009). This is clearly not the compelling reasons and substantial evidence required for a showing of good cause. Instead, the MPUC improperly overrode the County's judgment on technical health and safety issues.

Respondent AWA's brief even acknowledges that the MPUC failed to defer to the County, making the contradictory assertions that "MPUC was not required to defer to Goodhue County's judgment or policies in determining whether to apply the 10-RD setback. Rather it was to apply the 10-RD setback standard unless it found "good cause" not to …." AWA Brief at 27. Contrary to AWA's position, Minn. Stat. § 216F.081 provides that MPUC is to shall consider and apply a county standard where it is stricter than the MPUC's own requirements.

Therefore, the MPUC erred as a matter of law when determining that "good cause" existed to ignore Goodhue County's ordinance requiring 10-RD setbacks for all wind turbines.

B. The MPUC Did Not Take the Overall Legislative Framework of Minn. Stat. §216F Into Account When Determining if Good Cause Existed to Reject the County Standards.

In determining whether "good cause" existed, the MPUC failed to construe the statute as a whole. Minn. Stat. § 645.17 ("the legislature intends the entire statute to be effective and certain"); *State v. United States Fidelity & Guaranty,* 226 N.W.2d 322, 323-4 (Minn. 1975) ("It is settled that statutes are to be construed so as to give effect to every section and part."); *In re Estate of Nordlund,* 602 N.W.2d 910, 913 (Minn. App. 1999)

rev. denied (Minn. Feb. 15, 2000) (construing statute as a whole and "together with" related statutory provisions),. The MPUC failed to consider the meaning of "good cause" as used in Minn. Stat. §216F.081 within the larger context of the regulatory scheme of Section 216F.

When construing a statute, the Court must consider its plain language. The "plain, obvious, and rational meaning of a statute should always be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute intellect would discover." *Lynch v. Alworth-Stephens Co.*, 294 F. 190 (8th Cir. 1923), *affd.*, 267 U.S. 394 (1925). Here, Minnesota Statute § 216F.03 contains a declaration of public purpose that promotes development of only responsible, environmentally sensitive projects: "The legislature declares it to be the policy of the state to site LWECS in an orderly manner compatible with environmental preservation, sustainable development, and the efficient use of resources." Minn. Stat. § 216F.03. See also MN ADC 7854.0200; MN ADC 7854.1000 (conditioning LWECS permitting on Commission determination "that the project is compatible with environmental preservation, sustainable development, and the efficient use of resources").

When § 216F.03 and § 216F.081 are read together, the legislative intent is clear— where counties have adopted stricter LWECS standards to protect the health and welfare and promote development in an orderly manner of their citizens, the MPUC should defer to those standards absent good cause. Here, however, rather than respecting local standards, as required, the MPUC has interpreted the statute to mean that unless a county can show that its ordinance is necessary and there is no less restrictive alternative

to meet a county's goals, the agency will find good cause to ignore the county standard. The MPUC's inversion of the legislated the regulatory scheme constitutes legal error.

In defining and applying good cause, the MPUC failed to consider the statutory scheme which requires LWECS to be sited in a manner "compatible with environmental preservation, sustainable development, and the efficient use of resources."

Good cause can only spring from new independent facts and findings and cannot come out of simply criticism of the original ordinance. The Respondents attack on the validity of the Goodhue County ordinance is not the same as good cause to reject the ordinance.

II. THE MPUC LACKED GOOD CAUSE TO REJECT THE COUNTY STANDARD

A. The Decision Of The MPUC Is Not Supported By Substantial Evidence As A Matter Of Law.

Herein lies the core of the MPUC's legal error. The standard adopted by the MPUC is clear attempt to shift the burden for justification of the County Ordinance to the County in violation of the clear language of Minn. Stat. § 216F.081.

This standard chosen by the MPUC seeks to impose a "strict scrutiny" standard. This would significantly raise the bar for Counties when regulating siting for LWECS and have a chilling effect on a County attempting to impose such restrictions

The MPUC should have simply applied the law as it is unambiguously written. The MPUC is required to defer to the elected representatives of Goodhue County on the setback issue, and to follow the statutory process. Minn. Stat. § 216F.081; *see also*

Langfield, 449 N.W.2d at 740 (when a statute is unambiguous, its wording controls over agency interpretations); *Matter of Kern Grain Co.*, 369 N.W.2d at 570 (same).

By inverting this analysis and shifting the burden to *the County* to convince the MPUC that the County's adopted setback standards were "necessary," the MPUC erred as a matter of law.

B. The MPUC Exceeded Its Jurisdiction and Erred in Interpretation and Application of Good Cause.

The jurisdiction of the MPUC, as a state agency, is necessarily limited to its statutory authority. *Minnegasco v. Minnesota Pub. Util. Comm'n,* 549 N.W.2d 904, 907 (Minn. 1996) ("The MPUC, as a creature of statute, only has the authority given it by the legislature."). Respondents admit that adoption of the County ordinance into the permit would "Thwart Minnesota's Goal of Developing Energy through Renewable Sources" (AWA Brief at 17). This is a "back door" attempt to impose a public policy justification for its decision. But an agency may not regulate by fiat, nor may it gain jurisdiction with public policy as a justification. This is reserved to the legislature.

The MPUC has argued on appeal that public policy and its view of the Legislative goals in Section 216F provide a backdoor support for its interpretation of good cause. But the courts have limited an agency's authority to regulate to the plain statutory language, not public policy. *Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n,* 358 N.W.2d 639, 642 (Minn. 1984) (courts independently review agency's jurisdiction). And the MPUC's approach also overlooked the stated intent of the Legislature in Section 216F.03. The Court must decline the invitation to allow this version of good cause to be created by

claimed legislative "goals" that are directly contrary to the Legislature's stated intent. Minn. Stat. § 645.16 ("the letter of the law shall not be disregarded under the pretext of pursuing the spirit.").

Moreover, the Respondents' arguments contradict the reality of LWECS within Minnesota. They have suggested that the goals of Sections 216F will not be met and respect for the County's 10-RD setback "sets a dangerous precedent for the viability of commercial wind farms in Minnesota." (AWA Brief at 18). But this statement fails to note that there are other wind farms in Minnesota with setbacks that are more restrictive than the MPUC general permit standards. (*See e.g. In the Matter of the Application of Lake Country Wind Energy, LLC for a 41 Megawatt Large Wind Energy Conversion System in Kandiyohi and Meeker Counties,* 2011 WL 490531, Minn. P.U.C. 2011). The parade of horribles speculated by the Respondents in their briefs have not yet come to pass.

Section 216F.081 does not state that stricter County standards shall be respected "except if the MPUC determines that public policy does not support incorporation into such a permit" or "except if the MPUC determines that the particular standard is necessary or cannot otherwise be addressed through less stringent manners."

The reality is that Respondents are attempting to scare the Court into thinking that respecting county regulation will result in no further development of renewable energy sources. This argument overlooks and mischaracterizes the facts in the record.

The MPUC's statutory jurisdiction, rather than its mistaken concerns of public policy, must determine whether good cause exists to reject the County's ordinance. The absence of statutory jurisdiction requires reversal.

C. The MPUC Cannot Justify Good Cause to Ignore the County Ordinance Because it Wants the Project to be Permitted.

The MPUC is fitting a square peg into a round hole on this project by attempting to define good cause based on the need to permit the project. The ALJ and the MPUC all argued below and on appeal that because the project might not go forward if the MPUC adopted the County 10-RD setback standard, this constituted good cause.

In Respondents' briefs, they argue that adopting the County standard would be "physically and economically infeasible," that it would somehow "severely hinder the implementation of the state renewable energy goals" and the county standard "sets a dangerous precedent for viability of commercial wind farms in Minnesota." (*See* AWA Brief 18-20 and MPUC Brief 19-21)

The viability of the project is not good cause to reject the County's 10-RD setback. Maybe this is not the right location for a wind farm. Maybe some other type of renewable energy source such as hydroelectric, bio-mass fuel or solar system is better suited for the AWA project location. Maybe new forms of renewable energy will be invented in the future that do not violate the County's standards.

The legislature clearly intended counties to have the right to use their experience and local resources to direct development of these projects. The MPUC is not free to ignore this portion of the statute by attacking the basis for such ordinances. The MPUC

cannot argue that the Renewable Energy Standards of the state trump all other statutory requirements and dictate that there is not good cause to respect a county ordinance if it makes a project too expensive.

CONCLUSION

For the reasons stated above, this Court should void the Permit and require the MPUC to apply the Goodhue County ordinance to the permit, or, in the alternative, remand this matter to the MPUC with instructions that it grant the appropriate amount of deference to the County's setback ordinance.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to Rule 132.01 of the Minnesota Rules of Appellate Procedure for a brief using proportional font of 13 point or larger. I further certify that, in preparation of this brief, I used Microsoft Office Word 2007, Professional Edition, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

I further certify that the above referenced brief contains 3,128 words.

Respectfully submitted,

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