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**FABYANSKE  
WESTRA  
HART &  
THOMSON**

February 23, 2016

**VIA EMAIL ([ndpsc@nd.gov](mailto:ndpsc@nd.gov); [dnitschk@nd.gov](mailto:dnitschk@nd.gov))  
and U.S. MAIL**

Darrell Nitschke, Executive Secretary  
North Dakota Public Service Commission  
600 E. Blvd., Dept. 408  
Bismarck, ND 58505-0480

**Re: Brady Wind, LLC, Case Nos. PU-15-690 and PU-15-797**

Dear Mr. Nitschke:

Enclosed for filing in the above-referenced matters is the Concerned Citizens of Stark County's Motion for a Continuance pursuant to N.D. Admin. Code 69-02-04-03.

Pursuant to N.D. Admin. Code 69-02-04-03, I have enclosed the original Motion for a Continuance. By copy of this letter, I am serving same by U.S. Mail and email to the other parties to this matter.

Very truly yours,



Matthew T. Collins

MTC/  
Enclosure

cc: Timothy J. Dawson (via mail and email: [tjdawson@nd.gov](mailto:tjdawson@nd.gov)) (w/ encl.)  
Illona Jeffcoat-Sacco (via mail and email: [ijs@nd.gov](mailto:ijs@nd.gov)) (w/ encl.)  
John G. Hamre (via mail and email: [jghamre@nd.gov](mailto:jghamre@nd.gov)) (w/ encl.)  
Zachery Pelham (via mail and email: [zep@pearce-durick.com](mailto:zep@pearce-durick.com)) (w/ encl.)  
Brian R. Bjella (via mail and email: [bbjella@crowleyfleck.com](mailto:bbjella@crowleyfleck.com)) (w/ encl.)

**22** **PU-15-797** Filed: 2/23/2016 Pages: 30  
**Motion for Continuance**

Concerned Citizens of Stark County (CCSC)  
Matthew Collins, Attorney

**28** **PU-15-690** Filed: 2/23/2016 Pages: 30  
**Motion for Continuance**

Concerned Citizens of Stark County (CCSC)  
Matthew Collins, Attorney

**STATE OF NORTH DAKOTA**  
**NORTH DAKOTA PUBLIC SERVICE COMMISSION**  
600 E. Boulevard, Dept. 408  
Bismarck, ND 58505-0480

Julie Fedorchak  
Randy Christmann  
Brian P. Kalk

Chairman  
Commissioner  
Commissioner

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**Brady Wind, LLC**  
**150 MW Wind Energy Center – Stark County**  
**Siting Application**

**Case No. PU-15-690**

**Brady Wind, LLC**  
**230 kV Transmission Line – Stark County**  
**Siting Application**

**Case No. PU-15-797**

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**MOTION FOR A CONTINUANCE**

Pursuant to N.D. Admin. Code 69-02-04-03, the Concerned Citizens of Stark County (“CCSC”), through undersigned counsel, hereby respectfully petition the North Dakota Public Service Commission (the “Commission”) to cancel the March 2, 2016, hearings in the above-captioned dockets and continue the hearings to a date to be determined. CCSC’s request should be granted because CCSC can demonstrate good cause for its request.

**STANDING OF CCSC**

The North Dakota Supreme Court in Dakota Resource Council v. Stark County, 2012 ND 114, 817 NW2d 373 (2012), held that in order for a non-profit group to have standing, “the association must demonstrate that at least some of its members would have standing to bring the action in their own right.” Id. at paragraph 7. Here, the individual members of CCSC would have standing to intervene and participate in these proceedings.

CCSC is a North Dakota non-profit corporation, with its principal executive office located at 104 Oak Avenue, Taylor, North Dakota 58656. CCSC consists of a five-member board of directors who live in and own property in Stark County, North Dakota. The three officers of CCSC live in

and own property in Stark County, North Dakota. The members of CCSC live in and own property in Stark County, North Dakota. CCSC's primary activity is to protect the natural beauty of the existing landscape in Stark County, North Dakota by providing education to the public and policy-makers of the detrimental effects of placing industrial wind energy facilities within Stark County.

Farren Richard is a resident of Stark County and resides at 5125 104 Avenue SW, Lefor, North Dakota. Mr. Richard lives near the proposed Brady Wind Energy Center and at least three wind turbines will surround his property. Mr. Richard is a member of CCSC.

Patrick Praus is a resident of Stark County and resides at 10440 51<sup>st</sup> Street SW, Lefor, North Dakota. Mr. Praus lives near the proposed Brady Wind Energy Center and at least one turbine will be within 2,000 feet of his kitchen window. Mr. Praus is a member of CCSC.

Thomas W. Reichert is a resident of Stark County and resides part-time at 4474 107<sup>th</sup> Avenue SW, Dickinson, North Dakota. Mr. Reichert's property is adjacent to the proposed Brady Wind Energy Center and the landscape around his property will have countless turbines. Mr. Reichert is a member of CCSC.

CCSC requests that the Commission determine that CCSC has standing to intervene and participate in these proceedings.

### **GOOD CAUSE FOR A CONTINUANCE**

Under N.D. Admin. Code 69-02-04-03, CCSC must demonstrate good cause for its request for a continuance of the March 2 hearings. The N.D. Admin. Code does not provide a definition of good cause and CCSC has been unable to locate a North Dakota Supreme Court decision defining the phrase.

Wright & Miller, Federal Practice and Procedure, have addressed the good cause standard under the Fed. Rule Civ. P. 6(b)(1)(A). According to Wright & Miller, Rule 6 "gives the court wide discretion to grant a request for additional time" and to satisfy the "for good cause" standard, "a

party must demonstrate some justification for the issuance of the extension.” 4B Wright & Miller, Fed. Prac. & Proc. Civ. § 1165 (4th ed.) Here, CCSC can demonstrate good cause for an extension of the March 2 hearing dates.

**A. CCSC Has Not Been Given The Chance To Adequately Prepare For The March 2 Hearing.**

Good cause for granting the continuance exists because CCSC has not been given a fair and reasonable opportunity to review, analyze, and properly prepare for the for the March 2 hearings. Since intervening on February 12, 2016, Brady Wind, LLC (“Brady Wind”) has filed 307 pages of information in support of its 152 page application in Case No. PU-15-797 and 430 pages of information in support of its 228 page application in Case No. PU-15-690. The combined 737 pages of information filed since CCSC’s intervention include highly technical and scientific information and CCSC requires the assistance of consultants and experts for the proper interpretation and consideration of the information submitted by Brady Wind. CCSC requests that the Commission grant the requested continuance for good cause.

**B. Without A Final Site Plan, The Hearing Is Premature.**

CCSC can establish good cause for a continuance because the application is not complete because it fails to provide a final site plan for the proposed wind energy center. In the application in Case No. PU-15-690, Brady Wind notes that final turbine sites have not been selected. (*See* December 2015, Application for a Certificate of Site Compatibility, Section 1.2). Because CCSC and the Commission can only determine compliance with North Dakota law once specific sites are determined for purposes of setbacks, noise, shadow flicker and other distance and location sensitive items, it is difficult to assess or give credence to the analysis of these issues without a final siting plan.

At page 1-4 of the application in Case No. PU-15-690, Brady Wind states that it is “completing additional required studies” and will do further evaluation of the site plan based on

construction efficiency and other factors. (See December 2015, Application for a Certificate of Site Compatibility, page 1-4). In other words, CCSC does not have a reasonable basis to consider the application until all “required studies” or final siting is completed. Brady Wind’s proposal to submit a final site plan after the permit is issued will make it virtually impossible for CCSC to challenge the siting plan if a problem arises at that point. CCSC and its members should be given the opportunity to review each final location for compliance and effects generally and individually. A continuance should be granted until Brady Wind provides more detail in its application. Good cause exists for granting the requested continuance.

**C. Because Local Approval Has Been Challenged, Good Cause Exists To Grant A Continuance.**

On January 28, 2016, CCSC and three citizens of Stark County commenced an action in the district court of Stark County against the Stark County Board of County Commissioners for, among other things, violating North Dakota’s open meeting laws. CCSC believes the violation of North Dakota’s open meeting laws prevented the citizens of Stark County from meaningfully participating in the local approval of the proposed Brady Wind Energy Center. A true and correct copy of the January 27, 2015, Complaint is enclosed with this Motion as Exhibit A. Among other relief, CCSC has requested a preliminary injunction to enjoin the enforcement of the conditional use permit approved by the Stark County Commissioners on December 22, 2016. Good cause exists to continue the hearings pending the Court’s ruling on the request for a preliminary injunction.

In addition, on January 19, 2016, CCSC and three other plaintiffs filed an appeal of the Stark County Board of County Commissioners’ grant of the conditional use permit for the Brady Wind Energy Center. CCSC believes that the Stark County Board of County Commissioners acted arbitrarily and capriciously when they approved the conditional use permit for the Brady Wind Energy Center.

At page 1-7 of the application, Brady Wind references the expected receipt of the local conditional use permit in January 2016. (*See* December 2015, Application for a Certificate of Site Compatibility, page 1-7). CCSC is challenging the “receipt” of the conditional use permit and, therefore, it is legally problematic and potentially invalid. Given the ongoing dispute over the local approval of the Brady Wind Energy Center, the Commission’s proceedings on the applications should be delayed until those legal issues are resolved. It would be a waste of Commission resources to conduct the hearings and issue permits premised on local permitting that may not be valid.

Given the ongoing litigation over the local approval of the conditional use permit, CCSC has demonstrated that good cause exists to continue the March 2 hearings.

**D. Time Required For Review Of Environmental Impacts Established Good Cause For A Continuance.**

Brady Wind’s applications for Case No. PU-15-797 and Case No. PU-15-690 did not properly address the environmental impacts that the proposed Brady Energy Center would present. Only in the last few weeks has Brady Wind filed some of the required environmental information. Good cause exists to grant the requested continuance so that CCSC can properly respond to the recently filed environmental information filed by Brady Wind.

Brady Wind’s application acknowledges that there will likely be an impact on native bat species. (*See* December 2015, Application for a Certificate of Site Compatibility, page 7-30.) The application also states that there are rare and unique natural resources that may be impacted, including federally listed species under the Endangered Species Act. (*Id.* at 7-33 – 7-36.)

On February 8, 2016, less than 30 days before the scheduled hearing, Brady Wind filed a 115 page document titled 2015 Fall Avian Survey, Whopping Crane Likelihood of Occurrence Report, Bat Habitat Assessment. Good cause exists to continue the hearings so that CCSC may have enough time to conduct a meaningful review of the 2015 Fall Avian Survey and related

materials. CCSC needs time to determine the appropriateness of requesting mitigation efforts to include feathering of the turbines during bat migration by expert analysis. CCSC must also determine whether a request for pre- and post-construction mortality studies and monitoring is needed. This is particularly true for the Northern long-eared bat which Brady Wind admits may be travelling through the project area during migration. (See December 2015, Application for a Certificate of Site Compatibility, page 7-34.) CCSC also needs additional time to review and analyze the potential impact on eagles, whooping cranes, and other endangered species. Because of the late disclosure of the environmental information by Brady Wind, good cause exists to grant CCSC's motion for a continuance.

**E. The Allotment Of Two Hours For Each Application Is Insufficient.**

Given the magnitude of the proposed Brady Wind Energy Center and the keen public interest in the project in Stark County, CCSC does not believe the scheduled allotment of two hours of hearing time for each application is sufficient. The technical deficiencies in the applications will take a substantial amount of time to explore. Supporters of CCSC include several hundred Stark County citizens and a substantial number of them intend to voice their concerns over the proposed projects. Given the amount of time needed to provide an open and fair hearing, CCSC requests that the Commission find good cause exists to grant the motion for a continuance.

**F. CCSC Has Requested A Conference Pursuant To N.D. Admin. Code 69-02-03-01 That Will Take Place Seven Days Before The March 2 Hearing.**

CCSC has requested a conference with the appointed administrative law judge pursuant to N.D. Admin. Code 69-02-03-03. CCSC requested the conference to expedite the orderly conduct and disposition of the hearings on Brady Wind's applications. Pursuant to N.D. Admin. Code 69-02-03-01, the conference should address the exchange of printed testimony and exhibits that will be offered in evidence. *Id.* The conference may also address stipulations of facts not in dispute, the number of witnesses, and the time allowed for the testimony of witnesses. *Id.* Because the hearings


are scheduled one week after the February 24 hearing, and given the recent filings by Brady Wind since CCSC's intervention, it will be difficult to accomplish the steps identified in N.D. Admin. Code 69-02-03-01 to expedite the orderly conduct and disposition of the hearings. As such, CCSC requests that the Commission grant the continuance for good cause shown.

**CONCLUSION**

Based on the foregoing, the Concerned Citizens of Stark County request that the Public Services Commission grant its request for a continuation of the March 2, 2016, hearings in Case No. PU-15-797 and Case No. PU-15-690.

DATED: February 23, 2016

**FABYANSKE, WESTRA, HART & THOMSON,  
P.A.**

By:   
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**ATTORNEYS FOR CONCERNED CITIZENS  
OF STARK COUNTY**



STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF STARK

SOUTHWEST JUDICIAL DISTRICT

Concerned Citizens of Stark County, North  
Dakota, a non-profit corporation; Farren  
Richard; Patrick Praus; and Thomas W.  
Reichert,

Case File No: 45-2016-CV-00099

Plaintiffs,

**COMPLAINT**

vs.

Stark County Board of County Commissioners,  
North Dakota; Planning and Zoning  
Commission of Stark County, North Dakota;  
Brady Wind, LLC; and Melissa Hochmuth,

Defendants.

Plaintiffs Concerned Citizens of Stark County, North Dakota, a non-profit corporation (“CCSC”); Farren Richard; Patrick Praus; and Thomas W. Reichert, as and for their Complaint against Defendants Stark County Board of Commissioners (“Board”), Planning and Zoning Commission of Stark County (“P&Z Commission”), Brady Wind, LLC (“Brady Wind”); and Melissa Hochmuth (“Hochmuth”), state and allege as follows:

**PARTIES**

1. CCSC is a North Dakota non-profit corporation, with its principal executive office located at 104 Oak Avenue, Taylor, North Dakota 58656. CCSC consists of a five-member board of directors who live in and own property in Stark County, North Dakota. The three officers of CCSC live in and own property in Stark County, North Dakota. The members of CCSC live in and own property in Stark County, North Dakota. CCSC’s primary activity is to protect the natural beauty of the existing landscape in Stark County, North Dakota by providing



education to the public and policy-makers of the detrimental effects of placing industrial wind energy facilities within Stark County.

2. Farren Richard is a resident of Stark County and resides at 5125 104 Avenue SW, Lefor, North Dakota. Mr. Richard lives near the proposed Brady Wind Energy Center and at least three wind turbines will surround his property.

3. Patrick Praus is a resident of Stark County and resides at 10440 51<sup>st</sup> Street SW, Lefor, North Dakota. Mr. Praus lives near the proposed Brady Wind Energy Center and at least one turbine will be within 2,000 feet of his kitchen window.

4. Thomas W. Reichert is a resident of Stark County and resides part-time at 4474 107<sup>th</sup> Avenue SW, Dickinson, North Dakota. Mr. Reichert's property is adjacent to the proposed Brady Wind Energy Center and the landscape around his property will have countless turbines.

5. The Board consists of the five County Commissioners for Stark County, North Dakota.

6. The P&Z Commission consists of the eight members of the Planning and Zoning Commission of Stark County, North Dakota.

7. Brady Wind is a foreign limited liability company with a registered agent located at 314 E. Thayer Ave., Bismarck, North Dakota.

8. Upon information and belief, Hochmuth is a resident of the state of Florida with a business address of 700 Universe Boulevard, Juno Beach, Florida 33408.

#### **JURISDICTION AND VENUE**

9. This action arises from the a public hearing on December 22, 2015, held by the P&Z Commission and a special meeting of the Board, held on the same day, to consider the

application for a conditional use permit for a wind energy facility, including electrical substation, submitted by Melissa Hochmuth and/or Brady Wind for the property listed in the application

10. The Court has jurisdiction over the parties and the subject matter of this proceeding under N.D. Const. art. VI, § 8 and art. XI, § 5; N.D.C.C. §§ 27-05-06, 32-06-02, 32-23-01 to 32-23-13, 44-04-19, 44-04-20, and 44-04-21.2; N.D. R. Civ. P. 4(b)(1), (2)(A), (B), (E), (H), and (I); and Stark County Zoning Ordinance § 8.10(1), and (2).

11. Venue is proper in Stark County under N.D.C.C. §§ 28-04-01 and 28-04-04.

12. The conditional use permit application has not identified the final boundary of the proposed Brady Wind Energy Center.

13. Upon information and belief, at least some of CCSC's members live within 500 feet of the property listed in the conditional use permit application.

14. Plaintiff Farren Richard lives within 500 feet of the property listed in the conditional use permit application.

15. Plaintiff Patrick Praus lives within 500 feet of the property listed in the conditional use permit application.

#### FACTS

16. Wind energy is produced through the use of large industrial wind turbines. Each wind turbine consists, generally, of three blades connected to a generator (turbine) that sits atop of a tower. The tower, due to its size, requires a large foundation to stay upright.

17. The individual wind turbines are enormous. From the ground up the turbine, the tower reaches 262 feet. From the base of the tower to the tip of the upright blade, the wind turbine extends to 431 feet.

18. Scientific studies regarding the adverse impacts of industrial wind turbines have found that:

- a. Rotating blades from industrial wind turbines create a “shadow flicker” that can cause adverse effects to human health;
- b. Industrial wind turbines emit high levels of noise, much of which has a substantial low-frequency component that is undetectable to the human ear (infrasound);
- c. Noise emissions from industrial wind turbines can disturb sleep and cause daytime sleepiness and impair mental health;
- d. Health effects related to noise emissions from industrial wind turbines can be observable up to three (3) miles from the system, with the effects being greatest within one (1) mile from the system;
- e. Property values can be adversely impacted by industrial wind turbines.

19. Hochmuth is an attorney licensed in the state of Florida and a project manager for NextEra Energy Resources, LLC (“NextEra”).

20. Brady Wind is a wholly-owned, indirect subsidiary of NextEra.

**I. The Failed Dickinson Wind Energy Center and the Lessons Learned**

21. Dickinson Wind, LLC (“Dickinson Wind”) was a foreign limited liability company and a wholly-owned, indirect subsidiary of NextEra.

22. In or about the fall of 2014, Hochmuth and others, on behalf of Dickinson Wind and NextEra, began clandestinely meeting with landowners of Stark County regarding the possibility of entering into easement agreements for a wind energy facility known as the Dickinson Wind Energy Center. Dickinson Wind and NextEra needed the easements for the placement of an 87-industrial-wind turbine wind farm, a high voltage electrical transmission line,

and associated facilities to be located in and around the communities of Taylor, Gladstone, and Richardton, North Dakota.

23. Upon information and belief, Hochmuth, her associates, Dickinson Wind, and NextEra instructed those landowners who had agreed to grant the easements to remain quiet and not discuss the easements with their neighbors.

24. The easement agreements entered into with the landowners by Hochmuth, her associates, Dickinson Wind, and NextEra contain provisions requiring the landowners not to disclose the terms of the easement agreements.

25. Hochmuth, her associates, Dickinson Wind, and NextEra held private and secret meetings and catered dinners and invited only landowners who were recommended as people who may sign the easement agreements by landowners who had already signed easement agreements.

26. Upon information and belief, Hochmuth, her associates, Dickinson Wind, and NextEra utilized these clandestine tactics to secure easement agreements because of their experience in other communities that have objected to the construction of wind farms due to their adverse effects on: (a) the health and well-being of the citizens of the communities; (b) property values; (c) the aesthetic beauty of the environment; (d) wildlife; (e) future community development; and (f) rural community harmony and kinship.

27. On March 9, 2015, Hochmuth, her associates, Dickinson Wind, and NextEra submitted to Stark County a conditional use permit application for the Dickinson Wind Energy Center.

28. Within a few weeks, citizens of Stark County formed CCSC to voice the community's opposition to the Dickinson Wind Energy Center because of the adverse effects on:

(a) the health and well-being of the citizens of the communities; (b) property values; (c) the aesthetic beauty of the environment; (d) wildlife; (e) future community development; and (f) rural community harmony and kinship.

29. Over the next several weeks, numerous letters to the editor were published in the DICKINSON PRESS voicing support for and against the Dickinson Wind Energy Center.

30. On April 18, 2015, CCSC hosted an informational presentation on the impact of wind turbines in Stark County at the Taylor Elementary School gymnasium. CCSC gathered hundreds of names for a petition to oppose the Dickinson Wind Energy Center and presented compelling information regarding the potential adverse effects that wind farms can have on rural and semi-rural communities.

31. In 2015, the Board's regularly scheduled meetings were scheduled for the first Tuesday of the month, with an additional meeting in September and December.

32. According to the Stark County's website, the P&Z Commission's policy is to schedule its public hearings at 3:00 p.m. on the Thursday prior to the Board's meeting on the following Tuesday.

33. The application for the conditional use permit for the Dickinson Wind Energy Center was scheduled for a public hearing before the P&Z Commission on Thursday, April 30, 2015, at 3:00 p.m.

34. Because of the public interest in the application for the conditional use permit for the Dickinson Wind Energy Center, the P&Z Commission moved the hearing from a small conference room to a large courtroom in the Stark County courthouse.

35. At the April 30 hearing, Hochmuth, her associates, Dickinson Wind, and NextEra were given reserved seating by the P&Z Commission at the front of the courthouse even though the courtroom was standing-room-only and Stark County citizens were forced to stand.

36. Despite moving the hearing to the larger courtroom, an estimated 25 to 35 Stark County residents were not able to enter the courtroom, hear the proceedings, nor were provided any accommodation to meaningfully participate in the hearing. This was a violation of North Dakota open meeting laws.

37. The Chairman of the P&Z Commission, Russ Hoff, designated that Hochmuth, her associates, Dickinson Wind, and NextEra would be granted up to 30 minutes to present the reasons why the conditional use permit should be granted.

38. Following the presentation of Hochmuth, her associates, Dickinson Wind, and NextEra, Chairman Hoff allowed the public to comment on the application for the conditional use permit. By one estimation, almost seventy percent of the public stated they were not in support of the application.

39. At the April 30 hearing, CCSC submitted a twenty-three page objection to the application and included an appendix of over 800 pages of studies, scholarly research, and other information explaining the potential adverse effects of wind farms. The P&Z Commission received the written objection and appendix, but did not review the information before voting on the application.

40. After several hours of public comment, Chairman Hoff invited Hochmuth, her associates, Dickinson Wind, and NextEra to respond to the public's criticism.

41. The P&Z Commission then held a vote on the application and decided to recommend approval of the conditional use permit to the Board based on a 6 to 2 vote. Board

members Hoff and Jay Elkin, who also sits on the P&Z Commission, voted in favor of the application.

42. On May 5, 2015, the Board held its regularly scheduled meeting and considered the application for a conditional use permit for the Dickinson Wind Energy Center.

43. During the meeting, Board members stated that following the P&Z Commission's approval, they had received hundreds of telephone calls expressing disapproval of the Dickinson Wind Energy Center. The public's outcry over the possible approval of the conditional use permit for the Dickinson Wind Energy Center was immediate, loud, and sustained.

44. Despite voting to approve the conditional use permit while serving on the P&Z Commission five days earlier, Commissioner Elkin voted against the conditional use permit for the Dickinson Wind Energy Center. Commissioner Elkin stated that he had voted against the conditional use permit because the public's outcry that he received against, including the four mayors of the impacted cities, the project in the five days between the P&Z Commission meeting and the Board meeting.

45. Although the P&Z Commission recommended approval of the conditional use permit application, the Board voted to deny the application by a unanimous vote of four Board members, with Chairman Hoff abstaining.

## **II. The Appointment of the Standing Board on the Stark County Wind Energy Facility Ordinances**

46. In or about August 2015, CCSC submitted a request for changes to the Stark County Zoning Ordinance that governed wind energy facilities.

47. On August 27, 2015, the P&Z Commission held a hearing on CCSC's request, among other matters. Although a quorum was present for the meeting, three members of the P&Z Commission were absent: Gene Jackson, Kurt Froelich, and Sue Larsen.



48. At the August 27 hearing, the P&Z Commission unanimously voted to recommend to the Board to form an advisory group to review the Stark County Zoning Ordinance for potential changes to the wind energy facilities provisions.

49. On September 1, 2015, the Board held a regular meeting. The Board considered the recommendation by the P&Z Commission, and Chairman Hoff designated a "Standing Board to advise the Zoning Board on any potential amendments regarding Wind Farms." Chairman Hoff appointed Elkin, Hochmuth, Craig Kubas, Ed Krank, Leland Brandt, Roosevelt Custer, Gene Buresh, and himself to the Standing Board.

50. Elkin and Chairman Hoff, as P&Z Commission representatives on the Board, failed to bring this unanimous recommendation to the County P&Z Commission for formal approval of the creation of the Standing Board.

51. Elected official either directly or indirectly sought to not release information from the Standing Board as there was no mention of the work of the Standing Board in County meeting minutes.

### **III. Brady Wind Energy Center and Applying the Lessons Learned**

52. In the fall of 2015, several members of the Stark County community became aware that NextEra and Hochmuth were planning to submit another application for a conditional use permit for a wind farm in Stark County. Because of their concerns, these community members contacted several members of the Board, including Chairman Hoff and Elkin, to express their concerns regarding NextEra and Hochmuth's intent to seek a conditional use permit for another wind farm.

53. Coinciding with these discussions, NextEra formed Brady Wind as the entity that would submit an application with Hochmuth for a conditional use permit for a wind energy facility known as the Brady Wind Energy Center in Stark County.

54. On November 3, 2015, Hochmuth and Brady Wind submitted an application for a wind energy facility siting permit application to the P&Z Commission and the Board. The application describes the Brady Wind Energy Center as consisting of 87 wind turbine generators, access roads, electrical collection systems and cabling, a collection substation, an operation and maintenance building, and a construction laydown area. The application also describes the construction of an 18.5 mile, 230 kilovolt overhead transmission line.

55. The application stated that Brady Wind was targeting an April 2016 construction start date with commercial operation beginning October 2016.

56. Upon information and belief, Chairman Hoff and other members of the P&Z Commission made telephone calls to residents of the Stark County and told them that the Brady Wind Energy Center would not be approved so to avoid having the public voice its opposition to the P&Z Commission and the Board as it had when the same public bodies considered the application for the Dickinson Wind Energy Center.

57. On December 22, 2015, the Commissioner held a hearing on Hochmuth, NextEra, and Brady Wind's application for a conditional use permit for the Brady Wind Energy Center.

58. The P&Z Commission did not follow its policy of holding hearings at 3:00 p.m. on the Thursday before the regularly scheduled Board meeting. Instead, the P&Z Commission scheduled the hearing for Tuesday, December 22, 2015, at 8:00 a.m.

59. The P&Z Commission's December 22 hearing was an "emergency or special meeting" as that term is used in N.D.C.C. § 44-04-20(6).

60. Upon information and belief, the P&Z Commission's purpose in holding the hearing at a special date and time was to limit public debate over the application for the Brady Wind Energy Center and avoid similar public opposition to that raised when the P&Z Commission considered the application for the Dickinson Wind Energy Center.

61. Pursuant to Stark County Zoning Ordinance section 6.19.3, landowners within 500 feet of the perimeter of the proposed Brady Wind Energy Center should have received mailed written notice of the P&Z Commission meeting at least 15 days prior to the hearing. At least 1 landowner within 500 feet of the perimeter of the proposed Brady Wind Energy Center did not receive the mailed notice. This is a violation of the Stark County Zoning Ordinance.

62. The P&Z Commission held the hearing in a small conference room on the first floor of the Stark County courthouse in Dickinson.

63. Upon information and belief, the P&Z Commission held the hearing in a small conference room to limit public access and debate on the application for the Brady Wind Energy Center and avoid the public opposition that it saw when it considered the application for the Dickinson Wind Energy Center.

64. The conference room where the hearing was held could not accommodate the number of people that sought to participate in the hearing. At least 32 residents or landowners of Stark County attempted to attend the P&Z Commission's hearing but were unable to gain reasonable access because the room was too small.

65. Further, at least 35 residents or landowners of Stark County attempted to attend the P&Z Commission's hearing but were unable to hear the proceedings, including testimony and discussion, because of their inability to gain reasonable access to the room.

66. The first member of the public that addressed the P&Z Commission requested that the P&Z Commission adjourn the meeting so it could be relocated to a large courtroom to better accommodate the members of the public who sought to attend the hearing or hear the proceedings. Chairman Hoff refused this request and stated that the hearing would continue and that the courtrooms were not available.

67. The Stark County courtrooms were available on December 22, 2015.

68. Based on the previous hearing on April 30, 2015, that considered Hochmuth and NextEra's application for a conditional use permit for the Dickinson Winder Energy Center, the P&Z Commission knew or should have known a large hearing room would be needed to accommodate the public's right to attend the hearing.

69. Upon information and belief, the P&Z Commission's actions violate the North Dakota open meeting laws.

70. Upon information and belief, the Chairman and/or P&Z Commission applied what they learned when considering the application for the Dickinson Wind Energy Center and refused to move the hearing to a larger room in order to deny the public access to the meeting and minimize the opposition to the application for a conditional use permit for the Brady Wind Energy Center.

71. Upon information and belief, the P&Z Commission refused to move the hearing to a larger room with the intent and purpose of circumventing the North Dakota open meeting laws.

72. At the December 22 hearing, Chairman Hoff improperly limited the time for the length of the hearing. Chairman Hoff also improperly limited the time available for the public to

be heard on the application for a conditional use permit for the Brady Wind Energy Center. This violated North Dakota open meeting laws.

73. Upon information and belief, the Chairman Hoff limited the time for the public hearing with the intent and purpose of circumventing the North Dakota open meeting laws.

74. As a result of Chairman Hoff limiting the time for public comment on the application for a conditional use permit for the Brady Wind Energy Center, at least 16 residents and/or landowners of Stark County were denied the opportunity to speak at the hearing.

75. During the hearing, Hochmuth, NextEra, and Brady Wind presented new information not previously made part of their application for a conditional use permit and not available to the public before the December 22 hearing.

76. During the hearing, the P&Z Commission considered for the first time new information provided by Hochmuth, NextEra, and Brady Wind regarding the impact wind farms have on property values; this information was not previously made part of the application for a conditional use permit and was not available to the public before the December 22 hearing.

77. During the hearing, County Planner Steve Josephson failed and refused to make available to the public the county zoning staff recommendations regarding the application for a conditional use permit for the Brady Wind Energy Center.

78. At the December 22 hearing, P&Z Commission did not seek or request input from the Standing Board appointed by the Board on the application for a conditional use permit for the Brady Wind Energy Center.

79. The P&Z Commission voted 5-3 to recommend that the Board approve the application for a conditional use permit for the Brady Wind Energy Center. The P&Z Commission voted 5 to 3 to recommend approval.

80. The P&Z Commission approved an approximately 17,665-acre, \$250 million wind farm project that violates the Stark County Comprehensive Plan based on a two-hour hearing.

81. At the December 22 hearing, two members of the Board, Hoff and Elkin, were present because they also serve on the P&Z Commission. In addition, the three remaining members of the Board were at the hearing in the audience. Because all 5 members of the Board attended the P&Z Commission hearing, the Board held a special meeting of the Board at the P&Z Commission hearing in violation of North Dakota's open meeting laws.

82. Before addressing the remaining applications by Hochmuth, NextEra, and Brady Wind, the P&Z Commission recessed so that the Board could consider the P&Z Commission's recommendation at its special meeting. The Board's special meeting took place during a recess—i.e., in the middle of—the P&Z Commission's hearing.

**V. The Board Applies the Lessons Learned from the Dickinson Wind Energy Center Application Process**

83. Upon information and belief, the Board convened a special meeting in the middle of the P&Z Commission's hearing on the Brady Wind Energy Center in order to avoid and limit public outcry similar to that which the Board experienced in the five days between the P&Z Commission meeting and regular Board meeting in April and May 2015 when the Board considered the Dickinson Wind Energy Center.

84. Upon information and belief, the Board scheduled the special meeting to take place to during the Commissioner's hearing with the intent and purpose of circumventing the North Dakota open meeting laws.

85. At approximately 10:00 a.m. on December 22, 2015, the Board called to order its special meeting to consider the application for a conditional use permit for the Brady Wind

Energy Center. The Board held the special meeting in the same small conference that the P&Z Commission had been using for its hearing.

86. Upon information and belief, the Board failed to comply with the requirements of N.D.C.C. §§ 11-11-05 and 44-04-20 regarding notice of its special meeting.

87. Upon information and belief, the Board failed to comply with the requirements of N.D.C.C. §§ 11-11-05 and 44-04-20 regarding notice of its special meeting with the intent and purpose of circumventing the North Dakota open meeting laws.

88. The conference room where the Board meeting was held could not accommodate the number of people that sought to participate in the meeting. At least 30 residents or landowners of Stark County attempted to attend the Board's meeting but were unable to gain reasonable access because the room was too small.

89. Further, at least 32 residents or landowners of Stark County attempted to attend the Board's special meeting but were unable to hear the proceedings, including testimony and discussion, because of their inability to gain reasonable access to the room.

90. Upon information and belief, Chairman Hoff and/or the Board refused to move the meeting to a larger room in order to deny the public access to the meeting and minimize the opposition to the application for a conditional use permit for the Brady Wind Energy Center.

91. Upon information and belief, the Board refused to move the special meeting to a larger room with the intent and purpose of circumventing the North Dakota open meeting laws.

92. At the December 22 Board special meeting, Chairman Hoff improperly limited the time for the length of the meeting. Chairman Hoff also improperly limited the time available for the public to be heard on the application for a conditional use permit for the Brady Wind Energy Center.

93. As a result of Chairman Hoff limiting the time for public comment on the application for a conditional use permit for the Brady Wind Energy Center, at least 21 residents and/or landowners of Stark County were denied the opportunity to speak at the Board meeting.

94. At the December 22 Board special meeting, the Board did not seek or request input from the Standing Board appointed by the Board on the application for a conditional use permit for the Brady Wind Energy Center.

95. At the December 22 Board special meeting, Commissioner Elkin stated that he would vote in favor of the application for a conditional use permit for the Brady Wind Energy Center because the P&Z Commission had recommended the approval and he believed that the Board should follow the recommendation. Upon information and belief, Commissioner Elkin, however, failed to realize that three of the eight P&Z Commission members were not aware of and did not participate in the August 27 P&Z Commission meeting that appointed the Standing Board to consider amending the wind farm provisions of the Stark County Ordinances. Upon information and belief, three members of the P&Z Commission voted for approval of the Brady Wind Energy Center without knowledge of the existence of either the Standing Board or its role in the approval process.

96. Upon information and belief, prior to the P&Z Commission hearing and the Board meeting on December 22, members of the Board, including Chairman Hoff, intentionally met – face-to-face, over the telephone, or through text messages and/or email – in groups smaller than a quorum, yet collectively involving a quorum, and intentionally discussed or received information regarding the application for a conditional use permit for the Brady Wind Energy Center and any said meeting would have had to occur in an open meeting if any of the gatherings had been attended by a quorum of the Board.



97. Upon information and belief, prior to the P&Z Commission meeting and the Board meeting on December 22, members of the Board, including Chairman Hoff, gathered information as a step in the decision making process to approve the application for a conditional use permit for the Brady Wind Energy Center.

98. Upon information and belief, a meeting among the Board took place even though there was no intent to build a consensus or take a vote.

99. Upon information and belief, because the information gathering done by the Board members was more than ministerial in nature, the public had a right to know what steps the Board members took to investigate and/or consider the application for a conditional use permit for the Brady Wind Energy Center and that the investigation was endorsed by the Board.

100. Upon information and belief, because the discussions took place outside of an open meeting, the Board was operating without the public's knowledge.

101. Upon information and belief, members of the Board engaged in these secret discussions with the intent and purpose of violating North Dakota's open meeting laws.

102. At the special meeting of the Board on December 22, the Board approved the conditional use permit for the Brady Wind Energy Center by a vote of 3 to 2. Although he voted against the application, Chairman Hoff did so only after a majority of Board members (3) voted to approve the application.

103. Upon information and belief, the Board failed to publish notice of its resolution in accordance with N.D.C.C. §§ 11-11-37 and 11-33-09.

104. Upon information and belief, the Board failed to provide written findings upon which its decision is based in violation of N.D.C.C. § 11-33-01.

105. Seven days after the December 22 meeting and hearing, on December 29, 2015, the Board held its regularly scheduled meeting. At the meeting, the Board implemented a two-year moratorium on wind energy facilities in Stark County. The Board also disbanded the Standing Board established at the August 27, 2015, meeting.

106. The Attorney General for North Dakota has repeatedly found that the Stark Board of County Commissioners has failed to follow and comply with the open meeting laws of the North Dakota Century Code.

**DEMAND FOR JURY TRIAL**

107. Plaintiffs demand trial by jury on all issues so triable.

**COUNT I – PRELIMINARY INJUNCTION – N.D.C.C. §§ 32-06-02, 44-04-21.2**

108. Plaintiffs restate and reallege all preceding paragraphs of their Complaint.

109. Pursuant to N.D.C.C. §§ 32-06-02 and 44-04-21.2, Plaintiffs request a preliminary injunction enjoining enforcement of the conditional use permit for the Brady Wind Energy Center approved by the Board on December 22, 2015, and preventing Hochmuth and Brady Wind from beginning construction of the Brady Wind Energy Center because the conditional use permit was approved by the P&Z Commission and the Board in violation of N.D. Const. art. XI, § 5; N.D.C.C. §§ 44-04-19 and 44-04-20; and Stark County Zoning Ordinance §§ 6.19.3 and 8.3(3).

110. Plaintiff's are entitled to a preliminary injunction based on the following factors:

- a. substantial probability of succeeding on the merits;
- b. irreparable injury;
- c. harm to other interested parties; and
- d. effect on the public interest.

111. Plaintiffs are entitled to a preliminary injunction in their favor, together with costs, disbursements, interest, and attorneys' fees as permitted by N.D.C.C. § 44-04-21.2.

**COUNT II – INJUNCTION – N.D.C.C. §§ 32-05-04, 44-04-21.2**

112. Plaintiffs restate and reallege all preceding paragraphs of their Complaint.

113. Pursuant to N.D.C.C. §§ 32-05-04, 32-06-02, and 44-04-21.2, Plaintiffs request a final injunction enjoining enforcement of the conditional use permit for the Brady Wind Energy Center approved by the Board on December 22, 2015, and preventing Hochmuth and Brady Wind from beginning construction of the Brady Wind Energy Center because of the P&Z Commission and Board's violations of N.D. Const. art. XI, § 5; N.D.C.C. §§ 44-04-19 and 44-04-20; and Stark County Zoning Ordinance §§ 6.19.3 and 8.3(3).

114. Final injunctive relief is necessary to prevent the breach of an obligation existing in favor of the Plaintiffs. Specifically, that the Board and P&Z Commission failed to comply with the requirements of N.D.C.C. §§ 44-04-19 and 44-04-20 and violated the rights of Plaintiffs by granting Hochmuth and Brady Wind a conditional use permit to construct the Brady Wind Energy Center.

115. Pecuniary compensation would not afford Plaintiffs adequate relief and/or it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief.

116. Pursuant to N.D.C.C. §§ 32-05-04, 32-06-02, and 44-04-21.2, Plaintiffs are entitled to a final injunction against Defendants, together with costs, disbursements, interest, and attorneys' fees as permitted by N.D.C.C. § 44-04-21.2.

**COUNT III – DECLARATORY JUDGMENT – N.D.C.C. Ch. 32-23 and § 44-04-21.2**

117. Plaintiffs reallege and incorporate the preceding paragraphs for all purposes.

118. An actual and justiciable controversy, ripe for adjudication, has arisen between the Plaintiffs on the one hand, and the Defendants on the other hand, regarding their respective rights and obligations under N.D. Const. art. XI, § 5; N.D.C.C. §§ 44-04-19 and 44-04-20; and Stark County Zoning Ordinance §§ 6.19.3 and 8.3(3).

119. In accordance with N.D.C.C. Chapter 32-23 and N.D.C.C. § 44-04-21.2, Plaintiffs are entitled to declaratory judgment that (i) the Board and P&Z Commission violated N.D. Const. art. XI, § 5; N.D.C.C. §§ 44-04-19 and 44-04-20; and Stark County Zoning Ordinance § 6.19.3 and 8.3(3); and (ii) the approval of the conditional use permit for the Brady Wind Energy Center is void and/or voided.

120. Plaintiffs are entitled to a declaratory judgment, together with costs, disbursements, interest, and attorneys' fees as permitted by N.D.C.C. §§ 32-23-10 and 44-04-21.2.

WHEREFORE, Plaintiffs Concerned Citizens of Stark County, North Dakota, a non-profit corporation ("CCSC"), Farren Richard; Patrick Praus; and Thomas W. Reichert, request judgment of the Court against Defendants as follows:

1. On Count I, Plaintiffs are entitled to a preliminary injunction enjoining enforcement of the conditional use permit for the Brady Wind Energy Center approved by the Board on December 22, 2015, and preventing Defendants Hochmuth and Brady Wind from beginning construction of the Brady Wind Energy Center because the conditional use permit was granted in violation of N.D. Const. art. XI, § 5; N.D.C.C. §§ 44-04-19 and 44-04-20; and Stark County Zoning Ordinance §§ 6.19.3 and 8.3(3) by the Defendants Planning and Zoning Commission of Stark County and the Stark County Board of County Commissioners, together with costs, disbursements, interest, and attorneys' fees as permitted by N.D.C.C. § 44-04-21.2.

2. On Count II, Plaintiffs are entitled to a final injunction enjoining enforcement of the conditional use permit for the Brady Wind Energy Center approved by the Board on December 22, 2015, and preventing Defendants Hochmuth and Brady Wind from beginning construction of the Brady Wind Energy Center because of the Defendants Planning and Zoning Commission of Stark County and the Stark County Board of County Commissioners' violations of N.D. Const. art. XI, § 5; N.D.C.C. §§ 44-04-19 and 44-04-20; and Stark County Zoning Ordinance §§ 6.19.3 and 8.3(3), together with costs, disbursements, interest, and attorneys' fees as permitted by N.D.C.C. § 44-04-21.2.

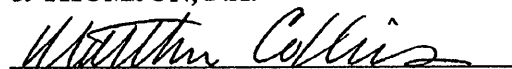
3. On Count III, Plaintiffs are entitled to declaratory judgment that (i) the Stark County Board of County Commissioners and Planning and Zoning Commission of Stark County violated N.D. Const. art. XI, § 5; N.D.C.C. §§ 44-04-19 and 44-04-20; and Stark County Zoning Ordinance §§ 6.19.3 and 8.3(3); and (ii) the approval of the conditional use permit for the Brady Wind Energy Center is void and/or voided, together with costs, disbursements, interest, and attorneys' fees as permitted by N.D.C.C. §§ 32-23-10 and 44-04-21.2.

4. Awarding any other relief that the Court may deem just and equitable.

Dated: January 27, 2016

**FABYANSKE, WESTRA, HART  
& THOMSON, P.A.**

By:



Matthew T. Collins (N.D. Atty. #07295)

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**ATTORNEYS FOR PLAINTIFF**

AFFIDAVIT OF SERVICE

STATE OF MINNESOTA     )  
  ) ss.  
COUNTY OF HENNEPIN    )

Kathy Jensen, being first duly sworn on oath, deposes and says that on February 23, 2016, she made service of the following:

1.     Motion for a Continuance


by e-mailing and mailing a true and correct copy thereof, postage prepaid, by United States mail, to:

Darrell Nitschke, Executive Secretary  
[ndpsc@nd.gov](mailto:ndpsc@nd.gov); [dnitschk@nd.gov](mailto:dnitschk@nd.gov)  
North Dakota Public Service Commission  
600 E. Blvd., Dept. 408  
Bismarck, ND 58505-0480


Timothy J. Dawson [tjdawson@nd.gov](mailto:tjdawson@nd.gov)  
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Bismarck, ND 58502

  
\_\_\_\_\_  
Kathy Jensen

Subscribed and sworn to before me  
this 23<sup>rd</sup> day of February, 2016.

  
\_\_\_\_\_  
Notary Public

