STATE OF NORTH DAKOTA	**DISTRICT COURT**
COUNTY OF BURLEIGH	**SOUTH CENTRAL JUDICIAL DISTRICT**

APH Farms, Arden Hagerott, Jonathan Hagerott, Janel Olson, Valera Hayen, Kari Curran, Scott Irmen, Mary Jo Irmen, Leon Mallberg, Staroba Revocable Living Trust, Loren Staroba, Diane Staroba, James Tiegs, Appellants, v. North Dakota Public Service Commission, SCS Carbon Transport, LLC, John H. Warford, Jr. Revocable Trust, Chad Wachter, Chad Moldenhauer, City of Bismarck, Laborers District Council of Minnesota and North Dakota, Emmons County, and Burleigh County, Appellees.	Case No.: 08-2024-CV-03622

BRIEF OF EMMONS COUNTY

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APPEAL - Brief of Emmons County

Intervenors Emmons County Board of County Commissioners
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BACKGROUND

I. Introduction

This matter arises out of the North Dakota Public Service Commission's ("PSC or Commission") February 7, 2024 Order, Order on Petition for Reconsideration, and November 15, 2024 Findings of Fact, Conclusions of Law, and Order. Index ##2-3; Index #549, Exh. 366.

[¶1] SCS Carbon Transport LLC ("Summit") filed an Application for Certificate of Corridor Compatibility and Route Permit and Waiver on October 17, 2022. Index ##227-245, Exh. 84. Emmons County filed a Petition to Intervene and Response in Opposition to Summit's Motion to Declare Emmons County and Burleigh County Ordinances Superseded and Preempted on June 30, 2023. Index # 512, Exh. 329. An Order Granting Emmons County's Petition for Intervention was entered on July 11, 2023. Index #516, Exh. 333.

[¶2] The PSC issued an Order on August 4, 2023 denying Summit's application for waiver of procedures and time schedules, application for a certificate of corridor compatibility and application for a route permit. Index #530, Exh. 347.

[¶3] On August 18, 2023, Summit filed a Petition for Reconsideration, Notice of Route Adjustment and Request for Limited Rehearing. Index #531, Exh. 348. With one commissioner dissenting, the PSC issued an Order on Petition for Reconsideration dated September 15, 2023 granting Summit's petition for reconsideration and granting a rehearing. Index #549, Exh. 366.

[¶4] On December 21, 2023 oral argument was held regarding the application of N.D.C.C. § 49-22.1-13 to local land use or zoning regulations. Index #568, Exh. 385.

[¶5] The PSC issued an order on February 7, 2024 ordering that under N.D.C.C. § 49-22.1-13 preemption of any and all local government ordinances is automatic upon issuance of a PSC siting permit and that the PSC need not make any factual findings. Index #586, Exh. 396.

[¶6] The Commission framed the issue on which Emmons County bases its appeal as follows:

> The issue before the Commission is not whether it may preempt local land use or zoning regulations, but whether preemption is automatic. N.D.C.C. § 49-22.1-08 provides that a utility may combine an application for a certificate or permit SCS's Application is a consolidated application for a certificate of corridor compatibility and for a route permit The Commission concludes that based on the plain language of N.D.C.C. § 49-22.1-13, the approval of a route permit for a gas or liquid transmission facility automatically supersedes and preempts local land use or zoning regulations, except for road use agreements, even though local ordinances may be filed for Commission review and consideration. By function of the consolidated application, local land use and zoning regulations are automatically superseded and preempted in the present case.

Id., p.3.

[¶7] On June 4, 2024, the PSC conducted a technical hearing at the Our Club in Linton, Emmons County, North Dakota. Index ##751-753, Exh. 545.

[¶8] On November 15, 2024, the PSC issued its second Findings of Fact, Conclusions of Law, and Order. Index #2. These findings and conclusions essentially adopted the Commission's prior order on the preemption of local ordinances as a matter of law, stating: "…NDCC Section 49-22.1-13 automatically supersedes and preempts any local land use or zoning regulations for a gas or liquid transmission facility route permit except for road use agreements." *See* Index #2, pg. 16, ¶4.

[¶9] This legal interpretation of N.D.C.C. § 49-22.1-13 is erroneous and arbitrary and not in accordance with law.

LAW AND ARGUMENT

II. N.D.C.C. § 49-22.1-13 requires factual findings and a conclusion of law that a local ordinance is unreasonably restrictive before the PSC can supersede or preempt local land use laws.

[¶10] The North Dakota Legislative Assembly has delegated land use and zoning authority to the counties through N.D.C.C. ch. 11-33.

> For the purpose of promoting health, safety, morals, public convenience, general prosperity, and public welfare, the board of county commissioners

> of any county may regulate and restrict within the county… the location and the use of buildings and structures and the use, condition of use, or occupancy of lands for residence, recreation, and other purposes.

N.D.C.C. § 11-33-01. "For any or all of the purposes designated in section 11-33-01, the board of county commissioners may divide by resolution all or any parts of the county… into districts of such number, shape, and area as may be determined necessary, and likewise may enact suitable regulations to carry out the purposes of [chapter 11-33]." N.D.C.C. § 11-33-02.

[¶11] N.D.C.C. § 49-22.1-13(2)(c) allows the Commission to supersede an "unreasonably restrictive" ordinance, but only in specific factual circumstances that have not been found or even discussed here:

> A permit may supersede and preempt the requirements of a political subdivision if the applicant shows by a preponderance of the evidence the regulations or ordinances are unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers regardless of their location, or are in direct conflict with state or federal laws or rules.

[¶12] "The 'preeminent canon of statutory interpretation' requires that courts 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" *State ex rel. Stenehjem v. FreeEats.com, Inc.*, 2006 ND 84, ¶ 11, 712 N.W.2d 828 (quoting *Bedroc Ltd. v. United States*, 541 U.S. 176, 183 (2004)). "The court's inquiry 'begins with the statutory text, and ends there as well if the text is unambiguous' … and administrative agencies must give effect to the unambiguously expressed intent of [the Legislature]. *Id.*

[¶13] The plain text quoted above requires the applicant to present competent evidence sufficient to establish by "a preponderance of the evidence the regulations or ordinances are unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers regardless of their location…." N.D.C.C. § 49-22.1-13(2)(c). Summit did not even attempt to do this.

[¶14] Summit argued that the reference to road use agreements in the first sentence of N.D.C.C. § 49-22.1-13(2)(c) dictates the interpretation of the terms "requirements of a political subdivision" and "regulations or ordinances" in the next sentence of subsection "c". But this interpretation flies in the face of the various interchangeable references to regulations, ordinances, and requirements local governments, contrasted with the Legislative Assembly's very specific use of the term "road use agreements" in the pertinent sentence. A glance at the entire relevant language shows this clearly – the following image depicts the language of this section of the Century Code with the general language about local ordinances shaded and the one instance of the specific reference to "road use agreements" underlined.

49-22.1-13. Effect of issuance of certificate or permit - Local land use, zoning, or building rules, regulations, or ordinances - State agency rules.

1. The issuance of a certificate of site compatibility or a route permit is, subject to subsections 2 and 3, the sole site or route approval required to be obtained by the utility.
2. a. A certificate of site compatibility for a gas or liquid energy conversion facility may not supersede or preempt any local land use; zoning; or building rules, regulations, or ordinances, and a site may not be designated which violates local land use; zoning; or building rules, regulations, or ordinances.
   b. Except as provided in this section, a permit for the construction of a gas or liquid transmission facility within a designated corridor supersedes and preempts any local land use or zoning regulations.
   c. Before a gas or liquid transmission facility is approved, the commission shall require the applicant to comply with the road use agreements of the impacted political subdivision. A permit may supersede and preempt the requirements of a political subdivision if the applicant shows by a preponderance of the evidence the regulations or ordinances are unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers regardless of their location, or are in direct conflict with state or federal laws or rules.
   d. When an application for a certificate for a gas or liquid transmission facility is filed, the commission shall notify the townships with retained zoning authority, cities, and counties in which any part of the proposed corridor is located. The commission may not schedule a public hearing sooner than forty-five days from the date notification is sent by mail or electronic mail. Upon notification, a political subdivision shall provide a listing to the commission of all local requirements identified under this subsection. The requirements must be filed at least ten days before the hearing or the requirements are superseded and preempted.
   e. An applicant shall comply with all local requirements provided to the commission pursuant to subdivision d, which are not otherwise superseded by the commission.

[¶15] It is apparent on its face that this section of the Century Code is using phrases such as "regulations" and "ordinances" and "local requirements" interchangeably. And these phrases all refer generally to the local land use codes and their pertinent legal "requirements."

[¶16] Summit interprets the following language from subsection "c":

> Before a gas or liquid transmission facility is approved, the commission shall require the applicant to comply with the road use agreements of the impacted political subdivision. A permit may supersede and preempt the requirements of a political subdivision if the applicant shows by a preponderance of the evidence the regulations or ordinances are unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers regardless of their location, or are in direct conflict with state or federal laws or rules.

N.D.C.C. § 49-22.1-13(2)(c) (emphasis added); *see also* Index #423, Exh. 262.

[¶17] According to Summit, the word "requirements" in the sentence that begins: "A permit may supersede and preempt the *requirements* of a political subdivision…" only refers to "road use agreements" as referenced in the prior sentence. This is a myopic and tortuous interpretation.

[¶18] The verbiage "requirements of a political subdivision" does not refer to the "road use agreements" but rather to "all local requirements" which are provided to the Commission in a listing from the political subdivision under subsection "d". *See* N.D.C.C. § 49-22.1-13(2)(d) ("Upon notification, a political subdivision shall provide a listing to the commission of all local requirements identified under this subsection. The requirements must be filed at least ten days before the hearing or the requirements are superseded and preempted."). Within the same paragraph containing the word "requirements" that the Commission interprets to mean only "road use agreements," the statute itself broadens the meaning: "A permit may supersede and preempt the requirements of a political subdivision if the applicant shows by a preponderance of the evidence the regulations or ordinances are unreasonably restrictive in view of existing technology,

factors of cost or economics…." N.D.C.C. § 49-22.1-13(2)(c) (emphasis added). The reference to the broader "regulations or ordinances" refers back to "the requirements" in the first clause, meaning that "the requirements" are all local "regulations or ordinances." The second clause is intended to be interchangeable with the first, and "regulations or ordinances" obviously is not a reference merely to "road use agreements."

[¶19] Again, reference to the diagram above with the language from the statute and the various references to these requirements is a helpful visual aid here.

[¶20] This later reference in subsection "d" also refers to superseding and preempting the local requirements, but for a different reason than specific Commission findings on whether they are unreasonably restrictive: "The requirements must be filed at least ten days before the hearing or the requirements are superseded and preempted." N.D.C.C. § 49-22.1-13(2)(d). In other words, if the local requirements are not filed at least ten days before the hearing, they are *automatically* superseded and no finding that they are unreasonably restrictive is needed. Additionally, "An applicant shall comply with all local requirements provided to the commission pursuant to subdivision d, which are not otherwise superseded by the commission." N.D.C.C. § 49-22.1-13(2)(e) (emphasis added). It is clear that the Legislative Assembly knows how to be clear about when the local ordinances and regulations will be superseded and it is not necessary to presume; but it only said this happens if the local requirements are not filed at least ten days before the hearing, or if the Commission makes certain findings. It is illogical to conclude that despite this language, the local requirements are *also* automatically superseded every time the Commission issues a permit under this chapter.

[¶21] Chapter 11-33 of the North Dakota Century Code gives land use control to local government, where it belongs. Section 49-22.1-13 provides a limited exception to the general rule

in North Dakota that government closest to the people is best suited to serve the people. But that exception cannot be read as broad authority for the Commission to blithely sweep away local control as it did here.

> A permit may supersede and preempt the requirements of a political subdivision **if** the applicant shows by a preponderance of the evidence the regulations or ordinances are unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers regardless of their location, or are in direct conflict with state or federal laws or rules.

N.D.C.C. § 49-22.1-13(2)(c) (emphasis added).

[¶22] Even if the statute were ambiguous and resort to interpretive aids were required, the legislative history makes it clear that the local government ordinances are by default enforced, not preempted. The legislative history[1] is replete with support:

> Sen. Schaible: …to make sure we do not impede any authority that was given to counties. It was added to insure we do not take power away.
>
> ***
>
> Rep. Keiser: On line 19, the engrossed bill, we're making a big change here from may to must. Are we taking away local authority? Sen. Schaible: The hope is not to. The hope is we would streamline the process and they would work together and **that the PSC would not overstep the authority of our local entities**. It's the idea of trying to do it together, at one time rather than multiple hearings and then trying to determine the overlap. It's the idea to combine it and get it together and get it that way. **The hope is not to intercede on the political subdivisions.**
>
> ***
>
> Todd Kranda (ND Petroleum Council): … We do and what we anticipate happening, those local political subdivisions putting together that checklist and saying, here's all the things we need to have complied with in our county, in our jurisdiction, our city, our

[1] 2017 Senate Bill 2286 Legislative History, pp. 9, 15, 16 (emphasis added) available at https://ndlegis.gov/sites/default/files/resource/65-2017/library/sb2286.pdf. *See also* http://ndlegis.gov/assembly/65-2017/regular/documents/17-0950-05000.pdf (final version of SB2286 as amended in 2017).

> township, give that to the PSC. If you look at my handout is a certification by the PSC, deals with the DAPL corridor findings and certification letter. The certification letter says, and the PSC has this for each applicant, says, "company agrees to comply with all rules and regulations of other agencies having jurisdiction, including all city, township and county zoning regulations." So the PSC is the one telling us you MUST comply and **the locals aren't losing any control**. We're not trying to take away from what they do and what we have to comply with. We're saying it's all done at the PSC level and this one order will define everybody complying with that.

[¶23] As is apparent from only a few quotes, the legislative history supports enforcement of local requirements as a default, and preemption only with great deference and when necessary based on the findings and circumstances in a specific case. Far from taking away local authority, even the industry representatives agreed "the locals aren't losing any control."

[¶24] Further, in 2017, the Legislative Assembly actually added a specific definition for "road use agreement" to N.D.C.C. § 49-22-03 (Definitions).[2] It defined these narrowly as "permits required for extraordinary road use, road access points, approach or road crossings, public right - of - way setbacks, building rules, physical addressing, dust control measures, or road maintenance and any repair mitigation plans." *Id*. It is again illogical to presume that the Legislative Assembly went to the trouble to define the phrase "road use agreements" in the Code and then failed to use that term in the second half of N.D.C.C. § 49-22.1-13(2)(c) when it defined the circumstances under which the Commission can supersede and preempt local control.

[¶25] During the 69th Legislative Session in 2025, the North Dakota Legislative Assembly passed House Bill 1258.[3]

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[2] *See* https://ndlegis.gov/assembly/65-2017/regular/documents/17-0950-05000.pdf (final version of SB2286 as amended in 2017).

[3] https://ndlegis.gov/files/resource/69-2025/library/hb1258.pdf. *See also* https://ndlegis.gov/assembly/69-2025/regular/documents/25-0777-03000.pdf (final enrolled version of HB 1258).

[¶26] HB 1258 copies the language at issue in this proceeding and adds it to the parallel chapter for siting electric transmission lines and other facilities, adding identical language to N.D.C.C. § 49-22-16. It is apparent from the discussion on the Senate floor that the legislators themselves continue to believe the language at issue supports local control and requires specific findings by the Commission that local ordinances are unreasonable before they can be preempted. One of the bill's sponsors explained:

> Sen. Patten: Mr. President, I stand in support of House Bill 1258 and I want to refer you to the language in the bill at the bottom of the first page. In the case of this with the Public Service Commission, the permit may supersede and preempt the requirements of a political subdivision if the applicant shows by a preponderance of evidence that the regulations or ordinances are unreasonable restrictive in view of existing technology, factors of cost or economics, or the need for consumers regardless of location. In other words, the local zoning ordinance will apply and be adhered to by the permit application unless they are unnecessarily burdensome determined by the Public Service Commission. It does not do away with the local ordinances. It does put 'em on notice that they have to be reasonable in what they pass and what they put in place. And if they aren't, then the Public Service Commission can apply a reasonable standard of setbacks…

April 4, 2025 ND Senate Floor Session Video (1:32:15) (emphasis supplied).[4]

[¶27] Speaking in support of the language, Senator Patten, one of the sponsors of the bill who also chairs the Senate Energy and Natural Resources Committee,[5] explained that the language "only preempts local ordinances when they are shown to be unreasonably restrictive." *Id*. (1:33:49).

[4] https://ndlegis.gov/assembly/69-2025/regular/bill-video/bv1258.html?bill_year=2025&bill_number=1258.
[5] https://ndlegis.gov/biography/dale-patten.

III. The Emmons County ordinance cannot be superseded pursuant to N.D.C.C. § 49-22.1-13 because the record contains no evidence to substantiate the required findings.

[¶28] Erin Magrum, Chair of the Emmons County Commissioner, testified that Summit has never submitted an application for any type of zoning approvals or land use approvals with Emmons County. Index #751, Exh. 545 at 27. Mr. Magrum also testified that the Emmons County ordinance provided a variance process to allow pipeline developers the ability to negotiate with landowners for variances to locate the pipeline within those setbacks if it chooses. *Id.* at 22. Summit never made any attempts to request any such variances, though. *Id*. at 36.

[¶29] There is no competent evidence in the record to support findings of fact necessary for the Commission to preempt the Emmons County Ordinance. "The admissibility of evidence in any adjudicative proceeding before an administrative agency shall be determined in accordance with the North Dakota Rules of Evidence." N.D.C.C. § 28-32-24. In order to supersede the Emmons County Ordinance, the Commission would have to find that it is "unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers regardless of their location…." N.D.C.C. § 49-22.1-13. Such findings would require significant evidence to sustain. *See* N.D.C.C. § 28-32-46(5) (court shall reverse agency decision if the "findings of fact made by the agency are not supported by a preponderance of the evidence.").

[¶30] Summit produced no evidence that the Emmons County Ordinance is "unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers regardless of their location." Its only submission was incorporating a map into page two of its brief to the Commission that lacked any foundation and was not accurate. Index #423, Exh. 262. As was pointed out below, this map is inadmissible. N.D.C.C. § 28-32-24(3)&(5). Emmons County objected to the map and commentary on the map contained in the Summit brief to the Commission and asked that it be excluded from the record. Index #512, Exh. 329, ¶13.

IV. The Commission denied Summit's application and amendment on reconsideration was illegal.

[¶31] On August 4, 2023, the Commission denied Summit's application. Index #530, Exh. 347. This was a final decision and closed the proceedings. This is significant because Summit's later request for "reconsideration" was illegal.

[¶32] Following the order denying Summit's application, it submitted a "Petition for Reconsideration." Index #531, Exh. 348. But this request for "reconsideration" was in fact an amendment to the application Summit had filed and which was already denied. As Commission Haugen-Hoffart put it:

> In support of its request for reconsideration, SCS submitted that with additional evidence and testimony provided during a limited rehearing, Summit will demonstrate that it has met its burden by meeting the requirements of the Siting Act and Commission regulations. In support of its petition, SCS proposed extensive route adjustments, a reduced corridor, and a litany of deficiencies and reroutes that are or will be remedied by the time of the rehearing. SCS also provided there will be witnesses available at the rehearing to address the deficiencies during the rehearing.
>
> A request for additional hearings and an opportunity to present this evidence could have been submitted at any time prior to the issuance of the Commission Order. The arguments and evidence provided in the Petition could have been presented by SCS during the multiple hearings held over six months that the Commission provided for evaluation of the application. Due to the breadth of changes provided in its petition, a new application was appropriate to address the material changes to the project.

Index #549, Exh. 366 (emphasis added) (dissenting opinion of Commission Haugen-Hoffart in Order on Petition for Reconsideration).

[¶33] On its face, the Petition for Reconsideration contains material amendments to the application at issue. Index #531, Exh. 348. Changes were made to the actual route of the pipeline and an entirely new route map was submitted. *Id*. Summit notes in its petition that "The map book attached as Exhibit A is intended to **amend** and replace A ppendix 1 (ND PSC Aerial Map Book) of Summit's Application." *Id*. (emphasis added). This concession is significant, because

amendments to an application are not allowed in a so-called "petition for reconsideration" nor are they allowed after a final decision has been issued. *See* N.D.C.C. 28-32-40. The Administrative Agency Practices Act does not anticipate the petitions for reconsideration may include wholesale amendments to the application at issue. *Id*.

[¶34] Pursuant to N.D.C.C. § 49-22.1-06(4) and N.D.C.C. § 49-22.1-07(4), "An application for an amendment of a [corridor certificate or permit] must be in the form and contain the information the commission prescribes." But in its regulations, the Commission has made no allowance for amendments to route permits or corridor certificates for transmission lines. It *has*, however, promulgated regulations that apply to siting energy conversion facilities. While no such provisions apply or allow amendments for the application at issue here, the regulations from the Commission for conversion facilities are telling.

[¶35] The Commission has prescribed administrative rules related to amendments for conversion facilities in N.D.A.C. § 69-06-04-01(5). This regulation states:

> **Amendment of application.** The commission may allow an applicant to amend its application, consistent with North Dakota Century Code chapter 28-32 and North Dakota Administrative Code article 69-02, at any time **during the pendency of an application**. A rehearing may be required if the commission determines that a proposed amendment, which is received after the hearing process has been completed, materially changes the authority sought.

N.D.A.C. § 69-06-04-01(5) (emphasis added).

[¶36] Such amendments are only allowed "during the pendency of an application." An order denying such an application terminates "the pendency of an application." This is made apparent by the Commission's regulation for *Reapplication*:

> **Reapplication. When a certificate is denied** and the commission specifies a modification that would make it acceptable, **the applicant may reapply**. In a reapplication: a. The reapplication must be heard as specified in section 69-06-01-02. b. The utility

> shall indicate its acceptance or rejection of the suggested modification. c. If a suggested modification is rejected by the applicant, it shall propose an alternative modification. d. Include a filing fee and any additional fees as specified in North Dakota Century Code chapter 49-22. e. Reapplication must be made within six months of the order denying an application.

N.D.A.C. § 69-06-04-01(6) (emphasis added).

[¶37] Again, these regulations apply to energy conversion facilities, but they are significant for two reasons: 1) there are no such regulations allowing amendments to route permits or corridor certificates, and 2) the applications that do allow this for conversion facilities require amendments "during the pendency of the proceeding" and after the final order, a reapplication is required. That is what Summit should have done here rather than wholesale amending its application under the guise of petitioning for reconsideration.

CONCLUSION

[¶38] The Commission misinterpreted the applicable law and failed to make the required findings before attempting to preempt or supersede the Emmons County Ordinance. Before it may do so, it is required to make factual findings that the Ordinance is "unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers regardless of their location…." N.D.C.C. § 49-22.1-13. The decision should be reversed, or remanded for the Commission to appropriately consider the matter under the proper interpretation of the law.

[¶39] The Commission also erred by allowing Summit to wholesale amend its application under the guise of requesting "reconsideration." The appropriate process here is for Summit to simply reapply to the Commission so that both Summit and the Commission can comply with the law, and the decision should be reversed for this reason as well.

Dated: February 19, 2026.

Respectfully submitted,

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