

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

SCS Carbon Transport LLC
Midwest Carbon Express CO2 Pipeline Project
Siting Application

Case No. PU-22-391
OAH FILE No. 20230002

EMMONS COUNTY’S CLOSING ARGUMENT

[¶1] On June 1st, 2023, SCS Carbon Transport LLC (“Summit”) filed its Motion to Declare Emmons County and Burleigh County Ordinances Superseded and Preempted. *See* Docket #282.

[¶2] On June 30th, 2023, Emmons County Board of County Commissioners (“Emmons County”) filed a Petition to Intervene and Response to SCS Carbon Transport LLC’s Motion to Declare Emmons County and Burleigh County Ordinances Superseded and Preempted. *See* Docket #350.

[¶3] On July 10th, 2023, this Commission granted Emmons County’s Petition to Intervene. *See* Docket #354.

[¶4] On July 21, 2023, Summit filed a reply brief. *See* Docket #359.

[¶5] On August 4th, 2023, this Commission filed its Findings of Fact, Conclusions of Law, and Order (“Order”). *See* Docket #366. The Commission found that while Summit had requested the ordinances of Emmons and Burleigh County be superseded and preempted, it had not filed an application with either county seeking a variance or waiver of those ordinances. *Id.* at p.19. The Commission ultimately denied Summit’s applications for a Certificate of Corridor Compatibility and Route Permit. *Id.* at p.12. Consequently, Summit’s motion asking the Commission to deem the Emmons County ordinance to be superseded was moot. *Id.* at p.11.

[¶6] On August 18th, 2023, Summit filed a Petition for Reconsideration, Notice of Route Adjustment and Request for Limited Rehearing (“Petition”). *See* Docket #371-03. In this Petition, Summit failed to address the Commission’s finding of fact regarding the county ordinances beyond baseless speculation. During the two weeks from the date of the Commission’s Order to the filing of the Petition, Summit did not attempt to contact any representative of Emmons County to seek a variance or waiver.

[¶7] N.D.C.C. § 49-22.1-13(2)(c) allows the Commission to supersede an “unreasonably restrictive” ordinance, but leaves out the remaining effective language which states:

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.

[¶8] “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. “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.*

[¶9] Summit makes a number of statements about what the legislators must have intended with certain amendments to the statute, but then argues that the PSC should not look behind the curtain at what those same legislators actually said. Docket #359, p.5. Emmons County agrees with Summit on one thing, however: “...in any event, those stray and sometimes confusing (or confused) comments cannot change the plain text.” *Id.* The plain text quoted above clearly 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, or are in direct conflict with state or federal laws or rules.” Summit did not even attempt to do this.

[¶10] But it is not only the plain language of the statute that compels Summit to make a factual showing that is absent from the record before the Commission here. The North Dakota Supreme Court “deem[s] a legislative grant of power to the executive to be proper when the executive’s policy-making discretion is constrained by “reasonably clear guidelines” and a “sufficiently objective standard.” *N.D. Legislative Assembly v. Burgum*, 2018 ND 189, ¶ 45, 916 N.W.2d 83, 101 (citing *County of Stutsman v. State Hist. Soc. of ND*, 371 N.W.2d 321, 329 (N.D. 1985).

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

The board of county commissioners is authorized to adjust the application or enforcement of any provision of a resolution hereunder in any specific case when a literal enforcement of such provision would result in great practical difficulties, unnecessary hardship, or injustice, so as to avoid such consequences, provided such action shall not be contrary to the public interest or the general purposes hereof.

N.D.C.C. § 11-33-11.

[¶12] Summit argues that despite having clearly delegated this authority to local governments, that somehow a reference to road agreements belies the plain language of N.D.C.C. § 49-22.1-13(2)(c). According to Summit, the next sentence that begins with “A permit may supersede and preempt the *requirements* of a political subdivision...” somehow only refers to the road agreements, rather than the “requirements” or ordinances of the local government that are referenced throughout the rest of that statute. Indeed, subsection d explicitly states: “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). If the requirements of the county must be filed ten days before the hearing or they are superseded, it is absurd to argue as Summit does that the

requirements are somehow also superseded automatically without any decision by the Commission. And subdivision e goes on: “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 confusing indeed to discern which requirements the applicant must comply with given Summit’s interpretation that all requirements are superseded automatically if the Commission issues a siting permit after reviewing the local laws that must be submitted (for no reason, apparently). The reality is that Summit’s proclamations that intervenors’ arguments are absurd is projection.

[¶13] Summit ignored the Commission’s requests for information. It ignored its *burden of proof* to submit evidence that the Emmons County ordinance is “unreasonably restrictive.” To the extent it now argues no such burden or criterion exists for this determination, and to the extent this Commission accepts that argument and reconsiders its decision, Summit has interposed an interpretation that results in an unconstitutional delegation of power to the Commission and the statute should be struck down as an improper delegation of the legislative function, and as violative of the principled separation of powers set forth by the North Dakota Constitution. *See, generally N.D. Legislative Assembly v. Burgum*, 2018 ND 189, 916 N.W.2d 83 and *County of Stutsman v. State Hist. Soc. of ND*, 371 N.W.2d 321 (N.D. 1985). Should the Commission grant Summit’s applications, Emmons County hereby submits this argument as notice to the Attorney General of North Dakota (serving as counsel for the Commission in this proceeding) that it will bring this constitutional challenge to the judiciary to interpret the statute and if the court agrees with Summit’s interpretation, Emmons County will ask the court to strike it down as unconstitutional.

[¶14] Erin Magrum, commissioner and chair of the Emmons County Commission, testified that Summit has never submitted an application for any type of zoning approvals or land use approvals

with Emmons County. Docket #615, #629. Mr. Magrum also testified that the Emmons County ordinance “provided a variance process to allow pipeline developers the ability to negotiate with our landowners for variances to locate the pipeline within those setbacks if it chooses.” *Id.* Apparently rather than even attempt to comply with local law, Summit surreptitiously filed a motion with the Commission and did not even provide notice to Emmons County, which learned of it from other parties involved in the proceedings. *Id.* The Commission cannot so lightly ignore its own obligation to follow the law, however, and the law is clear: “the board of county commissioners of any county may regulate and restrict within the county, subject to chapter 54-21.3, 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.” The limited delegation to the Commission to preempt local laws when necessary to effectuate the purpose of the Chapter 49-22.1 is not carte blanche authority to step on local government as Summit asks the Commission to do.

[¶15] 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.

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. § 49-221-13(2)(c)

[¶16] Summit made no effort to comply with the Emmons County ordinance so it has no factual basis to even argue for application of this limited exception. It also has provided no competent evidence in support of its request.

[¶17] Emmons County will defend local government and local control and will defend its right to regulate land use in the County. It asks the Commission to respect local control and deny Summit's request for authorization to ignore the laws passed by the people of Emmons County.

Dated: July 8, 2024.

BRAATEN LAW FIRM

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STATE OF NORTH DAKOTA
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PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

FINDINGS OF FACT

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and Route Permit. *Id.* at p.12. Consequently, Summit’s motion asking the Commission to deem the Emmons County ordinance to be superseded was moot. *Id.* at p.11.

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CONCLUSIONS OF LAW

[¶7] N.D.C.C. § 49-22.1-13(2)(c) allows the Commission to supersede an “unreasonably restrictive” ordinance, but leaves out the remaining effective language which states:

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.

[¶8] “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. “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.*

[¶9] Summit failed to meet its burden of proof to submit evidence that the Emmons County ordinance is “unreasonably restrictive.” Summit has interposed an interpretation that results in an unconstitutional delegation of power to the Commission and which is violative of the principled separation of powers set forth by the North Dakota Constitution. *See, generally N.D. Legislative Assembly v. Burgum*, 2018 ND 189, 916 N.W.2d 83 and *County of Stutsman v. State Hist. Soc. of*

ND, 371 N.W.2d 321 (N.D. 1985). Because this cannot be the appropriate interpretation, Summit must meet its factual burden.

[¶10] 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 ignore local control.

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)

[¶11] Summit made no effort to comply with the Emmons County ordinance so it has no factual basis to even argue for application of this limited exception. It also has provided no competent evidence in support of its request.

ORDER

[¶12] The Commission reconsiders its prior determinations and hereby DENIES Summit's requests to preempt the Emmons County ordinance.

Respectfully submitted for
consideration on July 8, 2024.

BRAATEN LAW FIRM

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DECLARATION OF SERVICE

[¶1] I hereby certify that true and correct copies of the following documents:

- 1. Emmons County’s Closing Argument;**
- 2. Proposed Findings of Fact, Conclusions of Law, and Order; and**
- 3. Declaration of Service.**

were, on July 8, 2024, filed with the North Dakota Public Service Commission by mailing, by USPS First Class mail, postage prepaid, the originals and seven copies, and by e-mailing copies of the same, to:

North Dakota Public Service Commission
Steve Kahl, Executive Secretary
State Capitol
600 E. Boulevard Avenue, Dept. 408
Bismarck, ND 58505-0480
ndpsc@nd.gov

[¶2] I further certify that true and correct copies of the same were, on July 8, 2024, sent by electronic mail to the following:

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[¶3] The addresses of each party served are the last reasonably ascertainable e-mail address and post office address of such party.

[¶4] I declare, under penalty of perjury under the law of North Dakota, that the foregoing is true and correct.

Signed on this 8th day of July, 2024 at Bismarck, North Dakota.



Desirae Zaste