

April 3, 2017

Davison County Zoning and Planning
Davison County Courthouse
200 East 4th Avenue
Mitchell, SD 57301

Dear Mr. Bathke,

In your response dated March 15, 2017 to Mr. Kelley (and at the March 8, 2017 meeting at the Davison County Fairgrounds) you made some misleading and erroneous statements regarding the ability for townships to enact ordinances. In paragraph five, you stated:

“Davison County maintains Townships do not have the inherent power to zone. Please reference *Welsh v. Centerville Township, 1999 SD 73*. The First Judicial Circuit Court granted the landowner's motion for summary judgment finding the Township did not have, pursuant to its general authorization under SDCL 8-2-1(4), the power to zone. The trial court also found the ordinance passed by the Township was void and of no effect upon the landowner. The Township appealed the decision. The South Dakota Supreme Court affirmed the Circuit Court decision. The full case can be found @ http://uj.s.sd.gov/Supreme_Court/opiniondetail.aspx?ID=440.”

In the case of “*Welsh v. Centerville Township*” you conveniently cited only those portions of the overall ruling which supported your obvious bias toward installing large wind energy systems in Davison County and misrepresented the actual ruling made by the SD Supreme Court. Please allow me to clarify.

Firstly, townships DO have the ability to enact ordinances. This is provided for under SDCL 8-2-1 (paragraph 4) under “Powers and Obligations” whereby it states:

“Corporate and regulatory powers. Each organized township in the state is a body corporate and has power:”...“(4) To pass bylaws or ordinances for the government of such township and for the protection of the lives and property of its inhabitants, and to enforce the same in its corporate name before any magistrate;”

Furthermore, in a private conversation I had with one of your own Davison County Commissioners back on May 15, 2016, they confided in me that “yes, townships have the ability to enact ordinances in the absence of a county-wide one.”

Letcher Township’s ordinance on Wind Energy Systems (Ordinance 16-1) is no different than a township enacting an ordinance for road weight restriction, which many townships do throughout the year. In fact, Sanborn County Commissioner Gary Blindauer, whom you cite in your letter to Mr. Kelley, is also a township supervisor of Butler Township in Sanborn County. Butler Township has perhaps the most restrictive load limits in Sanborn County to protect their roads. As a result, heavy traffic (e.g., rock being hauled to the Letcher municipal sewage treatment plant) could not be carried over Butler Township roads; instead, they had to be hauled over Sanborn County and Letcher Township roads!

You conveniently left out any reference to paragraph (21) of the “*Welsh v. Centerville Township*” ruling, in which the SD Supreme Court stated:

“SDCL 8-2-1(4) does authorize a township to act in instances that have not been assumed by the state or counties under their regulatory authority and are ‘for the protection of the lives and property of [the township’s] inhabitants.’ As such, the scope of this township authority and when it may be exercised is outside of the resolution of the issue now before us, and a definition of its parameters awaits another day.”

In other words, if the state or county does not already have an ordinance governing the issue at hand, then the townships can do so...noting that the scope of when it can be exercised is not within the “Welsh v. Centerville Township” ruling.

On May 12, 2016 I spoke with Sanborn County Zoning & Planning Committee member Myron Sonne (whom you also cite in your letter to Mr. Kelley) at which time Mr. Sonne informed me that Sanborn County did not have in place any ordinance governing wind energy systems. He went on to say that they planned to use a pattern from eight or ten other counties, would use the District III zoning regulations as a “fall back till something is in place”, that they did not want to enact something and then have to potentially change it later, and that they had a motion to develop a Sanborn County ordinance no later than January 1, 2017. Thus, at the time Letcher Township’s ordinance was enacted in July 2016, Sanborn County did not have an ordinance in place.

Even District III Planning and Development’s Brian McGinnis (“Community Development Specialist”), in an email to me dated June 13, 2016 (10:18 am) confirmed that Sanborn County did not have an ordinance in place, stating “the County is staying its course and does not plan to adopt comprehensive regulations regarding Wind Energy but rather work within the Conditional Use process and tailor regulations on a project basis and what the officials believe to be necessary and fair regulations.”

Furthermore, SDCL 8-5-8 provides an appeal process for township ordinances:

“SDCL 8-5-8. Appeals from board of supervisors--Time for taking--Service and filing of notice. From all decisions, orders, and resolutions of the boards of supervisors of townships, there shall be allowed an appeal by any person aggrieved thereby upon compliance with this section.

Such appeals shall be taken within twenty days after the publication of the decision, order, or resolution of the board, if such be published; and in those cases where there is no publication, then within twenty days from the time of receiving actual notice thereof, by serving a written notice on one of the members of the board, which notice shall describe with reasonable certainty the decision, order, or resolution appealed from, and shall briefly set forth the grounds upon which the appeal is made. The original of such notice of appeal, together with proof of service, shall be filed forthwith in the office of the clerk of courts of the county in which the township is located, and it shall be docketed in the same manner as complaints in civil actions. However, the filing fee is twenty-five dollars.”

That deadline for appeal of the Letcher Township Ordinance 16-1 under the SDCL 8-5-8 was July 6, 2016. No appeal was filed by “any person aggrieved” within the legally required time period. Therefore, the ordinance has become law.

When I spoke with you following the March 8, 2017 meeting at the Davison County Fairgrounds, challenging your statements regarding the Letcher Township Ordinance, you said that a State's Attorney had made the claim that Letcher Township's Ordinance was invalid. Well, no State's Attorney, Sanborn County Commissioner, developer, landowner, or any other potentially "person aggrieved" appealed the decision of the Letcher Township Board of Supervisors within the required timeframe.

The decision to abide by existing laws is not a buffet, whereby you get to pick and choose which ones you obey. SDCL 8-2-1(4) and 8-5-8 are laws...and everyone, including State's Attorneys, must obey them. No one, especially an elected official, can simply disregard a law!

Lastly, the entire process of development of Letcher Township's Ordinance for the siting of wind energy systems (Ordinance 16-1) was developed under the legal counsel and direction of Mr. Jay Leibel, attorney for the South Dakota Association of Towns and Townships.

Respectfully,

Ken Stach
Treasurer, Letcher Township
Sanborn County, SD