

SUPREME COURT OF SOUTH DAKOTA

Armstrong v. Turner County Board of Adjustment, 2009 SD 81

772 N.W.2d 643 (2009) · No. No. 25008 · Decided August 26, 2009

SUMMARY

The South Dakota Supreme Court reviewed a challenge to the Turner County Board of Adjustment’s approval of a conditional use permit for a commercial grain storage facility. The Court held that the homeowners were denied due process because Board member Lyle Van Hove had a disqualifying interest arising from his prior involvement in the dispute as a county commissioner. The Court reversed the circuit court’s denial of the writ of certiorari.

CASE DETAILS

COURT	Supreme Court of South Dakota
WRITING FOR THE COURT	Meierhenry, Justice; Gilbertson, Chief Justice; Konenkamp, Justice; Severson, Justice; Zinter, Justice
JURISDICTION	South Dakota
DECIDED	August 26, 2009
DOCKET	No. 25008
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Appeal from the circuit court's denial of a writ of certiorari challenging the Board's approval of a conditional use permit.
STANDARD OF REVIEW	On certiorari, review is limited to whether the board had jurisdiction and regularly pursued the authority conferred upon it; the court does not review whether the board's decision was right or wrong.
PRECEDENTIAL VALUE	Published South Dakota Supreme Court opinion; precedential.
PARTIES	Rosemary Armstrong, Alphie Petersen v. Turner County Board of Adjustment

TOPICS

- judicial review of agency action
- writ of certiorari
- zoning
- procedural due process
- administrative law

PRACTICE AREAS

- administrative law
- municipal law
- constitutional law
- real estate
- appellate procedure

QUESTIONS PRESENTED

1. Whether the Homeowners were denied due process because Lyle Van Hove participated as a Board of Adjustment decision maker despite his prior involvement in the dispute and potential interest in the county's liability.
2. Whether the Board exceeded its authority by failing to comply with the county zoning ordinance's requirement concerning compatibility with adjoining property.

HOLDINGS

1. A member of a county board of adjustment conducting a quasi-judicial conditional-use-permit proceeding must be disinterested and free from actual bias, an unacceptable risk of actual bias, or prejudgment. Van Hove's prior efforts as a county commissioner to protect the county from potential liability and negotiate a resolution, followed by his participation in the Board proceeding and motion to approve the permit, created an unacceptable risk of bias and required his disqualification.
2. When a board member's disqualifying interest violates the parties' due process right to a fair and impartial adjudication, the permit must be vacated and the matter remanded for a new hearing before a neutral board without the disqualified member's participation.

KEY QUOTATIONS

“Because a county board of adjustment functions as an adjudicatory body when it hears requests for conditional use permits, members of the board must be free from bias or predisposition of the outcome and must consider the matter with the appearance of complete fairness.” (772 N.W.2d at 651)

“Due process requires fair and impartial consideration. The circumstances here created an unacceptable risk of impartiality.” (772 N.W.2d at 654)

“Because of the violation of a due process right to a fair and impartial adjudication, we reverse and remand for a new hearing before the Board.” (772 N.W.2d at 655)

FACTUAL BACKGROUND

Viborg Cooperative Elevator Association sought a conditional-use permit to construct two large commercial grain-storage bunkers on agricultural property adjacent to residential property owned by the Homeowners. The county zoning administrator mistakenly issued a building permit, and the Elevator claimed it spent approximately \$44,000 before being told the permit was invalid. Before joining the Board of Adjustment, County Commissioner Lyle Van Hove became involved in the dispute, contacted counsel for both sides regarding the county's potential liability, and attempted to negotiate a resolution. Van Hove later participated in the Board hearing, moved to approve the permit, and helped impose conditions.

PROCEDURAL HISTORY

The Turner County Board of Adjustment initially denied the Elevator's conditional-use application as inadequate, but later approved a revised application after a hearing in which County Commissioner Lyle Van Hove participated and moved for approval. After the Homeowners petitioned for a writ of certiorari, the Board

conducted a rehearing and again approved the permit with additional conditions. The circuit court denied the writ, and the Homeowners appealed.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Vacate the conditional-use permit and conduct a new hearing before a neutral Turner County Board of Adjustment without Van Hove's participation.

CASES CITED

- Goos RV Center v. Minnehaha County Comm'n, 2009 SD 24, 764 N.W.2d 704
- Jensen v. Turner Cty. Bd. of Adjustment, 2007 SD 28, 730 N.W.2d 411
- Elliott v. Board of County Comm'rs of Lake County, 2005 SD 92, 703 N.W.2d 361
- Duffy v. Circuit Court, Seventh Judicial Circuit, 2004 SD 19, 676 N.W.2d 126
- Bechen v. Moody County Bd. of Comm'rs, 2005 SD 93, 703 N.W.2d 662
- Nectow v. City of Cambridge, 277 U.S. 183 (1928)
- Euclid v. Ambler Co., 272 U.S. 365 (1926)
- Schafer v. Deuel County Bd. of Comm'rs, 2006 SD 106, 725 N.W.2d 241
- Hanig v. City of Winner, 2005 SD 10, 692 N.W.2d 202
- Riter v. Woonsocket Sch. Dist., 504 N.W.2d 572 (S.D. 1993)
- Strain v. Rapid City Sch. Bd., 447 N.W.2d 332 (S.D. 1989)
- Voeltz v. John Morrell & Co., 1997 SD 69, 564 N.W.2d 315
- Northwestern Bell Tel. Co., Inc. v. Stofferahn, 461 N.W.2d 129 (S.D. 1990)
- Application of Union Carbide Corp., 308 N.W.2d 753 (S.D. 1981)
- Mordhorst v. Egert, 88 S.D. 527, 223 N.W.2d 501 (1974)
- Barrett v. Union Twp. Comm., 553 A.2d 62 (N.J. Super. Ct. App. Div. 1989)
- Eacret v. Bonner County, 139 Idaho 780, 86 P.3d 494 (2004)
- City of Hobart Common Council v. Behavioral Inst. of Ind., LLC, 785 N.E.2d 238 (Ind. Ct. App. 2003)
- State v. Wilson, 2008 SD 13, 745 N.W.2d 666
- State v. Thorsby, 2008 SD 100, 757 N.W.2d 300
- O'Connor v. Leapley, 488 N.W.2d 421 (S.D. 1992)
- Ass'n of Nat. Advertisers, Inc. v. F.T.C., 627 F.2d 1151 (D.C. Cir. 1979)