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Saunders County v. Metro. Utils. Dist.-A, 645 N.W.2d 805 (Neb. Ct. App. 2002)

County failed to establish the director's denial of the County's hearing request was arbitrary, capricious, or unreasonable.

Susan Curtis

Saunders County v. Metro. Utils. Dist.-A, 645 N.W.2d 805 (Neb. Ct. App. 2002) (holding: (1) a plaintiff must have standing to bring the cause of action; (2) a given water right will not give standing to challenge previously established water rights; (3) the authority to enforce zoning and flood plain regulations does not provide standing without evidence the water rights will violate these regulations; (4) riparian rights alone will not give standing without evidence of their infringement by the water right being contested; and (5) a contractual relationship alone will not suffice to establish standing to challenge a water right).

Saunders County brought this action before the Nebraska Court of Appeals after the Nebraska Department of Natural Resources ("NDNR") dismissed eighteen causes of action filed by the county against the Metropolitan Utilities District ("District").

On October 6, 1993, the District applied to the NDNR for a permit to appropriate the natural flow of the Platte River for induced ground water recharge. On March 1, 1994, the District filed a second application with the NDNR requesting the transference of the Platte waters to the Platte West Wellfield. The NDNR published notice of the District's requests on multiple occasions during July and August of that year. No parties filed objections in response to these notices, and as a result, the NDNR granted the two permits on December 10, 1998.

On May 11, 1999, Saunders County filed a complaint with the NDNR regarding the District's applications. Saunders County argued the NDNR's initial approval of the District's application was void due to procedural inadequacies, and the county requested a hearing on these matters. The county also sought an injunction halting further water withdrawal.

In November 1999, the NDNR responded to the seventeen causes of action, ruling Saunders County did not have sufficient standing to contest the District's applications. The county later sought a hearing on this issue, which the NDNR granted, but only to uphold its previous dismissal of Saunders County's claims due to a lack of standing. Subsequently, the NDNR denied Saunders County's request for a rehearing. The county appealed to the Nebraska Court of Appeals on five grounds: (1) NDNR violated the county's due process rights; (2) NDNR erroneously allowed a department hearing officer and unit supervisor to be involved in the proceedings; (3) NDNR erroneously denied requested subpoenas; (4) NDNR failed to keep a complete record; and (5) NDNR erroneously dismissed the county's seventeen

causes of action.

In analyzing these five assignments of error, the court stated an appellate court's obligation in assessing a director's factual findings is to ensure the previous rulings were supported by competent and relevant evidence, so as not to be arbitrary, capricious or unreasonable. The court then proceeded to apply this test to the five aspects of Saunders County's appeal. The Nebraska Court of Appeals affirmed the NDNR's judgments.

First, the court recognized that Saunders County incorporated allegations of deprived due process within almost all of its assignments of error to the NDNR. However, in *City of Lincoln v. Central Platte NRD* the Supreme Court ruled both federal and state constitutional rights to due process apply only to "people" in a jurisdiction. Noting a county is neither a natural nor an artificial person, the court disregarded all of Saunders County's arguments regarding due process violations.

Second, the court assessed Saunders County's argument that NDNR should have prohibited the involvement of the hearing officer and unit supervisor, Sievers and France, in the county's proceedings regarding the District. Saunders County also asserted the officers' involvement violated disciplinary and ethical standards. However, the NDNR contested Sievers' and France's involvement, stating in the previous hearing there was no evidence that reflected either officers' role in investigation, prosecution, or advocacy related to this complaint. The court then held Saunders County failed to present sufficient evidence of the officers' prior involvement as investigators, prosecutors, or advocates on this matter to outweigh the presumption of honesty.

Third, the court analyzed Saunders County's claim that the NDNR erroneously denied its requests for subpoenas for Sievers; France; Ann Bleed, the state hydrologist; and David Vogler, an NDNR attorney. Again, the appellate court resorted to the Supreme Court's language in *Central Platte NRD*, stating persons performing adjudicative functions are "presumptively incompetent to testify" and parties may not subpoena them, unless that employee has "unique knowledge indispensable to the adjudication." The court in this case held the burden of proving unique and indispensable knowledge was on Saunders County, yet it failed to demonstrate these four employees had any such information. Therefore, the court dismissed this assertion of error for denial of subpoenas.

Fourth, the court similarly dismissed Saunders County's claim that the NDNR failed to maintain a complete record of the proceedings on this matter and failed to disclose the hearing officer's findings. The court held a record's imperfections do not lead a department's conclusions to be arbitrary, capricious, or unreasonable.

Fifth, the Court addressed Saunders County's contention that NDNR erred in dismissing its seventeen causes of action against the

District based on their finding that the county lacked standing to bring these actions. The court acknowledged one must have standing to sue via some real interest in the cause of action, such as some legal or equitable right, title, or interest in the subject matter of the controversy. Saunders County contended the subject matter of the controversy is the District's wells, and the county did have a legally protected interest in the matter. The NDNR conversely stated Saunders County's complaint reveals that the subject matter of this controversy pertains to the District's applications, not its wells. The court agreed with the NDNR on this issue, holding each cause of action brought by Saunders County alleged deficiencies in the District's applications or the department's approval of those applications.

Within this framework, the court then evaluated Saunders County's contention that the NDNR inaccurately assessed the county's standing given the county's: (1) outstanding surface water rights applications; (2) adjacent water well; (3) obligation to administer zoning and flood plain regulations; (4) alleged riparian water rights; and (5) construction contract with the District that allegedly provided the district with water from the District's wells.

Saunders County first asserted it had standing to bring actions against the District because the county filed three applications to appropriate surface water. The NDNR had yet to grant these applications, and the county filed them after the NDNR approved the District's applications; therefore, the District had the earlier priority date. Finding that a mere application for a water right does not grant a property right to the applicant, the NDNR originally dismissed the claim that these outstanding applications gave Saunders County any standing in the instant case. The court affirmed NDNR's conclusion, finding it well supported by the evidence, and neither arbitrary, capricious, nor unreasonable.

Saunders County also attempted to establish standing based upon a water well constructed near the District's well field, arguing its well would suffer potential negative consequences due to the drawdown in the area of the District's well. Nevertheless, Saunders County did not register its well until approximately two years after the NDNR approved the District's applications. The court affirmed the NDNR's initial judgment that a new well cannot create a water right that gives rise to standing to challenge a water right previously established.

Next, Saunders County alleged standing in this cause of action because of the county's role in zoning and flood plain regulations. Yet Saunders County provided no evidence the District's water rights would violate zoning or flood plain restrictions in any fashion. Therefore, the court established the county proved no legal or equitable right, title, or interest in this case upon the basis of zoning and flood plain guidelines.

Saunders County also alleged its real estate deeds and patents in Saunders County gave the county riparian water rights that gave rise to

its standing in this case. In assessing this claim, the court stated it must first determine if any property is riparian in nature, and then determine the extent to which Saunders County demonstrated this right. Based on the evidence, the court concluded at least some of the county's property did have water flowing over or along its borders, and was, therefore, riparian in nature. However, the court then agreed with the NDNR's finding that Saunders County failed to make these riparian rights relevant to the instant case by neglecting to prove any manner in which the District's granted water rights would harm those of the county.

Lastly, Saunders County argued it granted the District a construction permit stipulating the District would supply water to areas of Saunders County on a cost basis, as permitted by law. Again, Saunders County was insufficient in making this fact relevant to the instant case. The court stated the county did not provide any basis for how this contractual clause should warrant standing to challenge the legality of the District's applications for water rights in the county. Once more, the court found the evidence adequately supported NDNR in rejecting Saunders County's argument for standing based upon this construction contract, and was not arbitrary, capricious, or unreasonable.

Jessica L. Grether

NORTH CAROLINA

Deep River Citizens' Coalition v. Dep't of Env't & Natural Res., 560 S.E.2d 814 (N.C. Ct. App. 2002) (holding trial court's failure to state both whether it used a de novo or whole record standard of review, and the extent to which the court applied either standard to each issue raised, precluded appellate review of decision).

Deep River Citizens' Coalition ("DRCC") challenged the Piedmont Triad Regional Water Authority ("Water Authority") petition to the North Carolina Environmental Management Commission ("EMC"). Once EMC issued a final decision, DRCC appealed this final decision to the Wake County Superior Court. The court upheld the agency's final decision. DRCC appealed to the North Carolina Court of Appeals, claiming the trial court erred by not reviewing EMC's decision under a de novo standard of review. The Court of Appeals reversed and remanded the case, ordering the trial court to advance its own characterization of the issues and delineate the standards of review for each issue presented.

For over a decade, the Water Authority sought to build a water supply reservoir on the Deep River, located in eastern North Carolina. In 1988, the Water Authority sought EMC's approval to purchase land