

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 98,487

ROGER ZIMMERMAN, ET AL,
Appellants/Cross-appellees

and

A.B. HUDSON AND LARRY FRENCH,
Intervenors/Appellants/Cross-appellees

v.

BOARD OF COUNTY COMMISSIONERS OF WABAUNSEE COUNTY, KANSAS,
Appellee/Cross-appellant.

**ORDER SETTING SUPPLEMENTAL BRIEFING SCHEDULE AND ORAL
ARGUMENT**

On October 30, 2009, this court filed its opinion in this matter, resolving a number of issues presented by the parties in their appellate briefs. The opinion did not resolve all issues presented because supplemental briefing and oral argument are required as described below:

1. Intervenors contend that Kansas has recognized wind rights as a property interest which, as here, can be given via a general warranty deed. See K.S.A. 58-2221(c); K.S.A. 58-2272. They further contend that the Board's action is in violation of the Takings Clause of the United States Constitution, with their amended petition expressly asserting that the taking of their wind rights "is no different than banning all oil and gas wells in Wabaunsee County and preventing use of mineral interests."

The parties should thoroughly analyze the particular nature of the rights allegedly taken—from landowners and from nonlandowners alike. Their

briefs should address whether wind rights are analogous to other interests in various areas of property law and, if so, thoroughly explain.

2. The Board contends that for the Intervenor to show a violation of the Takings Clause, they must demonstrate a deprivation of all economic beneficial use of the parcel as a whole, not just their "discrete segment" of wind rights. It cites *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646, *reh. denied* 439 U.S. 883 (1978).

The parties should thoroughly analyze whether Kansas follows, or should follow, the Board's "aggregate approach." Contrast, *e.g.*, *Mid Gulf, Inc., v. Bishop*, 792 F. Supp. 1205 (D. Kan. 1992), with *Vulcan Materials Co. v. City of Tehuacana*, 369 F.3d 882 (5th Cir. 2004).

3. The parties should thoroughly address all steps in the analysis of whether the Board's amended zoning regulations violate the "dormant" aspect of the Commerce Clause of the United States Constitution: (1) discrimination against interstate commerce and (2) burden on interstate commerce. See, *e.g.*, *Department of Revenue of Kentucky v. Davis*, 553 U.S. ___, 170 L. Ed. 2d 685, 128 S. Ct. 1801 (2008); *United Haulers Assoc., Inc. v. Oneida-Herkimer Solid Waste Management Authority.*, 550 U.S. 330, 167 L. Ed. 2d 655, 127 S. Ct. 1786 (2007).

4. The parties should thoroughly address why, or why not, future discovery is necessary to resolve the Board's alleged violation of the Takings Clause, the Commerce Clause, or both.

The parties are directed to file their supplemental briefs on the issues listed above by 5 p.m. on December 11, 2009. The briefs shall not exceed 40 pages in length,

exclusive of the signature pages. Only one brief per party will be allowed, *e.g.*, no reply briefs as contemplated by Supreme Court Rule 6.01 (2008 Kan. Ct. R. Annot. 37) and by Supreme Court Rule 6.06 (2008 Kan. Ct. R. Annot. 44) are authorized. Nevertheless, timely applications for *amici curiae* briefs will be considered.

The parties are further directed to appear before this court on January 27, 2010, at 9 a.m., for oral argument exclusively on the issues listed above. The Appellants, Intervenors, and Appellee shall each have 20 minutes to present their arguments to the court for a total argument time of 60 minutes. Appellants and Intervenors shall have the option of reserving a portion of their argument time, not to exceed 5 minutes, for rebuttal.

Resolution of the following issues originally presented by the Intervenors shall necessarily await the supplemental briefing and oral argument provided by this order: (1) whether the district court erred in dismissing the 42 U.S.C. § 1983 (2006) claim and (2) whether the district court erred in dismissing the inverse condemnation claim.

BY ORDER OF THE COURT this 30th day of October 2009.

ROBERT E. DAVIS
Chief Justice