

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF CODINGTON)

IN CIRCUIT COURT
THIRD JUDICIAL CIRCUIT

PAUL JOHNSON, PATRICK LYNCH,
MELISSA LYNCH, and AMBER
CHRISTENSON,

Petitioners,

v.

CODINGTON COUNTY BOARD OF
ADJUSTMENT, CROWNED RIDGE
WIND, LLC, CROWNED RIDGE WIND
II, LLC,

Respondents.

14CIV18-340

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW
AND ORDER**

The Court having reviewed the parties' submissions, and having heard argument from the parties, and being full advised, enters the following Findings of Fact and Conclusions of Law and Order.

FINDINGS OF FACT

To the extent that any Finding of Fact herein is improperly designated as such, it shall be considered as a Conclusion of Law.

1. This appeal follows the decision of the Codington County Board of Adjustment ("Board") to grant a CUP to Crowned Ridge Wind, LLC, and Crowned Ridge Wind II, LLC (collectively "Crowned Ridge").

2. Petitioners all own land in Codington County and claim to be aggrieved by the Board's decision granting a CUP to Crowned Ridge.

3. On or about June 4, 2018, Crowned Ridge filed an application for a CUP to construct and operate a wind energy system (“WES”) project in Codington County.

4. In addition to the CUP application, Crowned Ridge included a participating property owner list, corresponding map, project overview, as well as maps, plans, studies, reports, and analyses required by the recently revised Codington County Ordinance ("Ordinance").

5. The Board sent notice of the hearing to be held on Crowned Ridge’s CUP application via certified mail to 200 adjacent property owners.

6. The notice, dated July 5, 2018, stated, *inter alia*, “Your property has been identified as adjacent to property included in the wind energy system project described below. You are welcome to attend a meeting of the Codington County Planning Commission/Board of Adjustment on Monday, July 16, 2018 at the Codington County Extension Complex at 6:30 pm.”

7. The notice stated the Board would be considering the following application: “A Conditional Use Permit Pursuant to Section 3,04.02.21 Wind Energy System. The applicant, Crowned Ridge LLC and Crowned Ridge Wind II, LLC, is requesting to operate a Wind Energy System with up to 164 wind turbines, associated electrical transmission lines, and maintenance structures on certain property situated in Leola, Germantown, Rauville, Waverly, Kranzburg N, and Kranzburg S townships as displayed in the below map and available for review at the Codington County Zoning Office.”

8. The notice also stated “All persons interested therein may appear and be heard before the Board of Adjustment at said hearing or may file written comments with the Zoning Officer at 1910 West Kemp Avenue three or more days prior to said hearing.”

9. The Board provided evidence of certified mail receipts indicating notice was sent to each adjacent property owner.

10. The Board published notice of its July 16, 2018, hearing on Crowned Ridge's CUP application in the Watertown Public Opinion on July 6, 2018.

11. The Codington County staff report and related materials were posted on the County’s website the week before the July 16, 2018, hearing.

12. A public hearing on Crowned Ridge's CUP application was held before the Board on July 16, 2018.

13. Petitioners have not identified any adjacent property owners who failed to attend the Board's July 16, 2018, hearing.

14. Petitioners have not provided proof of any written comments that were submitted after 12:00 pm on Friday, June 13, 2018, that were excluded from the Board's consideration.

15. Petitioners all attended and presented opposition to Crowned Ridge's CUP application, either personally or through counsel.

16. During the hearing, Board Member Klatt advised the Board of his sister’s wind easement, and Petitioner Amber Christenson objected to his participation as a result.

17. There is no evidence that Board member Klatt stood to gain directly and financially by approving Crowned Ridge's CUP application.

18. The objection to Klatt participating was noted, but Klatt was found to be qualified to participate, without objection from any of the other Board members.

19. The Board's Findings of Fact show that the Board unanimously voted in favor of granting Crowned Ridge's CUP application.

20. Disqualifying Klatt's vote still satisfies the Ordinance requirement of a two thirds vote to grant a CUP.

21. Crowned Ridge's CUP application included an expert report regarding the noise and flicker impact of the WES project.

22. The expert concluded the noise and flicker impact would comply with the Ordinance.

23. The expert report was considered by the Board at the public hearing and was responded to by Petitioners at said hearing.

24. Petitioners provided no evidence regarding the credibility of that expert, no evidence that such expert lacked appropriate education, training, and expertise, and no evidence that the estimates in the expert report were unreliable.

25. The hearing minutes reflect that the Board discussed the issue of decommissioning with Crowned Ridge.

26. Petitioners have provided no evidence to call into question the reliability of Crowned Ridge's software programs such as "windPRO."

27. Prior to construction of a WES project, estimates based on computer modeling are all that is available when determining the flicker impact.

28. Crowned Ridge submitted a letter of assurance for obtaining haul road agreements to the Board.

29. Crowned Ridge is subject to the continuing jurisdiction and authority of the Board in the event of non-compliance of any conditions pertaining to the CUP for the WES project.

30. The Board addressed issues concerning certain terms and conditions of the haul road agreements.

31. Numerous questions were addressed at the hearing.

32. The Board clearly considered and asked questions regarding the issue of whether Crowned Ridge's CUP application would promote the public health, safety, and welfare.

33. After considering Crowned Ridge's CUP application, written testimony submitted prior to the hearing, and oral testimony presented at the July 16, 2018, hearing, the Board in a 6-0 vote granted a CUP to Crowned Ridge.

34. The Board issued its Findings of Fact in support of its motion to approve the application for CUP, dated July 16, 2018.

35. In its Findings of Fact, the Board found, *inter alia*, that the “application and testimony at this meeting allowed the Board to adequately review how the applicant will satisfy requirements of Chapter 5.22 of the Codington County Zoning Ordinance; including but not limited to site clearance, topsoil protection, compaction, livestock protection, fences, publish roads, haul roads, turbine access roads, private roads, control of dust, soil erosion and sediment control, electromagnetic interference, lighting, turbine

spacing, footprint minimization, collector lines, feeder lines, decommissioning, tower height, flicker appearance, and noise.”

36. The Board’s Findings of Fact also state that the “applicant submitted all materials required by Chapter 5.22 of the . . . Ordinance” and the agreement in the letter of assurance that the applicant will obtain a haul road agreement satisfies the requirement for a haul road agreement.”

37. The Board determined that “with conditions proposed by the Board, the proposed use will meet the intent, purpose, and regulations of the Comprehensive Land Use Plan and Zoning Ordinance.”

38. The Board concluded it was “empowered to grant the conditional use, and that the granting of the conditional use will not adversely affect the public interest.”

39. On August 17, 2018, Petitioners filed their “Petition to Appeal the Wind Energy System Conditional Use permit Granted July 16, 2018, and Filed July 18, 2018.” The Petition was submitted “pursuant to SDCL 11-2-61, SDCL 11-2-62 and SDCL 21-31-1 et seq.” and Petitioners allege the Board’s decision granting the CUP was illegal.

40. Petitioners request reversal of the decision granting the CUP and/or remand.

41. Petitioners allege five grounds for reversal: the Board arbitrarily and willfully disregarded undisputed proof; the Board’s decision was based on fraud; the Board exceeded its jurisdiction; the Board failed to regularly pursue its authority; or the Board engaged in any act forbidden by law and neglected to do any act required by law.

42. Additional findings of fact are set forth in the Court's Memorandum Opinion dated March 22, 2019, and are incorporated herein by this reference as allowed under SDCL § 15-6-52(a).

CONCLUSIONS OF LAW

To the extent that any Conclusion of Law herein is improperly designated as such, it shall be considered a Finding of Fact.

1. Pursuant to SDCL 11-2-61.1, "[a]ny appeal of a decision relating to the grant or denial of a conditional use permit shall be brought under a petition, duly verified, for a writ of certiorari," and "shall be determined under a writ of certiorari standard regardless of the form of the approving authority."

2. The petition must set forth "that the decision is illegal, in whole or in part, [and] specify the grounds of the illegality."

3. Judicial review of petitions for relief postured as writs of certiorari is limited.

4. The court in reviewing the Board's decision does not determine whether it was right or wrong, but only "whether the board of adjustment had jurisdiction over the matter and whether it pursued in a regular manner the authority conferred upon it."

5. The test of jurisdiction is whether there was power to enter upon the inquiry.

6. A challenge to jurisdiction tests the power to make an inquiry, not the correctness of a decision of law or fact.

7. The Board's actions will be sustained unless it did some act forbidden by law or neglected to do some act required by law.

8. Certiorari will not lie to review technical lack of compliance with law or be granted to correct insubstantial errors which are not shown to have resulted in prejudice or to have caused substantial injustice.

9. The Board's consideration of Crowned Ridge's CUP application as authorized by the newly enacted Ordinance was not improper, but rather the duty of the Board.

10. Municipal zoning ordinances are afforded a presumption of constitutional validity.

11. To overcome this presumption, the Petitioners must present facts supporting the claim the ordinance is arbitrary, capricious, and unconstitutional.

12. The scope of review under the certiorari standard does not give the court the power to invalidate the ordinances themselves in this action, because under SDCL 11-2-65, this Court may only reverse or affirm, wholly or partly, or modify the decision brought up for review.

13. SDCL § 11-2-29 and -30 concern notice requirements for a planning commission's hearing and subsequent board hearing on any proposed amendment, supplement, change, modification, or repeal of comprehensive plan, ordinances, restrictions, and boundaries adopted by the County, and are inapplicable to the Board's review of a CUP application.

14. SDCL 15-6-6(a) is inapplicable because SDCL Ch. 15-6 governs the rules of procedure in circuit courts, not county boards of adjustment, and that chapter does not apply to writs of certiorari.

15. The Board had jurisdiction to consider Crowned Ridge's CUP application, and it did not exceed its authority in granting said application in accordance with the Ordinance.

16. Petitioners' argument that Crowned Ridge is not the real party in interest was not presented to the Board, and was made for the first time in this appeal, and the Court, therefore, need not consider this argument.

17. Moreover, even if the Court considered Petitioners' argument, it is without merit. A limited liability company such as Crowned Ridge is a legal entity distinct from its members [i.e., NextEra].

18. A member of a limited liability company is not a proper party to proceedings by or against a limited liability company.

19. Crowned Ridge was the real party in interest to file the CUP application.

20. The Board had jurisdiction over the matter to consider Crowned Ridge's CUP application, and it did not exceed its authority in granting said application to Crowned Ridge.

21. The notice and hearing requirements of South Dakota law are in place to afford affected landowners with the opportunity to formally voice their concerns and present evidence in opposition to opposed measures.

22. The Board complied with section 4.05.01(2) of the Ordinance by sending notice via certified mail to adjacent property owners.

23. The Board complied with section 4.05.01(2) of the Ordinance by timely publishing notice in the Watertown Public Opinion.

24. The Watertown Public Opinion is "a paper of general circulation in the area affected" because it "is a daily legal newspaper as defined in SDCL 17-2-2.1 through 17-2-2.4, as amended, published at Watertown, Codington County, South Dakota.

25. To establish a procedural due process violation, a plaintiff must demonstrate that he has a protected property or liberty interest at stake and that he was deprived of that interest without due process of law.

26. Proof of prejudice is generally a necessary element of a due process claim.

27. While chapter 5.22 of the Ordinance set forth requirements for the contents of the WES map to be included in a CUP application, the chapter does not extend these requirements to the contents of the Board's notice to adjacent land owners.

28. Petitioners are property owners adjacent to the wind project and thereby have protected property interests at stake.

29. Petitioners fail to show that they were deprived of their interests without due process of law.

30. Petitioners fail to show that the Board's mailing and publication of notice of its July 16, 2018, hearing caused them prejudice or substantial injustice.

31. Petitioners were properly and timely notified via certified mail of the Board's July 16, 2018, hearing, signed the included return receipts, and personally attended the hearing to voice their opposition to Crowned Ridge's CUP application.

32. The Board's inclusion of the WES map with the mailed and published notice of its July 16, 2018, hearing did not result in any prejudice or substantial injustice.

33. Petitioner Christenson both received mailed notice and attended the Board's meeting on Crowned Ridge's CUP application.

34. Petitioners fail to demonstrate that any of their submitted written comments were not considered by the Board, or that they were prejudiced by any alleged misunderstanding of the contents of the Board's notice published on July 6, 2018.

35. Therefore, the Board pursued in a regular manner the authority conferred upon it by complying with the notice requirements in the Ordinance, and did not thereby violate Petitioners' due process rights.

36. There is nothing in the Ordinance requiring that the zoning officer's staff report (its recommendation to grant the CUP application) must include exhibits, testimony or findings of fact.

37. A zoning officer's duties include receiving CUP applications, reviewing the application, and making recommendations regarding said application the Board of Adjustment.

38. The Ordinance does not require the zoning officer to independently review and provide recommendations for anything other than the CUP application.

39. The zoning officer duly reviewed Crowned Ridge's CUP application in making his recommendations to the Board, thereby satisfying section 4.02.02(12).

40. The recommendations in the Staff Report were not inherently illegal, and it was properly considered by the Board.

41. The Staff Report was properly made available at the zoning officer's office and online at the County's website on July 10, 2018.

42. The Board's public posting of the Staff Report was timely pursuant to its bylaws and state law.

43. Therefore, the Board pursued in a regular manner the authority conferred upon it in considering the zoning officer's Staff Report on Crowned Ridge's CUP application.

44. "Due process requires adequate notice and an opportunity for meaningful participation."

45. Under South Dakota law, "meaningful participation" does not require "equal time."

46. The Board may limit the period for public comment, but not so much as to provide for no public comment.

47. The Board pursued in a regular manner the authority conferred upon it in imposing time limitations on Petitioners' ability to present testimony at the July 16, 2018, hearing.

48. The Board pursued in a regular manner the authority conferred upon it by drafting its findings of fact during or after the July 16, 2018, hearing.

49. Because certiorari cannot be used to examine evidence for the purpose of determining the correctness of a finding, this Court does not decide whether it would have reached the same conclusion as the Board.

50. Therefore, the Board pursued in a regular manner the authority conferred upon it by finding that notice was adequately given.

51. The Board may review the evidence presented to it and make credibility determinations.

52. The Board acted within its authority at the hearing by adopting the report of Crowned Ridge's expert over Petitioners' objections about the validity of the report's conclusions.

53. The Board pursued in a regular manner the authority conferred upon it by considering the noise and flicker impacts of Crowned Ridge's proposed WES project.

54. The Board addressed the issue of allegedly missing tower locations and receptors by reviewing Crowned Ridge's CUP application and asking Crowned Ridge numerous questions regarding the WES project and its impact on the region.

55. The Board pursued in a regular manner the authority conferred upon it by finding that Crowned Ridge submitted all materials required by chapter 5.22 of the Ordinance.

56. The Board pursued in a regular manner the authority conferred upon it by finding that Crowned Ridge satisfied the haul road requirement as it pertains to issuance of the CUP.

57. The Board duly considered the credibility of all evidence before it and made its determination that Crowned Ridge's application satisfied all applicable Ordinance requirements.

58. The Board pursued in a regular manner the authority conferred upon it by finding that Crowned Ridge's CUP application and all written and oral testimony at the July 16, 2018, hearing adequately addressed all concerns of the Ordinance.

59. Some of the objectives of the County's adoption of the Ordinance include, "[t]o prevent excessive population densities and overcrowding of the land with structures" and "to protect and to promote the public health, safety, peace, comfort, convenience, prosperity and general welfare."

60. The Board considered these objectives and found them to be satisfied.

61. The Board pursued in a regular manner the authority conferred upon it by considering the issue of project density or overcrowding of structures and determining that Crowned Ridge's application complied with Ordinance requirements.

62. The Board pursued in a regular manner the authority conferred upon it by finding that granting Crowned Ridge's CUP application would promote the public health, safety, and welfare.

63. Decision makers are presumed to be objective and capable of judging controversies fairly on the basis of their own circumstances.

64. The burden was on Petitioners to present some evidence of "actual bias," "unacceptable risk of actual bias or prejudgment," or some other conflict of interest by Klatt.

65. Petitioners failed to present any evidence of Klatt's alleged bias.

66. If an official with a direct pecuniary interest participates in discussion or votes on a matter before the governing body, the legal sole remedy is to invalidate that official's vote.

67. Board member Klatt did not harbor any improperly biased motive or purpose in deciding upon Crowned Ridge's CUP application.

68. If Klatt had a conflict of interest and his vote were disqualified, the number of Board member votes in favor of granting Crowned Ridge's CUP application is sufficient to grant the CUP to Crowned Ridge.

69. The Board pursued in a regular manner the authority conferred upon it by permitting Klatt to participate and vote upon Crowned Ridge's CUP application.

70. Petitioners' allegations are not supported in fact or law.

71. The Board had jurisdiction over the matter, regularly pursued its authority, and acted legally.

72. Additional conclusions of law are set forth in the Court's Memorandum Opinion dated March 22, 2019, and are incorporated herein by this reference as allowed under SDCL § 15-6-52(a).

ORDER

Based on the foregoing, the Court enters the following:

The Petition to Appeal the WES CUP Granted July 16, 2018, and Filed July 18, 2018, is Denied and the Board's decision to grant the CUP to Crowned Ridge is Affirmed.

Dated this ____ day of May, 2019.

BY THE COURT

Signed: 5/6/2019 3:42:19 PM

Robert L. Spears
The Honorable Robert L. Spears
Circuit Court Judge

Attest:
ATTEST:
Zeller, Barbara
Clerk of Court
Clerk/Deputy

BY _____



(SEAL)