STATE OF SOUTH DAKOTA
THIRD JUDICIAL CIRCUIT COURT
CODINGTON COUNTY COURTHOUSE
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HON. ROBERT L. SPEARS
Circuit Judge
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Date: March 22, 2019
RE: *Johnson v. Codington County Board of Adjustment*, 14 CIV 18-340; Writ of Certiorari

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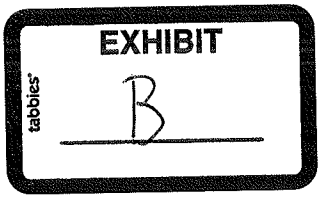
Counselors,
The Opinion of the Court in the above captioned matter is set forth below.

MEMORANDUM OPINION

INTRODUCTION

Petitioners Paul Johnson, Patrick Lynch, Melissa Lynch, and Amber Christenson (collectively, "Petitioners") filed their Petition to Appeal the Wind Energy System ("WES") Conditional Use Permit ("CUP") Granted July 16, 2018, and Filed July 18, 2018, seeking reversal of the issuance of a CUP by Respondent Codington County Board of Adjustment ("Board") to Respondents Crowned Ridge Wind, LLC and Crowned Ridge Wind II, LLC (collectively,



"Crowned Ridge"), and return of the Writ of Certiorari by the Board via full certification of its record for the underlying proceeding. The Court granted issuance of the Writ of Certiorari as it pertained to the Board filing a Return to the Writ of Certiorari. Petitioners then filed their Brief in Support of the Petition to Appeal. A hearing on the matter was held before the Court on February 04, 2019. Based on the rationale set forth below, and the law as applied to the facts presented, Petitioners' Petition to Appeal is denied.

STATEMENT OF FACTS

This appeal follows the decision of the Board to grant a CUP to Crowned Ridge. On or about June 04, 2018, Crowned Ridge sought the CUP to construct and operate a WES project in Codington County. In addition to the 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"). A public hearing on Crowned Ridge's CUP application was held before the Board on July 16, 2018, and Petitioners attended and presented opposition to Crowned Ridge's CUP application. Petitioners all own land in Codington County and claim to be aggrieved by the Board's decision granting a CUP to Crowned Ridge. After considering Crowned Ridge's CUP application, written testimony properly submitted prior to the hearing, and oral testimony at the July 16, 2018, hearing, the Board in a 6-0 vote granted a CUP to Crowned Ridge.

For purposes of clarification, Petitioners' Petition to Appeal will be cited as "Petition at ¶ [paragraph number]." Petitioners' Brief in Support of the Petition to Appeal will be cited as "P. Brief at [page number]." Petitioners' Reply Brief will be cited as "P. Reply at [page number]." The Board's Responsive Brief will be cited as "Bd. Brief at [page number]." Crowned Ridge's Response to Petitioners' Brief will be cited as "CR Brief at [page number]." References to the

Amended Return to Writ of Certiorari will be cited as "Writ Ex. [exhibit number], at [page number]." Finally, references to the Supplemental Return to Writ of Certiorari will be cited as "Miller Aff. at [page number]," and exhibits therein as "Miller Aff. Ex. [exhibit number], at [page number]."

RULES OF LAW

Pursuant to recently enacted 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." SDCL 11-2-61.1. The petition must set forth "that the decision is illegal, in whole or in part, [and] specify[] the grounds of the illegality." SDCL 11-2-61. "Upon the presentation of the petition, the court may allow a writ of certiorari directed to the board of adjustment to review the decision of the board of adjustment . . . ." SDCL 11-2-62. "The court may [then] reverse or affirm, wholly or partly, or may modify the decision brought up for review." SDCL 11-2-65.

Judicial review of petitions for relief postured as writs of certiorari is limited. *Wedel v. Beadle Cty. Comm'n*, 2016 S.D. 59, ¶ 11, 884 N.W.2d 755, 758 (citing *Jensen v. Turner Cty. Bd. of Adj't*, 2007 S.D. 28, ¶ 4, 730 N.W.2d 411, 412–13. The Court in reviewing a 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." *Id.* (quoting *Hines v. Bd. of Adj't of City of Miller*, 2004 S.D. 13, ¶ 10, 675 N.W.2d 231, 234). "The test of jurisdiction is whether there was power to enter upon the inquiry[.]" *Lake Hendricks Imp. Ass'n v. Brookings Cty. Planning & Zoning Comm'n*, 2016 S.D. 48, ¶ 26, 882 N.W.2d 307, 315 (alteration in original) (quoting *Becker v. Pfeifer*, 1999 S.D. 17, ¶ 15, 588 N.W.2d

913, 918). "A challenge to jurisdiction tests the power to make an inquiry, not the correctness of a decision of law or fact." *Ridley v. Lawrence Cty. Comm'n*, 2000 S.D. 143, ¶ 10, 619 N.W.2d 254, 258. "A board's actions will be sustained unless it did some act forbidden by law or neglected to do some act required by law." *Adolph v. Grant Cty. Bd. of Adj't*, 2017 S.D. 5, ¶ 7, 891 N.W.2d 377, 381 (quoting *Grant Cty. Concerned Citizens v. Grant Cty. Bd. of Adj't*, 2015 S.D. 54, ¶ 10, 866 N.W.2d 149, 154). "[C]ertiorari 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[.]" *Id.* (alteration in original) (citations omitted).

ANALYSIS

1. Whether the Board had jurisdiction over the matter.

The first issue for the Court to decide is whether the Board had jurisdiction over the matter. Here, Petitioners present several contentions that the Board exceeded its authority to grant Crowned Ridge's CUP request. Each contention will be addressed in the following sections.

a. Illegality of Section 68.4.05.02(3) of the Ordinance

Petitioners argue that the Board exceeded its authority because the timing of the Board's grant of Crowned Ridge's CUP application and the County's passing of its recently revised Ordinance was improper. Petitioners also allege that section 4.05.01(3) of the Ordinance is illegal because it does not comport with the due process requirements provided in SDCL 11-2-19, 11-2-29, 11-2-30, nor 15-6-6(a). P. Brief at 3-4; P. Reply at 2. The Board and Crowned Ridge contend that the Board properly adhered to the Ordinance, that the aforementioned statutes do not apply in the present case, and that section 4.05.01(3) affords Petitioners with due process. Bd. Brief at 6-7; CR Brief at 8-9.

Codington County recently revised its Ordinance. Writ Ex. A2, at 180-87. Pursuant to SDCL 11-2-28, the County has the authority to adopt such revisions. *See* SDCL 11-2-28 ("The plan, ordinances, restrictions, and boundaries adopted pursuant to this chapter may be amended, supplemented, changed, modified, or repealed by action of the board."). Here, Petitioners do not allege that the County's adoption of the newly revised Ordinance was procedurally deficient so as to render it invalid. *See, e.g., Pennington Cty. v. Moore*, 525 N.W.2d 257, 257, 260 (S.D. 1994) (holding zoning ordinances void for failure to provide notice and hearing under SDCL 11-2-19).[1] Codington County uses the Board to review and determine applications for CUPs and variances—a task which the County is statutorily authorized to delegate. *See* SDCL 11-2-40 (authorizing county commission to appoint a board of adjustment); SDCL 11-2-53 (allowing a duly appointed board of adjustment to "[h]ear and determine conditional uses as authorized by the zoning ordinance"). Moreover, based on this Court's review of the Ordinance, a WES project is a conditional use in the location and under the conditions determined by the Board. Writ Ex. A1, at 33, 65-66. Thus, 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.

Regarding the alleged illegality of section 4.05.01(3) of the Ordinance, the Court first notes that "[m]unicipal zoning ordinances are afforded . . . [a] presumption of constitutional validity." *In re Conditional Use Permit No. 13-08*, 2014 S.D. 75, ¶ 13, 855 N.W.2d 836, 840 (citations omitted). To overcome this presumption, the challenging party 'must show facts supporting the claim the ordinance is arbitrary, capricious, and unconstitutional.'" *Id.* Second, "the scope of review under the certiorari standard d[oes] not give the court the power to invalidate the ordinances

[1] SDCL 11-2-28 provides that any "modification or repeal [of the zoning ordinance] shall be proposed in a resolution or ordinance, as appropriate, presented to the board for adoption in the same manner and upon the same notice as required for the adoption of the original resolution or ordinance," *i.e.*, as stipulated in SDCL 11-2-19. SDCL 11-2-19, 11-2-28.

themselves in this action." *Wedel v. Beadle Cty. Comm'n*, 2016 S.D. 59, ¶ 16, 884 N.W.2d 755, 759. This is because under SDCL 11-2-65, "[t]he court may reverse or affirm, wholly or partly, or may modify the decision brought up for review." *Id.* The decision brought up for review is not the validity of the ordinances, but the Board's decision granting the CUP. *Id.* Invalidating county ordinances goes beyond the relief the Court may grant under SDCL 11-2-65. *Id.*

Here, Petitioners do not provide any authority to support their argument that a county's zoning ordinance must comply with the aforementioned statutes. SDCL 11-2-19 regards notice for board meetings on "the respective comprehensive plan, zoning ordinance, or subdivision ordinance." SDCL 11-2-18, 11-2-19.[2] SDCL 11-2-29 and 11-2-30 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; thus, they are also inapplicable to a board's review of a CUP application. SDCL 11-2-28 to 11-2-30. SDCL 15-6-6(a) is likewise inapplicable because SDCL chapter 15-6 governs the rules of procedure in *circuit courts*, not county boards of adjustment. SDCL 15-6-1.[3]

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[2] South Dakota courts have interpreted this statute as not referring to a board's consideration of a CUP application, but rather to the process of enacting or amending ordinances or comprehensive plans. *See Tibbs v. Moody Cty. Bd. of Comm'rs*, 2014 S.D. 44, ¶¶ 22-23, 851 N.W.2d 208, 216 (holding that notice was properly given pursuant to SDCL 11-2-18 and 11-2-19 regarding enactment of Moody County ordinances); *Schafer v. Deuel Cty. Bd. of Comm'rs*, 2006 S.D. 106, ¶ 14, 725 N.W.2d 241, 247 (citations omitted) (holding, under SDCL ch. 11–2, that procedural safeguards including a hearing are provided when changes in a comprehensive plan are proposed by petition of landowners); *Pennington Cty. v. Moore*, 525 N.W.2d 257, 257, 260 (S.D. 1994) (holding zoning ordinances void for failure to provide notice and hearing under SDCL 11-2-19); *Save Centennial Valley Ass'n, Inc. v. Schultz*, 284 N.W.2d 452, 455-56 (S.D. 1979) (describing notice and hearing requirements in SDCL ch. 11-2 for adopting a proposed comprehensive plan).

[3] Petitioners' argument is further contradicted by SDCL 15-6-81(a) and Appendix A to SDCL chapter 15-6, which appear to exclude writs of certiorari from the scope of the chapter's applicability. *See* SDCL 15-6-81(a) ("This chapter does not govern pleadings, practice, and procedure in the statutory and other proceedings included in but not limited to those listed in Appendix A to this chapter insofar as they are inconsistent or in conflict with this chapter."); SDCL 15-6 app. A (including writs of certiorari as a special proceeding excepted from the rules of SDCL chapter 15-6).

Finally, Petitioners do not show that section 4.05.02(3) is illegal and thereby caused them any prejudice or substantial injustice. Petitioners have not shown facts supporting their claim that section 4.05.02(3) of the Ordinance is arbitrary, capricious, and unconstitutional by not complying with state law. As further discussed *infra*, evidence establishes that, on July 6, 2018, the Board published notice of its July 16, 2018, hearing in compliance with the Ordinance, *i.e.* ten days prior to the Board's hearing on Crown Ridge's CUP application. Writ Ex. C, at 13-14. Petitioners have not provided proof that section 4.05.02(3) fails to comply with statutory and due process requirements.[4] Moreover, Petitioners do not contend that the timing of the Board's published notice prevented them from personally attending the Board's July 16, 2018, hearing. Petition at ¶ 6; P. Brief at 1; Miller Aff. Ex. B; Writ Ex. E1, at 5-6. Therefore, 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 in accordance with the newly enacted Ordinance.

b. Issuance of CUP to real party in interest

Petitioners also assert that the Board exceeded its jurisdiction in granting Crowned Ridge's CUP request because NextEra Energy Resources, LLC ("NextEra"), rather than Crowned Ridge, is the real party in interest, and NextEra is not licensed to do business in South Dakota. Petition at ¶ 15(c)-(d); P. Brief at 22-24; P. Reply at 5-6. The Board and Crowned Ridge contend that, while Crowned Ridge are indirect subsidiaries of NextEra, they are legally separate entities

[4] It should be noted that Petitioners' due process argument regarding the alleged illegality of section 4.05.02(3) does not align with previous caselaw considering such arguments. In those cases, the South Dakota Supreme Court on review considered whether a county commission was deprived of jurisdiction to render CUP decisions because it had invalidly enacted its zoning ordinance—*i.e.*, by not providing the public with notice and a hearing regarding said enactment pursuant to SDCL ch. 11-2. *See, e.g., Wedel v. Beadle Cty. Comm'n*, 2016 S.D. 59, ¶¶ 6-7, 14-15, 884 N.W.2d 755, 757-59 (considering procedural due process protections for whether defendant-commission had validly enacted its county zoning ordinances, which affected whether defendant had jurisdiction to grant the CUP). Here, Petitioners make no such argument.

properly formed under South Dakota law—and thus the real party in interest. Bd. Brief at 30-31; CR Brief at 23-25.

Here, Petitioners do not support their argument—made for the first time on this appeal—with evidence that Crowned Ridge is not the real party in interest.[5] Moreover, even if the Court considered Petitioners' argument, South Dakota authority clearly rejects such argument. While it is true that "[a] foreign corporation [*i.e.*, NextEra] may not transact business in this state until it obtains a certificate of authority from the Office of the Secretary of State," pursuant to SDCL 47-34A-201, "[a] limited liability company [*i.e.*, Crowned Ridge] is a legal entity distinct from its members [*i.e.*, NextEra]." SDCL 47-1A-1501, 47-34A-201. Though Petitioners contend that NextEra is the real party in interest because it is the only member of Crowned Ridge, "[a] member of a limited liability company is not a proper party to proceedings by or against a limited liability company," because a member is merely an agent of the limited liability company. *Id.*; SDCL 47-34A-301(a)(1). Therefore, 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.

2. Whether the Board pursued in a regular manner the authority conferred upon it.

Having concluded that the Board had jurisdiction over the matter to consider Crowned Ridge's CUP application, the second inquiry for the Court is whether the Board pursued in a regular manner the authority conferred upon it in deciding to grant Crowned Ridge's CUP request. Petitioners present several arguments in advocating that the Board's decision granting the CUP to Crowned Ridge was illegal, which are analyzed in the following sections.

a. Publication and mailing of notice

[5] Petitioners attempt to support their arguments with six exhibits attached to their Brief in Support of their Petition for Writ of Certiorari. P. Brief at 22-24. Petitioners, however, never raised these arguments nor presented these exhibits for the Board's consideration of Crowned Ridge's CUP application. Thus, Petitioners' attached exhibits are not part of the underlying record, and this Court is precluded by the certiorari standard from reviewing this new evidence.

i. Whether the Board provided adequate notice pursuant to the Ordinance.

Petitioners argue that the Board failed to regularly pursue its authority because it failed to provide adequate notice of its July 16, 2018, hearing on Crowned Ridge's CUP application. Petition at ¶ 15(a). The Board and Crowned Ridge assert that the Board provided adequate notice because the Board complied with the notice requirements in the Ordinance. Bd. Brief at 5-7; CR Brief at 8-9.

Section 4.05.01(2) of the Ordinance provides that "[p]roperty owners adjacent to the proposed site shall be notified of the conditional use request by certified or registered mail, at the cost of the applicant." Writ Ex. A1, at 82. Section 4.05.01(3) additionally stipulates that notice of the Board's hearing on a CUP application "shall be published once, ten (10) days prior to the Board of Adjustment public hearing, in a paper of general circulation in the area affected." *Id.* Here, the Board has presented supplementary evidence to its Return to the Writ of Certiorari showing that it complied with section 4.05.01(2) by sending notice via certified mail to adjacent property owners. Miller Aff. Ex. A; Writ Ex. C, at 1-10. The Board has also presented evidence that notice of its July 16, 2018, hearing on Crowned Ridge's CUP application was published in the Watertown Public Opinion on July 6, 2018. Writ Ex. C, at 13-14. Moreover, the Board has presented evidence that 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 . . . ." *Id.*

While Petitioners argue, pursuant to SDCL 15-6-6(a), that the notice published in the Watertown Public Opinion provided only six days' notice of the Board's July 16, 2018, hearing, the Court generally must give the language of Ordinance sections plain meaning and effect; moreover, a writ of certiorari may not be granted to correct insubstantial errors that did not cause

the appellant prejudice or substantial injustice. *See Hoffman v. Van Wyk*, 2017 S.D. 48, ¶ 8, 900 N.W.2d 596, 598-99 (quoting *Even v. City of Parker*, 1999 S.D. 72, ¶ 8, 597 N.W.2d 670, 673) ("When interpreting an ordinance, [the Court] must assume that the legislative body meant what the ordinance says and give its words and phrases plain meaning and effect."); *Adolph v. Grant Cty. Bd. of Adj't*, 2017 S.D. 5, ¶ 7, 891 N.W.2d 377, 381 (alteration in original) (citations omitted) ("[C]ertiorari 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[.]").[6]

In the same way, Petitioners assert that the Board's list of adjacent property owners was incomplete without supporting their assertion with evidence. Petitioners have not provided proof that the Board failed to provide notice to each property owner adjacent to the wind project. While the Board states via Luke Miller's affidavit that not all certified mail return receipts were signed and returned, Petitioners do not explain how the Board's lack of receipt of a signed return receipt from each adjacent property owner proves that the Board failed to notify all adjacent property owners. To the contrary, the Board has provided evidence of certified mail receipts indicating notice was sent to each adjacent property owner. Miller Aff. Ex. A; *see also Madsen v. Preferred Painting Contractors*, 233 N.W.2d 575, 577 (S.D. 1975) (citations omitted) (stating the general rule "that where a statute authorizes service of notice by registered mail, service is effective when the notice is properly addressed, registered, and mailed"). Therefore, the Board pursued in a regular manner the authority conferred upon it by complying with the notice requirements in the Ordinance.

ii. Whether the contents of the Board's mailed and published notice were adequate.

[6] Petitioners also fail to substantiate their assertion that SDCL 15-6-6(a) applies to this case. P. Brief at 4, 6. SDCL chapter 15-6 governs the rules of procedure in *circuit courts*, not county boards of adjustment. SDCL 15-6-1.

Petitioners contend that the mailed and published notice provided by the Board was inadequate due to inclusion of a map titled "Wind Energy System Orientation Map" ("WES map") which differed from a map provided as part of Crowned Ridge's CUP application, in that the WES map did not indicate parcels of land which were not participating in the wind project area nor outline the project area. P. Brief at 4. Petitioners also assert that published notice was inadequate because, while it indicated that written comments could be filed with the Zoning Officer at 1910 W. Kemp Avenue on or before Friday, June 13, 2018, it did not indicate that the Board Bylaws state "[n]o written testimony provided after 12:00 pm (noon), three (3) days prior to the meeting will be accepted by staff, or the Board of Adjustment." P. Brief at 4-5; Writ Ex. A3, at 11; Writ Ex. C, at 12.

Here, Petitioners do not cite any Ordinance requirements on the contents of the notice to be provided by the Board for its hearings on CUP applications. Moreover, Petitioners' assertion that inclusion of the WES map with the notice mailed to all adjacent property owners thereby provided inadequate notice to said owners fails, because it ignores the fact that notice was still mailed to all adjacent property owners irrespective of the map's inclusion. Petitioners also do not identify any adjacent property owners who failed to attend the Board's July 13, 2018, hearing based on a misunderstanding of the mailed notice. *See Adolph v. Grant Cty. Bd. of Adj't*, 2017 S.D. 5, ¶ 7, 891 N.W.2d 377, 381 (alteration in original) (citations omitted) ("[C]ertiorari 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[.]").[7] Petitioners have additionally not provided proof of any written comments which were submitted

[7] The Court notes that, while chapter 5.22 of the Ordinance provides 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. Writ Ex. A1, at 118-19.

after 12:00 pm on Friday, June 13, 2018, that were excluded from the Board's consideration. *Id.* Therefore, the contents of the Board's mailed and published notice for its July 13, 2018, meeting do not affect the Court's conclusion that the Board pursued in a regular manner the authority conferred upon it by complying with the notice requirements in the Ordinance.

iii. Whether Petitioners' due process rights were violated.

Petitioners additionally claim in each argument, discussed *supra*, that the Board thereby violated their due process rights. Petition at ¶¶ 15(a), 15(l); P. Brief at 3-7. The Board and Crowned Ridge assert that Petitioners' due process arguments fail because Petitioners fail to show that they were prejudiced by the Board. Bd. Brief at 5-9; CR Brief at 7-9.

No person shall be deprived of life, liberty, or property without due process of law. U.S. CONST. amend. XIV; S.D. CONST. art. VI, § 2. "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." *Grant Cty. Concerned Citizens v. Grant Cty. Bd. of Adj't*, 2015 S.D. 54, ¶ 25, 866 N.W.2d 149, 158 (quoting *Osloond v. Farrier*, 2003 S.D. 28, ¶ 16, 659 N.W.2d 20, 24). "[P]roof of prejudice is generally a necessary . . . element of a due process claim[.]" *S.D. Dep't of Game, Fish & Parks v. Troy Twp.*, 2017 S.D. 50, ¶ 46, 900 N.W.2d 840, 857 (alteration in original) (quoting *State v. Stock*, 361 N.W.2d 280, 283 (S.D. 1985)). The notice and hearing requirements of SDCL chapter 11-2 "afford[ ] the affected landowners with the opportunity to formally voice their concerns and present evidence in opposition to opposed measures[.]" *Grant Cty. Concerned Citizens*, 2015 S.D. 54, ¶ 25, 866 N.W.2d at 158 (alterations in original) (quoting *Schafer v. Deuel Cty. Bd. of Comm'rs*, 2006 S.D. 106, ¶ 13, 725 N.W.2d 241, 246). Moreover, "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" to Petitioners. *Adolph v. Grant Cty. Bd. of Adj't*, 2017 S.D. 5, ¶ 7, 891 N.W.2d 377, 381 (citations omitted).

Here, while it is undisputed that Petitioners are property owners adjacent to the wind project and thereby have protected property interests at stake, Petitioners fail to show that they were deprived of their interests without due process of law. 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. Petitioners concede, and the Board has provided evidence establishing, that Petitioners were 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. Petition at ¶ 6; P. Brief at 1; Miller Aff. Ex. B; Writ Ex. E1, at 5-6.

Petitioners likewise do not provide proof that the Board's inclusion of the WES map with the mailed and published notice of its July 16, 2018, hearing resulted in any prejudice or substantial injustice. P. Reply at 3-4. Though Petitioner Amber Christenson contends that her property was not identified on the WES map as being within the project boundary, Petitioners do not refute that Petitioner Christenson both received mailed notice and attended the Board's meeting on Crowned Ridge's CUP application. *Id.* at 3. Petitioners also do not identify that any of their submitted written comments failed to be considered by the Board, nor that Petitioners were thereby prejudiced, due to an alleged misunderstanding of the contents of the Board's notice published on July 6, 2018. *Adolph*, 2017 S.D. 5, ¶ 7, 891 N.W.2d at 381. 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.

b. Zoning officer's staff report and availability for public inspection

Petitioners contend that the Board failed to regularly pursue its authority because it relied on the zoning officer's Staff Report that was prepared in advance of the July 16, 2018, hearing; assumed contested facts or facts not in evidence; and included no exhibits, testimony, or proposed findings of fact made by protesting participants prior to and during the hearing. P. Brief at 7, 11-13. Petitioners also argue the Board failed to regularly pursue its authority because it did not make the Staff Report available for inspection prior to the hearing in violation of open meeting laws and the Ordinance. Petition at ¶ 15(e); P. Brief at 7, 17-19. The Board and Crowned Ridge contend that nothing about the Staff Report suggests that the Board failed to regularly pursue its authority nor violated opening meetings laws, because the contents of the Staff Report satisfied Ordinance requirements and was timely made publicly available at the zoning officer's office and online at the County's website six days prior to the hearing. Bd. Brief at 16-17, 19, 25-27; CR Brief at 10, 16-18, 20-21.

Here, Petitioners do not cite any Ordinance section providing that a zoning officer's staff report, *i.e.*, a recommendation on a CUP application, must consider or include the exhibits, testimony, and proposed findings of fact made by protesting participants. P. Brief at 7.[8] Based on the Court's independent review of the Ordinance and the Board's Bylaws, there is no such requirement. *See* Writ Ex. A1, at 75-76 (listing powers and duties of zoning officer); Writ Ex. A3, at 2 (same). To the contrary, section 4.02.02(12) of the Ordinance provides that a zoning officer's duties include receiving CUP applications, reviewing the application, and "mak[ing] recommendations *regarding said application* to the Board of Adjustment." Writ Ex. A1, at 75-76 (emphasis added). The Ordinance does not require the zoning officer to independently review and provide recommendations for anything other than the CUP application. *Id.* The Staff Report

[8] As the Board and Crowned Ridge note, the Board was also not required pursuant to its Bylaws to consider any of Petitioners' materials first provided at the July 16, 2018, meeting. Writ Ex. A3, at 11; Writ Ex. C, at 1, 12.

provided to the Board in this case shows that the zoning officer duly reviewed Crowned Ridge's CUP application in making his recommendations to the Board, thereby satisfying section 4.02.02(12). Writ Ex. E1, at 13-22.

Moreover, Petitioners do not show that the recommendations in the Staff Report were inherently illegal, thereby rendering it improper for the Board's consideration. While Petitioners contend the accuracy of "flicker results addressed in Section 5.22.03.13 in the Staff Report" because they are not based on empirical data, Petitioners do not provide alternative flicker results or other evidence to support their otherwise bare assertion that the flicker results addressed in the Staff Report were not credible. P. Brief at 11-12.[9] Petitioners also do not refute the explanation of the Board and Crowned Ridge, discussed *supra*, that the zoning officer making the Staff Report merely assesses that the CUP applicant has provided documentation on all pertinent Ordinance requirements—and does not independently fact-find or determine the accuracy of said documentation, which is the responsibility of the Board. Bd. Brief at 17; CR Brief at 16. Indeed, the recommendations within Staff Report reflect that the zoning officer merely determined that Crowned Ridge's application contained documentation which appeared "to meet the requirements of the zoning ordinance in reference [sic] the proposed wind energy system." Writ Ex. E1, at 20. Such administrative responsibilities are clearly within the capability of the zoning officer and do not require education, training, or expertise in analyzing complex engineering data as Petitioners contend. Writ Ex. A1, at 75-76; Writ Ex. A3, at 2.

Finally, Petitioners' argument that the Board failed to make the Staff Report publicly available in violation of open meeting laws and the Ordinance fails, because the Board has presented evidence that the Staff Report was made available at the zoning officer's office and

[9] As Crowned Ridge explains in its brief, estimates based on computer modeling are all that is available when determining the flicker impact of a given WES project. CR Brief at 16-17.

online at the County's website on July 10, 2018. Miller Aff. at 2; Miller Aff. Ex. C. Thus, the Board's public posting of the Staff Report was timely pursuant to its bylaws and state law. *See* Writ Ex. A3, at 11 (requiring Board documents, including staff reports, to be "indexed as a matter of public record"); *see also* SDCL 1-27-1.16 (stating, in relevant part, that when "any printed material relating to an agenda item of the meeting is prepared or distributed by or at the direction of the governing body or any of its employees and the printed material is distributed before the meeting to all members of the governing body, the material shall either be posted on the governing body's website or made available at the official business office of the governing body at least twenty-four hours prior to the meeting or at the time the material is distributed to the governing body, whichever is later"). Petitioners additionally do not present evidence that the timing of the Staff Report's public availability caused them substantial prejudice; again, it is uncontroverted that Petitioners both attended and actively participated in the Board's July 16, 2018, hearing. Petition at ¶ 6; P. Brief at 1; Miller Aff. Ex. B; Writ Ex. E1, at 5-6.[10] 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.

c. Time limitations imposed at the Board's July 16, 2018, hearing

Petitioners contend that the Board failed to regularly pursue its authority by providing Crowned Ridge with more time than Petitioners to present testimony at the July 16, 2018, hearing. Petition at ¶ 15(j); P. Brief at 13. Petitioners also argue that the Board failed to regularly pursue its authority because it permitted Crowned Ridge an opportunity for extended surrebuttal and

[10] Even if it the Board somehow violated open meeting laws in its publication of notice for its July 16, 2018, hearing, the appropriate remedy requires Petitioners to contact the local State's Attorneys' Office and file a criminal complaint. It is then up to the State's Attorney to investigate and prosecute the offenders if appropriate. *See* SDCL 1-27-1.16 ("A violation of this section is a Class 2 misdemeanor."). This Court is unaware of any authority that would allow it in this case to reverse or remand the Board's decision for an alleged violation of the open meetings law.

multiple appearances by its witnesses, but did not provide Petitioners with equal opportunity to be heard. P. Brief at 13. The Board and Crowned Ridge assert that the Board was not required to provide equivalent time to Petitioners, and that any alleged time limitations were proper. Bd. Brief at 18-19; CR Brief at 18-19.[11]

"Due process requires adequate notice and an opportunity for meaningful participation." *Cty. Concerned Citizens v. Grant Cty. Bd. of Adj't*, 2015 S.D. 54, ¶ 31, 866 N.W.2d 149, 160 (quoting *Osloond v. Farrier*, 2003 S.D. 28, ¶ 19 n.4, 659 N.W.2d at 25 n.4). Petitioners' argument, however, is similar to that which was rejected by the South Dakota Supreme Court in *Grant County Concerned Citizens*—and like the petitioners in that case, Petitioners here do not offer authority leading this Court to conclude that under South Dakota law, "meaningful participation" is defined as "equal time." *Id.* Petitioners also do not contend that, due to the time limitation, they were unable to meaningfully participate in the July 16, 2018, hearing; as previously stated, Petitioners actively participated in the meeting before the Board. Petition at ¶ 6; P. Brief at 1; Miller Aff. Ex. B; Writ Ex. E1, at 5-6. Petitioners additionally do not argue that they were unable to present all of their information before the Board due to the time limitation. *Grant Cty. Concerned Citizens*, 2015 S.D. 54, ¶ 31, 866 N.W.2d at 160-61. Moreover, "[t]he chair of the public body shall reserve at every official meeting by the public body a period for public comment, *limited at the chair's discretion*, but not so limited as to provide for no public comment." SDCL 1-25-1 (emphasis

[11] Petitioners' related argument that the Board did not follow its Bylaws by permitting Crowned Ridge a surrebutal time exceeding fifteen minutes is ill-founded. The Bylaws clearly state that, while a CUP applicant's time to initially present its request at the Board's hearing is not to exceed fifteen minutes, at the close of the hearing the Board will call back the applicant to answer questions asked by the Board and staff. Writ Ex. A3, at 8, 10. No time limitation is imposed for this later query of the applicant by the Board. *Id.*; Writ Ex. E1, at 7. Thus, the Court's analysis is limited to whether the Board's time limitation on Petitioners' ability to testify at the hearing violated Petitioners' due process rights.

added).[12] Therefore, 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.

d. Board's satisfaction of Ordinance chapter 5.22 requirements in making its Findings of Fact

Petitioners make several arguments that the Board failed to regularly pursue its authority because it failed to satisfy the requirements of chapter 5.22 of the Ordinance in making its findings of fact regarding Crowned Ridge's CUP application. Petition at ¶¶ 15(e), (f), (g), (i); P. Brief at 7-11. The Board and Crowned Ridge argue that the Board considered all issues and made all findings required of it under chapter 5.22, and that the majority of Petitioners' contentions require examination beyond the Court's permitted scope of review under the writ of certiorari standard. Bd. Brief at 11-16; CR Brief at 10-15.

i. Preparation of findings of fact

Petitioners first argue that the Board failed to regularly pursue its authority because it failed to draft its findings of fact prior to the July 16, 2018, hearing so as to provide them to adjacent landowners opposing Crowned Ridge's CUP application at said hearing. P. Brief at 7. Petitioners, however, do not cite any Ordinance section bearing such a requirement; the Court's independent examination of the Ordinance confirms no such requirement exists. Writ Ex. A1. Therefore, 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.

ii. Finding of Fact 1

[12] The Court notes that pending legislation for this statutory section would not change its effect. *See* S.B. 91, 94th Leg. Assemb., Reg. Sess. (S.D. 2019) (emphasis added) ("The public body shall reserve at every regularly scheduled official meeting a period for public comment, *limited at the public body's discretion*, but not so limited as to provide for no public comment. At a minimum, public comment shall be allowed at regularly scheduled official meetings which are designated as regular meetings by statute, rule, or ordinance.").

Petitioners also assert the Board failed to regularly pursue its authority in making Findings of Fact 1, 6, 8, 9, 10, 13, 14, and 16. P. Brief at 7-13. The Court initially notes that "[b]ecause '[c]ertiorari cannot be used to examine evidence for the purpose of determining the correctness of a finding[,]' [the Court] do[es] not decide whether [it] would have reached the same conclusion as the Board." *Concerned Citizens v. Grant Cty. Bd. of Adj't*, 2015 S.D. 54, ¶ 17, 866 N.W.2d 149, 156 (quoting *Elliott v. Bd. of Cty. Comm'rs*, 2005 S.D. 92, ¶ 14, 703 N.W.2d 361, 367). Thus, the Court attempts in the following sections to analyze Petitioners' arguments to the extent that is possible under certiorari review.

Petitioners' contention with Finding of Fact 1, which adopts the standard findings of fact for CUPs in the articles of the Bylaws, is that the Board failed to provide adequate notice to adjacent landowners. *Id.* at 7. As discussed *supra*, Petitioners' contention is without merit. Therefore, the Board pursued in a regular manner the authority conferred upon it by finding that notice was adequately given.

iii. Finding of Fact 6

Petitioners argue that the Board did not regularly pursue its authority in making Finding of Fact 6, regarding whether the Board was able to adequately review how Crowned Ridge would satisfy the requirements of chapter 5.22 based on its application and on testimony given at the July 16, 2018, hearing, because the Board accepted Crowned Ridge's expert report pertaining to noise and flicker analysis. Petition at ¶ 15(b), (f), (g), (i); P. Brief at 7-8, 10-13.[13]

[13] Crowned Ridge's expert report concluded that the noise and flicker impact of the WES project would comply with the Ordinance. Writ Ex. B, at 140. The Court notes that this report was included as part of Crowned Ridge's CUP application, was considered by the Board at the public hearing, and was responded to by Petitioners at said hearing. *Id.*; Writ Ex. E1, at 8-9, 11.
Petitioners also allege that the Board failed to regularly pursue its authority in making Finding of Fact 6, because the Board deferred the issue of decommission. P. Brief at 8. Here, Petitioners offer this argument as a bare assertion without supportive evidence; thus, the Court will only analyze whether the Board failed to regularly pursue its authority by accepting Crowned Ridge's expert report pertaining to noise and flicker analysis. *Id.* Petitioners' assertion, however, is likely without merit, because the Ordinance anticipates deferral of decommission issues until

The Board is required to consider the noise and flicker impact of a WES project before granting a CUP. Writ Ex. A1, at 117. Here, while Petitioners contend that the Board failed to verify the credibility of the expert report and testimony provided by Crowned Ridge, Petitioners do not provide evidence that the noise and flicker estimates in the report were unreliable, nor that those who provided the estimates lacked appropriate education, training, and expertise. P. Brief at 17.[14] Moreover, 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, because the Board may review the evidence presented to it and make credibility determinations. *See Willard v. Civil Serv. Bd. of Sioux Falls*, 63 N.W.2d 801, 801 (S.D. 1954) (quoting *State* ex rel. *Grey v. Cir. Ct. of Minnehaha Cty.*, 235 N.W. 509, 511 (S.D. 1931)) ("[C]ertiorari cannot be used to examine evidence for the purpose of determining the correctness of a finding, at least in the absence of fraud, or willful and arbitrary disregard of undisputed and indisputable proof wherein credibility of witnesses is not involved."). Therefore, 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.

iv. Finding of Fact 8

Regarding Finding of Fact 8, Petitioners argue the Board failed to regularly pursue its authority by finding that Crowned Ridge submitted all materials required by chapter 5.22 of the Ordinance, because the maps included in Crowned Ridge's CUP application were allegedly inaccurate. Petition at ¶ 15(e); P. Brief at 8, 13-17; P. Reply at 4-5. Petitioners specifically contend

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after the Board issues a CUP to the applicant and the applicant completes construction of the WES project. Writ Ex. A1, at 117. Moreover, the hearing minutes reflect the Board discussed the issue of decommissioning with Crowned Ridge. Writ Ex. E1, at 4.

[14] Likewise, Petitioners fail to evidentiarily support their arguments concerning the use of certain software programs, *i.e.*, "windPRO," and their reliability. P. Brief at 8, 10-13. As Crowned Ridge explains in its brief, estimates based on computer modeling are all that is available when determining the flicker impact of a given WES project. CR Brief at 16-17.

that the map included in Crowned Ridge's application differed from that which was mailed and published in the Board's notice of hearing, and that the map within Crowned Ridge's application did not identify all WES tower locations and "shadow receptors," *i.e.*, occupied residential structures, businesses, churches, and other governmentally owned or maintained buildings within one mile of the project area. P. Brief at 8, 13-17; P. Reply at 4-5; Writ Ex. A1, at 118.

The Ordinance requires a CUP applicant for a WES project to include a map of "any occupied residential structures, businesses, churches, and buildings owned and/or maintained by a governmental entity within one (1) mile of the project area." Writ Ex. A1, at 118. Here, 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. Writ Ex. E1, at 7-12.[15] Therefore, 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.

v. Finding of Fact 9

Petitioners assert that the Board failed to regularly pursue its authority by finding the haul road requirement of the Ordinance satisfied, because Crowned Ridge did not submit any terms or conditions of haul road agreements to the Board for its consideration. P. Brief at 8-9. The Ordinance provides that "[p]rior to commencement of construction, the permittees shall identify all state, county or township 'haul roads' that will be used for the WES project and shall notify the

[15] While Petitioners dedicate much of their argument to explaining their belief that the Board's finding was erroneous due to the evidence before it, such a probing into the accuracy of the Board's factual findings is outside the scope of this Court's certiorari review. *See Concerned Citizens v. Grant Cty. Bd. of Adj't*, 2015 S.D. 54, ¶ 17, 866 N.W.2d 149, 156 (quoting *Elliott v. Bd. of Cty. Comm'rs*, 2005 S.D. 92, ¶ 14, 703 N.W.2d 361, 367) ("Because '[c]ertiorari cannot be used to examine evidence for the purpose of determining the correctness of a finding[,]' [the Court] do[es] not decide whether [it] would have reached the same conclusion as the Board."). The Court notes that, regarding Petitioners' argument, Crowned Ridge's CUP application and attached maps clearly show the intended locations of WES towers and receptors for the WES project. Writ Ex. B.

state, county or township governing body having jurisdiction over the roads to determine if the haul roads identified are acceptable." Writ Ex. A1, at 113.

Here, Petitioners fail to cite any Ordinance provision requiring the terms and conditions of haul road agreements to be finalized and presented to the Board prior to its issuance of a CUP; to the contrary, the Ordinance merely requires submission of such finalized agreements sixty days prior to construction. *Id.* at 119. Crowned Ridge also submitted a letter of assurance for obtaining haul road agreements to the Board, and Crowned Ridge are now 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. *See* Writ Ex. A1, at 3-4, 84 (providing that Board may deny conditional uses when not in harmony with the purpose and intent of the Ordinance and penalize for any noncompliance with Ordinance requirements); Writ Ex. F, at 3-4 (imposing conditions and safeguards on Crowned Ridge's issued CUP). Moreover, the minutes of the hearing reflect that the Board addressed issues concerning certain terms and conditions of the haul road agreements. *See, e.g.*, Writ Ex. E1, at 8-9 (indicating Crowned Ridge will need to have haul road agreements in place, will repair any damage occurring to roads that are in direct relation to WES project construction or transportation in the area, and will be responsible for snow removal on tower access roads that are not generally plowed by the road authority). Therefore, 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.

vi. Finding of Fact 10

Petitioners allege that the Board failed to regularly pursue its authority 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. P. Brief at 9. While Petitioners argue that

this finding is "a legal conclusion which is not supported by the record," this argument is outside the scope of the Court's certiorari review. *See Willard v. Civil Serv. Bd. of Sioux Falls*, 63 N.W.2d 801, 801 (S.D. 1954) (quoting *State* ex rel. *Grey v. Cir. Ct. of Minnehaha Cty.*, 235 N.W. 509, 511 (S.D. 1931)) ("[C]ertiorari cannot be used to examine evidence for the purpose of determining the correctness of a finding, at least in the absence of fraud, or willful and arbitrary disregard of undisputed and indisputable proof wherein credibility of witnesses is not involved."). As discussed *supra*, 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. *Id.* Therefore, 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.

vii. Findings of Fact 13, 14, and 16

Petitioners contend that the Board failed to regularly pursue its authority by finding that Crowned Ridge's satisfaction of all conditions of applicable Ordinance sections for the WES project satisfied the purpose of the Ordinance, that the Board was empowered to grant Crowned Ridge's CUP application, and that prescription of conditions and safeguards in the form of an as-yet-to-be executed letter of assurance was sufficient to ensure Crowned Ridge's compliance with the Ordinance—all because the evidence allegedly establishes that the WES project will not promote the public health, safety, and welfare. P. Brief at 9.

Section 1.01.03 of the Ordinance states its purpose, in part, is "to protect and to promote the public health, safety, peace, comfort, convenience, prosperity and general welfare." Writ Ex. A1, at 2. Here, 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. Writ Ex.

E1, at 7-12; Writ Ex. F, at 2-4. While Petitioners express disagreement with the Board's determination based on their differing interpretation of the record, as stated *supra*, the Court on certiorari review may not examine evidence to determine the correctness of the Board's findings. *Concerned Citizens v. Grant Cty. Bd. of Adj't*, 2015 S.D. 54, ¶ 17, 866 N.W.2d 149, 156 (quoting *Elliott v. Bd. of Cty. Comm'rs*, 2005 S.D. 92, ¶ 14, 703 N.W.2d 361, 367).[16] Therefore, 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.

e. Consideration of density and overcrowding of land with structures

Petitioners next argue that the Board failed to regularly pursue its authority by failing to consider overcrowding of land with structures in violation of the Ordinance. Petition at ¶ 15(j); P. Brief at 21-22. The Board and Crowned Ridge contend that the Board specifically considered this issue and complied with the Ordinance. Bd. Brief at 29-30; CR Brief at 23.

Here, one of the objectives of the County's adoption of the Ordinance is "[t]o prevent excessive population densities and overcrowding of the land with structures." Writ Ex. A1, at 2. Another objective is "to protect and to promote the public health, safety, peace, comfort, convenience, prosperity and general welfare." *Id.* Contrary to Petitioners' assertions, these objectives are clearly not elements or factors the Board must expressly find in making every and any CUP decision for a WES project. *Id.* Moreover, the record reflects that the Board considered information about tower placement and determined that such placement complied with the Ordinance. Bd. Brief at 29-30; CR Brief at 3, 23; Writ Ex. A1, at 114-16; Writ Ex. F, at 1.[17]

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[16] Moreover, as stated *supra*, Crowned Ridge are now 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. *See* Writ Ex. A1, at 3-4, 84 (providing that Board may deny conditional uses when not in harmony with the purpose and intent of the Ordinance and penalize for any noncompliance with Ordinance requirements); Writ Ex. F, at 3-4 (imposing conditions and safeguards on Crowned Ridge's issued CUP).

[17] As discussed *supra*, Crowned Ridge are now 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. *See* Writ Ex. A1, at 3-4, 84

Therefore, 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.

f. Board member bias and conflicts of interest

Petitioners allege that the Board failed to regularly pursue its authority because it refused to excuse Board member Rodney Klatt ("Klatt") from the July 16, 2018, hearing when it was alleged that Klatt had a bias necessitating disqualification, specifically that his sister had received a wind easement. Petition at ¶ 15(h); P. Brief at 19-20. The Board and Crowned Ridge contend that Klatt's sister having a wind easement is not a disqualifying conflict of interest for Klatt. Bd. Brief at 27-29; CR Brief at 21-22.

"Decision makers 'are presumed to be objective and capable of judging controversies fairly on the basis of their own circumstances.'" *In re Drainage Permit 11-81*, 2019 S.D. 3, ¶ 38, 922 N.W.2d 263, 274 (quoting *Armstrong v. Turner Cty. Bd. of Adj't*, 2009 S.D. 81, ¶ 23, 772 N.W.2d 643, 651 (quoting *Nw. Bell Tel. Co., Inc. v. Stofferahn*, 461 N.W.2d 129, 133 (S.D. 1990)). Starting with this presumption, the burden was upon Petitioners to present some evidence of "actual bias," "unacceptable risk of actual bias or prejudgment," or some other conflict of interest by Klatt. *Id.* (quoting *Armstrong*, 2009 S.D. 81, ¶ 23, 772 N.W.2d at 651). A risk of bias is unacceptable "[i]f the circumstances show a likely capacity to tempt the official to depart from his duty[.]" *In re Drainage Permit 11-81*, 2019 S.D. 3, ¶ 38, 922 N.W.2d at 274 (quoting *Adolph v. Grant Cty. Bd. of Adj't*, 2017 S.D. 5, ¶ 30, 891 N.W.2d 377, 387 (quoting *In re Conditional Use Permit # 13-08*, 2014 S.D. 75, ¶ 19, 855 N.W.2d 836, 842)). A board member's conflicting interest is sufficient to

(providing that Board may deny conditional uses when not in harmony with the purpose and intent of the Ordinance and penalize for any noncompliance with Ordinance requirements); Writ Ex. F, at 3-4 (imposing conditions and safeguards on Crowned Ridge's issued CUP).

raise an unacceptable risk of bias. *Id.* (quoting *In re Conditional Use Permit No. 13-08*, 2014 S.D. 75, ¶ 21, 855 N.W.2d at 843).

SDCL 6-1-17 further provides:

> No county, municipal, or school official may participate in discussing or vote on any issue in which the official has a conflict of interest. Each official shall decide if any potential conflict of interest requires such official to be disqualified from participating in discussion or voting. However, no such official may participate in discussing or vote on an issue if the following circumstances apply:
>
> (1) The official has a direct pecuniary interest in the matter before the governing body; or
> (2) At least two-thirds of the governing body votes that an official has an identifiable conflict of interest that should prohibit such official from voting on a specific matter.
>
> 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.

SDCL 6-1-17.

Here, Petitioners do not show that Klatt harbored any improperly biased motive or purpose in deciding upon Crowned Ridge's CUP application; to the contrary, Klatt himself informed the Board of his sister having a wind easement at the July 16, 2018, hearing. P. Brief at 20; Writ Ex. E2, at 00:03:45-00:05:50. Moreover, Petitioners do not support their assertions with evidence that Klatt stood to gain directly and financially by approving Crowned Ridge's CUP application. SDCL 6-1-17.

Even assuming that Klatt did have a conflict of interest, the appropriate remedy would be to disqualify his vote—not to reverse the Board's decision as Petitioners contend. *Id.* If Klatt's vote was 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. *See* Writ Ex. A1, at 84 ("The concurring vote of two-thirds (2/3) of the present and voting members of the Board of Adjustment

is required to pass any application for a Conditional Use.").[18] Here, the Board's Findings of Fact show that the Board unanimously voted in favor of granting Crowned Ridge's CUP application; thus, disqualifying Klatt's vote still satisfies the Ordinance requirement of a two-thirds vote to grant a CUP. Writ Ex. F, at 4. Therefore, 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.

CONCLUSION

For the aforementioned reasons, Petitioners' Petition to Appeal the WES CUP Granted July 16, 2018, and Filed July 18, 2018, is DENIED. Counsel for the Respondents shall prepare Findings of Fact, Conclusions of Law, (unless waived), and an Order consistent with this written opinion.

Robert L. Spears

Robert L. Spears'

Circuit Court Judge.

[18] This Ordinance section is in accords with SDCL 11-2-59, which states in relevant part: "The concurring vote of two-thirds of the members of the board of adjustment is necessary . . . to decide in favor of the applicant on any matter upon which it is required to pass under any such ordinance . . . ." SDCL 11-2-59.