

STATE OF SOUTH DAKOTA)
: SS.

IN CIRCUIT COURT

COUNTY OF CLARK)

THIRD JUDICIAL CIRCUIT

CROCKER WIND FARM, LLC,
Petitioner,

12 CIV 17-17

-vs-

THE CLARK COUNTY COMMISSION
AND THE CLARK COUNTY
COMMISSION ACTING AS THE
CLARK COUNTY BOARD OF
ADJUSTMENT,

**RESPONDENT'S RESPONSE TO
PETITIONER'S STATEMENT OF
UNDISPUTED MATERIAL FACTS**

Respondent.

Pursuant to SDCL 15-6-56(c)(2), the Respondent, Clark County Board of Adjustment ("Board"), responds to Petitioner's Statement of Undisputed Material Facts as follows:

1. Undisputed.
2. Undisputed.
3. Undisputed.
4. Undisputed.
5. The Board objects to this paragraph, as it sets forth a legal conclusion rather than a statement of undisputed fact. The zoning ordinance speaks for itself.
6. Undisputed.
7. Undisputed.
8. Undisputed.
9. Undisputed.

10. Undisputed.
11. Undisputed.
12. Undisputed.
13. The Board disputes this statement to the extent the phrase "prescribed distances" is meant to suggest that the Board is confined to the precise distances listed in Section 4.21.03. The language of Section 4.21.03 is clear that the distances are intended as minimum spacing requirements.
14. Undisputed, but immaterial.
15. Undisputed, but immaterial.
16. Undisputed, but immaterial.
17. Undisputed, but immaterial.
18. The Board does not dispute that Section 4.21.03 contains *some* of the information that is required to obtain a conditional use permit. However, other considerations appear throughout the zoning ordinance, and the Board's decision-making on conditional use permits is not confined merely to the WES sections. For instance, SDCL 11-2-17.3 requires the Board to also consider the purpose of the Ordinance in evaluating proposed conditional uses. Under CCZO §3.04.01, the Board may utilize appropriate conditions and safeguards in granting a conditional use.
19. The Board objects to this paragraph, as it sets forth a legal conclusion rather than a statement of undisputed fact.

The Board's response to SUMF ¶18 is incorporated by this reference.

20. It is undisputed that Clark County has chosen to make wind farms a permitted use with conditions. The ordinance states the criteria for granting such conditional uses, and also provides that, in granting any conditional use, the Board may prescribe appropriate conditions and safeguards. CCZO §3.04.01. The Board's response to SUMF ¶18 is incorporated by this reference.
21. The Board disputes this paragraph. As authorized under the ordinance, the Board prescribed additional conditions and safeguards, and it does not appear that Crocker's application, as drafted, meets those requirements. (Return, Ex. B.)
22. The Board disputes this paragraph, because it improperly characterizes the Board's findings. The Board's actual findings read as follows:
 13. That based upon the size and scope of the project, related footprint minimization, and testimony from landowners impacted by a current wind farm located in the county and sited with setbacks of 1,000 feet from existing off-site residences, the proper setback for this WES shall be 3/4 of mile from existing off-site, non-participating residences, measured from tire wall line of the neighboring principal building to the base of the WES tower.
 14. That based upon testimony from those concerned with the peace and tranquility of local cemeteries and the remains of loved ones, the proper setback from cemeteries shall be one mile.

uniformly required of similar uses under similar circumstances throughout the county." (Return, Ex. A, pg. 111.)

29. Undisputed, but incomplete. This finding was made along with the Board's findings recited in the response to SUMF ¶ 22. The Board prescribed conditions to ensure compatibility with adjacent properties.
30. It is undisputed that the zoning ordinance does not provide specific criteria for increasing setbacks for wind turbines; however, the language of Section 4.21.03 is clear that the distances are intended as minimum spacing requirements, and in granting any conditional use, the Board may prescribe appropriate conditions and safeguards. The Board's response to SUMF ¶18 is incorporated by this reference.
31. Undisputed.
32. Undisputed.
33. Undisputed.
34. Undisputed.
35. Undisputed.
36. Undisputed, but immaterial. The language of Section 4.21.03 is clear that the distances are intended as minimum spacing requirements, and in granting any conditional use, the Board may prescribe appropriate conditions and safeguards.
37. Undisputed.

38. The Board objects to this paragraph. The Board's substantive decision-making on the proper conditions for the conditional use permit should not be revisited in this appeal, or as part of petitioner's motion. "Certiorari cannot be used to examine evidence for the purpose of determining the correctness of a finding" Hines v. Board of Adjustment of City of Miller, 2004 S.D. 13, ¶ 10, 675 N.W.2d 231, 234; see also Grant Cnty. Concerned Citizens v. Grant Cnty. Bd. of Adjustment, 2015 S.D. 54, ¶ 21, 866 N.W.2d 149, 157 (factual determinations are properly resolved by the Board). The Board also disputes this paragraph, because it attempts to narrow the Board's decision-making to capitulating to the desires of the neighbors rather than considering the CCZO. The neighbors' testimony played a part in the Board's decision-making, but the Board is entitled to give that testimony such weight as it desires. Grant Cnty. Concerned Citizens, at ¶ 38, 866 N.W.2d at 162-63. The Board's factual finding discloses other concerns related to the size and scope of the project and footprint minimization:

13. That based upon the size and scope of the project, related footprint minimization, and testimony from landowners impacted by a current wind farm located in the county and sited with setbacks of 1,000 feet from existing off-site residences, the proper setback for this WES shall be 3/4 of mile from existing off-site, non-participating residences,

measured from tire wall line of the neighboring principal building to the base of the WES tower.

(Ex. J.)

Dated this 3rd day of August, 2017.

RICHARDSON, WYLY, WISE, SAUCK
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By /s/ Zachary W. Peterson
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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for respondent, hereby certifies that on the 3rd day of August, 2017, a true and correct copy of **RESPONDENT'S RESPONSE TO PETITIONER'S STATEMENT OF UNDISPUTED MATERIAL FACTS** was served electronically through the Odyssey file and serve system on:

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/s/ Zachary W. Peterson