

as provided for in the zoning ordinance to three-fourths of one mile, or 3,960 feet. Because the County had no authority to impose these setbacks, the Court should modify the decision by eliminating the offending conditions or remand to the Board with instruction to make them consistent with the zoning ordinance. SDCL 11-2-65. This motion is supported by a Statement of Undisputed Material Facts and the Affidavit of Brian Donahoe, which set forth the essential provisions of the zoning ordinance at issue and the Findings produced by Clark County in its return to the Writ of Certiorari issued by the Court.

UNDISPUTED MATERIAL FACTS

A Statement of Undisputed Material Facts (SUMF) is filed contemporaneously with the Motion, and will be cited as appropriate. The testimony of neighbors, which is the only basis for the decision to impose a new setback or increase those in the CCZO, is set forth in audio recordings of the public meetings. SUMF ¶ 37. Additional facts will be added where pertinent in subsequent argument, but the critical provisions of the current Clark County Zoning Ordinance (“CCZO”) provide the following:

CHAPTER 4.21 WIND ENERGY SYSTEM (WES) REQUIREMENTS

Section 4.21.01 Applicability.

1. The requirements of these regulations shall apply to all WES facilities except private facilities with a single tower height of less than seventy-five (75) feet and used primarily for on-site consumption of power.

* * *

Section 4.21.03 General Provisions.

* * *

2. Setbacks

Wind turbines shall meet the following minimum spacing requirements.

- a. Distance from existing off-site residences, business, churches, and buildings owned and/or maintained by a governmental entity shall be at least one thousand (1,000) feet. Distance from on-site or lessor's residence shall be at least five hundred (500) feet. Distance to be measured from the wall line of the neighboring principal building to the base of the WES tower.
- b. Distance from centerline of public roads shall be be [sic] at least five hundred (500) feet or one hundred ten percent (110%) the height of the wind turbines, measured from the ground surface to the tip of the blade when in a fully vertical position.
- c. Distance from any property line shall be at least five hundred (500) feet or one hundred ten percent (110%) the height of the wind turbine, whichever distance is greater, measured from the ground surface to the tip of the blade when in a fully vertical position unless wind easement has been obtained from adjoining property owner.
 - i. Exception: The Board of Adjustment may allow setback/separation distances to be less than the established distances identified above, if the adjoining landowners agree to a lesser setback/separation distance. If approved, such agreement is to be recorded and filed with the Clark County Administrative Official.

* * *

10. Height from Ground Surface. The minimum height of blade tips, measured from ground surface when a blade is in fully vertical position, shall be twenty-five (25) feet.

11. Towers.

- a. Color and Finish. The finish of the exterior surface shall be non-reflective and non-glass.
- b. All towers shall be singular tubular design.

13. Noise. Noise level shall not exceed 50 dBA, average A-weighted Sound pressure including constructive interference effects at the perimeter of the principal and accessory structures of existing off-site residences, businesses, and buildings owned and/or maintained by a governmental entity.

14. Permit Expiration. The permit shall become void if no substantial construction has been completed within three (3) years of issuance.

15. Required Information for Permit.

- a. Boundaries of the site proposed for WES and associated facilities on United States Geological Survey Map or other map as appropriate.

- b. Map of easements for WES.
- c. Affidavit attesting that necessary easement agreements with landowners have been obtained.
- d. Map of occupied residential structures, businesses and buildings owned and/or maintained by a governmental entity.
- e. Preliminary map of sites for WES, access roads and collector and feeder lines. Final map of sites for WES, access roads and utility lines to be submitted sixty (60) days prior to construction.
- f. Proof of right-of-way easement for access to transmission lines and/or utility interconnection.
- g. Location of other WES in general area.
- h. Project schedule.
- i. Mitigation measures.
- j. Project-specific environmental concerns (e.g. native habitat, rare species, and migratory routes). This information shall be obtained by consulting with state and federal wildlife agencies. Evidence of such consultation shall be included in the application.
- k. Final haul road agreements to be submitted sixty (60) days prior to construction

* * *

Affidavit of Brian Donahoe, Ex. 1; Return to Writ of Certiorari, Ex. 1.

SDCL Ch. 11-2 sets forth the authority for a county to impose zoning restrictions on individual property owners. SDCL 11-2-17.3 requires that the zoning ordinance set forth the criteria for determining any conditional use. Clark County has chosen to make wind farms a permitted use with conditions under SDCL 11-2-17.3 and further has stated in its ordinance that it will set forth the criteria for any conditional use.

Crocker reviewed the conditional use permit requirements and met those requirements in its application and subsequent submissions to the Board. SUMF ¶ 8; Return to Writ of Certiorari, Ex. B; Aff. of Donahoe, Ex. 2. At the public hearing on the conditional use, the Board

was persuaded by adverse comments and the demands of neighbors seeking greater separation distances from the wind turbines and cemeteries, residences, churches and buildings owned by the government. SUMF ¶¶ 22; 30-34; and 38. There is no provision of the zoning ordinance that provides for a setback from cemeteries. *Id.* at 23; Return to Writ of Certiorari, Ex. A. Further, the setback for residences, churches and government buildings requires “at least” 1,000 feet of separation, measured from the turbine base to the closest exterior building wall, and there is no provision setting forth any criteria for modifying those setbacks, or to judge the amount of any increase if deemed necessary. *Id.* at ¶¶ 11-16; 23-34.

SUMMARY JUDGMENT STANDARD

Summary judgment is authorized when the movant is entitled to judgment as a matter of law because there are no genuine issues of material fact. *See* SDCL § 15-6-56(c); *Trapp v. Madera Pacific, Inc.*, 390 N.W.2d 558, 564 (S.D. 1986) (citations omitted). “Generally, summary judgment should never be viewed as ‘a disfavored procedural shortcut, but rather as an integral part of [our rules] as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action.’” *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265, 276 (1986) (citations omitted).

The movant bears the initial burden of demonstrating the absence of a genuine issue of material fact and an entitlement to judgment as a matter of law. *See Waddell v. Dewey County Bank*, 471 N.W.2d 591, 593 (S.D. 1991); *Wilson v. Great Northern Ry. Co.*, 83 S.D. 207, 212, 157 N.W.2d 19, 21 (1968). However, “[t]he party opposing a motion for summary judgment must be diligent in resisting the motion, and mere general allegations and denials which do not set forth specific facts will not prevent issuance of a judgment.” *Breen v. Dakota Gear & Joint*

Co., Inc., 433 N.W.2d 221, 223 (S.D. 1988). Rather, the non-movant "must set forth specific facts showing that there is a genuine issue for trial." SDCL § 15-6-56.

It is equally true that the non-movant cannot simply create any type of a factual dispute in order to avoid summary judgment. *Webb v. Lawrence County*, 144 F.3d 1131, 1135 (8th Cir. 1998). The dispute must be genuine and concern those facts that are material and could actually affect the outcome of the lawsuit. *Id.* This motion is based on an interpretation of law, not facts.

Writ of Certiorari Standard of Review

SDCL Chapter 11-2 constrains review of the Board's decision to grant the CUP to the writ of certiorari standard. SDCL 11-2-61. Namely, the statutes limit this review to facts that demonstrate whether the Board acted unlawfully, in whole or in part. In other words, did the Board "pursue in a regular manner the authority conferred upon it[?]" *Jensen v. Turner County Board of Adjustment*, 2007 S.D. 28, ¶ 4, 730 N.W.2d 411, 413. The Board's actions will be sustained unless it did some act forbidden by law or neglected to do some act required by law. *Tibbs v. Moody County Board of Commissioners*, 2014 S.D. 44, ¶28 (citing *Armstrong v. Turner County Bd. of Adjustment*, 2009 S.D. 81, ¶12, 772 N.W.2d 643, 648). The Court is not charged with evaluating the correctness of the Board's decision; it only reviews whether the Board regularly pursued its authority. *Armstrong* at ¶ 12, 772 N.W.2d at 648 (quoting *Duffy v. Circuit Court, Seventh Judicial Circuit*, 2004 S.D. 19, ¶ 33, 676 N.W.2d 126, 138). ("Additionally, we have said '[w]ith a writ of certiorari, we do not review whether the [board's][] decision is right or wrong. We are limited to determining whether the [board][] regularly pursued its authority.'"). The Board acts unlawfully if the Board "acted fraudulently or in arbitrary or willful disregard of undisputed and indisputable proof." *Lamar Outdoor Advertising of S.D., inc. v. City of Rapid*

City, 2007 S.D. 35, 731 N.W.2d 199. Acting in excess of its authority is clearly unlawful. *See e.g. Save Centennial Valley Association Inc. v. Schultz*, 284 N.W.2d 452, 457 (S.D.1979).

The Court interprets the CCZO and statutes as a matter of law.

The question of the authority of the Board to impose greater conditions or requirements is a matter of interpreting statutes and the county zoning ordinance. “The purpose of statutory construction is to discover the true intention of the law which is to be ascertained primarily from the language expressed in the statute.” *State v. Jensen*, 2003 SD 55, ¶ 15, 662 N.W.2d 643, 648. When a term is not defined, it must be construed according to its accepted usage, and a strained, unpractical or absurd result is to be avoided. *Nelson v. South Dakota State Bd. of Dentistry*, 464 N.W.2d 621, 624 (S.D.1991). The intent of the zoning regulations must be ascertained and considered when construing an ordinance. *See Save Centennial Valley Ass'n, Inc.*, 284 N.W.2d at 457. “The purpose of the zoning districts is to be gathered from the whole act, and where a word or term is susceptible to two constructions, a meaning must be ascribed which carries out the purpose of the act.” *Id.* (citing *Western Surety Co. v. Mydland*, 85 S.D. 172, 179 N.W.2d 3, (1970)). Additionally, exceptions to general provisions of an ordinance must be strictly, but reasonably construed. *See Olsen v. City of Spearfish*, 288 N.W.2d 497, 500 (S.D.1980). Exceptions extend only as far as their language fairly allows, with all doubts being resolved in favor of the general provision. *Id.* (citing *Lien v. Rowe*, 77 S.D. 422, 426, 92 N.W.2d 922, 924 (1958)). A court should construe multiple statutes covering the same subject matter in such a way as to give effect to all of the statutes if possible. *Kinzler v. Nacey*, 296 N.W.2d 725, 728 (S.D.1980) (citations omitted). In addition, the rules of statutory construction dictate that “statutes of specific application take precedence over statutes of general application.”

Cooperative Agronomy Services v. South Dakota Department of Revenue, 2003 SD 104, ¶ 19, 668 N.W.2d 718, 723.

In this case, the Board has told Crocker that it has authority to increase the setbacks set forth in the WES conditional use section of the CCZO because general provisions governing the zoning ordinances make those provisions only minimums, implying authority for the Board to impose more conditions or restrictions necessary to carry out the intentions of the zoning plan and ordinances overall. Pointing to the language in the WES setbacks, the Board asserts that the term “at least 1,000 feet” is a condition that can be adjusted upward to make the setback meet the goals of the comprehensive planning and zoning ordinance. That interpretation is contrary to the plain language of the ordinance as a whole because the general provisions describing the provisions as “minimums” conflict with a specific section on conditional uses requiring clear criteria for determining each conditional use as to general compatibility with adjacent properties. Because the setbacks at issue go directly to the compatibility with adjacent properties, there can be no doubt that the specific provision is to govern over the general provision as explained below. That specific provision incorporates that statutory requirement of SDCL 11-2-17.3, which likewise requires that requirements or criteria for conditional uses be set forth in the zoning ordinance. Taken together, the zoning ordinance must be interpreted to intend that the term “at least 1,000 feet” in a setback means that the setback condition cannot be increased by the Board because the criteria at issue have been decided as a matter of public policy by the legislative function of zoning enactment or amendment. That is a power the Board cannot exercise when determining whether to grant a conditional use permit. Further, even if there was some authority to increase the setbacks, there is no evidence in this record to support an increase. The lack of

factual support to address some specific criteria in the zoning ordinance renders the decision an arbitrary and unlawful deference to the public opposition as explained below.

ARGUMENT AND AUTHORITIES

Clark County is only delegated those authorities granted by statute from the Legislature or the South Dakota Constitution. *Schafer v. Deuel Cty. Bd. of Comm'rs*, 2006 S.D. 106, ¶ 15, 725 N.W.2d 241, 248; Article III, § 1 of the South Dakota Constitution. Although granted the authority to enact zoning ordinances, the ordinances must comply with requirements of the Legislature, particularly in regard to conditional use limitations. The Legislature set forth the specifics required in a county zoning ordinance “that authorizes a conditional use of real property.” SDCL 11-2-17.3. The statute provides:

A county zoning ordinance adopted pursuant to this chapter that authorizes a conditional use of real property shall specify the approving authority, each category of conditional use requiring such approval, the zoning districts in which a conditional use is available, *and the criteria for evaluating each conditional use*. The approving authority shall consider the stated criteria, the objectives of the comprehensive plan, and the purpose of the zoning ordinance and its relevant zoning districts when making a decision to approve or disapprove a conditional use request.

SDCL 11-2-17.3 (emphasis added). Conditional uses within a zoning district are authorized by ordinance and “owing to certain special characteristics attendant to its operation,” must be evaluated and approved separately from other permitted uses. SDCL 11-2-17.4.

Therefore, any zoning ordinance restricting landowners’ use of their own property under a conditional use restriction (i.e., barring the use unless approved with a permit) must define all criteria by which the zoning authority will determine whether to approve the proposed land use. SDCL 11-2-17.3. Consistent with those statutory requirements, Clark County adopted a requirement in its zoning ordinance that wind energy systems (“WES”), commonly known as wind farms, must obtain a conditional use permit by meeting certain requirements and accepting

conditions on its proposed use of land. Those requirements or criteria are spelled out in Chapter 4.21 of the CCZO. The only setback requirements are in subsection 2 of Section 4.21.03.

1. Interpretation of the CCZO and statutes shows the Board exceeded its authority.

When the provisions of the ordinance as a whole are reviewed, it is clear that the Board cannot impose an additional setback distance in this case. The term “at least 1,000 feet” must be interpreted to mean that the ordinance considers that distance to be sufficient as a matter of public policy, but the applicant is free to use a longer distance as it sees fit. This is the only reasonable interpretation of that setback language in the absence of a specific provision allowing for the Board to consider other criteria for increasing the setback and setting forth the criteria to be used. It is not sufficient to rely on general requirements that the use be consistent with public safety, welfare and protection of property values. Those general goals are met by the minimum setback, as the Planning Commission and County Commission enacted that provision after notice and public hearings and thereby established the public policy could be met with a setback of 1,000 feet. Crocker has demonstrated that its turbines meet criteria for noise levels, shadow and flicker, and other requirements; there is nothing unique or novel about these proposed wind turbines that would provide an objective basis for increasing the setback. Again, the increase of the setbacks is arbitrary and without authority as it merely allows opponents’ concerns to dictate the outcome.

Even if the ordinance did arguably contain sufficient information to put a reasonable applicant on notice that some increase in the setbacks could be considered, there are no objective criteria or other basis for decision to increase the separation distance, and the Board does not have discretion to extend the setback and create its own minimum distance.

In the absence of specific criteria or conditions, the Board could only make an *ad hoc* determination with no standards or guidelines. Similar to amendment of zoning ordinances by initiative, an *ad hoc* determination to modify terms of the CCZO by interpreting the general provisions to allow it is an exercise contrary to the clear intent of the Legislature. *Schafer*, 2006 S.D. 106, ¶ 14, 725 N.W.2d at 247 (“It seems unlikely that the legislature would have intended to allow the “ad hoc” scheme that zoning by initiative would establish when such a procedure would bypass constitutionally required protections.”).

General provisions giving the Board authority to act, by stating that the ordinance provisions are minimum requirements, is not authority to change those minimum standards set forth in the zoning ordinance.¹ The terms of a criteria or condition already addressed in the

¹ Hence, other provisions of the CCZO which do provide for discretion of the Board to consider additional conditions or to increase setbacks set forth the authority to make such a determination and the standards or guidelines to be considered in making that determination. *See, e.g.*, setbacks for CAFO’s in Clark County at CCZO Section 4.25.05.7:

7. Separation Distance Requirements

Each application for a new or expanded Concentrated Animal Feeding Operation (CAFO) will be reviewed by the Board of Adjustment on a site-specific basis. The Board reserves the right to increase or decrease the minimum required setbacks and separation distance on a site specific review based on one (1) or more of the following considerations:

a. Considerations To Increase Suggested Setbacks And Separation Distances

- i. A concentration of Concentrated Animal Feeding Operations in the area exists or would occur which may pose an air or water quality concern.
- ii. Due to topography and/or prevailing wind direction, additional setback and separation distance is appropriate to safeguard air or water quality. The South Dakota Odor Footprint Tool may be utilized to determine the need to increase setback and/or separation requirements.
- iii. A Concentrated Animal Feeding Operation is in excess of five thousand (5,000) animal units.
- iv. Review of past management practices and proposed improvements to manure handling facilities.

Return, Ex. J, pg. 76-77 (excerpted at Donahoe Aff. Ex. 1). Similar language is commonly used when the county preserves the right to increase a setback requirement. *See, e.g.*, Lake County Zoning Ordinance, Article XIII, Section 7, (found July 26, 2017at: <http://www.lake.sd.gov/Uploads/documents/34/LAKE%20COUNTY%20ZONING%20ORDINANCE.pdf>):

zoning ordinance are decided by legislative act in adopting or amending the zoning ordinance. SDCL 11-2-17.3 Allowing changes in an ordinance without strictly complying with the process set forth in statutes would violate Due Process. *Schafer*, 2006 S.D. 106, ¶¶ 13-15, 725 N.W.2d at 247-48. The Board cannot undertake such a legislative function; its role in deciding conditional use issues is to act in an administrative capacity. *See Donahoe Aff., Ex. 1, CCZO Section V, “Definitions” –at “Conditional Use”* (specifically stating “Conditional uses are subject to evaluation and approval by the Board of Adjustment and are administrative in nature.”). An agency acting in an administrative capacity performs the task of executing on a legislatively established framework or policy. Our Supreme Court has recognized that the process of enacting or amending a zoning ordinance sets the public policy of the county or municipality. Once a use is allowed, it is axiomatic that such a use is a “public good” and furthers the intent of the Legislature in allowing zoning for advancement of the public welfare. *In re Conditional Use Permit Denied to Meier*, 2000 SD 80, ¶16, n.4, 613 NW2d 523 (S.D., 2000) (hereafter, “*Meier P*”) (“We presume that since the county commission allowed for animal feeding operations in agricultural districts when it passed the ordinance, the commission considered such an enterprise

Footnote 1, continued...

Each application for a new or expanded Concentrated Animal Feeding Operation (CAFO) will be reviewed by the Board of Adjustment on a site-specific basis. The Board of Adjustment reserves the right to increase the minimum required setbacks and separation distance on a site specific review, based on one or more of the following considerations.

A. A concentration of CAFOs in the area exists or would occur which may pose an air or water quality concern.

B. Due to topography and/or prevailing wind direction, additional setback and separation distance is appropriate to safeguard air or water quality.

C. A Concentrated Animal Feeding Operation is in excess of 5,000 animal units. Such a provision in the CCZO for WES projects would be consistent with SDCL 11-2-17.3, and with CCZO’s definition of “General Compatibility with Adjacent Properties” as discussed below. The County’s assertion that it has authority to expand any setbacks is contrary to its own provisions on CAFO’s in Clark County. It only has such authority when set forth in the zoning ordinance, with appropriate criteria for consideration of the proper amount of any increase.

to be in the public good when it is limited in number, area, place and by other appropriate limitations and conditions. *See East Manchester Tp. v. Dallmeyer*, 147 Pa.Cmwlth. 671, 609 A.2d 604 (1992); *Schatz v. New Britain Tp.*, 141 Pa.Cmwlth. 525, 596 A.2d 294 (1991); *Appeal of Baird*, 113 Pa.Cmwlth. 637, 537 A.2d 976 (1988).”). Thus, because the legislative function addressed the issue of the public good and determined that such uses are appropriate with those criteria or requirements set forth in the zoning ordinance, the criteria themselves establish a public good at the outset, so long as the wind turbines are no less than the minimum setback from other structures and meet the other criteria. *Id.* at ¶ 16 (initial burden of persuasion by applicant met if “he has and/or will meet the performance standards and the other objective criteria established in the ordinance” as a public good established by zoning ordinance). It is true that such an initial showing is merely “sufficient evidence to avoid a directed verdict” and not enough to overturn a decision that is based on some criteria and standards, where there is evidence in the record to sustain a decision on those criteria. *Conditional Use Permit Denied to Meier*, 2002 SD 49, ¶ 15, 645 N.W.2d 579, 582 (S.D., 2002) (“*Meier II*”) (discussing footnote 4 in the initial appeal opinion, *Meier I*). The Board in the *Meier I* case had criteria to consider and specific authority to consider matters outside of certain “performance standards” under Section 515(d) of the zoning ordinance. “Section 515 of the ordinance establishes specific standards that the applicant must satisfy ‘either before the issuance of a permit or after, *but it does not preclude other considerations.*’ (emphasis added).” *Id.* at ¶ 3, 645 N.W.2d 581 (citation to *Meier I* omitted). The Supreme Court found that, because it had such authority, the Board considering the Meier application had authority to address a number of considerations, and Meier failed to establish that the Board acted arbitrarily. *Id.* at ¶¶14-18, 645 N.W.2d at 582-83.

The case before this Court is inapposite: the CCZO has specific criteria which the applicant met, but the Board did not have authority to consider additional or different criteria. It had only the designated setback of “at least 1,000 feet” from certain structures, which Crocker showed it would meet, and no provision allowing additional considerations to increase the setback. In fact, one of the initial considerations under the Board’s authority for conditional use permits in general under Section 3.04.01.05.g is that the applicant show “General compatibility with adjacent properties and other property in the district.” That term is expressly defined as:

General Compatibility with Adjacent Properties. All uses listed as permitted or as conditional uses are generally compatible with other property in a specified zoning district. If such uses are not generally compatible, they should be prohibited within the specified district. *Conditional uses may only be denied in accordance with definable criteria in order that an applicant may know under which circumstances a permit may be granted in this location.* In Clark County, general compatibility refers to the manner of operation of a use. The Board of Adjustment may consider compatibility when prescribing conditions for approval of a permit, but those conditions should be uniformly required of similar uses under similar circumstances throughout the county.

Donahoe Aff., Ex. 1, CCZO Section V, “Definitions” –at “General Compatibility with Adjacent Properties” (emphasis added). Therefore, the CCZO specifically requires that any additional requirements be set out with “definable criteria” so that a WES understands “under which circumstances a permit may be granted” and with “conditions . . .uniformly required of similar uses under similar circumstances throughout the county.” There is absolutely no showing in the record before this Court to establish any criteria for determining an increase in the setback distance at issue, or that the other criteria which are set forth in the CCZO are inadequate to meet the needs of protecting the public good and general welfare or meeting the goals of the county’s comprehensive zoning plan.²

² Because the other provisions of the CCZO require criteria for making such a determination, the Board cannot claim authority to increase setbacks under Section 3.04.01.9, whereby it “may

The Board is to administer the CCZO and cannot amend it by exercising discretion to “read into” the ordinance an additional provision on setbacks or expansion of them. Amendments must be done in the process set forth in statute, and not be administrative action. The law clearly requires any amendment or replacement of a zoning ordinance to comply with the provisions of SDCL Ch. 11-2 to be valid. *Schafer*, 2006 S.D. 106, ¶15, 725 N.W.2d at 249 (holding that only amendment under SDCL 11-2 is valid, stating “SDCL 11-2-28 is specific to zoning ... [and] controls amendments to zoning ordinances...”); *see also Grant Cty. Concerned Citizens v. Grant Cty. Bd. of Comm'rs*, 2011 S.D. 5, ¶ 9, 794 N.W.2d 462, 465 (same).

The public policy of the State of South Dakota is already embodied in the setback requirements of the CCZO. Specifically, in 2008 the South Dakota Public Utilities Commission proposed model county zoning ordinance language with a setback provision found in CCZO Section 4.21.03.2. *See* <https://energy.gov/savings/model-ordinance-siting-wind-energy-systems>. The following Legislative Session saw enactment of SDCL 43-13-24 with a setback from property lines, but did not require a setback from buildings or specific uses. *See* SL 2009, Ch. 221, § 4. That statute states:

Each wind turbine tower of a large wind energy system [i.e., with a tower greater than 75' high as defined by SDCL 43-13-23] shall be set back at least five hundred feet or 1.1 times the height of the tower, whichever distance is greater, from any surrounding property line. However, if the owner of the wind turbine tower has a written agreement with an adjacent land owner allowing the placement of the tower closer to the property line, the tower may be placed closer to the property line shared with that adjacent land owner.

The wind turbine towers proposed by Crocker are greater than seventy-five feet in height, making SDCL 43-13-24 applicable to the project. The proposed placement of the Crocker

prescribe appropriate conditions and safeguards in conformity with this regulation.” In order to be in conformity with the regulation or ordinance, criteria must be provided. *See* note 1 above.

turbines will comply with SDCL 43-13-24. It can be presumed that the Legislature deemed a setback from property lines to be sufficient protection from cemeteries, residences and government-owned buildings. CCZO provides that those towers be “at least” 1,000 feet from other structures, and therefore already provides additional protection to such uses or structures. But in approving the CCZO, the county made no provision allowing the Board to create setbacks from cemeteries or other uses or structures not listed in CCZO Chapter 4.21. Concerns about noise or other matters which might impact the public or adjacent landowners are addressed in other provisions of the WES conditional use criteria. *See, e.g.,* Donahoe Aff., Ex. 1, CCZO §4.21.3.13 (“Noise level shall not exceed 50 dBA, average A-weighted Sound pressure including constructive interference effects at the perimeter of the principal and accessory structures of existing off-site residences, businesses, and buildings owned and/or maintained by a governmental entity”). All reasonable impacts of a WES were considered and addressed by various requirements in Chapter 4.21 of the CCZO. There is simply no potential item of concern that was not already accounted for in the CCZO. No room exists for implied authority of the Board to extend the setback distance at issue.

Without authority, the Board unilaterally conditioned the land use on a setback from cemeteries. It went on to increase the setback distances arbitrarily without any justification or explanation of how it determined those setbacks to be appropriate. In doing so, it made a decision wholly without fixed rules or standards on how to make its determination. That is not administering a zoning program. It is legislating without authority or it is acting arbitrarily or capriciously in violation of the due process rights of the land use applicant.

"A decision is arbitrary and capricious when it is not governed by any fixed rules or standard." *Smith v. Canton Sch. Dist. No. 41-1*, 1999 SD 111, ¶ 9, 599 N.W.2d 637, 639-40 (quoting Black's Law Dictionary 104 (6th ed. 1990)). The fixed rules that guide the Board's decision here are provided by the Aurora County Zoning

Ordinances, particularly § 515 governing performance standards for commercial feedlot operations and § 1107B governing conditional uses generally.

Id. at ¶ 29 (C.J. Gilbertson, dissenting) (asserting that a Board has wide discretion to consider compliance within those fixed rules and standards).

In addition, the *ad hoc* determination without guiding standards is contrary to law because it provides excessive discretion or authority contrary to the clear requirements of the limiting statute, SDCL 11-2-17.3. There is no criteria, i.e., “fixed rule or standard” in the CCZO that gives the Board authority to make an independent determination of the appropriate distance when increasing the setback requirement at issue. The Board gave way to complaints by the opponents and neighbors, and made an arbitrary determination that the wind towers must be separated from residences by nearly 4,000 feet, nearly four times the distance that the ordinance requires the WES to meet. No Findings of Fact or other explanation from the Board justifies the increase in the setback distance, other than the testimony of neighbors opposed to the project SUMF ¶38; Donahoe Aff., Ex. 2, ¶ 13. Likewise, only the testimony of those opposed to the project formed the basis for imposing a new cemetery setback. SUMF ¶ 32. As such, the record can only be interpreted to support a decision based solely on those complaints of opposing neighbors. As shown below, the Board cannot give way to pressure of opponents in this way.

2. Should the Court determine there is some authority to act, the record is devoid of any factual support for increasing the setbacks or imposing a setback on cemeteries.

The action by the Board was factually unsupported; the decision was based on subjective concerns that a new WES might cause problems. A decision based on such concerns is unlawful. *M.G. Oil Co. v. City of Rapid City*, 2011 S.D. 3, ¶ 18, 793 N.W.2d 816, 823 (citing to SDCL 11-4-4.1, the municipal analog of SDCL 11-2-17.3). “[V]ague reservations expressed by

Commission members and nearby landowners are not sufficient to provide factual support for a Board decision.” *Olson v. City of Deadwood*, 480 N.W.2d 770, 775 (S.D. 1992). Our Supreme Court has also stated that “[p]redictions and prophecies by neighboring property owners that a building when completed will likely become a nuisance and annoyance ... [cannot] serve as a legal reason for [local governments] to deny a ... permit to persons otherwise entitled thereto.” *Breckweg v. Knochenmus*, 81 S.D. 244, 133 N.W.2d 860, 866 (1965).

Action by a county “is arbitrary and capricious if it is based on personal, selfish, or fraudulent motives, or on false information, **and is characterized by a lack of relevant and competent evidence to support the action taken.**” *Tri County Landfill Ass'n, Inc. v. Brule County*, 535 N.W.2d 760, 764 (S.D.1995) (emphasis added) (citing *Hendriks v. Anderson*, 522 N.W.2d 499 (S.D.1994); *Iversen v. Wall Bd. of Educ.*, 522 N.W.2d 188 (S.D.1994); *Riter v. Woonsocket Sch. Dist.*, # 55-4, 504 N.W.2d 572 (S.D.1993)). The decision was arbitrary and wholly outside the authority of the Board. SDCL 11-2-17.3. No actual evidence of harm from a wind turbine at setbacks less than 1,000 feet was established by any opponents. The Board’s decision is clearly unsupported by relevant and competent evidence to support the increase in the setback distance or to impose a setback for a cemetery. It cannot exercise unfettered discretion and, even in the face of overwhelming public sentiment against a proposed use, may only deny the use when it can do so under established criteria or standards for its decision.

We have condemned this type of arbitrary decision-making in the past. In *Cary v. City of Rapid City*, 1997 SD 18, 559 N.W.2d 891, we struck down a statute that rested “the ultimate determination of the public's best interest” with a group of neighbors. *Id.* ¶ 23. There we reasoned, “The ultimate determination of the public's best interest is for the legislative body, not a minority of neighboring property owners.” *Id.* Because the Constitution protects a landowner's right to use land for any legitimate purpose, we are wary of decisions that are based on “whims of neighboring landowners.” *Id.* ¶ 22. This is so because their decisions may be lacking “any standards or guidelines,” leading to decisions that may be arbitrary or capricious. *Id.* Worse, their opinions may be wholly self-serving.

Understanding the need for standards and guidelines in the variance procedure, our Legislature requires that boards of adjustment determine whether requests are contrary to the public interest. *See* SDCL 11-2-53(2). The discretion of a board to decide such matters however is not limitless. To base a decision solely on the opinion of neighbors was arbitrary and beyond its jurisdiction.

Hines v. Bd. of Adjustment of City of Miller, 2004 S.D. 13, ¶¶ 15-16, 675 N.W.2d 231, 235–36.

The record before the Court shows such a decision based solely on the opinion of neighbors.

It is important to emphasize that the concerns of those neighbors were addressed by the requirements already in the CCZO. As noted above, if noise or other impacts of a wind turbine were of concern, the neighbors should have come forth and shown some objective basis to establish that the current zoning regulations were insufficient for some reason unique to this operation or land use. The record is devoid of any evidence that the 3,960 foot distance was necessary for all residences and that 5,280 foot distance was necessary for all cemeteries. This is simply acquiescence to complaints of neighbors.

The wholly arbitrary nature of this *ad hoc* determination is demonstrated by the imposition of a greater setback for cemeteries than for residences. It defies common sense to impose a greater setback for cemeteries than residences (or churches, which apparently are only subject to a setback of 1,00 feet under the other provisions of CCZO Section 4.21.2).

Here, the Court need not remand for a “proper determination.” *Hines*, 2004 S.D. 13, ¶ 16. The lack of relevant evidence to support the restrictions is sufficient to require modification of the condition to a setback of 1,000 feet only and eliminate cemeteries from that setback requirement. That would bring the decision within the authority of the Board and eliminate arbitrary and capricious conditions.

CONCLUSION

Because the Board had no authority to extend the setbacks at issue, and there is no criteria by which “fixed rules or standards” can apply to making such a decision, the Board acted unlawfully. The Court must declare the condition unlawful and modify paragraphs 13-15 of the Findings (Donahoe Aff., Ex. 2, Return, Exhibit J) to only require that Crocker’s wind turbine towers be at least 1,000 feet from any residence. Alternatively, the Court should order the Board to modify the conditions to comply with those requirements of the CCZO.

Dated this 26th day of July, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2017, a true and correct copy of the foregoing Brief in Support of Motion for Partial Summary Judgment was electronically filed and served through South Dakota's Odyssey File and Serve Portal upon the following:

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