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STATE OF SOUTH DAKOTA)  
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COUNTY OF CLARK)

IN CIRCUIT COURT  
THIRD JUDICIAL CIRCUIT

CROCKER WIND FARM, LLC,  Petitioner,  vs.  THE CLARK COUNTY COMMISSION AND THE CLARK COUNTY COMMISSION ACTING AS THE CLARK COUNTY BOARD OF ADJUSTMENT,  Respondent.	12CIV17-0017   MOTION FOR PARTIAL SUMMARY JUDGMENT AND NOTICE OF HEARING
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#### MOTION FOR PARTIAL SUMMARY JUDGMENT

Petitioner, Crocker Wind Farm, LLC (“Crocker”), through undersigned counsel, hereby moves for partial Summary Judgment pursuant to SDCL 15-6-56. Crocker seeks a judgment and order directing the Clark County Board of Adjustment (“Board”) modify the conditional use permit issued to Crocker by eliminating a condition requiring a setback in excess of 1,000 feet or remand to the Board with instruction to make them consistent with the zoning ordinance at 1,000 feet. SDCL 11-2-65. This motion is supported by a Statement of Undisputed Material Facts and the Affidavit of Brian J. Donahoe.

Crocker reserves all other claims and further specifically reserves its rights to raise additional issues not addressed in the brief or argument presented on the narrow legal issues presented in this Motion for Partial Summary Judgment.

**NOTICE OF HEARING ON MOTION  
FOR PARTIAL SUMMARY JUDGMENT**

TO: THE CLARK COUNTY COMMISSION AND THE CLARK COUNTY COMMISSION ACTING AS THE CLARK COUNTY BOARD OF ADJUSTMENT, and their legal counsel Jack H. Hieb and Zachary W. Peterson of Richardson, Wyly, Wise, Sauck & Hieb, LLP, One Court Street, Post Office Box 1030, Aberdeen SD 57401.

PLEASE TAKE NOTICE that the foregoing Motion for Partial Summary Judgment will be presented for oral argument at hearing by presiding Circuit Court Judge, the Honorable Carmen Means, on August 14, 2017, at 10:30 a.m. at the Clark County Courthouse in Clark, SD. This hearing was set pursuant to the requirements of SDCL 15-6-6(d) and applicable Supreme Court Rules.

Dated this 26<sup>th</sup> 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 Motion for Partial Summary Judgment and Notice of Hearing was electronically filed and served through South Dakota's Odyssey File and Serve Portal upon the following:

Jack H. Hieb  
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Attorneys for Respondents

IN CIRCUIT COURT  
THIRD JUDICIAL CIRCUIT

## INTRODUCTION

Summary Judgment on these discrete issues will expedite the resolution of the case. The conditions imposed a one-mile setback for cemeteries and increased the setback from 1,000 feet

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, impractical 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.<sup>1</sup> The terms of a criteria or condition already addressed in the

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<sup>1</sup> 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 I*”) (“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

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*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.<sup>2</sup>

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<sup>2</sup> 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

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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 26<sup>th</sup> 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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Attorneys for Respondents



IN CIRCUIT COURT  
THIRD JUDICIAL CIRCUIT

Pursuant to SDCL 15-6-56(c)(1), Petitioner Crocker Wind Farm, LLC (“Crocker”) respectfully offers this statement of undisputed facts in support of its Motion for Partial Summary Judgment.

1. Petitioner Crocker is a limited liability company in the business of providing electricity generated by wind turbines. *See* Respondents' Return to Writ of Certiorari, filed herein on June 6, 2017 ("Return"), at Ex. B (application for conditional use permit).
2. Crocker is proposed to be located in Clark County, and is subject to Clark County zoning regulations. *Id.*; Return at Ex. A (Clark County Zoning Ordinance 1-14).
3. Clark County Zoning Ordinance 1-14 ("CCZO") provides for a Board of Adjustment to decide whether proposed land uses are granted a conditional use permit. Return, Ex. A.
4. CCZO provides that the Clark County Board of County Commissioners act as the Board of Adjustment for zoning matters as authorized by SDCL 11-2-60. *Id.* Return, Ex. A, pg. 43, administration section, "Establishment."

5. The Board is to act in an administrative capacity when deciding conditional uses under the CCZO. *Id.* (“Conditional uses are subject to evaluation and approval by the Board of Adjustment and are administrative in nature.”).
6. Crocker’s proposed project is a large Wind Energy System (“WES”). *See* Return, Ex. B.
7. The Clark County Zoning Ordinance (“CCZO”) requires a conditional use permit for a WES. Return at Ex. A, Ch. 4.21.
8. Crocker applied for and was granted two Conditional Use Permits, designated as CU1-17 and CU2-17, by the Clark County Board Adjustment (“Board”) on April 4, 2017. Return Ex. J; Donahoe Aff. Exhibit 2.
9. Crocker’s conditional use permit **CU1-17** is a conditional use permit for the wind turbine towers and is the subject of the above-captioned appeal. *See* Petition, Ex. B.
10. The second conditional use permit is for the transmission lines serving the wind turbines and is not at issue in this motion. *See* Petition.
11. Section 4.21.01 of Chapter 4.21 WES, states the requirements of that section 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. Return, Ex. A.
12. The Crocker project is not a private facility with a single tower height of less than seventy-five feet. Return, Ex. B.
13. Section 4.21.03 of WES provides minimum spacing requirements for setbacks. These minimum spacing requirements include prescribed distances for off-site residences, businesses, churches, and government owned and/or maintained buildings as well a distance for on-site or lessor’s residence. Return, Ex. A. Distances are also provided for the centering of public roads and a distance from any property line. *Id.* Finally, Section

4.21.03 also includes an exception to its prescribed distances when adjoining landowners agree to a lesser setback distance. *Id*

14. Section 4.21.03 of WES provides for the minimum height of blade tips, measured from ground surface when a blade is in fully vertical position, to be twenty-five (25) feet.

Return, Ex. A.

15. Section 4.21.03 of WES provides that Towers shall have non-reflective and non-glass finish and color. Section 4.21.03 also states that Towers shall be of a singular tubular design. *Id*.

16. Section 4.21.03 of WEST requires noise to be kept from exceeding 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. *Id*.

17. Section 4.21.03 of WES states that the permit shall become void if no substantial construction has been completed within three (3) years of issuance. *Id*.

18. Section 4.21.03 of WES provides the information that is required to obtain a conditional use permit. *Id*.

19. 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.

20. Clark County has chosen to make wind farms a permitted use with conditions under SDCL 11-2-17.3 and has stated the criteria for any conditional use in its ordinance.

Return, Ex. A.

21. Crocker reviewed the conditional use permit requirements and met those requirements in its application and subsequent submissions to the Board. Return, Ex. J.
22. 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 and with residences. *Id.*
23. There is no provision of the zoning ordinances that specifically provides for a setback from wind turbine towers to cemeteries. Return, Ex. A.
24. The Board imposed a setback requirement for the Crocker WES of one mile (5,280 feet) from cemeteries. Return, Ex. J, pg. 2, ¶ 14.
25. The CCZO 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 for such a setback. Return, Ex. B.
26. The provisions of the CCZO governing WES projects are also subject to the general requirements for all conditional use permits to be considered and decided by the Board. Return at Ex. A.
27. When considering a conditional use, the Board considers “general capability with adjacent properties” as that term is defined in the CCZO. *Id.*
28. The CCZO’s definition of “generally compatible with adjacent properties” includes the statement that “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.” Return, Ex. A, pg. 111.

29. The Board found the Crocker project was “generally compatible with adjacent properties and other property in the district.” Return, Ex. J, pg. 2, ¶ 32; pg. 6, ¶ 12.
30. The CCZO does not contain definable criteria for increasing a WES wind turbine setback from other uses or structures. *See* Return, Ex. A.
31. The Board declared “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  $\frac{3}{4}$  mile from existing off-site, non-participating residences, measured from the wall line of the neighboring principal building to the base of the WES tower.” Return, Ex. J., pg. 2, ¶ 13.
32. The Board found “That based upon the 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.” *Id.* at ¶ 14.
33. The Board found “That all other ordinance setbacks will be met or exceeded by the applicant.” *Id.* at ¶ 15.
34. The Board based its decision on the conditional use permit on the information contained in the Return. *See* Return, ¶ 3 (affirmation of Board Commission Chair).
35. The Board acted in its capacity as the Board of Adjustment and not as the Clark County Commission in deciding the Crocker WES permit application. *Id.*
36. Clark County did not amend or revise the CCZO in response to the concerns of residents “impacted by a current wind farm located in the county and sited with setbacks of 1,000 feet from existing off-site residences,” as cited by the Board in finding that Crocker’s

project would be subject to a setback from residences of ¾ mile (3,960 feet) at paragraph

13 of the Board's written Findings. *See* Return, Ex. B; Ex. J.

37. Audio recordings of the public hearings have been filed with the Court as Exhibits G2, H2, and I2. *See* Return.

38. The Board's decision to impose additional setbacks to residences and to create a setback from cemeteries was based solely on testimony from public hearings. Return, Ex. J.

Dated this 26<sup>th</sup> 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 Petitioner's Statement of Undisputed Material Fact was electronically filed and served through South Dakota's Odyssey File and Serve Portal upon the following:

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Attorneys for Respondents

STATE OF SOUTH DAKOTA     )  
  )SS  
COUNTY OF CLARK            )

CIRCUIT COURT  
THIRDJUDICIAL CIRCUIT

CROCKER WIND FARM, LLC,

Petitioner,

vs.

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

RESPONDENT.

**AFFIDAVIT OF BARRY FLADEBOE**

State of       Minnesota     )  
  SS  
County of Hennepin        )

COMES NOW Barry Fladeboe, on behalf of the Petitioner in the above captioned action and for his affidavit swears and states as follows:

1.     My name is Barry Fladeboe.
2.     I am employed by Geronimo Energy as Director of Wind Development.
3.     I have been involved in the Crocker Wind Farm on behalf of the petitioner.
4.     I have reviewed the petition for writ of certiorari.
5.     I verify its contents and state that to the best of my personal knowledge, information and recollection and belief it is true and correct.

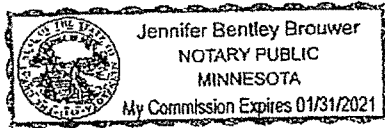
Dated this 3<sup>rd</sup> day of May, 2017.

  
\_\_\_\_\_  
BARRY FLADEBOE

State of Minnesota )  
 ) SS  
County of HENNEPIN )

On this the 3<sup>RD</sup> day of May, 2017, before me the undersigned, a Notary Public within and for said County and State, personally appeared, Barry Fladeboe, known to me to be the person who is described in and who executed the foregoing instrument and acknowledged to me that he executed the same.

(SEAL)



A handwritten signature in black ink, appearing to read "J. Bentley Brouwer", written over a horizontal line.

Notary Public

Notary Print Name: Jennifer Bentley Brouwer

My Commission Expires: Jan. 31, 2021



# Exhibit 1

*Benjamin  
Crocker*

ARTICLE I  
GENERAL PROVISIONS

CHAPTER 1.01 TITLE AND APPLICATION

Section 1.01.01 Title.

This Ordinance may be known and may be cited and referred to as the "Clark County Zoning Ordinance" to the same effect as if the full title were stated.

Section 1.01.02 Jurisdiction.

Pursuant to SDCL 11-2, 1967, as amended, the provisions of this Ordinance shall apply within the unincorporated areas of Clark County, South Dakota, as established on the map entitled "The Official Zoning Map of Clark County, South Dakota."

Section 1.01.03 Purpose.

The Zoning Ordinance is adopted to protect and to promote the public health, safety, peace, comfort, convenience, prosperity and general welfare. More specifically, the Zoning Ordinance is adopted in order to achieve the following objectives:

1. To assist in the implementation of Clark County's Comprehensive Land Use Plan which in its entirety represents the foundation upon which this Ordinance is based.
2. To foster a harmonious, convenient, workable relationship among land uses.
3. To promote the stability of existing land uses that conform with the Land Use Plan and to protect them from inharmonious influences and harmful intrusions.
4. To insure that public and private lands ultimately are used for the purposes which are most appropriate and most beneficial from the standpoint of the community as a whole.
5. To prevent excessive population densities and overcrowding of the land with structures.
6. To protect and enhance real estate values.
7. To place the power and responsibility of the use of land in the hands of the property owner contingent upon the compatibility of surrounding uses and the comprehensive land use plan.
8. To facilitate the adequate provision of transportation, water and sewerage, schools, parks, and other public requirements.
9. To regulate and restrict the height, number of stories, and bulk of building and other structures; the percentage of lots that may be occupied; the size of yards, courts, and other open spaces; and the location and use of other purposes.
10. To regulate and restrict the erection, construction, reconstruction, alteration, repair, and use of building, structures, and land.

## ARTICLE II DISTRICT REGULATIONS

### CHAPTER 2.01 APPLICATION OF DISTRICT REGULATIONS

#### Section 2.01.01 Application of District Regulations.

The regulations set by this Ordinance within each District shall be minimum regulations and shall apply uniformly to each class or kind of structure of land, and particularly, except as hereinafter provided:

1. No building shall be erected, converted, enlarged, reconstructed or structurally altered, nor shall any building or land be used except for a purpose listed as a permitted use or conditional use in the district in which the building or land is located.
2. No building shall be erected, converted, enlarged, reconstructed, or structurally altered to exceed the height limit established for the district in which the building is located.
3. No building shall be erected, converted, enlarged, reconstructed, or structurally altered except in conformity with the area and parking regulations of the district in which the building is located.
4. The minimum yards and other open spaces, including lot area per family, required by this Ordinance for each and every building at the time of passage of this Ordinance or for any building hereafter erected shall not be encroached upon or considered as yard or open space requirements for any other buildings, nor shall any lot area be reduced beyond the district requirements of this Ordinance.
5. All sign sizes, lighting, and locations shall, at a minimum, meet all State and Federal laws and regulations.

### CHAPTER 2.02 NON-CONFORMING USES

#### Section 2.02.01 Purpose and Intent.

The purpose of this article is to provide for the regulation of nonconforming uses, buildings, and structures, and to specify those circumstances under which they shall be permitted to continue. Further, it is intent of this Ordinance to permit these nonconformities to continue until they are removed, but not to encourage their survival.

Section 2.02.02 Continuation of Nonconforming Uses. Subject to the provisions of this article, the lawful use of a premise existing immediately prior to the effective date of this ordinance may be continued although such use does not conform to the provisions hereof.

Section 2.02.03 Use Becoming Nonconforming by Change in Law or Boundaries. Whenever the use of a premises becomes a nonconforming use through a change in zoning ordinance or district boundaries, such use may be continued, although the use does not conform to the provisions thereof.

**Section 2.02.04 Extension or Enlargement.** A nonconforming use shall not be enlarged, extended, converted, reconstructed, or structurally altered unless such use is changed to a use permitted in the district in which the premise is located.

**Section 2.02.05 Restoration After Damage.** When the use of a building is nonconforming as defined by this ordinance and such a building is damaged by a fire, explosion, act of God, or the public enemy to the extent of more than sixty (60) percent of its fair market cash value, it shall not be restored except in conformity with the provisions of the district in which the building is located. Such repair or reconstruction of such building shall be begun within six (6) months after such casualty and completed within a reasonable time thereafter. The loss in value shall be computed as the difference between the actual cash value of the structure immediately before and after the casualty. Cash value shall be the same as that used for insurance purposes as approved by the State of South Dakota Insurance Code.

**Section 2.02.06 Repairs and Maintenance.** On any nonconforming structure or portion of a structure containing a nonconforming use, work may be done on ordinary repairs, or on repairs or replacement of non-bearing walls, fixtures, wiring, or plumbing, provided that the nonconformity of the structure shall not be increased.

**Section 2.02.07 Unsafe Nonconforming Use.** If a nonconforming structure or portion of a structure containing a nonconforming use becomes physically unsafe or unlawful due to the lack of repairs and maintenance, and is declared by any duly authorized official to be unsafe or unlawful by reason of physical condition, it shall not thereafter be restored, repaired, or rebuilt except in conformity with the regulations of the district in which it is located.

**Section 2.02.08 Discontinuance of Nonconforming Use.** No nonconforming use, building, structure or premises, if once changed to conform to the requirements of this ordinance for the district in which it is located, shall ever be changed back so as to be nonconforming. In the event that a nonconforming use is discontinued for more than one (1) year, any subsequent use shall thereafter be in conformity with the regulations of the district in which it is located.

**Section 2.02.09 Effect on Use Which is Illegal Under Prior Law.** Nothing in this Ordinance shall be interpreted as authorization for, or approval of, the continuance of the use of a building or premises in violation of zoning regulations in effect at the time of the effective date of this Ordinance.

**Section 2.02.10 Powers of the Planning Commission/Board of Adjustment.** Nothing contained in this Section shall be so construed as to abridge or curtail the powers of the County Planning Commission or Board of Adjustment as set forth elsewhere in this Ordinance.

**Section 2.02.11 Continuation of Nonstandard Uses.** Nonstandard uses existing immediately prior to the effective date of this ordinance may be continued, although such uses do not conform to the provisions hereof. Nonstandard buildings or structures may be enlarged or extended, converted, reconstructed, or structurally altered as follows:

1. Enlargements, extensions, conversions, or structural alterations may be made as required by law or ordinance.

2. Structural alteration of buildings or structures may otherwise be made if such changes do not encroach into an existing front yard, side yard, or rear yard which is less than the minimum required yards for the district in which they are located.
3. Enlargement, extension, conversion of buildings or structures may otherwise be made if such changes comply with the minimum required yards, lot area, height, landscaping, parking, and density for the district in which they are located.

#### **Section 2.02.12 Non-conforming Lots of Record.**

1. In any zoning district a permitted or conditional use and customary accessory buildings may be erected on any single lot of record at the effective date of adoption or amendment of this Ordinance, notwithstanding limitations imposed by other provisions of this Ordinance. Such lot must be in separate ownership and not of continuous frontage with other lots in the same ownership. This provision shall apply even though such lot fails to meet the requirements for area or width, or both, that are generally applicable in the district, provided that yard dimensions and requirements other than those applying to area or width, or both, of the lot shall conform to the regulations for the district in which such lot is located. Variance of yard requirements shall be obtained only through action of the Board of Adjustment.
2. If two (2) or more lots or combinations of lots and portions of lots with continuous frontage in single ownership are of record at the time of passage or amendment of this Ordinance, and if all or part of the lots do not meet the requirements established for lot width and area, the lands involved shall be considered to be an undivided parcel for the purposes of this Ordinance, and no portion of said parcel shall be used or sold in a manner which diminishes compliance with lot width and area requirements established by this Ordinance, nor shall any division of any parcel be made which creates a lot width or area below the requirements stated in this Ordinance.

### **CHAPTER 2.03 DISTRICT REGULATIONS**

#### **Section 2.03.01 Districts.**

For the purpose of this Ordinance, the unincorporated areas of the County may be divided into any of the following zoning districts: A-Agricultural; CI-Commercial/Industrial; NR-Natural Resources; PR-Planned Residential; and TD-Town District.

In addition to zoning districts, the "AP" Aquifer Protection zoning overlay district imposes special regulations on the property that may fall within these districts without abrogating the requirements imposed by the underlying land use district regulations.

#### **Section 2.03.02 Prohibited Uses.**

All uses and structures not specifically listed as a permitted use or as a conditional use in a particular zoning district shall be prohibited in said district.

## **CHAPTER 2.04 "A" AGRICULTURAL DISTRICT**

### **Section 2.04.01 Purpose.**

This district is established to preserve open space and maintain and promote farming and related activities within an environment which is generally free of other land use activities. The Agricultural District is further characterized, as land areas not yet ready for further development. Residential development, other than single-family farming dwelling units, will be discouraged to minimize conflicts with farming activities and reduce the demand for expanded public services and facilities.

### **Section 2.04.02 Permitted Uses.**

1. Agricultural activities and farm related buildings, excluding Class A, B, C, and D Concentrated Animal Feeding Operations but including Class E Concentrated Animal Feeding Operations;
2. Site-built single-family dwellings, modular homes, and Type I and Type II manufactured homes used as farm or non-farm dwellings;
3. Fisheries services and game propagation areas (Public wildlife production areas);
4. Public parks and recreation areas;
5. Temporary fireworks stands used for the sale of fireworks during times of the year specified in SDCL 34-37 provided that there have been no past complaints or violations regarding previous sales;
6. On-premise signs;

### **Section 2.04.03 Permitted Accessory Uses.**

The following accessory uses and structures shall be permitted in the "A" Agricultural District:

1. Accessory uses and structures customarily incidental to permitted uses and structures when established in compliance with the requirements of this district;
2. Home occupation;
3. Temporary roadside stands for sales of agricultural products grown or produced on the premises provided that there have been no past complaints or violations regarding previous sales.

### **Section 2.04.04 Conditional Uses.**

1. Airports and airstrips;
2. Church or cemetery;
3. Golf course, golf driving range, clubhouse;

4. Sand, gravel or quarry operation; mineral exploration and extraction; rock crushers; and concrete and asphalt mixing plants provided they meet the requirements of Chapters 4.20.
5. Sanitary landfills, rubble sites, composting sites, waste tire sites, restricted use sites, and other sites governed by the South Dakota Department of Environment and Natural Resources permits for solid waste provided they meet the requirements of Chapter 4.30.
6. Land application of petroleum-contaminated soils;
7. Institution farms, including religious farming communities;
8. Bed and breakfast home provided they meet the requirements of Chapter 4.27;
9. Domestic sewage treatment plant/facility provided they meet the requirements of Chapter 4.31;
10. Class A, Class B, Class C, Class D Concentrated Animal Feeding Operations. (See Concentrated Animal Feeding Operations, Article IV, Chapter 4.24)
11. Veterinary clinics;
12. Junkyards/salvage yards, provided that they meet the requirements of Chapter 4.32.
13. Public utility and public service structure including transmission lines, substations, gas regulator stations, pipelines, community equipment buildings, water pumping stations, elevated tanks and similar essential public utilities and service structures.
14. Wireless Telecommunications Towers and Facilities (Chapter 4.22);
15. Commercial public entertainment enterprises not normally accommodated in commercial areas, including but not limited to, the following: music concerts, rodeos, tractor pulls, and animal and vehicle races;
16. Extended home occupation (Chapter 4.19);
17. Livestock sales barns;
18. Game Lodge.
19. Fur farms and kennels;
20. Wind Energy System (WES). (See Article IV, Chapter 4.21);
21. Commercial Orchards, tree farms, truck gardening, nurseries and greenhouses;
22. Horticultural Services;
23. Contractor shops and yards;
24. Temporary fireworks stands which have had past complaints or violations regarding previous sales;

**Section 3.03.06 Duties Of Administrative Official, Board Of Adjustment, and Courts On Matters Of Appeal.**

It is the intent of this Ordinance that all questions of interpretation and enforcement shall be first presented to the Administrative Official, and that such questions shall be presented to the Board of Adjustment only on appeal from the decision of the Administrative Official, and that recourse from the decision of the Board of Adjustment shall be to the courts as provided by law.

**Section 3.03.07 Appeals to a Court of Record.** Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, or any taxpayer, landowner, or any officer, department, board, or bureau of the County, may present to a court of record a petition duly verified, setting forth that the decision is illegal, in whole or in part, specifying the grounds of the illegality. The petition shall be presented to the court within thirty (30) days after the filing of the decision in the office of the Auditor.

**CHAPTER 3.04 PROCEDURES FOR CONDITIONAL USES, VARIANCES, AND ZONING AMENDMENTS**

**Section 3.04.01 Powers and Jurisdiction Relating to Conditional Uses.**

The Board of Adjustment shall have the power to hear and decide, in accordance with the provisions of this Ordinance, requests for conditional uses or for decisions upon other special questions upon which the Board of Adjustment is authorized by this Ordinance to pass; to decide such questions as are involved in determining whether special conditions and safeguards as are appropriate under this Ordinance, or to deny conditional uses when not in harmony with the purpose and intent of this Ordinance. A conditional use permit shall not be granted by the Board of Adjustment unless and until:

1. A written application for a conditional use permit is submitted, indicating the section of this Ordinance under which the conditional use permit is sought and stating the grounds on which it is requested.
2. The Administrative Official may require the applicant for a conditional use permit to notify adjacent property owners by mail, at their last known address, of the conditional use permit request and of the public hearing time and date prior to the hearing of the Board of Adjustment.
3. Notice of hearing 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.
4. The public hearing shall be held. Any party may appear in person, or by agent or attorney.
5. The Board of Adjustment shall make a finding that it is empowered under the section of this Ordinance described in the application to grant the conditional use permit, and that the granting of the conditional use will not adversely affect the public interest.
6. Before granting any conditional use permit, the Board of Adjustment shall make written findings certifying compliance with the specific rules governing individual conditional uses and that satisfactory provision and arrangements have been made concerning the following, where applicable:



- a. Entrance and exit to property and proposed structures thereon with particular reference to automotive and pedestrian safety and convenience, traffic flow and control, and access in case of fire or catastrophe.
  - b. Off-street parking and loading areas where required, with particular attention to the items in (a) above and the economic, noise, glare or other effects of the conditional use on adjoining properties and properties generally in the district.
  - c. Utilities refuse and service areas, with reference to locations, availability, and compatibility.
  - d. Screening and buffering with reference to type, dimensions and character.
  - e. Signs, if any, and proposed exterior lighting with reference to glare, traffic safety, economic effect and compatibility and harmony with properties in the district.
  - f. Required yards and other open space.
  - g. General compatibility with adjacent properties and other property in the district.
  - h. The roads providing access to the property are adequate to meet the transportation demands of the proposed conditional use. The Board of Adjustment may require the applicant to enter into a written contract with any affected township or other governmental unit regarding the upgrading and continued maintenance of any roads used for the conditional use requested prior to issuance of a Conditional Use Permit.
7. The concurring vote of two thirds (2/3) of all members of the Board of Adjustment four (4) votes is required to pass any application for a Conditional Use Permit.
  8. A conditional use permit shall expire two years from the date upon which it becomes effective if the construction related to the project requiring the conditional use has not been completed. Upon written request to the Board of Adjustment and prior to the conditional use permit expiration date, a one (1) year time extension for the conditional use may be granted by the Board of Adjustment.
  9. In granting any conditional use, the Board of Adjustment may prescribe appropriate conditions and safeguards in conformity with this regulation. Violation of such conditions and safeguards, when made a part of the terms under which the conditional use permit is granted, shall be deemed a violation of this regulation and punishable under the terms of this regulation.
  10. The Board of Adjustment may, after notice and hearing, revoke a conditional use permit in the event of a violation of any of the conditions upon which such permit was issued. In addition, the conditional use permit may not be transferred during any violation.
  11. Reapplication: The Board of Adjustment may only consider a previously denied application if the following occur:
    - a. Six (6) months has expired since the date of the previous final action of the Board of Adjustment; or

4. Performance Bond.

The applicant may be required to post a surety performance bond in an amount to be determined by the County Commission to assure that sufficient funds will be available to carry out required reclamation and, if necessary, decontamination of affected ground and surface waters. The amount shall be set by the County Commission based on an estimate of the cost of reclamation and decontamination. The bond shall be released five (5) years after mining and milling has ceased unless the Commissioners find, for good cause shown, that the water quality of the affected area has not been restored or the reclamation plan has not been completed. The amount of the surety bond may be reduced by the Commissioners if a bond is held by the State of South Dakota for the same purpose, by the same amount of the latter bond.

5. Utilities/Easements.

No excavation shall occur within recorded easements. The Board of Adjustment may specify a maximum slope at which excavation may occur in relation to any utility pole or recorded easement

6. A conditional use permit shall be issued only after all conditions specified herein have been met. Evidence of violation of the regulations, including but not limited to air and water contamination, shall be cause for an immediate cessation of mining and milling activities.

7. Solution mining - mining of an ore body with circulation of chemicals through injection and recovery wells, for minerals is prohibited.

## **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 4.21.02 Federal and State Requirements.**

1. All WESs shall meet or exceed standards and regulations of the Federal Aviation and South Dakota State Statutes and any other agency of federal or state government with the authority to regulate WESs.

### **Section 4.21.03 General Provisions.**

1. Mitigation Measures

- a. Site Clearance. The permittees shall disturb or clear the site only to the extent necessary to assure suitable access for construction, safe operation and maintenance of the WES.
- b. Topsoil Protection. The permittees shall implement measures to protect and segregate topsoil from subsoil in cultivated lands unless otherwise negotiated with the affected landowner.

- c. Compaction. The permittees shall implement measures to minimize compaction of all lands during all phases of the project's life and shall confine compaction to as small an area as practicable.
- d. Livestock Protection. The permittees shall take precautions to protect livestock during all phases of the project's life.
- e. Fences. The permittees shall promptly replace or repair all fences and gates removed or damaged during all phases of the project's life unless otherwise negotiated with the affected landowner.
- f. Roads
  - i. Public Roads. Prior 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 state, county or township governing body having jurisdiction over the roads to determine if the haul roads identified are acceptable. The governmental body shall be given adequate time to inspect the haul roads prior to use of these haul roads. Where practical, existing roadways shall be used for all activities associated with the WES. Where practical, all-weather roads shall be used to deliver cement, turbines, towers, assemble nacelles and all other heavy components to and from the turbine sites.
  - ii. The permittees shall, prior to the use of approved haul roads, make satisfactory arrangements with the appropriate state, county or township governmental body having jurisdiction over approved haul roads for construction of the WES for the maintenance and repair of the haul roads that will be subject to extra wear and tear due to transportation of equipment and WES components. The permittees shall notify the County of such arrangements upon request of the County.
  - iii. Turbine Access Roads. Construction of turbine access roads shall be minimized. Access roads shall be low profile roads so that farming equipment can cross them and shall be covered with Class 5 gravel or similar material. When access roads are constructed across streams and drainageways, the access roads shall be designed in a manner so runoff from the upper portions of the watershed can readily flow to the lower portion of the watershed.
  - iv. Private Roads. The permittees shall promptly repair private roads or lanes damaged when moving equipment or when obtaining access to the site, unless otherwise negotiated with the affected landowner.
  - v. Control of Dust. The permittees shall utilize all reasonable measures and practices of construction to control dust.
  - vi. Soil Erosion and Sediment control Plan. The permittees shall develop a Soil Erosion and Sediment Control Plan prior to construction and submit the plan to the County. The Soil Erosion and Sediment Control Plan shall address the erosion control measures for each project phase, and shall at a minimum identify plans for grading, construction and drainage of roads and turbine pads; necessary soil information; detailed design features to maintain downstream water quality; a comprehensive revegetation plan to maintain and ensure adequate erosion control and slope stability and to restore the site after temporary project activities; and measures to minimize the area of surface disturbance.

Other practices shall include containing excavated material, protecting exposed soil, stabilizing restored material and removal of silt fences or barriers when the area is stabilized. The plan shall identify methods for disposal or storage of excavated material.

## 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 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.
3. Electromagnetic Interference. The permittees shall not operate the WES so as to cause microwave, television, radio, or navigation interference contrary to Federal Communications Commission (FCC) regulations or other law. In the event such interference is caused by the WES or its operation, the permittees shall take the measures necessary to correct the problem.
  4. Lighting. Towers shall be marked as required by the Federal Aviation Administration (FAA). There shall be no lights on the towers other than what is required by the FAA. This restriction shall not apply to infrared heating devices used to protect the monitoring equipment. Upon commencement of construction of a Tower, in cases where there are residential uses located within a distance which is three hundred (300) percent of the height of the Tower from the Tower and when required by federal law, dual mode lighting shall be requested from the FAA. Beacon lighting, unless required by FAA, shall not be utilized.
  5. Turbine Spacing. The turbines shall be spaced no closer than three (3) rotor diameters (RD) (measurement of blades tip to tip) within a string. If required during final micro siting of the turbines to account for topographic conditions, up to 10 percent of the towers may be sited closer than the above spacing but the permittees shall minimize the need to site the turbines closer.

6. **Footprint Minimization.** The permittees shall design and construct the WES so as to minimize the amount of land that is impacted by the WES. Associated facilities in the vicinity of turbines such as electrical/electronic boxes, transformers and monitoring systems shall to the greatest extent feasible be mounted on the foundations used for turbine towers or inside the towers unless otherwise negotiated with the affected landowner.
7. **Collector Lines.** Collector lines are the conductors of electric energy from the Wind Energy System to the feeder lines. When located on private property, the permittees shall place electrical lines, known as collectors, and communication cables underground between the WES and the feeder lines. The exception to this requirement is when the total distance of collectors from the substation requires an overhead installation due to line loss of current from an underground installation. Collectors and cables shall also be placed within or immediately adjacent to the land necessary for turbine access roads unless otherwise negotiated with the affected landowner. This paragraph does not apply to feeder lines.
8. **Feeder Lines.** Feeder lines are the conductors of electric energy from the collector lines to the main electric terminal. The permittees shall place overhead electric lines, known as feeders, on public rights-of-way or private property. Changes in routes may be made as long as feeders remain on public rights-of-way and approval has been obtained from the governmental unit responsible for the affected right-of-way. If no public right-of-way exists, the permittees may place feeders on private property. When placing feeders on private property, the permittees shall place the feeder in accordance with the easement negotiated with the affected landowner. The permittees shall submit the site plan and engineering drawings for the feeder lines before commencing construction. Feeder line support structures (power poles) shall be placed on private property where concrete or other similar materials are used as an exposed or above-ground permanent foundation.
9. **Decommissioning/Restoration/Abandonment**
  - a. **Decommissioning Plan.** Within 120 days of completion of construction, the permittees shall submit to the County a decommissioning plan describing the manner in which the permittees anticipate decommissioning the project in accordance with the requirements of paragraph (b) below. The plan shall include a description of the manner in which the permittees will ensure that it has the financial capability to carry out these restoration requirements when they go into effect. The permittees shall ensure that it carries out its obligation to provide for the resources necessary to fulfill these requirements. The County may at any time request the permittees to file a report with the County describing how the permittees are fulfilling this obligation.
  - b. **Site Restoration.** The decommissioning of the WES shall begin within eight (8) months of the expiration of this permit, or earlier termination of operation of the WES and be completed within eighteen (18) months of the expiration of this permit or earlier termination of operation of the WES. The permittees shall have the obligation to dismantle and remove from the site all towers, turbine generators, transformers, overhead and underground cables, foundations, buildings and ancillary equipment to a depth of four (4) feet. To the extent possible the permittees shall restore and reclaim the site to its pre-project topography and topsoil quality. All access roads shall be removed unless written approval is given by the affected landowner requesting that one or more roads, or portions thereof, be retained. Any agreement for removal to a lesser depth or for no removal shall be recorded with the County and shall show the locations of all such foundations. All such agreements between the permittees and the affected landowner shall be submitted to the County prior to

completion of restoration activities. The site shall be restored in accordance with the requirements of this condition within eighteen months after expiration.

- c. Cost Responsibility. The owner or operator of a WES is responsible for decommissioning that facility and for all costs associated with decommissioning that facility and associated facilities.
  - d. Financial Assurance. After the tenth (10<sup>th</sup>) year of operation of a WES facility, the Board may require a performance bond, surety bond, letter of credit, corporate guarantee or other form of financial assurance that is acceptable to the Board to cover the anticipated costs of decommissioning the WES facility.
  - e. Failure to Decommission. If the WES facility owner or operator does not complete decommissioning, the Board may take such action as may be necessary to complete decommissioning, including requiring forfeiture of the bond. The entry into a participating landowner agreement shall constitute agreement and consent of the parties to the agreement, their respective heirs, successors, and assigns, that the Board may take such action as may be necessary to decommission a WES facility.
10. Abandoned Turbines. The permittees shall advise the County of any turbines that are abandoned prior to termination of operation of the WES. The County may require the permittees to decommission any abandoned turbine.
11. 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.
12. 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

## **CHAPTER 4.22 WIRELESS TELECOMMUNICATIONS TOWERS AND FACILITIES**

### **Section 4.22.01 Purpose.**

The general purpose of this Section is to regulate the placement, construction, and modification of Towers and Telecommunications Facilities in order to protect the health, safety, and welfare of the public, while at the same time not unreasonably interfering with the development of the competitive wireless telecommunications marketplace in the County.

Specifically, the purposes of this Ordinance are:

1. To regulate the location of Towers and Telecommunications Facilities in the County;
2. To protect residential areas and land uses from potential adverse impact of Towers and Telecommunications Facilities;
3. To minimize adverse visual impact of Towers and Telecommunications Facilities through careful design, siting, landscaping, and innovative camouflaging techniques;
4. To promote and encourage shared use/co-location of Towers and Antenna Support Structures as a primary option rather than construction of additional single-use Towers;
5. To promote and encourage utilization of technological designs that will either eliminate or reduce the need for erection of new Tower structures to support antenna and Telecommunications Facilities;

TABLE 4.24-2  
MINIMUMS

	CLASS A (2,000 or more)	CLASS B (1,000 to 1,999)	CLASS C (300 to 999)	CLASS D & E (10 to 299)
Established Residences	2,640 feet Plus one (1) Foot for each Addl. AU over 1,000 AU	2,640 feet Plus one (1) Foot for each Addl. AU over 1,000 AU	2,640 feet	1,320 feet
Churches, Businesses and Commercially Zoned Areas	2,640 feet plus 440 ft For each Addnl. 1,000 AU over 2,000 AU	2,640 feet	2,640 feet	1,320 feet
Incorporated Municipality Limits, Carpenter & Crocker	10,560 feet plus 440 feet for each addnl. 1,000 AU over 2,000	5,280 feet	2,640 feet	2,640 feet
Lakes and Streams classified as Fisheries as identified by the State	500 feet	200 feet	200 feet	200 feet
Federal, State & County Road ROW	330 feet	330 feet	330 feet	200 feet
Township Road ROW	330 feet	330 feet	330 feet	200 feet
Designated Flood Plain Public Water Supplies	Prohibited 1,000 feet	Prohibited 1,000 feet	Prohibited 500 feet	Prohibited 500 feet
Private Shallow Wells Other than the operator*	250 feet	250 feet	250 feet	250 feet

\* Private wells meeting the definition of an abandoned well shall not be considered in determining the above minimum setback and separation distances.

## 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.

b. Considerations To Decrease Suggested Setbacks And Separation Distances

The Board of Adjustment may reduce recommended setback/separation distances of any new or existing Concentrated Animal Feeding Operation proposing to expand based upon any or all of the following considerations:

- i. Public input relating to the variance requested;
- ii. Site specific review dealing with drainage, topography, and wind direction; and
- iii. Review of the operation of the Concentrated Animal Feeding Operation as it pertains to the type of manure handling system and manure application methods to be used would not require conformance with suggested setback and separation distances as outlined herein.
- iv. An existing Concentrated Animal Feeding Operation proposes to expand but does not meet suggested setback or separation distances, the Board of Adjustment may reduce suggested setbacks and separation distances after review of past management practices and proposed improvements to manure handling facilities.
- v. Due to the type of manure handling and management of the CAFO little or no impact on adjacent property is expected. The use of Bio-filters, neoprene lagoon covers, and/or methane digesters are examples of improvements which may result in the reduction of recommended setbacks and separation distances. The South Dakota Odor Footprint Tool may be utilized to determine the need to decrease setback and/or separation requirements.
- vi. Due to topography and/or prevailing wind direction little or no impact on adjacent property is expected. The South Dakota Odor Footprint Tool may be utilized to determine the need to decrease setback and/or separation requirements.
- vii. By limiting the proposed expansion to specific number of animal units no adverse impacts are expected. The South Dakota Odor Footprint Tool may be utilized to determine the need to decrease setback and/or separation requirements.

**Comprehensive Land Use Plan.** The adopted long-range plan intended to guide the growth and development of Clark County.

**Concentrated Animal Feeding Operation.** A Concentrated Animal Feeding Operation is defined as a lot, yard, corral, building or other area where animals have been, are, or will be stabled or confined for a total of forty-five (45) days or more during any twelve (12)-month period, and where crops, vegetation, forage growth, or post harvest residues are not sustained over any portion of the lot or facility.

**Contractor Shops and Yards.** Those facilities to include structures and land areas where the outdoor storage of equipment and supplies used for various types of construction are stored. Examples of equipment and supplies include but are not limited to the following – road construction, building construction, gravel operations, and general contracting services.

**Conditional Use.** A conditional use is a use that would not be appropriate generally or without restriction throughout the zoning division or district, but which, if controlled as to number, area, location, or relation to the neighborhood, would promote the public health, safety, welfare, morals, order, comfort, convenience, appearance, prosperity, or general welfare. Such uses may be permitted in such zoning division or district as conditional uses, as specific provisions for such uses is made in this zoning Ordinance. Conditional uses are subject to evaluation and approval by the Board of Adjustment and are administrative in nature.

**Contamination.** The process of making impure, unclean, inferior or unfit for use by introduction of undesirable elements.

**Contamination, Air.** A concentration of any radioactive or toxic material which is a product, by-product, or otherwise associated with any exploration, mining or milling operation that increases ambient air radiation levels by fifty (50) mrems from the background levels at the perimeter of the mining and milling site or at the top of an exploration hole.

**Contamination, Water.** A concentration of any radioactive or toxic material which is a product, by-product, or otherwise associated with any exploration levels established by the Federal Safe Drinking Water Act and regulations promulgated there under.

**Contingency Plans.** Detailed plans for control, containment, recovery and clean up of hazardous materials released during floods, fires, equipment failures, leaks and spills.

**Contractor Shops and Yards.** Those facilities to include structures and land areas where the outdoor storage of equipment and supplies used for various types of construction are stored. Examples of equipment and supplies include but are not limited to the following – road construction, building construction, gravel operations, and general contracting services.

**Convenience Store.** Any retail establishment offering for sale pre-packaged food products, household items, and other goods commonly associated with the same, at which a customer typically purchases only a few items during a short visit.

**Density.** The number of families, individuals, dwelling units, or housing structures per unit of land.

**Development.** The carrying out of any surface or structure construction, reconstruction or alteration of land use or intensity of use.

**Feedlot.** Feedlot means pens or similar areas with dirt, or concrete (or paved or hard) surfaces. Animals are exposed to the outside environment except for possible small portions affording some protection by windbreaks or small shed type shade areas. Feedlot is synonymous with other industry terms such as open lot pasture lot, dirt lot, or dry lot.

**Fence.** A structure used as a boundary, screen, separation, means of privacy, protection or confinement, and is constructed of wood, plastic, metal, wire mesh, masonry or other similar material and is used as a barrier of some sort.

**Filling.** To reclaim land by filling in low-lying ground with soil.

**Firearm.** A gun that discharges shot, bullet or other projectile by means of an explosive, gas, compressed air, or other propellant.

**Frontage.** All the property on one (1) side of a street or road.

**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.

**Game Lodge.** A building or group of two (2) or more detached, or semi-detached, or attached buildings occupied or used as a temporary abiding place of sportsmen, hunters and fishermen, who are lodged with or without meals, and in which there are sleeping quarters.

**Garage, Private.** An accessory building used for the storage of vehicles owned and used by the occupant of the building to which it is necessary. Vehicles include cars, pickups, trailers, and boats.

**Grade.** The finished grade of premises improved by a building or structure is the average natural elevation or slope of the surface of the ground within fifty (50) feet of the building or structure.

**Grading.** The act or method of moving soil to reshape the surface of land or a road to a desired level or grade.

**Grandfather"ed" Clause.** A clause in a law that allows for the continuation of an activity that was legal prior to passage of the law but would otherwise be illegal under the new law.

**Greenhouse.** A building whose roof and sides are made largely of glass or other transparent or translucent material and in which the temperature and humidity can be regulated for the cultivation of delicate or out-of-season plants for subsequent sale or for personal enjoyment.

**Grey Water.** All domestic wastewater except toilet discharge water.

**Wind Energy System (WES).** A commonly owned and/or managed integrated system that converts wind movement into electricity. All of the following are encompassed in this definition of system:

1. Tower or multiple towers,
2. Generator(s),
3. Blades,
4. Power collection systems, and
5. Electric interconnection systems.

**Windward Row.** Of or on the side exposed to prevailing winds. Regarding shelterbelts, on the north and west side of a public right-of-way, the windward row of the shelterbelt is northernmost or westernmost row of trees. On the south and west side of a public right-of-way, the windward row of the shelterbelt is southernmost and easternmost row of trees.

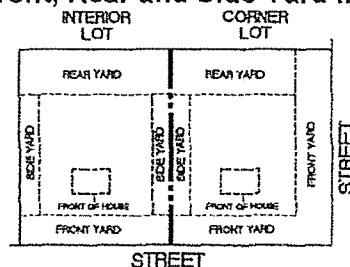
**Yard.** An open space on the same lot with a building, unoccupied and unobstructed. In measuring a yard for the purpose of determining the width of a side yard, the depth of a front yard, or the depth of a rear yard, the minimum horizontal distance between the lot line and bearing wall of the main building shall be used.

**Yard, Front.** A yard extending across the front of a lot between the side-yard lines, and being the minimum horizontal distance between the road right-of-way line and the main bearing wall of the main building or any projections thereof other than the projections of the usual steps, unenclosed balconies or open porch. There shall be a front yard on each street which a lot abuts regardless of zoning district. (See Front, Side, and Rear Yard Illustration Below)

**Yard, Rear.** Any yard extending across the rear of a lot measured between the side lot lines, and being the minimum horizontal distance between the rear lot line and the rear of the main building or bearing wall or any projections other than steps, unenclosed porches, or unenclosed balconies. On corner lots the rear yard may be to the rear of either street, provided that the minimum rear yard depth requirement shall be calculated on the longest average lot dimension. On interior lots the rear yard shall in all cases be at the opposite end of the lot from the front yard. (See Front, Side, and Rear Yard Illustration Below)

**Yard, Side.** A yard between the main building and the side line of the lot being the minimum horizontal distance between the bearing wall of the building and the side yard line, and extending from the front lot line to the rear yard line. (See Front, Side, and Rear Yard Illustration Below)

**Front, Rear and Side Yard Illustration**



**Zone of Contribution.** The entire area around a well or wellfield that contributes water to the well or wellfield.

# Exhibit 2

Written Findings of the Clark County Board of Adjustment  
Hearing for Conditional Use Permit -- Crocker Wind Farm, LLC  
CU1-17

The Board of Adjustment finds and rules as follows:

1. That Crocker Wind Farm, LLC, has properly submitted a written application to obtain a Conditional Use Permit for a Wind Energy System (WES).
2. That all information required for the granting of the permit has been submitted to Board of Adjustment pursuant to Section 4.21.03(15) of the Clark County Zoning Ordinance.
2. That proper notice of the request for the Conditional Use Permit and the time and place of public hearing was properly provided to adjacent landowners.
3. That notice of the public hearing was properly published in the Clark County Courier.
4. That the Board of Adjustment is empowered under Section 4.21 of the Clark County Zoning Ordinance to grant a Conditional Use Permit for applicant to construct and operate a Wind Energy System.
5. That it appears the project as detailed will have the capacity to meet or exceed all standards and regulations of the Federal Aviation Administration and all South Dakota state statutes, as well as those of other federal and state agencies having regulatory oversight of Wind Energy Systems.
6. That the project as detailed properly addresses all mitigation requirements, including but not limited to questions of site clearance, topsoil protection, soil compaction, livestock protection, and fencing concerns.
7. That the project as detailed properly addresses identification of state, county, and township "haul roads" and notification to the respective governmental bodies.
8. That the project as detailed properly addresses the necessity of proper repair and maintenance of "haul roads" and the entry of agreements with the state, county, and townships to mandate the repair, maintenance, and other conditions under written haul road agreements.
9. That the project as detailed provides for the minimization of turbine access roads, the constructions of the roads in a manner allowing passage of farm machinery, and the construction with materials as required by the zoning ordinance.
10. That the project as detailed provides for proper repair to private roads, if damaged.
11. That the project as detailed provides for the proper control of construction dust.

12. That all necessary soil erosion and sediment control plans will be properly submitted to the County prior to construction.

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  $\frac{1}{4}$  of mile from existing off-site, non-participating residences, measured from the 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.

15. That all other ordinance setbacks will be met or exceeded by the applicant.

16. That private property considerations necessitate that the setback distances may be less than established by these findings if adjoining landowners agree to lesser setbacks and such agreement is recorded and filed with Clark County Administration Official.

17. That applicant has conducted a third-party telecommunications study and any electromagnetic interference disruptive of microwave, television, radio, or navigation signals is unlikely.

18. That testimony provided by Interstate Telecommunications Cooperative does necessitate that applicant make agreement with the cooperative, specifically incorporating the terms and conditions contained in a Resolution proposed by Interstate Telecommunications Cooperative which resolution is a part of the file in this matter.

19. That the project as detailed requires all towers to be marked and lighted as required the FAA; however, the peace and tranquility of county residents requires that the applicant shall make a good faith effort to employ an Aircraft Detection Lighting System designed to turn blinking lights atop wind turbines on or off, based on the presence or absence of aircraft in the vicinity of the WES, and that it shall as soon as practicable, commission a study to determine the feasibility of such a system, including pros, cons, and estimated costs, with the study being presented to the Board of Adjustment and the Board of Adjustment reserving the right to mandate such a system after review of the feasibility study.

20. That the project as detailed calls for turbine spacing of a minimum of three rotor diameters.

21. That the project, having a  $\frac{1}{4}$  mile setback, will comply with all footprint minimization requirements.

22. That the project as detailed meets the minimum requirements for all collector and feeder lines.

23. That applicant will submit a decommissioning plan within 120 days of completion of construction and has the ability to meet all other decommissioning requirements, including the decommissioning of any abandoned towers, if any.

24. That all turbine models under consideration by the applicant meet county requirements with respect to height from ground surface and color and finish and shall be singular, tubular design.

25. That evidence presented at the hearing indicates that that with a  $\frac{3}{4}$  mile setback, noise levels will not exceed 50dBA, as defined in the zoning ordinance, at the perimeter of the principal and accessory structures of existing off-site residences, businesses, and buildings owned or maintained by a governmental entity.

26. That questions relating to entrance and exit to affected property and proposed structures thereon have been adequately addressed with reference to automotive and pedestrian safety and convenience, traffic flow and control, and access in case of fire or catastrophe.

27. That there are no questions or concerns with respect to off-street parking and loading areas, and any questions or concerns with respect to economic impact, noise, glare or other effects on adjoining properties and other properties in the district have been addressed.

28. That there are no questions with respect to utilities, refuse and service areas relating to location, availability and character.

29. That there are no questions relating to screening and buffering.

30. That there are no questions with respect to required yards and other open spaces.

31. That evidence presented at the hearing was sufficient to prove that the granting of the conditional use would not adversely affect the public interest.

32. That the evidence presented at the hearing was sufficient to prove that the conditional use is generally compatible with adjacent properties and other property in the district.

33. That the Conditional Use Permit was approved with the following conditions:

The setback distance from existing off-site, non-participating residences shall be  $\frac{3}{4}$  mile measured from the wall line of the neighboring principal building to base of the WES tower, unless otherwise negotiated pursuant to the zoning ordinance.



The construction and operation of the WES shall be done in a manner so as to not interfere with the maintenance and operation of other utility and telecommunication lines, specifically incorporating the terms and conditions contained in a Resolution proposed by Interstate Telecommunications Cooperative which resolution is a part of the file in this matter. .

The applicant shall make a good faith effort to employ an Aircraft Detection Lighting System designed to turn blinking lights atop wind turbines on or off, based on the presence or absence of aircraft in the vicinity of the WES and shall, as soon as practicable, commission a study to determine the feasibility of such a system, including pros, cons, and estimated costs, with the study being presented to the Board of Adjustment.

The applicant is required to meet or exceed all standards and regulations of the Federal Aviation Administration, the State of South Dakota, and any other agency of the federal or state government with the authority to regulate Wind Energy Systems.

The applicant shall make all reasonable efforts to protect county and township roads and shall enter into road haul agreements with Clark County and all affected townships. The applicant shall employ an on-site contact person to deal with any county or township road issues or complaints during construction of the WES.

The applicant shall, at a minimum, meet all standards dictated in the zoning ordinance or proposed in its application if more stringent than the zoning ordinance, including but not limited to the following categories: Mitigation Measures; Roads, Setbacks, Electromagnetic Interference; Lighting; Turbine Spacing; Footprint Minimization; Collector Lines; Feeder Lines; Decommissioning; Abandoned Turbines; Height from Ground Surface; Tower Design; Noise; Permit Expiration Limitation of three years; and any other conditions the Board of Adjustment deems necessary.

The setback shall be at least one mile from cemeteries.

The applicant shall provide an updated project map showing accurate project area boundaries, the movement of tower 56, the elimination of tower 58 (potentially affecting a private airstrip), and updated setbacks.

The approval of this conditional use permit is subject to and shall become final only upon the Board of Adjustment's approval of written findings mandated by the zoning ordinance which findings will be presented for approval at the next scheduled meeting of the Board of Adjustment.

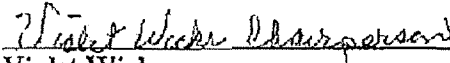
34. Approval was based upon the following vote:

Voting Yes on the motion to approve said permit were:

Bob Bjerke, Francis Hass, Richard Reints, Violet Wicks

Voting No on the motion to approve said permit was:

Chris Sass

  
Violet Wicks  
Chairperson, Board of Adjustment

Written Findings of the Clark County Board of Adjustment  
Hearing for Conditional Use Permit – Crocker Wind Farm, LLC  
CU2-17

The Board of Adjustment finds and rules as follows:

1. That Crocker Wind Farm, LLC, has properly submitted a written application to obtain a Conditional Use Permit for a Wind Energy System (WES) Transmission Line.
2. That all information required for the granting of the permit has been submitted to Board of Adjustment pursuant to Section 4.21.03(15) of the Clark County Zoning Ordinance.
3. That proper notice of the request for the Conditional Use Permit and the time and place of public hearing was properly provided to adjacent landowners.
4. That notice of the public hearing was properly published in the Clark County Courier.
5. That the Board of Adjustment is empowered under Section 4.21 of the Clark County Zoning Ordinance to grant a Conditional Use Permit for applicant to construct and operate a Wind Energy System Transmission Line.
5. That the transmission line will be constructed in Sections 3, 10, 15, 16, 19, 22, and 30 in Township 119N, Range 58 West of the 5<sup>th</sup> P.M., Clark County, South Dakota.
6. That questions relating to entrance and exit to affected property and proposed structures thereon have been adequately addressed with reference to automotive and pedestrian safety and convenience, traffic flow and control, and access in case of fire or catastrophe.
7. That there are no questions or concerns with respect to off-street parking and loading areas, and any questions or concerns with respect to economic impact, noise, glare or other effects on adjoining properties and other properties in the district have been addressed.
8. That there are no questions with respect to utilities, refuse and service areas relating to location, availability and character.
9. That there are no questions relating to screening and buffering.
10. That there are no questions with respect to required yards and other open spaces.
11. That evidence presented at the hearing was sufficient to prove that the granting of the conditional use would not adversely affect the public interest.
12. That the evidence presented at the hearing was sufficient to prove that the conditional use is generally compatible with adjacent properties and other property in the district.