



April 16, 2019

VIA Email: dcatty@itctel.com
State's Attorney
John Knight
PO Box 590
Clear Lake, SD 57226
Phone: (605) 874-2840

Re: Request for Interpretations of Deuel County Zoning Ordinance

Dear Mr. Knight:

I write on behalf of Deuel Harvest Wind Energy LLC ("Deuel Harvest"), which is proposing the up to 310.1 megawatt Deuel Harvest North Wind Farm ("Project") to request an interpretation from the Board of Adjustment ("BOA") regarding certain provisions of the Deuel County Zoning Ordinance. Deuel Harvest is making this request because there were allegations that Deuel County Zoning Officer Jodi Theisen may have a conflict because she signed an agreement with Invenergy Wind Development LLC. Deuel Harvest does not agree that Ms. Theisen has a conflict that precludes her from interpreting the Zoning Ordinance. Nevertheless, to avoid additional claims of conflict and to aid the review of Deuel Harvest's April 5, 2019 application for a Special Exception Permit ("SEP"), Deuel Harvest respectfully requests that the BOA provide a formal interpretation of the Zoning Ordinance with respect to the three provisions identified below.

Deuel County Zoning Ordinance, §1215.03(2)(d)

Section 1215.03(2)(d) provides setbacks for new wind energy systems ("WES"):

2. Wind turbines shall meet the following minimum spacing requirements.

* * *

- d. Distance from the Lake Park District located at Lake Cochrane 3 miles, Lake Alice 2 miles and 1 mile from the Lake Park District at Bullhead Lake.

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Deuel Harvest believes the plain reading of the ordinance is that turbines must be placed at least 2 miles from the Lake Alice Lake Park District. Specifically, that the "Lake Park District Located at" modifies both (1) "Lake Cochrane" and (2) "Lake Alice," i.e., the setback is 3 miles from the Lake Cochrane Lake Park District and 2 miles from the Lake Alice Lake Park District. This reading is also consistent with the comments made during the Zoning Ordinance amendment process which resulted in these setbacks being established.

Zoning Officer Theisen provided an interpretation of Section 1215.03(2)(d) to the South Dakota Public Utilities Commission ("PUC") Staff in Docket EL18-053 confirming that the setback is from the Lake Alice Lake Park District, not Lake Alice. In a memorandum submitted to the PUC, Ms. Christina Kilby alleged, on pages 3-4, that Ms. Theisen has a conflict of interest because she has an easement agreement with Invenergy Wind Development LLC. A copy of Ms. Kilby's filing is enclosed as **Exhibit 1**.

Deuel Harvest disputes Ms. Kilby's allegations and does not believe that Ms. Theisen is precluded from rendering an interpretation of §1215.03(2)(d). Nevertheless, Deuel Harvest requests that the BOA render an interpretation confirming that the setback is from the Lake Alice Lake Park District.

Deuel County Zoning Ordinance, §1215.03(2)(a)

Section 1215.03(2)(a) establishes setbacks applicable to wind turbines:

Distance from existing Non-Participating residences and businesses shall be not less than four times the height of the wind turbine. Distance from existing Participating residences, business and public buildings shall be not less than fifteen hundred feet. Non-Participating property owners shall have the right to waive the respective setback requirements. For purposes of this section only, the term "business" does not include agricultural uses.

The term "business" is not separately defined in the Zoning Ordinance. There is a claim that the term "business" should apply to a hunting operation. Deuel Harvest requests that the BOA confirm that, as used in this provision, "business" applies to buildings that can be occupied by people. This interpretation is consistent with the second sentence that refers to "residences, business and public buildings," where "business" rather than "businesses" is used, indicating that "business" modifies "building."

This interpretation is also consistent with the other provisions of the WES requirements which establish setbacks from property lines. Zoning Ordinance, §1215.03(2)(a). The only way to harmonize the two provisions is to interpret "business" as modifying the word "building." To interpret otherwise, i.e., that a use such as a hunting operation qualifies as a "business," would

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lead to an absurd and unintended result. There would be no location from which to measure a setback because there is no structure. Also, it would stand to reason that since “business” does not include agricultural uses, it would not include a hunting operation. Deuel Harvest requests that the BOA render an interpretation confirming that “business” in Section 1215.03(2)(a) means a building that can be occupied by humans.

Deuel County Zoning Ordinance, §504(8)

Section 504(8) establishes a timing bar for new SEP applications under certain circumstances:

Reapplication. No applicant requesting a special exception permit whose application includes the same or substantially the same requirements for the same or substantially the same property which has been denied by the Board of Adjustment shall be again considered by the Board of Adjustment before the expiration date of six (6) months from the date of the final action on the petition.

Deuel Harvest requests that the BOA provide an interpretation of this provision clarifying that it does not apply to a second SEP application when the first SEP is rendered invalid due to a later Third Circuit Court’s determination that certain BOA members’ votes were invalid. The provision, by its plain terms, applies when an application “has been denied by the Board of Adjustment.” In the case of Deuel Harvest’s first application, the SEP was approved by a vote of 5-0. The Circuit Court later held that two of the BOA members were ineligible to vote. Thus, the BOA took no action; the Circuit Court did so in Docket No. 19CIV18-000019. At most, the BOA failed to approve a motion to approve issuance of the SEP – that is not the same as approving a motion to deny the SEP.

Deuel Harvest is appealing the Circuit Court’s decision and disagrees with the Circuit Court’s conclusion that the BOA members had a disqualifying interest, but Deuel Harvest has also reapplied to ensure the Project proceeds on a timely basis. Even if the Circuit Court’s decision is affirmed, and Section 504(8) were to apply here, the date of any denial would be when the BOA approved SEPs and adopted findings in January/February 2018 because the Circuit Court held that at that time in January/February 2018 the two BOA members were ineligible to vote. Therefore, at that time in January/February 2018, the BOA failed to approve the SEP for the Project. Since more than 6 months has elapsed since that failure to approve, the BOA may consider Deuel Harvest’s April 5, 2019 SEP Application.

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Thank you for your attention to this matter.

Sincerely,

/s/ Lisa M. Agrimonti

Lisa M. Agrimonti
Attorney at Law
Direct Dial: 612.492.7344
Email: lagrimonti@fredlaw.com

LMA:rg

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**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

**IN THE MATTER OF THE
APPLICATION BY DEUEL HARVEST
WIND ENERGY, LLC FOR A PERMIT
OF A WIND ENERGY FACILITY AND
A 345-kV TRANSMISSION LINE IN
DEUEL COUNTY**

* **INTERVENOR CHRISTINA KILBY’S**
* **REPLY BRIEF IN SUPPORT OF**
* **MOTION TO DENY**
* **EL18-053**
*
*

I. INTRODUCTION

Deuel Harvest’s Application is inaccurate and premature, resulting in a waste of Commission time and resources. Deuel Harvest is attempting a bait and switch and a “we will” answer to application requirements. Too many unknowns in Deuel Harvest’s Application and Project prevent Intervenors adequate notice and meaningful participation, resulting in due process violations.

SDCL 49-41B-13 provides authority for the Commission to deny Deuel Harvest’s application for any deliberate misstatement of a material fact in the application or in accompanying statements or studies required of the applicant. 49-41B-13 also provides authority for the Commission to deny an application for failure to include the required content. Deuel Harvest’s Application should be denied for its numerous misstatements of facts and for not containing all content required by

II. DEUEL HARVEST IS UNABLE TO MEET ITS BURDEN OF PROOF

Deuel Harvest claims it is “committed” to complying with all applicable law and rules. (DH Response to Motion for Denial, at B.) SDCL 49-41B-22 specifically requires the applicant

prove that the proposed facility will comply with all applicable laws and rules.. (emphasis added)
A commitment to comply is not sufficient to satisfy this requirement. Further, this burden of proof must be met prior to receiving a permit, not simply prior to beginning construction.

One significant requirement Deuel Harvest must prove prior to receiving a permit from the commission is that the project will comply with the setbacks required by the Deuel County Ordinance (“Ordinance”). Not only is Deuel Harvest unable to prove that it will receive a special exception permit required for a wind energy system in Deuel County, but the proposed configuration in the Application violates the Deuel County setback requirements from Lake Alice. Mr. Thurber has verified that the configuration submitted by Deuel Harvest violates this setback. (Thurber Testimony, p 23).

The Ordinance states, “Distance from the Lake Park District located at Lake Cochrane 3 miles, Lake Alice 2 miles, and I mile from the Lake Park District at Bullhead Lake.” (Application App C) A first public reading of the proposed amendments was done on May 16, 2017. The second reading of the proposed amendment was done on May 23, 2017, at which time the language was approved and adopted.¹

The Supreme Court has ruled that, “[w]hen interpreting an ordinance, we must assume that the legislative body meant what the ordinance says and give its words and phrases plain meaning and effect.” *Even v. City of Parker*, 1999 SD 72, 597 N.W.2d 670, See *Nilson v. Clay County*, 534 N.W.2d 598, 601 (S.D.1995). Here, the plain language of the Ordinance indicates that the two-mile setback is from Lake Alice, not its lake park district. Specific language indicating setbacks to be from the Park District were included for Lake Cochrane and also for

¹ An Ordinance to Amend Section 1215 Wind Energy System (WES) Deuel County
https://docs.wixstatic.com/ugd/1bce45_4ea62d7301e84a0fb5b44dfaf848e220.pdf

Bullhead Lake, but was excluded for Lake Alice. The ordinance itself is clear and not ambiguous.

Deuel Harvest's Application also interpreted the setback from Lake Alice to be from the entire lake: At 9.2 "Distance from the Lake Park District located at Lake Cochrane is at least 3 miles, from Lake Alice at least 2 miles and 1 mile from the Lake Park District at Bullhead Lake." Deuel Harvest should not be allowed this bait and switch. The numerous inconsistencies contained in the Application regarding the setback from Lake Alice alone warrants a denial.

According to the Direct Testimony of Jon Thurber, filed March 14, 2019, "[t]he Zoning Officer for Deuel County indicated to Commission Staff that the setback was from the Lake Park District at Lake Alice, not from Lake Alice itself." (Thurber Testimony, p 23) Mr. Thurber stated, "Commission Staff will defer to Deuel County to interpret its Ordinance on the Lake Alice setback as the measure relates to the orderly development of the region, and the Commission has legislative direction to give due consideration to the views of governing bodies of affected local units of government pursuant to SDCL 49-41B-22(4)."

However, the Commission should not rely on the Zoning Officer's interpretation of the ordinance pertaining to the setbacks from Lake Alice. Besides the Zoning Officer's interpretation being at odds with the plain reading of the text, the Zoning Officer, Ms. Jodi Theisen, is not a "governing body" for purposes of SDCL 49-41B-22(4). More importantly, Ms. Theisen has a significant conflict of interest regarding the Project because she has signed an agreement with Deuel Harvest. (Theisen Agreement with Invenergy, Att. 1; Aff. Of Almond, Deuel County Answers, at 14, Holborn v. Deuel County Board of Adjustment) Unless shown otherwise, it is safe to assume Ms. Theisen's agreement contains the same requirement contained in the Invenergy lease given to John Homan (Kilby Affidavit, Ex E 06) That lease requires:

Owner shall assist and fully cooperate with Grantee, at no out-of-pocket expense to Owner in complying with or obtaining any land use permits and approvals, building permits... or any other permits and approvals required for the ...construction, installation...of Windpower Facilities, including but not limited to, execution of applications and documents reasonably necessary for such approvals and permits, and participating in any appeals or regulatory proceedings respecting the Windpower Facilities.

Ms. Theisen's mistaken interpretation of a plainly written ordinance in a manner to benefit Deuel Harvest's project, while she is required by contract to do so, is just one example of the extensive conflicts of interest intervenors are having to deal with in Deuel County. Because of her conflict of interest Ms. Theisen should be recused from any duties relating to the Project. Additionally, any decision of the Deuel County Zoning Officer is appealable to the Board of Adjustment, and then to the courts. (Deuel County Ordinance, Article VI.² The interpretation of an ordinance presents a question of law reviewable de novo. *Even v. City of Parker*, 1999 SD 72, ¶8, 597 NW2d 670, 673 (citations omitted).

Any potential issues regarding the interpretation of the Ordinance must follow proper procedures at the county level.³ It is for this reason that Deuel Harvest must first obtain the required special exception permit required by Deuel County. As it stands, Deuel Harvest is unable to prove the Project will comply with the county setbacks, and therefore does not meet its burden of proof required by SDCL 49-41B-22.

Deuel Harvest claims the statement that States Attorney John Knight has a conflict of interest is "meritless." Deuel Harvest is well aware of the facts supporting this statement. Deuel Harvest and/or its attorneys attended Deuel County hearings and meetings where John Knight

² https://docs.wixstatic.com/ugd/1bce45_aa74143ecd604f67965091665ce47f99.pdf

³ "Deuel Harvest does not ask the Commission to preempt local controls." (DH Response to Motion, D.2.)

advised the Board of Adjustment and/or County Commission on issues related to the Project. And according to Deuel Harvest’s Answers to Petitioners’ Interrogatories signed by Ms. Agrimonti on Sept. 4, 2018, “...Deuel Harvest Wind understands that Mr. Knight represented Darold Hunt and Gregory Toben on Wind Leases with Invenergy.” (Att. 2, Deuel Harvest’s Answers, Interrogatory #6) Further, the Board of Adjustment admitted John Knight advised the Board and that the Board relied on his advice regarding the Deuel Harvest Project.:

16. Admit that John Knight provided advice to the BOARD related to the PROJECT.

RESPONSE: Admit.

17. Admit that the BOARD relied on John Knight’s advice related to the PROJECT.

RESPONSE: Admit.

18. Admit that John Knight provided advice to the BOARD regarding the process to be used at the HEARING.

RESPONSE: Admit.

19. Admit that the BOARD relied on John Knight’s advice regarding the process to be used at the HEARING.

RESPONSE: Admit.

(Deuel County Board of Adjustment Objection and Responses, Affidavit of Almond, Ex. 16, Holborn v. Deuel County Board of Adjustment, Case No. 19CIV18-000019.

III. DEUEL HARVEST’S PREMATURE AND INCOMPLETE APPLICATION REQUIRES A DENIAL.

Deuel Harvest’s Application is premature and incomplete in many aspects. ARSD 20:10:22:05 lists the required information that an application for a permit for a facility must contain. Deuel Harvest’s Application fails to provide all required information, violating intervenors’ due process rights: “Due process requires adequate notice and an opportunity for meaningful participation.” *Grant County Concerned Citizens v. Grant County*, 2015 S.D. 54, ¶

30, citing *Osloond v. Farrier*, 2003 S.D. 28, ¶ 16, (citations omitted.) The vague, incorrect and incomplete application precludes intervenors' adequate notice and meaningful participation. The many steps in this process are meaningless if information in the Application is inaccurate, incomplete, and misleading.

Deuel Harvest has admitted "inaccuracies." What is so shocking is the magnitude of these inaccuracies. When multiple locations in an Application state drastically different setbacks, and the submitted configuration violates all of them, there is obviously an extreme lack of diligence, or an attempted "bait and switch.." Deuel Harvest's failure to accurately report an eagle's nest that it had been informed of rises to the level of deceit. At the very least, Deuel Harvest should have included the information it had received regarding a possible eagle's nest.

Deuel Harvest did not even provide a "general" description of the local land use controls required by ARSD 20:10:22:19 because it failed to even mention two significant sections of the Deuel County Ordinance the project must comply with, Section 504, Powers and Jurisdiction Relating to Special Exceptions, and Section 1105, Aquifer Protection Overlay District. ARSD 20:10:22:19 also requires a description of the *manner* in which the proposed facility will comply with the local land use controls. Deuel Harvest's answer to this requirement is a general statement that "Deuel Harvest has designed the Project to meet the requirements contained in the Ordinance and will comply with all applicable terms and conditions of the land use permits from Deuel County." (Deuel Harvest's Response to Motion, at D. 2) This obviously fails to meet the requirements.

Mr. Dean Pawlowski testified to additional issues with Deuel Harvest's Application. (Otter Tail Testimony, filed March 14, 2019) "Deuel Harvest Wind included the Interconnection Switching Station as part of its pending Application for Facility Permits (Application) in this

proceeding, notwithstanding the fact that the Interconnection Switching Station will be designed, constructed, owned and maintained by Otter Tail as part of our networked system of transmission assets.” “Otter Tail has concerns about the location and characterization of the Interconnection Switching Station contained within the application.” (Otter Tail Testimony) According to the Application section 8.5, and Mr. Pawlowski’s Testimony, the location of the Project Substation has not been determined. “The Project Substation will be approximately 2 acres in size, located generally in the center of the Project Area...”

Deuel Harvest has not determined what turbines will be used: “Deuel Harvest requests the Commission provide flexibility for the Project to use a turbine of comparable capacity and specifications, provided it meets all applicable County and State setback requirements and specified noise and shadow flicker requirements; cultural resource impacts are avoided or mitigated in consultation with SHPO; environmental constraints are adhered to as agreed upon with the USFWS and the SDGFP; and wetland impacts are avoided. Prior to implementing the turbine adjustment, the Applicant would file in the docket an affidavit demonstrating compliance with the limitations set forth above.” (App.8.2)

Deuel Harvest has not finalized turbine locations. ARSD 20:10:22:33.02 requires the applicant provide the configuration of the wind turbines. According to Mr. Thurber’s Testimony, Deuel Harvest had indicated it would move two turbines near the previously undisclosed eagle’s nest and is also assessing whether any turbines would need to be moved because of building permits acquired by participating landowners. (Thurber Testimony, p 11) Mr. Thurber stated it is unknown if layout changes are coming yet, and if so, what they would be. Mr. Thurber also verified that turbines are located even within Deuel Harvest’s claimed setbacks. (Thurber Testimony, p 23) He recommended that the project be constructed in a

manner consistent with the Application. (Id.) However, Mr. Thurber stated he understands Deuel Harvest's intention is to simply modify the avoidance and minimization measures of the Application to correctly to accurately state the layout. (Id.)

The number of MET towers is not yet determined. "Up to four permanent MET towers may be installed as part of the Project." (App. 8.10) "The location of these MET towers will depend on the final location of the turbines and specifications of the turbine manufacturer and financing parties. Locations will be within the Project Area, on land that is under lease with Deuel Harvest, and will meet all County setbacks and requirements." (Id.)

The location of the O & M building is not yet determined: "An O&M building will be constructed adjacent to the Project Substation and Interconnection Substation, or another suitable location within the Project Area." "Deuel Harvest would purchase up to 5 acres to facilitate construction and use of the O&M building." (App. 8.8) "The Applicant requests the ability to adjust the location of the Transmission Line..." (App. 8.7) And finally, "Once applicable local, State, and federal approvals are obtained, the Applicant will complete engineering scale design of access roads, construction areas, turbine foundations, and electrical components." (App. 8.13)

It is quite clear Deuel Harvest's Application is premature. The permit should be denied until Deuel Harvest is able to finalize the important details that are necessary for an adequate review.

CONCLUSION

Because Deuel Harvest has failed to meet the content requirements of 0:10:22:05 and 20:10:22:33.02, and Deuel Harvest is unable to meet its burden of proving compliance with all applicable laws and rules required by SDCL 49-41B-22. For all the reasons discussed above and

for all reasons discussed in my previous Brief, I respectfully request the Commission exercise its authority under SDCL 49-41B-13 and deny a permit to Deuel Harvest Energy at this time.

Dated: March 26, 2019

/S/ Christina Kilby

Christina Kilby
Intervenor
112 Geneva Blvd.
Burnsville, MN 55306
christinaLkilby@yahoo.com