



Department of Transportation

Office of Legal Counsel

Sioux Falls Area Office
5316 West 60th Street North
Sioux Falls, South Dakota 57107
PH: 605/367-4970 Ext. 1802014 FAX: 605/367-5685

March 22, 2019

VIA EMAIL ATTACHMENT ONLY

Mr. Darren Kearney
SD PUC
500 E. Capitol Ave.
Pierre, SD 57501

RE: Deuel Harvest Wind Energy LLC
EL18-053

Dear Mr. Kearney:

You have contacted the Department of Transportation Office of Aeronautics (“the Department”) requesting an opinion related to the referenced application. It is my understanding Garrett Homan has intervened in the permit application and approval process for the proposed Deuel Harvest Wind Energy windfarm. You had inquired about arguments Mr. Homan made in his public testimony regarding effects of the installation of wind turbines near the Homan Airfield, a private airport, as they pertain to SDCL Title 50 and, specifically, SDCL 50-10-2. I have had an opportunity to review Mr. Homan’s written testimony submitted in the matter. The argument I will address is contained in Paragraph A.2. of the Intervenor’s written testimony:

2) Wind Turbines in close proximity to my family’s airport will create a hazard and as such do not meet South Dakota Codified Law chapter 50 Aviation and 50-10 Airport Zoning which provides protection to private airports by preventing the creation of hazards to landing and taking off.

There are two chapters of Title 50 which address airport hazards relative to airport operation.

1. SDCL 50-9-1: Approval required for construction or alteration of certain structures

SDCL Ch. 50-9 (Airport Navigation Hazards) contains the “traditional” permit application process for construction of tall structures or a potential airport hazard. Department approval is required for construction or alteration of certain structures. SDCL 50-9-1 details the height threshold and the buffer distances from airports relative to the approval process.

Mr. Kearney
March 21, 2019
Page 2

In SDCL 50-9-2, the Aeronautics Commission was ordered “to promulgate rules, pursuant to chapter 1-26, covering the requirements that shall be met by any applicant to obtain the approval for the construction or alteration of any structure which is not exempt from the requirements of § 50-9-1.” SDCL 50-9-2. As additional criteria for the permitting process, ARSD 70:02:03:20 provides:

The [Aeronautics Commission] shall grant approval to any structure defined by SDCL 50-9-1 and 50-9-7 that has received and submitted to the commission a written determination by the FAA that the proposed structure does not pose a hazard to air navigation. The approval shall be conditioned upon the structure's compliance with all requirements contained in the FAA's determination that the proposed structure does not pose a hazard to air navigation. If the FAA has not yet issued a written determination at the time the application is submitted, the commission may grant conditional approval contingent upon submittal prior to commencing construction of a written determination by the FAA that the proposed structure does not pose a hazard to air navigation.

ARSD 70:02:03:20. Please note SDCL 50-9-7 has been repealed.

SDCL 50-9-1 details with specificity the circumstances under which the Department would be involved with the permitting of tall and potentially hazardous structures. The height and spacing of structures relative to the runway or airport facilities are clearly defined parameters. Failure to comply with this statute and the permit application procedure outlined in Title 50 is a criminal offense. See SDCL 50-9-5. An unapproved or illegal structure which would potentially endanger the safety of the public is a public nuisance. See SDCL 21-10-1. The Department may take steps prescribed in statute to abate the nuisance. See SDCL Ch. 21-10.

2. SDCL 50-10-2: Airport hazards as danger to life and property

The second chapter of Title 50 which addresses airport hazards is SDCL Ch. 50-10 (Airport Zoning). Specifically, SDCL 50-10-2 is a general public nuisance statute addressing airport hazards. The definition of "airport" as used in Title 50 includes private airports. SDCL 50-1-1(7). In contrast to a public airport, it is important to emphasize the Department only becomes involved with private airports when the provisions of Title 50 allow. A private airport can be established within South Dakota without the need for any involvement or approval from the Department, so long as it conforms with state statutes and any applicable Federal Aviation Administration (FAA) regulations.

An “airport hazard” is defined as “any structure, or tree, or use of land, which obstructs an aerial approach of such an airport or is otherwise hazardous to its use for landing or taking off[.]” SDCL 50-10-1(1). SDCL 50-10-2 essentially established as public policy that “an airport hazard endangers the lives and property of users of the airport and of occupants of land in its vicinity, and also, if of the obstruction type, in effect reduces the size of the area available for the landing, taking off and

Mr. Kearney
March 21, 2019
Page 3

maneuvering of aircraft, thus tending to destroy or impair the utility of the airport and the public investment therein.” *SDCL 50-10-2*. It was further declared in the statute:

- (1) That the creation or establishment of an airport hazard is a public nuisance and an injury to the community or the United States served by the airport in question; and
- (2) That it is therefore necessary in the interest of the public health, public safety, and general welfare that the creation or establishment of airport hazards be prevented.

Id.

The responsibility of prevention of airport hazards has been generally designated to “political subdivisions” by *SDCL 50-10-2.1* and not specifically to the Department. If a structure is believed to be an airport hazard, and therefore a possible public nuisance pursuant to *SDCL 50-10-2*, *SDCL 50-10-2.1* does provide for the use of public funds by “political subdivisions” for “the prevention of the creation or establishment of airport hazards[.]” *SDCL 50-10-2.1*.

3. The Department’s position

It is clear the Department is fully involved with the permit application process addressed in *SDCL Ch. 50-9*. The Department will grant tall or hazardous structure permits as long as all conditions are met. If the conditions aren’t met or a structure is constructed in violation of the law, the Department will take steps to abate the nuisance. But that is not the concern here.

With regard to private airports, Title 50 provides the Department with limited enforcement authority. The Department *may* have the authority to abate a private airport hazard found to be a public nuisance as *SDCL 50-2-5* provides one of the duties of the Transportation Commission, and also the Department, is to “supervise the aeronautical activities and facilities within the state, including supervision and control over all airports and aviation facilities.” *SDCL 50-2-5*

As previously noted, the Legislature has expressly granted the authority to abate private airport hazards to “political subdivisions” in *SDCL 50-10-2.1*. *SDCL 50-10-5* further provides “[e]ach municipality, county, or other political subdivision that has an airport layout plan, shall take measures for the protection of airport approaches, and shall adopt, administer, and enforce, under the police power and in the manner and upon the conditions prescribed by this chapter, airport zoning regulations applicable to the area.” *SDCL 50-10-5*. This statute, and the general intent of *SDCL Ch. 50-10*, shifts zoning enforcement, and therefore airport hazard enforcement which isn’t definitively granted to the Department through Title 50, to the respective political subdivision. In this instance, it is the Department’s belief Deuel County would be the political subdivision required to address any airport hazards or zoning violations which affect a private airport or which are not violations of the permit process in *SDCL Ch. 50-9*.

Mr. Kearney
March 21, 2019
Page 4

4. Final note: Clear Lake Airport

As a final note, there is a public airport which may affect the installation of at least one wind turbine related to the referenced application. The Clear Lake Airport is a public airport located within Deuel County which has been permitted by the Department. In reviewing the proposed turbine locations, Department staff has preliminarily determined one turbine (referenced as #90) may require an aeronautical hazard permit pursuant to SDCL 50-9-1, et al. Turbine #90 is approximately 23,300 feet from the Clear Lake Airport. The spacing would give the relative positions about a 48 to 1 approach surface ratio and SDCL 50-9-1 states any positioning within that distance to the airport which exceeds 50 to 1 surface ratio requires a permit be granted by the Department. This would be an example of the permit process in action addressed in Paragraph 1, above.

Thank you for this opportunity to provide input in this matter. Please let me know if you should have any questions regarding this information.

Best regards,

/s/ Dustin W. DeBoer

Dustin W. DeBoer
Special Assistant Attorney General

cc: Mr. Jack Dokken (Office of Aeronautics)
Ms. Karla Engle (DOT Office of Legal Counsel)