STATE OF SOUTH DAKOTA) : SS		IN CIRCUIT COURT
COUNTY OF DEUEL)		THIRD JUDICIAL CIRCUIT
GEORGE HOLBORN, RUBY HOLBORN, JOHN HOMAN, TERESA HOMAN, VICKI HINDERS, STACEY HINDERS, RICK KOLBECK, JENNIFER KOLBECK, WILLIAM STONE, FAY STONE, HEATH STONE, KATIE STONE, and STEVEN OVERBY, Petitioners, vs. DEUEL COUNTY BOARD OF ADJUSTMENT, DEUEL HARVEST WIND ENERGY LLC, and DEUEL HARVEST WIND ENERGY SOUTH LLC, Respondents.		19CIV18-000019 **RESPONDENTS DEUEL HARVEST WIND ENERGY LLC AND DEUEL HARVEST WIND ENERGY SOUTH LLC'S RESPONSIVE BRIEF**

SUMMARY OF ARGUMENT

Petitioners ask the Court to second-guess the Deuel County Board of Adjustment's ("Board") sound decision to issue Special Exception Permits ("SEPs") to Deuel Harvest Wind Energy LLC and Deuel Harvest Wind Energy South LLC (together, "Deuel Harvest")[1] for two proposed wind farms ("Projects"). In so doing, Petitioners fail to cite controlling law that undercuts their claims, omit key facts, and offer only speculation in lieu of evidence. All of their arguments fail, and the Board's decision should be affirmed in its entirety.

[1] Deuel Harvest is an affiliate of Invenergy, LLC ("Invenergy").

First, there is a controlling statute on the issue of whether any of the Board members had a conflict of interest, SDCL § 6-1-17 (the "Conflicts Statute"). Enacted in 2005, the Conflicts Statute provides:

> No county, municipal, or school official may participate in discussing or vote on any issue in which the official has a conflict of interest. Each official shall decide if any potential conflict of interest requires such official to be disqualified from participating in a discussion or voting. However, no such official may participate in discussing or vote on an issue if the following circumstances apply:
>
> (1) The official ***has a direct pecuniary interest in the matter before the governing body***; or
>
> (2) At least two-thirds of the governing body votes that an official has an identifiable conflict of interest that should prohibit such official from voting on a specific matter.
>
> If an official with a direct pecuniary interest participates in a discussion or votes on a matter before the governing body, ***the legal sole remedy is to invalidate that official's vote.***

(Emphases added.)

Based on the Conflicts Statute, the sole question when analyzing conflicts of interest is whether any Board member has a "direct pecuniary interest." Because the answer here is "no", the Court must find there was no conflict of interest. This answer may explain why Petitioners make no mention of the Conflicts Statute.

Second, Petitioners' claim of due process violations based on alleged bias lacks factual support to suggest bias or an unacceptable risk of actual bias. Petitioners' factual support is based on the Board's review and ultimate grant of an SEP to Petitioner John Homan in an unrelated permitting process for a private air strip. The Board's approval process for Mr. Homan's air strip is not relevant here. Moreover, the process used to approve Mr. Homan's air strip is illustrative of the thorough and thoughtful review process the Board undertakes in

approving SEPs. Petitioners also attempt to argue bias of one Board member based on a decade-old lease that one Board member's company has with a different developer for an entirely different project in Minnesota. In so doing, Petitioners create their own meaning for the defined phrase, "Windpower Facilities," and leap to an unsupportable and illogical conclusion that in 2018, the Board member was contractually bound to vote in favor of Deuel Harvest. Relatedly, the agreements Board members have with other, competing wind developers do not show a bias toward Deuel Harvest any more than a Board member's contract with one farmer for transporting grain shows a bias toward all agricultural uses.

Third, Petitioners' efforts to attack the Board's process in approving the SEPs based on the Board's decisions on specific provisions similarly must be rejected. The Court's review is limited to determining whether the Board had jurisdiction and regularly pursued its authority. *Parris v. City of Rapid City*, 834 N.W.2d 850, 854 (S.D. 2013). The facts show that the Board did. Specifically, the facts show that the Board applied the Zoning Ordinance to the Project and, after hearing public comments and engaging in reasoned discussion, unanimously determined that the Projects comply with the Zoning Ordinance.

Because the Board regularly pursued its authority in granting the SEPs, this Court should affirm the Board's decisions.

BACKGROUND

Deuel Harvest presents the following chronology of events to assist the Court in placing Petitioners' arguments in their proper context.

In October 2016, the Planning and Zoning Board ("P&Z") which also sits as the Board, began reviewing the existing zoning requirements for a wind energy system to qualify as a special exception use under the Deuel County Zoning Wind Energy System Ordinance ("WES

Ordinance"), Section 1215. (Affidavit of Mollie M. Smith ("Smith Aff.") Ex. 1 (Oct. 17, 2016 minutes).)

On November 17, 2016, Deuel Harvest terminated a wind lease agreement with Board member Mike Dahl. At the time Mr. Dahl signed the lease in January 2016, Deuel Harvest advised there was low landowner interest in his area. (Affidavit of Reece M. Almond ("Almond Aff.") Ex. 2 at 10:14-25 (Dahl Dep.).) Deuel Harvest later terminated the lease (November 17, 2016) because it was unable to secure sufficient land rights in the vicinity to build facilities. (*Id.* at 14:1-5 (Dahl Dep.); Almond Aff. Ex. 12 (Dahl Notice of Release of Easement).)[2]

Between November 2016 and January 2019, the P&Z held three public hearings on proposed changes to the WES Ordinance. During those hearings, P&Z received comments for many hours from more than three dozen speakers on all aspects of wind farms, including sound, shadow flicker, and setbacks. (Smith Aff. Exs. 2 (Nov. 21, 2016 minutes), 3 (Dec. 12, 2016 minutes), and 4 (Jan. 9, 2017 minutes).) The P&Z on January 9, 2017, proposed five changes to the WES that would place additional restrictions on proposed wind farms, including a shadow flicker limit of 30 hours per year and setbacks from lake park districts. (Smith Aff. Ex. 4 (Jan. 9, 2017 minutes).) At that time, Petitioner George Holborn was a member of the P&Z and moved to require a lower sound level. His motion did not carry. (*Id.*)

On May 23, 2017, the Deuel County Board of Commissioners adopted changes to the WES Ordinance that included greater setbacks from non-participating residences and Lake Cochrane lake park district than the P&Z had recommended. (Smith Aff. Exs. 5 (May 23, 2017 minutes) and 6 (Ordinance B2004-01-23B).)

[2] Mr. Dahl received $3,095 due under the term of his wind easement prior to its termination. (Almond Aff. Ex. 6 at ¶ 9.)

Residents circulated referendum petitions in response to the WES Ordinance changes approved by the County Board of Commissioners, seeking to put the adopted changes to a vote pursuant to SDCL Chapter 7-18A. The referendum efforts to overturn the County Commission's legislative decision failed. *See Thompson v. Lynde,* 2018 S.D. 69, 918 N.W.2d 880 (2018) (affirming denial of writ of mandamus to refer Deuel County WES Ordinance).

Later in 2017, Board Member Kevin DeBoer contacted a Deuel Harvest representative to request that he be released from two wind easements. He had signed the easement in June 2016 before he became a member of the Board. (Almond Aff. Ex. 6 at ¶¶ 5, 6.) Mr. DeBoer testified that he told the Deuel Harvest representative: "I said in order for me to have a voice on the Board, I'll have [] to be released from the contract." (Almond Aff. Ex. 1 at 31:13-14 (DeBoer Dep.).) On December 14, 2017, Deuel Harvest granted Mr. DeBoer's request and terminated Mr. DeBoer's wind easement. (*Id.* at 30:25 – 31:2 (DeBoer Dep.); Almond Aff. Ex. 9 (DeBoer Notices of Release of Easement).)[3]

On December 22, 2017, Deuel Harvest applied for special exception permits for the 300 MW Deuel Harvest North Wind project and the 200 MW Deuel Harvest South Project ("Applications"). (Smith Aff. Ex. 7 (Findings and Letters of Assurance).) The Board members at the time consisted of Chairman Dennis Kanengeiter, Paul Brandt, Mike Dahl, Kevin DeBoer and Steve Rhody. (Smith Aff. Ex. 8 (Jan. 22, 2018 minutes).)[4]

[3] Mr. DeBoer received the development period payments due under the term of his wind easement prior to termination. He received $3,060 by letter dated August 16, 2016. (Almond Aff. Ex. 1 at 29 (DeBoer Dep.).) Deuel Harvest made a second payment of $3,060 in August 2017.

[4] The minutes erroneously list the date of the meeting as January 22, 2017. The correct date is January 22, 2018.

On January 22, 2018, the Board held a public hearing on the Applications. (Smith Aff. Ex. 8 (Jan. 22, 2018 minutes).) Prior to hearing any comments in the quasi-judicial proceeding,[5] the Board members addressed the attendees and confirmed that no Board member had any financial interest in the Projects:

> The chairman Kanengieter stated to the public that there have been some concerns about the current Zoning Board Members being biased. Keven DeBoer stated that he will receive no financial gain from the wind tower project good or bad. He does not have any wind agreements so he believes he can make a fair decision. Steve Rhody stated that he does not have a wind agreement and he will receive no financial gain from the wind tower project so he believes he can make a fair decision. Paul Brandt stated that he does not have a wind agreement and he will receive no financial gain from the wind tower project so he believes he can make a fair decision. Mike Dahl stated that he will receive no financial gain from the wind tower project. He does not have any wind agreements and wind towers are not in his area so he believes he can make a fair decision. Dennis Kanengieter stated that he does not have a wind agreement and he will receive no financial gain from the wind tower project so he believes he can make a fair decision.

(Smith Aff. Ex. 8 (Jan. 22, 2018 minutes).)

The Board then received comments from 28 speakers, including Deuel Harvest. After 3.5 hours of public comment, the Board determined that Deuel Harvest had satisfied the WES requirements and would have to also obtain Public Utilities Commission and Federal Aviation Administration approvals and meet all Federal, County and State requirements. (Smith Aff. Ex. 8 (Jan. 22, 2018 minutes).) The Board voted to approve the SEPs for the Projects. (*Id.*)

On February 12, 2018, the Board met to consider adoption of findings for the two SEPs (the "Findings"). (Smith Aff. Ex. 9 (Feb. 12, 2018 minutes).) Luke Muller, Senior Planner for

[5] A board of adjustment acts as an adjudicatory body when it considers requests for special exception permits. *Armstrong v. Turner Cty. Bd. of Adjustment*, 772 N.W.2d 643, 651 (S.D. 2009) ("*Armstrong*").

First District Association of Local Governments, presented the Board with suggested findings which were each individually reviewed and approved by the Board. (Smith Aff. Ex. 9 (Feb. 12, 2018 minutes).) The Findings include findings addressing the specific WES requirements, as well as the general SEP and Aquifer Protection District requirements. (Smith Aff. Ex. 9 (Feb. 12, 2018 minutes).)

LEGAL STANDARD

The Board's decision is reviewable by certiorari. SDCL § 11-2-62. "The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review." SDCL 11-2-65. Review of the decision is narrow: "review of certiorari proceedings is limited to whether the challenged court, officer, board, or tribunal had jurisdiction and whether it regularly pursued its authority." *Parris*, 834 N.W.2d at 854. The "court will not review matters of evidence in absence of showing that [the] board acted fraudulently or in arbitrary or willful disregard of undisputed and indisputable proof." *Lamar Outdoor Advertising of South Dakota, Inc. v. City Rapid City,* 731 N.W.2d. 199, 204 (S.D. 2007) (internal citations omitted). On certiorari, the court "shall give deference to the decision of the approving authority in interpreting the authority's ordinances." SDCL § 11-2-61.1.[6] "[C]ertiorari will not lie to review technical lack of compliance with law or be granted to correct insubstantial errors which are not

[6] The appeal was filed prior to SDCL 11-2-61.1 became effective on July 1, 2018. The South Dakota Supreme Court has held that "statutes which affect only procedural matters, as opposed to substantive rights should be given retroactive effect." *In re Engels*, 687 N.W.2d 30, 33 (S.D. 2004) (holding that "remedial statutes" are "those statutes 'that describe methods for enforcing, processing, administering, or determining rights, liabilities, or status,'" and "[a] law is substantive if it creates rights, duties, and obligations.") The standard of review in SDCL 11-2-61.1 prescribes how the courts are to review local decisions, but does not create any rights for the parties. The standard therefore would apply to the Court's review of the Board decisions in this matter.

shown to have resulted in prejudice or to have caused substantial injustice." *Adolph v. Grant Cty. Bd. of Adjustment*, 891 N.W.2d 377, 381 (S.D. 2017) ("*Adolph*").

DISCUSSION

I. THE BOARD DID NOT VIOLATE PETITIONERS' DUE PROCESS RIGHTS.

Petitioners assert that the SEPs should be reversed based on factually and legally unsupportable arguments about Board members' purported conflicts of interest and alleged bias. The law and the facts unequivocally support affirmance of the Board's SEP decisions.

A. The BOA's Conduct Comported with the Conflicts Statute.

The key provision of the Conflicts Statute provides that a local official is disqualified if the official "has a direct pecuniary interest in the matter before the governing body." SDCL § 6-1-17(1). The Board members dutifully adhered to this statute in assessing whether they had a disqualifying conflict of interest. Each member individually addressed attendees of the public hearing and stated that he did not have a personal or pecuniary interest in the SEPs. (Smith Aff. Ex. 8 (Jan. 22, 2018 minutes).) Therefore, each Board member was eligible to render a decision on the SEPs. Thus, as of January 22, 2018, no Board member had a disqualifying conflict of interest and Petitioners' arguments fail.

On the first page of her January 15, 2018, letter to the Board, Petitioners' counsel Christina Kilby referenced the Conflicts Statute, asserting the Board had potential conflicts of interest. (Smith Aff. Ex. 10 (January 15, 2018 Letter from Christina Kilby to the Board).) Yet, in Petitioners' Brief to this Court, there is, without explanation, no mention of the statute. At best, this is an oversight. At worst, the omission raises serious questions regarding counsels' compliance with South Dakota Rules of Professional Conduct, 3.3(a)(2), Candor to the Tribunal ("A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the

controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.").

Petitioners compound their failure to mention the Conflicts Statute when they rely on *Hanig v. City of Winner*, 692 N.W.2d 202 (S.D. 2005) ("*Hanig*"), and do not disclose that the Legislature enacted the Conflicts Statute expressly to overturn *Hanig*. Notably, the Court in *Hanig* recognized that, when analyzing whether a conflict of interest exists, the court must first look to the Legislature.

Here, the Legislature has spoken in direct response to *Hanig* to ensure that only current, direct pecuniary interests in the matter to be decided could provide grounds for disqualification. On January 27, 2015, just eight days after the *Hanig* decision, Senate Bill 171 was introduced.[7] The legislative history of this bill, which will be discussed in more detail below, confirms that the Conflicts Statute was intended to overrule the broad conflicts of interest standard applied and the remedy granted by the *Hanig* Court.

Hanig involved the renewal of a liquor license related to a proposed new restaurant; Mr. Hanig's initial liquor license was issued by the County, but his property was subsequently annexed into the City of Winner. *Hanig*, 692 N.W.2d at 203. The City Council consisted of six members, one of whom was a part-time waitress at another restaurant in the City. *Id.* at 204. The owner of that restaurant (the council member's employer) wrote a letter to her urging the denial of the liquor license. *Id.* She also acknowledged she may receive reduced tips if the requested liquor license renewal were granted. *Id.* at 209. She and all other members of the City Council voted to deny the license renewal. *Id.* at 204.

[7] An Act to prohibit certain officials from voting if a conflict of interest exists, S.B. 171, 80th Leg. Ch. 40, § 1 (S.D. 2005), available at http://sdlegislature.gov/sessions/2005/171.htm.

The South Dakota Supreme Court reversed. Finding no South Dakota statute on point, the *Hanig* Court relied upon a New Jersey decision that recognized four types of disqualifying interests: direct pecuniary, indirect pecuniary, direct personal, and indirect personal. *Hanig*, 692 N.W.2d at 208-09. The *Hanig* Court concluded that the councilmember's potential future pecuniary interest in tips not only disqualified her vote, but invalidated the entire City Council's decision. The *Hanig* Court reasoned: "first and foremost one of the council members had an *indirect* pecuniary interest" that she did not disclose. *Hanig*, 692 N.W.2d at 210 (emphasis added).

The Legislature directly rejected *Hanig*'s expansive view of conflicts of interest and defined the one type of conflict of interest that is disqualifying—a "direct pecuniary interest."[8] In the legislative history of the Conflicts Statute, the legislation's sponsor explained:

> [T]his bill sets up two situations where [local government officials] can't vote. One is if they have a direct pecuniary interest. That's pretty straightforward and I think something we all understand. The second one is a safety gap where if 2/3rds of the local body believe the person has a conflict, they have the ability to not let them vote in that instance.

(Smith Aff. Ex. 11, Part 1 (Legislative History of S.B. 171).)

The Conflicts Statute was also enacted to provide guidance to local officials. The Conflicts Statute has three components: (1) it identifies when and what kind of a pecuniary interest creates a conflict under South Dakota law—the conflict must be *direct*, it must exist at the time of the vote ("*has* a direct pecuniary interest"), and it must involve the matter to be decided; (2) it grants the power to the other members of the board to determine if there is a direct pecuniary interest of another member by a two-thirds vote; and, (3) it limits the remedy when a

[8] The legislative history for the Conflicts Statute is available at http://sdlegislature.gov/sessions/2005/171.htm.

government official has a conflict—"the *legal sole* remedy is to invalidate that official's vote." *See* SDCL § 6-1-17 (emphasis added).

During the legislative hearings regarding the Conflicts Statute, legislators repeatedly addressed why the *Hanig* decision had to be superseded:

- The standard set in *Hanig* would cause many problems for local governing bodies because it would result in many local government officials being disqualified. In many cases, the governing bodies would not be able to reach quorum. (Smith Aff. Ex. 11, Part 3 (Legislative History of S.B. 171) ("Also, suppose our local governments decide to honor this decision. Well, then you're not going to be able to get quorums if you use this decision as a standard.").)

- *Hanig* did not represent South Dakota's view on conflicts of interest. For example, the court's reliance in Minnesota case law was out of place, as the South Dakota legislators recognized that Minnesota has vastly different conflicts of interest laws than South Dakota and also wished to expressly reject adopting New Jersey's conflict of interest standard. (Smith Aff. Ex. 11, Part 1 (Legislative History of S.B. 171) ("And then when you go through the – they look to Minnesota and those of us in the legislature know that Minnesota has a completely different set of conflict of interest laws. I mean, all of us would be prosecuted under their standard every week because you can't even have a cup of coffee in front of a lobbyist without violating their standards. . . . [T]hen they go to New Jersey and New Jersey has – and this is the real concern – they have four different descriptions. They have direct pecuniary interest and we all know what that is – that's bad – that's if you're going to get money out of the contract going on for example. Indirect, which is where a family member is going to get a pecuniary interest. Direct personal interest, which would be you vote on a matter that benefits a blood relative or close friends and it's of great importance but there's – it's a non-financial interest. And then an indirect personal interest – these are four categories they describe . . . . If that's the standard for conflict of interest, nobody, nobody, can vote – and in the legislature we'll lose half our body, I mean, if it's an Ag bill we'll lose a whole bunch of people.").)

- *Hanig* encouraged opponents to look for after-the-fact purported conflicts of interest to challenge a local decision. (Smith Aff. Ex. 11, Part 1 (Legislative History of S.B. 171) ("You lose a vote – now you sit back and I don't care if you're in Zell or Rockham or Sturgis, or wherever you're at – and you take a look and you say, okay, who on the board? – okay direct pecuniary, well I can't find one of those. Indirect personal interest. Okay, challenge the decision. And local governments by this decision are put in a very difficult position.").)

- The Conflicts Statute puts the burden on local government officials to decide whether they have a conflict. This was intentional, as the Legislature wanted to limit review of that decision and make it more difficult to reverse in any subsequent court proceeding. (Smith Aff. Ex. 11, Part 1 (Legislative History of S.B. 171) ("I believe of that sentence is that's its discretionary with the individual which makes it very hard to review subsequently by a court because it's a discretionary call of the individual.").)

- The Conflicts Statute is meant to overrule the *Hanig* court's broad definition of conflicts of interest to include indirect pecuniary interest and instead to limit conflicts of interest to direct pecuniary interests, such as an existing financial interest in the matter to be decided. (Smith Aff. Ex. 11, Part 3 (Legislative History of S.B. 171) ("The indirect personal test for conflict of interest which is one of the four standards – not used in that case but set forth in it – could apply is this. When an official votes on a matter in which an individual's judgment may be affected because of membership in some organization and a desire to help that organization further its policies. I'd like to see you apply that one to this legislative body and then let's find out how we get a quorum to vote on anything. Well, I would suggest the cities have exactly the same problem under this decision that came down.").)

- The remedy contemplated by *Hanig* was too extreme. The Legislature believed that only the conflicted vote should be invalidated. Where there was a unanimous vote, it should not be overturned. (Smith Aff. Ex. 11, Part 1 (Legislative History of S.B. 171) ("then the last sentence is the one that catches the remedy which says look, if there's a problem what you do is you'll – the remedy is you can strike that person's vote, you can't overturn the entire decision of governing board").)

There is a one opinion citing the Conflicts Statute – *Dunn v. Lyman Sch. Dist. 42-1*, 35 F.Supp. 3d 1068 (D.S.D. 2014) ("*Dunn*"). The *Dunn* Court determined that the Conflicts Statute controlled in an age discrimination suit against a school board. In *Dunn*, a board member participated in a decision not to rehire an employee but then recused herself from a decision whether to hire her future daughter-in-law for the same position. The *Dunn* court rejected a breach of ethics claim and noted that the Conflicts Statute was controlling and that the remedy was limited to that contained in the statute. *Id.* at 1090-91 ("South Dakota has a statute that prohibits county, municipal, and school officials from partaking in matters in which they have a

conflict of interest. . . . [A]n injured party's sole legal remedy is to have the officials' votes invalidated.") (internal citations omitted).

Rather than analyzing their claims with respect to the Conflicts Statute, however, Petitioners rely on *Hanig* and *Armstrong*. This reliance is misplaced. As noted, *Hanig* is no longer good law. *Armstrong* is inapplicable; it analyzes whether *ex parte* communications were sufficient to disqualify a board member.

In *Armstrong*, a company applied for and received a building permit for a commercial grain elevator, which was granted. *Armstrong*, 772 N.W.2d at 646. It began construction of the elevator, incurring more than $40,000 in expenses, before the zoning administrator realized that the building permit was wrongly issued and that a conditional use permit ("CUP") was required. *Id.* The company then applied for a CUP. The board held a hearing and ultimately denied that permit application because it did not contain the information required by the board. *Id.* The company then submitted a revised application, and the board held another hearing. *Id.* at 647.

Between the initial hearing and the subsequent hearing, one member of the board was replaced by a county commissioner who had been involved in the dispute between the company and neighboring landowners in his role as county commissioner. *Id.* at 646. He had communicated with both the applicant company and the landowners to negotiate a resolution. *Id.* The commissioner participated in the second hearing as a member of the board and moved to approve the CUP. *Id.* at 646-47.

On appeal, the South Dakota Supreme Court acknowledged that South Dakota law does not prohibit *ex parte* communications in local government proceedings but nevertheless relied upon SDCL § 1-26-26 and held that the commissioner should have been disqualified because his

ex parte communications indicated that he was "deeply involved" in the matter. *Armstrong*, 772 N.W.2d at 654.[9]

By contrast, in this case, Petitioners allege that personal interests created a conflict of interest. Therefore *Armstrong* is factually distinguishable.[10] Therefore, the only law to apply is the Conflicts Statute.[11] The Conflicts Statute is specifically designed to uphold local government decisions in these circumstances.

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[9] The *Armstrong* Court concluded that the petitioners were entitled to a new hearing because of the commissioner's "active[] participat[ion]" in the discussion and vote, as well as his extensive prior involvement in the matter. *See Armstrong*, 772 N.W.2d at 654-55. Deuel Harvest notes that this outcome is inconsistent with the Conflicts Statute, which as noted was not analyzed by the Supreme Court.

[10] The applicability of *Armstrong* to allegations of conflicts is also questionable. The decision does not refer to or analyze the Conflicts Statute. A review of the parties' briefing in the case demonstrates that the Conflicts Statute was not referenced. In addition, *Armstrong* relied extensively upon *Hanig*, without recognizing the enactment of the Conflicts Statute and its impact on the *Hanig* decision.

[11] As noted by Justice Gilbertson in his dissent in *Hanig*, the courts must respect the limits of legislative enactments:

> In the matter of liquor licenses, the Legislature recognized that the issuance of licenses by municipalities could involve a conflict of interest. Therefore it passed SDCL 9–14–16 which prohibits a "mayor, alderman, commissioner, or trustee" who holds a liquor license from voting "on the issuance or transfer of any such license." In a similar vein, SDCL 35–1–3 prohibits the Secretary and employees of the Department of Revenue from having any "interest, financial or otherwise, in the ... sale of alcoholic beverages." SDCL 35–2–6.4 bars liquor manufacturers and wholesalers from holding a retail liquor license. However, that is as far as the Legislature felt it appropriate to act. Significantly for this case, it never prohibited even those local city council members who held liquor licenses from voting on other liquor license applications. *We have said repeatedly that the Legislature said what it meant and meant what it said.*

Hanig, 692 N.W.2d at 212 (Gilbertson, J., dissenting) (emphasis added).

B. No Board Member Had a Disqualifying Conflict of Interest at the Time of the SEP Approval.

Petitioners assert that Board members had conflicts of interest regarding the Project. As noted, under the Conflicts Statute, the sole inquiry is whether a Board member possesses a direct pecuniary interest in the matter before the governing body at the time of the decision. The answer is "no" for all five Board members, and therefore, the Court must determine that no conflict existed. The more detailed discussion below confirms that the Board members lacked any disqualifying conflict of interest.

1. Kevin DeBoer Did Not Have a Disqualifying Conflict of Interest.

Mr. DeBoer executed two wind leases for the Project before he was appointed to the Board; those leases were terminated at his request before Deuel Harvest submitted SEP applications for the Project to the Board. (Almond Aff. Exs. 1 at 31:13-18 (DeBoer Dep.) and 9 (DeBoer Notices of Release of Easement).) Mr. DeBoer testified that he wanted to have the leases terminated so that he could fully participate in Board decision-making. (Almond Aff. Ex. 1 at 31:13-18 (DeBoer Dep.).) Once the leases were terminated, there are no circumstances under which Mr. DeBoer would receive financial benefits from the Projects. (Almond Aff. Ex. 1 at 33-34 (DeBoer Dep.).) Petitioners point to a benefit Mr. DeBoer's brothers may receive from the Projects, but such potential remote interest is irrelevant under the Conflicts Statute. Therefore, Mr. DeBoer had no direct pecuniary interest that would invalidate his vote.

2. Mike Dahl Did Not Have a Disqualifying Conflict of Interest.

Mr. Dahl entered into a lease for the Project on January 26, 2016, at which time he was told that Deuel Harvest did not have a lot of land signed up for the Project in his vicinity. (Almond Aff. Exs. 10 (Dahl Wind Lease and Easement Agreement) and 2 at 10:14-21 (Dahl Dep.).) Deuel Harvest terminated this lease on November 17, 2016, long before filing the SEP

Applications because, after further development and design for the Projects, Mr. Dahl's property was no longer within the vicinity of planned Project facilities. (Almond Aff. Exs. 2 at 14 (Dahl Dep.) and 12 (Dahl Notice of Release of Easement).) As a result, Mr. Dahl could not receive any gain from his vote on the Project. Petitioners argue that Mr. Dahl's contract with two different developers created a disqualifying interest. (Petitioners' Brief at 9-10.) The Conflicts Statute states otherwise. Any interest Mr. Dahl may have had with a different developer is not an interest "in the matter to be decided."

Petitioners' argument is also illogical. If anything, termination of a contract and its associated income, would have a negative influence on a decision maker. And, to the extent Petitioners assert that Mr. Dahl cannot vote on any wind facilities because he had agreements for an unrelated wind project which shows bias, such an argument is not supported by the facts—both agreements were more than 10 years old and expired. (Almond Aff. Ex. 2 at 8 (Dahl Dep.).) Such argument also is not supported by law and as noted, is directly refuted by the Conflicts Statute which requires a present, direct pecuniary interest in the matter being decided. It also ignores the practical realities of local permitting. Using Petitioners' logic, a farmer who served on a board of adjustment would be disqualified from *any vote* related to agricultural use. This is not the law.

These facts do not constitute a disqualifying conflict of interest under the Conflicts Statute.

3. Dennis Kanengieter Did Not Have a Disqualifying Conflict of Interest.

Mr. Kanengieter's employer has a lease for the Project. (Almond Aff. Exs. 3 at 7-8 (Kanengieter Dep.) and 14 at 7 (Answers to Petitioners' Interrogatories and Requests for Production of Documents (First Set).) Mr. Kanengieter has spoken publicly about wind development, and he has a lease for a transmission line related the Flying Cow wind project.

(Almond Aff. Ex. 3 at 17-19 (Kanengieter Dep.).) None of these facts creates a direct pecuniary interest in the matter to be decided, and, therefore, Mr. Kanengieter was eligible to vote on the SEPs.

There is zero evidence that Mr. Kanengieter's employer has or sought to influence over Mr. Kanengieter's vote. Mr. Kanengieter's public statements cannot amount to a conflict under the Conflicts Statute—they create no existing pecuniary interest. Public officials are allowed to have opinions – indeed, that is often why they are elected to their positions.[12] None of the statements cited by Petitioners show that Mr. Kanengieter had any improper bias in favor of Deuel Harvest or these Projects. Indeed, the statements cited by Petitioners were made by Mr. Kanengieter in a County legislative process in which he was discussing ordinance amendments to a zoning ordinance that already allowed wind energy facilities in agricultural districts if the requirements are met – the statements were not made with respect to any project in particular. (Petitioners' Brief at 11.)

[12] This issue has been described as follows: "In zoning and other cases, courts generally try to distinguish between a strongly held philosophical or policy position as opposed to actual prejudgment of the specific adjudicative facts at issue in a particular case. . . . A predilection toward a particular decision does not prevent the decisionmaker from deciding the case fairly. . . . To show an invalidating bias in zoning cases, courts generally have required that such statements be linked with advocacy of a position in the particular case in question, as demonstrated by hearing conduct or by the course of proceedings, that makes plainly evident the "closed mind" of the zoning decisionmaker. For example, the Connecticut court has held that a strong anti-development policy may constitute sufficient predisposition to deny a developer a fair hearing where the conduct of the hearing clearly favored opponents of a proposed development. Similarly, the Supreme Court of Washington invalidated a board of county commissioners' decision to rezone because the board's chairman moved to grant the rezone before all opposing testimony had been heard and persistently interrupted opposing speakers by informing them that they were 'just wasting [their] time' in testifying." 2 EDWARD H. ZIEGLER, JR.,RATHKOPF'S THE LAW OF ZONING AND PLANNING, § 32:18 (4th ed.) (collecting cases) (internal citations omitted).

4. Paul Brandt Did Not Have a Disqualifying Conflict of Interest.

Petitioners assert that Mr. Brandt had a conflict of interest because of a term in a lease between and company in which he owns a minority interest and an unrelated party for an unrelated wind project that was entered into more than 10 years ago ("Minndakota Lease"). (Almond Aff. Ex. 18 (Wind Energy Lease and Wind Easement Agreement between Supreme Pork, Inc. and Minndakota Wind, LLC).) Based on an incomplete and misleading recitation of the terms of the lease, Petitioners argue that Mr. Brandt was contractually bound to vote for the SEPs. (Petitioners' Brief at 12.)

This is a gross misstatement of the lease agreement. Petitioners do not identify the plain meaning of the lease; the non-interference clause shows that it applies only to the "Windpower Facilities." Petitioners fail to acknowledge for the Court that "Windpower Facilities" is defined in the Minndakota Lease to refer to the specific facilities associated with that project, installed by Minndakota. (*See* Almond Aff. Ex. 18 at ¶ 3.2.2 (Wind Energy Lease and Wind Easement Agreement between Supreme Pork, Inc. and Minndakota Wind, LLC).) The Minndakota Lease prohibits the lessor from interfering with the Minndakota project – not *all* wind projects. As stated previously, wind developers are competitors. This is demonstrated by the final sentence in the non-interference provision, which Petitioners omitted (emphasized below):

> Landowner's activities and any grant of rights Landowner makes to any person or entity, whether located on the Property or elsewhere, shall not currently or in the future, impede or interfere with: (i) the siting, permitting, construction, installation, maintenance, operation, replacement, or removal of Windpower Facilities whether located on the Property or elsewhere. **In no event during the term of this Agreement shall Landowner construct, build or locate or allow others to construct, build or locate any wind energy conversion system, wind turbine or similar project on the Property.**

(Almond Aff. Ex. 18 at ¶ 9.2 (Wind Energy Lease and Wind Easement Agreement between Supreme Pork, Inc. and Minndakota Wind, LLC).)

In another stretch, Petitioners also argue that Mr. Brandt had a disqualifying conflict of interest because another company in which he has an interest does welding for a fiberglass company that, among many other things, manufactures turbine blades. (Petitioners' Brief at 13.) There is no evidence in the record showing any connection between either Mr. Brandt's company or the fiberglass company and Deuel Harvest, Invenergy, or the Project. Indeed, like the other Board members, and consistent with the standard set by the Conflicts Statute, Mr. Brandt confirmed that he will have no financial gain from the Projects. (Almond Aff. Ex. 4 at 30:20-21 (Brandt Dep.).)

C. Petitioners Have Not Demonstrated a Lack of Due Process Based on Bias.

After falsely accusing four of the five Board members of disqualifying conflicts of interest, Petitioners allege that Board members were otherwise disqualified because of bias. In essence, Petitioners assert that the Board exhibited bias because it did not reach the result urged by Petitioners. This is not bias; indeed, it would have been unlawful for the Board to disregard the Zoning Ordinance and reach a decision based on Petitioners' complaints. *See Hines v. Bd. of Adjustment of City of Miller*, 675 N.W.2d 231, 235 (S.D. 2004) ("The ultimate determination of the public's best interest is for the legislative body, not a minority of neighboring property owners.'… To base a decision solely on the opinion of neighbors was arbitrary and beyond its jurisdiction."). The legal standard is whether there was "actual bias or an unacceptable risk of actual bias." *Adolph*, 891 N.W.2d at 387. There is an unacceptable risk of bias "if the circumstances show a likely capacity to tempt the official to depart from his duty." *Id.* "Decision makers 'are presumed to be objective and capable of judging controversies fairly on the basis of their own circumstances.'" *Armstrong*, 772 N.W.2d at 651.

Petitioners assert that a separate and un-appealable SEP approval for a private air strip and the conduct of the Deuel Harvest hearings show bias on the part of the Board members. These claims are no more than speculative conclusions based on selective facts, and they do not indicate actual bias or any facts that show "a likely capacity to tempt [any Board member] to depart from his duty." *Id.*

As an initial matter, Petitioners cite *Hanig* and *Armstrong* in support of their arguments. Neither case is applicable. As discussed previously in Section I, *Hanig* was overruled by the Conflicts Statute. Similarly, *Armstrong* involved ex parte communications and a decision-maker deeply involved with the facts and parties in the particular permitting proceeding at issue. Petitioners allege nothing approaching those facts here.

1. Mr. Homan's Air Strip is Not Relevant to This Appeal.

Petitioners assert that the Board showed bias in favor of the Projects because of its actions in a separate irrelevant SEP proceeding – namely, an application for a private use airstrip SEP submitted by Petitioner John Homan. (Petitioners' Brief at 14.) This argument fails for at least two reasons.

First, Mr. Homan's SEP application was a separate approval process with a separate decision and a separate permit. Moreover, to the extent Mr. Homan did not agree with the outcome of his air strip SEP application process, he had recourse—he could have and should have appealed from the Board's decision in that matter. He did not do so, and the Board's decision granting Mr. Homan's SEP is final and no longer appealable.

Second, Petitioners' arguments ignore and/or misstate the facts. For example, Petitioners complain that the Board asked questions concerning wind turbines in connection with its consideration of Petitioner John Homan's air strip and accuse the Board of a pro-wind bias. Petitioners failed to point out, however, that when asked about this issue by Petitioners' counsel

during depositions, members of the Board testified that local residents expressed concern to the Board regarding the impact of Mr. Homan's proposed private airstrip on their ability to have wind turbines sited on their property; Board members were also concerned that Mr. Homan's application was specifically intended to disrupt wind development on his neighbors' property. (*See*, *e.g.*, Almond Aff. Ex. 1 at 67:23-25 (DeBoer Dep.).) The Board was not displaying a pro-wind bias, as Petitioners allege; rather, it was doing its job to understand how the proposed land use would potentially affect the land rights of others in Deuel County.

Petitioners also complain that the Board did not issue an SEP to Mr. Homan at its first meeting considering the application. Again, Petitioners fail to point out that, as Board members explained to Petitioners' counsel during depositions, the Board considered Mr. Homan's application over several meetings because Mr. Homan submitted the application without providing the Board with any supporting information about it, and the Board felt it was necessary to gather more information before acting on the application. Board members testified that they had not permitted a private use air strip before, and continued the proceedings to gather more information, rather than denying the application, which would have required Mr. Homan to wait six months before reapplying. (*See*, *e.g.*, Almond Aff. Ex. 4 at 46:12-18 (Brandt Dep.) ("If [Mr. Homan] would have come to us earlier and said here is what I want to do informally, and I don't remember if he did or not, and then the next time he actually applies for the special exception, comes in and visits with it. And, you know, what I didn't want to do was because once you deny it, I don't think he can come back for six months, I think it is, and apply for the same airstrip.").)

In contrast, before submitting its SEP applications, Deuel Harvest attended numerous public Board meetings to provide information about the Projects and answer questions from the Board. (*See, e.g.,* Smith Aff. Exs. 2 (Nov. 21, 2016 minutes), 3 (Dec. 12, 2016 minutes), and 4

(Jan. 9, 2017 minutes).) Thus, by the January 22, 2018, hearing, the Board had already received substantial information concerning the Project from prior public meetings.[13]

2. Public Comments and Participation in Referendum Process Does Not Show Bias.

Petitioners also assert that Mr. Kanengieter was biased because of his comments regarding setbacks at a March 7, 2017 county commission meeting and the fact he signed a petition for referendum. There is nothing improper about Mr. Kenengiter expressing his opinion regarding setbacks or by participating in the referendum process. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) ("[E]ach and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies.").

3. Agreements with Other Wind Developers Do Not Show Bias.

Petitioners' claims that Mr. Kenengieter was biased based on an agreement with Flying Cow, is unsupportable. (Petitioners' Brief at 11.) Mr. Kanengieter's transmission line easement for another project is not relevant here, as this Court has decided: "the agreement is not relevant to the claims of bias by the Petitioners." (Order Regarding Petitioners' Motion to Compel and Motion to Amend Scheduling Order to Allow for Additional Discovery, ¶1.) If anything, it suggests the opposite. Despite Petitioners' unsupported accusations, wind developers are not

[13] By way of another example, in their conclusion, Petitioners state, "[t]he Board's only concern with the runway was the potential effect it could have on Invenergy's project." (Petitioners' Brief at 27.) The record (specifically, depositions taken by Petitioners' counsel) demonstrates that this assertion is not accurate. (*See* Almond Aff. Ex. 2 at 41:20-25 (Dahl Dep.) ("As I recall, I think we didn't want to handcuff other landowners in the area. And like I said, we hadn't – I had never permitted a landing strip before in the county. Kind of caught us offguard and, you know, we didn't know what was coming for sure before that meeting."); Almond Aff. Ex. 4 at 44:18 – 45:5 (Brandt Dep.) ("Q. Why were you as a board member asking Mr. Homan about the setbacks for wind towers and airstrips at this time? A. Because the public was asking about them. . . . I think what the question was is, you know, was coming from the audience because there were quite a few people there, and they were concerned about what happens if Don – or John, puts in an airstrip and how that affects them.").)

colluding so that as many wind projects as possible can be built; they are competitors. The fact that Mr. Kanengieter executed an agreement with Deuel Harvest's competitor does not demonstrate bias in favor of Deuel Harvest.

4. The Board's SEP Review Process Afforded the Applicant and Commenters Due Process.

As with other arguments, Petitioners' challenges relating to the SEP approval process for the Deuel Harvest Wind farms are unsupported and ignore how local land use decision-making occurs. For examples, Petitioners complain that the Board set a three-minute time limit on public comments. However, they fail to provide any support demonstrating that this limit was unreasonable. The Board had previously used a three-minute time limit and found it successful in both soliciting public comment and ensuring an efficient process. (Almond Aff. Ex. 1 at 58-59 (DeBoer Dep.).) Contrary to Petitioners' assertions, due process requires notice and an opportunity to be heard; it does not require that Petitioners be given unlimited time to speak at a public meeting. The South Dakota Supreme Court previously rejected a similar argument in *Grant County Concerned Citizens,* 866 N.W.2d 149,160 (S.D. 2015) in which a five-minute limit was imposed:

> GCCC misunderstands what due process requires. "Due process requires adequate notice and an opportunity for meaningful participation." GCCC has offered no authority for the conclusion that, under South Dakota law, "meaningful participation" is defined as "equal time." Despite its claim that one of its members "was not permitted to present all of the information she desired at the hearing[,]" GCCC fails to actually articulate any such allegedly suppressed information, let alone assert that the exclusion of such information prevented GCCC from participating in a meaningful way.[14]

[14] In *Grant County Concerned Citizens*, the appealing members of the public were represented by Davenport Evans, co-counsel in this case; it is unclear why counsel makes an argument that the South Dakota Supreme Court soundly rejected.

(internal citations omitted).

Petitioners also complain that the Board "ignored many of the concerns," and did not review all of the documents submitted at hearing, relying on *Adolph*, 891 N.W.2d 377 (S.D. 2017). (Petitioners' Brief at 18.) Once again, Petitioners' reliance is misplaced. Due process requires an opportunity for meaningful participation; it does not require the Board to demonstrate that it reviewed in detail every document submitted by Petitioners. Indeed, if the rule were otherwise, it would encourage a sand-bagging strategy where opponents can do a document dump at a hearing and have that self-serving action be grounds for reversal. The Supreme Court recognized this issue in *Adolph*:

> Adolphs also contend "[t]he Board read Nelson's engineering report in its entirety, but refused to read the report of Kathy Martin, a professional engineer with two decades of CAFO experience." Martin's report totaled 250 pages and was dated the day of the hearing. The Board heard extensive comments from multiple opponents of the CAFO detailing the same material contained in the report, and Adolphs' attorney provided a summary to the Board to ensure it was aware of the highlights of Martin's report. Moreover, the Board actually adopted one of Martin's recommendations as a condition of approving the application (i.e., synthetic liners for the waste-water ponds). Therefore, it appears the Board did consider opposition testimony and written submissions.

Adolph, 891 N.W.2d at 387.[15] Here, as in *Adolph*, there is no evidence that the Board failed to consider all of the issues raised. The Board heard comments and input from multiple persons, including Deuel Harvest and Petitioners. The resulting Board decision is not unlawful just because Petitioners' arguments were unsuccessful. Petitioners have failed to show they were denied due process.

[15] As with *Grant County Concerned Citizens*, the Davenport Evans law firm also represented parties in *Adolph*.

II. THE BOARD REGULARLY PURSUED ITS AUTHORITY.

As discussed in more detail below, the record demonstrates that the Board regularly pursued its authority and acted within its jurisdiction with respect to the SEPs. As an initial matter, however, Petitioners point to deposition testimony regarding that process in support of their arguments. This reliance is misplaced. First, Deuel Harvest respectfully submits that the Court should decline to accept the deposition testimony regarding the process into the record. The testimony is after-the-fact recollections; the more reliable evidence regarding the Board's process is the official Board record. Supplementing the administrative record on appeal is triggered by the Court's determination of need, not Petitioners'. *Wedel v. Beadle County. Comm'n*, 884 N.W.2d 755, 759 (S.D. 2016). Here, the Court does not need after-the-fact deposition testimony when the official record of the Board's actions is available. Second, even if the Court does accept this additional evidence, as described in more detail below, the evidence does not support Petitioners' claims; rather, it shows that the Board thoughtfully and diligently considered the SEPs for the Projects.

A. <u>The Board Properly Interpreted and Applied the Zoning Ordinance</u>.

Petitioners argue that the Board unlawfully amended the WES Ordinance because it clarified the definition of "business" and modified the time within which the Projects must be constructed. Because neither of these actions constitutes amending the WES Ordinance, this argument should be rejected.

First, Petitioners claim that the Board lacks the authority to clarify the definition of a term in the WES Ordinance. The WES Ordinance requires that wind turbines be set back at least four times the height of the turbine from existing businesses, but does not specifically define "business." The Board clarified that, with respect to turbine setbacks, "business" means a physical structure; the Board made this finding because it determined that the setback must

logically be limited to structures. Under Petitioners' more broad interpretation (considered and not adopted by the Board), any agricultural operation would also be a "business" under the Ordinance requiring a setback. The Board determined that this would be an untenable outcome because all farms would be businesses. (Almond Aff. Ex. 22 (Video 2) at minute 1:42:10 – 1:42:20 (Brandt) (Video of January 22, 2018 Board Meeting).)

The Board's determination that business meant a physical structure is not an amendment of the WES Ordinance – it is an important and helpful clarification regarding how the Board interprets the ordinance that it regularly applies. *See* SDCL § 11-2-61.1 (providing that the court "shall give deference to the decision of the approving authority in interpreting the authority's ordinances").

Second, Petitioners claim that the Board is not authorized to specify the timeframe in which the Project must be constructed. Petitioners ignore that the Board is specifically authorized by the general SEP provision of the Ordinance to modify timeframes: "A special exception that is granted but not used within two (2) years shall be considered invalid unless an extension has been requested and approved by the Board of Adjustment." (Smith Aff. Ex. 12 (Ordinance § 504(6)(first)).) Although the WES-specific SEP term provision (Ordinance § 1215.14) is silent as to extensions, the general SEP provision explicitly authorizes the Board to exercise its discretion and grant extensions. The Board's interpretation of its ordinance is entitled to deference. Here, in its Applications, Deuel Harvest requested an extended timeframe, and the Board considered and approved it, as allowed by the Ordinance. (Smith Aff. Ex. 8 at 9-10 (January 22, 2018 minutes).) As such, the Board regularly pursued its authority, and Petitioners' claims should be rejected.

B. Board Properly Granted the SEPs After Making Findings and After Obtaining Letters of Assurance.

Next, Petitioners argue that the Board failed to follow the Ordinance because it issued written findings after it voted to approve the Projects and did not confirm that the Projects complied with all Ordinance requirements. (Petitioners' Brief at 21-22.) Like their prior arguments, these, too, lack support in the record.

The Ordinance requires the Board to issue written findings before granting an SEP. (Smith Aff. Ex. 12 (Ordinance § 504(5).) In this case, the Board voted to approve the Projects on January 22, 2018. However, it did not issue permits at this meeting. Rather, at its February 12, 2018 meeting, it made detailed written findings regarding the Projects, which imposed specific requirements on the Projects and Deuel Harvest. For example, the Board required Deuel Harvest to submit a Letter of Assurance for the Projects confirming Deuel Harvest's compliance with Ordinance requirements before the SEPs would be issued. (Smith Aff. Ex. 9 at ¶ 14(k) (February 12, 2018 minutes).) The SEPs were not issued until March 2, 2018, after Deuel Harvest provided the required Letters of Assurance. (Smith Aff. Ex. 7 (Findings and Letters of Assurance).)

Petitioner offers no legal support for its argument that the findings had to be completed at the public hearing; like Petitioners' other arguments, this argument also ignores the practical realities of local governance. The Board had already conducted a 3.5-hour public hearing. It takes many hours to draft, review, and approve written findings, and it is unreasonable to suggest that it all had to occur at the same meeting. The Board properly made findings prior to the issuance of SEPs, and Petitioners' argument that the Board issued permits for the Projects without written findings lacks merit.

With respect to Petitioners' argument that the Board did not confirm that the Projects complied with all Ordinance requirements, Petitioners' brief lists bullet-points criticizing the Board's decision in detail. Petitioners fail to acknowledge that the Court's job in this matter is not to second-guess the Board's decision – this is not *de novo* review. Rather, the Court's job is to review whether the Board had jurisdiction over the matter and regularly pursued its authority. *E.g.*, *Adolph*, 891 N.W.2d at 381. The facts demonstrate that it did. For example:

- Section 1215.03(1)(a) of the WES Ordinance requires that 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." Petitioners assert that "Invenergy did not address to what extent areas would be disturbed during the construction phase." (Petitioners' Brief at 22.) This is not accurate. Among other things, the Application states: "Each wind turbine site, including the access road to the wind turbine, only takes approximately 1 to 1.5 acres out of a field during the life of the Project, and temporarily disturbed areas will be restored to a condition reasonably similar to their original condition, consistent with the continued use of the property." With respect to this requirement, the Board specifically found that the Application and testimony "allowed the Board to adequately review how the applicant will satisfy requirements for site clearance." (Smith Aff. Ex. 7 at ¶ 10 (Findings and Letters of Assurance).)

- Section 1215.03(1)(b) requires the permittee to "implement measures to protect and segregate topsoil. . . ." Petitioners assert that "Invenergy did not provide what measures would be implemented to protect topsoil during the project." (Petitioners' Brief at 23.) Again, this is not accurate. The Application states: "Deuel Harvest Wind will submit a Soil Erosion and Sediment Control ("SESC") Plan to Deuel County prior to construction. This SESC Plan will outline construction Best Management Practices ("BMPs") for all Project Facilities and specifically address topsoil protection. Deuel Harvest Wind will make efforts during construction of the Project to minimize soil erosion and removal of topsoil from cultivated lands. Protection measures typically include segregating topsoil from subsoil during construction, replacing topsoil after subsoil has been backfilled, and not removing topsoil from any property without the landowner's consent." The Board specifically found that there was sufficient information in the record regarding topsoil protection. (Smith Aff. Ex. 7 at ¶ 10 (Findings and Letters of Assurance).)

Petitioners next conduct a strained reading of the Ordinance and argue that the Board failed to consider whether the Project will meet the requirements for aquifer protection zones. Specifically, Petitioners state that: "the Board's Findings reveal the Board did not even consider whether the Project can meet the Performance Standards outlined for the Aquifer Protection Overlay Zone." (Petitioners' Brief at 25-26.) Petitioners again misstate the facts. The Board's Findings contain specific references to the Aquifer Protection Overlay Zone, indicating that the Board considered this issue and determined that the Project would comply with all applicable requirements. (*See* Smith Aff. Ex. 7 at ¶¶ 14(k)(2)(b) and 15 (Findings and Letters of Assurance).) Similarly, the Board's findings incorporated a specific requirement of the Aquifer Protection Overlay Zone, stating: "Storage of petroleum productions in quantities exceeding one hundred (100) gallons at one (1) locality in one (1) tank or series of tanks must be in elevated tanks. . . ." (*Compare* Smith Aff. Ex. 7 at ¶ 14(k)(2)(b) (Findings and Letters of Assurance) *with* Smith Aff. Ex. 13 (Ordinance § 1105.12(3) (Performance Standards for Aquifer Protection Overlay Zones)).)

The Return fully demonstrates that the Board regularly pursued its authority and the Court should affirm the decisions in their entirety.

III. PETITIONERS' FINAL ARGUMENT REGARDING APPLICATIONS LACKS LEGAL AND FACTUAL SUPPORT.

Finally, Petitioners assert that "the [a]pplications [w]ere [v]ague and [i]ncomplete, [p]recluding the Board and the [p]ublic from [e]ngaging in [m]eaningful [r]eview." (Petitioners' Brief at 26.) Petitioners cite no legal support and offer only vague and inaccurate allegations. For example, Deuel Harvest is not free to place turbines in any location it chooses, each location must comply with all of the Deuel County requirements. The Zoning Administrator and the Board have both the discretion and the expertise to determine whether the information before the

Board is sufficient to make a decision. They did so here, and Petitioners cite no factual or legal support for an argument that the Court should further review these determinations.

CONCLUSION

The Petitioners' claims must be denied. The Legislature enacted the Conflicts Statute to counter the very mischief Petitioners are engaged in here, seeking to overturn lawful decisions under the guise of conflicts. Applying the Conflicts Statute, the Court must find that the Board was free of conflicts of interest. There are also no facts to support Petitioners' due process claims. The Board properly pursued its authority in fully compliance with the Conflicts Statute and its Zoning Ordinance. This Court should affirm the Board's SEP decisions.

Dated: November 30, 2018

/s/ *Lisa M. Agrimonti*

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STATE OF SOUTH DAKOTA): SS COUNTY OF DEUEL)		IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
GEORGE HOLBORN, RUBY HOLBORN, JOHN HOMAN, TERESA HOMAN, VICKI HINDERS, STACEY HINDERS, RICK KOLBECK, JENNIFER KOLBECK, WILLIAM STONE, FAY STONE, HEATH STONE, KATIE STONE, and STEVEN OVERBY, Petitioners, vs. DEUEL COUNTY BOARD OF ADJUSTMENT, DEUEL HARVEST WIND ENERGY LLC, and DEUEL HARVEST WIND ENERGY SOUTH LLC, Respondents.		19CIV18-000019 **RESPONDENTS DEUEL HARVEST WIND ENERGY LLC AND DEUEL HARVEST WIND ENERGY SOUTH LLC'S MOTION FOR RECONSIDERATION**

INTRODUCTION

In its January 25, 2019 memorandum decision ("Decision"), the Court appears to have intended to affirm the issuance of Special Exception Permits ("SEPs") granted to Deuel Harvest Wind Energy LLC and Deuel Harvest Wind Energy South LLC (together, "Deuel Harvest Wind"). The Court, however, made an error of law in failing to recognize that SDCL 11-2-59 and the Deuel County Zoning Ordinance (Section 504(4)) require that SEPs be approved by a two-thirds vote of the five-member Board as a whole, *i.e.,* four votes are required to approve an SEP (2/3 * 5 = 3.333 votes, rounded up to 4). The Court's decision, leaving only three votes in favor of the SEPs, therefore accomplishes the opposite of the intended result – the SEPs are now effectively denied.

The Court also erred when it relied upon *Armstrong v. Turner County Board of Adjustment*, 772 N.W.2d 643 (S.D. 2009) ("*Armstrong*"), to hold that the Board members Kevin DeBoer ("DeBoer") and Mike Dahl ("Dahl") were disqualified based solely on their receipt of annual development payments duly made in accordance with wind easements. It is undisputed that the payments were received and that the leases were terminated prior to the filing of the SEP applications in December 2017. Simply stated, in applying the remedies provision of SDCL 6-1-17 (the "Conflicts Statute"), the Court failed to consider or apply the substance of the statute which, under these undisputed facts, mandates a finding of no disqualifying pecuniary interest.

For these reasons, Deuel Harvest Wind brings this Motion for Reconsideration ("Motion") and asks the Court to rule that neither Board member had a disqualifying pecuniary interest and that the SEPs were properly issued.

KEY UNDISPUTED FACTS

The timeline relevant to this Motion is set forth below:

- January 26, 2016: Dahl executes lease. (Almond Aff. Ex. 6 at ¶ 6 (Board Objections and Answer to Petitioners' Interrogatories (First Set).)
- July 26, 2016: DeBoer executes lease. (*Id.*)
- November 17, 2016: Dahl's lease is terminated. (Almond Aff. Ex. 12 (Dahl Notice of Release of Easement).) Mr. Dahl received $3,095 due under the term of his wind easement prior to its termination. (Almond Aff. Ex. 6 at ¶ 9.)
- January 9, 2017: As member of the Planning and Zoning Commission, Dahl recommended WES ordinance changes to the Commission that are more restrictive on wind farms; Dahl votes in favor of setbacks from lakes and municipalities, as well as limits on shadow flicker and sound. (Deuel Harvest Wind's Responsive Brief, Affidavit of Mollie M. Smith ("Smith Aff.") Ex. 4 at 4 (Jan. 9, 2017 minutes).)[1]

[1] Also available at: https://docs.wixstatic.com/ugd/1bce45_3af2a21986d54b5fb26a581c08a0a58c.pdf.

- February 21, 2017: DeBoer is appointed to the Board. (Almond Aff. Ex. 6 at ¶ 5 (Board Objections and Answer to Petitioners' Interrogatories (First Set).)

- December 14, 2017: DeBoer's lease is terminated. (Almond Aff. Ex. 9 (DeBoer Notices of Release of Easement).) DeBoer received two development period payments of $3,060 due under the term of his wind easement in August 2016 and August 2017, prior to termination. (*See* Almond Aff. Ex. 6 at ¶ 6 (Board Objections and Answer to Petitioners' Interrogatories (First Set).)

- December 22, 2017: Deuel Harvest Wind submits SEP applications. (Return to Writ, Ex. F.)

- January 22, 2018: Board hearing on SEP applications, at which each Board member affirms that he does not have a conflict of interest and there were no votes to prohibit any member from voting. Board verbally approved SEP applications.[2] (Return to Writ, Ex. E at 50-60.)

- February 12-13, 2018: Board issues written findings. (Smith Aff. Ex. 9 (Feb. 12, 2018 minutes).)[3]

- February 23, 2018: Deuel Harvest Wind submits letters of assurance, in accordance with Board findings. (Return to Writ, Ex. F.)

- March 2, 2018: SEPs issued. (*Id.*)

LEGAL STANDARD

The Conflicts Statute sets forth South Dakota law regarding conflicts of interest in local decision-making. It controls when determining whether a pecuniary interest is disqualifying:

> 6-1-17. Official prohibited from discussing or voting on issue if conflict of interest exists--Legal remedy. No county, municipal, or school official may participate in discussing or vote on any issue in which the official has a conflict of interest. Each official shall decide if any potential conflict of interest requires such official to be disqualified from participating in discussion or voting.

[2] The minutes erroneously list the date of the meeting as January 22, 2017. The correct date is January 22, 2018.

[3] Also available at: https://docs.wixstatic.com/ugd/1bce45_3c84f3304c204e9bae6468dafd5babf0.pdf.

> However, no such official may participate in discussing or vote on an issue if the following circumstances apply:
>
> (1) The official has a direct pecuniary interest in the matter before the governing body; or
>
> (2) At least two-thirds of the governing body votes that an official has an identifiable conflict of interest that should prohibit such official from voting on a specific matter.
>
> If an official with a direct pecuniary interest participates in discussion or votes on a matter before the governing body, the legal sole remedy is to invalidate that official's vote.

It is clear from the express language of the Conflicts Statute that the "pecuniary interest" it addresses is a direct and present interest, existing at the time that the vote at issue occurs, and not a past interest that no longer exists at the time of the vote. The Legislature in turn enacted the Conflicts Statute in direct response to the South Dakota Supreme Court decision in *Hanig v. City of Winner*, 692 N.W.2d 202 (S.D. 2005), in which the Court held that direct and indirect pecuniary interests were disqualifying. The Legislature determined that the *Hanig* court decision went too far. The Legislature therefore enacted the Conflicts Statute to empower local decision-makers to determine whether they should be recused while also discouraging *post-hoc* attacks on these decisions.[4] The resulting Conflicts Statute provides express guidance to local officials, and courts, on when a pecuniary interest requires disqualification. The Conflicts Statute limits the

[4] *See* Smith Aff. Ex. 11, Part 1 at 2 (Legislative History of S.B. 171) ("You lose a vote – now you sit back and I don't care if you're in Zell or Rockham or Sturgis, or wherever you're at – and you take a look and you say, okay, [who's] on the board? – okay direct pecuniary, well I can't find one of those. Indirect personal interest. Okay, challenge the decision. And local governments by this decision are put in a very difficult position."); Smith Aff. Ex. 11, Part 1 at 3 (Legislative History of S.B. 171) ("I believe of that sentence is [that it's] discretionary with the individual which makes it very hard to review subsequently by a court because it's a discretionary call of the individual."); Smith Aff. Ex. 11, Part 3 at 2 (Legislative History of S.B. 171) ("Also, suppose our local governments decide to honor this decision. Well, then you're not going to be able to get quorums if you use this decision as a standard.").

type of *pecuniary* interest that is disqualifying – to a current, direct pecuniary interest. It is undisputed that neither DeBoer nor Dahl possessed any such current, direct pecuniary interest at the time that the hearing and vote on the SEPs occurred;[5] nor was there a vote of the members of the Board to prevent them from voting. Thus, their votes cannot be disqualified.

DISCUSSION

I. NEITHER DEBOER NOR DAHL HAD A DISQUALIFYING CONFLICT OF INTEREST.

A. Applying the Conflicts Statute, Neither Dahl Nor DeBoer Had a Disqualifying Interest.

It is undisputed that Dahl and DeBoer lacked any present, direct financial interest in the SEP decisions. This fact is dispositive under the Conflicts Statute and neither should have been disqualified from voting on the Deuel Harvest SEPs.

B. *Armstrong* is Not Applicable to This Case.

In determining that Dahl and DeBoer should have recused themselves, this Court relied upon the general standard articulated in *Armstrong*: "[T]he standard that this Court follows in determining bias or disqualification is whether there has been clear and convincing evidence that a board member's actions demonstrate bias or an unacceptable risk of bias." (Decision, at 4 (internal quotes omitted, emphasis added).)[6]

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[5] As noted, Dahl and DeBoer each received payments under their respective leases prior to termination of their leases and prior to the filing of the SEP applications. (*See* Almond Aff. Ex. 6 at ¶¶ 6, 9 (Board Objections and Answer to Petitioners' Interrogatories (First Set)) and Exs. 9 and 12 (Notices of Release of Easement).)

[6] Petitioners assert that conflicts of interest violated their due process rights. Petitioners' asserted protected property interest is not clear from this record. *See Daily v. City of Sioux Falls*, 802 N.W.2d 905, 911 (S.D. 2011) ("To establish a procedural due process violation, an individual must demonstrate that he has a protected property or liberty interest at stake and that he was deprived of that interest without due process of law.") (internal citations omitted).

This Court stated that *Armstrong* was controlling because the 2009 *Armstrong* court did not reference the 2005 Conflicts Statute. (Decision, at 4.) But the fact that the *Armstrong* Court did not analyze the Conflicts Statute is not relevant to the facts of this case. The "board member's actions" giving rise to the disqualification in *Armstrong* were *ex parte* communications. There was no allegation that the official in *Armstrong* had a pecuniary interest in that matter to be decided. Accordingly, the circuit court did not address the Conflicts Statute, the parties in that case did not brief it, and the South Dakota Supreme Court did not analyze it.[7] Conversely, it is the Conflicts Statute that governs the issue in this case, and not *Armstrong*.

This Court also quoted, but did not apply, SDCL 6-1-21. That statute was enacted in 2015, after *Armstrong* and in response to another Supreme Court decision which the Legislature determined was overbroad.[8] SDCL 6-1-21 addresses what communications between decision-makers and the public in a quasi-judicial proceeding are improper. This statute would be applicable if the board members' actions giving rise to alleged bias, as in *Armstrong*, related to *ex parte* communications. However, Petitioners' allegations are based solely on alleged pecuniary interest, and therefore the Conflicts Statute, and not SDCL 6-1-21 or *Armstrong*, applies.

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[7] The *Armstrong* briefing is available at 2009 WL 3226208 (Appellants' Brief), 2009 WL 3226209 (Brief of Appellee Turner County Board of Adjustment), and 2009 WL 3226210 (Appellants' Reply Brief). The circuit court decisions are available at 2008 WL 7662082 (Aug. 7, 2008 Memorandum Decision) and 2008 WL 7662081 (Sept. 10, 2008 Findings of Fact and Conclusions of Law).

[8] *Compare In re Conditional Use Permit No. 13-08*, 855 N.W.2d 836 (S.D. 2014) *with* SDCL 6-1-21 and its accompanying legislative history, available at: https://sdlegislature.gov/Legislative_Session/Bills/Bill.aspx?Bill=1106&Session=2015.

C. Even Under *Armstrong*, Neither DeBoer Nor Dahl Had a Disqualifying Conflict of Interest at the Time of the SEP Approval.

The Court determined that both Dahl and DeBoer were disqualified solely because they had, in the past, easements for the Project for which they received compensation. Notably, there is no evidence in the record that the compensation was unearned, that it was disproportionate to the rights exchanged or, even in the context of *Armstrong*, made to influence their actions as Board members. Most important in this context, and under the Conflicts Statute, there also is no evidence that the two members would receive financial benefit from their votes to issue the SEPs; rather, it is undisputed that the two Board members lost out on tens of thousands of dollars as a result of the termination of the leases. In accordance with the mandate of the Conflicts Statute, Dahl's and DeBoer's interests must be analyzed separately and in greater detail because they are presumed to be objective decision-makers and the record demonstrates that they were objective. *E.g.*, SDCL 6-1-21; *Armstrong*, 772 N.W.2d at 651 (decision-makers presumed to be objective). Nor does a finding that one Board member should have been disqualified, albeit not proper under these facts, mean that both should be disqualified.

Dahl entered into a lease for the Project on January 26, 2016. (Almond Aff. Ex. 6 at ¶ 6 (Board Objections and Answer to Petitioners' Interrogatories (First Set).) Deuel Harvest made one development payment to Dahl and then terminated Dahl's lease on November 17, 2016 because the Project facilities would not be sited in that area. These facts do not amount to clear and convincing evidence of an actual or unacceptable risk of bias requiring disqualification, even if *Armstrong* applied to this case. The weight of the evidence demonstrates an absence of bias:

- Dahl's lease was terminated more than a year before Deuel Harvest submitted its SEP Applications.
- After the lease termination, Dahl participated, as a member of the Planning and Zoning Commission, in considering amendments to the County's WES Ordinance. As part of that process, Dahl voted in favor of provisions that

imposed greater restrictions on the Project, including increased turbine setbacks. (Smith Aff. Ex. 4 at 4 (Jan. 9, 2017 minutes).)[9]

- Dahl's lease was terminated because his property was no longer within the vicinity of planned Project facilities. (Almond Aff. Ex. 12 (Dahl Notice of Release of Easement).) His property is outside the areas for the two Projects. (Almond Aff. Ex. 6 at ¶ 3 (Board's Objections and Answers to Petitioners' Interrogatories (First Set)) and Return to Writ, Ex. B at 3.) The payment he received from Deuel Harvest was in accordance with his lease agreement, while that agreement was still in effect. He had no financial interest in the outcome of the SEP decisions. If anything, the circumstances surrounding the Project's development away from Dahl's area and the termination of his lease could have led him to be biased *against* the Project, rather than in favor of it (although there is no evidence either way).

DeBoer entered into easements before he was appointed to the Board. Those easements were terminated before Deuel Harvest submitted its SEP applications. (Almond Aff. Ex. 9 (DeBoer Notices of Release of Easement).) The payments DeBoer received occurred before the lease termination. The record does not contain any evidence, much less clear and convincing evidence, of actual or risk of bias. To the contrary, the record evidence supports a finding that DeBoer was not biased:

- DeBoer's lease was terminated prior to the submission of the SEP Applications. DeBoer specifically wanted to have the leases terminated so that he could fulfill his duty as a Board member and fully participate in Board decision-making. (Decision, at 4.)

- Once the leases were terminated, there are no circumstances under which DeBoer would or could receive financial benefits from the Projects. As with Dahl, if DeBoer were acting in his own financial interests, he would not have asked Deuel Harvest Wind to terminate his leases. He stood to gain nothing from his votes on the SEPs.

[9] Available at: https://docs.wixstatic.com/ugd/1bce45_3af2a21986d54b5fb26a581c08a0a58c.pdf.

Based on the record, the Court should have found that there is no evidence, much less clear and convincing evidence, of actual or unacceptable risk of bias. Consequently, the two Board members' votes should be counted and the SEPs affirmed.

II. SEPS MUST BE APPROVED BY TWO-THIRDS OF THE MEMBERS OF THE BOARD.

South Dakota statute (SDCL 11-2-59) and the Deuel County Zoning Ordinance (Section 504(4)) require that SEPs be approved by a two-thirds vote of the Board as a whole, *i.e.*, four votes are required to approve a SEP issued from this board of five members. *Jensen v. Turner Cty. Bd. of Adjustment*, 730 N.W.2d 411, 414 (S.D. 2007). This Court should find that the SEPs were approved by a vote of 5-0. This is consistent with the Court's evident intent to affirm the Board's actions on the SEP Applications.

CONCLUSION

For the reasons set forth above, Deuel Harvest Wind respectfully requests that the Court reconsider the Decision and affirm the Board's decision to issue the SEPs.

Dated: February 6, 2019

/s/ *Lisa M. Agrimonti*

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ATTORNEYS FOR RESPONDENTS DEUEL HARVEST WIND ENERGY LLC AND DEUEL HARVEST WIND ENERGY SOUTH LLC

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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	): SS	
COUNTY OF DEUEL	)	THIRD JUDICIAL CIRCUIT

* *

GEORGE HOLBORN, RUBY HOLBORN, JOHN HOMAN, TERESA HOMAN, VICKI HINDERS, STACEY HINDERS, RICK KOLBECK, JENNIFER KOLBECK, WILLIAM STONE, FAY STONE, HEATH STONE, KATIE STONE, and STEVEN OVERBY,	*	19CIV18-000019
Petitioners,	*	**RESPONDENTS DEUEL HARVEST WIND ENERGY LLC AND DEUEL HARVEST WIND ENERGY SOUTH LLC'S REPLY BRIEF**
vs.	*	
DEUEL COUNTY BOARD OF ADJUSTMENT, DEUEL HARVEST WIND ENERGY LLC, and DEUEL HARVEST WIND ENERGY SOUTH LLC,	*	
Respondents.	*	

* *

INTRODUCTION

Respondents Deuel Harvest Wind Energy LLC and Deuel Harvest Wind Energy South LLC ("Deuel Harvest") submit this reply in support of its Motion for Reconsideration ("Motion"). Petitioners ask the Court to ignore the governing South Dakota statute on the basis of a constitutional argument to which there is no evidence that the State has an opportunity to respond.[1] Accordingly, as set forth in more detail below and in the Motion, Deuel Harvest respectfully requests that the Court grant the Motion.

[1] In their Response Brief, Petitioners again imply that SDCL 6-1-17 and SDCL 6-1-21 are unconstitutional: "Applying the standards set forth in either legislative enactment . . . would result in an abrogation and limitation of Petitioners' due process rights, which is not permitted." (Pet. Br. at 4.) SDCL 15-6-24(c) requires Petitioners to have notified the Attorney General

DISCUSSION

Petitioners argue that Deuel Harvest asserts that the South Dakota Legislature "changed the requirements of the due process clause" when it enacted SDCL 6-1-17, and that "legislative enactments cannot modify or affect the requirements of due process." (Pet. Br. at 3.[2]) Petitioners misunderstand. First, Deuel Harvest does not assert that the Legislature attempted to lessen due process; rather, the Legislature's enactments provide protections beyond those of the Due Process Clause. Second, Petitioners fail to acknowledge that their argument, taken to its logical conclusion, would result in a myriad of laws being either superfluous or unconstitutional.

First, the Due Process Clause "establishes a constitutional floor, not a uniform standard." *S. Dakota v. U.S. Dep't of Interior*, 775 F. Supp. 2d 1129, 1139 (D.S.D. 2011) (citations omitted). For example, the U.S. Supreme Court has explained that, with respect to judicial disqualification, the Due Process Clause "demarks only the outer boundaries of judicial disqualifications" and that "Congress and the states, of course, remain free to impose more rigorous standards." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009) (citations omitted); *see also Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821 (1986) ("It is normally within the power of the State to regulate procedures under which its laws are carried out . . . and its decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be

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"[w]hen the constitutionality of an act of the Legislature affecting the public interest is drawn in question."

[2] In their Response, Petitioners make multiple factual statements for which they do not include a citation and which are not supported by the record. *See, e.g.*, Pet. Br. at 6-7 (asserting that Board members engaged in ex parte communications with Deuel Harvest); Pet. Br. at 7 (asserting without record support that Deuel Harvest was "aware the project would not likely extend to [Dahl's] area" when he inquired about a lease).

ranked as fundamental.") (citations omitted); *Bracy v. Gramley*, 520 U.S. 899, 904 (1997) (recognizing in the context of judicial recusal that "most questions . . . are not constitutional ones, because the Due Process Clause . . . establishes a constitutional floor, not a uniform standard . . . . Instead, these questions are, in most cases, answered by common law, statute, or the professional standards of the bench and bar.") (citations omitted). The South Dakota Supreme Court has reached similar conclusions. *State v. Good Plume*, 799 N.W.2d 717, 720–21 (S.D. 2011) ("Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution.") (citations omitted).

Second, because due process is a floor, rather than a uniform standard, states (like South Dakota) can and do enact laws that complement constitutional rights. Here, similar to the judicial code of ethics governing recusal, SDCL 6-1-17 provides the standard for disqualification of local officials when there is an allegation of a conflict of interest relating to a financial interest. The statute establishes the type and scope of disqualifying interests (pecuniary, direct), sets the procedure for addressing the issue, and provides the remedy. The standard in SDCL 6-1-17 is consistent with the U.S. Supreme Court's holding that recusal is required when the decision maker has a direct financial interest in the outcome of the case. *See, e.g., Aetna Life Ins. Co.*, 475 U.S. at 824. Similarly, the Legislature has enacted a statute prohibiting certain officials from deriving benefit from a contract; this statutory scheme specifically defines what constitutes a direct benefit or interest and what does not. *See* SDCL 3-23-1, -2, -2.1, and -2.2. Other states have similarly enacted conflicts of interest statutes. *See, e.g.*, Minn. Stat. 10A.07; N.D.C.C. 44-04-22. Under Petitioners' argument, these laws would be either meaningless or unconstitutional.

However, under established U.S. Supreme Court precedent (discussed above), they are neither, and Petitioners' position should be rejected.[3]

CONCLUSION

For the reasons set forth above, Deuel Harvest respectfully requests that the Court grant the Motion and reconsider the Decision.

Dated: February 15, 2019

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ATTORNEYS FOR RESPONDENTS DEUEL HARVEST WIND ENERGY LLC AND DEUEL HARVEST WIND ENERGY SOUTH LLC

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[3] Petitioners' argument that SDCL 6-1-17 does not apply to the Board likewise lacks merit. SDCL 6-1-17 applies to "county, municipal, and school official[s]." It is undisputed that the Board members are county officials. Petitioners cite no authority for their assertion that the phrase "governing body" excludes the Board members, who are county officials. In addition, this new argument is contrary to prior positions taken by Petitioners' counsel, Ms. Kilby, who argued for the application of SDCL 6-1-17 during Deuel County proceedings. (Return to Writ, Ex. D, at 305-06.)

Filed: 2/15/2019 1:58 PM CST Deuel County, South Dakota 19CIV18-000019

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
: SS
COUNTY OF DEUEL) THIRD JUDICIAL CIRCUIT

* *

GEORGE HOLBORN, RUBY HOLBORN, JOHN HOMAN, TERESA HOMAN, VICKI HINDERS, STACEY HINDERS, RICK KOLBECK, JENNIFER KOLBECK, WILLIAM STONE, FAY STONE, HEATH STONE, KATIE STONE, and STEVEN OVERBY,	*	19CIV18-000019
Petitioners,	*	
vs.	*	**FINDINGS OF FACT AND CONCLUSIONS OF LAW**
DEUEL COUNTY BOARD OF ADJUSTMENT, DEUEL HARVEST WIND ENERGY LLC, and DEUEL HARVEST WIND ENERGY SOUTH LLC,	*	
Respondents.	*	

* *

Petitioners, George Holborn, Ruby Holborn, John Homan, Teresa Homan, Vicki Hinders, Stacey Hinders, Rick Kolbeck, Jennifer Kolbeck, William Stone, Fay Stone, Heath Stone, Katie Stone, and Steven Overby, petitioned the Court for a Writ of Certiorari challenging the decision of the Deuel County Board of Adjustment ("Board") granting special exception permits to Deuel Harvest Wind Energy LLC and Deuel Harvest Wind Energy South LLC (together, "Deuel Harvest"). The matter came on for hearing before the Honorable Dawn M. Elshere, Circuit Court Judge, on December 13, 2018. Petitioners appeared through their attorneys, Reece Almond and Christina Kilby; the Board appeared through its attorney, Jack Hieb; and Deuel Harvest appeared through its attorney, Lisa Agrimonti.

The Court issued a written decision dated January 25, 2019, which is attached and incorporated herein by this reference. Thereafter, Deuel Harvest filed a Motion for Reconsideration. Briefs were submitted by Deuel Harvest and Petitioners. A hearing was scheduled for February 20, 2019, but was canceled due to inclement weather and the parties agreed the Motion for Reconsideration could be decided on the briefs without a hearing. The Court then issued a written decision on February 22, 2019, namely an Addendum to Memorandum Decision Dated January 25, 2019, which is attached and incorporated herein by this reference.

Having conducted a review of this matter, having considered the evidence in the record, having considered the arguments of counsel, and having rendered the aforementioned written decisions, the Court now makes and enters the following:

FINDINGS OF FACT

1. Deuel County enacted a zoning ordinance in 2004.

2. In 2016, the Planning and Zoning Board, which also sits as the Board of Adjustment, (hereinafter the Board) reviewed the current zoning requirements for a wind energy system (WES) to qualify as a special use exception under the Deuel County Zoning Wind Energy System Ordinance.

3. The Deuel County Commissioners adopted modifications which included greater setbacks from non-participating residences and Lake Cochrane lake park district in May of 2017.

4. Deuel Harvest Wind Energy LLC and Deuel Harvest Wind Energy South LLC (hereinafter Deuel Harvest) both of which are affiliated with Invenergy Wind Development, LLC applied for special exception permits (SEPs) for two wind farms (hereinafter Projects) in Deuel County.

5. The applications were filed on December 22, 2017.

6. At the time of the applications, the Board consisted of five members, Chairman Dennis Kanengieter, Paul Brandt, Mike Dahl, Kevin DeBoer and Steve Rhody.

7. The Board held its public hearing on the applications on January 22, 2018.

8. Five hundred eighteen pages were apparently received either the day of the hearing or one business day prior.

9. At the beginning of the public hearing, each Board member addressed the public and stated that they had no financial interest in the Projects.

10. Thereafter, the hearing commenced and lasted approximately three and a half hours.

11. The Board originally suggested that it did not believe it was fair to the Board to allow the meeting to extend unreasonably in length.

12. However, in the end the Board did not limit anyone from speaking and all were given the same time constraints of time to speak their opinion on the Project.

13. The Board took testimony from twenty-eight speakers, including Deuel Harvest, which gave its presentation first.

14. With the exception of Deuel Harvest, individuals who spoke either in favor or against the Projects were limited to speaking for three minutes.

15. After this hearing, the Board voted unanimously to approve both SEPs submitted by Deuel Harvest.

16. Under Section 504(4) of the Ordinance, an affirmative vote of two-thirds (2/3) of the full membership of the Board is required to approve a special exception permit.

17. At the Board's February 12, 2018 meeting, the Board made detailed written findings which imposed requirements on the Projects and Deuel Harvest.

18. The Board found that Deuel Harvest had satisfied all the Wind Energy System requirements but also found that Deuel Harvest would have to obtain approval from the Public Utilities Commission (PUC), Federal Aviation Administration (FAA), and meet all state, federal and county requirements.

19. The special exception permits did not actually issue until March 2, 2018, after Deuel Harvest provided the required letters of assurance that were required by the Board.

20. It is apparent to the Court that the Board did consider all the evidence that was presented to it by Deuel Harvest and all the others who came and spoke either in favor or against the Project.

21. The Board asked many questions of Deuel Harvest in response to many of the concerns that were presented by the opponents.

22. In reviewing the video from the hearing, it is clear to the Court that the Board consciously deliberated the applications and ultimately approved the applications on the night of the public hearing.

23. Petitioners argue that the Board incorrectly interpreted the Ordinance as it relates to the term "business."

24. The business that is involved in this claim is a hunting preserve owned by Will and Fay Stone,[1] which is located on approximately four hundred eighty acres.

[1] The January 25, 2019 Memorandum Decision incorrectly identified the owner of the hunting business as Homan.

25. The Deuel County Ordinance reads at Section 1215.03(2)(A) that "Distance from existing non-participating residences and business shall be not less than four times the height of the wind turbine."

26. The Ordinance did not define "business," and the Board interpreted its ordinance to determine that "business" means a physical structure.

27. Section 1215.03.14 of the Ordinance states that a permit shall become void if no substantial construction has been completed within three years of issuance, which presumably is issuance by the Board and not the PUC.

28. In its application, Deuel Harvest requested three years from the date of receiving a permit from the PUC.

29. The Board permitted Deuel Harvest to have three years from the date of receiving a permit from the PUC before its permit would become void.

30. Board members DeBoer and Dahl each had wind lease agreements with Deuel Harvest for the Projects that were being considered by the Board.

31. Dahl's agreement with Deuel Harvest was terminated by Deuel Harvest in 2016 due to low landowner interest in the area.

32. Dahl was paid $3,095 by Deuel Harvest for this easement prior to its termination.

33. Dahl had signed lease agreements with other wind energy developers.

34. Board member DeBoer also had agreements with Deuel Harvest for this Project which were signed in 2016 before he was a member of the Board.

35. In 2017, DeBoer asked to be released from the agreements with Deuel Harvest so that he may continue to serve on the Board and participate in the proceedings.

36. DeBoer received payments from Deuel Harvest in the amount of $3,060 in 2016 and another $3,060 in 2017 prior to the termination of these agreements.

37. Board member DeBoer also has two brothers, James DeBoer and Jerome DeBoer, both of whom have agreements with Deuel Harvest for the Project.

38. Neither Dahl nor DeBoer ever returned the funds to Deuel Harvest or even attempted to return those funds.

39. Board members Dahl and DeBoer each had an unacceptable risk of bias in voting on the Projects after receiving funds from Deuel Harvest for these Projects.

40. Board member Kanengieter is employed with Rogness Truck and Equipment.

41. The owners of Rogness Truck and Equipment, Clark and Phillip Rogness, have signed lease agreements with Deuel Harvest.

42. Kanengieter also has a signed agreement with the Flying Cow Wind project, and had advocated for wind energy in general.

43. Board member Brandt has a minority interest in Supreme Pork, which has Supreme Welding as its subsidiary.

44. Supreme Pork had a lease agreement in 2006 with Minndakota Wind, which had a no interference clause.

45. Supreme Welding also does work for Molded Fiberglass, which manufactures blades for wind turbines.

46. In April 2017, John Homan applied for a special exception permit to construct an airplane landing strip on his property.

47. At this time the wind energy system ordinance was sought to being amended by the Board.

48. The Board tabled Homan's application request to consider additional evidence regarding how the airstrip would affect neighboring landowners and land uses.

49. Homan's special exception permit was ultimately granted with a letter of assurance by Homan addressing his neighboring land owners.

50. Homan did not appeal the Board's decision.

51. The Court's review of the process undertaken with Homan's special use exception indicates that the Board diligently studied the issue about Homan and surrounding land owners, including those that may be considering agreements with wind energy developers.

52. The Board performing its duties as the Board in that case does not create bias or an unacceptable risk of bias in this case.

53. Petitioners brought this appeal pursuant to SDCL 11-2-62.

54. Petitioners asked the Court to reverse the decision of the Board based upon three arguments: 1) that the Board violated the due process rights of Petitioners by failing to provide a fair and impartial hearing; 2) that the Board exceeded its authority and failed to regularly pursue its authority; and 3) that the application of Deuel Harvest was vague and incomplete and therefore did not allow meaningful review.

55. Petitioners also moved the Court to consider additional evidence outside of the Return, namely those 23 exhibits attached to the Affidavit of Reece M. Almond in Support of Petition and Petitioners' Motion to Consider Additional Evidence.

CONCLUSIONS OF LAW

1. Any of the foregoing Findings of Fact that contain Conclusions of Law or are a mixture of fact and law are by this reference incorporated herein.

2. The Board's decision in this matter can be reviewed by writ of certiorari. SDCL 11-2-62.

3. The Court's consideration of a matter presented on certiorari is limited to whether the Board had jurisdiction over the matter and whether it pursued in a regular manner the authority conferred upon it.

4. The Board's actions will be sustained unless it did some act forbidden by law or neglected to do some act required by law. *Armstrong v. Turner County Bd. of Adjustment*, 2009 S.D. 81, 772 N.W.2d 643.

5. The Petitioners' first argument is that the Board violated the Petitioners' due process rights when it allowed board members with a bias or conflict of interest to vote on the Projects.

6. A local board's decision to grant or deny a conditional use permit is quasi-judicial and subject to due process constraints.

7. As such the "constitutional right to due process includes fair and impartial consideration by a local governing board." *Hanig v. City of Winner*, 2005 S.D. 10, ¶ 10, 692 N.W.2d 202, 205.

8. A fair and impartial hearing depends on whether there was actual bias or an unacceptable risk of bias. *Armstrong*, at ¶ 21, 772 N.W.2d at 651, citing *Hanig*.

9. After *Hanig* was decided by the South Dakota Supreme Court, the legislature enacted SDCL 6-1-17 in 2005.

10. SDCL 6-1-17 states that:

> No county, municipal, or school official may participate in discussing or vote on any issue in which the official has a conflict of interest. Each official shall decide if any potential conflict of interest requires such official to be disqualified from participating in discussion or voting.

> However, no such official may participate in discussing or vote on an issue if the following circumstances apply:
>
> (1) The official has a direct pecuniary interest in the matter before the governing body; or
>
> (2) At least two-thirds of the governing body votes that an official has an identifiable conflict of interest that should prohibit such official from voting on a specific matter.
>
> If an official with a direct pecuniary interest participates in discussion or votes on a matter before the governing body, the legal sole remedy is to invalidate that official's vote.

11. The Board argues that this statute changed the landscape of what types of interests disqualify a board member from participating, arguing that only a direct pecuniary interest may lead to disqualification.

12. The Board fails to consider the *Armstrong* case that was decided in 2009, well after the 2005 legislative change.

13. *Armstrong* continued to hold that an official should be disqualified only when there has been a clear and convincing showing that the official has an unalterably closed mind on matters critical to the disposition of the proceeding. *Armstrong*, at ¶ 22.

14. It further held that an official must be disinterested and free from bias or predisposition of the outcome and the very appearance of complete fairness must be present. *Id.* at ¶ 23.

15. There must exist actual bias or an unacceptable risk of bias before a decision maker can be disqualified. *Id.*

16. Furthermore, SDCL 6-1-21, which was enacted in 2015, also addresses grounds for conflict in a quasi-judicial proceeding.

17. It holds that:

> An elected or appointed municipal, county, or township officer may receive input from the public, directly or indirectly, about any matter of public interest. Such contact alone does not require the officer to recuse himself or herself from serving as a quasi-judicial officer in another capacity. An elected or appointed officer is presumed to be objective and capable of making decisions fairly on the basis of the officer's circumstances and may rely on the officer's own general experience and background. Only by a showing of clear and convincing evidence that the officer's authority, statements, or actions regarding an issue or a party involved demonstrates prejudice or unacceptable risk of bias may an officer be deemed disqualified in a quasi-judicial proceeding.

18. This Court must take its guidance from both the legislative enactments and the opinions of the South Dakota Supreme Court.

19. They do not seem to be at odds as argued by the parties.

20. If they are diametrically opposed as argued by the parties, surely the South Dakota Supreme Court would have eluded to that in its decision in *Armstrong*.

21. Therefore, the standard that this Court follows in determining bias or disqualification is whether there has been clear and convincing evidence that a board member's actions demonstrate prejudice or an unacceptable risk of bias. *Armstrong*.

22. The Court finds that Board members DeBoer and Dahl, by virtue of the payments received from Deuel Harvest for this Project, held an unacceptable risk of actual bias and should have been disqualified from voting on these Projects.

23. The Court does not find persuasive the arguments of the Board and Deuel Harvest that since these payments were received prior to the actual applications being submitted and the public hearings commencing that they are no longer a direct, present tense pecuniary interest in the Projects.

24. Because the Court finds an unacceptable risk of actual bias as set forth above, the Court does not need to address any of the remaining allegations regarding these two board

members such as indirect pecuniary interest for DeBoer's brothers in the Project or signed lease agreements with other wind energy developers by Dahl.

25. Petitioners allege that Kanengieter should also be disqualified from participating in voting on this Project due to 1) his employer being signed up for the project and receiving payment for such, 2) signing a transmission line agreement with another wind developer, Flying Cow Wind, and 3) advocating for wind development in general in Deuel County.

26. The Court rejects the Board's and Deuel Harvest's position that if there is no direct pecuniary interest as set forth in 6-1-17 that no conflict exists.

27. The Court analyzes these claims as the standard set forth above, i.e. whether actual bias or unacceptable risk of bias was established by clear and convincing evidence. *Armstrong*.

28. Kanengieter is employed with Rogness Truck and Equipment.

29. The owners Clark and Phillip Rogness have signed lease agreements with Deuel Harvest.

30. There is no evidence that this tenuous connection to the Project created an unacceptable risk of bias.

31. The same can be said regarding the agreement that Kanengieter had with the Flying Cow Wind project and for advocating wind energy in general.

32. Public officials can hold and express opinions.

33. Such opinions in favor of wind energy, agriculture or other development do not establish an unacceptable risk of bias.

34. Petitioners also challenged Board member Brandt.

35. Board Member Brandt has a minority interest in Supreme Pork, which has Supreme Welding as its subsidiary.

36. Supreme Pork had a lease agreement in 2006 with Minndakota Wind, which had a no interference clause.

37. Such a clause cannot be construed to prevent Brandt from favoring or disfavoring another wind energy project 12 years later.

38. Supreme Welding also does work for Molded Fiberglass which manufactures blades for wind turbines.

39. There was no evidence to suggest any link between these companies and blades used by Deuel Harvest.

40. Any connection amounts to speculation and thus the Petitioners fail to establish unacceptable risk of bias based upon the above facts.

41. Petitioners also allege the Board demonstrated actual bias in favor of Deuel Harvest with respect to an application for a special exception permit (SEP) by John Homan to construct an airplane landing strip on his property.

42. This SEP was requested in April of 2017, which was during the time that the wind energy system ordinance was sought to being amended by the Board.

43. The Board tabled Homan's application request to consider additional evidence regarding how the airstrip would affect neighboring landowners and land uses.

44. The SEP was ultimately granted with a letter of assurance by Homan addressing his neighboring land owners.

45. Homan did not appeal the Board's decision.

46. The review by this Court of the process undertaken with Homan's special use exception indicates that the Board diligently studied the issue about Homan and surrounding land owners, including those that may be considering agreements with wind energy developers.

47. The Board performing its duties as the Board in that case does not create bias or an unacceptable risk of bias in this case.

48. The Petitioners also allege that the time limits placed upon those wishing to address the Board to three minutes per speaker established a bias.

49. However, the time limit applied equally to those in favor and those against the Projects.

50. The Supreme Court of South Dakota has concluded that meaningful participation does not equate to equal time. *Grant County Concerned Citizens v. Grant County Bd. of Adjustment*, 2015 S.D. 54, ¶ 31, 866 N.W.2d 149, 160-161.

51. This Court viewed the entire public meeting when the application of Deuel Harvest was considered.

52. The Board originally suggested that it did not believe it was fair to the Board to allow the meeting to extend unreasonably in length.

53. However, in the end the Board did not limit anyone from speaking and all were given the same time constraints of time to speak their opinion on the Project.

54. Prescribing an orderly procedure or time limits does not deprive the Petitioners of due process. *Id.*

55. Petitioners also allege bias by claiming that the Board failed to even read or consider written materials submitted by opponents prior to the hearing and during the hearing.

56. Petitioners claim that this failure to consider this evidence or table the matter until they could review everything shows bias.

57. Five hundred eighteen pages were apparently received either the day of the hearing or one business day prior.

58. The Court does not find relevant whether the Board could recall after the application was granted what precise evidence was reviewed and what evidence was not reviewed.

59. This Court also does not find persuasive the argument set forth by the Petitioners.

60. It is apparent to the Court that the Board did consider all the evidence that was presented to it by Deuel Harvest and all the others who came and spoke either in favor or against the Project.

61. The Board asked many questions of Deuel Harvest in response to many of the concerns that were presented by the opponents.

62. In reviewing the video from the hearing, it is clear to the Court that the Board consciously deliberated the applications and ultimately approved the applications on the night of the public hearing.

63. The decision to vote on the Projects at this hearing does not indicate bias.

64. Under the statutory review for a writ of certiorari, Petitioners must establish that the Board did not regularly pursue the authority that has been conferred upon them. *Armstrong.*

65. First, Petitioners argue that the Board incorrectly interpreted the Ordinance as it relates to the term "business."

66. The business that is involved in this claim is a hunting preserve owned by Will and Fay Stone which is located on approximately four hundred eighty acres.

67. The Deuel County Ordinance reads at Section 1215.03(2)(A) that "Distance from existing non-participating residences and business shall be not less than four times the height of the wind turbine."

68. Because the ordinance did not define "business" the Board interpreted its ordinance to determine that "business" means a physical structure.

69. In *Wegner Auto v. Ballard*, 353 N.W.2d 57, 58, the South Dakota Supreme Court held that:

> in passing on the meaning of a zoning ordinance, the courts will consider and give weight to the construction of the ordinance by those administering the ordinance. However, the administrative construction is not binding on the court, which is free to overrule the construction if it is deemed to be wrong or erroneous.

70. In this instance, the Board interpreted the term business to mean a physical structure.

71. This is consistent with the purpose of the term in the ordinance which is to determine setbacks.

72. Therefore, the Court cannot find that the construction is erroneous.

73. Second, the Petitioners argue that the Board did not have authority to extend the period for the substantial completion of the Projects.

74. Deuel Harvest in its application requested three years from the date of receiving a permit from the PUC.

75. However, Section 1215.03.14 of the Ordinance states that a permit shall become void if no substantial construction has been completed within three years of issuance, which presumably is issuance by the Board and not the PUC.

76. Therefore, the Board irregularly pursued its authority in this regard.

77. Finally, the Petitioners argue that the Board failed to comply with the Ordinance when it granted the special exception permit before issuing its findings.

78. The Board voted to approve the application of Deuel Harvest on January 22, 2018, after the public meeting.

79. At the Board's February 12, 2018 meeting, the Board made detailed written findings which imposed requirements on the Projects and Deuel Harvest.

80. The special exception permits did not actually issue until March 2, 2018, after Deuel Harvest provided the required letters of assurance that were required by the Board.

81. Therefore, it appears to this Court that the Board did comply with the Section 504(5) when it voted to approve the application, subsequently prepared written findings and finally issued the special exception permits pursuant to those findings.

82. Thus, there was no irregular pursuit of authority in this regard.

83. The Petitioners also ask this Court to review the merits of the application and determine anew whether the permits should be granted based upon various and numerous arguments.

84. This is not appropriate under the writ of certiorari standard that was previously articulated above and therefore this Court will not address those arguments.

85. The final argument of the Petitioners is that the application was vague and incomplete precluding the Board from making a meaningful review.

86. It was apparent to the Court that the application contained substantial and adequate information regarding the turbines and the setbacks that were necessary to comply with the WES Ordinances.

87. Therefore, the Court also finds this argument to be without merit.

88. In this matter, the Petitioners have asserted that their due process rights were violated by the Board due to bias on the part of certain Board members.

89. This Court found Board members DeBoer and Dahl each held an unacceptable risk of bias in voting on the Projects and should have disqualified themselves.

90. However, the Court does not find unacceptable risk of bias as to the other Board members and the other allegations of the Petitioners as set forth above.

91. Furthermore, the Court finds that the Board regularly pursued the authority that was conferred upon them, except as to the time limit for substantial completion of the Projects.

92. After invalidating the votes of Board members Dahl and DeBoer, the Projects did not pass with the two-thirds majority required under Section 504(4) of the Ordinance and under SDCL 11-2-59.

93. Therefore, the decision of the Board on the Projects is reversed, and the permits issued to Deuel Harvest are hereby revoked and void.

94. In the event a rehearing occurs on Deuel Harvest's applications, it should be held consistent with these Findings and Conclusions and consistent with the Court's memorandum decision of January 25, 2019, and the Addendum to Memorandum Decision of February 22, 2019.

95. As for Petitioners' Motion to Consider Additional Evidence, the Court grants it in part and denies it in part. The Court accepts into evidence Exhibits 6, 8, 9, 11, 12, 13, 14, 15, 16, 17, and 22. The Court denies Exhibits 1-5, 7, 10, 18, 19, 20, and 21.

Attest:
Reichling, Sandy
Clerk/Deputy

BY THE COURT:
Signed: 3/27/2019 4:38:41 PM

Dawn M. Elshere, Circuit Court Judge

STATE OF SOUTH DAKOTA
THIRD JUDICIAL CIRCUIT COURT

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January 25, 2019

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Re: George Holborn, et al v. Deuel County Board of Adjustment, et al, CIV18-19

Counsel:

The above entitled matter came on for hearing on December 13, 2018 in Clear Lake, Deuel County, South Dakota. The Petitioners appeared by and through counsel, Mr. Reece Almond. The Respondent Deuel County Board of Adjustment appeared by and through counsel, Mr. Jack Hieb. The Respondent, Deuel Harvest Wind Energy, appeared by and through counsel, Ms. Lisa Agrimonti. Counsel had previously submitted briefs and exhibits and presented oral arguments at the hearing. The Court took the matter under advisement to review briefs, evidence[1] (exhibits) and videos of the Board

[1] Petitioners filed a motion with the Court to consider additional evidence under SDCL 11-2-64. The Court in its discretion denies the request of the Petitioners as to the deposition testimony of the Board members in Exhibits 1,2,3,4 and 5. Exhibits 13, 15, and 17 which were minutes of the proceedings for the changes to the

of Adjustment proceedings. The Court now issues the following as its memorandum decision on this matter. Based upon the facts, legal standards and reasoning below, the Court affirms in part and reverses in part.

FACTS

Deuel County enacted a zoning ordinance in 2004. In 2016, the Planning and Zoning Board, which also sits as the Board of Adjustment, (hereinafter the Board) reviewed the current zoning requirements for a wind energy system (WES) to qualify as a special use exception under the Deuel County Zoning Wind Energy System Ordinance. The Deuel County Commissioners adopted modifications which included greater setbacks from non-participating residences and Lake Cochrane lake park district in May of 2017.

Deuel Harvest Wind Energy, LLC and Deuel Harvest Wind Harvest Wind Energy South, LLC (hereinafter Deuel Harvest) both of which are affiliated with Invenergy Wind Development, LLC applied for special exception permits (SEPs) for two wind farms (hereinafter Projects) in Deuel County. The applications were filed on December 22, 2017. At the time of the applications, the Board consisted of five members, Chairman Dennis Kanengieter, Paul Brandt, Mike Dahl, Kevin DeBoer and Steven Rhody. The Board held its public hearing on the applications on January 22, 2018. At the beginning of the public hearing, each Board member addressed the public and stated that they had no financial interest in the Projects. Thereafter, the hearing commenced and lasted approximately three and a half hours. The Board took testimony from twenty-eight speakers, including Deuel Harvest which gave its presentation first. Individuals who spoke either in favor or against the Projects were limited to speaking for three minutes. After this hearing, the Board voted unanimously to approve both the North and the South Projects SEPs that were submitted by Deuel Harvest. The Board found that Deuel Harvest had satisfied all the Wind Energy System requirements but also found that they would have to obtain approval from the Public Utilities Commission (PUC), Federal Aviation Administration (FAA) and meet all state, federal and county requirements.

Petitioners then brought this appeal pursuant to SDCL 11-2-62. Petitioners ask this Court to reverse the decision of the Board based upon three arguments 1) that the Board violated the due process rights of Petitioners by failing to provide a fair and impartial hearing; 2) that the Board

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Deuel County Zoning Ordinances were all considered as evidence by this Court. Exhibits 7, 10, 18, 19, 20 and 21 as additional evidence to be considered are denied by this Court. The Petitioners requests for consideration of additional evidence in Exhibits 6, 8, 9, 11, 12, 14, 16, and 22 will be granted and were considered as evidence by this Court.

exceeded its authority and failed to regularly pursue its authority and 3) that the application of Deuel Harvest was vague and incomplete and therefore did not allow meaningful review.

Standard of Review

The Board's decision in this matter can be reviewed by writ of certiorari. SDCL 11-2-62. The Court's consideration of a matter presented on certiorari is limited to whether the Board had jurisdiction over the matter and whether it pursued in a regular manner the authority conferred upon it. The Board's actions will be sustained unless it did some act forbidden by law or neglected to do some act required by law. *Armstrong v. Turner County Bd of Adjustment*, 2009 SD 81,772 N.W.2d 643, citations omitted.

1. Due Process Rights

The Petitioners' first argument is that the Board violated the Petitioners' due process rights when it allowed board members with a bias or conflict of interest to vote on the Projects. A local board's decision to grant or deny a conditional use permit is quasi-judicial and subject to due process constraints. As such the "constitutional right to due process incudes fair and impartial consideration by a local governing board." *Hanig v. City of winner*, 2005 SD 10 ¶ 10 692 N.W.2d 202, 205 citations omitted. A fair and impartial hearing depends on whether there was actual bias or an unacceptable risk of bias. *Armstrong*, at ¶21,772 N.W.2d at 651, citing *Hanig*.

After *Hanig* was decided by the South Dakota Supreme Court, the legislature enacted SDCL 6-1-17 in 2005. SDCL 6-1-17 states that:

> No county, municipal, or school official may participate in discussing or vote on any issue in which the official has a conflict of interest. Each official shall decide if any potential conflict of interest requires such official to be disqualified from participating in discussion or voting.
>
> However, no such official may participate in discussing or vote on an issue if the following circumstances apply:
>
> (1) The official has a direct pecuniary interest in the matter before the governing body; or
>
> (2) At least two-thirds of the governing body votes that an official has an identifiable conflict of interest that should prohibit such official from voting on a specific matter.
>
> If an official with a direct pecuniary interest participates in discussion or votes on a matter before the governing body, the legal sole remedy is to invalidate that official's vote.

Board argues that this statute changed the landscape of what types of interest disqualify a board member from participating, arguing that only a direct pecuniary interest may lead to disqualification. Board fails to consider the *Armstrong* case that was decided in 2009 well after the 2005 legislative

change. *Armstrong* continued to hold that an official should be disqualified only when there has been a clear and convincing showing that the official has an unalterably closed mind on matters critical to the disposition of the proceeding." *Armstrong*, at ¶ 22. It further held that an official must be disinterested and free from bias or predisposition of the outcome and the very appearance of complete fairness must be present." *Id.* at ¶23 There must exist actual bias or an unacceptable risk of bias before a decision maker can be disqualified. *Id.*

Furthermore, SDCL 6-1-21 which was enacted in 2015 also addresses grounds for conflict in a quasi-judicial proceeding. It holds that:

> An elected or appointed municipal, county, or township officer may receive input from the public, directly or indirectly, about any matter of public interest. Such contact alone does not require the officer to recuse himself or herself from serving as a quasi-judicial officer in another capacity. An elected or appointed officer is presumed to be objective and capable of making decisions fairly on the basis of the officer's circumstances and may rely on the officer's own general experience and background. Only by a showing of clear and convincing evidence that the officer's authority, statements, or actions regarding an issue or a party involved demonstrates prejudice or unacceptable risk of bias may an officer be deemed disqualified in a quasi-judicial proceeding.

This Court must take its guidance from both the legislative enactments and the opinions of the South Dakota Supreme Court. They do not seem to be at odd as are argued by the parties. If they are diametrically opposed as argued by the parties, surely the South Dakota Supreme Court would have eluded to that in its decision in *Armstrong*. Therefore, the standard that this Court follows in determining bias or disqualification is whether there has been clear and convincing evidence that a board members actions demonstrate prejudice or an unacceptable risk of bias. *Armstrong*.

A. Board Members Kevin DeBoer and Mike Dahl.

Board Members DeBoer and Dahl each had wind lease agreements with Deuel Harvest for the Projects that were being considered by the Board. Dahl's agreement with Deuel Harvest was terminated by Deuel Harvest in 2016 due to low landowner interest in this area. Dahl was paid $3,095 by Deuel Harvest for this easement prior to its termination. Board Member DeBoer also had agreements with Deuel Harvest for this Project which were signed in 2016 before he was a member of the Board of Adjustment. In 2017 DeBoer asked to be released from the agreements with Deuel Harvest so that he may continue to serve on the Board and participate in the proceedings. He received payments from Deuel Harvest in the amount of $3,060 in 2016 and another $3,060 in 2017 prior to the

termination of these agreements. There is no evidence that either Board Member ever returned the funds to Deuel Harvest or even attempted to return those funds.

The Court finds that Board members DeBoer and Dahl, by virtue of the payments received from Deuel Harvest for this Project, held an unacceptable risk of actual bias and should have been disqualified from voting on these Projects. The Court does not find persuasive the arguments of County and Deuel Harvest that since these payments were received prior to the actual applications being submitted and the public hearings commencing that they are no longer a direct present tense pecuniary interest in the Projects. Because the Court finds an unacceptable risk of actual bias as set forth above, the Court does not need to address any of the remaining allegations regarding these two board members such as indirect pecuniary interest for DeBoer's brothers in the Project or signed lease agreements with other wind energy developers by Dahl.

B. *Board Member Dennis Kanengieter.*

Petitioners allege that Kanengieter should also be disqualified from participating in voting on this Project due to 1) his employer being signed up for the project and receiving payment for such, 2) signing a transmission line agreement with another wind developer, Flying Cow Wind, and 3) advocating for wind development in general in Deuel County. The Court rejects the County and Deuel Harvest's position that if there is no direct pecuniary interest as set forth in 6-1-17 that no conflict must exists. The Court analyzes these claims as the standard set forth above, i.e. whether actual bias or unacceptable risk of bias was established by clear and convincing evidence. *Armstrong*

Kanengieter is employed with Rogness Truck and Equipment. The owners Clark and Phillip Rogness have signed lease agreements with Deuel Harvest. There is no evidence that this tenuous connection to the Project created an unacceptable risk of bias. The same can be said regarding the agreement that Kanengieter had with the Flying Cow Wind project and for advocating wind energy in general. Public officials can hold and express opinions. Such opinions in favor of wind energy, agriculture or other development do not establish an unacceptable risk of bias.

C. Board Member Paul Brandt

Board Member Brandt has a minority interest in Supreme Pork, which has Supreme Welding as its subsidiary. Supreme Pork had a lease agreement in 2006 with Minndakota Wind, which had a no interference clause. Such a clause cannot be construed to prevent Brandt from favoring or disfavoring another wind energy project 12 years later. Supreme Welding also does work for Molded Fiberglass which manufactures blades for wind turbines. There was no evidence to suggest any link between

these companies and blades used by Deuel Harvest. Any connection amounts to speculation and thus the Petitioners fail to establish unacceptable risk of bias based upon the above facts.

D. *Actual Bias in favor of Deuel Harvest.*

Petitioners also allege actual bias in favor of Deuel Harvest with respect to an application for a special exception permit (SEP) by John Homan[2] to construct an airplane landing strip on his property. This SEP was requested in April of 2017, which was during the time that the wind energy system ordinance was sought to being amended by the Board. The Board tabled Homan's application request to consider additional evidence regarding how the airstrip would affect neighboring landowners and land uses. The SEP was ultimately granted with a letter of assurance by Homan addressing his neighboring land owners. Homan did not appeal the Board's decision. The review by this Court of the process undertaken with Homan's special use exception indicates that the Board diligently studied the issue about Homan and surrounding land owners, including those that may be considering agreements with wind energy developers. The Board performing its duties as the Board in that case does not create bias or an unacceptable risk of bias in this case.

E. Time Limits

The Petitioners also allege that the time limits placed upon those wishing to address the Board to three minutes per speaker established a bias. However, the time limit applied equally to those in favor and those against the Projects. The Supreme Court of South Dakota has concluded that meaningful participation does not equivocate to equal time. *Grant County Concerned Citizens v. Grant County Bd of Adjustment*, 2015 SD 54, ¶ 31, 866 NW2d 149, 160-161. This Court viewed the entire public meeting when the application of Deuel Harvest was considered. The Board originally suggested that it did not believe it was fair to the Board to allow the meeting to extend unreasonably in length. However, in the end the Board did not limit anyone from speaking and all were given the same time constraints of time to speak their opinion on the Project. Prescribing an orderly procedure or time limits does not deprive the Petitioners of due process. *Id.*

F. Written Submissions by the Opponents

Petitioners also allege bias by claiming that the Board failed to even read or consider written materials submitted by opponents prior to the hearing and during the hearing. Petitioners claim that this failure to consider this evidence or table the matter until they could review everything shows bias. Five Hundred eighteen pages were apparently received either the day of the hearing or one business

[2] John Homan is a petitioner in this appeal.

day prior. The Court does not find relevant whether the Board could recall after the application was granted what precise evidence was reviewed and what evidence was not reviewed. This Court also does not find persuasive the argument set forth by the Petitioners. It is apparent to the Court, that the Board did consider all the evidence that was presented to it by Deuel Harvest and all the others who came and spoke either in favor or against the project. The Board asked many questions of Deuel Harvest in response to many of the concerns that were presented by the opponents. In reviewing the video from the hearing, it is clear to the Court that the Board consciously deliberated the applications and ultimately approved the applications on the night of the public hearing. The decision to vote on the Projects at this hearing does not indicate bias.

2. Regular Pursuit of Authority

Under the statutory review for a writ of certiorari, Petitioners must establish that the Board did not regularly pursue the authority that has been conferred upon them. *Armstrong*. First, Petitioners argue that the Board incorrectly interpreted the Ordinance as it relates to the term "business."[3] The Deuel County Ordinance reads at Section 1215.03(2)(A) that "Distance from existing non-participating residences and business shall be not less than four times the height of the wind turbine". Because the ordinance did not define "business" the Board interpreted its ordinance to determine that "business" means a physical structure. In *Wegner Auto v Ballard*, 353 N.W.2d 57, 58, the South Dakota Supreme Court held that:

> "in passing on the meaning of a zoning ordinance, the courts will consider and give weight to the construction of the ordinance by those administering the ordinance. However, the administrative construction is not binding on the court, which is free to overrule the construction if it is deemed to be wrong or erroneous."

In this instance, the Board interpreted the term business to mean a physical structure. This is consistent with the purpose of the term in the ordinance which is to determine setbacks. Therefore, the Court cannot find that the construction is erroneous.

Second, the Petitioners argue that the Board did not have authority to extend the period for the substantial completion of the Projects. Deuel Harvest in its application requested three years from the date of receiving a permit from the PUC. However, section 1215.03.14 of the Ordinance states that a permit shall become void if no substantial construction has been completed within three years of

[3] The business that is involved in this claim is a hunting preserve owned by Homan which is located on approximately four hundred eighty acres.

issuance, which presumably is issuance by the Board and not the PUC. Therefore, the Board irregularly pursued its authority in this regard.

Finally, the Petitioners argue that the Board failed to comply with the Ordinance when it granted the special exception permit before issuing its findings. The Board voted to approve the application of Deuel Harvest on January 22, 2018 after the public meeting. At the Board's February 12, 2018 meeting, the Board made detailed written findings which imposed requirements on the Projects and Deuel Harvest. The special exception permits did not actually issue until March 2, 2018 after Deuel Harvest provided the required letters of assurance that were required by the Board. Therefore, it appears to this Court that the Board did comply with the section 504(5) when it voted to approve the application, subsequently prepared written findings and finally issued the special exception permits pursuant to those findings. Thus, there was no irregular pursuit of authority in this regard.

3. **The Merits of the Application.**

The Petitioners also ask this Court to review the merits of the application and determine anew whether the permits should be granted based upon various and numerous arguments. This is not appropriate under the writ of certiorari standard that was previously articulated above and therefore this Court will not address those arguments.

The final argument of the Petitioners is that the application was vague and incomplete precluding the Board from making a meaningful review. It was apparent to the Court that the application contained substantial and adequate information regarding the turbines and the setbacks that were necessary to comply with the WES Ordinances. Therefore, the Court also finds this argument to be without merit.

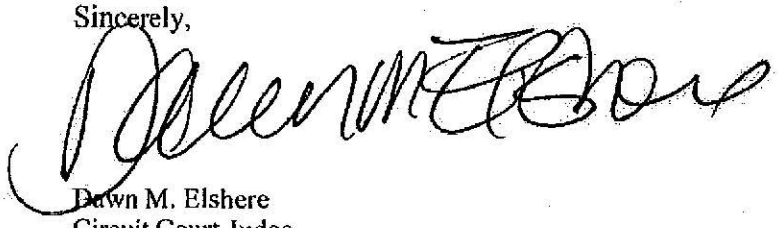
CONCLUSION

In this matter, the Petitioners have asserted that their due process rights were violated by the Board due to bias on the part of certain Board members. This Court has previously held that Board members DeBoer and Dahl each held an unacceptable risk of bias in voting on this project and should have disqualified themselves. That beings said, this Court will invalidate these Board members' votes, which would result in a decision approved by the Board by a margin of three to zero. SDCL 6-1-17. Therefore, the decision of the Board would be affirmed in part. The decision is modified by this Court to amend that portion of the findings referring to the time limits for substantial construction to be completed within three years of the date of issuance of a permits by the Board. SDCL 11-2-65.

Therefore, after careful review in this case the Court finds that unacceptable risk of bias only applied to Board Members DeBoer and Dahl and invalidated their votes. However, the Court does not find unacceptable risk of bias as to the other Board members and the other allegations of the Petitioners as set forth above. Furthermore, the Court finds that the Board regularly pursued the authority that was conferred upon them, except as to the time limit for substantial completion of the Projects.

Counsel for the Board shall prepare proposed Findings of Fact and Conclusion of Law and Order consistent with the Court's memorandum decision and submit them to the Court and counsel within twenty days. Counsel shall incorporate this Court's written decision herein in said Findings of Fact and Conclusion of Law. Petitioners may object in accordance with SDCL 15-6-52.

Sincerely,



Dawn M. Elshere
Circuit Court Judge

STATE OF SOUTH DAKOTA
THIRD JUDICIAL CIRCUIT COURT
Counties
Beadle, Brookings, Clark
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Hamlin, Hand, Jerauld
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Re: George Holborn, et al v. Deuel County Board of Adjustment, et al, CIV18-19

Counsel:

Addendum to Memorandum Decision Dated January 25, 2019

The above entitled matter came on for consideration after Deuel Harvest filed a Motion for Reconsideration on February 6, 2019. Briefs were submitted by Deuel Harvest and the Petitioners. A hearing scheduled for February 20, 2019 did not occur and the Court took the Motion under advisement based upon the briefs that were submitted. The Court considered the arguments of counsel and now issues the following as its addendum to memorandum decision dated January 25, 2019.

In the Court's, January 25, 2019 decision, the Court found that Board Members Dahl and DeBoer each had a unacceptable risk of bias in voting on the Projects after receiving funds from Deuel

Harvest for these Projects. The Court stands by the analysis and ruling in the previous memorandum decision regarding the unacceptable risk of bias held by Dahl and DeBoer. Memorandum Decision dated January 25, 2019 pg. 5. The Court did err in failing to consider SDCL 11-2-59 and the Deuel County Zoning Ordinance Section 504(4) which requires conditional use permits to be approved by a two- thirds majority rather than a simple majority. Therefore, since Board Members Dahl and DeBoer each would be disqualified from voting on this project based upon the previous analysis, the Projects did not pass the two- thirds majority required. Thus, the decision of the Board on the Projects is reversed and remanded for a rehearing on the applications consistent with this decision and the original memorandum decision. The Motion for Reconsideration by Deuel Harvest is denied.

Counsel for the Petitioners shall prepare proposed Findings of Fact and Conclusion of Law and Order consistent with the Court's memorandum decision of January 25, 2019 and this Decision and submit them to the Court and counsel within twenty days. Counsel shall incorporate this Court's written decision herein and he January 25, 2019 decision in said Findings of Fact and Conclusion of Law. Petitioners may object in accordance with SDCL 15-6-52.

Sincerely,

Dawn M. Elshere
Circuit Court Judge