



STATE OF SOUTH DAKOTA
THIRD JUDICIAL CIRCUIT COURT

Counties

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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, evidence¹ (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

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 includes 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 exist. 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 Homan² 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 be 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