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

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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

PETITIONERS' BRIEF IN SUPPORT OF PETITION AND PETITIONERS' MOTION TO CONSIDER ADDITIONAL EVIDENCE

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Petitioners, through counsel, submit this Brief in Support of Petition.

BACKGROUND

Petitioners bring this action pursuant to SDCL ch. 11-2, challenging the Deuel County Board of Adjustment's ("Board") granting of two special exception permits for Wind Energy Systems ("WES") to Deuel Harvest Wind Energy LLC and Deuel Harvest Wind South LLC, (hereafter, "Invenergy"), both subsidiaries of Invenergy LLC.

On December 22, 2017, Invenergy applied for special exception permits for two WES ("Applications"). (Return, Ex. F at 6-9, 19-22.) On January 22, 2018, the Board held a public hearing on Invenergy's special exception applications ("Hearing"). (*Id.*) The five members of

the Board at the time of the Hearing were Chairman Dennis Kanengieter, Paul Brandt, Mike Dahl, Kevin DeBoer and Steve Rhody. (Return, Ex. E at 51.) After approximately a three-and-a-half hour hearing, the Board voted unanimously to grant Invenergy the two special exception permits ("Permits"), allowing Invenergy to place up to 250 wind turbines anywhere on participating landowners' property. (*Id.* at 51-60.)

Deuel County Zoning Ordinance

In Deuel County, the Board is given the authority to grant special exception permits according to the Deuel County Zoning Ordinance ("Ordinance"). (Return, Ex. A at 29 (Ordinance § 504).) An affirmative vote of two-thirds of the full membership of the Board is required to approve a special exception permit. (*Id.*)

Under the Deuel County Ordinance:

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

(*Id.* at 21 (Ordinance § 278).)[1] The Ordinance requires all special exceptions meet the requirements of Ordinance § 504, in addition to all requirements specific to a particular special

[1] A special exception as described in the Ordinance is the same as a conditional use defined in SDCL 11-2-17.4 (defining "conditional use" as "any use that, owing to certain special characteristics attendant to its operation, may be permitted in a zoning district subject to the evaluation and approval by the approving authority specified in § 11-2-17.3"). For purpose of this brief, the terms "special exception" and "conditional use" are interchangeable.

exception. Ordinance § 1215 contains additional requirements for WES special exception permit applications.[2]

Recent Amendment to Ordinance & Petition for Referendum

The section of the Ordinance dealing specifically with WES was recently amended in May 2017. (Return, Ex. A at 100.) Those amendments imposed stricter requirements for wind development in Deuel County. (Almond Aff. Ex. 3 (Kanengieter Dep. p.50).) After their adoption, certain individuals in the community began circulating referendum petitions to repeal the amendments. (*Id.*) Board members Kanengieter and DeBoer each signed a referendum petition. (*Id.* at Ex. 3 (Kanengieter Dep. p. 50-52; *id.* at Ex. 1 (DeBoer Dep. p. 77-78).) Ultimately, the referendum attempt failed.

For the sake of brevity, additional pertinent facts are discussed within the Argument section below.

LEGAL STANDARDS

A court reviews a board of adjustment's decision to grant a special exception permit under the certiorari standard of review. SDCL 11-2-62. "A writ of certiorari may be granted by the Supreme and circuit courts when the inferior courts, officers, boards, or tribunals have exceeded their jurisdiction." SDCL 21-31-1; *see also Lamar Outdoor Adver. of S.D., Inc. v. Rapid City*, 2007 S.D. 35 ¶ 14, 731 N.W.2d 199.

The Court's scope of review is to determine "whether the board of adjustment had jurisdiction over the matter and whether it pursued in a regular manner the authority conferred

[2] SDCL 11-2-17.3 further requires the Board to consider "the objectives of the comprehensive plan, and the purpose of the zoning ordinance and its relevant zoning districts when making a decision to approve or disapprove a conditional use permit."

upon it." *Lake Hendricks Imp. Ass'n v. Brookings Cnty Planning and Zoning Comm'n*, 2016 S.D. 48, ¶ 26, 882 N.W.2d 307. The Board's decision must be reversed if it did some act forbidden by law or neglected to do some act required by law. *Armstrong v. Turner Cnty. Bd. of Adjustment*, 2009 S.D. 81, ¶ 12, 772 N.W.2d 643, 648. Moreover, if this Court finds that the Board failed to contribute independent thought and "did not fulfill its duty to follow the guidelines of the [county] ordinance . . . this case must be remanded to the board for a proper determination." *Hines v. Bd. of Adjustment of City of Miller*, 2004 S.D. 13, ¶ 16, 675 N.W.2d 231, 236. Also, if the Board applied an incorrect legal standard, its decision is illegal and reversal is proper. *Adolph v. Grant Cnty. Bd. of Adjustment*, 2017 S.D. 5, ¶ 19, 891 N.W.2d 377, 384.

Courts "interpret zoning laws according to the rules of statutory construction and any rules of construction included in the enactments themselves. The interpretation of an ordinance presents a question of law reviewable de novo." *City of Marion v. Rapp*, 2002 S.D. 146, ¶ 5, 655 N.W.2d 88, 90.

ARGUMENT

There are several independently-sufficient paths the Court can take to reverse the Board's decision. For organizational purposes, those paths have been grouped into three general categories: (1) the Board violated Petitioners' due process rights by failing to provide a fair and impartial hearing; (2) the Board exceeded its authority and failed to regularly pursue its authority; and (3) the vagueness and incompleteness of the Applications precluded the Board and the public from engaging in meaningful review. The end result, regardless of the path, is the same: the Board's decision should be reversed.

I. The Board Violated Petitioners' Due Process Rights by Failing to Provide a Fair and Impartial Hearing

As affected property owners, Petitioners were entitled to fair and impartial consideration by the Board (i.e., due process). The Board members, however, had conflicts of interest and bias that prevented them from providing fair and impartial consideration of Invenergy's Applications. Accordingly, Petitioners' due process rights were violated and the Board's decision should be reversed.

"[A] local zoning board's decision to grant or deny a conditional use permit is quasi-judicial and subject to due process constraints," which includes the requirement of "fair and impartial consideration" by the board. *Armstrong v. Turner Cnty Bd. of Adjustment*, 2009 S.D. 81, ¶ 19, 772 N.W.2d 643, 650-51; *Hanig v. City of Winner*, 2005 S.D 10, 692 N.W.2d 202. "Because a county board of adjustment functions as an adjudicatory body when it hears requests for conditional use permits, members of the board must be free from bias or predisposition of the outcome and must consider the matter with the appearance of complete fairness." *Armstrong*, ¶ 21. Due process is violated if there is actual bias or even "an unacceptable risk of actual bias." *Id.*

"The due process standard for disqualification in a quasi-judicial proceeding is 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 (internal quotations omitted). In other words, "where actual bias or an unacceptable risk of actual bias or prejudgment exists, the decision maker must be disqualified from participating." *Id.* Importantly, a "disqualifying conflict of interest may exist even if the official has not acted upon it." *Id.* at ¶ 24. "If circumstances show a likely capacity to tempt the official to depart from his duty, then the risk of

actual bias is unacceptable and the conflict of interest is sufficient to disqualify the official." *Id.* at ¶ 25.

Disqualifying interests exist when, for example, the decision maker has a pecuniary or personal interest in the proceeding or when the decision maker's employer or family member has a personal or pecuniary interest in the proceeding. *Armstrong*, ¶ 24; *Hanig*, ¶ 14 ("[P]ublic policy demands that officials normally disqualify themselves when they have a business or personal interest in the subject on which they must vote, regardless of whether this interest creates an actual bias."); *id.* at ¶ 19 (defining four categories of disqualifying interests: direct pecuniary interest, indirect pecuniary interest, direct personal interest, and indirect personal interest).

This Court "must consider whether the record establishes either actual bias on the part of the tribunal or the existence of circumstances that lead to the conclusion that an unacceptable risk of actual bias or prejudgment inhered in the tribunal's procedure." *Armstrong*, ¶ 21. "If circumstances show a likely capacity to tempt the official to depart from his duty, then the risk of actual bias is unacceptable and the conflict of interest is sufficient to disqualify the official." *Id.* at ¶ 25.

The facts in *Hanig v. City of Winner* are informative here. In *Hanig*, the Supreme Court held that a councilwoman's indirect pecuniary interest through her employer's interest constituted a conflict of interest that violated the right to due process and required her disqualification from participation. *Id.* at ¶ 20. The due process violation warranted a new hearing. *Id.* at ¶ 23.

Here, four of the five Board members—Kevin DeBoer, Mike Dahl, Dennis Kanengieter, and Paul Brandt—had disqualifying interests and should not have participated in the Hearing.

Those four Board members were more deeply involved than a neutral member of the public. And it showed, as they exhibited a clear bias and predisposition in favor of Invenergy's project.

A. Kevin DeBoer Had Disqualifying Interests

Kevin DeBoer entered into two separate Wind Lease and Easement Agreements with Invenergy for the very project that he and the Board ultimately considered. (Almond Aff. Ex. 7 (DCBA 1-21, 22-43).) Per those agreements, DeBoer was paid $3,060 by Invenergy. (*Id.* at Ex. 6 (Answer to Int. no. 9); Ex. 8 (DCBA 44).) DeBoer also attended gatherings hosted by Invenergy at Melvee's and Pizza Shack, where he and other project supporters were given pizza and advised of the status of the project. (*Id.* at Ex. 1 (DeBoer Dep. pp. 20-22).) DeBoer also signed a referendum petition seeking to repeal the recent amendments to the Ordinance, which would have made it easier for wind development in Deuel County.[3] (*Id.* at Ex. 1 (DeBoer Dep. pp. 77-78).)

Furthermore, DeBoer's two brothers, James DeBoer and Jerome DeBoer, each also had Wind Lease and Easement Agreements with Invenergy for the project. (*Id.* at Ex. 6 (Answer to Int. no. 7).) James attended the same gatherings at Melvee's and Pizza Shack. (*Id.* at Ex. 1 (DeBoer Dep. p. 21).) DeBoer had conversations with his brothers about whether the project "would come to fruition" and whether his brothers were going to get turbines placed on their properties. (*Id.* at Ex. 1 (DeBoer Dep. p.28).) In other words, at the time of the Hearing, DeBoer knew his two brothers had already financially benefited from the project and were in a position to benefit further if the project was approved by the Board. (*Id.* at Ex. 16 (Responses to Request nos. 31-32).)

[3] During his deposition DeBoer claimed he refrained from signing a referendum petition because he thought doing so was inappropriate given his position on the Board. (Almond Aff. Ex. 1 (DeBoer Dep. 77).) When confronted with the petition he actually signed, DeBoer admitted to doing so.

On December 14, 2017—about a week before Invenergy submitted its Applications to the Board—DeBoer was released from his two agreements with Invenergy. (Almond Aff. Ex. 9.) Although he was released from the two agreements, DeBoer did not pay back the $3,060 he had received from Invenergy. (Almond Aff. Ex. 1 (Deboer Dep. p. 30.) According to DeBoer, he requested to be released from the agreements so that he could vote on the Applications. (Almond Aff. Ex. 1 (DeBoer Dep. p. 31 ("I said in order for me to have a voice on the Board, I'll have [ ] to be released from the contract.").) When specifically asked why he did not just recuse himself rather than requesting to be released from the agreements, DeBoer responded it was because he wanted to have a voice at the Hearing. (*Id.* (DeBoer Dep. p. 75).) It is evident why he wanted a voice—he had already received $3,060 dollars from the applicant, his brothers had already received money from the applicant, and his brothers were in a position to receive additional financial benefits if the project was approved.

In sum, at the time of the Hearing, DeBoer's interest in the project went far beyond that of a neutral member of the public. DeBoer had received direct financial benefit from the very project he voted on at the Hearing. He also had an indirect pecuniary interest in the project, as his two brothers had received benefits from the project and could potentially benefit further from the project if approved. Such interests created actual bias or at a minimum an unacceptable risk of actual bias and are therefore disqualifying under South Dakota law. *See Hanig*, ¶ 14 ("[O]fficials normally disqualify themselves when they have a business or personal interest in the subject on which they must vote, regardless of whether this interest creates an actual bias."); *id.* at ¶¶ 19-20 (noting both direct and indirect (i.e., benefit to family member or employer) pecuniary interests are disqualifying interests).

B. Mike Dahl Had Disqualifying Interests

Mike Dahl, like Kevin DeBoer, also entered into a Wind Lease and Easement Agreement with Invenergy for the project the Board considered. (Almond Aff. Ex. 10 (DCBA 52-72).) Invenergy paid Dahl $3,095 for entering into the agreement. (*Id.* at Ex. 11 (DCBA 73).) In addition to Invenergy, Dahl has signed lease agreements with two other wind developers: Iberdrola and ENNXCO. (*Id.* at Ex. 2 (Dahl Dep. pp. 7-8).)

Dahl's agreement with Invenergy was "terminated" on November 17, 2016. (*Id.* at Ex. 12 (DCBA 76-80)). Dahl did not pay back the $3,095 he received from Invenergy. (*Id.* at Ex. 2 (Dahl Dep. p. 13).) Interestingly, Dahl's agreement was terminated just four days before Dahl and the other members of the Board held a public meeting regarding whether to amend the Ordinance as it related to wind development and whether to impose a suspension on all WES applications. (*Id.* at Ex. 13.) Dahl claimed he was released from his agreement with Invenergy because Invenergy did "not have enough interest" in Dahl's area. (*Id.* at Ex. 2 (Dahl Dep. pp. 13-14).) But Dahl's agreement was the very first, and for some time only,[4] agreement that Invenergy terminated. (*Id.* at Ex. 14 (Answer to Int. no. 13).) In fact, the next agreement Invenergy "terminated" was the agreement it had with County Commissioner Lynn Pederson just days before the County Commission began considering whether to amend the wind-specific sections of the Ordinance. (*Id.*; *see also id.* at Ex. 15.) In other words, there are three examples of Invenergy "terminating" an agreement with a public official only days before the public official is set to consider an issue affecting Invenergy. The most likely explanation for these

[4] Had Invenergy truly refined its project location, like Dahl claims, certainly Invenergy would have terminated agreements with other landowners at the same time it terminated Dahl's agreement. But it did not. The most likely explanation is that Dahl and Invenergy wanted Dahl, like DeBoer, "to have a voice" during those Board meetings.

three examples is that Invenergy wanted these individuals to participate in the proceedings; after all, they were predisposed to being in favor of the project given they had signed up their own land for the project.

Based on the above, Dahl had a disqualifying interest. First and foremost, he received a direct pecuniary interest from the project before even voting at the Hearing. That he signed lease agreements with three separate wind developers also evidences his pro-wind bias. Together, these facts created an actual bias or at a minimum an unacceptable risk of actual bias. *See Hanig*, ¶ 14 ("[O]fficials normally disqualify themselves when they have a business or personal interest in the subject on which they must vote, regardless of whether this interest creates an actual bias."). Put simply, Dahl should have recused himself from considering Invenergy's Applications.[5]

C. Dennis Kanengieter Had Disqualifying Interests

Dennis Kanengieter also had disqualifying interests. Kanengieter has been employed with Rogness Truck and Equipment since 1994. (*Id.* at Ex. 3 (Kanengieter Dep. pp. 7-8).) The owners of Rogness Truck and Equipment are Clark and Phillip Rogness. (*Id.*) Both Clark and Phillip Rogness signed lease agreements with Invenergy and were in a position to benefit financially from the project. (Return, Ex. B at 1261, 1600, 1604, 1662, 1666.) Kanengieter knew this before voting at the Hearing. (Almond Aff. Ex. 3 (Kanengieter Dep. pp. 29-30).) Stated differently, Kanengieter knew his employers were going to financially benefit if he voted in favor of the project. This was an indirect pecuniary interest that disqualified Kanengieter from participating in the Hearing. *See Hanig*, ¶¶ 14, 19-20. Yet he participated anyway, which violated Petitioners' right to a fair and impartial hearing.

[5] Notably, Mike Dahl recused himself from voting on a different wind project—the Flying Cow Wind project—because of his agreement with Invenergy. (*Id.* at Ex. 2 (Dahl Dep. pp. 16-17).)

Moreover, Kanengieter has shown bias in favor of wind development in the area. To start, Kanengieter acted as an advocate for wind development. For instance, he spoke at a County Commission meeting on March 7, 2017, and said: "financial benefits [from wind development] for townships is very good," "if setbacks [are] too tough wind companies won't develop here," and "don't lock their neighbors out." (Almond Aff. Ex. 17.) These statements show Kanengieter was biased in favor of wind development and would be unlikely to deny a permit for a WES, because doing so would be "locking neighbors out."

Kanengieter also signed the petition for referendum seeking to have the Ordinance revert back to less strict requirements for WES. (*Id.* at Ex. 3 (Kanengieter Dep. p. 50-52).) In fact, his wife circulated petitions for signatures. (*Id.*)

Lastly, Kanengieter signed an agreement with another wind developer, Flying Cow Wind. (Almond Aff. Ex. 21.) Not only did he sign an agreement with another wind developer, he lied about doing so during his deposition. Kanengieter was specifically asked about "any and all agreements that [he's] entered into with any wind company." (Almond Aff. Ex. 3 (Kanengieter Dep. pp. 9-10).) In response, Kanengieter identified only one agreement he had entered into 10 to 15 years ago. (*Id.*) To be sure that was the only agreement with a wind company he had entered into, a follow-up question was asked: "Any other agreement you've entered into with wind companies?" His answer: "Nope." (*Id.*) He was then questioned extensively about the Flying Cow Wind project. (*Id.* at pp. 15-19.) At first, Kanengieter claimed he had not heard whether the Flying Cow Wind project was being developed. (*Id.* at p. 16.) When pressed, he finally admitted not only that the project is still in development, but incredibly, that he had signed an agreement with Flying Cow Wind just months before the deposition. (*Id.* at

pp. 17-19.) That Kanengieter perjured himself to avoid disclosing his agreement with another wind developer demonstrates the lengths he will go to hide his bias.

For these reasons, Kanengieter had a disqualifying interest. Certainly the "appearance of complete fairness" was not present. *See Armstrong*, ¶ 23.

D. Paul Brandt Had Disqualifying Interests

Paul Brandt is President and owner of Supreme Pork, Inc. (Almond Aff. Ex. 4 (Brandt Dep. p. 10).) As President of Supreme Pork, Brandt entered into a Wind Energy Lease and Wind Easement Agreement with Minndakota Wind, LLC. (*Id.* at Ex. 18.) That agreement was in effect at the time of the Hearing and remains in effect today. (*Id.* at Ex. 4 (Brandt Dep. p. 12).) Included in the agreement is a "No Interference" provision, which provides:

> **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**[.]

(*Id.* at Ex. 18 § 9.2 (emphasis added).)

Nothing in the Minndakota contract limits the applicability of the No Interference clause to wind facilities owned by Minndakota. In fact, the language extends to any Windpower Facilities, regardless of their location. Put simply, Brandt executed a contract prohibiting him from impeding or interfering with the siting or permitting of any wind project. In other words, he was contractually bound to approve the Invenergy project.

Brandt has signed agreements with other wind developers. (*Id.* at Ex. 4 (Brandt Dep. p. 5).) Whether those agreements contain similar No Interference clauses is unknown. In addition, Brandt invested in a wind energy development company, Northern Wind LLC. (*Id.* at Ex. 20

(DCBA 126-138).) That he has invested in wind development and signed multiple easement agreements with wind developers demonstrates a strong bias in favor of wind development.

Brandt is also an owner of Supreme Welding. (*Id.* at Ex. 4 (Brandt Dep. p. 8).) During discovery, Petitioners served Supreme Welding a subpoena duces tecum. According to the documents provided, Supreme Welding has done over $865,000 worth of work for Molded Fiberglass Companies (a manufacturer of wind turbines) from 2016 through the beginning of 2018. (Almond Aff. Ex. 19; Ex. 4 (Brandt Dep. p.13).) In other words, Brandt's company has a direct financial link to wind development.

Acting in combination, Brandt's agreements with wind developers, investment in wind development, and ownership of Supreme Welding create a personal and financial interest in wind development that created an actual bias or unacceptable risk of actual bias. Brandt has much to gain from wind development in the County and a lot to lose if projects are denied.

* * *

The personal and pecuniary interests of any one of these Board members would be problematic standing alone. That all four Board members were predisposed to the project and wind development in general created a cumulative effect which undoubtedly prevented the Board from administering a fair and impartial hearing. Examples of the Board's actual bias are provided throughout this brief. But actual bias is not even the threshold that must be met here. A Board member is disqualified if an unacceptable *risk* of bias or prejudgment exists. *Armstrong*, ¶ 23. Given the Board members' personal and pecuniary interests, there was an unacceptable risk of bias and prejudgment. The Board members' interests combined with the evidence of actual bias shows the "very appearance of complete fairness" was not present here. *Id.* Therefore, the Board's decision should be reversed.

E. Examples of the Board's Actual Bias in Favor of Invenergy

The Board's bias in favor of Invenergy's project created by its disqualifying interests was displayed during Board meetings and during the Hearing. Board members argued fervently on behalf of the Project and against matters they were afraid could negatively affect it. For example, the Board displayed significant bias in favor of Invenergy during Board meetings concerning a runway application that occurred before Invenergy even filed their Applications.

In March 2017—nine months *before* Invenergy applied for its special exception permits—John Homan applied to the Board for a special exception permit to construct an airplane landing strip ("runway application"). (Return, Ex. D at 310.) The Board first considered Homan's runway application at its April 10, 2017 meeting. (*Id.* at 364-69.) At the time, there were no wind turbines around where the runway was being proposed, nor were there any pending applications to place turbines in that location. (Almond Aff. Ex. 4 (Brandt Dep. p. 43).) Yet, the very first question asked by the Board was how the runway would affect wind towers. (*Id.* at Ex. 5 (Rhody Dep. p. 42).) The primary issue discussed by the Board was "setbacks for wind towers and airstrips," and the Board decided to table the runway application "until the board can get more information about the setbacks for wind towers from an airstrip and until the County Commissioners have finalized the Wind Ordinance." (*Id.* at 368-69.) In other words, the Board was concerned about the runway's effect on *future* wind development by Invenergy and did not want to interfere with that future development by issuing Homan his permit for a runway.

The Board then considered Homan's runway application at its June 12, 2017 meeting. (Return, Ex. D at 370-78.) There still were no wind turbines around where the runway was being proposed, nor were there any pending applications to site turbines there. Nevertheless, the Board

again expressed concerns about how the runway might affect Invenergy's future wind turbines. (*Id.* at 377.) Unbelievably, Board member Dahl told Homan he "should wait to see where the towers would be sited" before moving forward with his runway. (*Id.*) That means on June 12, 2017, Dahl already assumed Invenergy's project would be approved, and that other landowners should act accordingly. The Board again tabled Homan's runway application.

The Board further considered Homan's runway application at its July 10, 2017 meeting. (*Id.* at 379-84.) How the runway would affect wind turbines was again the primary issue raised by the Board. Indeed, Board member Rhody performed ex parte research to see how an airstrip might affect a wind project. (*Id.* at 382.) The Board finally granted Homan a special exception permit subject to him signing a letter of assurance[6] acknowledging that he must secure airspace rights from his neighbors. (*Id.* at 383.) Two more Board meetings occurred on August 14 and September 11, 2017, regarding the language of the letter of assurance. (*Id.* at 386-93, 397-403.) At the September 11 meeting, the Board "stated that the runway and the future wind towners or any improvements surrounding the runway could be compatible." (*Id.* at 402.) That Invenergy's wind towers would be built was a foregone conclusion.

The Board continued to display bias at the Hearing, particularly in the way the Hearing was handled, the deference given to Invenergy, and the disregard for public comments opposing the project.

[6] According to the deposition testimony of Chairman Kanengieter, the idea to require a letter of assurance came from Invenergy. (Almond Aff. Ex. 3 (Kanengieter Dep. pp. 62-63).) And because Invenergy requested a letter of assurance, of course the Board obliged.

At the start of the Hearing, Chairman Kanengieter asked each Board member to address concerns that had been raised regarding the Board members' bias. (Return, Ex. E at 51.)[7] The Board members made the following statements:

- DeBoer stated that he will receive no financial gain from the project and that he does not have any wind agreements.
    - DeBoer *failed to disclose* that he already received $3,060 from the project, that he had previously signed an agreement supporting the project, that his brothers had already financially benefited from the project, or that his brothers were in a position to receive additional financial gain from the project.
- Dahl stated that he will receive no financial gain from the project and that he does not have any wind agreements.
    - Dahl *failed to disclose* that he already received $3,095 from the project or that he had previously signed an agreement supporting the project.
- Kanengieter stated that he does not have a wind agreement and he will receive no financial gain from the project.
    - Kanengieter *failed to disclose* his agreement with Flying Cow Wind and also failed to disclose that his employers were signed up for the project and would financially benefit from its approval.
- Brandt stated that he does not have a wind agreement and he will receive no financial gain from the project.
    - Brandt *failed to disclose* that he was an investor in wind development or that he and his company had signed wind agreements.

The Board members should have been forthcoming in disclosing their agreements with wind companies, including Invenergy, and their ties to wind development in the County. *See Hanig*, ¶ 23 ("The necessity to disclose a conflict cannot be over emphasized."). The public was

[7] The minutes erroneously have the date as January 22, 2017. The correct date is January 22, 2018.

entitled to know of these conflicts. Instead, the Board chose to hide their conflicts, which is further evidence of actual bias.

The Board's bias in favor of Invenergy is further illustrated by the fact that it broke from its past practice regarding conflicts and recusal. In 2016, the Board considered a special exception application submitted by Flying Cow Wind. (Almond Aff. Ex. 3 (Kanengieter Dep. 13-16).) Before consideration of the Flying Cow project, the Board's attorney, John Knight, instructed Board member Dahl that he should abstain from voting on that project because of his lease agreement with Invenergy. (*Id.* at Ex. 2 (Dahl Dep. pp. 16-17).) Dahl agreed and recused himself from considering the Flying Cow matter. (*Id.* at p. 17 ("Q: So because you had an agreement with Invenergy, you thought it was appropriate to recuse from considering the Flying Cow application; is that correct? A: That's correct.").) Kanengieter agreed recusal was appropriate. (*Id.* at Ex. 3 (Kanengieter Dep. p. 14).) Even though Dahl's agreement was with a different wind developer, the Board's attorney, Board member Dahl, and Chair Kanengieter all thought it appropriate that Dahl recuse himself from considering the Flying Cow project. The same situation existed here for Board members Dahl, Kanengieter, and Brandt, but none of them recused themselves. This double-standard illustrates that actual bias that existed here.

The Board displayed additional bias in the way it conducted the Hearing. For instance, although the Board gave Invenergy an unlimited amount of time during the Hearing and allowed Invenergy to interject whenever it wanted, the Board arbitrarily limited non-Invenergy persons to only three minutes of speaking time and precluded any non-Invenergy person from speaking twice. (Petition ¶¶ 36, 39; Almond Aff. Ex. 22, Video 1 at 01:02:20 and Video 2 at 02:30.) And it strictly enforced that limitation, as it cutoff multiple persons opposed to the project as soon as

their three minutes expired, preventing them from being heard fully. (*See, e.g.*, Almond Aff. Ex. 22, Video 2 at 26:45; 45:45; and 50:15.)

Not only did the Board limit the public's ability to express their concerns, the Board flatly ignored many of the concerns that were expressed. A substantial amount of written material opposing the project was submitted before and during the Hearing. (*See generally* Return, Ex. D.) Board members admitted during depositions that they did not even read, let along consider, all of the material submitted before or during the Hearing. (*See, e.g.*, Almond Aff. Ex. 4 (Brandt Dep. p. 25 ("Q: Did you read all the written submissions that were submitted to you both before the hearing and during the hearing? A: No.")); *id.* at Ex. 3 (Kanengieter Dep. p. 44 (acknowledging that he did not receive certain public comments that were submitted), p. 46 ("Q: And did you have the opportunity to read through all the public comments that were submitted in writing during the hearing? A: No.")).) If Board members did not even read much of the material submitted before or during the hearing, those submissions were meaningless. Due Process requires "an opportunity for meaningful participation." *Adolph v. Grant County Board of Adjustment*, 2017 S.D. 5, ¶ 28, 891 N.W.2d 377, 386 (emphasis added). Given Board members did not even read various public submissions opposing the project, the public was not afforded meaningful participation. This is just another example of the Board's actual bias—why read all the public submissions opposing the project because the decision to grant the Applications had been made long before the Hearing.

Here, like in *Hanig v. City of Winner*, Board members went beyond their duties as Board members and became advocates for the project. Four Board members had disqualifying interests, which created a clear bias in favor of the project and prevented the Board from abiding by its duty of impartiality when considering the Applications. This bias revealed itself months

before the Hearing during Homan's runway application proceedings and continued to be present through the Hearing. Put simply, Petitioners' due process rights were violated. "When a due process violation exists because of a board member's disqualifying interest, the remedy is to place the complainant in the same position had the lack of due process not occurred." *Armstrong*, ¶ 32. The proper remedy is to reverse the Board's granting of the Permits.

II. The Board Exceeded Its Authority and Failed to Regularly Pursue Its Authority

A. The Board Did Not Have the Authority to Effectively Amend the Ordinance by Defining Terms and Modifying Requirements of the Ordinance

Article IX of the Ordinance governs the process required for its amendment. (Return, Ex. A at 39.) The Board does not have authority to amend, supplement, change, or modify the Ordinance. Any amendment, supplement, change, or modification of the Ordinance can only be done by the County Commission. *See also* SDCL 11-2-28 (noting only the board of *county commissioners* can amend/modify zoning ordinances). Nevertheless, the Board amended and modified the Ordinance in various ways in order to grant Invenergy its Permits.

The Ordinance defines certain terms. (Return, Ex. A at 9-22.) The Ordinance further provides: "[a]ny word not herein defined shall be as defined in any recognized Standard English dictionary." (*Id.* at 9.)

A term at issue in this proceeding was "business." The Ordinance does not define "business;" it does provide that "the term 'business' does not include agricultural uses." (*Id.* at 73.)

The definition of "business" was an issue because the Applications did not have the required setbacks of four times the turbine height from Petitioners Will and Fay Stone's hunting business, South Dakota Pheasant Hunts. Ordinance § 1215.03(2)(a) provides the distance from

existing businesses shall be not less than four times the height of the wind turbine. (Return, Ex. A at 73.) Will Stone submitted written information to the Board describing his family business and livelihood for the last 33 years. They host hunters from every state in the U.S. on their 480 acres. They are required to pay a license fee on every acre, and because it is considered a business, they have to pay extra liability insurance on every acre. (Return, Ex. D at 430-32.) Put simply, South Dakota Pheasant Hunts is a business, and Will Stone informed the Board of Invenergy's non-compliance with the Ordinance through his written submissions and at the Hearing.

Recognizing that Stone's business would interfere with Invenergy's Applications, the Board took it upon itself to define the term "business" to include only a physical structure. (Return, Ex. F at 6-9, 19-22 (finding no. 12 ("The reference to business in the ordinance is defined as a physical structure.").) Doing so was an improper amendment and modification of the Ordinance, because only the County Commission can amend, supplement, change, or modify the Ordinance.

The Board also improperly modified the requirements of Ordinance § 1215. 14, which provides: "The permit shall become void if no substantial construction has been completed within three (3) years of issuance." (Return, Ex. A at 76.) Rather than comply with the unambiguous language of the Ordinance, the Board modified the requirement in its findings: "This permit shall become void if no substantial construction described within the application has been completed with three (3) years of issuance *by the South Dakota Public Utility Commission.*" (Return, Ex. F at 6-9, 19-22 (finding no. 14(k) (emphasis added)).) Doing so was an improper modification of the Ordinance.

Any modification of the Ordinance must be made by the County Commission as a permanent Ordinance amendment, not according to the whims of the Board. To allow the Board to modify the requirement of the Ordinance at will for a particular applicant or permit renders the Ordinance meaningless. The process for amending the Ordinance requires not only public notice and public hearing on a proposed change, but also a majority vote of the County Commission, the elected officials. These requirements act as safeguards to random and arbitrary modification of zoning requirements.

These actions not only exceeded the Board's authority, but further show the Board's bias in favor of Invenergy and the project.

B. The Board Failed to Follow the Requirements of the Ordinance and Failed to Regularly Pursue Its Authority

The Board had to follow the Ordinance. A failure to do so is grounds for reversal of its decision. *Hines v. Bd. of Adjustment of City of Miller*, 2004 S.D. 13, ¶ 16, 675 N.W.2d 231, 236 (noting that if a board "did not fulfill its duty to follow the guidelines of the ordinance" the "case must be remanded to the board for a proper determination").

Ordinance § 504 provides the criteria required for all special exception permits. (Return, Ex. A at 29.) Section 504 also specifically states that a special exception permit "shall[8] not be granted by the Board of Adjustment unless and until" all the requirements are met.

One such requirement is that "[b]efore granting any special exception, the Board must make written findings certifying compliance with the rules governing individual special exceptions." (*Id.* at 29.) In this case, that meant the Board was required to make written findings certifying compliance with Ordinance § 504 and § 1215.

[8] According to the Ordinance, "the word 'shall' is mandatory and not discretionary." (Return, Ex. A at 9.)

The requirement that the Board make written findings *prior* to granting the permit is not merely for some administrative purpose. Rather, it is to ensure the Board's consideration of the requirements before voting on whether or not to grant the permit. It is clear from the video of the Hearing that the Board did not discuss or address many of the specific requirements of Ordinance § 504 or § 1215 before voting on the Applications. (Almond Aff. Ex. 22.) This is more evidence of the Board's bias, as it was going to approve the Applications regardless of whether they complied with the Ordinance.

Further, the Findings adopted by the Board do not include many of the requirements the Board was required to certify the project met. For instance, the Board did not discuss or find that the project is compatible with adjacent properties. The Findings state only that "Wind Energy Systems are a use allowed by special exception in the Ag District. Applicants proposed project meets the use contemplated by the ordinance." (Return, Ex. F.) Just because a use may be permitted as a special exception does not automatically make that use compatible anywhere in the district. The very purpose of the special exception is to require the Board consider the specific adjacent properties and whether the proposed use is compatible. That was not done in this case.

The Board was required to certify compliance with Ordinance § 1215. The Return shows the Board was incapable of doing so:

- Section 1215.03(1)(a) requires: "[t]he 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." Invenergy did not address to what extent areas would be disturbed during the construction phase. The Board had no idea how Invenergy plans to minimize the disturbance, nor what condition the disturbed areas will be left. The Board was therefore not able to certify that Invenergy will only disturb a site to the extent necessary.

- Section 1215.03(1)(b) requires: "The permittees shall implement measures to protect and segregate topsoil from subsoil in cultivated lands unless otherwise negotiated with the

affected landowner." Invenergy did not provide what measures would be implemented to protect topsoil during the project. The Applications list typical protection measures, but they do not commit to using any of them. The Applications state that Invenergy "will make efforts." Nothing was provided to allow the Board to certify compliance with this requirement. This requirement is meaningless if a simple statement of making an effort is sufficient.

- Section 1215.03(1)(c) requires: "The permittees shall implement measures to minimize compaction of all lands during all phases of the project's life and shall confine compaction to as small an area as practicable." Invenergy's response to this requirement was that they will submit an SESC plan. (Return, Ex. B at 1107.) The requirement for an SESC plan is a separate requirement addressed in 1215.03(1)(f)(iv). The SESC plan is therefore not sufficient to meet this requirement. The Board (and the public) should have been given specific information on how Invenergy will minimize compaction. Agreeing to provide information at a later date is hardly meeting a requirement.

- Section 1215.03(1)(f)(v) requires: "The permittees shall utilize all reasonable measures and practices of construction to control dust." Here again, Invenergy addressed this requirement by saying they will submit an SESC plan prior to construction, and that they will utilize reasonable construction practices. (Return, Ex. B at 1109.) For the same reasons as stated above, this is hardly sufficient.

- Section 1215.03(6) requires the Permittees to design and construct the WES to minimize the amount of land that is impacted. Invenergy's Applications state that project facilities in the vicinity of turbines will be, to the greatest extent practicable, mounted on the turbine foundations or inside the turbines. (Return, Ex B. at 1111.) The land impacted by the design and construction of the WES includes much more than the specific land the facilities are physically set on, it includes the amount of land impacted by the entire footprint of the project. Turbines are spread throughout a very large portion of the County. According § 1215.03(6), the individual turbines should be placed in such a manner to minimize the amount of land that is impacted. Rather than spacing turbines throughout the entire County, Invenergy should have placed turbines in more concentrated groups to minimize the amount of land (and people) impacted. There is nothing in the record that shows any attempt was made to design and construct the project to minimize its footprint and impacts.

- Section 1215.15 required Invenergy to provide the Board with copies of easement agreements with landowners. Invenergy only submitted Memorandums of Agreements. In other words, contrary to the Ordinance, the Board was not provided the easement agreements, which contain the actual terms of the agreements between Invenergy and landowners. Knowing the terms of the agreements between Invenergy and the landowners was extremely relevant to assessing the effect of the project on the County as

the Board was required to do, in addition to whether the project complied with the Ordinance, *see, e.g.*, § 1215.8.

Despite a complete lack of information provided on these topics, the Board moved forward and voted unanimously to approve the project. Afterwards, the Board included the following in its Findings: "The application and testimony allowed the Board to adequately review how the applicant will satisfy requirements for site clearance, topsoil protection, compaction, livestock protection, fences, public roads, haul roads, turbine access roads, private roads, control of dust, soil erosion and sediment control, electromagnetic interference, lighting, turbine spacing, footprint minimization, collector lines, feeder lines, decommissioning, tower height and appearance, noise and flicker." (Return, Ex. F at 6-9, 19-22.) This finding by the Board is illusory, because Invenergy did not provide any information on how it would satisfy certain requirements.

The Board also failed to consider whether the Project meets the performance standards for aquifer protection overlay zones. Ordinance § 1105 addresses the Aquifer Protection Overlay District. (Return, Ex. A at 55.) Because residents of Deuel County rely exclusively on groundwater for their safe drinking supply and certain land uses in Deuel County can contaminate ground water particularly in shallow/surficial aquifers, the "purpose of the Aquifer Protection Overlay District is to protect public health and safety by minimizing contamination of the shallow/surficial aquifers of Deuel County." (*Id.*)

Much of the project area is located within Aquifer Zone B. (Return, Ex. B at 33, 51, 1125.) Ordinance § 1105.08 provides that Zone B is protected because (1) the aquifer is a valuable natural resource for future development, (2) the aquifer provides drinking water supply for individual domestic users, (3) contamination is not justified just because this area is not

currently used for public water supply, and (4) contaminants from this area could eventually enter Zone A. (Return, Ex. A at 59.)

"*All special exceptions* allowed in underlying districts, with the exception of those expressly prohibited in Zone B, *may be approved by the Board of Adjustment provided they can meet Performance Standards outlined for the Aquifer Protection Overlay Zone.*" (*Id.* at 60 (emphasis added).) The Performance Standards are found in Ordinance § 1105.12. (*Id.* at 60-62.)

Invenergy's Applications address the Aquifer Protection Overlay Zones in Section 7.2, which provides: "The Project will not affect Zone A, but does include representative turbine locations in Zone B as shown on Figures 6 through 8." (Return, Ex. B at 33.) The Applications go on to purport that a "review of the Zoning Ordinance Performance Standards demonstrates that there is no standard that would apply to a wind turbine." (*Id.*) That simply is not accurate, as Performance Standard No. 9 applies to "any facility involving . . . use . . . of hazardous materials." (Return, Ex. A at 61.) Wind turbines contain petroleum, which is ignitable and toxic and therefore a hazardous material according to the Definitions for Aquifer Protection Overlay District. (*Id.* at 56). In other words, each and every turbine making up the project is a facility involving the use or storage of a hazardous material. As such, the Board was required to ensure the project complies with all of the performance standards listed in § 1105.12. For example, one standard, 9.b, requires all turbines include a fire retardant system and provision for dealing safely with both health and technical hazards that may be encountered by disaster control personnel in combating the fire. (*Id.* at 56) Nothing in the record indicates the turbines comply with this requirement. More importantly, 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. (Return, Ex. F at 6-9, 19-22.)

Failure by the Board to ensure the project complied with the Ordinance is an example of the Board failing to regularly pursue its authority and neglecting to do an act required by the Ordinance. Reversal is appropriate.

III. The Applications Were Vague and Incomplete, Precluding the Board and the Public from Engaging in Meaningful Review

The Applications and testimony from Invenergy did not provide enough information for the Board or the public to adequately assess the project's effects on the County. In its Applications, Invenergy reserved the right to use any turbine, whether or not it is listed in the Applications. (Return, Ex. B at 21.) Invenergy also requested it be allowed to place turbines in any location on any participating landowner's property. (*Id.* at 20.) The Permits granted by the Board are worded to allow Invenergy this leeway. (Return, Ex. F.) This means the Board has permitted Invenergy to place up to 250 turbines *of any height or type, anywhere* on participating landowner property within the project area. This is a substantial injustice to the public. This free rein requested by Invenergy and granted by the Board precluded the Board or the public from engaging in a meaningful review of the project, whatever that may end up being. *Adolph*, ¶ 28 (noting due process requires "an opportunity for meaningful participation").

CONCLUSION

Deuel County has arguably never seen an application for a special exception permit that would affect the County as much as this project. Yet, the important decision of whether to grant the Permits was not made by an impartial Board; surely the appearance of complete fairness was

not present. Moreover, the Board exceeded its authority by improperly modifying the Ordinance and also failed to follow the requirements of the Ordinance. The record reveals there was not a thorough review of the evidence or thoughtful consideration of the requirements of the Ordinance.

This same Board took five meetings, occurring over a six-month period, to grant a special exception permit for a single runway—one grass landing strip. The Board's only concern with the runway was the potential effect it could have on Invenergy's project. That same Board then approved Invenergy's project in a single meeting that lasted a little over three-and-a-half hours, without even considering certain evidence in opposition. Put simply, the Board was biased in favor of the project, which is not surprising given the members' personal and pecuniary interests.

This case is a prime example of why due process rights and zoning laws exist—to prevent biased and arbitrary decision making. For the reasons stated herein and in the Petition, Petitioners respectfully request the Court reverses the Board's granting of the Permits.

Dated at Sioux Falls, South Dakota, this 15th day of November, 2018.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Petitioners, hereby certifies that on the 15th day of November, 2018, a true and correct copy of Petitioners' Brief in Support of Petition and Petitioners' Motion to Consider Additional Evidence was filed and served electronically through the Odyssey File and Serve system, as follows:

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