STATE OF SOUTH DAKOTA) : SS COUNTY OF DEUEL)		IN CIRCUIT COURT 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' REPLY BRIEF IN SUPPORT OF PETITION**

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

INTRODUCTION

Board members DeBoer and Dahl each signed up his land and received thousands of dollars from the applicant for the exact same project they then considered as Board members. Those facts alone disqualified those two Board members from participating in the quasi-judicial proceeding. In response, Respondents argue that as long as you pay your county officials before they vote, rather than after, then South Dakota law protects their decision. That simply is not the law—nor should it be.

More generally, to show a due process violation, Petitioners need only show an unacceptable risk of actual bias existed, or, the appearance of complete fairness was not present.

Kilby Aff Ex D 01

The following facts and circumstances show an unacceptable risk of bias existed and the appearance of complete fairness was lacking:

Board member DeBoer:

- Signed up his land for the project, which shows he was supportive of the project;
- Received thousands of dollars from Invenergy for the project (notably, DeBoer failed to disclose the full amount of the payments he had received from Invenergy both in his response to interrogatories and during his deposition);
- Has two brothers who are both signed up for the project, received payments for doing so, and are expected to receive more payments now that the project has been approved by the Board;[1] and
- Had ex parte communications with Invenergy shortly before the Hearing where he asked that his agreements be terminated so that he "could have a voice" during the Hearing;
- Signed a referendum petition seeking to make it easier for wind development in Deuel County (notably, during his deposition he claimed he did not sign the petition because he thought it would have been inappropriate given his position on the Board); and
- Failed to disclose these facts to the public at the Hearing, and instead represented that he will receive no financial gain from the project, conveniently leaving out the facts that he had already received over $6,000 from the project and that his brothers will be receiving financial gain from the project.[2]

Board member Dahl:

- Signed up his land for the project, which shows he was supportive of the project;
- Received thousands of dollars from Invenergy for the project;
- Has signed lease agreements with two other wind developers, which shows a predisposition in favor of wind development. In fact, Dahl had previously

[1] DeBoer's brothers, James and Jerome, have a combined 827 acres signed up for the project. (Return, Ex. B at 634 and 801.) Assuming their payment terms are similar to the ones DeBoer and Dahl signed, combined they have a chance to make tens if not hundreds-of-thousands of dollars from this project. (Almond Aff. Ex. 7 at DCBA 18 (Payment Terms).)

[2] The public is entitled to more than half-truths. *Hanig*, ¶ 23 ("The necessity to disclose a conflict cannot be over emphasized.").

recused himself from considering the Flying Cow wind project because of his agreement with Invenergy, recognizing his own bias. For unexplainable reasons, he chose not to recuse himself here; and

- Failed to disclose any of these facts at the Hearing, and instead represented that he will receive no financial gain from the project and was intentional to note that he "does not have a wind agreement with [Invenergy]."[3] Just like DeBoer, he left out the facts that he had already received thousands of dollars from the project and that he previously had a wind agreement with Invenergy.

Board member Kanengieter:

- His employers signed up for the project, received payments for doing so, and are expected to receive more payments now that the project has been approved by the Board;[4]

- Has signed an agreement with a different wind developer, Flying Cow Wind, and lied about doing so during his deposition;

- Has advocated for wind development in Deuel County and signed a petition for referendum, which his wife circulated, seeking to make wind development easier in Deuel County; and

- Failed to disclose any of these facts at the Hearing.

Board member Brandt:

- Has invested in wind development;

- Has signed agreements with other wind developers;

- Signed a lease agreement as President of his company that included a "No Interference" provision, preventing interference with "Windpower Facilities"[5];

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[3] (Almond Aff. Ex. 22, Video 1 at 1:30.)

[4] Kanengieter's employers, Clark and Phillip Rogness, signed up a combined 1,612 acres for the project. (Return, Ex. B at 1603, 1607, 1665, 1670.) Assuming their payment terms are similar to the ones DeBoer and Dahl signed, combined they have a chance to make tens if not hundreds-of-thousands of dollars from this project. (Almond Aff. Ex. 7 at DCBA 18 (Payment Terms).)

[5] Respondents argue Windpower Facilities is defined in the Minndakota Lease to only include the specific facilities associated with the Minndakota project and installed by Minndakota. The definition of "Windpower Facility" is found in Section 3.2.2 of Minndakota Lease. The limitation Respondents claim exists—i.e., limited to facilities associated with the Minndakota project and installed by Minndakota—simply is not present in the definition.

- Owns and is President[6] of a company, Supreme Welding, that profits significantly from wind development;[7] and

- Failed to disclose any of these facts at the Hearing.

Many of these facts, standing alone, would create significant risks of bias. But when considered together, there can be no doubt that the risk of bias was unacceptable and the "very appearance of complete fairness" was lacking. Indeed, the Board's bias was demonstrated through its statements and conduct at other meetings and during the Hearing. (*See* Petitioners' Opening Brief at 14-19 (providing examples of the Board's actual bias in favor of Invenergy).) As a result, Petitioners did not receive a fair and impartial hearing and their due process rights were violated.

REPLY ARGUMENT

I. Board Members Had Disqualifying Interests, As the Facts Show a Capacity to Tempt the Board Members to Depart from Their Duties and the Very Appearance of Complete Fairness Was Not Present

Armstrong v. Turner Cnty. Bd. of Adjustment, 2009 S.D. 81, 772 N.W.2d 643, and *Hanig v. City of Winner*, 2005 S.D. 10, 692 N.W.2d 202, provide the law that must be applied in this case. In no uncertain terms, the Supreme Court held: "The due process standard for disqualification in a quasi-judicial proceeding is that an official must be disinterested and free

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[6] Respondents attempt to downplay Brandt's role with Supreme Welding. Though, according to its Annual Report filed with the S.D. Secretary of State, Brandt is Supreme Welding's President. (Available at https://sosenterprise.sd.gov/BusinessServices/Business/FilingDetail.aspx?CN=03610003506605424509205723205106400215721404619 6.)

[7] Supreme Welding has done over $800,000 worth of work in the last three years for Molded Fiber Glass Companies, (Almond Aff. Ex. 19), which does business as MFG Wind. The Aberdeen location with which Supreme Welding has done its business is referred to by MFG as "the company's wind blade manufacturing plant." (https://mfgwind.com/mfg-announces-new-wind-blade-order-for-south-dakota-manufacturing-facility .)

from bias or predisposition of the outcome and the very appearance of complete fairness must be present." *Id.* at ¶ 23; Hanig, ¶¶ 10-11. "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; *Hanig*, ¶ 15.

Rather than analyze the facts here under the law articulated in *Armstrong* and *Hanig*, Respondents point to SDCL 6-1-17 as their saving grace, and then limit their analysis solely to that statute. But SDCL 6-1-17 is not their saving grace, nor is it "the controlling statute" here, as Respondents claim. The law that controls is the due process clause found in the United States Constitution and South Dakota Constitution. And a statute cannot overrule the Constitution.

A. SDCL 6-1-17 Is Not the Controlling Statute

Respondents contend SDCL 6-1-17 controls here, namely by arguing a due process violation can only occur within the ambit of SDCL 6-1-17. That is incorrect. The standard for disqualification in a quasi-judicial proceeding is defined by the due process clause, not by statutory law. The Constitution alone defines what process must be afforded to comport with due process. And the courts, not legislators, are charged with interpreting the Constitution.

At issue is the process that should have been afforded Petitioners during the county proceeding. Because the Board was acting in a quasi-judicial capacity affecting individual property rights, Petitioners were entitled to due process. *See Armstrong*, ¶ 19 (noting a "board's decision to grant or deny a conditional use permit is quasi-judicial and subject to due process constraints" and that the "due process requirement is particularly important when individual property rights are affected"). Due process rights are *constitutional* rights, not statutory rights. US Const. amend. V, XIV; S.D. Const. Art. VI §§ 1, 2; *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) ("The right to due process is conferred, not by legislative grace, but by

constitutional guarantee. While the legislature may elect not to confer a property interest in public employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."); *Armstrong*, ¶ 19 (citing the Fifth Amendment of the U.S. Constitution as the basis for due process rights related to conditional use hearings).

Because due process rights are constitutional rights, this Court must look to either the Constitution or to Supreme Court cases interpreting the Constitution for controlling authority, not state statutes. *See Loudermill*, 470 U.S. at 541 ("In short, once it is determined that the Due Process Clause applies, the question remains what process is due. The answer to that question is not to be found in the Ohio statute.") (internal citations omitted); *Pena v. Kindler*, 863 F.3d 994, 997 (8th Cir. 2017) (noting "if a state creates a property interest, the Constitution alone defines the process that must be provided to protect that interest pursuant to the Due Process Clause"); *Vitek v. Bon Homme Cnty Bd. of Comm'rs*, 2002 S.D. 45, ¶ 9, 644 N.W.2d 231, 234 (recognizing a statutory scheme does not trump the S.D. Constitution where the Legislature attempted to limit constitutional rights). The South Dakota Legislature lacks the authority to define, overturn, or abrogate due process rights afforded by the Constitution. *Id.* Yet, that is exactly what Respondents are advocating for here by arguing a due process violation can only occur within the ambit of SDCL 6-1-17.

The Supreme Court considered a party's due process rights in a quasi-judicial proceeding in *Hanig v. City of Winner*, 2005 S.D. 10, 692 N.W.2d 202. The Court stated: "Not only is a biased decision maker constitutionally unacceptable, but our system of law has always endeavored to prevent even the probability of unfairness." *Id.* (quoting *Strain v. Rapid City Sch. Bd.*, 447 N.W.2d 332, 336 (S.D. 1989)). The "very appearance of complete fairness must be

present." *Id.* Therefore, "the test is whether there was actual bias or unacceptable risk of actual bias." *Id.* at ¶ 11. "If a governmental official has a conflict of interest, an unacceptable risk of actual bias will normally exist and the official should not participate in the proceedings." *Id.* at ¶ 13. The Court recognized four situations where conflicts are likely to arise such that a due process violation occurs: direct pecuniary interests, indirect pecuniary interests, direct personal interests, and indirect personal interests. *Id.* at ¶ 19.

When analyzing what types of conflicts create an unacceptable risk of bias, courts can look to many resources, including statutes, prior cases and cases from other jurisdictions, administrative rules, and ethics rules. *See Armstrong*, ¶¶ 24-27 (referring to case law and administrative statutes); *Hanig*, ¶¶ 12-19 (referring to statutes and case law); *Voeltz v. John Morrell & Co.*, 1997 S.D. 69, ¶¶ 15-17, 564 N.W.2d 315 (referring to Rules of Professional Conduct for attorneys and Code of Judicial Conduct). None of these resources is controlling though, because, ultimately, the Constitution defines what process is due. *See Loudermill*, 470 U.S. at 541; *Pena v. Kindler*, 863 F.3d at 997 ("the Constitution alone defines the process that must be provided to protect that interest pursuant to the Due Process Clause").

The Court's analysis in *Hanig* recognized this principle: "In order to determine when and under what circumstances a conflict of interest disqualifies a local official by creating an unacceptable risk of actual bias, we *first look for guidance from the legislature*." *Id.* at ¶ 13 (emphasis added). In other words, the Legislature can provide guidance regarding disqualifying interests, but the Legislature is not the controlling authority for defining what a disqualifying interest is under the due process clause. If that were the case, the *Hanig* court would have stopped its analysis once it looked to state statutes. Instead, the Court went on to analyze how prior cases from South Dakota and other jurisdiction have defined disqualifying interests under

the due process clause. *Id.* at ¶¶ 15-19. Ultimately, the Court recognized four categories of conflicts—direct pecuniary interests, indirect pecuniary interests, direct personal interests, and indirect personal interests—that "serve as guidance to South Dakota officials and courts in determining whether an actual bias or an unacceptable risk of actual bias exists." *Id.* at ¶ 19. "If a board member's interest fits within any of these categories, that board member either has an actual bias or an unacceptable risk of actual bias." *Id.* In those circumstances, due process requires such a board member be disqualified from participating in the proceeding. *Id.* In short, *Hanig* defined the process that must be provided in quasi-judicial proceedings in order to comport with the due process clause of the Constitution.

That the Legislature passed SDCL 6-1-17 in the wake of *Hanig* does nothing to overturn or abrogate the *Hanig* decision as it relates to defining the process that is due in quasi-judicial proceedings under the due process clause. It is not for the Legislature to determine what process satisfies the due process clause; "the Constitution alone defines the process that must be provided." *Pena v. Kindler*, 863 F.3d at 997. And judges are charged with interpreting the Constitution, not legislators.[8] Therefore, only the Supreme Court (or the U.S. Supreme Court) is capable of overturning or abrogating *Hanig* as it relates to defining the process that is due in quasi-judicial proceedings. The Supreme Court has not done so and, in fact, has cited *Hanig* approvingly in other cases analyzing disqualifying interests since SDCL 6-1-17 was enacted.

[8] The flaw in Respondents' argument is perhaps best demonstrated in the Board's brief where it states: "*the Legislature was truly concerned* with board members considering matters when they were conflicted with direct pecuniary interest in the matters at hand." (Board's Brief at 5 (emphasis added).) The Legislature's concern is irrelevant to the issue of due process. The due process clause acts as a safeguard against unfair denial of property rights *by the government*, including the Legislature. Thus, the Legislature's "concern" is irrelevant here; indeed, the Legislature, like it attempted to do here through SDCL 6-1-17, is oftentimes the governmental entity infringing on the very rights the due process clause protects.

See In re Conditional Use Permit No. 13-08, 2014 S.D. 75, ¶ 19, 855 N.W.2d 836, 842; *Armstrong*, ¶¶ 19-21, 24-25, 28. Thus, *Hanig* is still good law.

That *Hanig* is still good law following the enactment of SDCL 6-1-17 is evident from *Armstrong*. In *Armstrong*, the Court found a board of adjustment member had a disqualifying interest because he simultaneously served on the county commission and was concerned with the potential liability of the county in the event the vote did not pass.[9] *Armstrong*, ¶ 30. Because of that concern, the board member attempted to minimize the county's liability exposure. *Id.* The Court noted: "in his role as member of the board of adjustment, his liability concerns and ex parte contacts are problematic because they had the potential to compromise his ability to be a fair and impartial adjudicator." *Id.* Put differently, the board member had an "indirect personal interest" conflict (i.e., 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). *See Hanig*, ¶ 19. The board member's role on the county commission and his desire to help the county created an unacceptable risk of bias vis-a-vis his adjudicatory role on the board of adjustment. *Armstrong* had nothing to do with "direct pecuniary interest" conflicts, which is what Respondents purport needs to exist to warrant disqualification. Rather, it was the board member's "indirect personal interest" conflict that caused him to be "more

[9] Respondents attempt to distinguish *Armstrong* by claiming it is not a disqualifying-interests case, rather an ex-parte-communications case. However, the Court spent multiple paragraphs in *Armstrong* discussing disqualifying interests. *See Armstrong*, ¶¶ 21-25, 28-32. That ex parte communications occurred was merely evidence of the official's conflicting interest that disqualified him. *Id.* at ¶ 31 (citing the ex parte communications as evidence the official had a conflicting interest that disqualified him). Much like here, where Board member DeBoer had ex parte communications with Invenergy to terminate his lease agreements shortly before the Board Hearing so that he could "have a voice on the Board" during the Hearing is an ex parte communication evidencing DeBoer's conflicting interest.

deeply involved" and "created an unacceptable risk of impartiality." *Armstrong*, ¶¶ 31, 32.[10] Thus, conflicts different from "direct pecuniary interest" conflicts can warrant disqualification under the due process clause, despite SDCL 6-1-17. And here, DeBoer, Kanengieter, and Brandt all have personal interests and relationships that could be negatively impacted from voting to deny the project. Given the large amounts of potential profits, it is naïve to think those interests and relationships could not influence their impartiality.

Moreover, by looking exclusively to SDCL 6-1-17 to define disqualifying interests here, Respondents fail to appreciate the unique nature of quasi-judicial proceedings subject to due process constraints. SDCL 6-1-17 is a statutory standard that applies to any county, municipal, or school proceeding, even those that are not quasi-judicial[11] or that do not trigger due process. For example, a county commissioner who has a direct pecuniary interest in a snow-removal contract would be forced under SDCL 6-1-17 to disqualify herself from participating in matters involving said contract even if those matters are not quasi-judicial proceedings and even if due process rights are not implicated. In other words, SDCL 6-1-17 provides a *statutory* standard for disqualification regardless of whether due process is triggered. Due process is a different animal and brings with it different standards. The Supreme Court recognized the same in *Armstrong* by

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[10] Invenergy suggests the Supreme Court got it wrong in *Armstrong* because the decision does not refer to SDCL 6-1-17. (Invenergy Brief at 14 n.10.) It further suggests the Supreme Court must have just missed SDCL 6-1-17, perhaps because the parties' briefs did not cite to it. Setting aside the slight to our Supreme Court and its ability to perform legal research on its own, there was no reason for the Supreme Court to refer to SDCL 6-1-17 because the Court was analyzing whether a due process violation occurred, not whether a statutory violation occurred. The same situation exists here, as Petitioners' due process rights are at issue when it comes to a fair and impartial hearing, not their statutory rights.

[11] The Legislature enacted a separate statute, SDCL 6-1-21, dealing with disqualification in quasi-judicial proceedings that provides disqualification where an "officer's authority, statements, or actions regarding an issue or a party involved demonstrates prejudice or unacceptable risk of bias."

stating "that the standard for disqualification in a quasi-judicial proceeding is stricter than in a regulatory or rule-making proceeding." *Armstrong*, ¶ 22. The Court then went on to totally ignore SDCL 6-1-17 when analyzing whether a due process violation occurred. That is because the due process clause, not SDCL 6-1-17, defines what process is due in quasi-judicial proceedings subject to due process constraints.

In sum, SDCL 6-1-17 is not controlling here.[12] And *Hanig* is still good law when it comes to defining the process that must be afforded under the due process clause. The South Dakota Legislature simply does not have the authority to "overturn" or "abrogate" Petitioners' due process rights.[13] If the Legislature had such authority, the due process clause would have little significance. *C.f. Mordhorst v. Egert*, 223 N.W.2d 501, 506 (S.D. 1974) ("[T]he final refuge people have in all governmental procedures is that of due process, the eternal friend of justice and unrelenting foe of undue passion."); *Pena v. Kindler*, 863 F.3d at 997 ("In short, once it is determined that the Due Process Clause applies, 'the question remains what process is due.' The answer to that question is not to be found in the [state] statute.") (quoting *Loudermill*, 470 U.S. at 541). Therefore, Respondents' exclusive reliance on SDCL 6-1-17 to refute the notion Board members had disqualifying interests misses the mark entirely.

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[12] Invenergy points to *Dunn v. Lyman Sch. Dist. 42-1*, 35 F. Supp. 3d 1068 (D.S.D. 2014), and proclaims the "*Dunn* Court determined that the Conflicts Statute controlled in an age discrimination suit against a school board." (Invenergy Brief at 12.) *Dunn* was not a due process case and did not involve whether a party's due process rights were violated. It has no application here.

[13] Indeed, Petitioners' due process rights are entrenched in the U.S. Constitution as well as the South Dakota Constitution. *See Armstrong*, ¶ 19 (citing the Fifth Amendment of the U.S. Constitution as the basis for due process rights related to conditional use hearings). Accepting Respondents' argument would mean the South Dakota Legislature has the authority to "overturn" or "abrogate" the U.S. Constitution.

B. Applying SDCL 6-1-17 Does Not Even Save Respondents

Even if SDCL 6-1-17 were to apply to Petitioners' claim that their due process rights were violated by not receiving a fair and impartial hearing, SDCL 6-1-17 does not protect the Board as much as Respondents would like the Court to believe.

SDCL 6-1-17 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 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.

The text of this statute recognizes that a conflict may exist even if it is not a "direct pecuniary interest" conflict. The first two sentences of the statute do not limit conflicts to "direct pecuniary interest" conflicts; instead, they speak to conflicts in general and put the burden on officials to identify whether the conflict, regardless of its nature, disqualifies them. Subpart (1) of the third sentence then goes on to *require* officials to disqualify themselves when a "direct pecuniary interest" conflict exists. Then subpart (2) again recognizes conflicts may exist outside of a "direct pecuniary interest" conflict and permits other officials to force the conflicted official to disqualify himself. In other words, the framework set up by SDCL 6-1-17 *requires* officials be disqualified when a "direct pecuniary interest" conflict exists, but recognizes that other

conflicts (e.g., indirect pecuniary interest, direct personal interest, or indirect personal interest) may still warrant disqualification.

Proof that other conflicts may warrant disqualification is found in SDCL 6-1-21, which requires disqualification of an official in a quasi-judicial proceeding when the official's "authority, statements, or actions regarding an issue or a party involved demonstrates prejudice or unacceptable risk of bias." This provision would be superfluous if disqualification only occurred when "direct pecuniary interest" conflicts exist. *See Kolda v. City of Yankton*, 2014 S.D. 60, ¶ 18, 852 N.W.2d 425, 430 (recognizing statutes should be construed to avoid rendering them superfluous or inoperative).

Regardless, the facts here establish SDCL 6-1-17 was violated. To start, Board members DeBoer and Dahl had "direct pecuniary interest" conflicts.[14] Both members had signed up for the project and in doing so were paid thousands of dollars by Invenergy.[15] They were then asked to vote on whether to permit that project, a project they had received thousands of dollars for. That is a clear-cut "direct pecuniary interest" conflict. Respondents argue that because they were paid before their vote and would not receive any additional money after the vote, somehow that eliminates the conflict. That is absurd. A board member cannot avoid a conflict simply by receiving payment before his vote. If that were the case, think of the abuse that would occur—applicants could simply pay off quasi-judicial officers for votes so long as payment is made

[14] Moreover, the zoning officer, Jodi Theisen, violated SDCL 6-1-17 as she also had a direct pecuniary interest in the proceeding, yet still participated in the process, just not in a voting capacity. (Almond Aff. Ex.16 (Response nos. 25-26).)

[15] The very contracts DeBoer and Dahl signed with Invenergy acknowledge the same: "Owner acknowledges that its receipt of monetary and other good and valuable consideration hereunder may represent a conflict of interest if Owner is a government employee or otherwise serves on a governmental entity with decision-making authority (a "Public Official") as to any rights Grantee may seek[.]" (Almond Aff. Exs. 7 and 10 at § 14.13.)

before the decision is rendered. When the money changes hands does not determine whether a "direct pecuniary interest" conflict exists; the fact that money changes hands is the conflict. Thus, not only were Petitioners' due process rights violated (as explained above and in Petitioners' opening brief), but the Board plainly violated SDCL 6-1-17 too, which merely gives Petitioners another avenue to the relief they seek.

Moreover, as discussed above, SDCL 6-1-17 and SDCL 6-1-21 are not limited solely to "direct pecuniary interest" conflicts. Thus, for the same reasons Petitioners' due process rights were violated due to the conflicts the Board members had separate from their "direct pecuniary interest" conflicts, SDCL 6-1-17 and SDCL 6-1-21 were violated because Board members' conflicts demonstrated prejudice and an unacceptable risk of bias.

Respondents rely heavily on the fact that Invenergy's agreements with Dahl and DeBoer were terminated as support for their argument no conflict existed. Even though the agreements between Invenergy and Board members DeBoer and Dahl were terminated, the Board members continue to be bound by certain contractual obligations. For example, Section 7.7 of the agreements specifically states: "This Section 7 [Indemnity/Liability] shall survive expiration or earlier termination of this Agreement." (*See, e.g.*, Almond Aff. Ex. 7 at DCBA 5; *see also* Section 12.3(e) ("The provisions of this Section 12 shall survive the termination, rejection or disaffirmance of this Agreement and shall continue in full force and effect thereafter to the same extent as if this Section 12 were a separate and independent contract made by Owner."). Another example is the confidentiality requirement contained in Section 14.2. When the agreements were produced in discovery, the Board's attorney emailed the undersigned to point out the confidentiality clause and to advise that "pursuant to" that clause, "the lease agreements are to be treated as confidential information and not disseminated." (Almond Aff. Ex. 23.) Invenergy's

attorney also chimed in: "My clients do not believe that the confidential status of the landowner easements is reasonably debatable. By their express terms, they are confidential." (*Id.* (emphasis added).) That Board members DeBoer and Dahl continue to be bound by certain contractual obligations owed to Invenergy (and that Invenergy expects compliance) demonstrates the existence of their conflicts despite the termination of the agreements.

* * *

Petitioners' due process rights were violated. Under the due process clause, Petitioners were entitled to a Board that was fair and impartial, free from interests that create actual bias or an unacceptable risk of actual bias. The very appearance of complete fairness was required. But that is not what Petitioners received because of the Board's conflicts of interest. Indeed, the Board's bias in favor of Invenergy created by their disqualifying interests was revealed multiple times:

- Months before the Hearing, the Board refused to issue Homan a runway permit until the Board could learn how the runway could impact Invenergy's wind facility and only agreed to issue the runway permit if Homan signed a letter of assurance that was requested by Invenergy.[16] (Petitioners' Opening Brief at 14-15.) In fact, the Board advocated fervently for the project during these proceedings, which shows the Board was "more deeply involved," much like the case in *Armstrong*. (Return, Ex. D at 346-48; Homan Aff. Exs. 1 and 2.) That the Board was so deeply concerned with how the runway would impact Invenergy's project shows the Board had already made up its mind

[16] Respondents argue the Court should disregard the runway proceedings because it was a separate process considering a separate permit. Petitioners agree that it was a separate process considering a separate permit. But that begs the question, why was the Board so concerned with how the runway would affect Invenergy's not-yet-permitted project? Why was the very first question from the Board related to how the runway would affect wind towers? Why did the Board require Homan sign a letter of assurance requested by Invenergy? Why did the Board want to table the decision until the wind ordnance could get finalized? Why did the Board tell Homan that he should wait to see where Invenergy's towers are sited before building his runway? Why did the Board perform ex parte research to see how the runway would affect Invenergy's project? Why did the Board make a finding that the runway and "the future wind towers" are compatible? The obvious answer to all these questions is that the Board did not want to do anything that might negatively affect Invenergy's project.

Invenergy's project was going to be permitted and that the Board did not want to do anything to jeopardize Invenergy's project.

- Board member Dahl actually told Homan that he "should wait to see where the towers would be sited" before moving forward with his runway. This shows Dahl's decision regarding Invenergy's project was made months before the Hearing. It also shows Dahl believed Invenergy's yet-to-be-permitted project took precedence over Homan's runway. (*Id.* at 15.)

- In issuing Homan his runway permit, the Board "stated that the runway and the future wind towers or any improvements surrounding the runway could be compatible." (*Id.*) From the Board's perspective, that Invenergy would be constructing future wind towers was a foregone conclusion months before Invenergy even applied for its permit, and the Board was already laying the groundwork to allow it to disregard the runway when it was time to consider Invenergy's applications.[17]

- At the beginning of the Hearing, the Board chose not to disclose any of their conflicts and, instead, attempted to lead the public to believe that no conflicts existed. (*Id.* at 16.)

- The Board broke from its past practice regarding conflicts and recusal. During a different permit hearing involving a different wind developer, Board member Dahl recused himself from participating in that hearing because of the conflict his agreement with Invenergy created. The Board's attorney at the time instructed Dahl to do so and Dahl agreed.[18] Board member Kanengieter agreed recusal was appropriate as well. In other words, Dahl, Kanengieter, and the Board's attorney all believed that an agreement with a

[17] Invenergy also notes that Homan did not appeal the issuance of his special exception permit and for that reason the Court should ignore those proceedings. This is merely an attempt to confuse the issues. Petitioners are not attempting to appeal the Board's decision related to the runway. Why would Homan even want to appeal—he received the permit? Rather, the runway proceedings simply display the Board's bias.

[18] Almond Aff. Ex. 2 (Dahl Dep. p. 17 (Q: So because you had an agreement with Invenergy, you thought it was appropriate to recuse [yourself] from considering the Flying Cow application; is that correct? A: That's correct.).)

different wind developer created a conflict such that recusal was appropriate.[19] That same situation existed here for Board members Dahl, Kanengieter, and Brandt, but none of those members recused themselves. (*Id.* at 17.)

- The Board showed blatant favoritism to Invenergy during the hearing by giving Invenergy an unlimited amount of time to speak and allowing Invenergy to interject whenever it wanted while limiting non-Invenergy speakers to only three minutes,[20] strictly enforcing that rule, and precluding any non-Invenergy persons from speaking twice. (*Id.* at 17-18.)

- The Board refused to even read or consider written materials submitted by opponents of the project both before the Hearing and during the hearing. After all, why spend time reading oppositional material when they already had their minds made up? (*Id.* at 17-18.) Respondents accuse Petitioners and others who submitted written information of "document dumping." First, the large amount of public submissions exemplifies the number of issues and concerns the public had, more than possibly could be addressed in three minutes. Also, there was no deadline to submit written comments, and members of the public often only have a few days or weeks to prepare for hearings. More importantly, though, nothing prevented the Board from tabling its decision until the next meeting to allow the Board members time to review all the information before making a decision. Given the size and complexity of Invenergy's project, one would actually expect that. Indeed, the Board was more than willing to table its decision on Homan's runway application for months and months to allow it to obtain more information on how

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[19] Respondents go to great lengths to argue that agreements with other wind developers should not create a conflict. Their arguments ultimately do not matter as it pertains to the agreements Dahl and Kanengieter have with other wind companies, because Dahl and Kanengieter both recognized previously that having agreements with other wind developers creates a conflict such that recusal is appropriate. Their own subjective beliefs outweigh their attorney's after-the-fact rationalizations. As such, they should have disqualified themselves. Further, any action by the Board on Invenergy's facility could affect subsequent wind projects, as it would create a precedent for future projects in Deuel County. Voting against the permit to Invenergy would make the future granting of a permit more difficult. Acknowledging turbines could negatively affect neighboring landowners, or increasing setbacks, would create problems for any future wind projects.

[20] Respondents argue a three-minute limitation comports with due process. For a project of this magnitude, and as shown by the amount of evidence submitted prior to the Hearing, three minutes did not allow for meaningful participation, especially when the Board did not even consider the written submissions provided. Further, Petitioners are arguing that the manner in which the Board ran the Hearing (which included a strict enforcement of the three-minute limitation while at the same time allowing Invenergy to interject at will during the proceeding) demonstrates its bias. A prime example of the bias can be seen at the 26:00 minute mark on Video 2 from the Hearing, where the Board abruptly cutoff a speaker and then refused to even allow him to respond to a comment made by the Board, because "we're not going to drag this on."

the runway would affect Invenergy's project. Likewise, the Board recently considered a different wind facility and tabled that decision to allow it time to review the information submitted by the public. (Rhody Dep. pp. 14-16 (testifying that because the Board "had a lot of information," it "had to process it, think it over before [it] decide[d]," and tabled its decision until the next meeting).) Given this, the Board's attorney's after-the-fact rationalization is unpersuasive. The Board could have easily reviewed all information had it wanted; it simply needed to table the matter. But the Board had no interest in tabling its decision because it had no interest in reading anything submitted by opponents of the project. Their minds were already made up.

These examples are evidence of actual bias. But actual bias is not even the threshold, because a Board member is disqualified if an unacceptable *risk* of bias exists. *Armstrong*, ¶ 23. The Board members' conflicts, even without these examples of actual bias, are sufficient to create an unacceptable risk of bias. The evidence of actual bias, however, illustrates just how strong the Board's bias was. The Board members should have been disqualified. Because they were not, 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. Therefore, the proper remedy here is to reverse the Board's granting of the Permits.

II. The Board Failed to Regularly Pursue its Authority

"A board's actions will be sustained unless it did some act forbidden by law or neglected to do some act required by law." *Adolph v. Grant Cnty Bd. of Adjustment*, 2017 S.D. 5, ¶ 7, 891 N.W.2d 377, 381. SDCL 11-2-17.3 requires the Board to consider the criteria stated in the Ordinance. In addition, "[p]ursuant to state law, the County has a duty to administer and enforce its own zoning ordinances." *Jensen v. Lincoln Cnty Bd. Of Comm'rs,* 2006 S.D. 61, ¶ 11, 718 N.W.2d 606, 611. The Board therefore only has the power that has been granted to it by state statute and the Ordinance, and in carrying out its authority to grant special exception permits, the Board must adhere to the requirements of the Ordinance. Anything else is an irregular pursuit of the Board's authority.

A. The Court Must Review the Manner in which the Board Exercised its Authority to Determine Whether the Board Regularly Pursued its Authority

Respondents argue the Court is prevented from reviewing the process used by the Board in deciding to grant the Permit. That is not so. In fact, the only way the Court can determine if the Board regularly pursued its authority is by reviewing the manner in which it did. It is therefore necessary for the Court to look at the specific process required by the County, and whether the Board adhered to that process in granting the Permits. Under *Adolph*, a board's granting of a permit would be illegal if the board failed to consider something it was required to consider. *Adolph*, ¶ 19 (finding the Board failed to consider past environmental violation of an applicant, as required by the applicable ordinances, and thus its decision was illegal).

Here, the Board failed to consider issues the Ordinance required it consider and failed to make findings it was required to find prior to granting a permit. The Board also claimed to have made Findings that the record shows they could not or did not actually find, rendering those Findings totally arbitrary. Examples were provided in Petitioners' opening brief. The Board's granting of the Permits without considering the required issues or making findings without any factual support was an irregular pursuit of the Board's authority and thus illegal. Contrary to Respondents' claims, Petitioners are not arguing the Board "got it wrong." Rather, Petitioners are arguing the Board failed to consider certain provisions of the Ordinance and, also, that there was no information in the record for the Board to make the findings that it did.

B. Amending the Ordinance Requirements for Invenergy Was an Irregular Pursuit of the Board's Authority and Further Demonstrates the Board's Bias

1. Definition of "Business"

The Board failed to follow the prescribed manner for determining the definition of "business" as it applies in the Ordinance. The Ordinance states that any term not specifically

defined in the Ordinance is to be determined by a common standard dictionary. (Return, Ex. A at 9.) According to www.merriam-webster.com, the first three definitions given for "business," are:

> **a:** a usually commercial or mercantile activity engaged in as a means of livelihood;
> **b:** a commercial or sometimes an industrial enterprise; and
> **c:** dealings or transactions especially of an economic nature.

Other common standard dictionaries define "business" in a very similar manner. Yet, the Board apparently did not like the definitions provided by common standard dictionaries, and therefore decided to define "business" to its liking and in a way to avoid affecting Invenergy's project, but to the detriment of Stone's hunting business and livelihood.[21] Nothing in the record indicates the Board used a common standard dictionary, as is required by the Ordinance. Failure to follow the requirement of the Ordinance was an irregular pursuit of the Board's authority.

2. Modifying the Expiration of the Permits

The Board irregularly pursued its authority by modifying the expiration requirements for WES permit. Section 1215.03.14 states a permit "shall become void if no substantial construction has been completed within three (3) years of issuance." (Return, Ex A. at 76.) In this case, the Board amended the expiration to be from three years *of receiving a permit from the PUC*. (Return, Ex. F at 6-9, 19-22 (finding no. 14(k)).) Because no one knows if and when that will be, the permit will not expire indefinitely. Respondents argue the Board was merely "interpreting" the Ordinance. No "interpreting" was necessary, as the Ordinance clearly states that the permits "shall become void if no substantial construction has been completed within

[21] Invenergy argues that limiting the definition of "business" to only physical structures is necessary because otherwise all farming operations would be considered a business. That argument ignores the Ordinance, which specifically states: "For purposes of this section only, the term "business" does not include agricultural uses." (Return, Ex. A at 73.) No similar excepting language exists for hunting businesses.

three (3) years of issuance." This drastic modification to the Ordinance requirements was an irregular pursuit of the Board's authority and just another example of the Board's bias at work.

C. Reliance on the Enforcement Clause

In response to Petitioners' arguments that the Board failed to make various required findings and that the some of the Board's findings lacked any evidentiary support, the Board notes that the zoning officer has ongoing enforcement responsibilities under Article VII of Ordinance, so any missteps by the Board during the permitting process are not that significant. Given the zoning officer who has the duty of enforcing the ordinance requirements has an agreement with Invenergy, the likelihood of any real future "enforcement" is unlikely.

CONCLUSION

The conflicts of interest, along with the displays of bias in favor of Invenergy, in conjunction with the Board's failure to regularly pursue its authority, show an undeniable violation of Petitioners' due process rights. Therefore, for the reasons stated herein and in Petitioners' opening brief, Petitioners respectfully request the Court reverse the Board's decision issuing Invenergy special exception permits.

Dated at Sioux Falls, South Dakota, this 10th day of December, 2018.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Petitioners, hereby certifies that on the 10th day of December, 2018, a true and correct copy of Petitioners' Reply Brief in Support of Petition was filed and served electronically through the Odyssey File and Serve system on the following:

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