

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF DEUEL)

IN CIRCUIT COURT
THIRD JUDICIAL CIRCUIT

GEORGE HOLBORN, RUBY HOLBORN,
JOHN HOMAN, TERESA HOMAN,
VICKI HINDERS, STACEY HINDERS,
RICK KOLBECK, JENNIFER KOLBECK,
WILLIAM STONE, FAY STONE, HEATH
STONE, KATIE STONE, and STEVEN
OVERBY

Petitioners,

vs.

DEUEL COUNTY BOARD OF
ADJUSTMENT, DEUEL HARVEST
WIND ENERGY LLC, and DEUEL
HARVEST WIND ENERGY SOUTH LLC,

Respondents.

CIV. 19CIV18-000019

**PETITION FOR WRIT OF
CERTIORARI UNDER SDCL
CH. 11-2**

Petitioners George Holborn, Ruby Holborn, John Homan, Teresa Homan, Vicki Hinders, Stacey Hinders, Rick Kolbeck, Jennifer Kolbeck, William Stone, Fay Stone, Heath Stone, Katie Stone, and Steven Overby submit the following Petition for Writ of Certiorari under SDCL ch. 11-2:

THE PARTIES

1. Respondent Deuel County Board of Adjustment, hereinafter "the Board," is the entity that approved the special exception permits on January 22, 2018, as described in this Petition, which decisions are being appealed in this action under SDCL ch. 11-2.

2. Respondents Deuel Harvest Wind Energy LLC (hereinafter “Deuel Harvest North”) and Deuel Harvest Wind Energy South LLC (hereinafter “Deuel Harvest South”) are affiliates of Invenergy LLC (“Invenergy”) and are the entities to whom the Board granted special exception permits on January 22, 2018. Together, Deuel Harvest North and Deuel Harvest South will be referred to as Invenergy.

3. Petitioners, who own land near the projects being proposed by Invenergy and are taxpayers, are persons aggrieved by the Board’s decision, because, among other reasons, the Board’s decision to grant special exception permits to Invenergy violated Petitioners’ due process rights, creates a serious risk of decreased property values, health problems caused by sound, infrasound, sleep disturbance, shadow flicker, stress and accompanying health effects, pollutants entering the aquifer, other bodies of water and waters of the state, dangers posed to the use of nearby runways, dangers from ice throw, fire, or falling turbines, high potential of damage to land, trees and buildings from fire, negative economic impacts, negative impacts on ecology and wildlife, and incompatibility with surrounding areas and properties. Given their proximity to the proposed projects, Petitioners are aggrieved by the decisions of the Board in ways that the general public is not aggrieved.

PROCEDURAL BACKGROUND

4. Invenergy submitted applications to the Board requesting special exception permits be issued to Deuel Harvest North and Deuel Harvest South allowing Invenergy to develop, construct, and operate wind energy systems in Deuel County.

5. The Board held a hearing regarding Invenergy’s applications on January 22, 2018.

6. The Board, which consisted of five members, namely Dennis Kanengieter, Steve Rhody, Kevin DeBoer, Paul Brandt, and Mike Dahl, voted unanimously to grant the applications and to issue special exception permits to Invenergy.

7. The Board did not make written findings certifying compliance with the specific rules governing individual special exceptions prior to granting the permits to Invenergy, as is required under the Zoning Ordinance for Deuel County ("Ordinance").

WRIT OF CERTIORARI UNDER SDCL CH. 11-2

8. Under SDCL 11-2-61, any person aggrieved by any decision of the Board may present to a court of record a petition duly verified, setting forth that the decision is illegal, in whole or in part, specifying the grounds of the illegality.

9. This Petition is being brought under SDCL 11-2-61 and is appealing the Board's above-referenced decisions issuing special exception permits to Invenergy.

10. The Court should reverse the Board's decision to grant a Special Exception Permit to Invenergy under the writ of certiorari standard as set forth in SDCL chapter 11-2, unless a trial *de novo* is granted for any reason allowed under the law.

11. Under current South Dakota Supreme Court authority, any of the following nine bases independently requires reversal of the decisions under the writ of certiorari standard: (a) the Board arbitrarily or willfully disregarded undisputed or indisputable proof; (b) the Board's decision was based on fraud; (c) the Board exceeded its jurisdiction; (d) the Board failed to regularly pursue its authority; (e) the Board engaged in any act forbidden by law or neglected to do any act required by law; (f) the Board failed to engage in independent thought; (g) the Board failed to follow the guidelines or requirements of the applicable ordinances; (h) the Board exceeded its authority; or (i) the Board's decision is illegal.

12. The Board's decisions to issue special exception permits to Invenergy on January 22, 2018, should be reversed because a) the Board arbitrarily and/or willfully disregarded undisputed and/or indisputable proof, (b) the Board's decision was based on fraud; (c) the Board exceeded its jurisdiction; (d) the Board failed to regularly pursue its authority; (e) the Board engaged in an act forbidden by law and/or neglected to do an act required by law; (f) the Board failed to engage in independent thought; (g) the Board failed to follow the guidelines and requirements of the applicable ordinances; (h) the Board exceeded its authority; and/or (i) the Board's decision is illegal.

13. Furthermore, the Board's decision to issue Invenergy special exception permits was quasi-judicial and subject to due process constraints, including the requirement of fair and impartial consideration by the Board.

14. As such, Petitioners, as property owners affected by the Board's decision, were entitled to a fair tribunal, meaning Board members free from bias or predisposition of the outcome.

15. Board members were obligated to consider the matter with the appearance of complete fairness.

16. An unfair tribunal and/or a violation of due process are further grounds for reversal of a board of adjustment's decision.

17. Here, Petitioners' due process rights were violated, as they did not receive a fair tribunal, did not receive fair and impartial consideration by the Board, Board members were not free from bias or predisposition, and the matter was not considered with the appearance of complete fairness.

18. Alternatively, the Board's decisions should be reviewed under a de novo standard of review and Petitioners request and are entitled to the same relief, namely a reversal of the Board's decisions.

19. Petitioners present the following paragraphs of this Petition as further factual support for this Petition. However, by doing so Petitioners are not limiting the grounds for their Petition to the following paragraphs, as additional information and facts may be relevant to this proceeding which are not included herein.

BOARD MEMBERS' CONFLICTS OF INTEREST

20. At least two members of the Board have signed a MEMORANDUM OF WIND LEASE AND EASEMENT AGREEMENT and a WIND LEASE AND EASEMENT AGREEMENT with Invenergy.

21. According to such agreements, the Board members received or will receive payments and other consideration from Invenergy.

22. According to Invenergy's WIND LEASE AND EASEMENT AGREEMENT, section 9.4, Requirements of Governmental Agencies and Setback Waiver:

Owner shall assist and fully cooperate with Grantee, at no out-of-pocket expense to Owner, in complying with or obtaining any land use permits.

23. Furthermore, at least one Board member's employer has signed a MEMORANDUM OF WIND LEASE AND EASEMENT AGREEMENT with Invenergy.

24. Moreover, John Knight, States Attorney for Deuel County, advised the Board prior to and during the hearing in such a manner as to favor issuance of the permits.

25. Notably, John Knight had previously recused himself from advising the Board on matters regarding wind turbines and the wind turbine project because of conflicts of interest, yet seemingly "un-recused" himself prior to and during the hearing.

26. Based on the foregoing, certain Board members and the Board as a whole had conflicts of interest that prevented a fair and impartial hearing.

EX PARTE COMMUNICATIONS

27. Upon information and belief, Invenergy had disqualifying ex parte communications with members of the Board.

28. Due to the disqualifying ex parte communications, there was not a fair and impartial hearing, and, further, the matter was not considered with an appearance of complete fairness.

BIAS AND PREDISPOSITION OF THE BOARD

29. The Board has displayed a bias in favor of wind projects during previous Board meetings and at other times.

30. For example, Paul Brandt, a member of the Board, stated at a Board meeting discussing setback amendments, that if the setbacks were of a certain distance, "At that distance we would not get any towers on Dad's [land]."

31. The Board openly displayed favorable bias toward possible wind projects during meetings regarding John Homan's application for a special exception permit for a runway on his land. For example, the Board attempted to improperly and illegally coerce John Homan to sign a letter of assurance waiving all of his rights to oppose wind farms being proposed in Deuel County.

32. At the hearing regarding Invenergy's permit, Garrett Homan, a pilot who plans to use the Homan runway, discussed the effects the proposed wind turbines would have on the safe use of the Homan runway and recommendations of the FAA. Dennis Kanengieter, Chairperson of the Board, then spoke and stated that he told John Homan when the Board granted the runway

permit that John Homan could not oppose the placement of any turbines on neighboring properties. However, that was and is a misrepresentation, as John Homan never agreed not to oppose the placement of turbines on neighboring properties.

33. During other county meetings, the Board consistently gave deference to conclusory statements made by Invenergy. The Board did not require results from any studies Invenergy claims were conducted. The Board did not require specific or detailed information regarding the proposed wind energy system prior to issuing the special exception permits.

34. Prior to and during the hearing, the Board displayed a clear bias and predisposition in favor of the projects being proposed by Invenergy, which translated to a hearing that was not fair or impartial.

OTHER DUE PROCESS VIOLATIONS

35. Lisa Agrimotti, attorney for Invenergy, submitted an email to John Knight, States Attorney for Deuel County, requesting the public be limited to three minutes each for speaking at the hearing.

36. Each member of the public who signed up to speak was only given three minutes to speak and a person not using their time could not give their time to another person.

37. At least one individual who requested to speak prior to the meeting was not allowed to do so.

38. As a result, members of the public, including Petitioners, were not afforded an adequate opportunity to be heard.

39. Invenergy, on the other hand, was not limited in its time to speak and was allowed to speak at any time during the hearing.

40. The Board stated at the hearing that individuals could not oppose the placement of individual turbines.

41. The public was allowed to submit written comments to the Deuel County Zoning Office regarding the Invenergy's applications.

42. Several written comments were submitted to the Deuel County Zoning Office the day of the hearing.

43. Upon information and belief, the Board did not consider or even read all written submissions before making its decisions.

44. Many people also provided oral comments during the hearing.

45. Comments addressed negative effects on the county that will be caused by the proposed wind turbines, including but not limited to decreased property values, pollution to the aquifer and other bodies of water near the proposed project, negative health effects caused by the sound and infrasound caused by wind turbines, potential damage to adjoining property from fire, the dangers fire, dangers to crop dusters and other aircraft from turbulence and collision with turbines, effect on wildlife, dangers of ice throw from, and cost to the county of decommissioning.

46. Neither the Board nor Invenergy addressed the majority of problems raised by the written submissions or oral comments at the hearing. Problems not addressed include but are not limited to: decreased property values, potential damage to adjacent lands and property, dangers to aircraft, negative health effects, water pollution, danger zones surrounding the turbines, and effects on wildlife.

47. In fact, the Board did not even discuss or deliberate on whether to issue the permits and just issued them out of hand.

48. These actions show the Board was biased in favor of Invenergy and predisposed to issuing the permits, and further show Petitioners were not afforded a fair and impartial hearing.

FAILURE OF THE BOARD TO FOLLOW THE ORDINANCES

49. Section 104 of the Ordinance states: "The regulations are intended to preserve and protect existing property uses and values against adverse or unharmonious adjacent uses by zoning all unincorporated land except those areas where joint zoning jurisdiction has been granted to a municipality."

50. Section 278 of the Ordinances defines "special exception" as:

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.

51. Section 504 of the Ordinances sets forth the powers and jurisdiction the Board has relating to special exceptions.

52. In particular, Section 504 states:

The Board of Adjustment shall have the power to hear and decide, in accordance with the provisions of this regulation, request for special exceptions or for decisions upon other special questions upon which the Board of Adjustment is authorized by this regulation to pass; to decide such questions as are involved in determining whether special conditions and safeguards are appropriate under this regulation, or to deny special exceptions when not in harmony with the purpose and intent of this regulation.

53. Section 504 of the Ordinances goes on to set forth that a special exception permit shall not be granted by the Board unless and until the following requirements are met:

1. A written application for a special exception is submitted, indicating the section of this regulation under which the special exception is sought and stating the grounds on which it is requested.
2. Notice of hearing is published once 10 days prior to the hearing in a newspaper of general circulation in the area it affects.

3. The public hearing shall be held. Any party may appear in person or by agent or attorney.
4. The Board of Adjustment shall make findings that it is empowered under the section of this ordinance described in the application to grant the special exception, grant conditions, or deny the special exception, and that the granting of the special exception will not adversely affect public interest. An affirmative vote of 2/3 of the full membership of the Board of Adjustment is required to approve a special exception.
5. Before granting any special exception, the Board of Adjustment shall make written findings certifying compliance with the specific rules governing individual special exceptions and that satisfactory provision and arrangement has been made concerning the following, where applicable:
 - a. Entrance to and exit from property in proposed structures thereon with particular reference to automotive and pedestrian safety and convenience, traffic flow and control, and access in case of fire or catastrophe.
 - b. Off street parking and loading areas where required, with particular attention to the items in (a) above and the economic, noise, glare, odor or other effects of the special exception on adjoining properties and properties generally in the district.
 - c. Utilities, with reference to locations, availability, and compatibility.
 - d. Screening and buffering with reference to type, dimensions, and character.
 - e. Signs, if any, and proposed exterior lighting with reference to glare, traffic safety, economic effect and compatibility and harmony with properties in the district.
 - f. Required yards and other open spaces.
 - g. General compatibility with adjacent properties and other property.
 - h. Refuse and service areas, with particular reference to the items in (a) and (b) above.

A special exception that is granted but not used within 2 years shall be considered invalid unless an extension has been requested and approved by the Board of Adjustment.

54. The permits granted to Invenergy violated the Ordinances for the following reasons:
 - a. The Board did not discuss or make oral findings that the proposed project met the Ordinance requirements prior to voting to grant the permits to Invenergy.
 - b. The Board did not make written findings as required by the Ordinance prior to voting to grant the special exception permits.

- c. Wind turbines will be placed within a distance of less than four times the height of the wind turbine from a non-agricultural business.
- d. Invenergy's applications were incomplete and premature because Invenergy did not specify which turbine would be used, and within its applications specifically reserved the right to use a turbine not listed.
- e. Invenergy's applications were also incomplete and premature because they contained three potential layouts for the project, and the lack of a specific layout or decision and disclosure of which turbine would be used for the project prevented the public from being able to address concerns over the placement of a specific turbine or turbines. The lack of a specific layout or decision and disclosure of which turbine would be used for the project prevented neighboring land owners from being able to adequately address any concerns specific to a type, size, or location of any turbine. The lack of a specific layout or decision and disclosure of which turbine would be used for the project prevented the Board from being able to adequately determine the effects the project would have on the county.
- f. Invenergy did not submit a Road Use Plan.
- g. The Board did not make findings that each proposed wind turbine would be compatible with the surrounding location.
- h. The Board did not make findings that the wind turbines would be adequately screened and buffered from surrounding areas.
- i. The Board granted Invenergy's permit without requiring information from Invenergy regarding its mitigation measures required by Ordinance B2004-01-23B Section 1215.03 1.

- j. The Ordinances state that wind turbines shall be spaced no closer than is allowed by the turbine manufacturer in its approval of the turbine array for warranty purposes. The Board was unable to determine whether Invenergy's project will meet the requirements of this section because the application did not specify the turbine that will be utilized and Invenergy did not provide warranty information from the manufacturer.
- k. The Board did not have enough information regarding the proposed project to be able to certify the project met the requirements of the Ordinances.

ADDITIONAL ISSUES

55. The Board exceeded its authority by defining the term "substantial completion" as it pertains to the Ordinance.

56. The Board exceeded its authority in amending the ordinance requirement that the permits will expire three years from issuance if no substantial construction has begun. The Board amended the requirements so that Invenergy's permits will not expire unless substantial construction has begun within three years of the issuance of a permit by South Dakota Public Utilities Commission.

57. The Board exceeded its authority by granting Invenergy the right to transfer the permits.

58. The Board based its decisions in part on false information provided by Invenergy. When asked about the possible use of lighting mitigation technology on the project's turbines, Invenergy incorrectly stated it did not exist or was new technology.

59. The Ordinances discriminate against property owners and residents from different areas and differently zoned districts in violation of the Equal Protection Clause. Not all

property owners receive equal protection from the negative effects of the wind turbines that the County found necessary for some.

60. The permits granted to Invenergy which include greater setbacks from residences than from property lines affects the neighboring land owners' rights to use and enjoy their property in its entirety and affects the future development rights they have in their property.

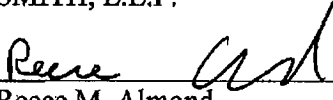
61. For the foregoing reasons, the Board exceeded its authority, acted outside of its jurisdiction, violated the Ordinances, failed to contribute independent thought, made a totally arbitrary decision, failed to regularly pursue its authority, engaged in an act forbidden by law and neglected to do an act required by law, and made an illegal decision that should be reversed.

WHEREFORE, Petitioners request the following relief in the form of a writ of certiorari, order, judgment, or other form allowed by law:

- a. all relief requested in this Petition;
- b. reversal of the Board's decisions granting special exception permits to Invenergy;
- c. revoking or voiding the permits granted to Invenergy;
- d. alternatively, remanding this matter to the Board;
- e. And for all other relief as allowed by law.

Dated at Sioux Falls, South Dakota, this 20th day of February, 2018.

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