

STATE OF SOUTH DAKOTA)
)SS
COUNTY OF CLARK)

CIRCUIT COURT
THIRD JUDICIAL CIRCUIT

CROCKER WIND FARM, LLC,

Petitioner,

vs.

THE CLARK COUNTY COMMISSION
AND THE CLARK COUNTY
COMMISSION ACTING AS THE CLARK
COUNTY BOARD OF ADJUSTMENT,

RESPONDENT.

**PETITION FOR WRIT OF
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Petitioner submits the following Petition:

1. Petitioner is the applicant for a Conditional Use Permit (CUP) from the Clark County Board of Adjustment to construct a wind energy system (WES) in Clark County.
2. Clark County has a zoning ordinance with specific provisions for WES, which was passed by the Clark County Commission.
3. The petitioner's application for the CUP met the relevant requirements of the Clark County zoning ordinance in all material respects. The application is attached as Exhibit A.
4. Respondent, Clark County Commission numbers five commissioners. They are Violet Wicks, Chairperson, and Bob Bjerke, Francis Hass, Richard Reints and Chris Sass, commissioners. The Clark County Commission sits as the Board of Adjustment. There are no other persons who are members of either body.
5. Respondent, Clark County Board of Adjustment (Board) is the entity which conducted hearings in accord with the law and granted a permit to construct which does not conform to the zoning ordinance.
6. The Petitioner applied for the conditional use permit on February 3rd, 2017. Notice was duly given of public hearings as required by law. Hearings on the Petition were held by the Clark County Board of Adjustment on March 7th, 2017 and March 27th, 2017. The

Board took testimony from both proponents and opponents at both hearings. Dozens of people attended and commented on the application.

7. On April 4, 2017, the Board of Adjustment granted Petitioner a permit to construct a WES in Clark County with conditions. The conditions are at issue in this proceeding. *The findings and conditions are attached as Exhibit B.*
8. Petitioner is aggrieved by the decision of the Board of Adjustment on the CUP application.

Count one- significant conditions imposed by the Board are illegal

9. The Board conditioned its decision to grant the permit with $\frac{3}{4}$ of a mile for wind towers from existing off-site non-participating residences, which setbacks are grossly in excess of those required in the zoning ordinance. *The zoning ordinance requires wind towers to simply be more than 1000 feet from residences. The Board failed to follow the Clark County zoning ordinance for WES in this respect. The layout of a wind farm of the same magnitude under these conditions would be spread over a much larger geographical area necessitating more leased land and more infrastructure, making it less competitive economically.*
10. *For the Board to require setbacks for Wind Energy System towers of such a distance is illegal and a violation of the Clark County Wind Energy System zoning ordinance. The Board significantly expanded the scope and breadth of the ordinance in excess of its authority, to the detriment of petitioner and landowners in the project.*
11. The Board conditioned its decision to grant the permit based on setbacks from residences without defining "existing off-site non-participating residence" leaving confusion as to whether residences includes currently occupied, formerly occupied or just what residences qualify for such treatment.
12. The Board conditioned its decision to grant the permit with setbacks of one mile from cemeteries, without defining which, or what kind of cemetery, and without making a finding on the impacts from the proximity of WES facilities to cemeteries. The motion was made to setback from a specific cemetery and condition was written generally to apply to 'Cemeteries' which remains an undefined term in both the Clark County ordinance and the CUP.

13. The Board referenced a “three year Permit Expiration Limitation” for the CUP but did not specify any acts which would trigger when the three years begins to run as the applicants provided in the conditional use permit application, or whether the WES if constructed is legally able to operate for longer than such period.
14. The illegal actions of the Board in these four regards make the construction and operation of the petitioner's proposed wind farm economically impractical. The amount of leased land usable for the wind farm within the current footprint is diminished. The proposed wind farm cannot be financed or built under these conditions and the investment in it, to date, is lost.
15. The illegal actions of the Board diminish the value of the easements obtained by the petitioner for the placement, construction and operation of the Wind Energy System, which was done in reliance on the Wind Energy ordinance in place at all relevant times. The ordinance was passed by the Clark County Commission.
16. Petitioner relied upon the plain language of the ordinance to plan and execute its wind farm and has invested millions of dollars in it, to date. Petitioner obtained and paid for expensive and valuable easements on roughly 30,000 acres.
17. By virtue of its illegal actions the Board has diminished the value of the property subject to easements, and trampled on the property rights of both the petitioner and its landowner hosts. The illegal actions of the Board have significantly and wrongly diminished the amount of land usable by landowners and significantly reduced the amount of land usable by Petitioner.
Count Two—The Board of Adjustment as composed is subject to undue influence and conflicts of interest which are unfair and violate due process
18. Under state law and the applicable Clark County zoning ordinance, actions of the Clark County Board of Adjustment on Conditional Use Permits require a two-thirds majority vote.
19. Under the applicable Clark County zoning ordinance, the Board of Adjustment and the County Commission have the same members.
20. Neither the Board of Adjustment nor the County Commission is comprised of a number capable of being evenly divided into thirds.

21. The makeup of the Clark County Board of Adjustment with five members requires four of the five votes for action which is a significant and extra burden on Petitioner.
22. Significantly, the Clark County zoning officer, Jarvis Reidburn, and two County Commissioners are all related by marriage to opponents of the wind farm. Commissioner Bob Bjerke and project opponent Allen Bjerke are brothers. Commissioner Chris Sass is married to Amy Bjerke Sass, daughter of Allen Bjerke. Clark County zoning officer Jarvis Reidburn is married to Alissa Bjerke Reidburn, another daughter of Allen Bjerke.
23. Project opponent Aaron Bjerke is the son of Allen Bjerke and the brother of Amy and Alissa. Aaron physically threatened petitioner's representatives at the conclusion of the March 27 meeting, using words indicating deep-seated family opposition to the project.
24. The close family relationships were and are and do constitute a conflict of interest for both commissioners.
25. The close family relationships combined with the de facto requirement to obtain 4 of 5 votes on the Board caused Applicant to be unable to obtain a CUP with workable conditions despite meeting the WES zoning ordinance in all material respects.
26. The Court should reverse the Board's decision on setbacks, clarify the conditions listed above, and order the Commission to appoint a Board of Adjustment which has members without conflicts of interest, and is of a number evenly divisible by three, under the writ of certiorari; unless a trial de novo is granted under state law.

WHEREFORE, Petitioners request the following relief:

- (a) Reverse the Board's actions in paragraphs 13, 14, 21, 25, and 33 of the findings; or In the alternative, grant Petitioner a trial de novo
- (b) Order Clark County to establish the membership of a Board of Adjustment which complies with state law, without conflicts of interest, and evenly divisible by three.
- (c) Its attorney's fees, costs and disbursements
- (d) Such other and further relief as the Court deems warranted under the circumstances.

Dated this 3rd day of May, 2017.

MAY, ADAM, GERDES & THOMPSON LLP


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VERIFICATION

I, Blake E. Nixon, President of Crocker Wind Farm, LLC hereby verify that the matters set forth in this petition are true and correct based on my personal knowledge and on my best information and belief.


Blake E. Nixon, President

Subscribed and sworn to before me this 3RD day of May, 2017.


Notary Public

