STATE OF SOUTH DAKOTA : SS COUNTY OF CODINGTON	)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
PAUL JOHNSON, PATRICK LYNCH, MELISSA LYNCH AND AMBER CHRISTENSON, Petitioners, vs. CODINGTON COUNTY BOARD OF ADJUSTMENT, CROWNED RIDGE WIND, LLC, CROWNED RIDGE WIND II, LLC, Respondents.		14CIV.18- PETITION TO APPEAL THE WIND ENERGY SYSTEM CONDITIONAL USE PERMIT GRANTED JULY 16, 2018, AND FILED JULY 18, 2018

COMES NOW, Petitioners above-named, and submit the following Petition:

1. Respondent Codington County Board of Adjustment (hereinafter referred to "BOA") is the Board of Adjustment of Codington County as appointed pursuant to Codington County Zoning Ordinances.

2. Respondent Crowned Ridge Wind, LLC is one of the Applicants for, and is the recipient of a Conditional Use Permit (CUP) to operate a Wind Energy System (WES).

3. Respondent Crowned Ridge Wind II, LLC is one of the Applicants for, and is the recipient of a Conditional Use Permit (CUP) to operate a Wind Energy System (WES).

4. Each Petitioner is an owner of land in Codington County, is a tax payer, and is otherwise aggrieved by the Decision of the BOA as set forth in this Petition.

5. Petitioners are appealing the Decision of the BOA to operate a WES CUP

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as reflected in the Application heard by the BOA on July 16, 2018 (hereinafter referred to as "the Hearing").

6. At the Hearing, Petitioners along with other members of the public, opposed the Application and presented testimony and evidence in opposition to the Application.

7. At the Hearing, the BOA voted to approve the Application and granted the Applicant a WES CUP.

8. The Decision made by the BOA at the Hearing, the unofficial minutes of the Hearing, the official minutes of the Hearing, the written filed Decision, and any other BOA action by which the Application is deemed approved or granted or by which the CUP is deemed approved or granted or issued to Crowned Ridge Wind, LLC and Crowned Ridge Wind II, LLC, shall be hereinafter referred to as "the Decision".

9. The Decision was filed by the BOA on July 18, 2018.

10. The Petitioners have filed this Petition to the Court within 30 days of the date the Decision was filed in the office of the zoning officer.

11. Petitioners submit and present this Verified Petition to the Court pursuant to SDCL 11-2-61, SDCL 11-2-62 and SDCL 21-31-1 et seq. the common law and any other statute or legal authority that may be afforded relief or rights to the Petitioners under South Dakota Law.

12. Petitioners submit this Petition setting forth that the Decision of the BOA is illegal, including the grounds of illegality as set forth in this Petition.

13. Petitioners request that the Court review the Decision of the BOA under the Writ of Certiorari standard set forth by statute (including but not limited to SDCL 11-

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2-62), review the Decision under a less differential or de novo standard of review for the reasons set forth in this Petition, or for other reasons, reverse the Decision, issue a Writ of Certiorari to the BOA ordering the relief set forth in this Petition, remand this matter to the BOA for further disposition as requested in this Petition, and otherwise grant Petitioners the relief requested.

14. Under current South Dakota Law, any of the following five grounds independently require reversal of the BOA Decision under the Writ of Certiorari Standard:

a. The BOA arbitrarily and willfully disregarded undisputed proof;

b. The BOA's Decision was based on fraud;

c. The BOA exceeded its jurisdiction;

d. The BOA failed to regularly pursue its authority; or

e. The BOA engaged in any act forbidden by law and neglected to do any act required by law.

15. Based on the following, the BOA arbitrarily and willfully disregarded undisputed evidence and based its Decision on fraud, exceeded its jurisdiction, failed to regularly pursue its authority, engaged in acts forbidden by law or neglected to perform acts required by law:

a. The BOA failed to give adequate notice of the July 16, 2018, Hearing in violation of §4.05.01(2)(3) by failing to give not less than 10 days prior notice to property owners by certified or registered mail or by publication. The BOA's publication was on Friday, July 6, 2018. Statutory notice is defined in SDCL 15-6-6(a). Notice of less than 11 days excludes Saturday and Sunday in

the computation of time. Further, the mailing of notice by the BOA was dated July 5, 2018. Without a return of service, actual notice started July 8, 2018.

b. The BOA does not have on staff, nor did it retain the services, of any individuals or experts qualified to analyze technical information submitted in support of the Application. By failing to do so, the BOA permitted the Decision to be based on potential fraud and failed to regularly pursue its authority to protect the health, safety, and welfare of the public (§1.01.03).

c. At the Hearing, Applicants' representative disclosed that Applicants Crowned Ridge Wind, LLC and Crowned Ridge Wind II, LLC are wholly owned subsidiaries of "Nextera Energy Resources, LLC". The BOA permitted Crowned Ridge Wind, LLC and Crowned Ridge Wind II, LLC to pursue a WES CUP on behalf of Nextera Energy Resources, LLC, which is not licensed to do business in the State of South Dakota and is not registered with the South Dakota Secretary of State. By allowing Crowned Ridge Wind, LLC and Crowned Ridge Wind II, LLC, to pursue an Application on behalf of "Nextera Energy Resources, LLC", the BOA perpetuated fraud upon the residents of Codington County and acted in excess of its statutory authority and powers.

d. The BOA approved the Application and issued a CUP permit to Crowned Ridge Wind, LLC and Crowned Ridge Wind II, LLC despite the fact that they are not the real party in interest (Nextera Energy Resource, LLC) and the action constitutes arbitrary and willful disregard of undisputed proof, exceeding the BOA's jurisdiction and failing to regularly pursue authority, engaging in acts forbidden by law or neglected to engage in acts required by law.

e. Public testimony established that multiple tower locations and receptors were not shown on Applicants' maps. The Petitioners were also not made aware of the zoning officer's report and recommendation which was received and reviewed by the BOA at the Hearing on July 16, 2018. The zoning officer's report established that the Applicants' sound and flicker maps were not accurate. The zoning officer's report was considered by the BOA at the Hearing. The BOA's failure to make the zoning officer's report available for inspection prior to the Hearing is a violation of the open meeting laws in the State of South Dakota (SDCL 1-25-1 et seq.).

f. In addressing the noise level permitted by §5.22.03(12)(a), the BOA relied on standards not set by the American National Standard Institute and permitted the Applicants' expert to speculate that the sound impact did not exceed Ordinance limits. As a result, the BOA neglected to inforce its own ordinance, and in fact, engaged in an act forbidden by its ordinance.

g. Codington County Zoning Ordinance §5.22.03(13) established a standard for flicker potential of not more than 30 hours per year, yet the BOA allowed the Applicants to "estimate" its flicker impact and exceeded its authority by relying speculative data. As a result, the BOA neglected to enforce its own ordinance, and in fact, engaged in an act forbidden by its ordinance.

h. At the July 16, 2018, Hearing, the Chairman of the BOA acted as moderator and had material vocal input into the decision-making process. He refused to excuse Board Member Rodney Klatt when testimony of record was that his sister was a Wind Power participant, and he allowed Klatt to participate in

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the Decision. The Chairman also held Petitioners to a three minute time limit to express their opinion, but he allowed the Applicants unlimited time and multiple appearances by its witnesses. At the conclusion of the Hearing, the Chairman advised members that they could either approve or disapprove the Application. He did not advised the BOA that the Application could be tabled. Petitioners argue that these events constitute bias and irregular pursuit of authority in violation of due process requirements.

i. The BOA has a duty to investigate all material issues and facts associated with the Application. Through its investigation, the BOA is required to contribute independent thought to the process, not simply accept whatever Crowned Ridge Wind, LLC and Crowned Ridge Wind II, LLC tell the BOA. By way of example, the Applicants offered the expert testimony of ESPA to satisfy sound and flicker requirements. No vitae or any other written evidence of their expert credentials were presented to the BOA. Petitioners argue that the BOA failed or refused and neglected to investigate speculative testimony and evidence. As a result, the BOA neglected to enforce its ordinance and engaged in an act forbidden by its ordinance.

j. The BOA failed to address overcrowding of land with structures, and approved construction of 164 wind towers, each of which may be up to 500 feet in height (§1.01.03(8)). Further, in §5.22.03.2, tower setbacks are addressed. Density is not addressed. By failing to consider density, the BOA has neglected to enforce its own ordinance and engaged in an act forbidden by its ordinance.

k. All of the BOA actions, missions, procedural deficiencies, and other matters set forth in this Petition are grounds for reversal under the Writ of Certiorari standard or as otherwise permitted for reversal or relief under the law.

l. Any omission of the BOA referenced in this Petition is in fact a due process violation and shall be considered by the Court in evaluating compliance with due process, even if a due process violation is not expressly mentioned.

m. The BOA arbitrarily or willfully disregarded undisputed proof offered at the Hearing as set forth in this Petition which entitles Petitioners to reversal of the July 18, 2018, Decision and all of the relief allowed by law.

n. The BOA's Decision is based in part upon fraud as set forth in this Petition which entitles Petitioners to reversal of the Decision and all other relief allowed by law.

o. The BOA exceeded its jurisdiction as set forth in this Petition which entitles Petitioners to reversal of the Decision and all other relief allowed by law.

p. The BOA failed to regularly pursue its authority as set forth in this Petition which entitles Petitioners to reversal of the Decision and all other relief allowed by law.

q. The BOA engaged in acts forbidden by law or neglected to do acts required by law as set forth in this Petition which entitles Petitioners to reversal of the Decision and all other relief allowed by law.

16. For the reasons set forth above, the Court should grant Petitioners Writ of Certiorari. Specifically, Petitioners request that the Court reverse the Decision of the BOA and revoke the CUP granted to Crowned Ridge Wind, LLC and Crowned Ridge

Wind II, LLC. In the alternative, the Court should remand this matter back to the BOA for further investigation and compliance with any directions form the Court.

WHEREFORE, Petitioners pray for the following relief:

1. The Court reverse the July 18, 2018, Decision and order that the WES CUP be revoked or voided; or

2. This matter be remanded to the BOA for further consideration or investigation; or

3. Petitioners request a trial de novo; and

4. All other relief provided by statute, common law or case law, and all other relief that the Court deems just, fair, lawful or equitable.

Dated at Watertown, South Dakota this 17th day of August, 2018.

WILES & RYLANCE

John C. Wiles
Attorneys for Petitioners
3 East Kemp, Suite 200
P. O. Box 227
Watertown, SD 57201-0227

VERIFICATION

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF CODINGTON)

Paul Johnson, being first duly sworn, deposes and states that he is the Petitioner above named; that he has read the foregoing Appeal, knows the contents thereof and that the same is true and accurate based on his own knowledge and best information and belief.

Paul Johnson

Subscribed and sworn to before me this 15th day of August, 2018.

My Commission Expires: 9/14/21

John C. Wiles, Notary Public
State of South Dakota

(SEAL)

VERIFICATION

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF CODINGTON)

Patrick Lynch, being first duly sworn, deposes and states that he is the Petitioner above named; that he has read the foregoing Appeal, knows the contents thereof and that the same is true and accurate based on his own knowledge and best information and belief.

Patrick Lynch

Subscribed and sworn to before me this 16th day of August, 2018.

Amanda Thyne, Notary Public
State of South Dakota

My Commission Expires: 11/9/22

(SEAL)

AMANDA THYNE
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL

VERIFICATION

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF CODINGTON)

Melissa Lynch, being first duly sworn, deposes and states that she is the Petitioner above named; that she has read the foregoing Appeal, knows the contents thereof and that the same is true and accurate based on her own knowledge and best information and belief.

Melissa Lynch

Subscribed and sworn to before me this 16th day of August, 2018.

Amanda Thyne, Notary Public
State of South Dakota

My Commission Expires: 11/9/22

(SEAL)

AMANDA THYNE
SEAL NOTARY PUBLIC SEAL
SOUTH DAKOTA

VERIFICATION

STATE OF MINNESOTA)
: SS
COUNTY OF STEARNS)

Amber Christenson, being first duly sworn, deposes and states that she is the Petitioner above named; that she has read the foregoing Appeal, knows the contents thereof and that the same is true and accurate based on her own knowledge and best information and belief.

Amber Christenson

Subscribed and sworn to before me this 16 day of August, 2018.

01/31/2022, Notary Public
State of MINNESOTA

My Commission Expires:

(SEAL)

JOHN A UECKER
NOTARY PUBLIC - MINNESOTA
MY COMMISSION EXPIRES 01/31/2022

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

In the Matter of Special Exception Permit Application of Crowned Ridge Wind II, LLC (Deuel County Application WES Sec. 1215)	
GARRY EHLEBRACHT, STEVEN GREBER, MARY GREBER, RICHARD RALL, AMY RALL, and LARETTA KRANZ, *Petitioners,* vs. DEUEL COUNTY PLANNING COMMISSION, *sitting as* DEUEL COUNTY BOARD OF ADJUSTMENT, *Respondent.*	19CIV18-19CIV18-000061 PETITION FOR WRIT OF CERTIORARI (SDCL § 11-2-61)

A. Introduction:

COME NOW these Petitioners, namely, GARRY EHLEBRACHT, STEVEN GREBER, MARY GREBER, RICHARD RALL, AMY RALL, and LARETTA KRANZ (collectively, "Petitioners"), by and through their undersigned attorney of record, A.J. Swanson, of Canton, South Dakota:

1. Petitioners present this petition for Writ of Certiorari, with separate verifications being annexed, alleging that a certain resolution was adopted by DEUEL COUNTY PLANNING COMMISSION, sitting as the DEUEL COUNTY BOARD OF ADJUSTMENT ("Respondent" or sometimes, "Board" or "Board of Adjustment"), upon a unanimous affirmative vote (5-0), entered during the Board's session held on October 22, 2018 (the "Decision"), concerning a public hearing held by the Board on September 20, 2018 (the "Hearing"), conducted in the course of administering certain provisions of the Deuel County Zoning Ordinance, as amended

(the "Zoning Ordinance"), and the Deuel County Comprehensive Plan (the "Comp Plan"). The Decision was made by, and the Hearing conducted by, the Board, then comprised of members Dennis Kanengieter, Steve Rhody, Kevin DeBoer, Gary DeJong, and Mike Dahl. At the Hearing, member Paul Brandt recused himself for undisclosed reasons, being replaced for this session by Gary DeJong, a member of the Deuel County Board of Commissioners.

2. The Decision represents an approval of a certain Special Exception Permit, as sought by written application of CROWNED RIDGE WIND II, LLC ("CRW2" or "Applicant"). According to records of the South Dakota Secretary of State, Applicant is a Delaware limited liability company, having a principal office of Corp Gov – Law/JB, 700 Universe Blvd., Juno Beach, FL 33408, and reporting also the beneficial owner of Applicant is ESI Energy, LLC, 700 Universe Blvd., Juno Beach, FL 33408. Applicant's registered agent and office in South Dakota is Corporation Service Company, 503 S. Pierre St., Pierre, SD 57501-4522. Petitioners neither oppose nor object to intervention in this matter by Applicant, if sought.

3. Applicant's Special Exception Permit proposes the "construction and operation" of approximately 68 industrial wind turbines upon some 19,169.54 acres of "leased land" in various described sections, ranges and townships of Goodwin, Havana, and Rome Townships, Deuel County, South Dakota (the "IWT Project").

4. These named Petitioners, by their oath, now state to the Court that the said Decision of Respondent Board of Adjustment has been made in excess of the jurisdiction and power actually conferred by law and ordinance, having been taken and entered in a manner and under a supposition that offends the procedural due process rights of Petitioners, even as the substantive due process rights and property rights of these Petitioners are violated, as Respondent endeavors to take and confiscate such rights and confer same in favor of Applicant and others in

privity of contract with Applicant, and upon such other and further grounds as stated herein, all further stating that Respondent's Decision is illegal, as alleged herein.

B. Identification of Petitioners:

5. GARRY EHLEBRACHT (hereafter, "EHLEBRACHT") resides at 17539 468th Ave., Goodwin, SD 57238, and is the owner of a parcel of land consisting of approximately 18 acres, consisting of a single family residence, in the SE1/4, NE1/4 of 20-116-50 (Goodwin Township, Deuel County); EHLEBRACHT has owned and resided at this address since 1999.

6. STEVEN GREBER and MARY GREBER, husband and wife (collectively, "GREBERS"), reside at 17165 468th Ave., Goodwin, SD 57238. They are the owners of a parcel of land consisting of approximately 12 acres, with a single family dwelling, in the N1/2, SE1/4 of 32-117-50 (Rome Township, Deuel County); GREBERS have owned and resided at this address since 1995.

7. RICHARD RALL and AMY RALL, husband and wife (collectively, "RALLS"), reside at 17192 469th Ave., Goodwin, SD 57238. They are the owners of a parcel of land consisting of approximately 14 acres, with a single family dwelling, being Lots 1, 2, 3 & 4, Dahl Second Addition, in the SW1/4 of 34-117-50 (Rome Township, Deuel County); RALLS have owned and resided at this address since 2010, having moved to this site from a location near White, in Brookings County, South Dakota, that move being motivated by industrial wind turbine developments near that former home.

8. LARETTA KRANZ (hereafter, "KRANZ" resides at 17553 468th Ave., Goodwin, SD 57238; she resides on and is the owner of a parcel of land comprising the S1/2 of 20-116-50 (Goodwin Township, Deuel County); KRANZ has resided at this address since 1963, the small village of Bemis being a short distance to the south.

C. Allegations Common to All Petitioners:

9. Petitioners, as named in paragraphs 5 to 8, are the respective owners in fee of the residential and surrounding properties generally described, having the right to "possess and use it to the exclusion of others," within the meaning of SDCL 43-2-1.

10. The respective investment in and monetary cost of the referenced residential properties, as to each of the Petitioners, is both substantial and valuable, and theirs alone to enjoy or to confer upon others.

11. For purposes of the IWT Project of CRW2, and also for purposes of applying the current, most relevant provisions of the Zoning Ordinance, Petitioners are each deemed to be "Non-participating Owners" (sometimes, "Non-Participants"), which is to also say, they are not in privity of contract with Applicant CRW2.

12. Petitioners, collectively, are adjacent to or in the immediate vicinity of those landowners in privity of contract with CRW2 (or affiliates of CRW2), and referenced as "Participating Owners," having granted easements, leases or licenses to permit the construction, development, maintenance and operation of one or more Industrial Wind Turbines ("IWT") on nearby or adjacent lands and properties, having been compensated, or the promise of future compensation, for such arrangements from CRW2, or its successors or assigns.

13. For their part, Petitioners are presently subject to *no* lawful servitudes whatsoever relevant to the IWT Project (such as the "right of receiving air, light, or heat from or over, or discharging the same upon or over land," as referenced in SDCL § 43-13-2(8)), nor have they granted, conferred, entered into, or promised to give in favor of CRW2, or any successors or assigns, any "wind easement" (as defined in SDCL § 43-13-16), or leases.

14. Petitioners, as residents and owners of property within the State of South Dakota, claim the benefits and protections of the *South Dakota Constitution*, including Article 6, § 2, providing that "[n]o person shall be deprived of . . . property without due process of law."

15. Each of the Petitioners, as citizens of the United States, claim the benefits and protections of provisions of the *United States Constitution*, similar to provisions quoted in paragraph 14, above.

16. Each of the Petitioners also claims the benefits and protections of Article 6, § 13, *South Dakota Constitution*, providing, *inter alia*, that "[p]rivate property shall not be taken for public use, or damaged, without just compensation . . . ."

17. Each of the Petitioners also travel by motor vehicles upon the township, county and state highways in and around the townships of Goodwin, Havanna and Rome, all in Deuel County, South Dakota, and have an interest in safe travel.

D. The Zoning Power & Delegation by the Legislature:

18. South Dakota recognizes the legislative power is vested with the legislative branch of the government, and that the legislative power includes the police power.

19. The police power embraces zoning (the "Zoning Power") of the various private and public lands located within the state, including reasonable regulations and restrictions for the use of properties located within distinct districts or zones. In general, the due exercise of the Zoning Power requires also the development of an official plan by the government (generally referenced as the "Planning Power").

20. As observed by the Court in *Schafer v. Deuel County Bd. of Com'rs*, 2006 S.D. 106, 725 N.W.2d 241 (2006), "[z]oning regulations when enacted or when amended, under the proper exercise of the police power, cannot exceed the constitutional limitations on governmental restrictions of private property."

21. Petitioners do not challenge Deuel County regulations applying to their own uses and respective properties, as Non-Participants in the IWT Project. Rather, the challenge is to those regulations allowing the Applicant (by means of a Special Exception Permit) to make such an intensive, proximate use of the adjacent or nearby lands of Participating Owners, both during construction and operation of some 68 structures, uses that effectively destroy or overwhelm Non-Participants in the safe use and enjoyment of their respective properties as living humans, and in making productive use of their properties, for such purposes as allowed by the Zoning Ordinance. This intrusive, proximate use by Applicant, affecting the adjacent or nearby properties of Petitioners, each of whom is a Non-Participant, and with whom Applicant has no privity of contract, is referenced herein as "Trespass Zoning," as further discussed, *infra*.

22. In or about 1967 (presently by means of Chapter 11-2, SDCL), the legislature delegated the Zoning Power to any of those counties wishing to properly exercise it; exercise of that power was contingent upon prior development of the Planning Power, to thereafter work in conjunction with the Zoning Power.

23. Thereafter, at times presently unknown to Petitioners, Deuel County exercised the delegated powers and adopted both a Comp Plan and a Zoning Ordinance.

24. Each of the properties of Petitioners, including their respective residences and outlying lands, are subject to the exercise of any lawful zoning powers of Deuel County, as expressed in the Comp Plan and the Zoning Ordinance.

25. Each of the properties of Petitioners, including their respective residences and outlying lands, have been determined and placed within the "A" Agricultural District, as one of the Zoning Districts formulated under the Zoning Ordinance (see Section 1101).

26. The purpose of the "A" Agricultural District, as stated in Section 1101.1:

> The district is established to maintain and promote farming and related activities within an environment which is generally free of other land use activities. Residential development will be discouraged to minimize conflicts with farming activities and reduce the demand for expanded public services and facilities.

27. The cited provisions of the Zoning Ordinance were adopted in 2004, contemporaneous with the County's adoption of the current Comp Plan.

28. At the time the Zoning Ordinance was adopted (2004), the respective use, ownership and occupation of the properties and residences of each of the Petitioners had already been established (except as noted in ¶ 7).

29. Each Petitioner has the rights, benefits, and privileges of, along with the asserted protections arising under, the Zoning Ordinance, including the continued right to use, enjoy and further develop each of their respective lands and properties in a manner fully consistent with the Zoning Ordinance, the Agricultural District regulations, and the Comp Plan.

30. These associated, inchoate rights (as referenced in ¶ 29), Petitioners further allege, are fundamentally destroyed or undermined (for decades to come) by the concept of "Trespass Zoning" (further referenced in Part G, following), a natural consequence of the sheer weight, massive force and preemptive presence of an operating IWT Project deploying some 68 turbines in these three townships alone, each nearly 500 foot in height, or *about 10 to 15 times taller* than anything else, living or otherwise, presently constructed, erected or growing in and around the properties of Petitioners.

31. While this IWT Project may reap financial benefits for the Applicant, along with the Participating Owners and the tax revenue for Deuel County itself, the uses envisioned by this Special Exception Permit are otherwise damaging to, and in derogation of, the health, well-being, property rights and associated property interests of the Non-Participants, including these Petitioners.

E. The 2004 Comp Plan and 2004 Zoning Ordinance:

32. The Comp Plan (effective May 5, 2004) is a forty-four (44) page document failing to predict or mention the use of Deuel County for so-called "wind farm" placement efforts, although the Comp Plan does warn that "[c]hange is a constant that will affect individuals throughout their life," followed immediately by this self-congratulatory proclamation:

> Although the Deuel County Planning Commission and County Commission have excelled in the historical application of land use management controls to the unincorporated areas of Deuel County, future development has the potential of applying new and varied pressures on local decision makers. [Comp Plan, at 2.]

33. Respondent, in fact, has succumbed to "new and varied pressures," in the exercise of a Zoning Power, by approving a Special Exception Permit and authorizing such a level, degree and intensity of use of some sixty-eight (68) host parcels, posing direct conflicts with the inherent rights of ownership and of enjoyment held by Non-Participants as to their respective properties. Not even the South Dakota Legislature claims to have such powers.

34. The writer of the 2004 Comp Plan expressed concerns about rural use conflicts, so that in looking forward (a) the County's agricultural lands should be preserved for agricultural production; (b) the County's shallow aquifers should be protected; and (c) that land uses permitted in the rural area should be compatible with each other. However, the use proposed by Applicant is decidedly not compatible with nearby human activities, or the uses to which Petitioners make use of, and enjoy, their respective properties. Further, Section 278 of Zoning Ordinance, in defining a special exception use that might be warranted, did not contemplate or embrace a non-agricultural, non-traditional use that is pervasive or widely scattered throughout a neighborhood of "Agriculture," having dimensions of immense size, emitting loud noise, casting flickering shadows, posing a variety of safety hazards and health risks to all, including the Non-

Participants, uses that are a permanent, hostile invasion rather than that "promot[ing]" the goals of the Zoning Ordinance.

35. The Zoning Ordinance includes provisions (Section 1215) as to "Wind Energy System (WES) Requirements." Section 1215, in original form, required a distance of "not less than one thousand (1,000) feet" from "existing off-site residences, business and public buildings," while the distance as to any on-site or "lessor's residence shall not be less than five hundred (500) feet, or one hundred and ten percent (110%) of wind turbine height, whichever is greater." This text is on par with an antiquated, aggressive void-filling work originally written upwards of 20 years ago, jointly promoted by an unholy alliance of wind-energy development interests and various state and federal agencies. Having no such provisions previously, Deuel County swallowed the bait.

36. Section 1215, in original form, also provided the turbine site must be placed 110% of the wind turbine height (and apparently exactly so, without any provided allowance for either a greater or a lesser distance), and likewise 110% of such height, from any property line "unless [a] wind easement has been obtained from [the] adjoining property owner."

37. Section 1215, in original form, provided that "[n]oise level shall not exceed 50 dBA, average A-Weighted Sound pressure at the perimeter of existing residences." This permitted noise level at receptor points, and the resulting risk of harm or disturbance to human life, may require scientific explanation. Further, the 2004 Zoning Ordinance fails to regulate or govern "low frequency noise," or "infrasound," emitted by wind turbines – generally, sounds that are felt if not heard; likewise, this feature of wind turbine operation requires scientific explanation, since it is a reality and remains a distinct risk of Applicant's proposed use of leased lands adjacent to Petitioners' properties, even if not regulated by the Zoning Ordinance.

38. The topic of shadow flicker (hereafter, "Shadow Flicker," addressed later in this Petition) also is *not* mentioned in the 2004 Zoning Ordinance.

F. The Zoning Ordinance, as Amended in 2017:

39. After many hearings by the Deuel County Planning Commission and the Deuel County Board of Commissioners, spread over the course of many months, several of the substantive provisions of the Zoning Ordinance concerning Wind Energy Systems (WES) and within Section 1215 thereof were amended by terms of Ordinance B2004-01-23B; a true copy of the amendatory ordinance, adopted May 23, 2017, is annexed as Exhibit A.

40. During the course of considering amendments requested by Petitioners and other residents of Deuel County, the Planning Commission and County Board regularly solicited the self-interested views of WES developers as to whether they could "live with" certain setbacks, noise level limits, and limitations on Shadow Flicker. To the knowledge and information of Petitioners, *not one* proposed amendment was recommended by the Planning Commission, *nor was any one* such amendment ultimately adopted in Zoning Ordinance form by the County Board, *unless and until* several of the WES developers had expressly signaled their assent to such proposed rules, or a representation that they could (*and would*) abide by such requirements.

41. The Zoning Ordinance amendment process, leading to the 2017 amendments of Zoning Ordinance Section 1215, was like consistently asking advice of the sly, old fox as to the best latch to be used on the chicken house, and then actually following the fox's advice that "Brand X" absolutely suffices to protect the life, health, welfare and allied interests of the hens. Meanwhile, few - *if any* - of the safety devices proposed by the "chickens" themselves came home to roost within the four walls of Section 1215, as then recommended by the Planning Commission (including member Paul Brandt), and thereafter adopted by the Deuel County Board of Commissioners (including member Gary Jaeger).

42. The Zoning Ordinance's Section 1215, as relevant to this Petition, and as amended in 2017 with the blessings, if not the active support, of the "wind farm" developers, is summarized, following:

(a) Wind turbines may be located not less than *four times the height* of the turbine from *existing* residences and businesses of Non-Participants (effectively, for this Applicant, a distance of 1,945 feet, more or less, from the closest exterior wall of the existing residences of Non-Participants), or fifteen hundred (1500) feet from existing Participating Owner residences, business and public buildings; Non-participating Owners are extended the right to waive these setback requirements.

(b) Distance from public right-of-way shall be one hundred ten percent (110%) the height of the wind turbine (measured from ground surface to the tip of blade in fully vertical position) - this provision, not amended in 2017, seems to be in conflict with the recommendations of the turbine manufacturer.

(c) Distance from any property line shall be one hundred ten percent (110%) the height of the wind turbine (measured likewise), unless a "wind easement has been obtained from adjoining property owner" – this original provision also supports Petitioners' arguments as to "Trespass Zoning," as further outlined in Part G, following.

(d) In the case of the small incorporated towns of Altamont, Astoria, Brandt and Goodwin, the setback distance is increased to "1 mile from the nearest residence." Residences of Non-Participating Owners within the incorporated town of Goodwin are protected by a setback of one mile from Applicant's IWTs (measured from individual homes, not the town's corporate limits), while Petitioners, all situated in the immediate vicinity of Goodwin, are under the "four-times-the-height" formula, resulting in a setback of merely 1,945 feet, more or less. Under SDCL § 11-2-14, Petitioners submit that

neither a rational nor a lawful basis exists for a 1-mile setback (5,280 feet) to those homes within Goodwin, while applying a different, much less generous, less protective setback to the similar, nearby homes of Petitioners.

(e) Regarding noise, the amended Zoning Ordinance does work a reduction, after "wind farm" developers assured the County Board they could meet that reduction. From the original text of "shall not exceed 50 dBA average A-Weighted Sound pressure at the perimeter of existing residences," the Zoning Ordinance now provides: "Noise level shall not exceed 45 dBA average A-Weighted Sound pressure at the perimeter of existing residences, for non-participating residences." Further discussion of this follows, *infra*.

(f) Prior to May 2017, the Zoning Ordinance made no provision whatsoever for regulating the matter of Shadow Flicker – as now amended, provision is ostensibly made for the "[l]imit for allowable shadow flicker at existing residences to no more than 30 hours annually." This specific provision, together with each of the others cited in subparagraphs (a) through (e), above, represents a governmental taking or confiscation of nearby private property – owned by Petitioners and other Non-Participants - for the sole benefit of the Applicant, something not even the Legislature itself may perform absent the giving of just compensation.

43. While certain of the 2017 Zoning Ordinance amendments seemingly afford *improved* conditions or circumstances for "Non-Participants" in an IWT Project (a required – but waivable - separation distance from residences of *four times* wind turbine height is better, unless the IWT Project developer was building *only* 100 foot structures, in which case, the resulting distance is actually less than the prior requirement of 1,000 feet), while others – such as a purported allowance for shadow flicker not to exceed 30 hours annually – would appear a further detriment to Petitioners and all other Non-Participants in this IWT Project.

44. As observed in ¶ 41, and reflected in the minutes of many meetings, the Planning Commission and the County Board resisted such "improved conditions" within the amended Zoning Ordinance's Section 1215, unless and until persons speaking on behalf of the contemplated developers of WES (including this Applicant) extended tacit or clearly expressed approval. As such, Petitioners allege that the current requirements of Section 1215 are neither obstacles nor unduly burdensome to meet, but, in reality, represent a kind of "lock" on the properties of Petitioners and other Non-Participants (and human occupation thereof), a lock designed by Applicant (and other wind developers), ordered up by the Planning Commission and readily purchased by the Deuel County Board of Commissioners.

G. The Concept of "Trespass Zoning":

45. As further stated and asserted within this Petition, Section 1215 of the Deuel County Zoning Ordinance is dependent upon an insidious concept of "Trespass Zoning." By drawing the relevant setback lines from *existing residences*, while also ostensibly allowing Shadow Flicker to be hereafter inflicted upon *existing residences*, the Zoning Ordinance implicitly allows the outsized footprint and shadow of an IWT – *particularly of the size and dimensions involved in this CRW2 Project, embracing 68 industrial installations, each approaching the height of a 45 story building, emitting a tremendous amount of noise at very high elevations* – to move in and upon, to adversely occupy and command, and continuing to do so for decades to come, or for however long the IWT Project is functional, the surface area of and all of the improvements upon that real property heretofore held, owned and enjoyed, *exclusively*, by the Non-Participants.

46. The concept of "Trespass Zoning" is reflected by provisions in the 2004 version of the Zoning Ordinance, requiring that a "wind easement" be obtained from an adjoining property owner – but *only* if the wind turbine is built closer to the property line than 110% of the

turbine's height. Thus, when a 400 foot turbine is built 420 feet from the property line, then a wind easement must be obtained from the adjoining owner (this adjoining owner obviously is not the host to or the lessor of an actual turbine site – otherwise there would already be a wind easement in place). But, if located 450 feet from the property line, then no such easement is required. This text underscores the pre-conceived notions shared by the Zoning Ordinance writer and the wind development industry – *only the flow of wind across the adjoining land, and the exclusive right to harvest same, has any real value.* Petitioners submit otherwise.

47. The exclusive right to enjoy one's own property, free from the risk and harm from several distinct health and safety hazards posed by the wind turbines, is never considered by the Zoning Ordinance, except to the extent of those few setbacks and limitations the "wind farm" development industry (the fox) has otherwise conceded to be appropriate for protection of the Non-Participants (the chickens).

48. The sought Special Exception Permit is progeny of Trespass Zoning. It seeks governmental approval of a proposed long-term, adverse occupation of some substantial part and parcel of the real property and associated property interests of Petitioners, even if no turbine is built upon the lands of Petitioners. In turn, Petitioners own abilities to make full and complete productive use are hindered, thwarted, diminished or overridden, due to the deleterious effects of being too close or proximate to Applicant's IWT operations. Risk of exposure to hazards due to proximity would include: (a) excessive noise flowing from IWT hubs and rotors (measured both on the dBA scale and open also to the effects of LFN, a concept which the Zoning Ordinance fails to even recognize much less regulate), and reaching to the properties of Non-Participants; (b) Shadow Flicker (even if limited to no more than 30 hours annually), reaching the properties of Non-Participants, (c) property damage and physical harm while present thereon, or in travel upon public highways to and from such properties, due to ice throw, physical disintegration or

collapse of the structures, and fire (beginning with a fire within the turbine itself, followed by a high risk of a fire upon the surrounding terrain at ground level), and (d) annoyance, a state of mental distress and agitation that, according to prior testimony of Applicant's own expert (Dr. Chris Ollson, not a medical doctor) leads to adverse health effects.

49. For purposes of illustrating "Trespass Zoning," Petitioners have attached a single page document (marked Exhibit B), reflecting the conflict between the hypothetical Farmer A, as owner of Parcel A, consisting of 23 acres, proposed as host to a 400 foot wind turbine. This example assumes an ordinance-required "building setback" of 1,250 feet, and the interplay of that required setback with the owners of neighboring Parcels B, C, D & E. If the "four-times-turbine height" setback to existing homes is then applied to future construction, then the example given is applicable to Deuel County's Zoning Ordinance, but increased to a radius of 1,945 feet (the setback distance used in Applicant's maps to plot the clear-area radius for the residences of Non-Participants). That neither the Applicant, nor its Participating Owners in privity, have the right to demand free use of the neighboring parcels, even as the Respondent Board has no power to make an adverse award of such use, is the intended point of this illustration.

50. As further alleged, following, the radius of 1,250 feet, as shown in Exhibit B, has actual application within Deuel County and this proceeding, given the testimony of Applicant's own expert witness (see reference to the testimony of Dr. Chris Ollson, not a medical doctor, upon being questioned by the Board of Adjustment, September 20, 2018, at ¶ 64, following).

51. The radius shown in Exhibit B is useful also to illustrate the degree to which the Non-Participants, having made *no* application under the Zoning Ordinance, and seeking *no* affirmative relief whatsoever from the Board of Adjustment, are henceforth effectively required to contribute – *for a period certain to last several decades* - the free and unwilling use of their

respective properties, akin to an implied easement or servitude, or a trespass, supporting Applicant's IWT Project but to the detriment, loss and injury of these Non-Participants.

52. Shadow Flicker arises when the spinning turbine blades, interposed between a point of reception and a source of light (the sun), result in a strobe or pulse-like "light-shadow" sensation, moving rapidly upon and across the surfaces of adjacent homes, structures and terrain, as received in the eye of the beholder at a point of reception. Shadow Flicker requires no tangled scientific explanation, as the negative effect upon humans (having their eyes open) is readily perceived and recognized.

53. As Shadow Flicker does not yet exist for this Applicant's proposed IWT Project in Northwest Deuel County, Petitioners are prepared to display to this Court several videos of Shadow Flicker, playing upon and dancing across the interior and exterior parts of afflicted homes and other structures. Shadow Flicker, as perceived by humans and animals, is unpleasant, offensive, and unsettling. Petitioners propose to present evidence on this concern from other South Dakotans who now suffer from a Shadow Flicker invasion of their premises (the experiences of David Janes, from Toronto, being a case in point).

54. The Board of Adjustment's tight schedule to process Applicant's Special Exception Permit did not allow for the presentation of such information (more on this, *infra*); that said, Shadow Flicker is an inevitable product of the IWT Project, if or when such is built in a land where the sun, or the moon, often shines. Applicant has chosen to read the Shadow Flicker restrictions as applying only to that arising from the sun, rather than the inclusion of full moons.

55. Shadow Flicker is a form of waste or burdens created or arising from Applicant's intended IWT operations, and cannot be lawfully disposed of by merely casting or leaving it on the properties of Non-Participants, as an act of trespass. The Board of Adjustment has no power

to adversely confer any easement or servitude, in favor of Applicant's Shadow Flicker, over and upon the lands of Petitioners or other Non-Participants.

H. The Special Exception Permit Application:

56. According to the Staff Report of Deuel County Board of Adjustment, dated September 20, 2018, CRW2, as the Applicant, seeks a Special Exception Permit to operate a Wind Energy System within Deuel County, specifically, thirty-nine (39) turbines in Goodwin Township (spread around in Sections 4, 7, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, and 36); five (5) turbines in Havana Township (Sections 3 and 4); and twenty-four (24) turbines in Rome Township (Sections 6, 7, 17, 18, 19, 20, 21, 27, 28, 29, 30, 31, and 33). The IWT Project embraces sixty-eight (68) turbines, plus many more beyond this count in adjoining areas of Codington and Grant Counties.

57. Applicant proposes to use three types of turbines for this IWT Project, all manufactured by General Electric: (a) thirteen (13) 1.7 MW turbines, 103 meter rotor, 80 meter hub; (b) fifteen (15) 2.1 MW turbines, 116 meter rotor, 80 meter hub; and (c) two-hundred sixty-four (264) 2.3 MW turbines, 116 meter rotor, 90 meter hub. This information appears in a study prepared for Applicant by EAPC Wind Energy of Grand Forks, ND, authored, proofed and checked by Jay Haley, P.E. (hereinafter, the "EAPC Study"); Applicant's filed project maps represent that only the 2.1 and 2.3 MW turbines will be used in Deuel County.

58. Also according to the EAPC Study, quoting from the manufacturer, the sound level emitted by the 2.1 and 2.3 MW turbines is 107.5 dBA at the source; the only cure for such noise is *distance* – or, more precisely, *an adequate separation distance.* Petitioners state and allege to the Court that 1,945 feet, more or less, is not an adequate separation distance, and 45 dBA measured at the exterior wall of Petitioners' residences is neither an adequate nor a safe sound pressure level for the Petitioners and their respective families and visitors, whether while

within the residence, without other structures on their properties, or the time while performing activities outside their respective four walls. Petitioners further state the residences of EHLEBRACHT and GREBERS were not included in the EAPC Study as to sound levels, even as the Zoning Ordinance fails to account for LFN, the infrasound that is also emitted from the operation of sixty-eight (68) IWTs (and noisy, emitting 107.5 dBA at the outset), such as this Applicant proposes to stuff into and among the rural areas of these three townships.

59. The EAPC Study uses computer modeling to conclude that the sound level of 45 dBA or less can be maintained at the residences of all Non-Participants, and likewise, the study further concludes, the duration of Shadow Flicker for each of these residences can be maintained at less than 30 hours annually (the study assumes so many cloudy days, but fails entirely to consider Shadow Flicker from a Harvest Moon or the Hunter's Moon, or the others that come each month of the year). Regardless, it is certain that *each* of the Petitioners' homes (and properties) is affected, to some extent, by Shadow Flicker.

60. The EAPC Study, being based on computer modeling for sound levels, is expressly built on the assumption of "moderate ground attenuation." If by "moderate" the study has assumed that fresh, green leaves are *always* growing on the cottonwood trees, or tall corn is *always* in the field, and the cordgrass and rushes are *always* tall in the ditches, sloughs, and other relict pastures, then the study's stated assumption is plainly faulty. *What about winter?* This is northern South Dakota! Winter is a time of hardscapes, when sounds are believed to bounce rather than be absorbed by the living landscape.

61. The EAPC Study offers no prediction of sound levels during the construction of Applicant's wind farm. Thus, no showing has been made Applicant can – or will – abide by the stated limits of 45 dBA during construction. The Zoning Ordinance is not applicable only to operational phase of the IWT Project.

62. Even assuming for sake of argument the EAPC Study is entirely correct in the findings, if correctly referenced in ¶ 58, it does not follow that Applicant's ability (or subsequent operator) to maintain these standards at the exterior wall of the residence of each Non-participating Owners, with the Respondent Board's approval, represents a lawful, concomitant exercise of a lawful, delegated Zoning Power. The Board of Adjustment has *no* right, power, privilege or license to take from Non-Participants, and bestow those benefits upon Applicant and those Participating Owners (formerly called "neighbors") in privity with Applicant.

63. The properties of Petitioners (in general) and their respective residences (in particular) will be invaded by noise levels (on the dBA A-weighted scale), low-frequency noise (LFN, otherwise unregulated by the Zoning Ordinance), and Shadow Flicker, all during the regular course of future IWT operations (over the projected course of several decades) that may be more or perhaps less severe than as is represented in the EAPC Study. These invasions preempt or erode the rights and prosperity of Petitioners to enjoy and otherwise deploy their properties as they wish. These grim prospects directly relate to the expected "market value loss" to Petitioners' respective properties by reason of the IWT Project. These summarized invasions and resulting injuries and losses arise from "Trespass Zoning," as complained of herein.

64. Applicant's Special Exception Permit request is supported by maps showing the location of Non-participating Owners (residences) by use of the Universal Transverse Mercator (UTM) coordinate system, with references stated in terms of "Easting" and "Northing." These sites are then used to document the computer modeling of both sound and shadow flicker intrusions. As best as can be discerned by Petitioners, these maps have been in the making for several years, and were being revised, updated and amended a day or two before the Special Exception Permit hearing, held September 20, 2018.

I. The Board's Public Hearing – September 20, 2018:

65. On September 20, 2018, the Board of Adjustment held a hearing on the Special Exception Permit in Clear Lake, South Dakota.

66. At the outset, the Board's chairman, Dennis Kanengieter, advised that Board member Paul Brandt had recused himself from the proceeding, and that alternate Gary DeJong would serve in his place. The reason for recusal was not stated. Paul Brandt has been a member of the Respondent Board for a number of years, voting in 2017, while sitting with the Planning Commission, to adopt the current form of the Zoning Ordinance.

67. During the period of 2016 and 2017, some public disclosure was made, or knowledge was gained, that said Paul Brandt was within the group referenced in this Petition as a "Participating Owner" (along with Gary Jaeger, member of the Deuel County Board of Commissioners). The current maps for the IWT Project now show otherwise. To what further extent Mr. Brandt, as member of the Planning Commission – or members of the County Board of Commissioners, or their appointees on the Planning Commission (hence, the Board of Adjustment) – have been, or may be, involved in the consideration of wind easements or ground leases, or any other arrangements with the Applicant, whether written or unwritten, is presently unknown by Petitioners.

68. After allowing the Applicant's project manager, Tyler Wilhelm, to speak and make a Power Point presentation, Mr. Kanengieter (per the official minutes of September 20, 2018):

> ". . . opened the meeting up to the public to speak. They were limited to 3 minutes per person."

69. Upon knowledge and belief, Petitioners state the imposed limits on the rights of Petitioners to speak in opposition to the Special Exception Permit, as referenced in ¶ 68, grow

out of recommendations by certain advisors to the Board, and also certain representatives of the "wind farm" development industry (the chickens being permitted to squawk, albeit briefly). Meanwhile, Applicant was unlimited in time for its presentation to the Board of Adjustment.

70. Thereafter, about 25 persons – including each of the Petitioners – addressed the Board, all speaking in opposition to some particular interest or interests, with several offering written statements or exhibits as to the issues of concern to them; given the attendance issues and the importance of this IWT Project to the health, well-being and property interests of Petitioners, the short time frame allotted by the Board of Adjustment was not an adequate allowance to be heard, and thus, Petitioners now raise due process concerns accordingly.

71. The Board of Adjustment asked a variety of questions of the Applicant's project manager, even as Petitioners were not allowed to make any further presentation based on those responses, nor were the Petitioners allowed to directly question the Applicant's witness. If a member of the Respondent Board didn't ask a particular question of Applicant's project manager, then it was neither asked nor answered.

72. Although not mentioned by name in the minutes of the Board of Adjustment, a Dr. Chris Ollson appeared as a witness for Applicant and responded to a few questions from the Board members – importantly, this witness indicated the manufacturer (General Electric) has issued a safety manual with a "stay clear zone" of 1,250 feet (as calculated and represented by Dr. Ollson) from the base of the turbine structure. This manual is not part of the Applicant's written presentation to the Board of Adjustment, nor has it been provided to Petitioners. According to the best understanding of these Petitioners, the manufacturer's manual is a so-called safety zone and one that *no humans* should occupy – however briefly - while the turbine is operating.

73. During a recess in the hearing on September 20, 2018, one Gary Jaeger, a member of the Deuel County Board of Commissioners, was observed to be discussing the public testimony with various members of the Board of Adjustment. Thereafter, Chairman Kanengieter thereupon closed the meeting, and advised further deliberation and a decision thereon would be postponed to October 11, 2018.

J. The Board of Adjustment Makes a Decision:

74. Due to scheduling conflicts, the continued meeting of the Board of Adjustment was further deferred until October 22, 2018, at which time the Board members again convened in Clear Lake.

75. Petitioners ask the Court to note that on October 16, 2018, representatives (and a lawyer) for Applicant appeared at a meeting of the Deuel County Board of Commissioners to advise that *if* the "application [of Applicant] meets the ordinance requirements then process needs to be honored by the Board; Deuel ordinance is consistent with PUC findings; never imposed less than 40 dba [sic]; Crowned Ridge One and Two will include 2.1 and 2.4 [2.3?] megawatt towers." This argument – made to the County Board of Commissioners, rather than the Board of Adjustment – seems quite similar to that recently rejected by the Circuit Court (Honorable Carmen Means) in 25CIV17-37, *Berg vs. Grant County Board of Adjustment, et al.* A mere ostensible meeting of the "setback requirements" or other stated criteria for a conditional use permit (Deuel County persists with the label "special exception permit") does not countermand or nullify the exercise of discretion by the Board of Adjustment, and also does not compel an approval of such a zoning request.

76. The asserted position of Applicant's counsel (October 16, 2018) does not undercut the main premise of this Petition and these Petitioners, which is to say: Apart from fully observing this distance or that requirement, even in successfully checking all the boxes that may

be required of this Applicant, as outlined in Section 1215 of the Zoning Ordinance, the Board of Adjustment has no authority to exercise discretion over a matter, when such exercise also requires the kind or type of power and authority that the South Dakota Legislature itself lacks, and never delegated to the Deuel County Board, when taking up the pen to write the provisions of the Zoning Ordinance, including Section 1215.

77. That said, and returning to the date of October 22, 2018, the Board of Adjustment again met in Clear Lake, and proceeded to ask the Applicant's representatives or witnesses a series of questions. Petitioners or others were not permitted to ask questions or to make any further presentations based on Applicant's responses.

78. According to draft minutes supplied to Petitioners by the zoning office of Deuel County, the Board of Adjustment members then asked themselves (or each other – the minutes are not clear in that regard) these questions thought pertinent:

> 1. Are you satisfied the application was received 4 weeks prior to our meeting?
>
> 2. Does this application meet the definition of a Wind Energy System?
>
> 3. Do you agree that this permit should not become effective until all required permits are granted by the state and federal government, including the remaining applications and licenses referenced in the application?
>
> 4. Did the application and testimony at this meeting allow us 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, erosion and sediment control, electromagnetic inference, lighting, turbine spacing, footprint minimization, collector lines, feeder lines, decommissioning, tower height and clearance, and noise?
>
> 5. Has the applicant demonstrated the ability to meet required setbacks for turbines from property lines, right-of-way, residences, businesses, government facilities and other structures, uses or features which would require setback?
>
> 6. Has the applicant submitted Boundaries of the site proposed for WES on a USGS Map, a map of easements, copies of easement agreements with

landowners, maps of occupied residential structures, businesses, churches, and buildings owned and/or maintained by a governmental entity, maps of sites for WES, access roads, and utility lines, location of other WES in general area, project schedule, and mitigation measures?

7. Does the agreement in the letter of assurance that the applicant will obtain a haul road agreement satisfy the requirement for a haul road agreement?

8. Are there any other issues brought up with the application or during testimony which relate to the Zoning Ordinance or Land Use Plan that you feel need to be addressed?

9. Do you agree we are empowered to issue the permit?

10. Do you agree that this will not adversely affect the public interest if operated according to our ordinance and the conditions prescribed?

11. Does the Board request the zoning officer to prepare the findings of fact consistent with these questions to be approved by the Chairman of the Board; and for the zoning officer to issue the Special Exception Permit and any letters of assurance, building permits or other items associated with said Special Exception Permit?

12. Does the Board agree the conditions recommended by staff should be agreed to by the Applicant and/or have any additional recommended conditions to add to this permit?

79. Thereupon the Board of Adjustment's proposed or draft minutes then further provide:

Motion by Dahl, seconded by Kanengieter, to approve the Special Exception Permit for the Crowned Ridge Wind II, LLC Wind Farm to construct and operate up to 153.6 MW Crowned Ridge Wind II, LLC Wind Farm with up to 68 wind turbines. The proposed Wind Energy System is located in the following sections and townships: Goodwin Township (T116N, R50W) in sections 3-9, 13, 15-36; Havana Township (T115N, R50W) in sections 3-8, 17 and Rome Township (T117N, R50W) in sections 6-9, 17-21, 27-35, all in Deuel County in an Agricultural Zoned District. Condition to use Aircraft Detection Lighting System where possible and applicable according to the FAA, for the purpose of this application substantial construction shall be considered the completitions [sic] of at least 25% of the towers in the final layout are erected and to include the other conditions that [Luke] Muller read during the meeting. Kanengieter called a roll call vote: Dahl-yes, Rhody-yes, DeBoer-yes, DeJong-yes Kanengieter-yes. Motion carried.

80. By adopting the motion outlined in ¶ 79, the Board of Adjustment effectively provided an affirmative answer to each and every of the twelve questions poised and as outlined in ¶ 78. Being mindful of the decision in *Hyde v. Sully County Board of Adjustment*, 2016 S.D. 65, 886 N.W.2d 355, while also being uncertain of exactly *what*, on the date of this Petition, may have been filed in the office of the Board of Adjustment (SDCL § 11-2-61), or *when*, Petitioners believe the affirmative, unanimous vote taken by the Respondent Board on October 22, 2018 may be construed as the "Decision" of the Board, and thus this Petition is herewith presented (and within 30 days thereof) to the Court on the issue of whether a Writ may issue.

K. The Decision is Illegal:

81. All of the foregoing matters and allegations considered, Petitioners now state and allege to the Court that the October 22, 2018 Decision of the Respondent Board is illegal on one or more of the following grounds:

A) The Decision, ostensibly based on Section 1215 of the Zoning Ordinance, represents a taking of or an infringement or burden upon the collective and individual property rights of Petitioners, regarding the right of an owner to have exclusive rights of possession and enjoyment, save only such rights as have been permitted or accepted by the owner, and a conferring of those rights upon or for the direct benefit of Applicant and the indirect benefit of various and sundry Participating Owners.

B) The South Dakota Legislature is constitutionally inhibited from the taking of private property for a public use absent the payment of just compensation.

C) The South Dakota Legislature cannot delegate to the counties, in the guise of the Zoning Power, any power, function or form of proceeding that the Legislature itself cannot exercise.

D) The Zoning Ordinance, Section 1215, as applied here, is a form of an unlawful taking of Petitioners' properties for the benefit of Applicant and those who are in privity with Applicant, namely, the Participating Owners.

E) As applied to Petitioners, the Zoning Ordinance, Section 1215, is in the nature of an easement or a servitude, in favor of Applicant and its Participating Owners (those in privity of contract with Applicant), which affects the right to use and occupy Petitioners' properties in a manner otherwise consistent with the Zoning Ordinance's provisions for all lands within the Agricultural District, and to that extent, the easement or servitude, all without benefit of either privity or consent by the Non-participating Owner, has been or is about to be taken without compensation by the actions of the Board of Adjustment.

F) The uses proposed by Applicant involves the emission of sound, both dBA A-weighted scale, and Low Frequency Noise, which may or is likely to cause or lead to adverse health, safety and welfare consequences to Petitioners, their families and invitees, even as the proofs and studies offered by Applicant as to compliance with the Zoning Ordinance's noise level limits are deficient, the resulting computer modeling being based on a critical faulty assumption, namely, that "moderate ground attenuation" is ever present in this environment. Petitioners also stress that the sounds sure to be emitted from these 68 wind turbines is a new threshold of sound – sound not presently existing or emitted within these townships, and thus results in significantly greater sound pressures reaching the residences of Petitioners than the current ambient sound levels within this decidedly rural area. Petitioners further state the residences of GREBERS and

EHLEBRACHT are *not* included in the EPAC Study as to projected sound compliance.

G) The uses proposed by Applicant involve the infliction of Shadow Flicker, for some part of the year, upon each of the Petitioners residences and properties; this is an unwanted and unsettling invasion by Applicant's intended operation of the sixty-eight (68) IWT installations in these three townships; in support of their claims, Petitioners wish to present video evidence of Shadow Flicker along with and the testimony of other South Dakota residents now afflicted by this unwelcome, dizzying phenomenon, while trapped into continued ownership of heavily draped and shuttered homes they cannot sell (as case in point, David Janes, Petitioners believe, is ready, willing and able to provide relevant testimony to the Court about his own personal experiences living adjacent to a nearby "wind farm").

H) Applicant's own expert testified to the Board of Adjustment on September 20, 2018, that the turbines to be used in the Crowned Ridge Wind II project are General Electric models, for which the manufacturer names a 1,250 foot keep-your-distance zone (as calculated by Dr. Chris Ollson, not a medical doctor); yet, the maps of the project provided to the Board of Adjustment show turbines in a number of cases being installed closer to certain roads and highways, in apparent violation of the General Electric's warning, as determined by Applicant's expert.

I) As a consequence of the foregoing statements of the manner of illegality, the Board of Adjustment is attempting to employ a kind of "Trespass Zoning" principal, which as further referenced or described in this Petition, confiscates, takes, or destroys the various rights of these Petitioners as to and in the

occupation, enjoyment, and use of their own lands. In such manner, the Board is exceeding its authority, and is acting beyond its lawful jurisdiction.

J) As evidence of the illegal nature of the determinations being made by the Board of Adjustment under the Zoning Ordinance, the regulations providing for setbacks from the exterior walls of residences are markedly different for certain homes that are otherwise similarly situated, which difference, Petitioners submit, is a violation of SDCL § 11-2-14, such provisions being otherwise discriminatory as to Petitioners, to their injury, and a denial of equal protection of the law.

K) The properties of Participating Owners may very well increase in market value over time, notwithstanding proximity to this "wind farm," due to the fact such persons are in privity of contract with Applicant and assigns, with some form of compensation or revenue over a period of time being promised; however, the properties of Non-participating Owners are likely to be harmed by the invasive presence and proximity of Applicant's so-called "wind farm," as these Petitioners, having given no license, easement or other interest in favor of Applicant, must bear fully the risks and detriments of the proximity of such "wind farm" operations, and for decades to come, without being asked or compensated for the privilege. This Special Exception Permit will dramatically and permanently change this "neighborhood" of Deuel County, a form of "Trespass Zoning" as referenced in and illustrated by this Petition. The State's delegated powers are subject to constitutional and statutory limits, and thus, the Zoning Powers taken up by Deuel County likewise. Petitioners are harmed, left with diminished if not destroyed market value of their respective properties, while Applicant along with many cohorts in privity of contract, devour the economic benefits of not insuring,

maintaining or sustaining the burdens of ownership of the adjoining properties of Non-Participants. This is stealing, even as the fox gets fatter, and all society within the chicken house is destroyed. The Zoning Ordinance, Section 1215(2)(c), prevents placement of a wind turbine close to the property line of another owner – if less than 110% of the height, then a wind easement must be "obtained from the adjoining property owner." The right to keep an unobstructed wind flow is not the only valuable attribute of property ownership – even when the fox along with the "fox-approved" Zoning Ordinance say otherwise.

L) Given time limits of only three (3) minutes (each) to present their concerns to the Board of Adjustment, these Petitioners (as the veritable chickens in this struggle) have not had the privilege of a meaningful opportunity to oppose the relief sought by Applicant, and such limitations, given the economic and risk of health and related consequences to Petitioners, implicates concerns of procedural due process, namely, the Board's withholding or denial of an adequate and sufficient opportunity to be heard.

M) Respondent Board has not disclosed to these Petitioners the identity of those who, as Participating Owners, are currently in privity of contract with Applicant for purposes of this IWT Project, although such is required by terms of the Zoning Ordinance's Section 1215; Petitioners, accordingly, are not presently aware of what family or other relationships may now exist between such Participating Owners and those exercising quasi-judicial powers on behalf of Respondent Board, or those persons having the power to appoint such members.

N) The Special Exception Permit is neither fully nor properly supported by the evidentiary elements required by the Zoning Ordinance or other applicable law, and the approval thereof by the Board of Adjustment is an abuse of discretion.

L. Prayer for Relief:

Wherefore, Petitioners pray for relief as follows:

82. That pursuant to SDCL § 21-31-3 and § 11-2-62, upon such further notice as the Court deems appropriate, the Court issue a Writ of Certiorari to the Respondent, Deuel County Planning Commission, sitting as the Board of Adjustment.

83. That pursuant to SDCL § 21-31-5 and § 11-2-62, the Court further issue within the Writ a restraining order, preventing the Respondent, or any other board, agency or official of Deuel County, from taking any further action with respect to any Special Exception Permit, building permit or other land use rights, concerning the sites as contemplated by Applicant.

84. That the Court, upon such further proceedings as deemed appropriate, including the taking of evidence by referee or otherwise, reverse the decision or determination of the Respondent Board of Adjustment, in the form of the motion adopted October 22, 2018, or any subsequent determination, if any, concerning the specific CRW2 IWT Project and site for location thereof within Deuel County, as proposed by Applicant, on one or more of the grounds as alleged in this Petition.

85. During discovery and the taking of evidence, as authorized under the Writ, Petitioners, *inter alia*, intend to inquire of the individual members of the Deuel County Board of Commissioners as to which of them, if any, or their family members, have engaged in discussions of the facts and circumstances leading to this Special Exception Permit with persons representing or acting on behalf of Applicant, and also as to which of them, if any, or their family members, have entered into privity of contracts (or discussions or negotiations related to

any contract intended but not yet executed) with Applicant for the siting of wind turbines, and have also engaged in discussions of the facts and circumstances with any one or more members of the Respondent Deuel County Planning Commission, sitting as the Board of Adjustment (the Board of Commissioners having powers of appointment over Respondent's constituency), the Board of Adjustment being a body that exercises quasi-judicial powers, and likewise as to those members of the Respondent Board, who, if any (or their respective family members) have engaged in any discussions of contracts or potential contracts (including easements or licenses) with Applicant or Applicant's agents or representatives, or have entered into any such contracts with Applicant or affiliates of Applicant.

86. That the Court determine, in due course, the Applicant's Special Exception Permit is not the type or kind of relief or remedy that may be lawfully awarded within the context of the Zoning Ordinance and under the facts and circumstances presented here. Applicant proposes (a) the construction and operation of some 68 wind turbines, spread across thirty-seven identified sections of land (embracing some 19,000 leased acres, or an average of one turbine for each 280 acres, more or less), cumbersome physical facilities (each having the ability to fall over, sling ice, lose turbine blades or portions thereof, and to catch on fire), that each represent a height of an approximate 45-story building; (b) the scattered use of wind turbines within these three townships, each turbine emitting, at a very high altitude, sound levels at or near the source of 107.5 dBA, for which the only cure is *adequate separation distance*, even as recent health studies affirm that 45 dBA, as called out in the Zoning Ordinance (a ceiling level, the Petitioners further stress, recently adopted by the Deuel County Board of Commissioners based on wind industry representations that they could meet *that* ceiling as to non-participating homes, not because sound scientific medical testimony, independent of this wind industry, was adduced in support), is *not* a safe long-term exposure level for the human auditory system and the human

need for daily restfulness; (c) the use of turbines that will emit LFN (or infrasound, noise that can be felt, otherwise below the scale detected by the human ear) for which there is no regulation in this fox-approved Zoning Ordinance; (d) the periodic dumping or disposal of Shadow Flicker upon the adjoining lands, including those of Petitioners, thus representing, *at the sly urgings of the fox*, a further invasion of the residences and properties of Petitioners, activities that are ostensibly blessed and protected by the Zoning Ordinance and Special Exception Permit, while likely leading to the extreme discomfort and annoyance of Petitioners; and (e) to install these 68 new wind turbines, at points set back from various highways and roads in such a manner that may facially comply with the Zoning Ordinance (just as the fox requested and designed it), but which yet, rather surprisingly, is in conflict with the revealed, calculated "stay-back" zone recommended by the manufacturer of the wind turbines, thus presenting a hazard to the health, safety, comfort, and well-being of Petitioners and all those who must pass by or live in and around this Applicant's IWT Project, carrying the innocent label of "wind farm." In totality of these uses and circumstances, Applicant's Special Exception Permit must be seen for what it truly is: a *de facto* taking of, under color of law, but in reality, an intrusion upon private property (namely, that of Petitioners), somewhat resembling an implied easement or servitude, but adversely seized from the hands of Petitioners without just compensation, even while being unanimously approved by the Respondent Board of Adjustment in a purported exercise of quasi-judicial powers, the effect of which is to confer the benefits of this taking upon both the Applicant and those in financial privity with Applicant. The Special Exception Permit – in the context of this "wind farm" - is an invidious form of "Trespass Zoning," where Petitioners *lose* rights of enjoyment and future use in their respective properties, while Applicant *gains* accordingly, albeit somewhat obliged to share the spoils with Participating Owners and, of course, the County's own fisc. But, the legal power to take, in this bold, intensive, conflictual

and controversial way, has neither been vested with nor delegated to Deuel County as an actual Zoning Power. The Legislature – itself lacking such powers – has not delegated to any county the ability to exercise essential quasi-judicial powers, which under the guise of the Zoning Power and in the form of a Special Exception Permit, may be pervasively and intrusively inflicted upon selected citizens and residents, for the benefit of those "neighbors" (Participating Owners) in privity of contract with Applicant. The Respondent Board has acted beyond its lawful jurisdiction.

87. That the Court award costs to Petitioners and against Respondent, for having acted in an absence of proper jurisdiction, in the manner as stated and alleged hereinabove, or that as the decision of Respondent, sitting as the Board of Adjustment, is not in conformity with the requirements of the Zoning Ordinance, the Comp Plan (the proposed use, on this scale, of this density, and consequential impact upon both adjoining properties and inhabitants, is simply not compatible with others, as required), and other governing law and, therefore, is illegal.

88. That the Applicant's submission, comprising the request for Special Exception Permit, does not facially comply with the requirements of the Zoning Ordinance; for example, submitting an endless compilation of those formal filings previously provided to the Register of Deeds, captioned "memorandum of leases and agreements," does not meet the requirement that "copy of easement agreements with landowners" be submitted to the Board of Adjustment (Section 1215.15.c.). A memorandum of leases and easements, already recorded with the Deuel County Register of Deeds, is *not* itself *the* easement agreement with those several landowners (formerly known as "neighbors") declaring themselves ready and willing to serve as hosts by privity of contract with Applicant. The Decision is, therefore, illegal, and should be reversed.

89. The Zoning Ordinance, as amended in 2017, provides for setbacks from "existing Non-Participating residences" (Section 1215.2.a), thus inviting the use of Trespass Zoning, as

alleged, upon the properties of Petitioners, such setbacks also being arbitrary, unequal, and discriminatory in comparison to the generous setbacks (1-mile) afforded to others within the Zoning Ordinance (the "others," apparently, being deemed as more deserving of greater protection, through increased setbacks, from the noise, hazards, Shadow Flicker, and risk of being situated, even while attempting to live one's life, at a site much too proximate to one or more of the 68 gigantic, outsized industrial plants that this Applicant proposes to unleash within what is now a quiet rural neighborhood), all in such a manner that violates both state law and the constitutional rights of Petitioners concerning equal protection of the laws. The Decision, accordingly, carries into effect an unlawful Zoning Ordinance provision.

90. That the Decision of the Respondent Board of Adjustment be reversed, together with an award of all other relief allowed by law in these circumstances.

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

Respectfully submitted,

/s/ A.J. Swanson
A.J. Swanson

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Attorney for Petitioners,
GARRY EHLEBRACHT, STEVEN GREBER, MARY GREBER, RICHARD RALL, AMY RALL, and LARETTA KRANZ

(Verification of Petitioners follow on separate pages)

STATE OF SOUTH DAKOTA) : SS COUNTY OF DEUEL)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
In the Matter of Special Exception Permit Application of Crowned Ridge Wind II, LLC (Deuel County Application WES Sec. 1215) GARRY EHLEBRACHT, STEVEN GREBER, MARY GREBER, RICHARD RALL, AMY RALL, and LARETTA KRANZ, Petitioners, vs. DEUEL COUNTY PLANNING COMMISSION, *sitting as* DEUEL COUNTY BOARD OF ADJUSTMENT, Respondent.	19CIV18-000061 **MOTION TO INTERVENE**

Crowned Ridge Wind II, LLC ("Crowned Ridge"), by and through its attorneys of record, and pursuant to SDCL § 15-6-24, moves the Court for an Order allowing it to intervene as a respondent in the above-entitled matter.

In support of this Motion to Intervene, Crowned Ridge states that it has an interest in this action, as it was granted the Special Exception Permit that is the subject of Petitioners' Petition for Writ of Certiorari. Crowned Ridge seeks to construct wind turbines on land situated in Deuel County, South Dakota, and is directly affected by the outcome of the Court's decision on the Writ of Certiorari. Crowned Ridge submits that

Filed: 11/20/2018 3:00 PM CST Deuel County, South Dakota 19CIV18-000061

its interests will not be adequately protected by the named Defendant, as they have distinct interests. Finally, in their Petition for Writ of Certiorari, Petitioners indicate they do not oppose or object to Crowned Ridge's intervention.[1] *See* Petition for Certiorari, p. 2, ¶ 2.

Dated this ____ day of November, 2018.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

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[1] Because Petitioners have indicated they do not object to Crowned Ridge's intervention, no supporting brief is being submitted along with this Motion. If the Court desires briefing on the issue, Crowned Ridge will, of course, submit such briefing.

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

In the Matter of Special Exception Permit Application of Crowned Ridge Wind II, LLC (Deuel County Application WES Sec. 1215)	
GARRY EHLEBRACHT, STEVEN GREBER, MARY GREBER, RICHARD RALL, AMY RALL, and LARETTA KRANZ,	19CIV18-000061
Petitioners,	WRIT OF CERTIORARI
vs.	(SDCL § 11-2-61)
DEUEL COUNTY PLANNING COMMISSION, *sitting as* DEUEL COUNTY BOARD OF ADJUSTMENT, and CROWNED RIDGE WIND II, LLC,	
Respondents.	

THE STATE OF SOUTH DAKOTA TO:

RESPONDENT DEUEL COUNTY PLANNING COMMISSION, SITTING AS THE DEUEL COUNTY BOARD OF ADJUSTMENT, AND DEUEL COUNTY STATE'S ATTORNEY, JOHN D. KNIGHT, GREETINGS:

IT APPEARING: upon the Petition for Writ of Certiorari, verified by Petitioners GARRY EHLEBRACHT, STEVEN GREBER, MARY GREBER, RICHARD RALL, AMY RALL, and LARETTA KRANZ, now being presented to this Court pursuant to SDCL § 11-2-61, and concerning the certain action of Respondent Board of Adjustment made on October 22, 2018 ("Decision"), under provisions of the Deuel County Zoning Ordinance and as to a Special Exception Permit sought by CROWNED RIDGE WIND II, LLC, a Delaware limited liability company ("Applicant"), having an address of Corp Gov – Law/JB, 700 Universe Blvd., Juno Beach, FL 33408, and a registered agent and office within the state of Corporation Service Company, 503 S. Pierre St., Pierre, SD 57501-4522; Applicant seeks the permit for the

construction and operation of sixty-eight (68) wind turbines, upon some 19,169.54 acres of leased lands, situate within Goodwin, Havana, and Rome Townships, within Deuel County, South Dakota; and

IT APPEARING FURTHER, as the statute requires an assertion that the action taken is illegal, in whole or in part, and specifying the grounds of the asserted illegality, the Court observes that the Petition for Writ of Certiorari, filed on November 15, 2018, makes a number of claims regarding the requirements of the Deuel County Zoning Ordinance, including claims the Decision entails approval of proposed activity of such scope and risk of harm and loss to Petitioners, and that, in the totality of the circumstances, represents an exercise of governmental power beyond the scope of the Zoning Power as may be lawfully delegated by the South Dakota Legislature, and inferentially, the potential illegality of Respondent's action, all such allegations, collectively, being deemed sufficient, as threshold matter, to warrant and support the issuance of a writ as sought; and

IT APPEARING FURTHER, upon the unopposed motion and the Court's order entered November 26, 2018, Applicant, CROWNED RIDGE WIND II, LLC, has been permitted to intervene as a party respondent, and GOOD CAUSE NOW APPEARING:

IT IS ORDERED the Writ is hereby allowed for purposes of conducting the review envisioned by the statute, with service hereof (along with a true copy of the Petition for Writ, with verifications and Exhibits A and B, and other initial pleadings, if any) to be made by U.S. mail (or service may be admitted) upon (a) any member of the Deuel County Planning Commission, sitting as the Deuel County Board of Adjustment, (b) upon either the Deuel County Auditor or Zoning Administrator or officer, and (c) by means of ECF to the Deuel County State's Attorney, John D. Knight; and

IT IS FURTHER ORDERED the Board of Adjustment shall make a return of the papers before Respondent as to the matter identified in the Petition, including therein all matters

considered by the Board of Adjustment in reaching the action taken, within 60 days of the date of notice of entry or of allowance of this Writ (or other satisfactory proofs of service), or within such additional time as the Court may allow, the return to include a true copy of the Deuel County Zoning Ordinance, and Deuel County Comprehensive Plan, each as was in force and effect on the date of the action taken, and all other matters of Deuel County resolution or ordinance as relate or respond to the assertions or claims set forth in the Petition for Writ, all such matters returned to be served also upon counsel for Petitioners; and

IT IS FURTHER ORDERED, notice of the issuance of this Writ shall be given to Applicant, CROWNED RIDGE WIND II, LLC, as intervening respondent, by means of ECF to the several counsel appearing for such Applicant, and in the event Petitioners seek to stay the proceedings to be reviewed by Writ, in accord with SDCL § 11-2-62, separate notice of the application shall be given to Respondent Board of Adjustment, Deuel County State's Attorney and any other counsel appearing for Respondent Board of Adjustment, as well as counsel appearing for the Applicant, as intervening respondent; and

IT IS FINALLY ORDERED: whether upon motion of a party or *sua sponte*, the Court may issue such other and additional orders in this matter for purposes of administration of justice, or in the hearing or trial of the case, and the parties shall be entitled to exercise written or other discovery methods as provided for by Chapter 15-6, SDCL.

Signed: 11/29/2018 10:46:57 AM

BY THE COURT:

Issued:

Honorable Dawn M. Elshere
Circuit Court Judge

Attest:
Reichling, Sandy
Clerk/Deputy

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF GRANT	)	THIRD JUDICIAL CIRCUIT

In the Matter of Conditional Use Permit Applications of Crowned Ridge Wind, LLC & Crowned Ridge Wind II, LLC., assigned CUP08172018,	
JARED KRAKOW, MEGAN KRAKOW, KEVIN KRAKOW, CINDY KRAKOW, KELLY OWEN, and KEVIN OWEN, *Petitioners,* vs. GRANT COUNTY PLANNING COMMISSION, *sitting as* GRANT COUNTY BOARD OF ADJUSTMENT, *Respondent.*	25CIV19-25CIV19-000007 PETITION FOR WRIT OF CERTIORARI (SDCL § 11-2-61)

COME NOW these Petitioners, namely, JARED KRAKOW, MEGAN KRAKOW, KEVIN KRAKOW, CINDY KRAKOW, KELLY OWEN, and KEVIN OWEN (collectively, "Petitioners"), each a landowner and resident of Grant County, South Dakota, by and through their undersigned attorneys of record, A.J. Swanson, of Canton, South Dakota and Jared Gass, of Brookings, South Dakota, and by this Petition for Writ of Certiorari ("Petition"), and now state and present to this Court, upon their knowledge, information or belief, as follows:

A. Preface:

1. This Petition is a challenge to land use rights being conferred upon two affiliated foreign limited liability companies (identified herein) for the construction of another so-called "wind farm" in Grant County, this being the fifth and sixth such similar land use right granted by government boards and officials over the course of a relatively short time period (since March 2017). Despite the benign title of "wind farm," there is *nothing* associated with this kind of an

industrial complex that is remotely "agricultural" in nature, nor is it a land use historically associated with farms and farming in South Dakota. The moving pieces and components of the "wind farm" are so inherently noisy and obnoxious in their operation (when operating, and indeed, even when not), and also potentially dangerous to human life, property, and wildlife that a "wind farm," as such, might *only* be constructed and maintained in a remote, rural area, relatively free from potential human conflict. But, it does not follow that *the* rural area in and around the farms, ranches and residences of these Petitioners in Grant County is a *lawful* place to build and maintain this "wind farm," an immense, constructed result that, once built and in place, will be an ever-present blight upon, and pose a hazard to, the landscape and community, likely to last for the remaining lives and being of each Petitioner coming before this Court.

2. During the May 2014 shareholders' meeting, Berkshire Hathaway's CEO, Warren Buffett (also known as the "Oracle of Omaha") was recorded to declare:

> I will do anything that is basically covered by the law to reduce Berkshire's tax rate. For example, on wind energy, we get a tax credit [Wind Production Tax Credit] if we build a lot of wind farms. That's the only reason to build them. They don't make sense without the tax credit.

3. While Buffett and Berkshire focus on developments in Iowa, the northeastern counties of South Dakota have garnered attention from NEXTERA ENERGY, INC. (NYSE:NEE) and APEX CLEAN ENERGY. Collectively, these entities – and their many predecessors and like-minded competitors, all looking to develop wind energy – are referenced herein as "Big Wind." Over the past several years, agents and managers of Big Wind have scoured Grant County, and adjoining areas of Codington and Deuel Counties. As a result, those referenced herein as "Participating Landowners," have expressed a willingness to surrender, in exchange for present payment of money and promises of future compensation, a significant range of usual landowner rights and privileges, whether such exchanges have been documented

in instruments entitled "land lease," or "wind easement," or even a so-called "good neighbor agreement." The land use permits (being challenged here by Petitioners) are essential, pre-construction steps, quickly facilitated by the prompt approvals of Grant County officials and boards, involving the exercise of quasi-judicial powers and a delegated zoning power claim, all arising under the current Grant County Zoning Ordinance ("Zoning Ordinance"). The land use permits (Conditional Use Permits, or "CUP"), together with Respondent's inherent claim of having the requisite power to act, are challenged by this Petition; challenged also is the manner in which the quasi-judicial powers have been exercised, by the Board of Adjustment – one that is not free from the taint of self-interests, bias and conflicts of interest.

B. Introduction:

4. Petitioners, by means of this Petition, with separate verifications annexed, allege that a certain decision was made by GRANT COUNTY PLANNING COMMISSION, sitting as the GRANT COUNTY BOARD OF ADJUSTMENT ("Respondent" or sometimes, "Board" or "Board of Adjustment," as then comprised), upon the affirmative, approving vote of a majority (6 in favor, 1 opposed), adopted during the Board's session held in Milbank, South Dakota, on December 17, 2018 (the "Decision"), concerning related applications (or perhaps a single application) for a Conditional Use Permit ("CUP"), jointly pursued by two affiliates of NextEra of Juno Beach, Florida ("NextEra"), namely, CROWNED RIDGE WIND, LLC and CROWNED RIDGE WIND II, LLC. ("Applicant," sometimes stated in plural form), collectively proposing to develop a "wind energy system" (sometimes, "WES" or "WES Project") in Mazeppa, Stockholm and Troy Townships of Grant County, South Dakota.

5. The Decision of the Board made December 17, 2018, is then further represented by certain "Findings of Fact," comprised of six (6) pages and sixteen (16) numbered paragraphs, signed by the Board of Adjustment's Chairperson, Nancy Johnson, on December 28, 2018,

reflecting also a "date filed" of December 28, 2018. Although Petitioners had understood the Applicants were *each* seeking a CUP, only one number appears to have been assigned – namely, CUP08172018 (a handwritten entry, appearing on the final page of Decision). A true copy of the Decision (including a report on the vote and an embraced Exhibit A, comprising a map of the proposed "wind farms"), as so comprised, is attached to this Petition as "Exhibit P-1" and incorporated by this reference.

6. Grant County is a large place (687 square miles) with a shrinking population base, untouched – *until now* - by the frenzy of the industrial wind turbine industry (including the WES Projects at issue here) in pursuit of the Wind Production Tax Credit, which also happens to be of interest to Mr. Buffett. As of this writing, there remains not a single, grid-connected wind turbine up and operating anywhere in Grant County. The effort to obtain land use permits (leading to hundreds of turbines of similar immense size) is well underway, however, particularly in the western townships of Farmington, Blooming Valley, Lura, Osceola, Mazeppa, Twin Brooks, Stockholm and Troy.

7. To the information and belief of Petitioners, the WES proposed by Applicants - to the extent proposed to be built within Grant County and as are described in the related CUP applications referenced in the Decision – embraces thirty-two (32) wind turbines. Petitioners further believe these turbines are represented by Applicants to consist of 2.3 MW General Electric models, having a rotor diameter of 116 meters (380 feet) and a hub height of 90 meters (295 feet), reflecting a total overall height (rotor blade extended horizontally) of approximately 485 feet. (The *sheer immensity of these dimensions*, in comparison to all other surrounding components, trees and structures of the landscape within the three townships of Mazeppa, Stockholm and Troy - cannot be overstated.)

8. The WES Projects proposed by Applicants within the CUP Application in question are part of a much larger, multi-county "wind farm" development, spread across the Grant, Deuel, and Codington Counties, South Dakota, and are known as the "Crowned Ridge Wind I" and "Crowned Ridge Wind II" projects (collectively, the "CRW Projects"). According to the Applicants, each of these CRW Projects, all told, is a 300 megawatt (MW) project, and obviously involving many dozens of wind turbines beyond the boundaries of Grant County.

9. As related in a certain facility permit application to the South Dakota Public Utilities Commission, dated October 17, 2017, these Applicants propose to also build a 34-mile transmission line (in Codington and Grant Counties), connecting the CRW Projects to the "Big Stone South Substation owned by Otter Tail Power Company." (Section 1.1, Executive Summary, at 1, PUC filing.) That transmission line does not appear to be part of the CUP Application; during the course of hearing on November 13, 2018, however, Applicants maintained that it was.

10. Further, the two CRW Projects, directly in question here, are also directly contiguous to the proposed WES Project of one CATTLE RIDGE WIND FARM, LLC ("CRWF" or the "CRWF Project"). Upon information and belief, Petitioners aver the CRWF Project is proposed as 127 turbines (similar size), with capacity of 200 to 400 MW project within Osceola, Mazeppa, Twin Brooks and Stockholm Townships, Grant County.

11. The CRWF Project was the subject of a prior CUP application to the Grant County Board of Adjustment, for which a determination of approval was obtained in March 2017 (minutes of BOA dated March 13, 2017); at the time of approving the CRWF Project, the Board was comprised of members Nancy Johnson, Mike Mach, Bob Spartz, Richard Hansen, Tom Adler, Gary Lindeman and Tom Pillatzki, with Dave Kruger and Don Weber serving as alternates. In considering the CRWF Project, member Richard Hansen recused, declaring

himself a party to the project in question, with Don Weber serving as alternate. The Board, in due course, approved the CUP for the CRWF Project exactly as proposed by that particular applicant.

12. As of March 2017, the CRWF Project was being fronted by an entity known as Geronimo Energy, LLC of Edina, Minnesota; later that year, the registered office and agent of CRWF was changed to the identical Juno Beach, Florida address otherwise appearing in public records for the Applicants identified in paragraph 4, above. Petitioners, therefore, believe that CRWF is now a sister entity to these Applicants, and as represented by one Tyler Wilhelm to the Board of Adjustment on November 13, 2018, Cattle Ridge is "part of our regional footprint," but "not the subject to today's review." That statement is true for this Petition, but the facts regarding CRWF have been stated here for context and relationship with these Applicants.

13. As stated previously, the Conditional Use Permit (one Application, but two Applicants, it appears) at issue here are approximately the fifth and sixth such "wind-farm" or WES Projects presented to the Board of Adjustment over the past twenty or twenty-four months. To the best information, knowledge and belief of Petitioners, each of the CUP Applicants (including those being challenged by this Petition) have come to Grant County and have been granted *exactly* what they have proposed in their respective CUP Applications, notwithstanding the expressed concerns of the local residents.

14. The constituency of the Board of Adjustment, at the time of the public hearing, held November 13, 2018, and at the time of the Decision made December 17, 2018 (entered in the Board's office on December 28, 2018), are these residents of Grant County: Tom Adler, Tom Pillatzki, Nancy Johnson, Richard Hansen, Mike Mach, Bob Spartz and Mark Leddy, with others – namely, Don Weber and Jeff McCulloch – serving as alternate members.

15. Two members of the Board of Adjustment deemed themselves recused (namely, Nancy Johnson and Richard Hansen, apparently due to being directly interested in the WES Projects then under consideration – but details are lacking, as Nancy Johnson was not identified as a "Participating Owner" – meaning, one willingly making room for a "wind farm," to be located, in part, upon their own property), on both November 13, 2018, and on December 17, 2018. After alternate members Don Weber and Jeff McCulloch were seated, the Board then additionally consisted of Tom Adler, Tom Pillatzki, Mike Mach, Bob Spartz and Mark Leddy.

16. That Chairperson Nancy Johnson, although recused on November 13, 2018 and December 17, 2018, then returns to her position to approve and sign the Findings of Fact (Exhibit P-1) comprising the Decision, filed December 28, 2018, approving the CUP Application for these Applicants, seems to suffer from a glaring legal juxtaposition.

17. Though the Board of Adjustment's Chairperson Nancy Johnson and member Richard Hansen (as of November 13, 2018) deemed themselves disqualified from deliberating on or approving the CUP Applications of "wind farms" in which they are said to have some direct interest, such persons, while sitting also as members of the Grant County Planning Commission, *have nevertheless continued to act* (also on December 17, 2018) as voting members in the preparation and recommendation of a new "wind farm" ordinance for Grant County (namely, 2016-01C - more on this topic later in this Petition).

18. The recusal and "no-recusal" circumstances (briefly referenced in paragraph 17) are of legal significance, as the developers of WES Projects openly supported adoption of the Zoning Ordinance amendments (per the minutes of the Grant County Planning Commission for December 17, 2018), even while many local residents objected to a new ordinance not sufficiently protective of the public's interests. Yet, these Applicants proved unwilling to wait for the new amendments to become effective – hence, the Decision would be entered by the

Board of Adjustment on December 17, 2018, notwithstanding the Board's adoption of a postponement motion on November 13, 2018 (as further referenced in paragraph 90, *infra*).

19. The two Planning Commission members (Johnson and Hansen) - with conflicts of interest such that they cannot serve as Board of Adjustment members - continued with writing the new Zoning Ordinance's Section 1211. The new amendment was then presented to and adopted by the County Board, an adoption which, in fact, duly transpired on December 28, 2018, even as the so-called "public input" opportunity in Milbank was held in the midst of a serious blizzard with no travel advised, and snowdrifts covered the courthouse parking lot. This frenzy is about what Petitioners have come to expect from a majority of Grant County officials, those with an obvious appetite for even more "wind farms" – the urgent need to act on December 28, 2018, Petitioners submit, is more about the departure of a long-time member of the County Board, favorably disposed to Big Wind's plans, as further referenced in paragraph 82, *infra.*

20. The described circumstances are indicative of a county - Grant County - carefully prepared over the years as someone's idea of a financial feast. Various officials and agents of Grant County (which is to say a majority, but not all of them) with economic self-interests at heart – after a false start some six years ago - have long anticipated WES Project developers in pursuit of tax credits (or whatever it is the "Oracle of Omaha" is also pursuing). Now, Big Wind has reached Grant County, contract forms and checkbook in hand, and the cooking of this desired feast has begun. To prepare the table, Grant County officials lay off onto Non-Participating Owners (including Petitioners), the burdens and detriments of being neighbors to WES Projects, thus limiting the scope and cost of "wind easements" or other contractual arrangements that must be funded by Applicants. Entirely uncompensated for their troubles and disruptions, Petitioners, *inter alia*, are adversely affected (and exposed to health risks) by the necessity of continuing to live and work in proximity to future "wind farm" operations.

C. Identification of Petitioners:

21. Each of the Petitioners identified and their respective interests is that of a "Non-Participating Owner" – meaning, Petitioners have entered into no lease, contracts or easements of any description to foster WES Projects (except as specifically noted in paragraph 25, following), so as to foster any aid, assistance or comfort to these Applicants, or to extend a legal or beneficial relationship in the use of their lands with or to and in favor of such Applicants and their covey of Participating Owners. Further, each of the identified Petitioners is the fee owner of his or her real estate, subject only to any encumbrances, reservations, easements and restrictions of record, none of which run in favor of Applicants, and each Petitioner claims to be the exclusive owner of his or her respective lands, as further referenced herein.

22. Those having the privilege of studying real property law under Professor Oliver E. Laymon (LL.B., 1947, Boston University) during his long tenure at the University of South Dakota, School of Law, will recognize that the kind and quality of fee ownership being claimed by each of the Petitioners (as a Non-Participating Owner) is that of "the entire bundle of sticks," representing "fee ownership" of the kind and quality recognized by SDCL § 43-2-1, *et seq.*

23. Further, Petitioners maintain that neither Grant County, as a political subdivision, nor either of the Applicants identified herein (except the one instance as noted in paragraph 25), have acquired any easement or right of access or entrance upon or over the properties of Petitioners, nor is there any lawful claim of a right or servitude to make adverse or unwelcome use of any of the properties of the Petitioners, with the exception of statutory highways (Chapter 31-18, SDCL) or those parcels (if any) acquired by Grant County for the making of road improvements.

24. JARED KRAKOW, spouse, MEGAN KRAKOW, together with their 3 children, (collectively, "JARED KRAKOW") reside at 16460 470th Ave., Strandburg, SD 57265. JARED

KRAKOW is the owner of two parcels of land, consisting of approximately 267 acres, in Sections 21 and 22, Township 118, Range 50 West (Troy Township, Grant County), and having lived at this address for several years. The JARED KRAKOW residence is located within the same farmstead of property owned by parents, Kevin & Cindy Krakow.

25. KEVIN KRAKOW, with spouse CINDY KRAKOW, reside at 16462 470th Ave., Strandburg, SD 57265, having resided at this address since 1986 (collectively, "KEVIN KRAKOW"), and being the owners of approximately 1,650 acres of lands in Sections 25, 26 and 27 of Troy Township, and Sections 31 and 32, Stockholm Township. KEVIN KRAKOW was recently paid the sum of $15,000 by interests aligned with these Applicants, to overhang a corner of the land in Section 31, Stockholm Township, with a powerline – to this limited extent, KEVIN KRAKOW is a "Participating Owner," but that potential, future powerline does not seem to be directly involved within the scope of this CUP. Having been paid for that specific small area of "overhang," however, KEVIN KRAKOW further notes that all the *rest* of his property is subject to the detriment arising from proximity to a "wind-farm," such property being used, without permission, to support the CUP Application in question and for the direct financial benefit of the Applicants but without any duty to pay "just compensation" to the owner (this taking, in the guise of the Zoning Power, is the essence of "Trespass Zoning," as referenced in this Petition).

26. KELLY OWEN resides with his minor children, Riley Owen and Kendall Owen (collectively, "KELLY OWEN") at 15629 468th Ave., Stockholm, SD 57264, being also the owner of 1,150 acres of land in Sections 8, 9, 17, 29, and 30 (Stockholm Township), Township 119 North, Range 50 West, Grant County. Additionally, KELLY OWEN is a partner in "OWEN BROTHERS," having ownership of an additional 460 acres, more or less, in Sections 9 and 17 (Stockholm Township).

27. KEVIN OWEN resides at 46845 SD Highway 20, Stockholm, SD 57264, with three minor children, namely, Ethan Owen, Joselyn Owen, and Preslie Owen (collectively, "KEVIN OWEN"). KEVIN OWEN is the owner of approximately 380 acres of land in Sections 20, 21, and 31 of Stockholm Township, has interests in an additional 388 acres in Section 18 (as beneficial owner), and is a partner in the partnership of OWEN BROTHERS, having land interests as referenced in paragraph 26.

28. The Petitioners, as described, have ownership interests in lands, and are nearby residents and make frequent use of the county, township and state highways that run either through or near the boundaries of the WES Projects proposed by the Applicants, and also their present affiliate (the CRWF Project, see paragraphs 10-12, above).

29. The lands and residences of the Petitioners are entirely located within the so-called "A" or Agricultural District of Grant County, as was previously determined by the elected and appointed leaders and officials of Grant County under the zoning powers delegated by the South Dakota Legislature, as further discussed and referenced within this Petition. Under the zoning regulations now existing, and also under the laws of the State of South Dakota, each Petitioner claims to be lawfully seized of the property interests referenced in the preceding paragraphs, and that the use of their respective properties is lawful and in full conformance with Grant County's zoning regulations. (Several sticks are involved here.)

30. Each Petitioner further claims the inchoate right, benefit and privilege of holding, developing, using and enjoying their respective lands in Grant County, both now and in the future, to the full extent permitted under the zoning ordinance adopted by Grant County. (More sticks within the bundle of fee title.)

31. Furthermore, Petitioners claim the right to make use of, to access, and to enjoy their real estate holdings, and their respective residences, and to also make use of the roads and

highways within the referenced Townships of Grant County, in a manner and as a place for safe conveyance, comparable to that enjoyed historically. (Again, more sticks.)

32. Petitioners, as fee owners of their respective lands, assert by virtue of SDCL § 43-2-1 and other laws, their ownership is "the right of one or more persons to possess and use a thing [in this case, land] to the exclusion of others." (More sticks in the hands of Petitioners, as fee owners, by virtue of these provisions.)

33. In addition to the claim of the exclusive right to occupy and enjoy their respective properties in Grant County, Petitioners state with certainty that none of their lawful rights and claims to these lands have been conferred upon any neighbors who are "Participating Owners," working in collaboration with these Applicants (except as to the limited powerline overhang easement, granted by KEVIN KRAKOW, as previously referenced in paragraph 25, above). Nor have Petitioners delegated their property rights to the officials of Grant County, including the Board of Adjustment, for infringement, conveyance, diminishment or debasement as these officials and agencies may wish or think best, whether such is being done under the guise of an exercise of the Zoning Power, or otherwise.

C. The Police Power, the Zoning Power, and the Delegation of Power:

34. Article 3, § 1, of the South Dakota Constitution vests the legislative power of the state in a Legislature, in which the police power is grounded, and of which the "zoning power" is kindred. As noted in *Cary v. City of Rapid City*, 1997 S.D. 18, ¶ 20, 559 N.W.2d 891, "[z]oning ordinances find their justification in the legislative police power exerted for the interest and convenience of the public."

35. The Legislature, as also noted in *Cary*, may delegate its powers to other officers and governmental subdivisions, as long as appropriate standards and guidelines are provided. *Id.*

36. In 1967, the Legislature delegated zoning power to the counties, statutory provisions having been much amended over the past half-century, comprising Chapter 11-2, SDCL.

37. To act upon this delegated power, a county must have a planning commission of five or more members, uneven in number, with at least one member being an elected member of the board of county commissioners. SDCL § 11-2-2.

38. The county planning commission is to prepare a comprehensive plan for the county, SDCL § 11-2-11, the purposes of this plan being:

> The comprehensive plan shall be for the purpose of protecting and guiding the physical, social, economic, and environmental development of the county; to protect the tax base; to encourage a distribution of population or mode of land utilization that will facilitate the economical and adequate provisions of transportation, roads, water supply, drainage, sanitation, education, recreation, or other public requirements; to lessen governmental expenditures; and to conserve and develop natural resources.

39. The "delegation-of-authority" statute also defines a "comprehensive plan" as that:

> . . . document which describes in words, and may illustrate by maps, plats, charts and other descriptive matter, the goals, policies, and objectives of the [board of county commissioners] to interrelate all functional and natural systems and activities relating to the development of the territory under its jurisdiction. SDCL § 11-2-1(3).

40. The proposed comprehensive plan, written and recommended by the planning commission, is then submitted to the county board for adoption by resolution, SDCL § 11-2-20, with the board's action on the plan being filed with the county auditor and a notice of fact of adoption published. SDCL § 11-2-21.

41. The planning commission is to also write and recommend the text of the zoning ordinance, which is to then be adopted by the board of county commissioners as an ordinance. SDCL §§ 11-2-13, -18, -20.

42. In adopting a zoning ordinance, the board of county commissioners may divide the county into districts, and within those districts, it may "regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures, or land." SDCL § 11-2-14. The statute further provides that "[a]ll such regulations shall be uniform for each class or kind of buildings throughout each district," and such regulations "shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration or scattering of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements."

43. To the extent a county adopts a zoning ordinance that allows a conditional use of real property, the ordinance is to "specify the approving authority, each category of conditional use requiring such approval, the zoning districts in which a conditional use is available, and the criteria for evaluating such conditional use." SDCL § 11-2-17.3. With regard to the "approving authority" for conditional uses, this same statute goes on to require consideration of "the stated criteria, 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 request."

44. The statute, SDCL § 11-2-17.3, adopted in 2004, might be viewed as the Legislature's clarification of the delegated power to conduct county-wide zoning. A companion statute, SDCL § 11-2-17.4, provides further definition:

> A conditional use is 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. A conditional use is subject to requirements that are different from the requirements imposed for any use permitted by right in the zoning district.

D. Grant County has Accepted the Delegation of Power:

45. The current Comprehensive Plan for Grant County (hereafter, generally referenced as the "Comp Plan") was the subject of public hearings in March 2004, having been heard on March 16, 2004, adopted and recommended by the Planning Commission on March 16, 2004, followed (apparently immediately) by a hearing held by the County Board on March 16, 2004, and adopted by resolution on March 16, 2004. (SDCL § 11-2-19 requires the county board to first *receive* the planning commission's recommendation before holding its own hearing, pursuant to published notice.)

46. The Comp Plan describes Grant County, comprised of 687 square miles, as having a declining population base, a long term, multi-caused trend dating back to 1960. (Comp Plan, pp. 5, 12.) Under the heading of "Future Land Use," and the label of "Fundamental Goals," the Comp Plan, at 24, sets forth eleven unnumbered goals, including these:

- To provide for orderly, efficient land development within the unincorporated areas of Grant County.
- To manage growth within the framework of the Grant County Comprehensive Use Plan and other municipal comprehensive plans.
- To promote compatible development in the rural area.
- To maintain a viable agricultural economy.
- To preserve the quality of life of the residents of Grant County.
- [To p]romote only responsible residential, commercial and industrial development based upon sound siting criteria.

47. The Comp Plan adopted in 2004 remains in place today (without any apparent amendment); thus, it is noteworthy this document says: "the bulk of agricultural land (cropland, rangeland, and pasture) that are not expected to experience any anticipated change during the planning period" can be referenced as "Areas of Development Stability." As to such areas,

"[t]here may be an occasional residence, or an agricultural-oriented commercial/industrial venture constructed, but the primary use or focus should remain agricultural." (Comp Plan, at 25.)

48. The Comp Plan also establishes "Agricultural Preservation Policies," which includes these statements:

- Preserve agricultural lands and protect the rural area from uses which interfere with and are not compatible with general farming practices.
- Promote development patterns which will avoid producing inflated agricultural land values.
- When considering future land use decisions, the preservation of agricultural land should be of significance.

49. In the entire thirty-nine pages of text, goals and policies, the Comp Plan says absolutely *nothing* – and offers no guidance whatsoever – as to *when*, *where*, *how* or *why* one or more of the rural areas of Grant County might be called upon to lend themselves (and their neighbors) as a captive host for industrial wind farms, or the development of Wind Energy Systems ("WES") as proposed by these Applicants.

50. Grant County's current Zoning Ordinance carries the label of Ordinance 2004-1; it appears this Zoning Ordinance was adopted April 13, 2004, the same date the Comp Plan became effective. The Zoning Ordinance divides the unincorporated area of Grant County into one of five enumerated zoning districts, "A" Agriculture being the relevant district for Petitioners and these Applicants.

51. The Zoning Ordinance, Section 1101.01, describes the form, function and purpose of the "A" district, as one "established to maintain and promote farming and related activities within an environment which is generally free of other land use activities."

52. Within the "A" district, Section 1101.02 sets forth a list of twelve "permitted uses" – ranging from agricultural activities to farm dwellings to public parks – that may be established, and for which premises may be used without advance or prior approval of the Board of Adjustment or other County officials.

53. A longer list of potential uses – some twenty-five in total – appears in Section 1101.03, under the category of "Conditional Uses." A "conditional use" is required to obtain a "Conditional Use Permit," under other provisions of the Zoning Ordinance. The long list of Conditional Uses that can be recognized in the "A" district includes: institution farms, including religious farming communities (in other words, Hutterite colonies); gravel pit operations; seasonal retail stands, including fireworks stands; church or cemetery; airports; Class A, B, C or D Concentrated Animal Feeding Operations; Agribusiness Activities, and "Wind Energy System." It is noted that a "Wind Energy System" can only be located within the "A" district, and only as a "Conditional Use."

54. The Zoning Ordinance itself – in Section 228 – defines a "Conditional Use" in this manner:

> A conditional use 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 conditional uses, as specific provisions for such exceptions are made in these zoning regulations. Conditional uses are subject to evaluation and approval by the Board of Adjustment and are administrative in nature. [Ord. 2004-1] [Emphasis supplied.]

55. Within the "A" district of this County, no structure is to exceed two and one-half stories (2 1/2) stories, or thirty-five (35) feet in height, per Section 1105.05, but with the exceptions of "Agricultural buildings; Chimneys, smokestacks, and cooling towers; radio and TV towers; Water tanks; Elevators; and Others, provided that they are not used for human

occupancy." Petitioners assume the last category is relied upon by the Board to permit the construction of wind turbines to a height of 485 feet, as humans would not ordinarily occupy the working area of a turbine. (No maximum, overall height is otherwise imposed on wind turbines – this is of some importance, since at the time of Zoning Ordinance writing in 2004, the typical wind turbine was perhaps 320 feet in height. The turbines involved here are said to be 485 feet, and continue to grow larger in other areas. Recently, wind developers have disputed the right of an Iowa county to limit the height of turbines at 600 feet. Is there a height limit in Grant County for turbines – either under the Zoning Ordinance, or the CUP in question? No.)

56. This expansive blessing within Section 1105.05 of the Zoning Ordinance does not detract from the simple fact that there are *few if any* broadcast towers approaching this height in Grant County (one in Section 30, Mazeppa Township, of unknown height), but *one* chimney or smokestack higher than 100 feet in Grant County, and no agricultural buildings, water towers or elevators coming anywhere close to even one-fourth or one-fifth of this height.

57. Petitioners note the Big Stone Plant controlled by Otter Tail Power Company, with 53.9% ownership, in the northeast corner of Grant County, has a stack height of 498 feet, just 13 feet higher than each of the wind turbines proposed by Applicants. This stack is one-of-a-kind for Grant County. The sheer, overwhelming presence of a *single* 485-foot turbine (with blade in full vertical position) – while carrying a 380-foot rotor assembly pinned at the 90 meter height (and rotating, of course) – cannot be overstated.

58. With these two Applicants, and for these two WES Projects alone (covered by one CUP), Petitioners must then multiply by thirty-two (32)! This result would be comparable to being surrounded (*permanently*, not some transitory conditional use, like selling fireworks in the lead up to July 4) by structures somewhat comparable in height to 32 of the current smokestack at the Big Stone Plant. Plus, these 32 "wind-farm" structures are also equipped with rotors of

380 feet diameter (190 foot radius), rotating at the hub height of approximately 350 feet, while also emitting or dumping noise onto the countryside of around 107 dB(A) from that extreme height (there are, of course, no trees in Petitioners' townships high or thick enough to block sound emissions from that height). Further, the rotors, as is asserted in this Petition, also have the distinct ability (like the young athlete winding up to throw the javelin, the rotor tips will spin at about 160 mph – or more) to shed and throw ice sheets and chunks over a significant distance, *if not parts and pieces of the rotors themselves* whenever such decide to delaminate rather than continue to function in proper rotation.

59. While keeping firmly in mind the definition of a CUP, as provided in Section 228 of the Zoning Ordinance, the end result of a so-called "wind farm" more closely resembles the invasion of a rural zoning district, one casting a permanent blight upon and a dancing shadow over the "neighborhood" (as referenced in Section 228), not some isolated or solitary landowner's wish to engage in a conditional use (such as a "home occupation").

60. Section 287 of the Zoning Ordinance defines "Wind Energy System" as:

> A commonly owned and/or managed integrated system that converts wind movement into electricity. All of the following are encompassed in this definition of system:
>
> a. Tower or multiple towers,
> b. Generator(s),
> c. Blades,
> d. Power collection systems, and
> e. Electric interconnection systems. [Ord. 2004-1, Rev. 2004-1G]

61. The Zoning Ordinance also includes Section 1211, specifically addressing "Energy System (WES) Requirements," provisions that run for under five pages of the ordinance (pp. 64-69). The stated purpose of these requirements – as a CUP Application – is to "protect the health, safety and welfare of the County's citizens." Nearly all of these provisions, Petitioners assert, deal with the arcane features of laying out and constructing of a so-called "WES," such as

"the permittees shall utilize all reasonable measures and practices of construction to control dust." (Zoning Ordinance, Section 1211.03.1.v.).

62. Section 1211, as adopted in 2004, does require the permittee (Applicant) to observe minimum spacing requirements, for example: from any "existing off-site residences, businesses, churches and buildings owned and/or maintained by a government entity shall be at least one thousand (1,000) feet, while from "on-site or lessor's residence shall be at least five hundred (500) feet," such distances being measured from the "wall line of the neighboring principal building to *the base of the WES tower.*" (Emphasis supplied.) Further, from the centerline of public roads, the distance is to be at least five hundred (500) feet or one hundred ten percent (110%) of the height of the wind turbines, whichever distance is greater. (The turbines proposed by these Applicants are represented to be 485 feet high, more or less.)

63. Several decades ago, governmental and wind-energy interests converged to create a so-called "Model Wind Energy Ordinance" (or similar title, hereafter "Model"), for purposes of advocating the Model to local governments exercising planning and zoning powers. The sponsors appear to have included the U.S. Department of Energy and lobbying interests, although a current review of websites failed to recover even a single version of these Models from the approximate era of 1995 to 2001.

64. Petitioners do assert to this Court that, judging entirely from current text of second or third iterations of the "Model" (while noting also the similarities with the Zoning Ordinance at issue here), such provisions were prepared *not* with the protection of the general public foremost in mind, but rather, the *objective of advancing wind farm development interests.* Governmental agencies then dutifully responded by encouraging local governments (counties exercising zoning powers, such as Grant County) to adopt a Zoning Ordinance something like the Model, including language so clearly friendly to pro-wind development interests.

65. Petitioners further believe that the reason the Model, dating back approximately two decades, can *no longer* be found or located on the website of U.S. Department of Energy is one of *official embarrassment* (assuming a governmental agency is capable of that emotion). In the light of knowledge developed from actual experience with "wind farms," the Model was biased and slanted in favor of wind development, with the goal of promoting and cheerleading development, while having little regard for the safety and property interests of the rural citizens where those "wind-farms" would someday hopefully materialize.

66. Petitioners further note that, at one time, the South Dakota Public Utilities Commission ("PUC") had a locally-developed version of the "Model" (now, the "South Dakota Model") available for downloading from its website; however, this South Dakota Model can no longer be located (by Petitioners' counsel) on the agency's website. What is likely a second-generation version of the South Dakota Model – dated in 2008 – is in the hands of Petitioners, but is also no longer available on the PUC website. Like the Model referenced in paragraphs 63, *et seq.*, the South Dakota Model was guided, if not suggested or indirectly written through suggestions and recommendations, by the many hands of "Big Wind," with provisions to be thereafter applied to WES Projects in South Dakota, when and as proposed by "Big Wind."

67. For years, Grant County – along with neighboring Codington County and Deuel County (and others) – have contracted with First District Association of Local Governments ("First District"), of Watertown, South Dakota, for assistance and direction in preparing plans and ordinances in conjunction with the Legislature's delegation of power to zone. The Comp Plans of each county served by First District strongly resemble each other, as do the respective Zoning Ordinances' provisions dealing with Wind Energy Systems (WES). Petitioners further believe that First District, in turn, was heavily influenced in the writing of Grant County's Comp

Plan and Zoning Ordinance – including the current WES provisions in Section 1211 – by the "wind farm" provisions from the South Dakota Model.

68. Thus, when Grant County wrote the Zoning Ordinance, by means of the Planning Commission (under the process referenced in paragraphs 41-42, above), adopting also the WES provisions in Section 1211 (as referenced in paragraphs 61-62), First District having prepared the proposed text, the County would adopt and deploy WES control provisions from sources that, in the first instance, were approved – if not ghost-written – by "Big Wind" itself, of which these Applicants are current exemplars, along with being the beneficiaries of Big Wind's earlier work.

69. As such, the resulting Grant County Zoning Ordinance is one that promotes "wind farm" development (although a "use" unmentioned in the corresponding Comp Plan). This viewpoint is advanced *entirely* at the expense of public safety (given twenty years or better of actual operational experience in other places), and is contrary to the vested interests of those with Grant County property desiring to continue ownership and enjoyment of their respective "bundles of sticks," as Non-Participating Owners, to include an inchoate future right to use and improve their property as they wish, in a manner consistent with the Zoning Ordinance.

70. In summary, Petitioners aver, the public safety and public interest shortcomings of the current Zoning Ordinance include these few examples, among other points of concern:

(a) *Setback Measurements.* In Grant County, the specified setbacks from turbines are invariably measured from the *base* of turbines, not the extended horizontal reach of the rotor. This means of measurement ignores the fact the rotor diameter, when wind direction flows perpendicular to the object, such as a road right-of-way, will extend about 190 feet closer to the object than when measured from the base – of particular concern when the blades start throwing ice sheets, for example. More as to this concern is outlined in subparagraphs, following.

(b) *Setbacks to Dwellings – Trespass Zoning.* With respect to dwellings (whether such are deemed "Participating" or "Nonparticipating" in relationship to the wind-farm developer), setbacks from turbines are also measured from the "wall line of the neighboring principal building" to the "base of the WES tower." This means of measurement does not even pretend to be concerned about accessory structures or outbuildings, such as shops, garages, etc., and also affords no protection for the Nonparticipating Owner to further improve his or her lands with other buildings that are even closer to the WES tower base than the measurement focused upon. This is the essence of the "Trespass Zoning" concept also stated in this Petition, and as annexed in Exhibit P-2 (incorporated by reference), whereby the "wind-farm," with CUP in hand, claims the right to adversely (inversely) occupy portions of a Nonparticipating Owner's property, without any permission, license or easement and, of course, also free of charge. This is an attempt to take, without just compensation, many of the sticks within the bundle represented by fee ownership of these nearby lands of Nonparticipating Owners.

(c) *Ice Throw & "Keep Out Zones" – GE's Formula.* The setbacks provided in the Zoning Ordinance, both the distance from the base of turbines to roads, or a "neighboring principal building," are inadequate from a public safety standpoint. General Electric, the manufacturer of the 2.3 MW turbines proposed for use by these Applicants, has published a short pamphlet entitled "Ice Shedding and Ice Throw – Risk and Mitigation;" this manual references "Wind Energy Production in Cold Climate," Tammelin, Cavaliere, et al., 1997, with a formula of **1.5 x (hub height + rotor diameter)**. In a recent Board of Adjustment hearing in Deuel County, for these same Applicants, a Dr. Chris Ollson (not a medical doctor, but a person who often testifies on behalf of "wind farm" interests, including these Applicants) is believed to have testified the safety exclusion zone for GE

turbines of this same size is 1,250 feet. Applying this published formula to this case, a stated hub height of 295 feet, plus rotor diameter of 380 feet equals 675 feet, times 1.5, yields 1,012.5 feet. That said, the Zoning Ordinance specifies a setback distance of merely 500 feet (from *centerline* of the road), or 110% of the height of the turbine (485 times 1.1 equals 533.5 feet). To the extent any wind turbine in this CUP Application is proposed to be set between 533.5 feet from "centerline" of the road, to upwards of 1,012.5 feet, however, General Electric's own published document suggests the turbine *is* capable of shedding or throwing ice onto either fixed or passing objects within that field or range. A cursory review of the Project Area Maps, being Appendix F to the CUP Application, suggests that many, perhaps most, of the turbine sites referenced are, in fact, between 533.5 and 1,012.5 feet of the *centerline* of a public road. Other evidentiary sources available to Petitioners will suggest the propensity or ability to shed and throw ice from comparable turbines in the vicinity of Grant County is significantly greater than 1,012.5 feet. Whether General Electric has actually published a "keep-out zone" in the case of a run-away generator-rotor (no brakes, unable to stop the rotation, so - time to clear out!), similar to what other manufacturers have done (such as Vestas and Nordex), is unknown to Petitioners. It appears that turbine manufacturers are extremely reluctant to widely publicize any such directives, as this fact runs counter to the claim that wind-turbines are completely safe to human life and normal work activities. Published information suggests the Vestas and Nordex danger or "keep-out zone" is somewhat larger – by a factor of some 25%, and in the range of 1,600 feet - than General Electric's "ice throw" risk zone referenced above (whether 1,012.5 feet or some other number, while musing that perhaps the 1,250 feet referenced by Dr. Ollson in other testimony, as noted above, represents GE's "keep-out zone"). If so, this renders the proposed

placement of turbines at 600 or 800 feet from roadways, for example, or other property lines, or the placement of turbines in proximity to human life and activities, as presently permitted by the Grant County Zoning Ordinance – even more foolhardy. Petitioners believe that Applicants breathed not one public word about any "keep-out zone" even as the Respondent Board of Adjustment made no apparent inquiry about such matters. [1]

(d) *Noise Levels and Standards.* The sound standards established in the Zoning Ordinance are inadequate from public safety and health standpoints. Currently, Grant County's Zoning Ordinance, in line with the South Dakota Model that clearly influenced it (as written by Big Wind, applied thereafter to measure Big Wind's plans in laying out as many "wind farms" as feasible upon the surface of South Dakota), provides:

> "Noise level shall not exceed 50 dBA, including constructive interference effects and the perimeter of the principal and accessory structures of existing off-site residences, businesses, and buildings owned and/or maintained by a governmental entity property line of existing off-site residences, businesses, and public buildings. [Ord. 2004-1, Rev. 2004-1G]"

What is allowed by this Zoning Ordinance is not a safe level for human health, as an emerging and growing number of health studies now show. Noise emitted by a GE 2.3MW turbine is understood to be approximately 107 dB(A) at the source - the hub and rotor assembly. *The only cure for this level of noise* – particularly when emitted at this altitude (as opposed to ground level, where trees, other landscape materials and structures may deflect or reduce noise as received by human ears beyond) – is *adequate separation distance.* The Zoning Ordinance, by failing to impose setbacks measured to (or from) the Non-Participating Owner's property line, and then also imposing setback distances that are inadequate to begin with (as in Trespass Zoning), fails to deal with noise levels in a

[1] GE's "confidential" safety manual was located January 17, 2019 – no specific distance seems recommended; in case of fire, wind turbine is to be "stopped and a large area . . . cordoned off."

suitable manner. The additional noise added to this rural landscape by 32 wind turbines will be an added burden upon each of the Petitioners and their respective rights and interests in use and enjoyment of their respective lands (part of the bundle of sticks of a fee owner, so often referenced by Professor Laymon).

(e) *Infrasound.* Further, and quite importantly, Grant County's Zoning Ordinance also fails to deal with Infrasound - not surprisingly, because both the Model and South Dakota Model likewise failed to do so. Infrasound is that range of sound that is inaudible, but yet can be *felt* by humans and animals alike. "Wind farm" components (there will be 32 of them, standing very high in the sky, and in all directions) emit *infrasound* (below 20 Hz), from rotating turbine blades, including "blade-pass harmonics," and resulting "structure-borne sounds." (Infrasound makes your own home or other structure vibrate or pulsate, somewhat akin to living inside a kettle drum – except you can only feel it, not hear it.) Years after allowing the wind farm to be built and operated close to human populations, researchers in Germany now work to confirm the health risks and ill effects of Infrasound emitted by industrial wind turbines, as reflected in the recent documentary film of ZDF television - *Infrasound caused by Industrial Wind Turbines*, https://www.youtube.com/watch?v=ywWNx3OJyuo&feature=youtu.be. Petitioners, either not asked by Applicants to sign a lease or wind easement, or if asked, having refused those offers, additionally refuse to unwittingly serve as subjects in some medical experiment, even if Respondent, charged with protecting the public interest, is fully prepared to allow these Applicants to engage in a sprawling, multiple-site (as in many), noisy and risky industrial activity (largely conducted, and rather conspicuously, at a very high altitude) within Grant County's "A" zoning district.

(f) *Shadow Flicker.* While the current Zoning Ordinance does not even purport to establish "standards" for the display or fall of Shadow Flicker upon nearby or adjoining properties, or on public roads, the fact of the matter is this: operations under the CUP Application at hand will involve the disposal or dumping of Big Wind's Shadow Flicker upon the lands of one or more of the Petitioners, and also upon the roads and highways that they travel in and through these three townships. Shadow Flicker produces a pulsating effect, shadows rapidly moving along the ground and perceived differently by individuals. Shadow Flicker is also believed capable of triggering epileptic episodes or seizures in some persons, while even those not suffering from that disorder, can also be surprised and react to (as an avoidance measure) the quickly moving shadows, presenting opportunities for accidents. Petitioners thus maintain the casting of light and shadows upon their lands is in the nature of a forced easement or servitude (in the guise of exercising the Zoning Power), while casting Shadow Flicker upon the roadways near the "wind farm" is a broader public safety risk. Petitioners' claimed "bundle of sticks" is further sawn asunder by Big Wind's Shadow Flicker.

(g) *Market Value Loss.* While Petitioners do not have any immediate wish to sell their properties or to move away from Grant County, the presence of the WES Projects proposed by Applicants – together with the nearby Cattle Ridge Wind Farm ("CRWF") project of what is now an affiliate of Applicants – will significantly harm the market value of Petitioners' homes and properties. Much of this harm arises from proximity to these gigantic structures comprising the wind turbines (and with moving parts), as referenced in several of the preceding subparagraphs. The integrity of Petitioners' bundles – in terms of market place value – will be shattered in this process.

71. Even as the Applicants advance their CUP Application for separately identified WES Projects, the GRANT COUNTY PLANNING COMMISSION has conducted hearings on proposed and recommended amendments to Section 1211 of the Zoning Ordinance. These amendments – if or when adopted by the County Board – would slightly modify certain of the setback features, permitted sound levels, and would also purport to "permit" the infliction of Shadow Flicker on a neighboring Nonparticipating Owner's residence, not to exceed 30 hours per year. The Planning Commission's final hearing on proposed Zoning Ordinance amendments was conducted December 17, 2018 (perhaps a coincidence), with a recommendation to the County Board. At hearing on December 28, 2018, the County Board then adopted the proposed amendments. (Petitioners do not believe the CUP Application(s) in question were proposed by Applicants, nor intended by the Board of Adjustment, to be measured or construed by anything other than the 2004 version of Section 1211; *but see*, the effect and outcome of a motion, adopted by the Board of Adjustment, with two alternate members then serving, on December 17, 2018, delaying further action on the CUP Applications until the County Board had adopted the new, proposed amendments to Section 1211, as further outlined in paragraph 90, following.)

E. The Board of Adjustment's Decision:

72. In terms of the power and jurisdiction to consider and determine entitlement to a "Conditional Use Permit" (sometimes, "CUP" or "CUP Application"), Section 504 of the Zoning Ordinance delegates these functions over to the Board of Adjustment.

73. The Board of Adjustment, as described in Section 501, describes that body as comprised of the "Grant County Planning Commission and four (4) alternates," as appointed by the County Board of Commissioners. This is one of just four occasions where the Planning Commission is even briefly mentioned in the Zoning Ordinance (Sections 902, 903 and 905 being the others), but it appears the size of the body established as the Planning Commission is

not otherwise addressed in the Zoning Ordinance, even as the Comp Plan gives no guidance for this issue.

74. The powers exercised by the Board of Adjustment as to a CUP Application are quasi-judicial in nature; in determining whether a Conditional Use described in the Zoning Ordinance is to be approved, the decisional power is hedged only by a required finding that "granting of the conditional use will not adversely affect the public interest" (Section 504, subd. 4) along with a variety of other perfunctory findings entirely suitable *if* the issue were merely one of "should a Pizza Hut be permitted in the A District on Highway 20 outside of Stockholm." Rather, the issue here is whether the specific location of 32 gigantic, noisy wind turbines, to be scattered throughout Stockholm, Troy and Mazeppa Townships, as proposed by Applicants, should be approved, despite the fact these devices are much taller and larger, and will occupy the visual field of all local residents, including Petitioners, than anything else now existing here (other than a single broadcast tower of unknown height in Section 30 of Mazeppa Township).

75. As a review of history will show, and as is also evidenced by the past practice of the Board of Adjustment's rendering entirely favorable actions upon WES Projects, *whenever* a "wind farm" developer meets the objective requirements of the Zoning Ordinance, then it must be said that *the opinions of the local residents count for nothing* – the State's Attorney was heard to so advise the Board of Adjustment on December 17, 2018. Furthermore, as Petitioners understand the event, the Grant County State's Attorney (Mark Reedstrom), on December 17, 2018, advised the Board of Adjustment that *if* the Application meets the specific details and requirements of Zoning Ordinance (such as they are, having been fashioned from Big Wind's early influence), *there is no choice but to grant the CUP*.

76. The actual Findings of Fact comprising the Decision of the Board of Adjustment, made December 17, 2018, and filed December 28, 2018 (signed by Nancy Johnson, Chairperson), have been previously referenced as being attached hereto, marked Exhibit P-1.

77. It is further recognized that once the Board of Adjustment has made a decision as to the merits of a CUP, then, by virtue of the Legislature's further amendatory delegations and refinements to the zoning power, the prospects of success for those in the position of these Petitioners are fairly slim under the statutory provisions in SDCL § 11-2-61 and the decisions of the Supreme Court.

78. Petitioners, nevertheless, assert to this Court the Decision as made by the Board of Adjustment on December 17, 2018, and entered December 28, 2018, on the CUP Application presented by these Applicants is illegal and now further state the grounds of such illegality, in those paragraphs within Sections F and G, following.

F. The Burdens and Duties of Contractual Privity with Applicants:

79. To the best information and knowledge of Petitioners, there is not presently a single wind turbine – or WES – existing in Grant County. All of that is about to change, and soon, as these Applicants endeavor to thickly populate the landscape of the County's western townships with wind turbines, following the earlier lead of Cattle Ridge Wind (now an affiliate of Applicants, as referenced in paragraph 7) with a CUP (for dozens of WES installations) approved by this Board of Adjustment in March 2017.

80. There are other applications for WES construction in Grant County moving forward at this time, including the Dakota Range series, but these actions are not of immediate concern to Petitioners.

81. Applicants, Petitioners further allege, have adhered to the recommendations of a certain siting guide for WES Projects, as published by the American Wind Energy Association (a

trade group in which NextEra Energy, the indirect, controlling member of Applicants, participates). This guide is thick with suggestions on how to win the support of both landowners (leases and other contractual arrangements, which entails the making of monetary commitments) and local governmental officials (necessary for local zoning and related approvals, as is the case in Grant County). Petitioners are reminded of the adage "killing two birds with one stone" when the local governmental officials, whose support is crucial, are also landowners, or closely related to persons who are landowners willing to allow subjugation of their lands for wind turbines over a period of many decades.

82. Local elected officials in Grant County control the land use approval process and appointment of the members of the Board of Adjustment (Respondent). An advocate for Big Wind, PAUL DUMMANN, served as a member of the County Board for many terms, until losing his bid for re-election in November 2018. (One of Mr. Dummann's last official acts in office – on December 28, 2018, while a blizzard was raging in Milbank and all of Grant County – was to vote with the majority, approving an updated version of Big Wind's idea of a proper Zoning Ordinance.) Board member Dummann is believed to have signed a wind development lease with another "wind farm" developer (Apex Clean Energy), currently enmeshed in several WES Projects in the northwestern part of Grant County. Whether Mr. Dummann's lease with Apex requires the specific sort of "cooperation" concerning local permits that other wind leases require (e.g., see paragraph 85, following) is not *yet* directly known by Petitioners.

83. The leases, wind easements and so-called "good neighbor agreements" used by wind developers are closely guarded secrets – although many landowners in Grant County have executed such documents, Petitioners have not had the opportunity to review the lease and other forms deployed by these Applicants (apart from the KEVIN KRAKOW power line easement, referenced in paragraph 25, above). If the forms or instruments are of record with the Zoning

Administrator, or the Board of Adjustment, or even the Grant County Register of Deeds, Petitioners are not aware of that fact.

84. Recalling that the WES Project (proposed by Cattle Ridge Wind Farm, LLC (CRWF, now an affiliate of these Applicants) immediately to the north of Crowned Ridge Wind I and II was initially rolled out by Geronimo Energy, LLC, it should be noted the blank lease form (entitled "Land Lease and Wind Easement," some 23 pages in length) used by that entity *was* disclosed to Grant County officials prior to the hearing in March 2017.

85. In executing the lease, the owner – as lessor – is also expected to make certain "Lessor's Covenants," as outlined in Article V of that instrument. Section 5.4 of the Cattle Ridge lease form, in pertinent part, provides:

> *Lessor shall also cooperate with Lessee to obtain and maintain any permits needed for the Wind Facilities.* In connection with the issuance of such permits, and to the extent allowed by (and subject to) applicable law, *Lessor hereby waives any and all setback requirements*, including any setback requirements described in the zoning ordinance of the county in which the Premises are located or in any governmental entitlement or permit hereafter issued to Lessee, with respect to the locations of any Wind Facilities to be installed or constructed on the Premises or on adjacent properties that are a part of the Project. Lessor shall also provide Lessee with such further assurances and shall execute any estoppel certificates, consents to assignments, non-disturbance agreements or additional documents that may be reasonably necessary for recording purposes or requested by Lessee or any of its lenders. Lessee shall reimburse Lessor for its reasonable and actual out-of-pocket expenses directly incurred in connection with such cooperation. (Emphasis supplied.)

Once the lease has been signed (the "Effective Date"), Lessor is thereafter required to "maintain in strictest confidence, for the benefit of Lessee" (namely, Geronimo or its assigns, in this example) all information pertaining to financial terms or payments.

86. At the present time (December 2018), NANCY JOHNSON and RICHARD HANSEN are serving members of the Board of Adjustment, and were likewise serving thereon at the time of the March 2017 presentation for the WES Project of CRWF (now, as noted earlier,

an affiliate of these Applicants). Both identified members recused themselves on November 13, 2018 (the date of the Board of Adjustment "evidentiary" hearing, as further referenced in paragraph 90.A, following), and also at the time of the Board's Decision of December 17, 2018 (although NANCY JOHNSON would nevertheless sign, as Chairperson, the Findings of Fact for these Applicants on December 28, 2018).

87. While those recusals concerning the exercise of quasi-judicial powers seem entirely apt and required by law (it being understood that both NANCY JOHNSON and RICHARD HANSEN are also parties to lease or other agreements with these Applicants), it is noteworthy the same individuals have *continued* to sit as members of the GRANT COUNTY PLANNING COMMISSION (on December 17, 2018, immediately following their recusals as members of the Board of Adjustment) in the recent preparation and making of recommendations to the County Board of Commissioners regarding the proposed text of proposed amendments to Section 1211 of the Zoning Ordinance (namely, that section, as originally adopted in 2004, outlining special requirements for WES Projects). Petitioners are also reminded of the *possible* contractual duty of Lessors to always facilitate the business interests of these Applicants. While Petitioners are not currently privy to the specific text of the leases between these two members of the Board of Adjustment and these two Applicants, the Court's permission is sought to engage in discovery as to these concerns.

88. During the March 2017 presentation by CRWF as to its own WES Project, RICHARD HANSEN also recused himself, as he "is a party to the project" (according to the minutes of the Board of Adjustment meeting held March 13, 2017). Again, Member Hansen's recusal, at that time and in that proceeding, seems entirely apt and required by law, since it is believed RICHARD HANSEN would have entered into a lease with the "duty" language quoted in paragraph 69, above.

89. Petitioners believe also the matter of *conflicts of interest* within the membership of those serving on the Board of Adjustment is somewhat more complicated than the described, straight-forward recusals of NANCY JOHNSON and RICHARD HANSEN (in their role as members of the Board of Adjustment, even as they continued to remain in their respective chairs as members of the GRANT COUNTY PLANNING COMMISSION, recommending text for amending the WES provisions of the Zoning Ordinance) may otherwise reflect. These concerns will be further outlined, following.

G. The Decision of December 17, 2018 (entered December 28, 2018) is Illegal:

90. The Decision made December 17, 2018, and entered December 28, 2018 (annexed as Exhibit P-1), is infirm and illegal based on each of (or the cumulative effect arising from) the following assertions, now made by Petitioners upon information, knowledge and belief:

A. The CUP Applications of these Applicants came before the Board of Adjustment on November 13, 2018, then consisting of seven members (Adler, Pillatzki, Johnson, Spartz, Leddy, Hansen and Mach). Because Johnson and Hansen have interests in the Applicants' WES Projects, they declared themselves recused and left the building. Although the minutes do not clearly say so, it appears alternates Jeff McCulloch and Don Weber assumed these vacancies. The Staff Report was considered, with certain conditions being prescribed. Upon motion of Pillatzki, seconded by Spartz, approval of the CUP Applications was further conditioned on meeting a ¾ mile setback from non-participating residences – this motion, which was approved on a vote of 4 (members McCulloch, Weber, Spartz and Pillatzki voting yes) to 3 (members Leddy, Adler and Mach, no), *was akin to rolling a live hand grenade into the midst of the meeting!* This approved action was immediately followed by a motion of Weber to postpone all further

action on the CUP Applications until the County Board had conducted a second reading of the proposed changes to Section 1211 (as previously referenced in paragraph 56, above). Weber's motion was seconded and adopted, with Leddy, Adler, Mach and Weber voting yes, and Spartz, Pillatzki and McCulloch voting no. At the making of this motion, the County Board's second reading of Zoning Ordinance amendments was not yet scheduled.

B. A further unsigned legal notice was published in Grant County's legal newspaper on December 5, 2018, advising of "Notice of Intent to Reconsider a Motion to Postpone by the Board of Adjustment on a Proposed Conditional Use Permit." The Notice asserted that MARK LEDDY, a member of the Board of Adjustment, had "filed an intent to reconsider the above motion to postpone," and if reconsideration is approved on December 17, 2018, the Board of Adjustment may further consider the proposed Conditional Use Permit (the notice identified both Applicants). Petitioners wish to learn what further communications transpired between Applicants, First District and Member Leddy as to why Applicants were unwilling to await further changes to the Zoning Ordinance, thus prompting publication of this Notice. In any event, the ¾ mile setback "hand grenade" of the same meeting, November 13, 2018, was somehow defused, never to be proposed again, and on December 17, 2018, the Board of Adjustment, by a vote of 6-1 (as is also referenced in paragraph 1, above), approved the CUP Applications of both Applicants. As further identified in subparagraph F(i), following, the member moving for reconsideration, MARK LEDDY, may have been motivated by the interests of close family members and his personal business interests, sufficient to comprise a disqualifying conflict of interest, a matter for which Petitioners intend to conduct discovery, if permitted by the Court.

C. Immediately prior to the vote on December 17, 2018, Petitioners believe the State's Attorney in and for Grant County advised or admonished the Board of Adjustment that *if* the CUP Applicants meet the standards outlined in Section 1211 of the Zoning Ordinance, the Board of Adjustment had no choice but to enter an approval. (With one dissent, at least one member of the Board did not heed the State's Attorney.) Petitioners maintain that merely meeting the objective requirements of Section 1211 of the Zoning Ordinance does not compel the conclusion a proposal is fully consistent with the Comp Plan or that every CUP Applicant for more WES Projects, *ipso facto*, deserves approval over the objections of those who own property, and must both live and work in the rural townships in and among these WES Projects.

D. Petitioners further believe the Staff Report (authored by officials of First District) was adopted and became part of the resolution of approval. As such, that part of the Staff Report providing "[t]he Conditional Use Permit is transferable" is objected to as being neither authorized nor provided for by the Zoning Ordinance of Grant County, or otherwise required by governing law.

E. The Staff Report also purports to approve the disposal of "Shadow Flicker" by the WES proposed by these Applicants. To the extent the WES will display any Shadow Flicker on the residences or real properties of Petitioners, such purported approval by the Board of Adjustment is objected to, as it is tantamount to the assertion of an *easement* or the creation of a *servitude* upon such properties, contrary to the rights, privileges and entitlements of Petitioners as fee owners.

F. While two members of the Board of Adjustment (Johnson and Hansen) would deem themselves disqualified, the further inquiry as to whether other conflicts of interest existed went unanswered. Petitioners state that the Board of Adjustment then continued

to hear and determine these matters, with the exercise of quasi-judicial powers, notwithstanding the evident and disqualifying self-interest of at least two other members, as outlined following:

i). Member MARK LEDDY is a leading, outspoken advocate for further wind energy development in Grant County, having built a new hotel business in Milbank in expectation of an influx of business from WES construction crews and assorted hosts of managers pursuing the favor of both landowners and local governmental officials, Petitioners believe. Further, Leddy's father and a brother are *both* Participating Owners for the site leases in nearby Cattle Ridge Wind Project (each having presumably signed a lease with the same text quoted in paragraph 85, above). While Petitioners agree that Leddy was *not* serving as a member of the Board of Adjustment at that specific time, he is serving now – and this is the time that Cattle Ridge's affiliates, these Applicants, are seeking a CUP from the Board of Adjustment. Leddy is *the* Board of Adjustment member whose participation in the motion to postpone was then reconsidered, as referenced in Subparagraphs A and B, above. Petitioners wish to undertake discovery of all these matters accordingly.

ii). Member MIKE MACH has served as a County Board Member, Planning Commissioner, and Member of the Board of Adjustment for a number of years, having been the chair of the County Board during 2017 (at the time of the Cattle Ridge Wind project being approved). Mach is a leader in the Grant County community, but he is also employed by Otter Tail Power Company, an entity heavily invested in developing and managing power transmission lines that will take the energy feeds from these Applicants (while recognizing that Mach is not employed by Otter Tail in the transmission side of the business). Mach often

appears at official meetings with the "Otter Tail" logo prominently appearing on his shirt. Mach's employer has a vested (and large) financial interest in the outcome of these proceedings, and thus, Mach's participation in the approval of the CUP Applications of these Applicants constitutes a conflict of interest.

G. The delegation of the zoning power to Grant County is subject to both constitutional and statutory restraints. In particular, the Comp Plan, as developed, is to be a guiding document for operation of the Zoning Ordinance. Nothing in the Comp Plan gives any signal that Grant County's rural residents, including these Petitioners, would be under the type or depth of "wind farm development assault" as is represented by the CUP Applications of these Applicants. Further, contrary to the assertion in Section 11 of Decision, the proposed use of these Applicants does not meet the intent, purpose and regulations of the County's Comprehensive Land Use Plan.

H. The type of development being proposed by Applicants, and as approved by the Board of Adjustment, represents "Trespass Zoning," a concept that implies a forfeiture of some part of the rights held by Petitioners, collectively and respectively, for the lawful development, use, occupation and enjoyment of their own lands in a manner consistent with the Grant County Zoning Ordinance. A diagram illustrating the concept of "Trespass Zoning," *not specifically keyed to current or proposed setbacks of the Grant County Zoning Ordinance,* is attached to this Petition as Exhibit P-2, and incorporated by this reference. The fact that Petitioners, if the Applicants now prevail, will be relegated to living and working in the immediate vicinity of a WES Project, including the further construction to be expected by Cattle Ridge Wind Farm (as an affiliate and now also part of Applicants' euphemistic "footprint" upon the surface of Grant County) will inhibit, preclude, damage, or destroy the respective abilities of these Petitioners to further

develop, use, occupy and enjoy their lands in accordance with the regulations for the "A" District of Grant County. For example, Petitioners each make their living in the care, feeding and growing of cattle on grass, and it is customary for each Petitioner to make some use of aerial spray plane services during the growing season for the control of noxious weeds, including thistles and leafy spurge. Each of the Petitioners – based on the representations of these applicator services – is fearful of losing those services due to the sheer size, number and proximity of the proposed turbines as mapped by Applicants. Even if such spray services remain available, Petitioners have been warned to expect a substantial increase in cost, as many pilots are unwilling to take the risk of collision.

I. The location or siting of a WES Project is an inherently complex issue. While it is true the Zoning Ordinance makes some provision for WES as a Conditional Use in the "A" district, it does not follow that the Board of Adjustment has no discretion in the exercise of quasi-judicial powers, or is required by law or the Zoning Ordinance to approve such a conditional use if the CUP Application otherwise meets the requirements of Section 1211. If this result is exactly what the law requires, as the State's Attorney was heard to suggest to the Board of Adjustment, then by terms of the Zoning Ordinance, has not Grant County effectively delegated the decision-making power over a WES Project (including the number of turbine locations) and the public interest to the Applicants themselves? *If a CUP Applicant has applied, and the minimal requirements of Section 1211 are met, then the Board of Adjustment must approve it?* Rather than assess the concerns of Petitioners with the assistance of an unbiased expert in "wind farm" developments (the combined concerns of shadow flicker, noise and related safety concerns, in addition to the anticipated market value loss of property, since few if any willing, sober buyers would choose to live in or near a WES Project and, after paying

good money for the privilege, be forever subject to shadow flicker, noise and related safety concerns), the Board of Adjustment (with one dissent) accepts the averments of Applicant's practiced witnesses, and, after the State's Attorney advises these concerns make no difference; such has cleared the way for Respondent Board of Adjustment to dismiss the stated concerns of Petitioners, as to their property interests and also their health and safety concerns, with a wave of the hand.

J. It is standard practice in Grant County to approve the CUP Applications for additional WES Projects, without any changes or meaningful restrictions being imposed by the Board of Adjustment. Is this because Petitioners' expressed concerns have no merit whatsoever, or because some element or faction of the Board of Adjustment is contractually obliged, or by other concerns (such as employment or close family ties), to ensure these Applicants (as representatives of Big Wind) must duly and promptly receive what they have asked for? Why not a ¾ mile setback from residences, unless it just isn't enough of "Trespass Zoning" to suit Applicants or other voices of Big Wind? *This appears to be so.* During the Grant County Board of Commissioners meeting held December 28, 2018, Commissioner Mach (who serves also on the Respondent Board of Adjustment, his participation in the merits of the Applicants' CUP being of concern to Petitioners, as outlined in subparagraph F.ii, above, at p. 37), revealingly declared (per the County Auditor's minutes of that date), just prior Mach's voting for approval of the new Zoning Ordinance amendments previously referenced in this Petition:

> He works for a coal fired power plant. He is an employee not an owner. Stated he is pro wind or anything that brings progress to the community. He talked about a township in Brookings County that had very little tax revenue for roads and now has $168,000 in the bank. He wants to see the county progress. The wind energy companies are not interested in setbacks in building projects if there is a ¾ mile or more setback. What other industry can we bring in? Expressed appreciation for Economic

> Development and their support. The money generated by the wind farms will be good for the taxing authorities. Thanked Chairman Johnson for her work at the meetings. In favor of the amendments as presented.

As a participant in the exercise of quasi-judicial powers, this member of Respondent Board, clearly, is focused on the limits for setbacks that Big Wind claims to have, *not what might actually suffice to protect the interests of Non-Participating Owners.* In regularly attending to his day job, Petitioners suspect, Commissioner Mach must look at a 495 foot smokestack at Big Stone, and concluded, somehow, that tolerating thirty-two (32) of them – each with a 380-foot moving and humming rotor – *along with all the rest of it* – isn't so out of step with that rural landscape Petitioners now call home. Even the avid desire of Grant County for more tax revenue all around, however, does not trump the interests that Petitioners now seek to protect, all as further described and referenced in this Petition and as to which, *Petitioners claim to be the sole and exclusive owners.*

H. Prayer for Relief:

Wherefore, Petitioners pray for relief as follows:

91. That pursuant to SDCL § 21-31-3 and § 11-2-62, upon such further notice as the Court deems appropriate, the Court issue a Writ of Certiorari to the Respondent, Grant County Planning Commission, sitting as the Board of Adjustment.

92. That pursuant to SDCL § 21-31-5 and § 11-2-62, the Court further issue within the Writ a restraining order, preventing the Respondent, or any other board, agency or official of Grant County, from taking any further action with respect to any Conditional Use Permit, building permit or other land use rights, concerning the sites as contemplated by the Applicants.

93. That the Court, upon such further proceedings as deemed appropriate, including the taking of evidence by referee or otherwise, reverse the Decision or other determination of the Respondent Board of Adjustment, in the form of the motion adopted December 17, 2018, and

stated within the Findings of Fact, filed December 28, 2018, or any subsequent determination, if any, concerning the specific WES Projects and sites for location thereof within Grant County, as proposed by Applicants, on one or more of the grounds as heretofore alleged in this Petition.

94. That during discovery and the taking of evidence, as may be authorized by the Court under the form of Writ to be proposed, Petitioners, *inter alia*, intend to inquire of the individual members of the Grant County Board of Commissioners, Grant County Planning Commission, and Grant County Board of Adjustment, and the alternates having been seated for one or more sessions relevant to these Applicants, as to which of them, if any, or their family members, have engaged in discussions of the facts and circumstances leading to this Conditional Use Permit, with persons representing or acting on behalf of Applicant, or being in privity of contracts (including discussions or negotiations related to any contract intended but not yet executed) with Applicants for the siting of wind turbines.

95. That the Court determine, in due course, the Conditional Use Permit approved is not the type or kind of relief or remedy that may be lawfully awarded within the context of the Zoning Ordinance, considering that, under the facts and circumstances presented here, and being an exercise of a purported delegated power, is more akin to a "taking" (eminent domain power). As such, under the facts presented, the Decision is in excess of any lawful delegation of the Zoning Power by the Legislature. As to these Petitioners, the Conditional Use Permit is a form of "Trespass Zoning," an adverse taking of their own collective, inchoate rights to use, enjoy, develop and hold their respective lands, consistent with a full and complete "bundle of sticks," as fee owners. Respondent Board of Adjustment would allow these Applicants to "take" from Petitioners, without compensation, because, as Board Member Mach would so candidly state while wearing his County Board member hat, these "wind farms" will result in tax revenue, this outcome is progress for Grant County. What this *actually* is - given Zoning Ordinance's

proclivity for measuring setbacks (to the extent such now exist, albeit inadequate in full measure) to dwellings or buildings *rather than property lines* – is a vivid display of "Trespass Zoning" (with credit to Kevon Martis for title and description of the concept) hard at work in Grant County. Outcomes under the Zoning Ordinance, via approval actions of the Board of Adjustment, are favorable to Big Wind, because the proposed "wind farms" are thought to meet also the specifications of the Zoning Ordinance. And, of course, Big Wind was the moving force behind the design and text of the Zoning Ordinance in the first place! (A new Zoning Ordinance is coming forth, but it, too, meets the approval of Big Wind!) A full circle, indeed.

96. That the Court also determine as follows: Grant County's exercise of Zoning Power is inherently defective, illegal, inconsistent with the Comp Plan, constituting a taking of rights and privileges (to be conferred on Applicants and Participating Owners), and comprising also an abuse of its own citizens, in that the County has taken up the delegation of such power, using the Model, or the South Dakota Model (as referenced in this Petition), serving as a mold or guide for fostering WES Project developments. Officers and agents of Grant County have paid close attention to whatever level of interference Big Wind claims willing to tolerate. (When Commissioner Mach declares that Big Wind will *not* proceed with projects if a required ¾ mile setbacks to residences is adopted, much more than that is being said; without Trespass Zoning being available, an implicit part of the Zoning Ordinance, Big Wind's "footprint" here would not be nearly so large – and perhaps it would not be visible at all.) Petitioners hope to learn just when this was said by Big Wind, the venue and identity of all participants in that conversation, and what else, if anything, may have ben said on that occasion. Now that Grant County's morning has dawned (with Big Wind standing along side), the County's decision makers seem open to as many large-sized, industrial-scale activities as might be shoehorned into the landscape. That this is excellent for tax revenue is the claim of those like Commissioner Mach.

That it is a bad outcome for Non-Participating Owners was not once seriously entertained by the Board of Adjustment.

97. That the Court determine: the County has no power, in the guise of the Zoning Power, to grant what effectively amounts to an easement or servitude upon, through or across the "bundles of sticks" held by Petitioners, nor, under the pretense of the Zoning Power, is there actual lawful power to foster a land use that endangers the public in their travels upon the roads and statutory highways, while rendering the Petitioners infirm and insecure in their respective premises; further, the exercise of this purported Zoning Power, in this manner, via a Board of Adjustment that, Petitioners have herein asserted, remains infected by undeclared conflicts of interest and evident bias, only makes this result that much more shameful, and illegal.

98. That the Court determine also: the Zoning Ordinance does not actually and fully provide for the safety of the citizens (what should be the professed, paramount consideration of any Zoning Power scheme), including these Petitioners, who, as Non-Participating Owners, are now being called upon to live within or near a future "wind farm" (perhaps several of them). This Zoning Ordinance, in the hands of the Board of Adjustment, likewise fails to provide for the safety of Participating Owners, recognizing, perhaps, that health and the ability to sleep without disturbance is of little consequence to those in privity with these Applicants, as they eagerly await future rents and incomes. Petitioners, on the other hand, are unwilling to suffer this invasion of a use that is not compatible with current district uses, one that represents not only infringement of property rights – a stealing of sticks from the bundle of each Petitioner, as it were, while also posing health risks to Petitioners, who live and work on their respective lands.

99. That the Court award costs to Petitioners and against Respondent Board of Adjustment, for having acted in an absence or in excess of proper jurisdiction under the Zoning Power, in the manner as stated and alleged hereinabove, or that as the decision of Respondent,

sitting as the Board of Adjustment, is not in conformity with the requirements of the Zoning Ordinance, the Comp Plan (the proposed use, on this scale, of this density, and consequential impact upon both adjoining properties and the respective inhabitants thereof, is simply not compatible with others, as required), and other governing law and, therefore, is illegal.

100. That the Decision of the Respondent Board of Adjustment, made December 17, 2018, and entered in the form of Findings of Fact, on December 28, 2018, be reversed, and that the Court enter an award, in favor of Petitioners, of all other relief allowed by law in these circumstances.

Dated at Canton, South Dakota, this 17th day of January, 2019.

Respectfully submitted,

/s/ A.J. Swanson
A.J. Swanson

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CINDY KRAKOW, KELLY OWEN and KEVIN OWEN

(Verification of Petitioners follow on separate pages)

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF GRANT	)	THIRD JUDICIAL CIRCUIT

In the Matter of Conditional Use Permit Applications of Crowned Ridge Wind, LLC & Crowned Ridge Wind II, LLC.	
JARED KRAKOW, MEGAN KRAKOW, KEVIN KRAKOW, CINDY KRAKOW, KELLY OWEN, and KEVIN OWEN, *Petitioners,* vs. GRANT COUNTY PLANNING COMMISSION, *sitting as* GRANT COUNTY BOARD OF ADJUSTMENT, *Respondent.*	25CIV19-_____ PETITION FOR WRIT OF CERTIORARI (SDCL § 11-2-61) VERIFICATION OF PETITIONERS JARED KRAKOW & MEGAN KRAKOW

JARED KRAKOW and MEGAN KRAKOW, each being a petitioner in the above-referenced matter, being first duly sworn, state that he or she is familiar with the petition for writ, and the facts stated therein regarding himself or herself, as petitioner and his or her respective interests therein, and now, he or she does hereby verify the factual allegations are true and correct to the best of his or her information, knowledge and belief.

Jared Krakow Date: 1/15/19

JARED KRAKOW

Megan Krakow Date: 1/15/19

MEGAN KRAKOW

Subscribed and sworn to before me, a Notary Public, by JARED KRAKOW and MEGAN KRAKOW, each personally known to me, this date: 1/15/19.

My Commission Expires:

1/16/2020

Valerie Zemlicka

NOTARY PUBLIC – SOUTH DAKOTA

(SEAL)

VALERIE K. ZEMLICKA
SEAL NOTARY PUBLIC SEAL
SOUTH DAKOTA

STATE OF SOUTH DAKOTA) : SS COUNTY OF GRANT)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
In the Matter of Conditional Use Permit Applications of Crowned Ridge Wind, LLC & Crowned Ridge Wind II, LLC. JARED KRAKOW, MEGAN KRAKOW, KEVIN KRAKOW, CINDY KRAKOW, KELLY OWEN, and KEVIN OWEN, *Petitioners,* vs. GRANT COUNTY PLANNING COMMISSION, *sitting as* GRANT COUNTY BOARD OF ADJUSTMENT, *Respondent.*	25CIV19-_____ PETITION FOR WRIT OF CERTIORARI (SDCL § 11-2-61) VERIFICATION OF PETITIONERS KEVIN KRAKOW & CINDY KRAKOW

KEVIN KRAKOW and CINDY KRAKOW, each being a petitioner in the above-referenced matter, being first duly sworn, state that he or she is familiar with the petition for writ, and the facts stated therein regarding himself or herself, as petitioner and his or her respective interests therein, and now, he or she does hereby verify the factual allegations are true and correct to the best of his or her information, knowledge and belief.

Kevin Krakow Date: 1-15-19
KEVIN KRAKOW

Cindy Krakow Date: 1-15-19
CINDY KRAKOW

Subscribed and sworn to before me, a Notary Public, by KEVIN KRAKOW and CINDY KRAKOW, each personally known to me, this date: 1-15-19.

My Commission Expires:
July 11, 2019

(SEAL)

Notary Public – South Dakota
NOTARY PUBLIC – SOUTH DAKOTA

STATE OF SOUTH DAKOTA) : SS COUNTY OF GRANT)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
In the Matter of Conditional Use Permit Applications of Crowned Ridge Wind, LLC & Crowned Ridge Wind II, LLC. JARED KRAKOW, MEGAN KRAKOW, KEVIN KRAKOW, CINDY KRAKOW, KELLY OWEN, and KEVIN OWEN, *Petitioners,* vs. GRANT COUNTY PLANNING COMMISSION, *sitting as* GRANT COUNTY BOARD OF ADJUSTMENT, *Respondent.*	25CIV19-_____ PETITION FOR WRIT OF CERTIORARI (SDCL § 11-2-61) VERIFICATION OF PETITIONER KELLY OWEN

KELLY OWEN, being a petitioner in the above-referenced matter, being first duly sworn, states that he is familiar with the petition for writ, and the facts stated therein regarding himself, as petitioner and his respective interests therein, and now, he does hereby verify the factual allegations are true and correct to the best of his information, knowledge and belief.

Kelly Owen Date: 1/14/19

KELLY OWEN

Subscribed and sworn to before me, a Notary Public, by KELLY OWEN, personally known to me, this date: 1/14/19.

My Commission Expires:

June 26, 2021

Brittany Folk

NOTARY PUBLIC – SOUTH DAKOTA

(SEAL)
BRITTANY FOLK
NOTARY PUBLIC
SOUTH DAKOTA

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF GRANT	)	THIRD JUDICIAL CIRCUIT

In the Matter of Conditional Use Permit Applications of Crowned Ridge Wind, LLC & Crowned Ridge Wind II, LLC.	
JARED KRAKOW, MEGAN KRAKOW, KEVIN KRAKOW, CINDY KRAKOW, KELLY OWEN, and KEVIN OWEN, *Petitioners,* vs. GRANT COUNTY PLANNING COMMISSION, *sitting as* GRANT COUNTY BOARD OF ADJUSTMENT, *Respondent.*	25CIV19-_____ PETITION FOR WRIT OF CERTIORARI (SDCL § 11-2-61) VERIFICATION OF PETITIONER KEVIN OWEN

KEVIN OWEN, being a petitioner in the above-referenced matter, being first duly sworn, states that he is familiar with the petition for writ, and the facts stated therein regarding himself, as petitioner and his respective interests therein, and now, he does hereby verify the factual allegations are true and correct to the best of his information, knowledge and belief.

Kevin M. Owen Date: 1-14-19

KEVIN OWEN

Subscribed and sworn to before me, a Notary Public, by KEVIN OWEN, personally known to me, this date: 1-14-19.

My Commission Expires:

June 26, 2021

Brittany Folk

NOTARY PUBLIC - SOUTH DAKOTA

(SEAL)

BRITTANY FOLK
NOTARY PUBLIC
SOUTH DAKOTA

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF GRANT	)	THIRD JUDICIAL CIRCUIT

In the Matter of Conditional Use Permit Applications of Crowned Ridge Wind, LLC & Crowned Ridge Wind II, LLC., assigned CUP08172018,	
JARED KRAKOW, MEGAN KRAKOW, KEVIN KRAKOW, CINDY KRAKOW, KELLY OWEN, and KEVIN OWEN, *Petitioners,* vs. GRANT COUNTY PLANNING COMMISSION, *sitting as* GRANT COUNTY BOARD OF ADJUSTMENT, *Respondent.*	25CIV19-000007 WRIT OF CERTIORARI (SDCL § 11-2-61)

THE STATE OF SOUTH DAKOTA TO:

RESPONDENT GRANT COUNTY PLANNING COMMISSION, SITTING AS THE GRANT COUNTY BOARD OF ADJUSTMENT, AND GRANT COUNTY STATE'S ATTORNEY, MARK REEDSTROM, GREETINGS:

IT APPEARING: upon the Petition for Writ of Certiorari, verified by Petitioners JARED KRAKOW, MEGAN KRAKOW, KEVIN KRAKOW, CINDY KRAKOW, KELLY OWEN and KEVIN OWEN, now being presented to this Court pursuant to SDCL § 11-2-61, and concerning the certain action of Respondent Board of Adjustment as made by voting thereon on December 17, 2018, and for which Findings of Fact were subsequently signed by Respondent's Chairperson Nancy Johnson on December 28, 2018, and filed that date in Respondent's office (the "Decision"), under provisions of the Grant County Zoning Ordinance and as to a Conditional Use Permit sought by CROWNED RIDGE WIND, LLC, and CROWNED RIDGE WIND II, LLC, each a Delaware limited liability company ("Applicants"), having an address of Corp Gov – Law/JB, 700 Universe Blvd., Juno Beach, FL 33408, and a registered agent and office within

the state of Corporation Service Company, 503 S. Pierre St., Pierre, SD 57501-4522; Applicant seeks the permit for the construction and operation of up to thirty-two (32) wind turbines, to be constructed upon lands leased from those referenced in the Petition as "Participating Owners," and situate within Mazeppa, Stockholm, and Troy Townships, within Grant County, South Dakota; and

IT APPEARING FURTHER, as the statute requires an assertion that the action taken is illegal, in whole or in part, and specifying the grounds of the asserted illegality, the Court observes that the Petition for Writ of Certiorari, filed on January 18, 2019, makes a number of claims regarding the requirements of the Grant County Zoning Ordinance, including claims the Decision entails approval of a proposed activity of such scope and with risk of harm and loss to Petitioners, and entailing also what is termed by them as "Trespass Zoning," understood, by reason of setbacks that are inadequate, from Petitioners' perspective, or are otherwise measured from dwellings or buildings rather than property lines, to be a form of taking or a preclusion of future enjoyment and use of Petitioners' own properties in conformity with the Zoning Ordinance, and that, in the totality of the circumstances, represents an exercise of governmental power beyond the scope of the Zoning Power as may be lawfully delegated by the South Dakota Legislature, and inferentially, the potential illegality of Respondent's action, and said Petition further alleges the proposed use by Applicants is not named in or envisioned by the Grant County Comprehensive Land Use Plan adopted in 2004, and additionally, various persons serving as members of Respondent Board have served and, in the exercise of quasi-judicial powers, taken action notwithstanding undisclosed conflicts of interest or bias in favor of wind development actions, all such allegations, collectively, being deemed sufficient, as threshold matter, to warrant and support the issuance of the writ as sought;

IT IS ORDERED the Writ shall be and is hereby allowed for purposes of conducting the review envisioned by the statute, with service hereof (along with a true copy of the Petition for

Writ, with verifications and Exhibits P-1 and P-2 thereto, and other initial pleadings, if any) to be made by U.S. mail (or service may be admitted) upon (a) any member of the Grant County Planning Commission, sitting as the Grant County Board of Adjustment, (b) upon either the Grant County Auditor or Zoning Administrator or officer, and (c) by means of ECF to the Grant County State's Attorney, Mark Reedstrom; and

IT IS FURTHER ORDERED the Board of Adjustment shall make a return of the papers before Respondent as to the matter identified in the Petition, including therein all matters considered by the Board of Adjustment in reaching the action taken, within 60 days of the date of notice of entry or of allowance of this Writ (or other satisfactory proofs of service), or within such additional time as the Court may allow, the return to include a true copy of the Grant County Zoning Ordinance, and Grant County Comprehensive Land Use Plan, each as was in force and effect on the date of the action taken, and any other matters of Grant County resolution or ordinance as relate or respond to the assertions or claims set forth in the Petition for Writ, all such matters returned to be served also upon counsel for Petitioners; and

IT IS FURTHER ORDERED, notice of the issuance of this Writ shall be given to Applicants, CROWNED RIDGE WIND, LLC, and CROWNED RIDGE WIND II, LLC (if Applicants intervene, then to counsel also appearing for such Applicants); in the event Petitioners seek to stay the proceedings to be reviewed by Writ, in accord with SDCL § 11-2-62, separate notice of the application shall be given to Respondent Board of Adjustment, Grant County State's Attorney and any other counsel appearing for Respondent Board of Adjustment, as well as counsel appearing for the Applicants; and

IT IS FINALLY ORDERED: whether upon motion of any party or *sua sponte*, the Court may issue such other and additional orders in this matter for purposes of administration of justice, or in the hearing or trial of the case, and further, the parties shall be entitled to exercise written or other discovery methods as provided for by Chapter 15-6, SDCL, including the use of

written interrogatories, served upon Respondent, or directed to one or more officers, agents or the appointed or serving members of such Board of Adjustment, including members and alternate members having heard the matter on November 13, 2018, and participating in the vote upon the motion adopted December 17, 2018, or in having signed the findings of fact as entered in this matter on or about December 28, 2018, such discovery may include inquiry therein as to potential or actual grounds for conflicts and personal interests or bias, if any.

Attest:
Johnson, Donna
Clerk/Deputy

Issued:

BY THE COURT:

Signed: 1/31/2019 10:45:16 AM

Robert L. Spears

Honorable Robert Spears
Circuit Court Judge

Attest:
Julie Anderson,
CLERK OF COURTS

By: _____

Filed on: 01/31/2019 GRANT County, South Dakota 25CIV19-000007

STATE OF SOUTH DAKOTA) : SS COUNTY OF GRANT)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
In the Matter of Conditional Use Permit Applications of Crowned Ridge Wind, LLC and Crowned Ridge Wind II, LLC, assigned CUP08172018 JARED KRAKOW, MEGAN KRAKOW, KEVIN KRAKOW, CINDY KRAKOW, KELLY OWEN, and KEVIN OWEN, Petitioners, vs. GRANT COUNTY PLANNING COMMISSION, *sitting as* GRANT COUNTY BOARD OF ADJUSTMENT, Respondent.	25CIV19-000007 **MOTION TO INTERVENE**

Crowned Ridge Wind, LLC and Crowned Ridge Wind II, LLC (collectively "Crowned Ridge"), by and through their attorneys of record, and pursuant to SDCL § 15-6-24, moves the Court for an Order allowing it to intervene as a respondent in the above-entitled matter.

In support of this Motion to Intervene, Crowned Ridge states that it has an interest in this action, as it was granted the Conditional Use Permit that is the subject of Petitioners' Petition for Writ of Certiorari. Crowned Ridge seeks to construct wind turbines on land situated in Grant County, South Dakota, and is directly affected by the

outcome of the Court's decision on the Writ of Certiorari. Crowned Ridge submits that its interests will not be adequately protected by the named Defendant, as they have distinct interests. Petitioners, through their attorney of record, indicate they do not oppose or object to Crowned Ridge's intervention.[1]

Dated this 8th day of February, 2019.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

Miles F. Schumacher
Dana Van Beek Palmer
Steven J. Oberg
Attorneys for Defendants
110 N. Minnesota Avenue, Suite 400
Sioux Falls, SD 57104
Telephone: (605) 332-5999
mschumacher@lynnjackson.com
dpalmer@lynnjackson.com
soberg@lynnjackson.com

[1] Because Petitioners have indicated they do not object to Crowned Ridge's intervention, no supporting brief is being submitted along with this Motion. If the Court desires briefing on the issue, Crowned Ridge will, of course, submit such briefing.

Filed: 2/8/2019 4:13 PM CST Grant County, South Dakota 25CIV19-000007

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF GRANT	)	THIRD JUDICIAL CIRCUIT

In the Matter of Conditional Use Permit Applications of Crowned Ridge Wind, LLC & Crowned Ridge Wind II, LLC., assigned CUP08172018,

ALLEN ROBISH, *and*
KRISTI MOGEN,

Petitioners,

vs.

GRANT COUNTY PLANNING COMMISSION, *sitting as* GRANT COUNTY BOARD OF ADJUSTMENT,

Respondent.

25CIV19-009

WRIT OF CERTIORARI (SDCL § 11-2-61)

THE STATE OF SOUTH DAKOTA TO:

RESPONDENT GRANT COUNTY PLANNING COMMISSION, SITTING AS THE GRANT COUNTY BOARD OF ADJUSTMENT, AND GRANT COUNTY STATE'S ATTORNEY, MARK REEDSTROM, GREETINGS:

IT APPEARING: upon the Petition for Writ of Certiorari, verified by Petitioners ALLEN ROBISH and KRISTI MOGEN, now being presented to this Court pursuant to SDCL § 11-2-61, and concerning the certain action of Respondent Board of Adjustment made on December 17, 2018, and for which Findings of Fact have been signed by Respondent's Chairperson Nancy Johnson on December 28, 2018, and filed that date in Respondent's office (the "Decision"), under provisions of the Grant County Zoning Ordinance and as to a Conditional Use Permit sought by CROWNED RIDGE WIND, LLC, and CROWNED RIDGE WIND II, LLC, each a Delaware limited liability company ("Applicants"), having an address of Corp Gov – Law/JB, 700 Universe

Blvd., Juno Beach, FL 33408, and a registered agent and office within the state of Corporation Service Company, 503 S. Pierre St., Pierre, SD 57501-4522; Applicant seeks the permit for the construction and operation of up to thirty-two (32) wind turbines, upon lands leased from those referenced in the Petition as "Participating Owners," and situate within Grant County, South Dakota; and

IT APPEARING FURTHER, as the statute requires an assertion that the action taken is illegal, in whole or in part, and specifying the grounds of the asserted illegality, the Court observes that the Petition for Writ of Certiorari, filed on January 25, 2019, makes a number of claims regarding due process violations and conflict of interest violations all in relation to the requirements of the Grant County Zoning Ordinance and State law, including claims the Decision entails approval of a proposed activity of such scope and with risk of harm and loss to Petitioners, and entailing also what is termed by them as "Trespass Zoning," understood, by reason of setbacks that are inadequate, from Petitioners' perspective, or are otherwise measured from dwellings or buildings rather than property lines, to be a form of taking or a preclusion of future enjoyment and use of Petitioners' own properties in conformity with the Zoning Ordinance, and that, in the totality of the circumstances, represents an exercise of governmental power beyond the scope of the Zoning Power as may be lawfully delegated by the South Dakota Legislature, and inferentially, the potential illegality of Respondent's action, and said Petition further alleges the proposed use by Applicants is not named in or envisioned by the Grant County Comprehensive Land Use Plan adopted in 2004, and additionally, various persons serving as members of Respondent Board have served and, in the exercise of quasi-judicial powers, taken action notwithstanding undisclosed conflicts of interest or bias in favor of wind development actions, all such allegations, collectively,

being deemed sufficient, as threshold matter, to warrant and support the issuance of the writ as sought;

IT IS HEREBY ORDERED AS FOLLOWS:

1. The Writ shall be and is hereby allowed for purposes of conducting the review envisioned by the statute, with service hereof (along with a true copy of the Petition for Writ, with verifications and Exhibits 1 and 2 thereto, and other initial pleadings, if any) to be made by U.S. mail (or service may be admitted) upon (a) any member of the Grant County Planning Commission, sitting as the Grant County Board of Adjustment, (b) upon either the Grant County Auditor or Zoning Administrator or officer, and (c) by means of ECF to the Grant County State's Attorney, Mark Reedstrom; and
2. The Board of Adjustment shall make a return of the papers before Respondent as to the matter identified in the Petition, including therein all matters considered by the Board of Adjustment in reaching the action taken, within 60 days of the date of notice of entry or of allowance of this Writ (or other satisfactory proofs of service), or within such additional time as the Court may allow, the return to include a true copy of the Grant County Zoning Ordinance, the Grant County Comprehensive Land Use Plan, and the Grant County Board of Adjustment Bylaws, each as was in force and effect on the date of the action taken, and any other matters of Grant County resolution or ordinance as relate or respond to the assertions or claims set forth in the Petition for Writ, all such matters returned to be served also upon counsel for Petitioners; and
3. Notice of the issuance of this Writ shall be given to Applicants, CROWNED RIDGE WIND, LLC, and CROWNED RIDGE WIND II, LLC (if Applicants intervene, then to counsel also appearing for such Applicants); in the event Petitioners seek to stay the

proceedings to be reviewed by Writ, in accord with SDCL § 11-2-62, separate notice of the application shall be given to Respondent Board of Adjustment, Grant County State's Attorney and any other counsel appearing for Respondent Board of Adjustment, as well as counsel appearing for the Applicants; and

4. Whether upon motion of any party or *sua sponte*, the Court may issue such other and additional orders in this matter for purposes of administration of justice, or in the hearing or trial of the case, and further, the parties shall be entitled to exercise written or other discovery methods as provided for by Chapter 15-6, SDCL, including the use of written interrogatories, served upon Respondent, or directed to one or more officers, agents or the appointed or serving members of such Board of Adjustment, including members and alternate members having heard the matter on November 13, 2018, and participating in the vote upon the motion adopted December 17, 2018, or in having signed the findings of fact pertaining to this matter on or about December 28, 2018, such discovery may include inquiry therein as to potential or actual grounds for conflicts of interest or bias, if any.

BY THE COURT:

Signed: 2/11/2019 10:49:54 AM

Issued: Attest:
Anderson, Julie
Clerk/Deputy

Robert L. Spears
Robert L. Spears
Circuit Court Judge

Attest:
Julie Anderson, Clerk
CLERK OF COURTS

By: _____