STATE OF SOUTH DAKOTA) : SS COUNTY OF CODINGTON)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
TIMOTHY LINDGREN and LINDA LINDGREN, *Plaintiffs,* vs. CODINGTON COUNTY, *a political subdivision of the State of South Dakota*, CODINGTON COUNTY BOARD OF ADJUSTMENT, *an agency of Codington County, having issued a certain Conditional Use Permit, # CU018-007,* CROWNED RIDGE WIND, LLC, CROWNED RIDGE WIND II, LLC, BOULEVARD ASSOCIATES, LLC, *all other Persons having present or future interests in #CU018-007, and* SOUTH DAKOTA PUBLIC UTILITIES COMMISSION, *having issued a certain Facility Siting Permit, Docket EL19-003, and all other Persons having present or future interest in a certain Energy Facility Permit issued by the South Dakota Public Utilities Commission in Docket EL19-003,* *Defendants.*	14CIV19-14CIV19-000303 COMPLAINT (VERIFIED) FOR DECLARATORY JUDGMENT AND OTHER RELIEF

COME NOW the Plaintiffs, namely, TIMOTHY LINDGREN and LINDA LINDGREN (collectively, "Plaintiffs," or sometimes, "the Lindgrens," and individually, by their respective first names, "TIM" and "LINDA"), married persons, as fee owners and persons in possession and enjoyment of the land identified in this pleading, and as residents of Codington County, South Dakota, by and through their undersigned attorney of record, A.J. Swanson, of Canton, South Dakota, and by this Complaint ("Complaint"), duly verified, seeking declaratory judgment and

other relief against the several named defendants, and now state, declare and present to this Court, upon their knowledge, information and belief, as follows:

Part One.
IDENTIFICATION OF THE PARTIES:

1. Plaintiffs, TIM and LINDA, reside at 16050 464th Ave., South Shore, SD 57263, on rural property within Codington County, South Dakota, and also within the boundaries of a so-called "wind farm project" known as the Crowned Ridge Wind Farm, a project extending over portions of Codington and Grant Counties; these Plaintiffs are two of the many dozens of property owners soon to be adversely affected by the Crowned Ridge Wind Farm, a category generally referenced herein as "Non-Participating Owners" (or similar designation).

2. Defendant CODINGTON COUNTY, whose boundaries are defined by SDCL § 7-1-15, is a political subdivision of the State, having been delegated zoning powers by the Legislature, and having also adopted a Comprehensive Land Use Plan (CLUP) and Zoning Ordinance, as amended from time to time. Defendant is governed by the Codington County Board of Commissioners ("County Board"), having authority to adopt ordinances in the exercise of the Legislature's delegated zoning powers under Chapter 11-2, SDCL.

3. Defendant CODINGTON COUNTY BOARD OF ADJUSTMENT ("Board of Adjustment") is vested with adjudicatory powers under the Codington County Zoning Ordinance ("Zoning Ordinance," as most recently amended by the County Board on June 7, 2018, effective on or about July 2, 2018), the members having been appointed by the County Board, and having jurisdiction to determine Conditional Use Permits ("CUP"). During a session held July 16, 2018, the Board of Adjustment unanimously approved (6-0) the issuance of a CUP with the unique nomenclature of "CU018-007" to other defendants to construct and operate the Crowned Ridge Wind Farm, with physical boundaries fully embracing also Plaintiffs' residence and property.

4. Defendants CROWNED RIDGE WIND, LLC ("Crowned Ridge I") and CROWNED RIDGE WIND II, LLC ("Crowned Ridge II"), are believed to be Delaware limited liability companies, having qualified to transact business in South Dakota (FL043911, on November 12, 2015, as to the former, and FL131050, February 27, 2017, as to the latter). Each of these entities claims a principal office address of 700 Universe Blvd., Attention: Corp Gov – Law/JB, Juno Beach, FL 33408. Each entity was a co-applicant for the approved and issued CUP, as identified in ¶ 3, above, and when appropriate, the two entities will be jointly referenced as "Defendant Crowned Ridge.")

5. Defendant BOULEVARD ASSOCIATES, LLC. ("Boulevard") is also believed to be a Delaware limited liability company, having a principal office address identical to the defendants identified in ¶ 4. Boulevard qualified to transact business in South Dakota on May 10, 2007 (FL003481). Defendant Boulevard, together with Defendants Crowned Ridge I and Crowned Ridge II, is represented to be an indirect wholly owned subsidiary of NEXTERA ENERGY, INC., a publicly-held corporation, with shares listed on the New York Stock Exchange (symbol: NEE).

6. Defendant SOUTH DAKOTA PUBLIC UTILITIES COMMISSION ("PUC") is an agency of the State, created by the Legislature, and vested, *inter alia*, with jurisdiction to consider and issue a Facility Siting Permit to large-scale industrial wind farms under the provisions of SDCL § 49-41B-1, *et seq.* Crowned Ridge Wind Farm is of sufficient size to require a Facility Siting Permit; on January 31, 2019, Crowned Ridge I filed application for such a permit from the PUC, which was assigned EL19-003. After proceedings, the PUC, on July 9, 2019, voted 3-0 to approve issuance of a Facility Siting Permit, and on July 26, 2019, the PUC adopted a *Final Decision and Order Granting Permit to Construct Facility* (hereafter "Final Decision"), consisting of 72 findings of fact and 17 conclusions of law, over twenty pages of text,

with 148 footnotes. Additionally, the PUC's Final Decision embraces a staff-prepared, stipulated document entitled "Permit Conditions," encompassing an additional 45 numbered paragraphs, spread over eleven pages.

Part Two.
THEORY OF THE CASE:

7. This Complaint, to the Circuit Court sitting in Codington County, concerns what will soon become (upon commencement of wind farm operations) an intensive, hostile, and adverse use of the Plaintiffs' land, one that is tantamount to a physical assault upon, a touching and an occupation of such land, by a significantly elevated amplitude and divers types of noise and sounds (both heard and those merely felt, not presently within the environment of Plaintiffs' land), to be predictably emitted by an outsized, large-scale industrial operation comprised of numerous wind turbines, and the dumping or disposal of a phenomenon known as "Shadow Flicker" onto Plaintiffs' rural land and residence, among other features likewise objectionable.

8. These referenced emissions and dumpings are the offal of every so-called wind farm, as surely as paunch manure and torn intestines are cast off by every meat packing plant – while the facility may provide employment for the laborer and food for the hungry, a pleasant neighbor it is not. These stated objectionable, obnoxious features (there are others, but this Complaint will focus on the very near at hand certainty of just these few mentioned thus far) are collectively referenced herein as the "Effects."

9. These are the Effects of having once lived – as Plaintiffs have heretofore lived – in the quiet serenity of their rural location, but are now faced with being forever confined inside the boundaries of a wind farm while being sited much too close to operating wind turbines that give off excessive noise, including sounds not now materially present in the ambient environment, and casting the pall of Shadow Flicker. In the public zeal to promote so-called "Green, Renewable

Energy" [1] at all costs, the Crowned Ridge Wind Farm, an industrial-scale operation designed, promoted and officially approved and duly permitted, is presented to the public as a duly and correctly zoned land use, a state-law compliant "facility site" by these Defendants. Each Defendant has played an essential role in the process.

10. Each Defendant, however, has assumed far too much license and requisite authority as to themselves, even while holding much too little regard for the property interests of Plaintiffs (and all other Non-Participating Owners).

11. Defendants Crowned Ridge I and Boulevard have assumed that, despite the absence of a negotiated easement for purposes of hereafter (for years and decades, however long this wind farm operates) casting the referenced "Effects" upon and over Plaintiffs' lands, the public zeal and interest in renewable energy has, somehow, sufficiently overwhelmed whatever the bundle of rights (or sticks) that Plaintiffs (and all other Non-Participating Owners) claim as fee owners. That is simply not so.

12. Defendants Codington County and its Board of Adjustment have assumed that the Legislature's delegation of the power to engage in zoning brings with it the inherent right of these governmental units, agencies or bodies to adopt a Zoning Ordinance that provides for, and then, by means of a Conditional Use Permit (CUP), authorizes a massive new type of rural use (a wind farm with 130 turbines, most having a rotor diameter of 116-meters at a 90-meter hub height, or total height of about 485 feet, spread over 53,186 acres of land in Codington and Grant Counties). By means of considering and then issuing a Conditional Use Permit (CUP), these Defendants have assumed further that the spreading of such a comprehensive, intensive use of lands without regard to property boundary lines, and afflicting even neighboring residences, can be lawfully

[1] The application in Docket EL19-003 cites a March 2018 Gallup poll, in which 73% of the public believes alternative energy is key to resolving the nation's energy problems, and 70% think more emphasis should be placed on wind energy.

accomplished, all in the name and theory of Euclidean Zoning,[2] without regard to whether Non-Participating Owners have consented to accepting or receiving the "Effects" flowing from or cast off as "waste products" by the Crowned Ridge Wind Farm. These Defendants, however, have assumed wrongly, in an affront to the property rights of Plaintiffs and all other Non-Participating Owners.

13. Defendant PUC has been given a broad charter under law [3] to consider elements of an applicant's burden of proof for a so-called Facility Siting Permit. The agency's authority, however, does not include the right to approve, determine, adjust, modify or ratify the details of just how, or when, or to what extent the wind farm operator may dump or dispose of waste products (including the "Effects") onto the neighboring lands and residences of those who, like Plaintiffs, have not otherwise expressly consented to receive such Effects. Likewise, the PUC's jurisdiction does *not* include the right to take property rights from Plaintiffs, as Non-Participating Owners, while stitching those purloined rights, as if seamless, onto those already voluntarily offered up for use by those having title and privity – the "Participating Owners" – thus accommodating an efficient, complete disposal of the continuous flow (so long as the wind blows) of the "Effects" from the very bowels of the Crowned Ridge Wind Farm.

14. The identified CUP, as issued by the Board of Adjustment in 2018, and the Facility Siting Permit, as issued by the PUC in 2019, together, constitute a *de facto* easement as to, and upon and over, Plaintiffs' land and residence; such issuance affords a legal sheen or appearance to the actions of Defendant Crowned Ridge I in the dumping of the Effects upon Plaintiffs and their lands and residence. But, this is a fiction as to the land title of Plaintiffs, as they have not agreed to the imposition of *any* such servitude upon their lands or residence.

[2] So named based on *Village of Euclid, et al. v. Ambler Realty Co*., 272 U.S. 365 (1926).
[3] SDCL § 49-41B-22

15. Once instituted – with wind farm operations to commence at some nearby date in the future – such Effects are likely to continue without material or substantial interruption for the duration of Plaintiffs' lives, and to their injury as property owners; thus the Effects, as a hostile, adverse use, are permanent in nature.

16. The *de facto* easement, as referenced in ¶ 14 and further described throughout this Complaint, represents a taking of the Plaintiffs' vested property interests.

17. Plaintiffs further expect, in due course, to pursue all appropriate recourse for such taking against those Defendants purporting to have jurisdiction and authority in the issuance of such essential permits, licenses or other official *imprimatur*, under the provisions of 42 U.S.C. § 1983.

18. This Complaint, as presented to this Court, is based entirely on state law property rights of Plaintiffs, as protected by South Dakota statutes and the Constitution of this State. Plaintiffs seek an express declaration of those property rights, in the face of both the CUP and the Facility Siting Permit, and given the declared intention of Crowned Ridge I to begin very soon the construction of the Crowned Ridge Wind Farm. Plaintiffs expressly reserve for another time and place their claims, as citizens of the United States, arising under provisions of the United States Constitution.

Part Three.
STATEMENT OF THE CASE:

A. Introduction.

19. By this action, Plaintiffs seek a declaratory judgment, concerning the identified CUP, against Defendants Codington County and the Board of Adjustment, and also Defendants Crowned Ridge I, Crowned Ridge II and Boulevard, and all others claiming any interest therein, to the effect that: (a) the Board of Adjustment has no lawful, delegated zoning authority or

jurisdiction, by terms of the Zoning Ordinance, to consider, determine and issue a CUP to Defendants Crowned Ridge I and Crowned Ridge II, under which affirmative rights are awarded to make a continuing and long term use of Plaintiffs' real property, which use in the nature of a servitude and easement adverse to Plaintiffs' rights as fee owners of property under the law; (b) in the alternative, if such authority and jurisdiction, as outlined in (a) is determined to lawfully exist, then the certain CUP, otherwise known as CU018-007, represents a taking of, injury to, or infringement upon Plaintiffs' property interests, on the part of Defendants Codington County and the Board of Adjustment, for purposes of further confirming or conferring the adverse use of such interests, upon or for the benefit of Defendants Crowned Ridge I, Crowned Ridge II and Boulevard, and all other persons claiming any interests therein, enabling said Defendants to construct and operate an industrial scale wind farm.

20. Plaintiffs, not having timely intervened in accord with SDCL § 49-41B-17(3) and ARSD 20:10:22:40 (intervention having been sought by application dated June 13, 2019, and denied by the PUC by order entered June 25, 2019, a motion to deny status having been adopted on a vote of 2-1), are now unable to pursue an appeal to Circuit Court of the PUC's Facility Siting Permit, as was recently issued by Final Decision of July 26, 2019, in the proceeding docketed as EL19-003. Having no other apparent remedy for the harm done to their property interests, Plaintiffs seek also a declaratory judgment against Defendant PUC, and all other Defendants, concerning the import or legal effect of the Facility Siting Permit, and all others claiming any interest therein, to the effect that: (a) the PUC has no lawful authority delegated by the Legislature, whether under Chapter 49-41B, SDCL or otherwise, to determine and issue a Facility Siting Permit to Defendant Crowned Ridge I, having the import or effect of a license for a long term, continuing use of Plaintiffs' real property, for the special use and benefit of all or any of the Defendants, and being in the nature of a servitude and easement adverse to Plaintiffs' rights as fee

owners of property under the law, or (b) in the alternative, if this Court determines the PUC is deemed to have such authority and jurisdiction, then the Facility Siting Permit, issued under Docket EL19-003, also represents a taking or an appropriation of, or an injury to, such property interests by and on the part of Defendant PUC, and as to such property interests, heretofore claimed exclusively by Plaintiffs, confirming or conferring those interests upon or for the use and benefit of Defendants Crowned Ridge I, affiliate Boulevard, and all other persons claiming any interests in the Facility Siting Permit, for the purpose of constructing and operating an industrial-scale wind farm in the immediate proximity of Plaintiffs' property and residence. [4]

21. Alternatively, if the CUP and Facility Siting Permit are declared to have no legal standing for purposes of authorizing an adverse and hostile use of Plaintiffs' property (as described in ¶ 22, following), and such authorizations do not, in the judgment of this Court, constitute a *de facto* easement, then and in such event, Plaintiffs seek injunctive relief as to the construction of any turbine sites, placements or other intended improvements as will contribute, or are likely to contribute, to the "Effects" flowing from the Crowned Ridge Wind Farm onto the property and residence of Plaintiffs, such adverse and hostile use being in the nature of a trespass.

B. Plaintiffs' Interests in Real Property.

22. Plaintiffs reside on their property (the "Lindgren Farm"), located a few miles south of South Shore, South Dakota, in Waverly Township, Codington County, South Dakota.

23. The Lindgren Farm is legally described as:

SOUTHWEST QUARTER (SW1/4) AND WEST HALF OF SOUTHEAST QUARTER (W1/2, SE1/4) OF SECTION 2,

[4] Plaintiffs note that although the Crowned Ridge entities jointly pursued the identified CUP in Codington County, their respective projects, for purposes of the PUC's jurisdiction and a Facility Siting Permit, are segregated into two distinct filings – Crowned Ridge I's EL19-003 is at issue in this case, involving Codington and Grant Counties, while Crowned Ridge II's EL19-027, currently pending before the PUC, and covering an area of Codington, Deuel and Grant Counties, starting a short distance south of Plaintiffs' property, is not of direct concern to Plaintiffs.

TOWNSHIP 118 NORTH, RANGE 51 WEST OF THE 5TH P.M., CODINGTON COUNTY, SOUTH DAKOTA.

24. The Lindgren Farm (SW1/4) has been owned by the Lindgren family since 1948; Tim, born in 1960, has lived here his entire life, and Linda has lived here also since her marriage to Tim in 2013.

25. As fee owners of the Lindgren Farm, Plaintiffs are persons having the right to "possess and use [their land] to the exclusion of others." SDCL § 43-2-1.

26. As citizens of South Dakota, Plaintiffs are also entitled to the rights and privileges arising under the *South Dakota Constitution*, including the right to acquire and protect property, as further outlined in Article 6, § 1 thereof.

27. The rights of Plaintiffs as to the Lindgren Farm are those that may not be taken from them "without due process of law." *South Dakota Constitution*, Article 6, § 2.

28. Plaintiffs also assert that their private property, namely, the Lindgren Farm, "shall not be taken for public use, or damaged, without just compensation . . . ." *South Dakota Constitution*, Article 6, § 13.

29. Plaintiffs claim also the protections of the Fifth Amendment to the United States Constitution concerning the deprivation of property without due process of law, or the taking of private property for public use without just compensation.

30. The rights and interests claimed by Plaintiffs as to the Lindgren Farm extend to all areas, parcels and portions thereof, including their residence thereon, and all land areas comprising the Lindgren Farm, including also the inchoate rights of Plaintiffs to hereafter hold, use, occupy and enjoy their property as described in a manner consistent with law, and the rights of fee owners, including the various regulations pertaining to the use and development of the land under and in accord with the Zoning Ordinance, as Plaintiffs may hereafter wish to invoke.

C. Plaintiffs Enter into Privity with Defendant Boulevard.

31. On June 11, 2014, Plaintiffs, as "Owner," entered into a certain Wind Farm Lease and Easement Agreement, ("Wind Lease & Easement") with Defendant Boulevard, as "Operator." The instrument, structured as an assignable option granted by Owner in favor of Operator, subjects the Lindgren Farm to a specific wind farm then labeled as "Crowned Ridge Wind Energy Center," to be located in Codington County.

32. The Wind Lease & Easement instrument remains unrecorded, but is referenced within a certain "Memorandum of Leases and Easements," ("Memorandum") dated June 3, 2014, filed in the office of Codington County Register of Deeds on July 7, 2014, as Instrument No. 201402773, listing eight specific leases, rights or easements by title, without further detail. To the best knowledge of Plaintiffs, Defendant Boulevard has not cancelled or voided the Memorandum, which remains of record as a cloud on Plaintiffs' title.

33. Under the described option – if or when exercised by Operator during an option term of five years (including an initial option term of three years, and an extended option term of two years, measured from and after June 11, 2014), and continuing for a period of fifty years - would allow, in the nature of a lease, the construction of one or more "Turbine Sites," access to the sites, and allowing also, in the nature of easements, in favor of Operator, a specific right entitled "Wind Non-Obstruction Easement," (Section 5.1 of Wind Lease & Easement), and an additional easement entitled "Effects Easement" (Section 5.2).

34. The "Effects Easement," being Section 5.2 of the Wind Lease & Easement, is a central provision of this Complaint, in that – *upon exercise of the Option* – Plaintiffs, as Owners of the Lindgren Farm, would have conferred upon Operator, a very broad right and easement to use the property as to effects arising from the wind farm or for any activity located on Plaintiffs' property, or arising upon adjacent properties and being visited upon the Lindgren Farm.

35. Section 17 of the Wind Lease & Easement further asserts that the instrument "includes confidential and proprietary information relating to [Defendant Boulevard] and the Wind Farm." Defendant Crowned Ridge I has persistently contended (during the course of Plaintiffs unsuccessful efforts to intervene in the PUC proceeding) that the provisions of Section 17 prevent Plaintiffs from quoting or presenting *any* part of the Wind Lease & Easement to the PUC, such provisions being claimed as a "trade secret" of Defendant Crowned Ridge 1 (Plaintiffs expect the "confidentiality" claim will be likewise made to this Court).

36. For purposes of this Complaint, Plaintiffs will defer from otherwise quoting – or annexing – the entirety or specific provisions of the Wind Lease & Easement until such time as the Court shall have ruled on the issue of whether such provisions are a "trade secret," entitled to confidentiality. Meanwhile, Plaintiffs allege that the "Effects Easement" (Section 5.2), having been prepared by Defendant Boulevard, with the intention of being assigned to Defendant Crowned Ridge I, for purposes of developing a wind farm as contemplated by both the CUP and Facility Siting Permit, is itself clear and certain evidence that Defendants intended to employ the Wind Lease & Easement for purposes of an *easement*, upon and across the entirety of the Lindgren Farm, establishing a servitude thereon for a variety of adverse effects flowing from either hosting or being too proximate to wind farm operations, including, as relevant here, both "noise" and "light, flicker . . . [and] shadow" (otherwise herein referenced as Shadow Flicker).

37. The Effects Easement, as embraced within the Wind Lease & Easement, included specified and "any other effects attributable to the Wind Farm or activity located on the [Lindgren Farm] or on adjacent properties over and across the [Lindgren Farm] ("**Effects Easement**")." (Section 5.2, Wind Lease & Easement)

38. Defendants did not exercise the option central to the Wind Lease & Easement, and the option (and all that was otherwise contained in the Wind Lease & Easement) thus expired,

according to its terms, on the day immediately prior to the fifth anniversary, namely, June 10, 2019.

39. The lapse or expiration of the five-year option to establish the Wind Lease & Easement transpired on June 10, 2019, during the course of the proceeding before the PUC for a Facility Siting Permit, docketed as EL19-003. This lapse would eventually cause Defendant Crowned Ridge I, just prior to the PUC's Final Decision and Order (July 26, 2019) to eliminate two proposed wind turbine sites on the Lindgren Farm.

40. Defendant Crowned Ridge, for more than a year prior to the lapse of the option, had predicted the extent of certain of the "Effects," adverse to Plaintiffs and the Lindgren Farm, that would arise from the development of the Crowned Ridge Wind Farm, including both "noise" and Shadow Flicker. The recent elimination of two proposed turbine sites on the Lindgren Farm results in little or no change in the predicted "Effects," according to evidence submitted to the PUC. Thus, Defendants, collectively, seem intent on appropriating certain property rights associated with Plaintiffs' ownership of the Lindgren Farm, a stealing of some of the "sticks" within their bundle, as evidenced by the actions further described, following.

D. Defendants Codington County and the Board of Adjustment.

41. Codington County, a local governmental subdivision acting under delegations of limited powers by the Legislature, is governed by the County Board.

42. The Legislature has delegated to all counties the power to zone the rural areas of each respective county, provided the zoning power is carried out in a manner consistent with the Legislature's directives in Chapter 11-2, SDCL.

43. Essential to the exercise of the county zoning power is the development of a Comprehensive Land Use Plan ("CLUP"), and the formation of a County Planning Commission,

which is to draft and propose the text of a Zoning Ordinance for adoption by the County Board as an ordinance.

44. Under statutory changes adopted in 2004, counties were permitted, if not encouraged, to also establish a "Board of Adjustment," an adjudicatory body with specific powers as outlined in SDCL § 11-2-53 – this board's powers are to include "[h]ear and determine conditional uses as authorized by the zoning ordinance."

45. All this – and more – has been implemented by the governing body of Codington County, with the assistance of the First District Association of Local Governments (Watertown, South Dakota).

46. Codington's CLUP, as adopted in 2012, establishes certain policies for future development of rural areas as wind farms (excerpts):

> Although no such projects have been initiated in Codington County at this time, neighboring counties have permitted these projects . . . Projects [will be] required to protect adjacent properties for potential safety hazards of turbines, electromagnetic interference, as well as noise . . . . (CLUP, at 71.)
>
> Policies
> - Appropriate setbacks will be determined [to] protect adjacent properties, roadways and residences from potential noise, destruction, or other potential adverse impacts of towers.
> - Maximum noise levels shall be established for wind energy systems.
>
> . . . .
>
> - Maximum noise levels to be heard at the property line of the site with a wind tower.
>
> . . . . (CLUP, at 72.)

47. The CLUP provides no legal basis for Codington County's officers or agencies to determine "maximum noise levels" at any place or point, other than at the property line of the site that has – or is to have – a wind tower.

48. Ordinance # 65, as adopted in 2017, appears to have been an amendment to Ordinance # 15, originally adopted many years ago, and as of that year, appears to be a complete

compilation of the Zoning Ordinance to that point in time. (Unless otherwise indicated, the term "Zoning Ordinance," as used in this pleading, shall mean that ordinance as adopted by Codington County, having the title of Ordinance # 65, with further amendments thereto being specified or referenced herein by a subsequent ordinance number.)

49. Under Section 4.04.01 of Ordinance # 65, the County Board appoints the Planning Commission (and two alternates) to serve as the Board of Adjustment.

50. Section 4.05.01 (Ordinance # 65) outlines the general jurisdiction of the Board of Adjustment as to conditional uses, a concept requiring the County's agents to have received a written application from a specific applicant.

51. A "conditional use" is defined in Ordinance # 65 (Article II, at p. 10), as:

> [A]ny use that, owing to certain special characteristics attendant to its operation, may be permitted in a zoning district subject to requirements that are different from the requirements imposed for any use permitted by right in the zoning district. Conditional uses are subject to the evaluation and approval by the Board of Adjustment and are administrative in nature.

52. The Zoning Ordinance's definition of "conditional use" is generally consistent with that provided by statute, SDCL § 11-2-17.4; the "administrative" nature of conditional uses is described in *Armstrong v. Turner County Board of Adjustment*, 2009 SD 81, 772 NW2d 643, is a function of exercising adjudicatory powers, as a tribunal and in the course of administering the Zoning Ordinance.

53. The enactment of zoning regulations by a county, as an exercise of the police power, cannot exceed constitutional limitations on a government's restrictions on private property. *Schafer v. Deuel County Board of Commissioners*, 2006 SD 106, 725 N.W2d 241.

54. Zoning ordinances, as a general rule, are a valid exercise of the police power, in legislative form. *Village of Euclid, et al. v. Ambler Realty Co.*, 272 U.S. 365 (1926).

55. At the writing of this Complaint, no wind farms are constructed or operating in Codington County, although a number, including the Crowned Ridge Wind Farm, are very close to beginning construction as a conditional use in the rural area.

56. This Complaint challenges the right, jurisdiction and authority, first, of Codington County to adopt a Zoning Ordinance making provision for such action, and secondly, of the Board of Adjustment to take adjudicatory action upon a Conditional Use Permit, pursuant to which the CUP Applicant (Defendants Crowned Ridge, jointly) are given express approval, as a consequence of a CUP, to inflict a certain level of intensity, or a "not-to-exceed" quantity of adverse effects [5] upon neighboring property owners (including Plaintiffs) who, themselves, have pursued no specific application and have sought no remedy from the County and its Board of Adjustment, other than to oppose the allowance (approval) of the CUP.

57. No sane person would seek to live as close as possible to a large-scale wind farm, such as is proposed by the developers of Crowned Ridge Wind Farm. When operating, the turbines tower far above any other structures, trees, windbreaks, or terrain features, a source of extreme noise levels, both heard (on the dBA scale) and often inaudible, but which can be felt – a category of noise comprised of infrasound and low frequency noise (commonly, "ILFN"), while emitting also Shadow Flicker. The only effective counter for such "Effects" is a sufficient, appropriate setback or separation distance, as it is not possible for the Non-Participating Owner to erect screens or fences, or to plant trees, to thwart "Effects" pouring in from such heights.

58. Plaintiffs state and allege that Codington County, *first*, failed to legislate a sufficient, reasonable separation distance between a proposed wind farm use and those who are Non-Participating Owners, such as Plaintiffs, and, *second*, the Board of Adjustment failed

[5] As listed in the "Effects Easement," Section 5.2 of the Wind Lease & Easement, referenced in ¶¶ 31-40, above.

likewise, in the exercise of adjudicatory powers, to impose adequate separation distance for the proposed use.

59. As a consequence, the Board of Adjustment, acting within the purported scope of discretion afforded by the Zoning Ordinance, has allowed a proposed, intensive use, namely, the Crowned Ridge Wind Farm, which, according to every required prediction, will adversely impose "Effects" (of a particular duration or intensity) upon neighboring Non-Participating Owners, including Plaintiffs. This adverse use and imposition represents a servitude upon Plaintiffs' property interests, as the resulting CUP has approved, authorized, blessed or permitted the imposition of such "Effects" upon Plaintiffs, not being the CUP Applicant and having sought no right nor remedy from the Board of Adjustment. This servitude thus becomes a *de facto* easement as to the Lindgren Farm.

60. Codington County adopted Ordinance 68 in June 2018, further amending the Zoning Ordinance as to Wind Energy Systems (WES). As further amended, the Zoning Ordinance includes, within Chapter 5.22, Table 5.22.03.2, establishing WES setbacks for a "tower" having a vertical height of 75' to 500' (1,500' as to a "Non-Participating occupied residence," when located in a district other than a Town District), plus an added factor of 2.5' for each additional vertical foot more than 500' in height. (Table 5.22.03.2 is reproduced in Exhibit A, annexed, incorporated by this reference.)

61. The proximity of a wind turbine to a Non-Participating Owner's residence (and other property) is such that the Zoning Ordinance presented here is an example of "Trespass Zoning," a term often used to describe the proclivity of wind farm developers, as often facilitated by the writers and administrators of zoning ordinances, to squeeze as many turbines into an allocated leased space, while making use also of non-leased adjacent lands (held by Non-Participating Owners) for some portion of the setbacks required by law or regulation.

62. The discernible extent of Trespass Zoning under this Zoning Ordinance depends on the variable factors of (a) safety zone, as determined or published by the manufacturer or other experts in the field, in the event of a turbine collapse, or a fire, or of ice throw from the spinning turbine as an intrusion upon the adjoining property of a Non-Participating Owner; and (b) the impact of the Effects as will flow from one or more wind turbine sites (including audible noise, on the dBA scale, ILFN, and Shadow Flicker) upon the Non-Participating Owner, which renders the full and complete use of the adjoining rural property, *because of such proximity*, either unsafe or impractical to use, enjoy, occupy or further develop, consistent with district regulations, and in line with the current or future inchoate wishes of the Non-Participating Owner.

63. Others have prepared, without claim of copyright, a variety of charts or diagrams to illustrate the concept of Trespass Zoning, as applicable in dealing with the threat of other proposed wind farms in other counties and jurisdictions. As a *caveat*, the diagrams of others may not be entirely or completely keyed to the Zoning Ordinance in Codington County, but yet serve to illustrate for the Court the concept of Trespass Zoning, and depicting also the gravamen of Plaintiffs' Complaint: that Defendants are each endeavoring, in the name of the Euclidean Zoning (the delegated zoning power) and under such other provisions of law as are alleged, and as a *de facto* easement, to facilitate the taking of some of the sticks, presently within the bundle of rights claimed by Plaintiffs as owners of the Lindgren Farm. With this in mind, one such diagram, marked Exhibit B, annexed, and incorporated by this reference, is captioned:

> "Trespass Zoning – Participating wind lease/easement holders, steal land use and safety from non-participants. Non-participants receive ZERO compensation."

Another rendition of the Trespass Zoning concept illustrates the relationship of a wind turbine site, on Parcel A, with a 1250' building setback, and a 500' setback to lot line, to the surrounding Parcels B, C, D & E; such is marked and attached as Exhibit C, incorporated by this reference.

64. The annexed examples of Trespass Zoning suffice to demonstrate that, as is the case with Plaintiffs, the utility of *some* part of the lands of the Non-Participating Owner, due to proximity of massive, rotating wind turbines, is damaged or destroyed by the acts of Defendants, acting for the benefit of both Defendants and the various Participating Owners (not parties to this case), an injury that will persist for the entire life or duration of the wind farm. Such an injury comprises an effective taking of the Non-Participating Owner's full right of utilization and further development of his or her own land for all purposes lawful under the Zoning Ordinance. (As an aside, Plaintiffs note, when this *very* point was made to the Board of Adjustment, Defendant's general response was that the neighbors themselves, *as Participating Owners*, also have land-based utilization and development rights, and, in fact, those rights had already been "sold" to the wind farm developer. Acceptance of Plaintiffs' position would thus limit or deny the Participating Owners the full benefit of a Wind Lease & Easement, like the one referenced in ¶ 31, above, even while frustrating the overall, full development potential of the Crowned Ridge Wind Farm. The obvious answer is that when one wishes to engage in a land use requiring, as an example, a contiguous land mass of 2,000 acres, stocked with 500' turbines, then, for the sake of safety of each neighbor and so as not to take, damage or interfere with the collective land-based rights of the neighbors, *as Non-Participating Owners*, one should gather together at least 2,000 contiguous acres before coming to the Board of Adjustment seeking a CUP. Not quite enough land? Then buy more, or, as a reasonable alternative, the CUP Applicant must work to control more land within a sphere of bargained-for privity. The actions taken here, however, have the collective effect of simply stealing land-based rights from the Non-Participating Owners, consistent with the concepts of Trespass Zoning, as reflected in Exhibit B and Exhibit C.)

65. Ordinance 68, within Chapter 5.22, establishes certain WES noise level limits:

12. Noise.

> a. Noise level generated by wind energy system shall not exceed 50 dBA, average a-weighted Sound pressure level effects at the property line of existing non participating residences, businesses, and buildings owned and/or maintained by a governmental entity.
> b. Noise level measurement shall be made with a sound level meter using the A-weighting scale, in accordance with standards promulgated by the American National Standards Institute. An L90 measurement shall be used and have a measurement period no less than ten minutes unless otherwise specified by the Board of Adjustment.

66. Ordinance 68, inconsistently with the CLUP (as cited at ¶ 46, above), does *not* establish a maximum noise level at the property line of the tract or parcel that holds a wind turbine. Rather, the Zoning Ordinance establishes a maximum noise level at the property line of tracts or parcels with existing Non-Participating residences and other occupied structures.[6] while leaving the establishment of the maximum noise level at the occupied structure itself to the PUC.

67. To the extent that noise is governed by Ordinance 68, it is important to note that the decibel (dB) is a unit of measurement, expressly the ratio of one value of the power or field quantity to another on a logarithmic scale. The intensity of sound pressure doubles with every increase of 3 dBA. Thus, the distinction between 40 dBA and 50 dBA is substantial, not a mere trifle.

68. Codington County's Ordinance 68 establishes only one regulated noise level – that of 50 dBA, as perceived (as relevant to Plaintiffs), at the *property line* of existing Non-Participating residences (a place of measure that is not in conformity with the CLUP).

69. Although WES, when operating, are the source of other noise, including Low Frequency Noise (LFN, having a frequency range from about 10 Hz to 200 Hz), and Infrasound (below 20 Hz), the Zoning Ordinance fails to govern such forms of noise (collectively, "ILFN").

[6] Establishing a maximum noise level at the occupied structure in Codington County is left to the PUC, assuming the PUC has jurisdiction over a particular wind farm project.

70. Ordinance 68, having been adopted by the County Board on June 7, 2018, also establishes provisions concerning "shadow flicker" – Shadow Flicker being defined by several public sites as "[r]otating wind turbine blades may cast shadows during periods when the sun is shining and the turbine is operating," resulting in "shadows [occasionally falling] upon homes or other occupied structures (known as receptors) in and near the wind farm area." [7]

71. Codington's Shadow Flicker provisions within Ordinance 68 state as follows:

> 13. Flicker Analysis. A Flicker Analysis shall include the duration and location of flicker potential for all schools, churches, businesses and occupied dwellings within a one (1) mile radius of each turbine within a project. The applicant shall provide a site map identifying the locations of shadow flicker that may be caused by the project and the expected durations of the flicker at these locations from sun-rise to sun-set over the course of a year. The analysis shall account for topography but not for obstacles such as accessory structures and trees. Flicker at any receptor shall not exceed thirty (30) hours per year within the analysis area.
>
> a. Exception. The Board of Adjustment may allow for a greater amount of flicker than identified above if the participating or non-participating landowners agree to said amount of flicker. If approved, such agreement is to be recorded [with the Codington County Register of Deeds] and filed with the Codington County Zoning Officer. Said agreement shall be binding upon the heirs, successors, and assigns of the title holder and shall pass with the land.

72. The Crocker Shadow Flicker Analysis appears to be the first occasion where Defendant PUC accepted and decreed that Shadow Flicker, in that particular proceeding, should not exceed thirty (30) hours per year on an occupied dwelling; the Crocker Shadow Flicker Analysis was prepared at about the same time as the Codington County Commission adopted Ordinance 68, the latter deploying the very same annual standard or limit as to Shadow Flicker.

[7] Quoting from a document marked and received by the PUC as Exhibit D, "Shadow Flicker Assessment, Crocker Wind Project, Clark County, South Dakota," at p. 1, prepared by Meteorology & Energy Assessment, and sometimes hereafter referenced as "Crocker Shadow Flicker Analysis," submitted by the applicant in Docket EL17-055, *In the Matter of the Application of Crocker Wind Farm, LLC for a Permit of Wind Energy Facility, etc., in Clark County, South Dakota*, application filed December 15, 2017, accessible at the PUC's Electric Dockets page, http://puc.sd.gov/Dockets/Electric/2017/el17-055.aspx).

73. The exact origin of a permissible allowance for Shadow Flicker, when inflicted upon someone like Plaintiffs – so long as not exceeding thirty (30) hours per year on an occupied dwelling – is uncertain. The Crocker Shadow Flicker Analysis cites a 2003 publication of the Danish Wind Industry Association. The latter publication and site (www.windpower.org) describes the Effect as "shadow casting," and, as in original text, observes:

> Shadow casting is generally not regulated explicitly by planning authorities. In Germany, however, there has been a court case in which the judge tolerated 30 hours of actual shadow flicker per year at a certain neighbour's property. In the 30 hours, it appears, one should only include flicker which occur during the hours where the property is actually used by people (who are awake).

74. In January 2012, a report entitled "Wind Energy & Wind Park Siting and Zoning Best Practices and Guidance for States," funded by U.S. Department of Energy, and written by a project of the National Association of Regulatory Utility Commissioners (NARUC), recommended (without attribution to the nameless judge in Germany) the approval of a Shadow Flicker restriction of "not more than 30 hours per year or 30 minutes per day at occupied buildings." While NARUC may deem this standard to be a "best practice," the adoption by the various South Dakota counties responding to that suggestion, including Codington County, has been edited to the "30 hours per year" component, the balance being ditched.

75. Apart from Codington County's very recent, partial adoption of NRUC's "best practices" recommendation, the 30-hours annual Shadow Flicker limit has not been adopted as a national or state standard, to be endured by any of the "receptors" (whether or not an occupied building) in line to receive this "Effect," as used in Section 5.2 of the Wind Lease & Easement document, briefly quoted in ¶¶ 36-37, above.

E. Codington County's CUP

76. Literally hours after Codington County's Ordinance 68 became effective (as referenced in ¶¶ 60-71, above), Defendant Crowned Ridge filed an application (on or about July

2, 2018) for a CUP, seeking approval for the construction and operation of the Crowned Ridge Wind Farm in Codington County.

77. The CUP application was supported by "Final Report Crowned Ridge Wind Farm Sound and Shadow Flicker Study, Codington County, SD, dated June 21, 2018, authored by one Jay Haley, P.E., as Partner of EAPC Wind Energy of Grand Forks, ND ("Haley 2018 Report"). As described therein, the report is based on computer modeling for predicted sound or noise impacts at 97 Non-Participating parcels (measured, by prediction, at the property line, not the residence), and Shadow Flicker for 204 occupied residences, all within Codington County. The Haley 2018 Report for Shadow Flicker has been built, as a claimed "real case" prediction, on the monthly average of sunshine data, as recorded at Huron, SD by the National Climatic Data Center over the years of 1965-1983.

78. For purposes of predicting Shadow Flicker in the CUP proceeding, Plaintiffs' residence, on the Lindgren Farm, was assigned a unique receptor code – CR1-C37P – at a predicted duration of 27 hours, 49 minutes (27:49) annually, and at a distance of 1,696 feet to the nearest turbine site. [8]

79. Having made an effort to further inform themselves as to the negative aspects of living near a wind farm, Plaintiffs subsequently informed Defendants that the Shadow Flicker, in particular, appearing to come solely from proposed wind turbine sites located on adjacent properties, was not acceptable to them.

80. Defendant Board of Adjustment, nevertheless, following a public hearing on July 16, 2018, during which Plaintiffs and other opponents were limited in their presentations to several minutes each, quickly approved the CUP by an affirmative 6-0 vote that date, with findings of fact and conclusions being signed and filed on July 18, 2018.

[8] The suffix letter "P" indicates a Participating Owner, while "NP" reflects Non-Participating.

81. Plaintiffs did not seek a writ of certiorari for review of the Board of Adjustment's determination, as is permitted by SDCL § 11-2-61, although others living in or near the proposed wind farm's boundary are known to have done so (14CIV18-000340, *Johnson, et al. vs. Codington County Board of Adjustment*); those efforts for review or appeal were denied by Honorable Robert L. Spears, Circuit Judge, presiding, by memorandum decision filed March 22, 2019.

82. Wind farms emit Shadow Flicker, along with an incredible volume of noise. As noted in the documents submitted to Codington County's Board of Adjustment, the wind turbines selected emit a sound at the source at 107.5 dBA,[9] while Shadow Flicker is a potential problem for any property within some 1700 meters of an operating turbine.[10] The Shadow Flicker Effect is most acute, Crowned Ridge I admits, within 1000 meters of the turbine.[11]

83. Shadow Flicker and such noise (as "Effects," as reiterated in the Wind Lease & Easement) is cured only when the wind farm developer is required to secure and then maintain adequate, responsible setbacks to neighboring, Non-Participating Owners, such as Plaintiffs.

84. The Codington County Zoning Ordinance represents a less than half-baked approach, where in attempting to serve the interests of the Participating Owners (those who clamor for revenue because of success in having a wind turbine constructed on their parcels, without regard to size or adequacy of self-contained setbacks),[12] the current Zoning Ordinance, as freshly amended just hours before the CUP was filed, permits Shadow Flicker to be dumped on

[9] Table 13.3.2.2, Application to PUC, dated January 30, 2019, at p. 83.
[10] Application to PUC, at p. 85. This is roughly equivalent to 5,500 feet from an operating turbine.
[11] Or about 3,280 feet – Plaintiffs' residence is about 1,700 feet from the nearest turbine, as cited in ¶ 78, but it is not known whether this nearest turbine is responsible for all or any of the Shadow Flicker predicted for Effects.
[12] Meaning by this reference those Participating parcels sufficiently large to accommodate required setbacks within their own discrete boundaries, without the need to "borrow" or "take" land areas from neighboring Non-Participating Owners to avoid placing or casting Effects upon those not in privity with the wind farm developer.

the residences and lands of neighbors, while also permitting the prediction of a relatively high level of sound (50 dBA) to be received at property lines of Non-Participating residences.

85. The described cure for these "Effects" would require greater separation distance between proposed wind turbines and the homes and properties of Non-Participants, a resolution that has been strongly resisted by wind farm developers in the formation of the Zoning Ordinance, including the commercial interests behind Crowned Ridge Wind Farm, and in designing the layout of this wind farm for presentation to the Board of Adjustment.

86. The Codington County "solutions," when applied to the specific proposal of Defendants in the design of the Crowned Ridge Wind Farm, are dependent on an official approval, if such "Effects" are to reach also the property interests of Plaintiffs, as Non-Participating Owners. The official approval of Defendant Board of Adjustment have been forthcoming, and thus, the Effects described are certain to be received by Plaintiffs at their residence and upon their land, as predicted by the Defendants' own evidentiary submissions.

87. Neither of the Codington County "wind farm solutions" within the Zoning Ordinance, as last amended, is in full harmony with Codington County's CLUP, nor are such solutions, as carried out by the CUP, anything but a taking of the land and property interests of Non-Participating Owners, including Plaintiffs.

88. Imposing these last minute "wind farm solutions" upon Non-Participants, by means of the amended Zoning Ordinance and the resulting CUP, represents an adverse taking of, or some damage to, an aspect or degree of property interests otherwise protected by law.

F. PUC's Facility Siting Permit.

89. Invoking the PUC's jurisdiction for a Facility Siting Permit was essential as Defendants Crowned Ridge propose the construction and operation of a "wind energy facility" with capacity greater than one hundred megawatts of electricity, *see* SDCL 49-41B-2(13).

90. The scope of the PUC proceeding (Docket EL19-003) is necessarily broader than the Codington County CUP, involving as it does a Facility Siting Permit covering areas in two contiguous counties (Codington and Grant).

91. The viewpoint of Defendants Crowned Ridge, as to both the necessity and inherent value of the Facility Siting Permit, is demonstrated by Applicant's 45-page response to the data requests of an intervenor in Docket EL19-003; Exhibit D, annexed, being marked page 000015 of Exhibit A20, is of particular interest in the offering of a response to this question:

> 1-42) Will shadow flicker from the turbines in the CRW project cross a non-participators property line? 1. If yes, provide details of compensation being provided.

The answer was provided by Jay Haley, as consultant, and Tyler Wilhelm, Project Manager for Defendants:

> **Response:** Crowned Ridge objects to the question because it is vague and calls for speculation. Subject to and without waiving the objections, depending on the proximity of the wind turbine to the non-participator's property line shadow flicker may cross the property line. *As modeled, shadow flicker from turbines meets Codington and Grant County ordinances for all participating and non-participating receptors. Compensation is not warranted as there are no exceedances.* . . . (Emphasis supplied) [13]

92. The exception stated in the Codington County Zoning Ordinance (as amended by Ordinance 68, and as quoted in ¶ 71, above), dovetails with the expressed views of Defendant's Project Manager and Consultant (quoted immediately above), in that a recorded instrument is important *only* if Shadow Flicker is predicted to exceed 30 hours annually, the Board of Adjustment has ordered or permitted such to occur, and the landowner in question has likewise agreed. Thus, the Zoning Ordinance *presumes* a servitude has been placed, or may be lawfully

[13] Plaintiffs hasten to add that they, as owners, have the *exclusive* right to create a servitude; the opinions of Witness Haley and Project Manager Wilhelm as to compensation being due *only* for "exceedances" matter not one wit here. Likewise, neither the Board of Adjustment nor the PUC has the power to compel one. Requiring Plaintiffs to endure Shadow Flicker of more than 15 hours annually is not a mere trifle, capable of being legally dismissed by the wave of any Defendant's hand wishing to do so.

created with the issuance of a CUP for a similar wind farm use, upon all "receptors" for up to 30 hours annually.

93. Likewise, the Facility Siting Permit application, as Defendant Crowned Ridge I submitted to the PUC, dated January 30, 2019, asserts:

> While there are no explicit state regulations on the limit of the number of shadow flicker hours allowed, the shadow flicker ordinances of both Codington and Grant Counties limit the maximum number of shadow flicker to 30 hours per year at occupied structures. Both Grant and Codington County allow shadow flicker to exceed 30 hours per year either at either [sic] a participating or non-participating landowner if waived in writing with an agreement that is recorded and filed with the County Register of Deeds. (Application, in Docket EL19-003, at p. 85)

The quoted provisions do nothing to explain how, or from what source, except by embracing the bogus doctrine of "Trespass Zoning," Codington County obtained the requisite authority to approve a wind farm's dumping of Shadow Flicker on nearby properties for any duration of time.

94. In exercising the jurisdiction over a Facility Siting Permit, the PUC is guided by no specific statutory or other fixed standards concerning the "Effects" of noise, whether heard or merely felt, or that of Shadow Flicker duration.

95. The PUC, in pursuit of the duty to consider a Facility Siting Permit in light of SDCL § 49-41B-22, uses its own staff and retained industry experts to examine the pre-filed and on-going testimony and studies compiled by an applicant for such a permit, and to provide an analysis of the technical and scientific evidence.

96. The PUC's amassed record of the proceeding known as Docket EL19-003 is impressive based on sheer heft or weight alone, Plaintiffs having in mind, in particular, Staff Exhibit S-1, the direct testimony of consultant David M. Hessler (20 pages, "Hessler Exhibit," this witness having focused on sound or noise issues), and Staff Exhibit S-2, the direct testimony of staff analyst Darren Kearney (675 pages, "Kearney Exhibit," this witness having covered many topics but of particular interest here, Shadow Flicker).

97. Witness Hessler has been hired by the PUC in prior wind farm settings, including Docket EL18-026, *In the Matter of Prevailing Wind Park, LLC*, a proposed development for some 61 turbines, producing up to 219.6 megawatts, located in Hutchinson, Bon Homme, and Charles Mix Counties. In that case, Witness Hessler recommended that sound levels be limited to 40 dBA at non-participating residences. Consequently, in paragraph 65 of the PUC's resulting Final Decision and Order, dated and entered November 28, 2018, the PUC, acting by and through the three Commissioners, noted and concluded (footnotes in original eliminated):

> The record demonstrates that 40 dBA at non-participating residences is an appropriate and reasonable sound limit to protect the welfare of non-participants. Sound limitations vary from jurisdiction to jurisdiction. There are no federal or state noise regulations that apply to this project and Applicant's sound limit goal for the project was based on the Bon Homme ordinance. During the evidentiary hearing, Commissioner Soukup, who was serving on the Bon Homme County Commission and Zoning Board when the wind-specific ordinances were adopted, made it clear that the ordinance adoption process was difficult to understand and hard to recall. At the evidentiary hearing, Mr. Hessler testified that he would like to see the project utilize a 40 dBA sound limit. Mr. Hessler stated that there is no limit that could be set to avoid sound complaints. Mr. Hessler acknowledged that that there is no need for a 35 dBA sound limit. Mr. Hessler testified that a sound level of 40 dBA would better protect the residences than a sound level of 45 dBA.

98. Then, a few months later, Witness Hessler returned at the behest of PUC Staff to provide testimony in the underlying case (EL19-003) concerning received sound levels in Codington and Grant Counties. In the Hessler Exhibit, the following exchange is found (at p. 5, beginning at line 9):

> Q. In Docket EL18-026, you recommended that the Commission include a noise limit for the Prevailing Wind Park facility at what you consider an ideal design goal of 40 dBA because there was obvious opposition to the project *and* such a level was reasonably, and unusually, achievable with fairly minor modifications to the project layout. Do you believe a similar limit for non-participants near this project is warranted and achievable?
>
> A. After carefully reviewing the updated sound contour plots, I believe a strict permit condition of 40 dBA at all non-participating residences would be overly onerous to the project; however, it appears to me, based on my experience doing optimization modeling for new wind projects, that the

> sound levels at many of the closest non-participating residences, with sound levels in roughly the 42 to 45 dBA range, could be significantly reduced to the point of nearly achieving an ideal performance of 40 dBA by relocating a relatively small number of turbines. [14] More specifically, I estimate that the sound level at all non-participants could be reduced to no more than about 41 or 42 dBA if 16 of the primary units were relocated to any of the 17 sites currently identified as alternate locations in Figure 2, titled "Project Map and Facilities," of Appendix A of the Application. The 16 units that I believe are unduly and unnecessarily affecting non-participating residences are circled in black in Exhibit DMH-2, which is a mark-up of the latest sound contour plots.

The Hessler Exhibit further continues (p. 6, line 15):

> Q. Is there a specific permit condition on noise that you would advance for the Commission's consideration?
>
> A. Yes. I think that at a bare minimum the sound emissions from the entire project, in both counties, should be limited to the Grant County Ordinance level of no more than 45 dBA at all non-participating residences.

99. In due course, PUC Staff and Crowned Ridge 1 entered into a stipulation entitled "Permit Conditions," establishing the following noise limit (Permit Conditions, ¶ 25):

> The Project, exclusive of all unrelated background noise, shall not generate a sound pressure level (10-minute equivalent continuous sound level, Leq) of more than 45 dBA as measured within 25 feet of any non-participating residence unless the owner of the residence has signed a waiver . . . .

100. The stipulated compilation of Permit Conditions (forty-five numbered paragraphs over 11 pages) was then annexed to the PUC's Final Decision of July 26, 2019 for Docket EL19-003, with the Commissioners adding (Final Decision, ¶ 45):

> The record demonstrates that [Crowned Ridge I] has appropriately minimized the sound level produced from the Project to the following: (1) no more than 45 dBA at any non-participants' residence . . . . [15]

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[14] Plaintiffs hasten to add their home was one such place, initially predicted for 46.5 dBA, but assertedly reduced to 44.8 dBA, as urged by Witness Hessler, per Exhibit A57, sponsored by Witness Jay Haley.

[15] In this example, where the Zoning Ordinance makes *no* provision (and that which is made is inconsistent with the CLUP, as noted in ¶ 66), the PUC itself has decided, without statutory or regulatory constraints, that 45 dBA for the Plaintiffs residence (and all others likewise) is about right, as contrasted with a mere 40 dBA in the EL18-026 proceeding, *Prevailing Wind Park, LLC*. This "authorization" by the agency serves to immunize Crowned Ridge Wind Farm so long as that limit is observed.

101. Meanwhile, Staff Analyst Darren Kearney's massive submission (Exhibit S2, or "Kearney Exhibit") includes a focus on Shadow Flicker. Referencing the plan of Crowned Ridge I to limit Shadow Flicker to 30 hours per year, the following appears (at p. 11, line 14):

> Q. In your response above you reference limiting shadow flicker to 30 hours per year. Is Staff comfortable with that limit?
>
> A. Yes. The 30 hours per year is consistent with the limits established in Grant and Codington counties. In addition, it is also consistent with the limit set forth in permit conditions issued for other wind projects by the Commission (see dockets EL17-055,[16] EL18-003, and EL18-046). Staff is not aware of any studies demonstrating that shadow flicker at a specific duration could potentially impair the health, safety, or welfare of inhabitants in the project area. Therefore, Staff has no basis to propose an alternative shadow flicker limit and looked to the county requirements and past Commission decisions for guidance.

Such testimony begs the question of where (and whether) Codington County obtained the authority to establish such Zoning Ordinance provisions, pursuant to which any luckless Non-Participating Owner (like Plaintiffs) must be prepared to endure Shadow Flicker within those limits, whenever the circumstance of history finds a newly proposed wind farm right next door.

102. Witness Kearney might be "comfortable" with Shadow Flicker up to 30 hours annually, but Plaintiffs are not; the degree of Staff comfort does not comprise a valid infringement or servitude upon the land title of Plaintiffs.

103. In similar fashion, within the stipulation as annexed to the PUC's Final Decision and Order, the following is noted as the outcome for Shadow Flicker (Permit Conditions, ¶ 34):

> Shadow flicker at residences shall not exceed 30 hours per year unless the owner of the residence has signed a waiver.

[16] A reference to the PUC's *Crocker Wind Farm* case, as also noted in n. 7, at 21, above.

The substance of this stipulated outcome – as to the duration of this "Effect" - is then incorporated into the PUC's Final Decision and Order, at ¶ 46. [17]

104. The entire process of pursuing a wind-farm Facility Siting Permit from the PUC is a marvel to behold, involving as it does literally thousands upon thousands of technical pages of written materials, charts, diagrams and opinions, from the permit applicant, PUC staff, and intervenors, all to be distilled, over a mere six months, into an order, determining whether the burden of proof for the elements in SDCL § 49-41B-22 have been met.

105. The question neither asked nor answered by anyone before the PUC (at least not directly nor in any discernible manner), however, is whether these several Effects (namely, noise registered on the dBA scale or ILFN, and Shadow Flicker, in particular, when considered and approved by the PUC as an "acceptable" level of emissions or waste products from the wind farm) are consistent with the inherent rights of title of those upon whom these Effects are about to be dumped or burdened, and then relatedly, what *is* the nature of the governmental approval being given to the Applicant in these proceedings in specific relationship to the property interests of those persons who, like Plaintiffs, are Non-Participating Owners, but upon whom, because of proximity to this wind farm, these unwelcomed Effects will nevertheless fall and invade?

106. This Complaint seeks to move the very questions poised in the preceding paragraph, even as Crowned Ridge Wind Farm development has broken ground and is preparing to construct an adverse, hostile use likely to endure for decades.

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[17] At the outset of Docket EL19-003, Plaintiffs were shown as "Participating" in the project, later corrected to "Non-Participating." The identifier code for Plaintiffs' "occupied residence" – CR1-C37-P (for which Witness Haley's study, dated January 22, 2019, predicted Shadow Flicker of 27:44, at a distance of 1,631 feet to the nearest turbine) – would become CR1-C37-NP. (*See* "Pre-Construction Compliance Report, Crowned Ridge Wind, LLC, Shadow Flicker Study, Codington and Grant Counties, SD, dated July 28, 2019." As if by some miraculous prognostication, Plaintiffs' residence, as an occupied structure and labeled receptor CR1-C37-NP, at p. 19 of report, remains static at 1,631 feet from the nearest turbine, but Shadow Flicker duration, according to Haley's reckoning, is reduced to 15:55, such being about 15:55 too long.

Part Four.
CAUSES OF ACTION

Count I.

Claims in the Form of Declaratory Relief and Judgment

107. Plaintiffs seek relief in the form of a declaratory judgment, based on their vested and protected rights as proprietors of the Lindgren Farm (legally described in ¶ 23, above), such property being located in Codington County, South Dakota, within the jurisdiction of this Court, and located also within the proposed perimeter or boundary of the Crowned Ridge Wind Farm.

108. Plaintiffs restate and further allege all of the facts and matters contained in ¶¶ 1 to 105, of this Complaint, as if set forth in full.

109. Plaintiffs, in reliance on the provisions of SDCL § 21-24-1, *et seq.*, seek relief in the form of a declaratory judgment as to each of the Defendants, and as to each and every of the following declarations (whether stated affirmatively or negatively, as the case may be):

(1) That as a matter of property law, neither Defendant Boulevard, nor any of its potential assigns or successors, have or enjoy any easement with respect to the Lindgren Farm, for purposes of emitting any of the "Effects" as referenced in this pleading, arising under the provisions of that certain Wind Lease & Easement, as described or referenced in ¶ 31, above.

(2) That the certain Wind Lease & Easement, structured as an option, has expired and is of no further force or effect.

(3) That the certain Memorandum, as referenced in ¶ 32, above, relates only to a now expired option for the so-called Wind Lease & Easement, and thus, having been recorded without reference to the expired option, is and continues to be a cloud on the title of Plaintiffs.

(4) That Plaintiffs, as owners of the Lindgren Farm, have created no effective servitude therein for the benefit of any one or more of the Defendants, whereby such would permit the visiting upon or the reception of the various "Effects" (as referenced in this pleading) upon the Lindgren Farm and the property interests of these Plaintiffs.

(5) That the Zoning Ordinance of Codington County, in relationship to the purported regulation of Wind Energy Systems (the "Activity"), as last amended (Ordinance 68), and in purporting to allow an applicant for zoning relief, in the form of a conditional use permit for the Activity, to impose or inflict, as a consequence, some aspect or measure of the objectionable features or "Effects" of the Activity on the use and enjoyment of nearby lands by those who, in the case of Plaintiffs (being the owners of such lands but not themselves an applicant for zoning relief to allow that Activity or other affirmative relief), exceeds the constitutional limits of the Legislature's zoning authority, as delegated to Codington County.

(6) That the Zoning Ordinance of Codington County fails to conform to the requirements of the CLUP, as it establishes noise limits (dBA) at the property line of parcels with existing occupied structures, rather than at the property line of those tracts or parcels serving as sites for wind turbines (as required by the CLUP); this subtle difference is clearly a form of "Trespass Zoning" upon and over the properties of Non-Participating Owners who may not have "occupied dwellings" constructed on such tracts or parcels prior to the CUP decision of the Board of Adjustment, thereby limiting, damaging or infringing upon the right to engage in future development of such tracts or parcels for purposes permitted within the district under the Zoning Ordinance.

(7) That the Zoning Ordinance of Codington County, under the delegation of the Legislature's zoning power and as an extension of the state's police powers, does not authorize the creation of any servitude upon or touching the lands owned by Plaintiffs, being in the nature of "Trespass Zoning."

(8) That the Conditional Use Permit, as issued by the Board of Adjustment, to the extent such CUP authorizes the Activity to be conducted on certain lands, and to thereby emit or dispose of the described "Effects" upon Plaintiffs' lands, residence or otherwise, is an intent or effort to create, by governmental action, a *de facto* easement upon the lands of Plaintiffs, for the benefit of Crowned Ridge Wind Farm.

(9) That the *de facto* easement, if one is deemed to exist by reason of the Conditional Use Permit, upon and across the lands (and residence) of Plaintiffs (otherwise, the Lindgren Farm) is an invalid, unconstitutional exercise of the zoning power by Codington County and the Board of Adjustment; and further, in such event, Plaintiffs shall seek injunctive relief in and under Count Two of this Complaint, as expressed following.

(10) That in the event the Court deems the Conditional Use Permit a valid exercise of the zoning power, whereby Defendants are thus enabled to emit or dump the various "Effects" (namely, noise, whether on the dBA scale or ILFN, and Shadow Flicker of any duration), all as received upon the Lindgren Farm, then and in such event, Plaintiffs request that the Court declare specifically and affirmatively the manner and nature of the "right-to-use" interests held by the several Defendants in and to the Lindgren Farm, and as to the Conditional Use Permit and the determined right to make any use, adversely, of the Lindgren Farm for the benefit of the

Crowned Ridge Wind Farm, and with respect to such declaration of interests, Plaintiffs shall then seek recompense elsewhere, in other venues, as to their rights and privileges as citizens of the United States, as such interests in the Lindgren Farm, in favor of all or any of the Defendants, have not been acquired by means of privity under the so-called Wind Lease & Easement, but taken by means of a purported exercise of the State's delegated zoning powers.

(11) That the Facility Siting Permit, as approved by the PUC (Docket EL19-003), to the extent that such further authorizes the Activity (Wind Energy Systems, as embraced by the CUP of Codington County Board of Adjustment, and of such size and capacity as comes within or otherwise invokes the statutory jurisdiction of the PUC), such to be conducted on certain lands, and to thereby emit or dispose of the described "Effects" upon the lands and residence of Plaintiffs, is an intent or effort to create, by governmental action, a *de facto* easement upon the lands of Plaintiffs, for the benefit of Crowned Ridge Wind Farm and the Defendants.

(12) That the *de facto* easement, if one is deemed to exist by reason of the Facility Siting Permit (in conjunction with, or standing alone from, the Conditional Use Permit), for the emission or dumping of the "Effects" upon and across the lands (and residence) of Plaintiffs (otherwise, the Lindgren Farm) is, and be now declared by this Court to be, an invalid, unconstitutional exercise of the jurisdiction conferred upon the PUC by the Legislature; and further, in such event, Plaintiffs shall seek injunctive relief in and under Count Two of this Complaint, as expressed following.

(13) That in the event the Court deems the Facility Siting Permit (in conjunction with or stand alone from the Conditional Use Permit) a valid exercise of the power

conferred upon the PUC by the Legislature, whereby Defendants are thus authorized for the carrying out of those acts and actions for the emitting or dumping of the "Effects" (namely, noise, whether on the dBA scale or comprised of ILFN, and Shadow Flicker of any duration), all as received upon the Lindgren Farm, then and in such event, Plaintiffs respectfully seek to have this Court declare specifically and affirmatively the manner and nature of the interests held by Defendants in and to the Lindgren Farm, and as to and by reason of the Facility Siting Permit, together with the right to make any use, adversely, of the Lindgren Farm for the benefit of the Crowned Ridge Wind Farm, as this Court may determine, and with respect to such declaration of rights and interests, whether as a *de facto* easement or otherwise, and Plaintiffs shall seek recompense elsewhere, in other venues, as to their rights and privileges as citizens of the United States, having been harmed by a taking of property interests without due process of law, or just compensation being paid.

(14) That in employing, approving or directing differing amounts or volumes of the Effects (with particular reference to a lower level of dBA for a wind farm in one area of South Dakota, and a higher level of dBA being authorized as to non-participating owners, including Plaintiffs, within the Crowned Ridge Wind Farm, recalling that 45 dBA is on the order of three times the sound pressure of 40 dBA), the PUC has failed to employ a common or consistent standard, in violation of law and as a consequence, the Facility Siting Permit is void, and the Court is urged to so declare.

(15) That the power to create a servitude upon the Lindgren Farm, without the willing consent of the Plaintiffs, has not been delegated to the PUC, as the Legislature

itself lacks that power; alternatively, if such a power is subject to being lawfully delegated, then the delegation here lacks suitable standards as to the property rights of Plaintiffs.[18]

(16) That in selecting for the Facility Siting Permit an allowable noise of 45 dBA, measured at or near the occupied structures or dwellings of Non-Participating Owners, the PUC has itself engaged in a form of "Trespass Zoning," ignoring the property lines of Non-Participating Owners (following the lead of Codington County's Zoning Ordinance, which also ignored establishing a noise ceiling at the property line of the specific site of the wind turbine), while selecting also, without law or regulatory guidance, a noise limit that the PUC itself deemed appropriate to the wind farm in question, but one that is substantially of greater intensity or amplitude than the noise limits selected in a prior wind farm proceeding. The exercise of such discretion, without standards, represents a taking of property rights, as the difference between 40 dBA and 45 dBA (44.8 dBA, to be precise), as will be received at the residence of Plaintiffs, is a substantial infringement on the right to use, possess and enjoy the Lindgren Farm.

(17) That, in addition to or as an alternative to the declarations sought in (13), (14), and (15), *supra*, that by allowing Plaintiffs' land interests, in the form of the Lindgren Farm in Codington County, to be invaded or inflicted by an amplitude or intensity of sound or noise (being one of the so-called "Effects") of roughly three times greater than a similarly sited property near a wind farm in another South Dakota county (as evident from the discussion cited in ¶ 98, above), the permitted

[18] That PUC experts profess comfort with an applied sound level ceiling of 45 dBA at nearby residences in one case, while holding to 40 dBA in another, expressing concerns for the viability of the wind farm if the more stringent standard were to be applied, is reflective of a mere contrivance, not a delegated standard.

affliction being based more on Witness Hessler's professed concern for the viability of the Crowned Ridge Wind Farm and the particular leasehold interests that the applicant has managed to obtain or hold, rather than the protection of the Non-Participating Owners. As such, the Facility Siting Permit has then become a *de facto* easement, to the extent of such variation, one that stands only by the PUC's case-by-case determination and the exercise of the PUC's claimed discretion in the tests applied under SDCL § 49-41B-22, all without the need of establishing privity with Plaintiffs. Plaintiffs, having created no such servitude upon the Lindgren Farm, shall seek recompense elsewhere, in other judicial venues, as to their rights and privileges as citizens of the United States for the taking of such an easement, without due process and also without just compensation being paid.

Count II.

Alternative Claim for Injunctive Relief

110. To the extent the Court shall or may find and declare that Defendants Codington County, Board of Adjustment, and PUC have *not* created, by virtue of their respective CUP and Facility Siting Permit, a *de facto* easement, upon and over the premises described herein as the Lindgren Farm, Plaintiffs hereby seek further relief from this Court, as to Defendants Boulevard and Crowned Ridge I, as developers of the Crowned Ridge Wind Farm, and all persons claiming through said defendants as real parties-in-interest, successors or assigns, permanent injunctive relief, restraining, preventing and prohibiting said Defendants from further constructing, operating, maintaining or in any fashion conducting business with the Crowned Ridge Wind Farm for purposes of emitting or dumping upon the Lindgren Farm any manner or measure of the "Effects," as have been referenced in this pleading.

111. Such proposed uses of and over the Lindgren Farm, for such purposes and in such manner by Defendants, are and will be unpermitted, unauthorized, and unlawful, not having been created by these Plaintiffs as a servitude for the Lindgren Farm; if such use, involving the "Effects," were to begin and thereafter persist, such would be in the nature of a trespass, and said Defendants, having no easement, license or other permission, actual or implied, should be enjoined and restrained accordingly.

Part Five.
PRAYER FOR RELIEF

Wherefore, Plaintiffs pray for relief, in the form of a declaration or series of declarations, as sought in Count I, concerning (a) the rights of Plaintiffs in the ownership of their property, including the right to protect and preserve same by maintaining this action; (b) the legal power or jurisdiction of Defendants Codington County to adopt a Zoning Ordinance with provisions for Wind Energy Systems, which provisions claim to assure to the proprietors of Wind Energy Systems certain rights and benefits, in the nature of easements and servitudes over Plaintiffs' land, as symbolized by such a permit but not otherwise enjoyed under law or by reason of privity with Plaintiffs; (c) with regard to the legal power or jurisdiction of the Board of Adjustment, acting under the provisions of the Zoning Ordinance, to approve and issue a CUP in like manner and for such purposes; (d) the Public Utilities Commission, in connection with Facility Siting Permit cases under Chapter 49-41B, SDCL, has been given no jurisdiction to order, or award, an easement for the benefit of Wind Energy Systems upon and over the lands of Non-Participants, such as Plaintiffs, or to require that Plaintiffs create a servitude upon their property to facilitate development of the Crowned Ridge Wind Farm; (e) as to those Defendants seeking to develop Crowned Ridge Wind Farm, namely, Crowned Ridge Wind, LLC and Boulevard Associates, LLC, the referenced CUP and Facility Siting Permit, *if not in the nature or substance of an*

easement for purposes of emitting Shadow Flicker or sound and noise (both dBA and ILFN) upon and over Plaintiffs' property, then any such use of Plaintiffs' properties for such purposes shall be adverse and hostile and in the nature of a trespass; and (f) for such other and further relief, including injunctive relief as outlined in Count II, and as the Court may determine as just, equitable and proper in these circumstances.

Dated at Canton, South Dakota, this 26th day of August, 2019.

Respectfully submitted,

/s/ A.J. Swanson
A.J. Swanson
State Bar of South Dakota # 1680

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(Affidavit of Plaintiffs follows)