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 of future interests in #CU018-007*, and SOUTH DAKOTA PUBLIC UTILITIES COMMISSION, *having issued a certain Facility Sitting 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.	File 14CIV19-303 **REPLY BRIEF IN SUPPORT OF DEFENDANT CODINGTON COUNTY AND CODINGTON COUNTY BOARD OF ADJUSTMENT'S MOTION TO DISMISS**

INTRODUCTION

Plaintiffs' theory of their case as it relates to the Codington County defendants is that the County and its Board of Adjustment have "blessed" Crowned Ridge with approval of its

plans for a wind energy system ("WES"), thereby bestowing upon Crowned Ridge a *de facto* easement to burden plaintiffs' property. It is a legal theory that is not supported by *any* decisional law whatsoever.

It also makes no sense. Codington County has enacted zoning regulations that place limitations on what plaintiffs' neighbors can do with their properties, and some of those limitations relate to the ability to construct and operate a WES. Without those limitations, Codington County would be the wild wild west as it relates to WESs, just like Campbell County. Plaintiffs' theory seems to be that, because Codington County requires *more* of those proposing to construct and operate a WES, it is violating their property rights.

Regardless of how novel plaintiffs try to be with their pleadings and argument, this lawsuit needs to be seen for what it really is - an untimely end-run to the statutory procedure for challenging a CUP. It should be dismissed.

REPLY TO PLAINTIFFS' ARGUMENT

A. The Court lacks jurisdiction over petitioners' untimely challenge to the Board of Adjustment's decision.

There is a reason the Legislature created specific, mandatory ways for those who claim to be aggrieved by a Board of Adjustment's zoning decisions to challenge such decisions. If petitioners are allowed to proceed with their current lawsuit and

collaterally attack the CUP through a declaratory judgment action, no judgment affirming a Board's decision will ever be truly final. And successful CUP applicants can never be confident that their permit will not be disturbed at some later point, after they have expended significant resources on their conditional use.

Petitioners argue that they are not seeking a review of the Board's decision to grant the CUP. (Pet. Brief, pg. 33.) Petitioners' argument contradicts the Complaint. One need look no further than the portion of the Complaint entitled "Introduction" to see that they are challenging the Board's jurisdiction and authority to issue the CUP:

> 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; . . .

(Compl. ¶ 19.) (Emphasis added.)

Similarly, plaintiffs ask the Court to declare that the Board's grant of the CUP was invalid and seek to enjoin

construction or operation of the WES. (Compl. ¶¶ 109 (8)-(10), 110.) Plaintiffs' "Prayer for Relief" seeks a declaration regarding "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 . . ." (Compl. pg. 39.) (Emphasis added.)

The exclusive avenue by which plaintiffs can challenge the Board's "legal power or jurisdiction" vis-a-vis a CUP is through a certiorari proceeding. "The legislature prescribes the procedure for reviewing the actions of the county. Review may be had only by complying with the conditions the legislature imposes." Elliott v. Board of County Com'rs of Lake County, 2007 S.D. 6, ¶ 17, 727 N.W.2d 288, 290. SDCL 11-2-61.1 clearly prescribes the way that the Board's decision must be challenged and is dispositive: "Any appeal of a decision relating to the grant or denial of a conditional use permit shall be brought under a petition, duly verified, for a writ of certiorari directed to the approving authority and, notwithstanding any provision of law to the contrary, shall be determined under a writ of certiorari standard regardless of the form of the approving authority." (Emphasis added.)

Plaintiffs argue that they could not have raised their constitutional rights in a certiorari appeal, Plaintiffs' Brief, pg. 28, and quote from an excerpt in Judge Spears Memorandum

Decision in which he referred to Wedel v. Beadle Cty. Comm'n, 2016 S.D. 59, 884 N.W.2d 755. Wedel had nothing to do with constitutional rights. It had to do with Beadle County failing to follow proper statutory procedures when it enacted its zoning ordinance. Because its ordinance was not properly enacted, the South Dakota Supreme Court agreed with the Circuit Court that the Board of Adjustment lacked jurisdiction to approve a CUP. However, because the Circuit Court went a step further than reversal and struck down the zoning ordinance, the Court reversed on that issue.

In other instances, litigants have raised challenges relating to the alleged violation of their constitutional rights and our supreme court has never expressed a reservation about ruling on such issues in the context of a writ of certiorari appeal. See Grant Cnty. Concerned Citizens v. Grant Cnty. Bd. of Adjustment, 2015 S.D. 54, ¶ 29, 866 N.W.2d 149, 159 (due process); Tibbs v. Moody Cnty. Bd. of comm'rs, 2014 S.D. 44, ¶ 9, 851 N.W.2d 208, 212 (equal protection); Armstrong v. Turner Cnty. Bd. of Adjustment, 2009 S.D. 81, ¶ 19, 772 N.W.2d 643, 651 (due process). Indeed, under a certiorari review, the Court is charged with evaluating the legality of the Board's decision. If the Board's decision violates a litigant's constitutional rights, it would seem to *ipso facto* be illegal and beyond the jurisdiction of the Board.

The time to challenge the Board's decision regarding the CUP expired long ago. Insofar as this lawsuit seeks to disturb the Board's decision, it should be dismissed under SDCL 15-6-12(b)(1).

B. Petitioners' constitutional theories are legally infirm.

Petitioners present absolutely no legal authority that supports their theory that a zoning ordinance that imposes *restrictions* on a WES is the equivalent of the County or the Board granting a *de facto* easement over neighboring properties or otherwise effecting a taking of their property rights.

The Seventh Circuit Court of Appeals addressed similar contentions in Muscarello v. Ogle County Bd. of Comm'rs, 610 F.3d 416 (7th Cir. 2010), and Muscarello v. Winnebago County Bd., 702 F.3d 909 (7th Cir. 2012). Much like plaintiffs here, Ms. Muscarello was a "pertinacious foe of wind farms." Muscarello v. Winnebago County Bd. at 912. In each case, Muscarello raised a number of concerns about the effects from a wind farm some day occupying the land adjacent to her property, including shadow flicker and noise. She alleged takings and other constitutional theories in each case, and, in each case, her claims were rejected.

Muscarello v. Ogle County Bd. of Comm'rs bears the strongest similarity to this case. Under the County's amended zoning ordinance, a wind farm obtained a special use permit to

build 40 wind turbines, some of which were slated for land adjacent to Ms. Muscarello's land. She sued 42 defendants, including the county, various county officials and the wind developer. She claimed, *inter alia*, that the county's decision to grant a permit to the wind developer constituted a taking of her property without just compensation. The district court dismissed her claim, and the Seventh Circuit affirmed:

> Muscarello would have us turn land-use law on its head by accepting the proposition that a regulatory taking occurs whenever a governmental entity *lifts* a restriction on someone's use of land. We see no warrant for such a step.

Id. at 421-22 (emphasis in original).

In Muscarello v. Winnebago County Bd., the plaintiff brought a lawsuit against the County Board, the County Zoning Board of Appeals, and a number of county officials, attacking a 2009 amendment to a County's zoning ordinance that made wind farms a permitted use. Before the amendments of the Winnebago County ordinance, a property owner had to obtain a special-use permit for a wind farm. The amendments made wind farms a "permitted use," which meant that only a zoning clearance (showing compliance with the zoning code) and a building permit were needed to construct a wind farm. Justice Posner rejected Ms. Muscarello's various constitutional theories, and reasoned that Ms. Muscarello was simply trying to turn a nuisance claim against the neighbor into a constitutional claim. "Stepping down

from the dizzying heights of constitutional law, we can restate the plaintiff's contention as simply that a wind farm adjacent to her property would be a nuisance. . . . That is a more sensible conceptualization of her claim than supposing as she does that she has a property right in her neighbors' use of their lands." Muscarello v. Winnebago Cnty. Bd., 702 F.3d at 914. Ultimately, Justice Posner concluded:

> There is, in sum, no merit to the plaintiff's claim that the ordinance as amended in 2009 violates her constitutional rights. It is a modest legislative encouragement of wind farming and is within the constitutional authority, state as well as federal, of a local government.

Id. at 915.

Conceptually, plaintiffs' contentions in this case are weaker than those made by Ms. Muscarello in her case against Winnebago County and its officials that failed to state a claim. Ms. Muscarello claimed that the county took legislative actions that made it *easier* for neighboring properties to obtain a permit, and thereby effected a taking, damaged her property, or otherwise assaulted her constitutional rights as a landowner. The appellate courts disagreed, and concluded that the legislative or adjudicative actions of county government did not impact Ms. Muscarello's constitutional rights.

Here, Codington County has legislatively determined that a WES should be deemed a conditional use that must meet a litany of criteria before approval can be granted. The County

has the statutory authority to enact zoning ordinances and prescribe standards and guidelines to evaluate proposed land uses. SDCL 11-2-13; SDCL 11-2-17.3; 11-2-17.4. In doing so, the County is *restricting* a landowner's ability to use his or her land as he or she pleases. With specific regard to a WES, in 2018, the County enacted Ordinance #68, which included provisions that set additional restrictions as to shadow flicker. It actually made it *even harder* to get a permit for a WES.[1] This makes plaintiffs' claim more dubious than those of Ms. Muscarello in her dismissed lawsuits.

Plaintiffs mainly target the heightened shadow flicker requirements as the source of their complaints. Their argument portrays the Board as somehow licensing Crowned Ridge to maintain a nuisance. This is not the case. The County has the statutory prerogative to adopt zoning regulations and regulate certain land uses, and it is doing so. By reading the relevant portions of Ordinance #68, it is clear that the County is placing a burden on applicants to comply with a condition that they otherwise would not have to comply with, not granting the applicant some form of permission:

> 13. Flicker Analysis. A Flicker Analysis shall include the duration and location of flicker potential for all

[1]Plaintiffs' portrayal of the purposeful timing of the Crowned Ridge application on the heels of the enactment of Ordinance #68 makes no sense at all. Why would a developer wait around until *more* regulations were in place to seek approval?

> 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.**

(Compl. ¶71.) (Emphasis added.)

As Justice Posner noted, if plaintiffs believe an adjacent wind tower is a nuisance, they are free to sue and make that assertion. But the plaintiffs do not state a claim against the County or the Board when they assert that the County took any adverse action as to their property rights.

One has to ask where plaintiffs' theory ends. If the County lacks the legislative authority to regulate shadow flicker produced by WESs, and the Board lacks the adjudicative authority to grant CUPs to WESs that meet the Ordinance's requirements, what else must be jettisoned from the zoning ordinance for the protection of neighboring property owners' rights? CAFOs produce smells that have a tendency to impact neighbors. Should the Board no longer require the planting of trees and shrubs around CAFOs, or prohibit the spreading of manure on certain days, for fear that by doing so, they are putting their stamp of approval on the CAFO's emission of odor to the detriment of neighboring property rights? Is the approval of such a land use a taking of

neighbors' property because of the "effects" CAFOs may disperse and scatter outward? Of course not. It is legitimate exercise of the County's zoning authority, just as limiting shadow flicker is here.

CONCLUSION

No matter how many pages plaintiffs use to berate the "NARUC Best Practices," and no matter how colorful their analogies about loading manure into bags, plaintiffs are too late to challenge the Board's decision to grant the CUP, and their claims regarding the constitutionality of the County and Board actions are legally untenable. Dismissal is appropriate.

Respectfully submitted this 2nd day of December, 2019.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Defendants Codington County and Codington County Board of Adjustment, hereby certifies that on the 2nd day of December, 2019, a true and correct copy of **REPLY BRIEF IN SUPPORT OF DEFENDANTS CODINGTON COUNTY AND CODINGTON COUNTY BOARD OF ADJUSTMENT'S MOTION TO DISMISS** was served electronically through the Odyssey file and serve system on:

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