| | |
|---|---|
| STATE OF SOUTH DAKOTA) : SS.<br>COUNTY OF CODINGTON) | IN CIRCUIT COURT<br><br>THIRD JUDICIAL CIRCUIT |
| TIMOTHY LINDGREN and LINDA LINDGREN,<br><br>Plaintiffs,<br>-vs-<br><br>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*,<br><br>Defendants. | File 14CIV19-303<br><br>**BRIEF IN SUPPORT OF DEFENDANTS CODINGTON COUNTY AND CODINGTON COUNTY BOARD OF ADJUSTMENT'S MOTION TO DISMISS** |

**BACKGROUND**

Codington County ("the County") has adopted a zoning ordinance, which it has amended from time to time. (Compl. ¶ 2.) In 2018, the County amended its ordinance to include certain

requirements regarding Wind Energy Systems ("WES"). (Compl. ¶ 60.)

On July 2, 2018, Crowned Ridge Wind, LLC, and Crowned Ridge Wind II, LLC (collectively "Crowned Ridge") filed an application for a conditional use permit ("CUP"), seeking approval for construction and operation of the Crowned Ridge Wind Farm in Codington County. (Compl. ¶ 76.) On July 16, 2018, the Codington County Board of Adjustment ("Board") held a hearing, at which plaintiffs appeared and resisted the CUP. (Affidavit of Zachary W. Peterson ("Peterson Aff."), Ex. A.) The Board approved the CUP by a 6-0 vote. (Compl. ¶ 80.) Its findings of fact and conclusions of law were signed and filed on July 18, 2018. (Id.)

Plaintiffs acknowledge they did not timely challenge the Board's decision to grant the CUP to Crowned Ridge. (Compl. ¶ 81.) Another group of individuals opposed to the WES appealed the decision, but were unsuccessful. (Peterson Aff. Ex. B.) Plaintiffs are now trying to collaterally attack both the zoning ordinance and the Board's CUP decision through an action seeking declaratory and injunctive relief. Plaintiffs' Complaint, as it relates to Codington County and the Board, lodges allegations about:

- "the right, jurisdiction and authority, first, of Codington County to adopt a Zoning Ordinance making provision for such action" (Compl. ¶56.)

- the authority of "the Board of Adjustment to take adjudicatory action upon a Conditional Use Permit . . ." (Id.)

- Codington County's failure "to legislate a sufficient, reasonable separation distance between a proposed wind farm use and those who are Non-Participating Owners, such as Plaintiffs. . ." (Compl. ¶58.)

- The Board's failure "in the exercise of adjudicatory powers, to impose adequate separation distance for the proposed use." (Id.)

- The Board allowing "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," which becomes a "*de facto* easement as to the Lindgren Farm." (Compl. ¶59.)

Plaintiffs go into significantly more detail about the Ordinance's treatment of setbacks, shadow flicker, noise and other alleged future "effects." (See Compl. ¶¶ 60-75.) However, the thrust of the Complaint is plaintiffs' assertion that the County lacks the authority to adopt an ordinance which allows a WES as a CUP; and the Board, therefore, lacks the adjudicatory authority to grant a CUP to Crowned Ridge. Plaintiffs seek declaratory and injunctive relief against the County and the Board. (Compl. ¶109 (5)-(10); ¶110.)

## LEGAL STANDARD

### A. SDCL 15-6-12(b)(1) - lack of subject matter jurisdiction.

"'The test for determining jurisdiction is ordinarily the nature of the case, as made by the complaint, and the relief

sought.'" Decker by Decker v. Tschetter Hutterian Brethren, Inc., 1999 S.D. 62, ¶ 14, 594 N.W.2d 357, 362 (quoting State v. Phipps, 406 N.W.2d 146, 148 (S.D. 1987) (citations omitted). The South Dakota Supreme Court has cited to Osborn v. United States to assist in delineating between the types of Rule 12(b)(1) motions:

> A court deciding a motion under Rule 12(b)(1) must distinguish between a "facial attack" and a "factual attack." In the first instance, the court restricts itself to the face of the pleadings . . . and the non-moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6).

918 F.2d 724, 729 n.6 (8th Cir. 1990) (internal citations omitted).

**B. SDCL 15-6-12(b)(5) - failure to state a claim.**

"In evaluating a complaint, the court must accept the material allegations as true and construe them in a light most favorable to the pleader and determine whether the allegations allow relief on 'any possible theory.'" Fenske Media Corp. v. Banta Corp., 2004 S.D. 23, ¶ 7, 676 N.W.2d 390, 392-93 (quoting Schlosser v. Norwest Bank South Dakota, N.A., 506 N.W.2d 416, 418 (S.D. 1993) (citation omitted). "While a complaint attacked by a Rule 12(b)([5]) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a

cause of action will not do . . . .” Sisney v. Best Inc., 754 N.W.2d 804, 808 (S.D. 2008) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). The rules “‘contemplate[] [a] statement of circumstances, occurrences, and events in support of the claim presented . . . .’” Id.

The Court must take the plaintiff’s factual allegations as true. Ashcroft v. Iqbal, 556 U.S. 662, 1949-50 (2009). However, this tenet does not apply to mere legal conclusions. Id. The complaint must allege facts, which, when taken as true, raise more than a speculative right to relief. Bell, 550 U.S. at 555. “While facts must be accepted as alleged, this does not automatically extend to bald assertions, subjective characterizations, or legal conclusions. The plaintiff need not include evidentiary detail, but must allege a factual predicate concrete enough to warrant further proceedings.” Id. Furthermore, “[w]here the allegations show on the face of the complaint there is some insuperable bar to relief, dismissal under Rule 12(b)([5]) is appropriate.” Benton v. Merrill Lynch & Co. Inc., 524 F.3d 866, 870 (8th Cir. 2008).

The Court considers the Complaint in its entirety, as well as other sources courts ordinarily examine when ruling on motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice. Tellabs, Inc. v. Makor Issues and Rights, LTD.,

551 U.S. 308, 322 (2007). Matters in the public record may be considered by the Court when resolving a motion to dismiss. Engesser v. Fox, No. 15-5044 JLV, 2016 WL 5376187, *2, (D.S.D. September 26, 2016).

## ARGUMENT

### A. The Court lacks subject matter jurisdiction over plaintiffs' claims challenging the CUP granted to Crowned Ridge.

It is obvious from plaintiffs' pleading that they challenge the Board's decision on the CUP following the July 16, 2018 hearing. They 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).

#### 1. Plaintiffs cannot collaterally attack the Board's CUP decision through a declaratory judgment action.

"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. Our supreme court has said that "[w]hen procedure is prescribed by the legislature for reviewing the action of an administrative body, review may be had only on compliance with such proper conditions as the legislature may have imposed." Appeal of Heeren Trucking Co., 75 S.D. 329, 330-31, 64 N.W.2d 292, 293 (1954); In re Appeal from Decision of Yankton Cnty.

Comm'n, 2003 S.D. 109, ¶ 18, 670 N.W.2d 34, 40 (because the taxpayers did not take an appeal from the Board of Adjustment to circuit court as directed by SDCL 11-2-61, the circuit court lacked jurisdiction).

SDCL 11-2-61.1 was enacted last year, and it clearly prescribes the way that the Board's CUP decision must be challenged:

> 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.)

This language is mandatory and could not be more clear: if plaintiffs wished to challenge the Board's decision on the CUP, they had to do so through a petition for writ of certiorari. See SDCL 2-14-2.1 ("As used in the South Dakota Codified Laws to direct any action, the term, shall, manifests a mandatory directive and does not confer any discretion in carrying out the action so directed.") Over a year later, plaintiffs are attempting to get around the clear statutory dictates to challenge the Board's action. Plaintiffs' challenge is untimely under SDCL 11-2-61 and must be dismissed.

**2. Plaintiffs' failure to exhaust administrative remedies precludes the use of a declaratory judgment action to challenge the Board's CUP decision.**

Albeit in a different setting than this case, the South Dakota Supreme Court has recognized that "when a remedy by appeal is available following administrative action, an action for declaratory judgment is not available." Dan Nelson Auto., Inc. v. Viken, 2005 S.D. 109, ¶ 17 n.9, 706 N.W.2d 239, 245. "'The prohibition against awarding declaratory relief to parties who have alternative statutory or administrative remedies is applicable only where the alternative means of redress was intended to be exclusive.'" Id. at ¶ 13, 706 N.W.2d at 244 (quoting Maryland-Nat'l Capital Park & Planning Comm'n v. Washington Nat'l Arena, 282 Md. 588, 386 A.2d 1216, 1223 (Md 1978)).

Based on the clear language of SDCL 11-2-61.1, challenging the Board's CUP decision through an appeal under the writ of certiorari standard was intended to be exclusive. Likewise, SDCL 11-2-62 provides the mechanism for seeking a restraining order during a pending appeal. Plaintiffs are attempting an untimely end-run to both of these statutes by requesting declaratory and injunctive relief to upset the Board's CUP decision. This cannot be sanctioned, or the provisions of SDCL 11-2-61, et seq., will be meaningless. Insofar as plaintiffs attempt to challenge the Board's CUP decision, the Complaint must be dismissed.

**3. Res judicata precludes plaintiffs' challenge.**

Paragraph 81 of the Complaint states: "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." In point of fact, plaintiffs also took part in the July 16, 2018 proceedings before the Board. (Peterson Aff. Ex. A.) Under our supreme court's loosened privity requirements, res judicata applies to bar this collateral challenge.

Res judicata bars an attempt to relitigate a prior determined cause of action by the parties, or one of the parties in privity, to a party in the earlier suit. Melbourn v. Benham, 292 N.W.2d 335 (S.D. 1980). Modifying the strict privity requirement, the South Dakota Supreme Court has held:

> In deciding who are parties for the purpose of determining the conclusiveness of prior judgments, the courts look beyond the nominal parties, and treat all those whose interests are involved in the litigation and who conduct and control the action or defense as real parties, and hold them concluded by any judgment that may be rendered.

Schell v. Walker, 305 N.W.2d 920, 922 (S.D. 1981).

Like the petitioners in 14CIV18-340, plaintiffs appeared at the July 16, 2018 public hearing and spoke in opposition to the WES. Their remedy when the Board decided in a manner inconsistent with their position was to appeal to challenge the Board's decision. They chose to sit on the sidelines

and wait to see how 14CIV18-340 would turn out. Judge Spears' affirmance of the Board's decision is now a final judgment. (Peterson Aff. Ex. B.) Plaintiffs are attempting to collaterally attack the judgment through this suit. This is precisely what res judicata is meant to foreclose, and plaintiffs' lawsuit should be barred.

**B. Plaintiffs fail to state a plausible claim regarding the County's adoption of Ordinance 68.**

The County acknowledges that it has only those powers as are expressly conferred upon it by statute and such as may be reasonably implied from the powers expressly granted. See State v. Quinn, 2001 S.D. 25, ¶ 10, 623 N.W.2d 36, 38. The statutory grant of power to adopt zoning ordinances is contained in SDCL 11-2-13:

> For the purpose of promoting health, safety, or the general welfare of the county the board may adopt a zoning ordinance to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of the yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, flood plain, or other purposes.

SDCL 11-2-13.

"Zoning ordinances find their justification in the legislative police power exerted for the interest and convenience of the public." Cary v. City of Rapid City, 1997 S.D. 18, ¶ 20, 559 N.W.2d 891, 895. "'[A] zoning law is a legislative act representing a legislative determination and judgment, and like

all legislative enactments a zoning law is presumed to be reasonable, valid and constitutional.'" City of Brookings v. Winker, 1996 S.D. 129, ¶ 4, 554 N.W.2d 827, 828-29 (quoting State Theatre Co. v. Smith, 276 N.W.2d 259, 263 (S.D. 1979) (further citations omitted). "The burden of overcoming this presumption is on the party challenging its legitimacy and he or she must show the ordinance is unreasonable and arbitrary." City of Colton v. Corbly, 323 N.W.2d 138, 139 (citing State Theatre at 263, and Tillo v. City of Sioux Falls, 82 S.D. 411, 147 N.W.2d 128 (1966)). Something more than abstract considerations is needed to demonstrate arbitrariness. Id. The party assailing the ordinance must show facts supporting the claim the ordinance is arbitrary, capricious, and unconstitutional. Fortier v. City of Spearfish, 433 N.W.2d 228, 231 (S.D. 1988).

**1. Enacting restrictions on Wind Energy Systems is not arbitrary, capricious or unconstitutional.**

Plaintiffs' theory of the case is counter-intuitive. Plaintiffs challenge the Ordinance under a number of grounds that relate to the standards the County adopted for WESs. They feel that the restrictions that the County has established for WESs - on things like setbacks (Compl. ¶¶ 58-64), noise (Compl. ¶¶ 65-69, and shadow flicker (Compl. ¶¶ 70-75) - are insufficient to protect their property rights. They allege that the Ordinance, as it relates to the permitting of a WES, "exceeds the constitutional limits of the Legislature's zoning authority, as delegated to Codington County." (Compl. ¶ 109(5))

Completely lost in plaintiffs' 40 page Complaint is the fact that zoning ordinances - like the one that plaintiffs challenge - impose *restrictions* on landowners that would not otherwise exist. Plaintiffs' position begs the question: if the standards created by the County are invalid and stricken, what standards remain in place to govern a WES?

The answer is very few. This is why early wind developers in South Dakota gravitated toward places like Campbell County where there was no county zoning at all.[1] In that setting, developers looked for approval from the PUC and simply had to ensure their turbines complied with state statutes and federal regulations. For instance, SDCL 43-13-24 requires that "[e]ach wind turbine tower of a large wind energy system shall be set back at least five hundred feet or 1.1 times the height of the tower, whichever distance is greater, from any surrounding property line." However, state statutes do not set specific requirements on shadow flicker, noise, or any number of other factors that are considered in evaluating WESs.

Such criteria are up to the county to legislate. "A significant function of local government is to provide for orderly development by enacting and enforcing zoning ordinances."

[1] More recently, Campbell County has given consideration to adopting an ordinance to set standards for WESs. See Peterson Aff. Ex. C, which is an article printed from: https://www.ksfy.com/content/news/Campbell-County-considers-zoning-amid-wind-farm-proposal-490067651.html

Schafer v. Deuel Cnty. Bd. of comm'rs, 2006 S.D. 106, ¶ 12, 725 N.W.2d 241, 245. Plaintiffs urge the Court to strike down the very provisions of the Ordinance that are there to protect them. If the County somehow exceeded its authority by enacting provisions to control WESs, then a successful outcome in this lawsuit is the worst possible result for plaintiffs. Instead of regulations they do not think are sufficient, there would be no county WES regulations at all.

What makes plaintiffs' theory unplausible is that it is the exact reverse of the constitutional concern associated with zoning ordinances. The concerns about a County's constitutional authority to adopt zoning regulations does not turn on the adequacy of an ordinance's protection of neighbors. Neighbors can avail themselves of nuisance and trespass laws against adjacent landowners who utilize their property in a tortious, unlawful or harmful manner. Instead, the South Dakota Supreme Court has recognized that allowing "the use of a person's property to be held hostage by the will and whims of neighboring landowners without adherence or application of any standards or guidelines" is repugnant to the due process clause of the Fourteenth Amendment. Cary, 1997 S.D. at ¶¶19-22, 559 N.W.2d at 895. In that way, plaintiffs' lawsuit asks the Court to turn our supreme court's authority on its head, essentially elevating the will and whims of neighbors over a landowner's property rights.

Landowners who wish to contract with an entity and

allow wind turbine towers to be erected on their property have constitutional rights that are impacted when a county attempts to restrict the use of their land through zoning. Any zoning ordinance restricting landowners' use of their own property under a conditional use restriction (i.e., barring the use unless approved with conditions and a permit) must specify the approving authority and define the criteria that authority will assess in determining whether to approve the proposed land use. By enacting zoning ordinances which govern WESs, the County is providing standards and guidelines to permissibly evaluate, and, depending on the applicant's ability to comply, conditionally allow or preclude the proposed land use. This is what the County is required to do by law. See SDCL 11-2-17.3 and 11-2-17.4. It is not arbitrary, capricious or unconstitutional for the County to adopt standards to govern WESs.

**C. Plaintiffs fail to state a valid takings claim.**

The County and the Board join and adopt the argument set forth in South Dakota Pubic Utilities Commission's Motion to Dismiss, pages 11-13.

**CONCLUSION**

Dismissal of this case is appropriate. Dismissal would ensure that litigants cannot end-run the statutory appeal process required by the South Dakota Legislature, and also make clear that counties may validly exercise police power by imposing standards for the evaluation of WESs. Defendants Codington

County and the Codington County Board of Adjustment respectfully urge the Court to grant their Motion to Dismiss.

Respectfully submitted this 30th day of September, 2019.

RICHARDSON, WYLY, WISE, SAUCK
& HIEB, LLP

By /s/ Zachary W. Peterson
Attorneys for Codington
County Defendants

One Court Street
Post Office Box 1030
Aberdeen, SD 57402-1030
Telephone No. 605-225-6310