STATE OF SOUTH DAKOTA

COUNTY OF CODINGTON

IN CIRCUIT COURT

THIRD JUDICIAL DISTRICT

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*.	Case No. 14CIV19000303 **DEFENDANTS CROWNED RIDGE WIND, LLC, CROWNED RIDGE WIND II, LLC, AND BOULEVARD ASSOCIATES, LLC'S BRIEF IN SUPPORT OF MOTION TO DISMISS**

Defendants, Crowned Ridge Wind, LLC, Crowned Ridge Wind II, LLC, and Boulevard Associates, LLC (collectively "Crowned Ridge"), by and through their

attorneys of record, respectfully submit this Brief in Support of Motion to Dismiss. Crowned Ridge further joins the Motions to Dismiss filed by the other named defendants in this matter, and adopts and incorporates their arguments and authorities.

INTRODUCTION

Rather than challenge the underlying decisions by the Codington County Board of Adjustment ("Board") and the Public Utilities Commission ("PUC") that are the subject of their Complaint for Declaratory Judgment and Other Relief ("Complaint"), Plaintiffs, Timothy Lindgren and Linda Lindgren, filed a declaratory judgment action, seeking to invalidate those decisions. Other than the well-pleaded facts contained in Lindgrens' Complaint and the facts from the underlying Board and PUC proceedings, which are a matter of public record, no facts are necessary to the determination of the various Motions to Dismiss, and it is clear that this Court lacks jurisdiction and the Complaint fails to state a claim upon which relief can be granted, and should be dismissed, with prejudice.

RELEVANT FACTUAL BACKGROUND

The facts pertinent to this Motion to Dismiss are few and undisputed. Codington County has in effect a zoning ordinance, which was amended in 2018, to include certain requirements regarding Wind Energy Systems ("WES"). *See* Complaint, ¶¶ 2, 60. Prior to implementing the zoning ordinance as it relates to WES – Ordinance 68 – the Codington County Planning and Zoning Commission and the County Board of Commissioners held several public meetings, in which public input was received and

discussion was held. *See* Affidavit of Miles Schumacher, Exhibit A (Ordinance Review Information Page).

Following passage of Ordinance 68, Crowned Ridge filed an application for a conditional use permit ("CUP"), in order to construct and operate the Crowned Ridge Wind Farm in Codington County.[1] *See* Complaint, ¶ 76. On July 16, 2018, the Board held a hearing on Crowned Ridge's application for a CUP, and Lindgrens personally appeared at that hearing.[2] *See* Complaint, ¶ 80 ("Plaintiffs and other opponents were limited in their presentations to several minutes each."). The Board unanimously approved the CUP by a 6-0 vote, and its findings of fact and conclusions of law relative to the CUP were filed on July 18, 2018. *See id.* Lindgrens did not challenge the Board's decision, but other parties did file a petition for writ of certiorari to challenge the Board's decision, which was upheld by the circuit court. *See* Complaint, ¶ 81; *Johnson, et al vs. Codington County Board of Adjustment*, Civ. No. 14CIV18-000340. Judge Spears denied the petition for writ of certiorari in that case, finding, "the Board pursued in a regular manner the authority conferred upon it by considering the issue of project density

[1] The wind farm is to be located on approximately 53,186 acres in the townships of Waverly, Rauville, Leola, Germantown, Troy, Stockholm, Twin Brooks, and Mazeppa, in Grant and Codington County in South Dakota. There are separate proceedings in Grant County regarding a conditional use permit there. The project is expected to be completed in 2020 and includes up to 130 wind turbine generators. *See* Complaint, ¶ 6; Application to the Public Utilities Commission of the State of South Dakota for a Facility Permit to Construct a 300 Megawatt Wind Facility, dated January 30, 2019.

[2] The application filed with the Board and the Board's hearing and decision are matters of public record, and this Court can take judicial notice of such public hearing and filings. *See* SDCL § 19-19-201.

or overcrowding of structures and determining that Crowned Ridge's application complied with Ordinance requirements." *See* Affidavit of Miles F. Schumacher, Exhibit B (Memorandum Decision filed March 22, 2019).

Because of the proposed size of the Crowned Ridge Wind Farm, Crowned Ridge was also required to obtain a permit from the PUC to construct a wind energy facility.[3] On January 30, 2019, Crowned Ridge filed an application for a permit to construct a wind energy conversion facility with the PUC. *See* Complaint, ¶ 6; Application to the Public Utilities Commission of the State of South Dakota for a Facility Permit to Construct a 300 Megawatt Wind Facility, dated January 30, 2019.[4]

Lindgrens did not timely seek to intervene in the proceedings before the PUC, but others did, and they were represented by counsel.[5] *See* Complaint, ¶ 20 ("Plaintiffs, not having timely intervened. . . ."). An evidentiary hearing was held on June 6, 2019 and June 11-12, 2019. *See* PUC Decision, PUC Docket EL 19-003. Only after the conclusion of the hearing, on June 13, 2019, did Plaintiffs file a petition for intervention. *See id.* On June 26, 2019, the Commission issued an order denying Plaintiffs' petition for

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[3] Pursuant to SDCL 49-41B-4, such a permit is required if the proposed wind generation facility is greater than one hundred megawatts; and such a permit is separate and distinct from any permit that may be required by the county.

[4] The PUC filings are a matter of public record, Docket EL 19-003, and this Court can take judicial notice of such public filings. *See* SDCL § 19-19-201.

[5] Pursuant to ARSD 20:10:22:40, interested parties had sixty days from the date that application was filed to intervene in the proceeding; thus, the deadline to intervene was April 1, 2019.

intervention as untimely, and finding the late intervention would unduly prejudice the rights of the other parties to the proceeding or be detrimental to the public interest. *See id.* Plaintiffs did not appeal from this denial of their petition to intervene. *See generally,* PUC docket.

The PUC then determined that the Crowned Ridge wind farm did not pose a significant health risk to the inhabitants of the project area, and issued the permit. [6] *See* Complaint, ¶ 6; PUC Decision. These Plaintiffs did not appeal the issuance of that permit, but it was appealed by others. *See In the Matter of the Application by the Crowned Ridge Wind, LLC for a Permit of Wind Energy Facility in Grant and Codington Counties*, Civ. No. 14CIV19-920. [7]

As noted, Lindgrens never appealed from the Board's decision granting the CUP, which was, in any event, upheld by this Court in an appeal by other parties, nor did Lindgrens timely intervene in the matter before the PUC, or appeal from the PUC's decision. Nevertheless, Lindgrens now seek injunctive relief and this Court's declaration, *inter alia*, that Ordinance 68 is unconstitutional, that the PUC was without jurisdiction, that the Board's decision granting the CUP should be invalidated, and that the presence of the Crowned Ridge wind farm constitutes a trespass. For the reasons explained below, Lindgrens have failed to state a claim upon which relief can be granted and their

[6] After issuance of the permit, Crowned Ridge filed a letter on September 12, 2019, notifying the PUC that due to interconnection issues, construction of 100 MW of the 300 MW Crowned Ridge Wind Farm would be deferred.

[7] This appeal has not been decided.

Complaint (Verified) for Declaratory Judgment and Other Relief should be dismissed, with prejudice.

ARGUMENT AND AUTHORITIES

Standard on a Motion to Dismiss

Crowned Ridge moves to dismiss the Complaint under SDCL § 15-6-12(b)(1), for lack of subject matter jurisdiction, and under § 15-6-12(b)(5), for failure to statute a claim upon which relief can be granted. A motion to dismiss under any of the subsections of SDCL § 15-6-12(b) "tests the legal sufficiency of the pleading, not the facts which support it." *Stathis v. Marty Indian School*, 2019 S.D. 33, ¶ 13, 930 N.W.2d 653, 658. "'For purposes of the pleading, the court must treat as true all facts properly pleaded in the complaint and resolve all doubts in favor of the pleader." *Id.* (other citations omitted). However, "the court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences, and sweeping legal conclusions cast in the form of factual allegations." *Id.*

Recently, in *Stathis*, the South Dakota Supreme Court considered a motion to dismiss under rule 12(b)(1), and reiterated the requirement of subject matter jurisdiction:

> "Subject matter jurisdiction is a 'court's competence to hear and determine cases of the general class to which proceedings in question belong; the power to deal with the general subject involved in the action;' and 'deals with the court's competence to hear a particular category of cases.'" . . . "Subject matter jurisdiction is conferred solely by constitutional or statutory provisions." . . . "[S]ubject matter jurisdiction can neither be conferred on a court, nor denied to a court by the acts of the parties or the procedures they employ." . . . "The test for determining jurisdiction is

> ordinarily the nature of the case, as made by the complaint, and the relief sought."

Stathis, 2019 S.D. 33, ¶ 14, 930 N.W.2d at 658 (internal and other citations omitted).

"It is well settled that '[a] motion to dismiss under Rule 12(b)(5) tests the law of a plaintiff's claim, not the facts which support it.'" *Osloond v. Farrier*, 2003 S.D. 28, ¶ 4, 659 N.W.2d 20, 22 (quoting *Thompson v. Summers*, 1997 S.D. 103, ¶ 5, 567 N.W.2d 387, 390 (other citations omitted). Upon a motion to dismiss, the circuit court must:

> "consider the complaint's allegations and any exhibits which are attached. The court accepts the pleader's description of what happened along with any conclusions reasonably drawn therefrom. The motion may be directed to the whole complaint or only specified counts contained in it.... 'In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' . . . . The question is whether in the light most favorable to the plaintiff, and with doubt resolved in his or her behalf, the complaint states any valid claim of relief. The court must go beyond the allegations for relief and 'examine the complaint to determine if the allegations provide for relief on any possible theory.'"

Osloond, 2003 S.D. 28, ¶ 4, 659 N.W.2d at 22. "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) (other citations omitted).

"In addition to the pleadings and exhibits attached to the pleadings, a court may take judicial notice of matters of public record." *Jenner v. Dooley*, 1999 S.D. 20, ¶ 15, 590 N.W.2d 463, 470 (other citations omitted). "Despite the language of Rule 12(b), when a court takes judicial notice of facts, it will not convert a dismissal motion into a motion for summary judgment. Only when a court goes beyond judicially noticed facts and pleadings will it be required to convert the motion and give both sides notice and an opportunity to supplement the factual record." *Id.*

For several reasons explained below, the Court lacks jurisdiction and Lindgrens have failed to state any valid claim for relief, and pursuant to SDCL § 15-2-12(b)(5), their Complaint should be dismissed, with prejudice.

A. There Is No Issue Ripe for Judicial Determination

Plaintiffs seek declaratory relief, citing SDCL § 21-24-1, et seq. *See* Complaint, p. 32, ¶ 109. SDCL § 21-24-1 provides:

> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree.

The statutes further state, "[t]he court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." SDCL § 21-24-10.

The South Dakota Supreme Court in *Boever v. South Dakota Bd. of Accountancy*, 526 N.W.2d 747, 749-50 (S.D. 1995), reiterated the four jurisdictional requirements for declaratory relief:

> "There must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy, that is to say, a legally protectible interest; and (4) the issue involved in the controversy must be ripe for judicial determination."

(other citations omitted). As to the fourth requirement – ripeness – the Court explained: "Ripeness involves the timing of judicial review and the principle that '[j]udicial machinery should be conserved for problems which are real and present or imminent, not squandered on problems which are abstract or hypothetical or remote.'" *Id.* (quoting *Gottschalk v. Hegg,* 228 N.W.2d 640, 643-44 (S.D.1975) (other citations omitted)). Accordingly, the Court held, "[c]ourts should not render advisory opinions or decide moot theoretical questions when the future shows no indication of the invasion of a right." *Boever*, 526 N.W.2d at 749-50. Thus, "courts ordinarily will not render decisions involving future rights contingent upon events that may or may not occur. . . . Even if a court has jurisdiction to decide the constitutionality of the law, it should decline to do so if the issue is so premature that the court would have to speculate as to the presence of a real injury." *Id.* (citing *Meadows of West Memphis v. City of West Memphis*, 800 F.2d 212, 214 (8th Cir.1986)).

The allegations in the Complaint show that this matter is not ripe and accordingly, no declaratory ruling can be issued. Lindgrens allege "[t]his Complaint to the Circuit Court is 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. . . ." Complaint, ¶ 7. Plaintiffs' unsupported predictions of some future consequences are simply insufficient to create a ripe controversy. On this basis, a declaratory ruling cannot be issued. *See Boever*, 526 N.W.2d at 749-50.

B. This Court Lacks Jurisdiction over the Declaratory Judgment Action

Even if there exists a ripe controversy, which is expressly denied, Plaintiffs' declaratory judgment action, challenging the legality of Ordinance 68, seeking to invalidate the Board's issuance of the CUP, and seeking a declaration that the PUC was without jurisdiction, is not the proscribed method for challenging those bodies' decisions. Codington County properly held public meetings in which it accepted public input, and Lindgrens had the ability to challenge both the Board's and the PUC's decisions through proscribed methods, of which they failed to avail themselves. As a result, Lindgrens have failed to exhaust their administrative remedies, and this Court lacks jurisdiction.

As noted above, "[s]ubject matter jurisdiction is conferred solely by constitutional or statutory provisions." *Stathis,* 2019 S.D. 33, ¶ 14, 930 N.W.2d at 658. There was ample opportunity for Lindgrens to oppose Ordinance 68, and there are specific statutory directives on how to seek review of the Board's and the PUC's decisions. First, as noted, the Lindgrens had several opportunities not only to attend the public meetings held by

both Planning and Zoning and the County Commission, prior to the adoption of Ordinance 68, but also to provide input. They cannot be heard to complain about the legality of an ordinance they were given the opportunity, but failed, to oppose.

Second, the Board's decision in granting the conditional use permit is challengeable under SDCL § 11-2-61.1, which states: "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).

Finally, in addition to the ability to intervene in the proceedings before the PUC, which Lindgrens attempted too late, there exists a statutory procedure to challenge the decision of the PUC. *See* SDCL § 1-26-30 ("A person who has exhausted all administrative remedies available within any agency or a party who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter."). "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.

Unquestionably, in order to challenge the Board's decision, Lindgrens were required to file a petition for writ of certiorari, the exclusive remedy to challenge a CUP, and in order to challenge the PUC's decision, the exclusive remedy is to appeal to circuit court, pursuant SDCL § 1-26-30. Lindgrens did neither. As a matter of law, Lindgrens

failed to avail themselves of the statutory procedures for challenging the Board's and the PUC's decisions, and cannot make an end run around those statutory directives and seek to challenge those decision by other means, such as the instant declaratory judgment action. *See Elliott v. Board of County Com'rs of Lake County*, 2007 S.D. 6, ¶ 17, 727 N.W.2d 288, 290 ("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."); *Appeal of Heeren Trucking Co.*, 75 S.D. 329, 330-31, 64 N.W.2d 292, 293 (1954) ("When 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."); *In re Appeal from Decision of Yankton County Comm'n*, 2003 S.D. 109, ¶ 18, 670 N.W.2d 34, 40 (circuit court lack jurisdiction where no appeal was taken from the board of adjustment, pursuant to SDCL § 11-2-61).

As a matter of settled law, this Court lacks jurisdiction to consider this declaratory judgment action, as there is no statutory or constitutional basis for jurisdiction. Lindgrens should have exercised the statutory remedies to challenge Ordinance 68, and challenged the PUC and Board decisions via appeal to the circuit court and via petition for writ of certiorari. Because Lindgrens had remedies available to them and failed to avail themselves of these remedies, their declaratory judgment action is impermissible. This Court lacks jurisdiction and the Complaint fails to state a claim upon which relief can be granted, and the Complaint should be dismissed, with prejudice.

C. Lindgrens' Claims are Precluded by the Doctrine of Res Judicata

As noted, Lindgrens had the opportunity to oppose Ordinance 68, to challenge the Board's decision through a writ of certiorari, the ability to intervene in the PUC proceedings, and the ability to appeal the PUC's decision, all of which are expressly and statutorily provided. As Lindgrens acknowledge, other parties did challenge the Board's decision and other parties appealed from the PUC's decision. The doctrine of res judicata applies here and prevents Lindgrens from relitigating the issues brought in those appeals from the PUC's and Board's decisions.

"'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.'" *JAS Enter., Inc. v. BBS Enterprises, Inc.*, 2013 S.D. 54, ¶ 19, 835 N.W.2d 117, 125 (other citations omitted). The Court does not require strict privity; rather, "[i]n 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.'" *Id.* (other citations omitted).

As noted, Lindgrens personally appeared at the July 16th hearing before the Board and spoke in opposition to the WES. Lindgrens' express remedy to challenge the Board's decision was through a petition for writ of certiorari, such as that filed by other opponents. Lindgrens' express remedy to challenge the PUC's decision was via appeal to the circuit court, again, as filed by others. The express statutory scheme provided for

challenging the PUC's and Board's decisions are in place, in part, to provide finality to those decisions, so as to allow decisions to be made and actions to go forward. *See Moe v. Moe*, 496 N.W.2d 593, 595 (S.D. 1993) ("public policy is best served when litigation has a finality."). The outcomes of those challenges are final judgments, which cannot be collaterally attacked through this declaratory judgment action, or any other means.[8]

D. Ordinance 68 Need Not Conform to the Conditional Land Use Plan

Lindgrens make various arguments that Ordinance 68 does not conform to the requirements of the comprehensive land use plan. However, there is absolutely no authority that requires that an ordinance, legislatively-enacted rules, conform to the comprehensive land use plan, which is merely a set of guidelines, policies and/or goals. In fact, the converse is true.

"A comprehensive plan is only a general guide for the legislative body. By definition it cannot bind the legislative body, as it is the ordinance that has the force of law and not the plan." *In re Approval of Request for Amendment to Frawley Planned Unit Dev.*, 2002 S.D. 2, ¶ 18, 638 N.W.2d 552, 557 (citing KENNETH H. YOUNG, 1 ANDERSON'S AMERICAN LAW OF ZONING § 5.06 (4th ed 1996). *See also Holtzen v. Tulsa Cty. Bd. of Adjustment,* 97 P.3d 1150, 1153 (Ok. Ct. App. 2004) ("the overwhelming weight of authority from other jurisdictions holds that where a conflict exists, the zoning laws themselves prevail over the comprehensive plan."). "'A land use plan is meant to be

[8] Codington County Defendants have responded to Lindgrens' constitutional claims. Crowned Ridge agrees with, relies on and specifically incorporates the County Defendants' arguments and authorities with regard to those claims.

just that—a plan. It is not to be legally binding.'" *Id.* (quoting *Taylor v. City of Little Rock*, 583 S.W.2d 72, 73 (Ark. 1979)).

Therefore, even if Ordinance 68 did not conform to the comprehensive land use plan, which is denied, Ordinance 68 controls. Any argument that such non-conformity somehow invalidates Ordinance 68 is completely without merit, as a matter of law.

CONCLUSION

For all these reasons, as well as those set forth by the South Dakota Public Utilities Commission, Codington County and Codington County Board of Adjustment, Crowned Ridge respectfully requests that the Court grant the Motions to Dismiss and dismiss Plaintiffs' Complaint (Verified) for Declaratory Judgment and Other Relief, with prejudice.

Dated this 3rd day of October, 2019.

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