STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF CODINGTON	)	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.*	14CIV19-000303 PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' SEPARATE MOTIONS TO DISMISS COMPLAINT UNDER SDCL § 15-6-12(b)(1) and (5)

Plaintiffs, Timothy and Linda Lindgren, by and through their attorney of record, hereby submit this Brief in Opposition to the Separate Motions of the Defendants to Dismiss the Complaint.

A. PRELIMINARY STATEMENT

Defendant South Dakota Public Utilities Commission ("PUC" or "Commission") submitted its motion to dismiss under SDCL 15-6-12(b), asserting a "[f]ailure to state a claim upon which relief can be granted." PUC, *inter alia*, asserts, in the alternative, that it has "no

jurisdiction over property rights" (PUC Brief, at 4) and as Plaintiffs' Complaint is seen as focused on property rights, the PUC argues it is not an appropriate party to the case. On the other hand, PUC also claims that the "effects" of concern to Plaintiffs – noise and shadow flicker – are merely as predicted by computer model and may not actually transpire,[1] as the wind farm projects become operational. Hence, PUC contends, Plaintiffs' claims are "completely speculative in nature" (*Id.*), the Complaint is anticipatory and "not ripe enough to go forward." Further, PUC contends, the Complaint should be dismissed as (a) Plaintiffs failed to exhaust their administrative remedies, or have waived their rights, as to Docket EL19-003[2] and (b) Plaintiffs' property "has not been damaged in the constitutional sense."

Defendant Codington County[3] soon thereafter also submitted a motion to dismiss, citing both SDCL § 15-6-12(b)(1) and (5), further asserting the Complaint is (a) "an untimely challenge to the [Board's] decision to grant a Conditional Use Permit" to the Crowned Ridge Wind group, and (b) fails to state a claim upon which relief may be granted. Included with such motion is the affidavit of Zachary W. Peterson ("Peterson Affidavit"), advancing three lettered exhibits – (a) the Board of Adjustment's minutes for July 16, 2018; (b) the findings and conclusions of Circuit Judge Spears, entered May 6, 2019, in case 14CIV18-340, *Johnson, et al. v. Codington County Board of Adjustment, et al*.; and (c) a very recent news article regarding a wind farm proposed for Campbell County. In this party's accompanying brief, at 3, Codington County asserts:

> ". . . the thrust of the Complaint is plaintiffs' assertion that the County lacks the authority to adopt an ordinance which allows a WES [wind energy system] as a

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[1] The PUC, as part of its motion, besmirches or questions the very "computer models" advanced by the permit applicants, accepted into evidence, and relied on by the PUC in ruling on a facility siting permit,

[2] True, Plaintiffs did not seek to intervene in the PUC permit case, EL19-003, during the 60-day window, during which intervention would have been allowed. Intervention was sought *after* the window had closed, and was denied by the PUC on a 2-1 vote. Further, only permitted intervenors may appeal a PUC permit decision. Such constraints speak loudly in favor of Plaintiffs, rather than the PUC's position. PUC goes on to note also Plaintiffs' failure to seek intervention in pending EL19-027. The Complaint, however, explains that *only* EL19-003 was (and is) of direct concern to Plaintiffs.

[3] Including Codington County's Board of Adjustment.

> CUP; and the Board, therefore lacks the adjudicatory authority to grant a CUP to Crowned Ridge."

Defendant has misapprehended (and thus has mis-described to the Court) the *actual* thrust of Plaintiffs' Complaint. This brief, *inter alia*, will endeavor to set the matter straight.

It suffices for now to simply say that, *yes*, a WES – even a hundred or more of them – might be a proper conditional use under a properly written zoning ordinance. It is logical that big, towering machines that emit a great deal of noise and sound, along with shadow flicker, are best suited for remote, sparsely settled places with very large tracts of land. In Codington County, however, the writer of the zoning ordinance (the County Board)[4] – followed closely by the adjudicator of the CUP (the Board of Adjustment)[5] – have each endeavored to accommodate *both* the demands of the wind promoters along with every willing host for such WES, such that the ordinance-established setbacks from these 500' tall devices (without parallel in the history of development in the rural areas of Codington or other counties). Such neither honors nor observes the property lines of adjacent "non-participants" (including Plaintiffs).

Thus, a perverse "cramdown" process then flows from such mad-cap zoning efforts, where the "adverse effects" are then promised for future infliction[6] upon those who are not applicants for *any* zoning relief, have *no* financial benefit to gain from the zoning relief sought, and who are *expected* to simply accept or tolerate the adverse effects (for the apparent benefit of others unable to contain or retain such effects on their own participating lands) for the entire operational life of the project. (This is "zoning" turned on its head.) In the process (both in the legislative and the adjudicatory phases), the Non-participants and their nearby lands and

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[4] Having adopted Ordinance # 68 on June 7, 2018, including newly adopted "shadow flicker" provisions.

[5] Crowned Ridge Wind's cover letter to Luke Muller, Codington County Planning, is dated June 8, 2018; the CUP was then heard – and granted - by the Board of Adjustment on July 16, 2018.

[6] According to the "computer models" dutifully produced by Crowned Ridge, sponsored by a variety of "experts," and ultimately relied upon both by Codington County and the PUC in rendering their official approvals and permits.

interests, *for the entire life of the project*, are non-consensually assigned (first, hypothetically, upon passage of the ordinance, and then, in reality, with the CUP, followed by construction and operation of the so-called "wind farm") a burden they must henceforth bear for the duration. Remember, this burden actually arises from a neighboring land use for which Plaintiffs, as non-participants, are not the promoters, and also are neither the benefactors nor the beneficiaries. This, then, is the *actual* gravamen of Plaintiffs' Complaint!

Crowned Ridge Wind and its affiliates (being, collectively, the applicants for requisite approvals from Codington County's Board of Adjustment and the PUC) have likewise moved for dismissal of the Complaint, relying on SDCL § 15-6-12(b)(1) and (5). Crowned Ridge also submits the affidavit of Miles Schumacher ("Schumacher Affidavit"), counsel for applicants, along with an *Exhibit A*, being the "Ordinance Review Information Page" from Codington County's web page, and *Exhibit B*, being the memorandum opinion of Circuit Judge Spears, in 14CIV18-340, *Johnson, et al. v. Codington County Board of Adjustment*, dated March 22, 2019.

Plaintiffs will respond to each of these motions, in the reverse order of submission to the Court, within Part D, below. Plaintiffs are simultaneously submitting with this brief the Affidavit of Linda Lindgren (the "Lindgren Affidavit"), along with Exhibits 1 to 6, inclusive, being attached to that filing; Part F of this brief will focus on why the Court should consider the Lindgren Affidavit.

B. FACTS & PROCEDURAL BACKGROUND

Plaintiffs, a married couple, reside on the "Lindgren Farm," south of South Shore, in Waverly Township, Codington County (Complaint, ¶ 22); the farm is comprised of a quarter section and an adjacent 80 (*Id*., ¶ 23).

In June 2014, Plaintiffs entered into a Wind Farm Lease & Easement Agreement (sometimes, "Easement") with Defendant Boulevard, more correctly being viewed as an "option

to obtain an easement (or lease)" - the option having a term of three years and an extended option of two years. The Easement, while remaining unrecorded, was referenced in a memorandum recorded with the Register of Deeds of Codington County on July 7, 2014, Instrument No. 201402773, comprising eight kinds or types of leases, rights or easements running in favor of Boulevard or its assigns. (*Id.*, ¶ 32.) The Memorandum remains of record, although both of the option terms have now expired (as of June 10, 2019). If exercised by Defendants, the Easement would have had a fifty year term (*Id.*, ¶ 33).

While the Easement never came to full fruition, even as the Lindgren Farm will not itself serve as host for two of Defendants' wind turbines,[7] the obvious irony is that Defendants yet intend to make use (apparently forever, or so long as the so-called Wind Farm is in operational business) of the Lindgren Farm as a dumping ground of sorts for the "adverse effects" of wind turbine operations arising from other nearby turbine installations. This claimed right of use by Crowned Ridge Wind stems *not* from enjoying privity with the owners of the Lindgren Farm, but rather from the legal effect of the permits and approvals other defendants have extended in favor of this Wind Farm. This lawsuit is an endeavor challenging the legal authority of the two defendant agencies for having added their respective blessings to the Wind Farm plans, and to the claimed right of Crowned Ridge to make an adverse use of the Lindgren Farm without benefit of any actual, effective easement.

Boulevard has previously maintained the unrecorded (and now lapsed) Easement is both a proprietary and confidential document that Plaintiffs cannot discuss with others, or display in a public forum. Outside the immediate scope of this case, Defendants have continued to assert a "confidentiality" claim even though the June 2014 instrument was itself merely an "option"

[7] Turbines CR-56 and CR-57 were planned for construction on Plaintiffs' property; with expiration of the option, later maps to the PUC reflect the elimination of these sites. *See* Exhibit 2, Lindgren Affidavit. However, this did little to reduce or abate the predicted, future "Effects" upon the Lindgren Farm.

(having a term of 5 years) rather than a site-specific lease or an enforceable easement as to the Lindgren Farm.

For the moment, counsel for Plaintiffs and Defendant Crowned Ridge Wind, in recent email communications, have now agreed that *most* provisions within the 2014 Easement document, as briefly cited in the Complaint (¶¶ 33-37), may be openly disclosed without further objection, so long as the provisions of Exhibit D to the Easement is not disclosed (this point having been mutually agreed).[8] Counsel's agreement extends to Section 5.2, reading (with Plaintiffs referenced as "Owner," Defendant Boulevard being "Operator") as follows:

> **Effects Easement**. Owner grants to Operator a non-exclusive easement for audio, visual, view, light, flicker, noise, shadow, vibration, air turbulence, wake, electromagnetic, electrical and radio frequency interference, and any other effects attributable to the Wind Farm or activity located on the Owner's Property or on adjacent properties over and across the Owner's Property ("**Effects Easement**").

The Lindgren Affidavit also discusses Section 11.4, of the Easement, entitled "Permits and Approvals."[9] Without quoting the entire section at length here, this provision *required* that Plaintiffs "cooperate with Operator as necessary" to obtain any approvals or permits, also obliging Plaintiffs to waive "enforcement of any applicable setback and sideyard requirements and restrictions and any other zoning restrictions" concerning the Wind Farm in relationship to the Lindgren Farm. So long as the option (in favor of Boulevard) of June 2014 remained viable, Plaintiffs believed, *all* zoning and permitting issues involving the Lindgren Farm, as a prospective host for two wind turbines, had been effectively surrendered over to those whose interests were fully aligned with Defendants.[10]

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[8] The Easement, *except for the provisions of Exhibit D, as originally annexed thereto*, is attached as Exhibit 1 to Lindgren Affidavit.
[9] This section is part of the option for Easement, and worth consideration by the Court, bearing also on the decision of Plaintiffs, having testified against the CUP, elected not to participate in an appeal to Circuit Court, in the form of writ of certiorari in mid-2018. Lindgren Affidavit, at ¶ 6.
[10] Lindgren Affidavit, ¶ 7.

In 1996, the Legislature adopted several related statutes governing the creation of "wind easements," and "wind power" leases, SDCL § 43-13-16, *et seq*., embraced within the chapter entitled "Easements and Servitudes." Among other features, wind easements are limited to a term not to exceed 50 years; further, such "easement is void if no development of the potential to produce energy from wind power associated with the easement has occurred within five years after the easement began." SDCL § 43-13-17. Similar limiting provisions as to "leases" are set forth in SDCL § 43-13-19.

Although Section 5.2 of the Easement deals with the concept of "shadow flicker," the Codington County Zoning Ordinance, prior to July 2018, said nothing about that "Effect." However, Ordinance # 68, as adopted by the County Board on June 7, 2018, added a provision requiring, in effect, that Shadow Flicker is henceforth to be tolerated by *all* adjoining property owners, so long as the duration does not exceed 30 hours annually. One may surmise this addition to the Zoning Ordinance – along with other adjustments in wind farm zoning in this county - was encouraged if not warmly welcomed by Crowned Ridge Wind, as the cover letter for submission of the CUP to County planning officials in Watertown was dated the very next day, June 8, 2018.

A central focus of Plaintiffs' Complaint challenges the source of Codington County's authority to legislate, via the Zoning Ordinance, that a potential exposure to Shadow Flicker of such duration on the part of all Non-Participating Owners is within the grasp of each applicant hoping to establish a wind farm. This challenge extends also to the Board of Adjustment, when adjudicating a specific, predicted exposure to some such burden, receptor-by-receptor, comprising the homes of those having submitted *no* application invoking the Board's jurisdiction

for a land use relief or remedy. Shadow Flicker, because of statutory provisions,[11] but given also the predicted assault on adjoining Non-Participants from wind farm operations, in the form of noise and sound, comprises a burden upon the lands of each such person in the position of Plaintiffs. There is no known provision in South Dakota law to support the concept that a "burden or servitude" flowing from a nearby wind farm – merely upon the authority of the local zoning writer (County Board) and the edict of the adjudicating body (Board of Adjustment) in hand - must be swallowed whole by the Non-Participating Owner, just as long as the duration of the "Effect" (as that term appears and is used in the Easement instrument (more correctly, an *option to obtain an easement*) of Boulevard, doesn't exceed 30 hours per year.

In January 2012 (as referenced in the Complaint, ¶ 74), the National Association of Regulatory Utility Commissioners (NARUC) released "Wind Energy & Wind Park Siting and Zoning Best Practices and Guidance for States" (hereafter "NARUC Best Practices"). Accessed online via the National Regulatory Research Institute website at http://www.nrri.org/pubs/electricity/NRRI_Wind_Siting_Jan12-03.pdf., NARUC Best Practices was funded by U.S. Department of Energy,[12] for Minnesota Public Service Commission. The report was then further publicized by a smaller booklet of the Environmental Law Institute, entitled "Siting Wind Energy Facilities – What Do Local Elected Officials Need to Know?" – published in 2013, available at www.eli.org.

In addition to discussion of "noise, sound, and infrasound," [13] NARUC Best Practices, in Table 6, at 27, promoted the local adoption of a "shadow flicker" standard, including these

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[11] SDCL 43-13-2(8) – the "right of receiving air, light, or heat from or over, or discharging the same upon or over land." This "burden or servitude" appears in the same chapter as the 1996 legislation dealing with "wind power" easements and leases, see discussion on page 7.

[12] The very same federal agency that has also funded the study of real estate market values in the vicinity of wind farms, commonly referenced as the Hoen Report, including "A Spatial Hedonic Analysis of the Effects of Wind Energy Facilities on Surrounding Property Values in the United States" (August 2013).

[13] NARUC Best Practices, at 29.

features:

• *Restrict to not more than 30 hours per year or 30 minutes per day at occupied buildings.*

• *Allow participating land owners to waive shadow-flicker limits.*

In the accompanying text, at 31, NARUC Best Practices then further observes:

> Shadow flicker is defined as "alternating changes in light intensity that can occur at times when the rotating blades of wind turbines cast moving shadows on the ground or on structures" (Priestley, 2011, p. 2). The International Energy Agency (2010, p. 42) identifies shadow flicker as a nuisance . . . . . Shadow flicker will affect any particular location only during either sunrise or sunset. The specific location is a function of the potential alignment between the sun, a wind turbine and a receiving surface. . . . . Shadow flicker should be determined as a pre-construction activity. Reports can be provided so that the possible shadow effects on properties, buildings, and roadways can be understood. A reasonable standard can rely on micro-siting to ensure that shadow flicker will not exceed 30 hours per year or 30 minutes per day at any occupied building. *These are the most commonly used guidelines* (Lampeter, 2011, pp. 5-14). (*Emphasis supplied.)*

The report's citation to Lampeter as a reference is actually to a PowerPoint presentation by one Richard Lampeter, dated February 10, 2011.[14]

The Lampeter PowerPoint does not approach Shadow Flicker from view of whether it is a "burden" on real estate, or might constitute "servitude" under the law of South Dakota. Likewise, in the entire NARUC Best Practices document (a total of 182 pages) there is *no* legal analysis whatsoever as to whether Shadow Flicker, as emitted by wind farms, might be an invasion of property rights (a form of "Trespass Zoning," as referenced in Complaint, ¶ 61, *et seq.*), or comprise a burden or servitude on real property ownership. The words "burden" and "servitude" are nowhere to be found, and as said, there is no analysis of the law, whether under

[14] The last page of the Lampeter PowerPoint (cited in NARUC Best Practices, is annexed to Plaintiffs' Brief (hence, "PB") as Exhibit PB-1 – Lampeter's final conclusion is – "30 hours per year of expected or real shadow flicker is generally the guideline applied by consultants when evaluating shadow flicker impacts." Lampeter, at 14, also claims, based on a Danish publication, a German court concluded "30 hours per year was acceptable." This additional slide, for good measure, is annexed as Exhibit PB-2, serving as the origins of the Shadow Flicker dichotomy in South Dakota, with 30 hours being the fulcrum.

South Dakota or other statutory and constitutional provisions.

Regardless, this shallow-but-lengthy NARUC Best Practices document has enjoyed wide acceptance in South Dakota. Every county with a Zoning Ordinance, purporting to regulate the placement and operation of industrial wind turbines (IWT or, as Codington County prefers, WES), to the best knowledge of this writer, has lately amended or adopted regulations limiting Shadow Flicker to 30 hours per year (the recommendation to no more than 30 minutes per day having been ignored). Codington County has likewise done so, by enacting Ordinance # 68 on June 7, 2018. Retracing this history, Codington County now has this "30 hours per year" allowance for Shadow Flicker, simply because the NARUC Best Practices report has urged it be done. The NARUC Best Practices report (2012), in turn, borrowed it from one Richard Lampeter's PowerPoint of February 10, 2011. Meanwhile, Lampeter's PowerPoint slide claims that this "30 hours per year" standard is a general guideline "applied by consultants" (what could be better – having the governing law directly shaped by consultants working for the wind farm developers?), hired to evaluate shadow flicker impacts; Lampeter further claims that, as attested to by the Danish Wind Industry Association, there is a ruling by a German judge to the effect that "30 hours per year [of Shadow Flicker] was acceptable." (The opinion of this German judge might be preferable to the consensus of wind farm consultants, but only marginally.)

The Legislature has adopted no statute providing for (or requiring) a certain modicum of Shadow Flicker tolerance, whether of 30 hours per year, or 30 minutes a day, or some other serving. Likewise, the PUC has promulgated no regulation adopting such a standard for Shadow Flicker, although this state agency does seem to have an active interest in the topic, apparently based on the underlying Zoning Ordinance provisions. In *Final Decision and Order Granting Permit to Construct Facility; Notice of Entry*, for Docket EL19-003,[15] the PUC, at ¶ 46, noted, in

[15] This being *the* Facility Siting Permit referenced in the caption of this case.

laudatory tones:

> Similarly, the record also demonstrates that Applicant has appropriately minimized the shadow flicker for the Project to no more than 30 hours for participants and non-participants . . . Applicant also used conservative assumptions, such as the greenhouse-mode, to model shadow flicker, which, in turn, produces conservative results.

During the course of the underlying proceedings, as the Complaint, ¶ 78, notes, the Lindgren Farm, as receptor CR1-C37P, at a distance of 1,696 feet to the nearest IWT, was initially projected to have Shadow Flicker duration of 27 hours, 49 minutes (27:49) annually. Later in the proceeding, as stated in Complaint, at footnote 17, the Lindgren Farm was re-entitled CR1-C37-NP, and while it is now 1,631 feet from the nearest site, the duration of Shadow Flicker was re-stated as 15:55.

Simply stated, Plaintiffs are (or, absent the intervention of this Court, soon will be) required to endure 15:55 worth (per the latest estimate) of Shadow Flicker. Apparently, this burden on Plaintiffs and their real property is coming about because: (a) expert Richard Lampeter, having read an article published by the Danish Wind Industry Association, believes that (b) a nameless German judge found, at some time in the past, that 30 hours per year would be *acceptable*, even as (c) the Lampeter writing[16] was then itself seized upon by the NARUC Best Practices report from 2012 (funded by US DOE, the same federal agency that funds market value studies claiming there is no discernible loss to real estate market value by being located closely to a wind farm) as the cited grounds to establish this Shadow Flicker standard in Table 6 (as quoted at 8 and 9, above).

Over the course of the ensuing several years, (d) the NARUC Best Practices report (based on Lampeter's understanding[17] of a judge's "acceptable" ruling in Germany) has then, in turn,

[16] In the form of a terse PowerPoint, dated February 10, 2011, see Exhibits PB-1 and PB-2, annexed.
[17] Witness Lampeter often appears as an expert witness before the PUC on Shadow Flicker and other wind farm concerns, although apparently that was not the case in Docket EL19-003.

become a "national standard" (or at least a State-standard) of sorts for the effects of Shadow Flicker, as virtually every county in South Dakota has then (e) amended their Zoning Ordinance to lay claim to a 30 hour per year standard. Codington County is such a jurisdiction, having adopted this standard (on June 7, 2018) as henceforth fully governing the Lindgren Farm (and the Plaintiffs themselves, who live there), in the event a wind farm would be built there at some time in the future.[18]

Needless to say, Codington County's adjudicator, just a few weeks later, took up the Crowned Ridge Wind CUP. Both of the Plaintiffs – along with others – appeared to object to the CUP, to no avail. The CUP was approved by a unanimous vote of the Board of Adjustment, in the same manner as filed.[19]

Several others (Paul Johnson and others, but not Plaintiffs in this case) then pursued an appeal, by writ of certiorari, to the Circuit Court under SDCL § 11-2-61. This case was docketed as 14CIV18-340, *Johnson, et al. v. Codington County Board of Adjustment, et al*., assigned to the Honorable Robert Spears.[20] Not having participated in the appeal, this writer does not claim a full understanding of the issues there, but it appears that a constitutional challenge was made to the notice provisions in Section 4.05.01 of the Zoning Ordinance (Ordinance # 65, apparently as amended by Ordinance # 68).

However, in a memorandum opinion entered March 22, 2019, Circuit Judge Spears, at 5-6, held that a constitutional challenge to the Zoning Ordinance (as adopted by the County Board on June 7, 2018) is *beyond* the purview of an appeal taken by writ of certiorari:

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[18] Codington didn't have to wait long for the wind farm interests to materialize, as Defendant Crowned Ridge Wind's cover letter to the County's planners, with a long, detailed CUP attached, was dated June 8, 2018; such fine choreography, where a County acts, and Big Wind responds, is breathtaking.

[19] The minutes of the Board of Adjustment comprise *Exhibit A* to Affidavit of Zachary W. Peterson ("Peterson Affidavit"), counsel for Codington County, filed herein on September 30.

[20] The Court's Findings of Fact, Conclusions of Law and Order, entered May 6, 2019, are annexed to the Peterson Affidavit, as *Exhibit B*.

> Regarding the alleged illegality of section 4.05.01(3) of the Ordinance, the Court first notes that "[m]unicipal zoning ordinances are afforded . . . [a] presumption of constitutional validity." *In re Conditional Use Permit No. 13-08*, 2014 S.D. 75, ¶ 13, 855 N.W.2d 836, 840 (citations omitted). To overcome this presumption, the challenging party 'must show facts supporting the claim the ordinance is arbitrary, capricious, and unconstitutional.' " *Id.* Second, the "scope of review under the certiorari standard d[oes] not give the court the power to invalidate the ordinances themselves in this action." *Wedel v. Beadle Cty. Comm'n*, 2016 S.D. 59, ¶ 16, 884 N.W.2d 755, 759. This is because under SDCL 11-2-65, "[t]he court may reverse or affirm, wholly or partly, or may modify the decision brought up for review." *Id.* The decision brought up for review is not the validity of the ordinances, but the Board's decision granting the CUP. *Id.* Invalidating county ordinances goes beyond the relief the Court may grant under SDCL 11-2-65. *Id.*

Judge Spears appears to be quite correct in that conclusion. It also appears that a constitutional challenge to the exact provisions questioned here, and on these same grounds, was *not* raised by the parties in the *Johnson* case, although such efforts wouldn't have mattered much, given what these Plaintiffs understand to be the Court's correct ruling as to the scope of review by writ.[21]

Meanwhile, a few months following the ruling of the Codington County Board of Adjustment, and while the *Johnson* case was pending before Circuit Judge Spears, Crowned Ridge Wind and affiliates submitted the application for Facility Siting Permit to the PUC, dated January 30, 2019. This filing would be docketed as EL19-003.

Consistent with what is now an established practice, the PUC, on February 6, 2019, issued orders, including "Notice of Opportunity to Apply for Party Status," direction that "any interested person may be granted party status in this proceeding by making written application to the Commission." Further, the PUC ordered that such applications be filed on or before the close of business on April 1, 2019, advising that becoming a party is necessary only to introduce evidence, cross-examine witnesses and "preserve your right to appeal to the courts if you do not believe the Commission's decision is legally correct." Any person "residing in the area where

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[21] Judge Spears' Memorandum Opinion, March 22, 2019, see *Exhibit B* to Schumacher Affidavit

the facility is proposed to be sited," can intervene, if timely application is made.[22]

At this point in time, the Lindgren Farm – and Plaintiffs – remained subject to the option for Easement, originally signed in June 2014. The instrument included Section 11.4, *Permits and Approvals* (as recounted in the discussion at 6, above). The concern was whether such language might render formal intervention in Docket EL19-003 a rather foolish act. The Lindgrens decided to defer seeking intervention before the PUC.[23]

The option for an Easement over the Lindgren Farm expired without exercise on June 10, 2019. On June 13, 2019, Plaintiffs then requested that counsel proceed with an Application for Party Status.[24] On June 18, 2019, staff counsel for PUC responded, recommended that the "late application for party status be granted." During session held June 26, 2019, however, the PUC voted 2-1 to deny intervention to Plaintiffs.[25] On July 26, 2019, the PUC issued the permit to Crowned Ridge Wind, including an extensive set of Permit Conditions (45 numbered paragraphs, some with many subparts) - # 34, in pertinent part, providing:

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

From the discussion appearing at the bottom of 10, above (and Complaint, ¶ 78), the predicted Shadow Flicker seems to have been reduced from about 28 hours annually, to around 16 hours. How much reduction arises from Crowned Ridge Wind's elimination of turbine sites 56 and 57 from the physical confines of the Lindgren Farm is not presently known.

What is known, going forward, Crowned Ridge Wind will *not* possess any Easement for casting Shadow Flicker (or emitting noise) as an "Effect," upon or over the Lindgren Farm. Defendants might be heard to exclaim on this order, "So what? The freshly-minted Zoning

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[22] SDCL § 49-41B-17; under ARSD 20:10:22:40, application for party status "shall be filed within 60 days from the date the facility siting application is filed."
[23] Lindgren Affidavit, ¶ 7.
[24] See Exhibit 3, Lindgren Affidavit, "Application for Party Status."

Ordinance of Codington County (adopted June 7, 2018) gives Applicant that very right and privilege!"[26] Meanwhile, the PUC obsequiously affords obvious homage and due enforcement (as part of the Facility Siting Permit, and related orders) to this 30 hours annual limit *as if* such were carved in stone, somewhere in Pierre or someplace having a prominent role in the rich legal history of the State.[27]

During the early stages of EL19-003, PUC staff, then also seemingly unsure of these legal foundations, transmitted a "data request" to Crowned Ridge Wind, with this very revealing question:

> Did Applicant base its 30-hour per year shadow flicker limit on any factor other than county ordinance? If so, provide support.

Applicant turned to one of its usual experts – Dr. Chris Ollson of Ollson Environmental Health Management (OEHM) – for a response to this quoted PUC request. The entire response of Dr. Ollson runs to 237 pages, but for this limited purpose and further discussion, only the first page (marked for other purposes as "Exhibit A7-6") is attached.[28] Therein, Dr. Ollson asserts:

> In summary, over the past decade there has been considerable research conducted around the world evaluating health concerns of those living in proximity to wind turbines. This independent research by university professors, consultants and governmental medical agencies has taken place in many different countries on a variety of models of turbines that have been in communities for numerous years. Based on scientific principles, and the collective scientific findings presented in research articles, OEHM believes that:
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> 1. Shadow flicker is not a health concern (e.g., seizure in photosensitive epileptics), rather it can be considered a nuisance by some non-participating project residents.
> 2. There is no scientific evidence that shadow flicker impairs quality of life or is of particular nuisance for any duration of time. Limiting shadow flicker to no more than 30-hours a year at non-participating residences is commonplace in those United States jurisdictions that have set standards. It has been effective to

[25] See Exhibit 4, Lindgren Affidavit, "Order Denying Late-Filed Application for Party Status."

[26] To be clear, Plaintiffs challenge any such claim – the Zoning Power delegation does not stretch that far.

[27] Having searched, counsel for Plaintiffs admits to not having found it anywhere in South Dakota law, other than by the purported authority of Codington County's Ordinance # 68, adopted June 7, 2018.

[28] See Exhibit PB-3, attached hereto.

> reduce complaints associated with those living in proximity to wind projects.

Dr. Ollson does not reveal that this "standard," when traced through Lampeter, actually began with an unnamed judge in Germany, supposedly ruling that 30 hours of Shadow Flicker per year would be "acceptable." Things have simply – and rapidly - snowballed from there. (Plaintiffs will add the snowball also does considerable violence to their title to the Lindgren Farm.)

This Court should consider this point – what did Crowned Ridge Wind view as being necessary or important for dealing with Shadow Flicker (or other "Effects")? To the extent that this Defendant was expecting or proposing to come into privity with a landowner, the "effects" of "flicker" and "shadow" were quickly and efficiently provided for by means of the "Effects Easement" (as stated in Section 5.2, quoted at 6, above, and also appearing within *Exhibit A* to Lindgren Affidavit). By entering into the option for this Easement, Plaintiffs had effectively given over into the hands of Boulevard (and friends) *all right and power over such emissions*, regardless of the source.

But, with the option for that Easement now having expired, Plaintiffs find themselves yet stuck with these very same "Effects." Rather than having privity with Crowned Ridge Wind, Defendant has instead received unction for the spewing of these Effects – sanction having been extended by both Codington County and the Board of Adjustment, and given that blessing, now by the PUC, too.

Curiously, if the Applicant – as turbine operator – might wish or need to display more than 30 hours of Shadow Flicker on a residence, the Codington County Zoning Ordinance also provides a remedy for escape. Note Section 5.22.03.13, entitled "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 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.

Other than the County Board's use of "Codington County Zoning Officer" as the place of recording and filing (rather than Codington County Register of Deeds), this exceptional approval approach sounds very much like an *easement*, one authorizing a specific servitude upon a servient estate (an occupied dwelling, as an example).

We pause here for this question – what, exactly, gives the ordinance writer and legislator (Codington County Board) and then also the local adjudicator (Codington County Board of Adjustment) the power and authority to say that *more* than 30 hours of Shadow Flicker is much too much – but *if* the landowner wishes to consent to that intrusion, then there must be a recorded easement? But then also, that some number *less* than 30 hours is just right, the Board of Adjustment has full authority, and landowners have no standing to complain, since the Zoning Ordinance facilitates that level of intrusion? And, after all, that all-powerful body – the Board of Adjustment – has issued the CUP providing for a variety of such Effects, to henceforth be scattered here and there, *permanently*, amongst all the persons and the properties of those who never sought to invoke the jurisdiction of this Board – but Plaintiffs in particular?

However brilliant that nameless German judge may have been, while knowing nothing of what the codified laws might have provided at the time, *none* of this fast creeping progression in governmental-authored, governmental-enforced, Shadow Flicker tolerances has transpired with any apparent recognition or even momentary consideration of whether South Dakota law says

anything about such a "bright line" standard (30 hours per year). SDCL § 43-13-2(8) is ripe for application to this purported standard.

As to the Lindgren Farm, the option expired on June 10, 2019, without any exercise by Defendant Boulevard and affiliates. Thus, as of this writing, Crowned Ridge Wind has no claim or right by easement over the Lindgren Farm – *at least not by privity of contract*. Yet, the intent to claim a right of servitude – and to place a burden – over and upon the Lindgren Farm obviously persists, to the extent of nearly 16 hours of predicted (and agency ratified or approved) intrusive Shadow Flicker annually. Only now, Crowned Ridge Wind points not to a recorded easement, but rather to the Codington County Zoning Ordinance, which now affords full right and entitlement – along with the resulting Board of Adjustment adjudication on the CUP which says likewise. The PUC, in turn, likewise gives its full consent to this arrangement, though it now also claims not to regulate "land uses" and is only charged to oversee and protect the health and welfare of the population.

Plaintiffs, however, maintain that this standard, apparently originating with an unknown judge in Germany (with subsequent avid promotion by consultants, such as Lampeter, and testimonial support by experts, such as Ollson, and the endeavors of the federal agency whose charter apparently involves ceaseless promotion of wind energy development), and now based thinly on the Codington County Zoning Ordinance, as well as each and every further adjudication issued by these Defendants pinned upon the same legal source, represents a taking – or a damage – of Plaintiffs' property rights. In reading these historical writings, one must grasp this evident truth - *not one* of these promoters or agencies even once considered the question of whether Non-Participating Owners, such as Plaintiffs, being citizens and property owners in

South Dakota, have a right to protect their lands and, in the absence of any privity, are entitled also to avoid burdens and servitudes upon their lands.[29]

C. THE ZONING POWER – ARE THERE LIMITS?

The legislative power is vested in the legislature, Const. Art 3, § 1; these provisions are read as including the "legislative policy power," a power that includes justification for zoning ordinances. *Cary v. City of Rapid City*, 1997 SD 18, ¶ 20, 559 N.W.2d 891.

In 1967, the legislature extended the zoning power to counties, capable of being exercised once a comprehensive plan is developed by the Planning Commission. SDCL § 11-2-11. Thereafter, the County may adopt a zoning ordinance, under which a county's area may be divided into districts. SDCL §§ 11-2-13, -14. The ordinance regulations, *inter alia*, are to be made with "reasonable consideration . . . to the character of the district, and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the county." *Id.*

Codington County has adopted such an ordinance, dividing the county into about 8 named districts (the "A," or Agricultural Land District, being relevant here), plus two overlay districts, as set forth in Ordinance # 65, believed to have been adopted by the County Board on March 28, 2017. The Lindgren Farm (legally described in Complaint, ¶ 23) is part of the "A" District, under which the uses to which Plaintiffs have put their property are classed, under Section 3.04.01 of Ordinance # 65, as Permitted Uses. As defined (Article II of Ordinance # 65), a Permitted Use is "[a]ny use allowed in a zoning district and subject to the restrictions applicable in that zoning district." The Lindgren Farm, as a Permitted Use, dates back prior to the time when legislative authority to adopt a Zoning Ordinance was delegated to Codington County. Complaint, ¶ 24.

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[29] In deeming 30-hours "acceptable," what facts did the German judge view or consider?

Under SDCL § 11-2-17.3, the Zoning Ordinance may authorize a conditional use of property, by specifying the approving authority, each category of conditional use requiring approval, the districts in which the use may be approved, the criteria for evaluating each conditional use, and the procedures for certifying approval of conditional uses. Under Article II, Ordinance # 65, a "Conditional Use" is defined as:

> . . . [A]ny use that, owing to 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.

The regulations for the "A" District include the naming of more than 40 "Conditional Uses" (Section 3.04.02, Zoning Ordinance), ranging from "churches and cemeteries" to "private clubs," and also "Wind Energy System (WES)." Several of these named conditional uses reference subsequent sections or chapters in the Zoning Ordinance – Concentrated Animal Feeding Operations, for example, incorporate the provisions of Section 5.14,[30] while the WES listing then directs the reader to Section 5.22.

Meanwhile, Section 5.22 is focused on the requirements for Wind Energy System(s). As of Ordinance # 65 (March 2017 adoption), this section had no provisions at all related to Shadow Flicker, while on the topic of "noise level" (Section 5.22.03.12), that version was amended and brought forward into Ordinance # 68 (June 2018 adoption) to read as follows:

> 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 measurements 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

[30] 5.14 is entitled "Accessory Buildings" - the intended reference might be Section 5.21, Concentrated Animal Feeding Operation Regulations.

> used and have a measurement period no less than ten minutes unless otherwise specified by the Board of Adjustment.

Plaintiffs would observe that the transmission of noise onto a property can be as much a servitude or burden as Shadow Flicker, even though there is not a specific statute for "noise," as is the case for the "right of receiving light" or "discharging the same upon or over lands," SDCL § 43-13-2. During operations of the wind farm, Plaintiffs' residence (and property) is predicted to receive levels of noise that is in excess – in consequential and measurable increments – of the ambient sound now experienced in this rural area. The "Effects Easement" would have allowed such intrusions, but the option has lapsed, and there is no privity with Crowned Ridge Wind for an increased level of sound, reaching Plaintiffs' home at all times the wind farm is in operation.

The mission of the Zoning Ordinance is to "assist in the implementation of the [County's CLUP], which in its entirety represents the foundation on which this Ordinance is based." Section 1.01.03.1. Further, the fostering of a harmonious, convenient and workable relationship among land uses is an expressed goal, including promoting the stability of existing land uses in conformity with the CLUP, and to protect those uses from "inharmonious influences and harmful intrusions." Sections 1.01.03.2 and .3. The last expressed intent, Section 1.01.03.10, is to "place the power and responsibility of the use of land in the hands of the property owner contingent upon the compatibility of surrounding uses and the [CLUP]."

Reading through the statement of purpose, it is hard to believe that a wind farm, involving 130 or so wind turbines, extending above ground level (AGL) nearly 500 feet while cranking out about 107 dBA of noise at the source, embracing within this so-called "Project" some 53,000 acres (including the Lindgren Farm, although no longer open to hosting two of the turbines)[31] *is in full conformity* with the Zoning Ordinance. But that issue seems to have been

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[31] See Exhibit 2, Lindgren Affidavit – comprised of Exhibit A53, in PUC's Docket EL19-003. Located 3 miles south of South Shore, still showing CR-56 and CR-57 locations on a mauve background.

addressed by Circuit Judge Spears in the *Johnson* case, and as such, is not the immediate concern of Plaintiffs' Complaint. The Complaint here is by no means an appeal, or a review by writ.

What remains of direct and immediate concern to Plaintiffs is whether, in the process of allowing this wind farm to be developed here and in such an expansive manner, the Board of Adjustment (in particular) is legally entitled to "borrow" from Plaintiffs (or, actually, take), as a function of the adjudicative process, an attribute of their property (one or more of the sticks that is part of the bundle of ownership rights), by burdening the property with the operational "Effects" of this wind farm due to relative proximity.

The zoning power in South Dakota, as delegated to and exercised by local government, is subject to "constitutional limitations on governmental restrictions of private property." *Schafer v. Deuel County Bd. of Commissioners*, 2006 SD 16, ¶ 14, 725 N.W.2d 241. In *Schafer*, plaintiffs were seeking to compel (by mandamus) the County Board to accept (and enact) two initiative petitions (under SDCL § 7-18A-13) proposing to amend the County's zoning ordinance (governed by SDCL, Chapter 11-2). The Court determined that the specific statute – zoning and the procedure established there – controlled over the general statute providing for initiative rights. Before getting to that point, however, the Court briefly reviewed the purpose of zoning, citing also to *Cary v. Rapid City*, ¶¶ 19-22, with the thought that allowing "the use of a person's property to be held hostage by the will and whims of neighboring landowners without adherence to or application of any standards or guidelines" is repugnant to the due process clause of the Fourteenth Amendment. The Court took note also of the controlling rulings in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), and *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

None of these cases are really an exact or close fit to this one; this case has unique facts and requires a focus on *when* might a CUP applicant take or borrow (in an adjudicative process

integral to the CUP approval, and also as assertedly authorized under the Zoning Ordinance) the facilities or lands of a nearby property owner, not otherwise in privity with the CUP applicant, to help facilitate the need for land mass, as one would expect to need for an "outsized" industrial operation. The Zoning Ordinance in question was amended on a Thursday (June 7, 2018), and as of the very next day - Friday (June 8, 2018), Defendant Crowned Ridge Wind was ready to apply for a CUP. Before considering a CUP, an "application"[32] from an "applicant"[33] is required. And, before granting a CUP, furthermore, the Board of Adjustment is to certify compliance with "the specific rules governing individual conditional uses," with satisfactory provision for "the economic, noise, glare or other effects[34] of the conditional use on adjoining properties and properties generally in the district." The case law, as represented by *Euclid*, and others, is generally to the effect that, when implementing zoning as a legislative function, the landowner (as a prospective applicant, hoping to submit an application for a zoning change or remedy) is either unhappy with the classification of lawful uses derived from legislative processes, or about some burden (commonly referenced an "exactment") that is placed on the real property in the course of adjudicating the property intended to serve as a site for one function or another.

However, the process actually being employed in Codington County is this: the Board of Adjustment – in response to an application from an applicant (Crowned Ridge Wind) and for purposes of making the applicant's conditional use proposal (130 turbines, more or less) actually fit, a bit here and a little there and quite a lot all over (much like the jig saw puzzle shown in the Project Map in question[35]) – now deems itself fully authorized to reach over onto each parcel of the "adjoining property" (the Lindgren Farm, in this case) for purposes of permanently assigning

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[32] Ordinance # 65, Section 4.05.01.1, requires a "written application."
[33] Ordinance # 65, Section 4.05.01.2, "applicant for a conditional use permit" to notify others.
[34] Same word as used in Section 5.2 of Easement, although in lower case spelling! Quoting from Ordinance # 65, Section 4.05.01.6.b, at p. 79.
[35] See Exhibit 2, Lindgren Affidavit.

to *that* property some degree or share of the burden flowing from the "effects of the conditional use." This is "exactment" from a non-applicant neighbor to the land use, and arises whenever the applicant attempts to squeeze in wind turbines into such close proximity that the CUP proposal mimics whatever minimum setbacks required by the Zoning Ordinance.[36] (This County effort is akin to squeezing 50 lbs. of manure into a sack designed to hold merely 10 lbs., all neighbors to the Project being completely soiled in the process.)

The Lindgrens, occupying a *Permissive Use*, pursue *no* land use application, and seek *no* affirmative remedy from the Board of Adjustment, or, for that matter, from the PUC. What other *label* might one honestly put on the Board's ratification and approval of some specific measure or quantity of Shadow Flicker being visited upon the Lindgren Farm and Plaintiffs' residence, whether to the extent of either 28 hours per year – or perhaps 16 hours? Only when exceeding 30 hours must such be in the form of some "agreement" that is recorded and the applicant is obliged to make some form of payment to the burdened landowner.[37] What legislative power, delegated to counties, makes that fine distinction (one duration of use requires an easement, the other does not)? Or, is the nameless German judge exercising jurisdiction beyond national boundaries and over oceans? No, even if predicted to last something less than 30 hours annually, Shadow Flicker remains a burden laid upon Lindgren Farm, arising entirely from a CUP application pursued by Crowned Ridge Wind and enthusiastically approved by County's Board of Adjustment.

Being non-consensual in nature, this burden (servitude) is also a taking of, or an infringement upon, property rights and interests, regardless of whether the desired approval is

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[36] In this instance, the Ordinance requires a 1,500 feet setback, while the distance to Plaintiffs' home from CR 48 is estimated at 1,650 feet; a more conservative approach, respectful of neighbors – such as 5,000 feet (or more) would substantially reduce, if not eliminate, Shadow Flicker, IFLN and dBA noise, perhaps giving space to fewer wind farms. But who must live with the "Effects"? The neighboring non-applicants, by the pure force of a Board of Adjustment edict. Is this a proper Zoning Power exercise?

coming from the Board of Adjustment, the PUC, or both. Plaintiffs think it unlikely the State's Zoning Power is *this* expansive, whether being wielded directly by the Legislature, or in any form as delegated to Codington County, or, in the alternative form of a "Facility Siting Permit," delegated to the PUC. This seems particularly so when the burden being fashioned by the agency is actually laid upon an adjoining property owner, rather than the land use applicant itself.

Neither the decision in *Schafer* nor in *Cary* dealt with facts remotely similar to the zoning excursions being done here, but yet each assures us there *are* constitutional limits to that power. As of today, Art. 6, § 13, S.D. Const. still provides that "[p]rivate property shall not be taken for public use, or damaged, without just compensation. . ." While South Dakota itself is not claiming any apparent title to or possession of the Lindgren Farm, Plaintiffs submit the property is yet about to be taken or damaged – for public use – without just compensation, as the State is allowing its agency and delegatee to engage in Taking through official, required permits.

Here, governmental power is exercised to bless an industrial use of land so ambitious, out-of-scale, that the "Effects" given off (spun off, actually) by the use cannot be fully contained on the host site itself. Nonetheless, the governmental agencies (as reflected by their respective legislative and adjudicative endeavors) wish to promote, welcome and warmly embrace a money-laden use, rich also with promises of new tax revenue, such that they are constrained to allow the use to reach across property lines – *beyond the site.* Then, in purporting to place restrictions on the industrial wind farm activity, the operator is instead given license, by imposing detailed measurements of how much (and for how long) the "Effects" may be transmitted to and dumped on the Non-Participating neighbors. Keep in mind, the neighbors have not heretofore experienced these Effects. They have become "receptors," or, as Plaintiffs

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[37] See Complaint, at ¶ 91, and Exhibit D thereto, Defendant's response to data requests before the PUC.

see it, hostages. Henceforth, they will be required to endure these Effects.[38] This case is emblematic of Zoning Power, now writ much too large (much like the many wind turbines themselves). This power reaches far beyond the constitutional limits envisioned by *Schafer* or *Cary* or – for that matter – any other South Dakota reported case.

D. RESPONSE TO THE MOTIONS OF DEFENDANTS

1.
Crowned Ridge Moves to Dismiss –
Lack of Subject Matter Jurisdiction (Rule 12(b)(1)) and Failure to State a Claim (Rule 12(b)(5)

Defendant advances a four-part argument, starting with "A. *There is no Issue Ripe for Judicial Determination*." Citing *Boever v. South Dakota Bd. of Accountancy*, 526 N.W.2d 747 (S.D. 1995), it is said there must be a justiciable controversy in the use of declaratory relief, a concept which itself has four requirements – apparently, Defendant claims the Plaintiffs' Complaint fails the fourth requirement – "the issue involved in the controversy must be ripe for judicial determination." *Id.*, at 750. Quoting from *Gottschalk v. Hegg*, 228 N.W. 2d 640 (S.D. 1975), *Boever* further states that "[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*, at 750.

Since the Supreme Court did reverse the trial court, *Boever* seems an odd choice to argue here. At the trial court, the complaint involved two constitutional challenges, the first to future

[38] Plaintiffs, in passing, observe SDCL § 21-10-2, providing that nothing "done or maintained under the express authority of statute can be deemed a nuisance." If the duration or intensity (loudness) of the Effects cast upon Plaintiffs and the Lindgren Farm is fully in line with the Zoning Ordinance, CUP and PUC Permit, but causes damage or injury beyond what the assembled experts have opined, are not Plaintiffs stripped of remedies? When Zoning Power, as used here, affords applicant the strength to reach out and over property lines, expelling a certain volume or duration of Effects thereon, is not a servitude created? That use of the Zoning Power might follow NARUC Best Practices; whether also in compliance with the South Dakota Constitution and statutory provisions is the Complaint's primary focus.

"quality review and disciplinary" matters under SDCL 36-20A-20 (with disciplinary actions being taken if or when factually needed), and a second challenge to 36-20A-15 (with licensed public accounting firms undergoing a quality review every three years). Dismissal of the challenge to the disciplinary statute was affirmed, while the trial court's failure to reach the merits of the second challenge was reversed. In that regard, *Boever* notes, at 750, "[a] matter is sufficiently ripe if the facts indicate imminent conflict. *Kneip*, 214 N.W.2d at 99."

The crews and equipment hired by Defendant Crowned Ridge are now in the field, starting the construction of wind turbines sites, not far from Plaintiffs' residence. In due course, whatever turbines are destined to create or contribute to the invasion of the Lindgren Farm will become operational. If this isn't "imminent conflict," then what is?[39]

Crowned Ridge also asserts the Court lacks "jurisdiction over the Declaratory Judgment Action," because Plaintiffs have not followed the "proscribed method for challenging those bodies' decisions." Mot. Brief, at 10. In other words, Plaintiffs have failed to exhaust their administrative remedies. Defendant further explains that Plaintiffs could have attended the public meetings and to provide input, and "cannot be heard to complain about the legality of an ordinance they were given the opportunity, but failed, to oppose." *Id.*, at 11. If permitted to testify on this point, Plaintiffs would say they did all that, but Codington County paid no heed.

Warming up, Crowned Ridge then asserts the sole method to challenge the Board of Adjustment is by writ under SDCL § 11-2-61.1, while as to the PUC's decision, the exclusive remedy is to appeal to circuit court under SDCL § 1-26-30. Since Plaintiffs did neither of those things, then, as a matter of law (according to Defendant), the Lindgrens, as owners of the Lindgren Farm, are simply out of options, citing *Elliott v. Board of County Com'rs of Lake County*, 2007 SD 6, ¶ 17, 727 N.W.2d 288, 290, along with several other cases.

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[39] Digging the hole to hold CR 48, about 1,600 feet distant, is underway as of November 2, 2019.

It is agreed that the Lindgrens did not participate in the writ review assigned to Circuit Judge Spears (the *Johnson* case). But, what would have come of that if, as here, the Lindgrens had based or anchored the assertions on appeal upon their constitutional rights as citizens and property owners in the State of South Dakota? Judge Spears, in affirming the Board of Adjustment, concluded that "[i]nvalidating county ordinances goes beyond the relief the Court may grant under SDCL 11-2-65."[40]

Strictly speaking, Plaintiffs do challenge the *adjudication* made by the Board of Adjustment is unconstitutional, as it represents a taking of property interests from those who are not applicants for a CUP. The Zoning Ordinance itself (as legislation by the County Board) is also constitutionally challenged by the Lindgrens, as it enables the adjudication made in July 2018. The legislation, as Plaintiffs see it, represents very poor public policy (back to the 50 lbs. of manure in a 10 lb. bag analogy, a process requiring a "taking" from those who are not even applicants, now playing the role of "receptors"[41]), taking nothing from non-applicants (such as Plaintiffs) until such time as an applicant (Crowned Ridge Wind) submits the application for a CUP.

As noted elsewhere, the CUP application was quickly thrust before the Board, with a cover letter dated the day *following* adoption of the Zoning Ordinance. The application here seeks to place wind turbines over a vast area in Codington County, at, or close to, the minimums required by the Zoning Ordinance. The Board of Adjustment responded in kind (with no apparent changes or quibbles to Applicant's request). Applicant's proposal to take from mere receptors (not in privity), and to make some specific, measurable and officially approved use of

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[40] Memorandum opinion, Circuit Judge Spears, at 6. See *Exhibit B*, Schumacher Affidavit.

[41] **Re-cep-tor:** RECEIVER as **a.** a cell or group of cells that receives stimuli: SENSE ORGAN **b**.: a chemical group or molecule in a plasma membrane or cell interior that has an affinity for a specific chemical group, molecule, or virus. *Webster's Ninth New Collegiate Dictionary* (1985). By this definition, Non-Participating Owners are a "group of [owners] that receive stimuli. *Perfect – but lawful?*

their lands, stitching (in effect) that open area onto the surface already afforded by the host sites, is clear evidence that a Taking has transpired for those areas beyond the host's property line.

The only alternative ruling, in Plaintiffs' view, is that the proclaimed zoning efforts are not based in law and are thus void. Whether Judge Spears, in ruling on *Johnson*, would have permitted a constitutional challenge by reason of the Board's *adjudication* (which, after all, is a response to an ambitious application from an applicant who desired to closely follow the minimum spatial and related requirements of the Zoning Ordinance)[42] is uncertain.

While the Legislature may have provided an exclusive review process for decisions of the Board of Adjustment, namely, the writ mentioned in both SDCL § 11-2-60 and -61.1, Plaintiffs are not seeking a mere judicial review of the Board – no, Plaintiffs assert (as clearly as this writer can state it) that the Board of Adjustment, following the narrow confines allowed by the County Board's legislation, have violated the constitutionally-protected rights of the Lindgrens, by issuing a decision that either takes or damages their property, in favor of the CUP pursued by Crowned Ridge. (Again, the natural – which is not to say lawful - consequences of attempting to squeeze 50 lbs. of offal into a small bag, one that is hopelessly too small for the purpose. Nearly every landowner with a parcel who wants a wind turbine will get one – with the resulting "Effects" then being readily dumped or spread, across property lines and including upon those not in privity with Crowned Ridge. Meanwhile, the Zoning Ordinance adopted just last night says this is okay! NARUC Best Practices recommends this, too, and who are we, the Board of Adjustment, to argue with the County Board?) If the Takings effect of the adjudication by the Board of Adjustment (operating within the generous scope of an ordinance crafted by the County

[42] Thus, in response to the Zoning Ordinance's minimum spacing of 1,500 feet, Plaintiffs will have a turbine operating just over 1,600 feet from their residence, as approved by the Board of Adjustment.

Board, at a time when the "Effects Easement" of Section 5.2 was still part of an option right for Defendant Boulevard) cannot be accomplished now and in this Court by Plaintiffs, then where?[43]

In pursuit of an answer to the immediate question, please note that at the time of the taking or damage to property, the Lindgrens were yet burdened by the Easement Agreement with this Defendant's affiliate, Boulevard (actually, an "option" with a 5-year term, expiring on or about June 10, 2019). This instrument included both Section 5.2 ("Effects Easement") and Section 11.4 ("Permits and Approvals"). The Lindgren Affidavit, together with the averments in the Complaint, reflect the uncertainty of whether the option would become a 50-year term under the domination of Crowned Ridge, and also the uncertainty of the level of cooperation expected or demanded of a landowner, caught up in the web of such an instrument. Now, with the recent expiration of the option, the Plaintiffs continue to be burdened by Crowned Ridge's ripening plans to implement an intensive, adverse use of the Lindgren Farm, notwithstanding the lack of privity between the WES owners and Plaintiffs.[44]

Ordinance # 68 (adopted June 7, 2018) also specifies certain information "required to obtain a permit" – the list includes:

> 15. . . . b. Map of easements for WES; and affidavit attesting that necessary easement agreements with landowners have been obtained.

Apparently, having an "option" for an easement is just as good as having an actual easement. The fact that there is *no actual easement* for the Lindgren Farm would not be determined until the lapse date, June 10, 2019, about eleven months after the Board of Adjustment had ruled. The pertinent "Effects Easement" never came into being. If it had, Plaintiffs' standing to pursue any action as to Crowned Ridge (or others) would be greatly afflicted if not entirely undercut.

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[43] Part E of this brief, beginning at 54, will attempt to suggest a potential "where."

[44] Is privity optional? The Zoning Ordinance condemns "receptors" to receive if "Effects," such as Shadow Flicker, is under 30 hours annually, but receptors must agree in writing if in excess of 30 hours. Where in South Dakota law – or the Zoning Power – is this distinction made?

As to taking an appeal from the PUC to circuit court, that remedy is available *only* to those who have been granted intervention. Intervention is assured *only* to those who move to do so within the rather narrow window of 60 days (under statute and regulation noted in footnote 22, above), and this, Plaintiffs did not do. As described in the Lindgren Affidavit, Plaintiffs deferred their intervention efforts until a few days following the option's lapse on June 10, 2019. The PUC is vested with discretion to either allow or deny at that point – and Plaintiffs were soon denied intervention.

Crowned Ridge asserts that further pursuit of the Lindgrens' claims are barred by the doctrine of res judicata, citing *JAS Enterprises, Inc. v. BBS Enterprises, Inc*., 2013 SD 54, 835 N.W.2d 117. The assertion that the Lindgrens are so directly connected to others opposing the "wind farm" – when the only actual privity was between Crowned Ridge Wind and the Lindgrens (the 5-year option for Easement, which then lapsed on June 10, 2019) – is not on point, in the view of this writer.

Finally, Crowned Ridge argues that the details of Ordinance # 68 are *not* bound by Codington County's CLUP. Clearly, the County's adoption of a comprehensive plan is obligatory (SDCL § 11-2-11), and failing to adopt one is fatal to the Zoning Ordinance, see *Pennington County v. Moore*, 525 N.W.2d 257 (S.D. 1994). Codington County's CLUP dates from 2012, and as a matter of policy, has very *specific* (if terse) statements and views of how a CUP will control the wind farm, including "[m]aximum noise levels shall be established for wind energy systems," and "[m]aximum noise levels to be heard at the property line of the site with a wind tower."[45] Ordinance # 65, adopted in March 2017, at Chapter 1.01, declares that the Zoning Ordinance is adopted to "assist in the implementation of Codington County's [CLUP],

[45] See Exhibit 5, Lindgren Affidavit; quoted material is from second and twelfth bullet points on page marked 72.

which in its entirety represents the foundation upon which this Ordinance is based." Yet, the same Ordinance *failed* to establish "maximum noise levels" for WES, and *failed also* to establish maximum noise levels at the property line of wind tower sites as that claimed "foundation" required. In fact, the only relevant provisions for noise levels were written as:

> 12. Noise. Noise level shall not exceed 50 dBA, average A-weighted Sound pressure including constructive interference effects at the property line of existing off-site residences, businesses, and buildings owned and/or maintained by a governmental entity.

Ordinance # 68 (adopted June 7, 2019) continues along the same lines – *only* the noise at the off-site residence property line is to be measured (a measurement not called out at all by the CLUP). Likewise, the CUP issued by the Board fails to govern what the CLUP mandated concerning noise measurements. Defendant's argument appears to be that while there must be a comprehensive plan, the County is then free to blithely ignore it – and, actually, not honor nor follow it at all.

The CLUP is not some magic touchstone, which, once adopted, can just hang there to be ignored, or to fester like a useless appendage. The guidance offered by a plan continues to be vital, particularly when the Board considers conditional use permits. As referenced by SDCL § 11-2-17.3, the approving authority (the Board of Adjustment) is to consider the "objectives of the comprehensive plan," among other features. How might the Board reach a rationale decision when the CLUP's clear objectives as to WES regulations are *never* brought forward into the Zoning Ordinance? How can the Board reach a decision based on CLUP objectives when an *entirely different noise measurement point* (the property line of "existing off-site residences") is substituted for those actually required under the CLUP?

To ask those questions is to suggest the answers – clearly, the CLUP objectives (policies) were not brought forward and applied to the dimensions of this CUP. Small wonder, given that

the Zoning Ordinance is out of synch with the CLUP as to the measurement of noise, the Board clearly allowed Applicant to stitch onto its own cloth (the host sites for turbines) whatever additional space was necessary, the latter being necessarily taken (County claims "borrowed") from that "receptor" class of people so that the bag in hand can fit it (the wind farm) all in.[46]

2.
Codington County Moves to Dismiss – Lack of Subject Matter Jurisdiction (Rule 12(b)(1)), Failure to State a Claim (Rule 12(b)(5)

Codington County also moves to "dismiss the . . . Complaint," citing SDCL 15-6-12(b)(1) and (5). County's brief opens with argument "A", to the effect that this Court lacks subject matter jurisdiction over the claims challenging the CUP, with subpart "1" being the statement that "Plaintiffs cannot collaterally attack the Board's CUP decision through a declaratory judgment action." The argument proceeds with a discussion of *Elliott v. Board of County Com'rs of Lake County*, *Appeal of Heeren Trucking Co.*, and other decisions (much as Crowned Ridge Wind has outlined in its brief), at 12.

None of this black letter law has any actual application to this case, however – Plaintiffs are not seeking a "review" of the Board of Adjustment's determination that a wind farm (spread over thousands of acres, sprouting about 130 wind turbines, each approaching 500 feet in height, and when operating, spewing out tremendous noise levels, and casting off Shadow Flicker, too) is a perfect fit for these rural neighborhoods around South Shore, worthy of a CUP. If that is what Codington County wants, well, then – *for the most part* - that's what it shall have.

Rather, this case is focused on *one little part* of that behemoth project – namely, that which Codington County and the Board of Adjustment has "taken" (and awarded to Crowned Ridge Wind), an unwelcomed, and unpermitted use of the Lindgren Farm. This is a Taking (including damage of the Lindgren Farm), a violation of the state constitutional rights claimed by

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[46] Loading 50 lbs. of manure into a 10 lb. bag causes spilling onto those not wishing to be victims.

the Plaintiffs. Are these Plaintiffs without remedy as to their rights arising under the South Dakota Constitution and statutes (as cited in the Complaint)? Defendant seems to claim so.

As stated in Complaint, ¶ 109, Plaintiffs framed sixteen (16) affirmative or negative propositions, all related to the Lindgren Farm, and concerning: (i) what Crowned Ridge proposes for the Plaintiffs' farm; (ii) what the Board of Adjustment has blessed regarding a use of the Lindgren Farm; or (iii) what the PUC has also ordered and approved in that regard. The propositions therein start rather modestly, if not blandly: *As a matter of property law, neither Defendant Boulevard nor any of its assigns, now have any easement for emitting any of the Effects upon the Lindgren Farm.*[47] Since the underlying claim could not have been fully determined until June 10, 2019 (the option for Easement having expired on and as of the end of that date), why is this not an issue that may be properly considered by this Court? Neither the Board of Adjustment considered it, and Circuit Judge Spears also did not consider it, and the PUC itself, by denying intervention, refused to consider it.

The next proposition (paraphrased) in line is quite like the first, but more tailored: *That the certain Wind Lease & Easement, structured as an option, has expired and of no further force or effect*.[48] This Court can surely issue a declaratory judgment as to this point.

In Complaint, ¶ 109 (5), the inquiry directed to this Court then takes a more serious, substantial and somber turn:

> 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

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[47] See Complaint, ¶ 109(1), at p. 32; obviously, the reference to easement and the "Effects" of a wind farm relate directly to Exhibit 1, Lindgren Affidavit, and Section 5.2 therein, "Effects Easement."

[48] See Complaint, ¶ 109(2); similarly, the next proposition, (3), focuses on the recorded memorandum for the expired option, which continues to be a cloud on title. Is there jurisdiction to hear this claim? According to Defendants, no.

> (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.

Again, Plaintiffs submit this fifth proposition (under ¶ 109) is an entirely suitable inquiry for this Court to take up. It is submitted that this same inquiry was not submitted, and certainly not in these terms, to the Board of Adjustment by anyone, and doubtful also that Circuit Judge Spears was presented with the same inquiry – or that if presented by those who were appellants in *Johnson*, the Court would have deemed the review-by-writ appeal a suitable vehicle for that purpose.

Plaintiffs – not being the applicants for a CUP by means of an application (as required if one is to seek a CUP under the Zoning Ordinance) – submit that the Board of Adjustment, in carrying out the assigned adjudicatory function, and also the County Board, in its legislative function, all as purportedly arise under or in connection with the Zoning Power, have thus extended to Crowned Ridge the further right to henceforth disperse or scatter the "Effects" flowing outward from the Crowned Ridge Wind project. This delegation includes that of reaching out and over the property lines of the host sites, casting the Effects onto adjoining or nearby properties.[49] The resulting license embraces this further claimed right as to the Lindgren Farm. These asserted rights, apparently all tied to a purported exercise of the Zoning Power, further result in a sculpted, measured, explicit and express approval of "this much of this, or that much of Shadow Flicker" (or however much noise - pick your poison). Plaintiffs are constrained to ask - What law, exactly, bestows on the County Board[50] the right to dictate that some specific quantity or perhaps the duration, of those Effects flowing outward from a wind farm, may both

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[49] Just as NARUC Best Practices recommended be done – albeit without any evident consideration of whether the exercise of claimed Zoning Power of such dimensions might, somehow, be seen as a servitude upon such nearby lands, either requiring or otherwise having the effect of, an easement.

[50] Same observation and question holds true as to the PUC, as well.

reach and then afflict (or assault) the residence of that specific "receptor"?[51] In what Title and Chapter, and in which Section, is that to be found, trumping the property rights of Plaintiffs?[52]

The sixteen (16) propositions outlined in ¶ 109 of Complaint – *each of them* – represent the ultimate issues for this case. We would submit also that *none* of these propositions have been previously placed before any decision maker having due and requisite jurisdiction. Further, these propositions are structured in a way that this Court may resolve that, *indeed*, the CUP *is* a valid exercise of the Zoning Power (in the context of state law), and that Defendants, by reason of such Zoning Power, *are* (and were) entitled to emit or dump the "Effects" over the property line and onto the Lindgren Farm.[53] Further, the Court is requested to declare "specifically and affirmatively" the "right-to-use" interests of the Defendants in the Lindgren Farm – because the "right" surely does not arise from privity with the property's owner.

Within that same inquiry, should this Court determine that state law fully supports Codington County's use of the Zoning Power in such manner, and, contrary to the so many words as have been pressed into the Complaint, that Defendants actions have occasioned *no* violation whatsoever of Plaintiffs' state constitutional and statutory rights, then and in such case, Plaintiffs further declare their intention to seek recompense in other venues for the taking of interests in their property under the Zoning Power.[54] The current challenges to the Board of Adjustment's CUP (or to the PUC's Facility Siting Permit) are on grounds quite distinct and unique from the scope of review under writ of certiorari, or another form of appeal to Circuit Court, as Circuit Judge Spears recognized in *Johnson*.

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[51] Ignoring for now whatever law and logic the German judge used to find such burdens "acceptable." NARUC Best Practices found that persuasive, but the question, we trust, remains open here.
[52] "Easements and Servitudes," Chapt. 43-13, SDCL, is not supportive, in Plaintiffs' opinion.
[53] Complaint, ¶ 109(10).
[54] This brief includes Part E, beginning at 54, a short review of federal decisional law concerning the use and misuse, of state zoning powers.

Secondly, Codington County asserts the failure to exhaust administrative remedies now precludes the use of declaratory relief to challenge to the Board's CUP decision. Defendant cites to footnote in *Dan Nelson Auto. Inc. v. Viken*, 2005 SD 109, ¶ 17, n. 9, 706 N.W.2d 239, 245, for the proposition that when a "remedy by appeal is available following administrative action, an action for declaratory judgment is not available." The trial court took a narrow view of the question, dismissing the auto dealer's action, seeking declaratory relief as to prospective application of an excise tax statute.

On appeal, the Department of Revenue contended the tax refund statutes (Ch. 10-49) were the exclusive remedy. On this point, the Court noted, at ¶16:

> [B]ecause the tax payment and refund remedy in SDCL Ch. 10-59 is not mandated or exclusive when no refund is sought, this statutory remedy does not divest the circuit court of primary jurisdiction to interpret the statute and declare the rights of parties.

It is important to keep in mind the Supreme Court reversed and remanded the case on appeal, concluding the opinion as follows:

> In this case, Nelson only sought an interpretation of the excise tax statutes as they apply to its prospective sales of automobiles. Nelson neither sought a monetary judgment nor a refund of taxes that would be paid from the state treasury. Furthermore, the action did not attempt to control or impose affirmative action upon a state official that was allegedly acting within scope of his legal authority. Rather, this action only sought a declaration concerning the applicability of the excise tax . . . . That question only required the circuit court to determine whether the Secretary of the Department of Revenue and Regulation was acting without legal authority in imposing that tax. *Id.*, ¶ 31.

Having been mentioned by the Court in *Nelson*, it seems suitable to briefly discuss the doctrine of primary jurisdiction (and of *exhaustion*), doctrines considered in *South Dakota Education Association v. Barnett*, 1998 S.D. 84, ¶ 9, 582 N.W.2d 386 (quoting from Gottschalk v. Hegg, 89 S.D. 89, 93, 228 N.W.2d 640, 642 (1975):

> " 'Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the

> administrative process has run its course. 'Primary jurisdiction,' on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative agency; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *United States v. Western P. R. Co.*, 352 U.S. 59, 63-64, 77 S.Ct 161, 165, 1L.Ed.2d 126, 132.

The Court in *Barnett* concluded by holding, at ¶ 10:

> Here . . . there are no claims of unfair labor practices that require resort to an administrative process. Rather, all of the claims concern implementation of an allegedly unconstitutional legislative act that may affect the collective bargaining rights of certain individuals. We conclude that neither principles of exhaustion nor primary jurisdiction require this Court's deference to an administrative proceeding and that [Plaintiff] has no other plain, speedy or adequate remedy in the ordinary course of law.

Before leaving *Nelson* and the "primary jurisdiction" issue, one does not normally think of needing to approach the Codington County Board of Adjustment over the claim (as presented in the Complaint) that constitutional limits are being violated. The Board certainly has no apparent jurisdiction to vindicate any of those rights.

In *Sancom, Inc. v. AT & T Corp.*, 696 F.Supp.2d. 1030 (D.C.S.D., S.D 2010), the U.S. District Court (Chief Judge Schrier) was presented with whether a case over the non-payment of access charges established in federal and state tariffs was a matter that should be referred to the FCC under the primary jurisdiction doctrine. The Court noted:

> The doctrine "applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *Alpharma, Inc. v. Pennfield Oil Co.*, 411 F.3d 934, 938 (8th Cir. 2005).

There is no special competence held by the Board of Adjustment as to matters ordered or approved by the agency, or whether such might constitute impermissible "burdens" or "servitudes" upon real estate near a wind farm. Codington County, both legislatively and adjudicatively, has perfectly – perhaps religiously - followed the NARUC Best Practices manual,

but with no deeper study of the legal issues raised here than NARUC afforded in 2012. That's the problem.

The failure to "exhaust" administrative remedies is what Codington County has seized upon as the main grounds for it's motion. However, at the moment of the Board's hearing (July 2018), Plaintiffs had, in fact, entered into the so-called Easement Agreement, structured as a 5-year option, not expiring until June 10, 2019. With the lapse of the option, this harsh reality now remains: Crowned Ridge Wind, though time would produce no easement for the "Effects" passing over and upon the surface of the Lindgren Farm (or the Plaintiffs' residence), Defendant yet intends to cast the "Effects" upon the property.

In *Mordhorst v. Egert*, 88 S.D. 527, 223 N.W.2d 501 (S.D. 1974), Circuit Judge Adams wrote for the majority, in a case involving the Board of Examiners in Optometry, bringing an administrative case against three optometrists for alleged unprofessional conduct. As to the lack of exhaustion before the state's board, the Court concluded:

> The presence of constitutional questions coupled with a sufficient showing of the inadequacy of administrative relief and impending irreparable harm flowing from delay incident to following the prescribed administrative procedures is sufficient to overcome the claim that administrative remedies must first be exhausted. *Id.*, at 532.

There are several differences in *Mordhorst* – there, for one, the administrative hearings had not yet transpired. At the time of the administrative hearing here (July 2018), Plaintiffs could not have then known that the option for Easement would lapse, and while this lapse would cause Crowned Ridge to delete two turbines intended for the Lindgren Farm (CR 56 and CR 57), the use of the farm for the "Effects" would continue. Further, this knowledge of lapse would have come much too late to have been raised before Circuit Judge Spears in the *Johnson* case, in the event Plaintiffs had participated in the case for review by writ. Codington County's exhaustion premise would require Plaintiffs to have addressed their constitutional claims to both the Board

and also to Judge Spears (if at all) long before Plaintiffs could have even known of the option's lapse.[55] Beyond that, the language used in the Court's Memorandum Opinion would suggest to this reader that any alleged unconstitutional scope of the reviewed CUP order, or the underlying ordinance, is beyond the confines of review under SDCL § 11-2-61.

Looking again at Complaint, ¶ 109, the thrust of the sixteen (16) separate declarations sought all relate to the actions taken or approved by either the Board of Adjustment or the PUC, and the resulting effect that such "Effects" mean or portend as to the Lindgren Farm. Essentially, the CUP and Facility Siting Permit, together, are viewed by Plaintiffs as a "de facto easement," and that such is (are) either an "invalid, unconstitutional exercise of the zoning power by Codington County and the Board of Adjustment (see ¶ 109 (8)), or in the alternative, if such *is* a valid exercise of the Zoning Power, and Defendants *are* entitled to emit or dump Effects onto the Lindgren Farm, then the Court is asked to declare specifically and affirmatively the manner and nature of such interests (see ¶ 109 (10)). It is a "one-or-the-other" proposition. Plaintiffs are not seeking to have this Court review the Board's decision, as if this case were a writ of certiorari.

Had the sixteen (16) declarations been clearly enunciated to the Board of Adjustment (in the few sparse minutes afforded to each speaker), is there substantial doubt how this lay-board (proficient as they might be as to the embrace of the Zoning Ordinance) would have ruled? And if the Plaintiffs *had* participated in the *Johnson* appeal, with reference to the many declarations laid out in ¶ 109 of Complaint, such efforts would be quickly overwhelmed by merely producing

[55] Plaintiffs were somewhat incautious in entering into the June 2014 option for easement; on the other hand, Defendant Crowned Ridge did not correctly represent to the Board of Adjustment that, as required by the Zoning Ordinance, applicant possessed an easement for all required lands. *Defendants held only an option, which lapsed in June, 2019.* Not requiring actual proofs of "easements" suggests the Board is unlikely to care much about Plaintiffs' constitutional or statutory protections concerning use and ownership of the Lindgren Farm.

the "Effects Easement" in Section 5.2 of the Easement, then yet appearing entirely viable, even though structured merely as an option that bound Plaintiffs.[56]

Under the various declarations outlined in Complaint, ¶ 109, Plaintiffs, at no time, urge this Court to declare that the CUP is null and void.[57] In Count II, beginning at p. 38, Plaintiffs do include claims for injunctive relief, in the event the Court determines the CUP (and Facility Siting Permit) do not themselves create a *de facto* easement to shower the Effects upon the Lindgren Farm. However, the Court is otherwise afforded ample opportunity to determine that, *yes*, the CUP does create a burden on Plaintiffs' property, or *no*, the CUP's employed use of NARUC's guidance (and that of the unknown German judge) is entirely fitting and proper.

The intended lesson from this case, is this – *if* the Effects *are* a burden on adjoining lands of those who are Non-Participants (having given no easement, and also not being applicants within an application for zoning relief) – then Codington County needs to be prepared to not merely grant a CUP, but to then also compensate the owners for having taken such property interests (or for the damage to those owners, including the Lindgren Farm). We think the County, in following the NARUC Best Practices recommendation, is reckless, both in the writing of Zoning Ordinances and in the adjudication of CUPs for wind farms. But if Codington County, having openly declared itself as "pro-wind" in its actions, is fully prepared to pave the way for new wind farms, by the Taking or damaging of property not otherwise in privity, and this Court determines that such actions *are* within the delegated powers of Zoning, then all that is left is to

[56] No separate response is made to County's assertion that *res judicata* bars this case; as noted, at the time of the Board's hearing (July 2018), and at all times leading up to June 10, 2019, Plaintiffs could not have asserted any escape from the burdens anticipated by Section 5.2, "Effects Easement." This Complaint is based on the central claim that, *because* of the Zoning Ordinance, *and* the CUP, the Lindgren Farm still remains subject to all such "Effects," notwithstanding the lack of privity with Crowned Ridge Wind.

[57] Although in (14), on p. 36 of Complaint, the Court is urged to declare the PUC's Facility Siting Permit void, the agency having been given *no apparent authority* to decide that the neighbors of one wind farm may be afflicted at 45 dBA (Crowned Ridge Wind), while near another wind farm, a limit of 40 dBA pertains. *Big difference!* The PUC's discretion lay one sound level here, another there, is not apparent.

determine the value of what has been taken from or damaged in the hands of Plaintiffs. (Only declaratory relief is sought for now. Alternatively, if the Zoning Power *was* wielded unlawfully, Defendants might reconsider such generous approaches to zoning, also known as freely giving away other people's property!) Further, if the Court is unwilling or deems itself unable to respond to the Complaint as sought, whether based on the motions now considered or otherwise, Plaintiffs will take the issue elsewhere, based on their rights as owners of property and the protections of the U.S. Constitution. (A dismissal without prejudice would be in order.)

Codington County's motion moves to the second major lettered point: "Plaintiffs fail to state a plausible claim regarding the County's adoption of Ordinance 68." The brief begins by citing a number of South Dakota cases, comparable to this example:

> "The burden of overcoming this presumption [that of being reasonable, valid and constitutional] 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.

Codington then continues, proclaiming: "Enacting restrictions on Wind Energy Systems is not arbitrary, capricious or unconstitutional," while at 12, this point is asserted:

> 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?

Where the County has gone off the rails with the Zoning Power is by purporting to enact restrictions on WES, but with special focus on the *how*[58] such Effects from those WES are then perceived – or received – at the occupied dwellings and similar land uses nearby. By allowing the "Effects" of WES to invade upon, over and across property lines to reach these Non-Participating Owners, readily accepting the recommendations of the NARUC Best Practices,[59] Codington County has created its own problems.

[58] Including related questions of "how much" and "how long" must a receptor endure "Effects"?
[59] Not to mention that unknown German judge who found 30 hours of Shadow Flicker "acceptable."

Property lines exist for a reason. They have legal significance. Further, as predicted by the CLUP in 2012, the forthcoming "restrictions" on wind farm operations (adopted in 2018) should have been placed within the upcoming Zoning Ordinance, exactly where the CLUP said they properly belong – *at the property line of the parcel with the wind turbine*. A later drawing of the line at the "receptors" home (Plaintiffs' residence), both legislatively and adjudicatively, represents a Taking of the Plaintiffs' ownership and possessory rights over a Permissive Use. Additionally, the nearby presence of Crowned Ridge Wind ultimately overwhelms (from these 500 foot tall installations, spewing or dumping Effects in the direction of the Lindgren Farm), the many lawful Permissive Uses that Plaintiffs might have otherwise have desired and been free to pursue on and about their property, all in perfect harmony with the Zoning Ordinance. This, too, is a loss of property rights.

Even after reading the entire Complaint, Codington County yet misapprehends the relief sought – Plaintiffs are *not* seeking that any part or provision of the Zoning Ordinance be deemed "invalid and stricken" – except as in a purported application of the rights now claimed by Crowned Ridge Wind, arising under the CUP as approved by the Board, directly pertaining to the Lindgren Farm. No one, nobody, has rights, by privity, or law, including the Zoning Ordinance, to invade or make use of the Lindgren Farm.[60]

Being unable to find a state case exactly on point with these facts (absent the seduction evident in the NARUC Best Practices document, this writer thinks it very unlikely that *any county*, in the exercise of the Zoning Power, would have attempted to unleash a zoning scheme purportedly empowering the zoning regulators to reach beyond the property line of the applicant, in the course of a CUP application, declaring that the Non-Participating Owner is henceforth

[60] CR 48 may be the wind turbine nearest to Plaintiffs' residence, about 1,600 feet distant. Whether contributing Shadow Flicker and noise is presently unknown. As of November 2, 2019, the foundation

amenable, as a "receptor," to be visited by so-much Shadow Flicker and, for good measure, some particular assault by noise. (So much for the owner's historic right to protect his or her own property from such intrusions.) From both *Schafer* and *Cary*, discussed at 22, above, it seems certain local government's exercise of the Zoning Power *is* subject to some constitutional limits, but that is a limit not otherwise well defined in our case law. In the related section for review of federal case law,[61] it is also evident that the significant cases have largely dealt with a state zoning or development law exercise attempting to impose some degree of cost upon, or a "donation" from, the zoning application as part of the price to pay for having invoked the zoning or development power.

Meanwhile, in *Cary*, the South Dakota court ruled on due process grounds, to address concerns that "the use of a person's property [might] be held hostage by the will and whims of neighboring landowners without adherence to or application of any standards or guidelines." The reference to "person's property" in *Cary* was that of the intended applicant for an attempted rezoning, while the "neighboring landowners" were those (non-applicants) looking to subvert or undercut the rezone by use of a protest petition. *Those* zoning concerns, as evident in *Cary*, are now being stood on their head *here*.

Here, the applicant for zoning relief (as to a Conditional Use for a great many interrelated locations) is proposing to make some specific use of a property; but such is also an invasive, over-sized use (unlike any other Conditional or Permissive Use in the district) that will forever bleed out various unwelcome "Effects," readily reaching the homes and properties of those who are non-applicants. No permission, easement or written approval of the non-applicant (a Non-Participating Owner) even necessary, however, for the Codington County Zoning Ordinance and

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hole is dug. Codington County has enabled this by use of a claimed Zoning Power. If lawful (as the Court may find), there is still a Taking to be addressed, if not by this Court, then another.

[61] Part E, *infra*, at 54; the arguments being incorporated here in response to Codington County.

the resulting adjudication of the Board of Adjustment *will afford all the permission required* of those who are mere "receptors."

The Zoning Ordinance and the subsequent adjudication issued here – the CUP – normalizes (while also fully legitimatizing, apart from due judicial consideration by this Court of the concerns expressed in the Complaint) invasive uses by wind farms, nakedly supported by bold, official edicts (from both Codington County and the PUC), each requiring by their terms that the neighboring owners (including Plaintiffs) *shall* henceforth accept (and you will tolerate) such Effects, at least to the extent of such predicted quantities and durations.

All this is made possible by a government eager to regard Plaintiffs and their home as being mere "receptors" for the new, important functions of the County, namely, the Crowned Ridge Wind Farm.[62] Thus, rather than comprising some new, legitimate approach for the exercise of South Dakota's Zoning Power, pursuant to which a County or state agency is now vested, by edict, to bless the extension of the assorted Effects out and over the property lines of "receptors," reaching even to and into their homes, the real facts of this case, as thus far known to Plaintiffs, seem more like an old, dated movie script, ripped from the pages of history, written by the best and brightest minds of some failed totalitarian regime.[63]

3.
The PUC Moves to Dismiss –
Lack of Subject Matter Jurisdiction (Rule 12(b)(1)), Failure to State a Claim (Rule 12(b)(5))

The PUC's motion is based on similar grounds, while also looking to put Plaintiffs in a box with no way out – since Plaintiffs did not seek to intervene until some time after the evidentiary hearing for EL19-003 had closed, and such intervention was denied by the

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[62] Rather than as South Dakota citizens having property, with the historic protections of both statutes and the South Dakota Constitution.

[63] "It is useless to struggle," or perhaps, "Either give in to us, or we will use your property anyway. Read the Zoning Ordinance, you are just receptors!" "You're going to get the noise, so you might as well get in on the money." Plaintiffs will testify that Defendant's agents all sounded very much like this!

Commissioners on June 26, 2019, Plaintiffs were also unable to appeal the PUC final decision in favor of Crowned Ridge Wind. What is not said by the PUC in its brief is that the same lawyer(s) submitting this motion *did* support (unsuccessfully) the proposed intervention by Plaintiffs before the PUC. Now that the PUC has ruled on the issue, however, there is no further appeal, and also no further available remedy, according to this agency's counsel.

The PUC argues here that declaratory judgment is improper as it will not "terminate the uncertainty or controversy giving rise to the proceeding," citing SDCL § 21-24-10. The only South Dakota opinion turning on that statute seems to be *Royal Indemnity Company v. Metropolitan Casualty Ins. Co. of New York*, 80 S.D. 541, 128 N.W.2d 111 (1964). In that case, three insurance companies sought a declaration of fault determination as to the accident loss suffered by one Viola Miller. Miller, an employee of Singer Sewing, was riding in a car rented from Avis by one Ms. Sloy, an employee of Rival Manufacturing, Miller having been directed to travel with Sloy for purposes of displaying a "steam iron" (manufactured by Rival) to Singer stores in South Dakota. The car would crash near Groton, with injuries to Miller. Miller brought suit against Sloy and Rival based on negligent operation, and received a judgment of $19,000. No appeal was taken and the judgment remained unsatisfied.

The immediate case involved Royal Indemnity, as insurer for Rival, Metropolitan, as insurer for Sloy, and Continental Casualty, as insurer for Avis. Sloy, employed by Rival, was under a Missouri employment contract, calling for her to be liable to Rival for any loss suffered by employer because of her negligence; thus, Royal, as the carrier for Rival, sought to be subrogated to Rival's claim for indemnity, which the trial court had declined. Against this backdrop, the Supreme Court, at 128 N.W2d 114, concluded (and affirmed):

> In this regard the trial court is vested with a discretion. It may refuse to make a declaration if to do so would not terminate the controversy. SDC 1960 Supp. 37.0106 [precursor to SDCL § 21-24-10]. Since neither Rival nor Mrs. Sloy are

> parties to this action there existed substantial grounds for the view that any determination of that matter in this action would not terminate the controversy. SDC 1960 Supp. 37.0111 [now, SDCL § 21-24-8]. Accordingly, we feel that the trial court did not abuse its discretion in declining to declare the liability of Mrs. Sloy to Rival and any right of Royal to be subrogated thereto.

What the PUC's brief doesn't state or assert is this mystery – who, exactly, is missing from the Complaint's embrace? The mystery is deepened a bit by the Court's reference in Royal Indemnity to the precursor to SDCL § 21-24-8, presently providing – apparently without further amendment since being part of the 1960 Supp. to the South Dakota Code of 1937: a municipality is to be joined in the case if an ordinance or franchise of the municipality is involved, and in addition, the attorney general is to be served with a "copy of the proceeding and be entitled to be heard." On the face of things, both the Codington County Board – as writer of the Zoning Ordinance – and the Board of Adjustment, as adjudicator of the CUP – are present. The PUC is here, having filed the Motion now being discussed – and the records of service, appearing within Odyssey ECF, also reflect that the Attorney General's office was served with a copy of the Complaint.[64] Who is missing here?

The PUC's brief goes on to assert that *it* has no jurisdiction over property rights: "The Commission does not have the authority to appropriate land, rule on easements, or grant eminent domain." Thus, the agency claims, it is not an appropriate party to the case. If the PUC's assertion about "no jurisdiction" is true, then one needs to examine also - and then explain further – as to why the resulting Facility Siting Permit (and the ancillary orders and stipulations) nevertheless embraces provisions, conditions or measures that purport to fix, adjust, or regulate the limits of *how much* Effects – *and for how long* - are to be experienced by this new class of citizens - "receptors" – who are scattered along the edges or within the boundaries of this wind

[64] Hughes County Sheriff's return # 19998, September 6, 2019, service on one Richard Williams.

farm project. It sure looks like a permit that is based on the review, approval and ratification of "Effects" as these Non-Participating Owners – Plaintiffs – are predicted to experience.

The PUC further argues this "action is not ripe." If the projects are built – and the noise and shadow flicker are as predicted by a computer model, "then at some future time Plaintiffs might suffer damages." Meanwhile, this agency asserts, the claims are "completely speculative in nature."[65]

Have Plaintiffs asked, anywhere within the Complaint, ¶ 109, as the PUC professedly fears, for the "halting of entire projects"? No, unless this Court were to rule also that the approved or permitted use of the Lindgren Farm for the dumping of Effects, as contemplated by the Zoning Ordinance and issued by the Board of Adjustment, is a use of the Zoning Ordinance in a way that offends Plaintiffs' constitutional rights, in which case, the cause of action for injunctive relief will be pursued, too.

The agency correctly points out that Plaintiffs failed to timely intervene in Docket EL19-003, and also did not seek intervention in nearby Docket EL19-027. Both of the PUC dockets – involving separate but roughly contiguous wind farms – were covered in a single Codington County CUP, as referenced in the caption of the case. Only the so-called Crowned Ridge Wind farm – EL19-003 – embraces and surrounds the Lindgren Farm, with express approvals for Crowned Ridge in to place the Effects upon, and for making use of, the Lindgren Farm, now and for years into the future.

This agency also correctly notes Plaintiffs did not appeal the PUC's order in EL19-003. This is a "chicken-or-egg" moment, since only those who have been allowed intervention and party-status have the right to appeal such an order. Thus, even though the "intervention

[65] When these motions are argued to the Court next month, counsel hopes to have digital photos showing the erection of multiple subject wind turbines, some clearly visible from the Lindgren Farm, and with the foundation hole for CR 48 having been dug around November 1. *Looks quite ripe to Plaintiffs!*

window" was open for 60 days (to April 1, 2019), even as Plaintiffs would not know until June 10, 2019 (or a few days later, to allow for delivery of operative instruments by mail) whether the option for Easement would be exercised, or expire, then, in PUC logic, Plaintiffs really never had any constitutional rights or other claims to raise as property owners of Lindgren Farm, and they also don't have any such rights now, since, in this agency's view, this Court lacks all jurisdiction to hear the Complaint. All of the windows for "litigation standing" flew open – and then promptly closed – but before the option for Easement expired, or lapsed without being exercised by Boulevard. Only then (on or after June 10, 2019), as this brief has attempted to explain, would Plaintiffs have had true standing to complain about the intended, future use of the Lindgren Farm, at a time the owner was not in privity of contract with that intended user.[66]

While Plaintiffs believe the Complaint, comprised of more than 100 numbered paragraphs, clearly states that they are owners of the Lindgren Farm, and further establishes that this farm is about to be put to use (without their consent or license) as a dumping ground for the "Effects" of the Crowned Ridge Wind Farm, and that such adverse use, in turn, has been expressly approved by both the Board of Adjustment and the PUC, each being a required element before building such a facility, the state agency itself remains defiant as to its role in the Taking so laboriously described in the Complaint. The PUC also claims the pleading is "completely devoid of well-pleaded factual allegations," failing also to "include any citations to statute to support the claims in the Complaint." In that regard, the Complaint readily and easily speaks for itself, and no more need be said at this juncture.

The PUC also asserts the Plaintiffs have failed to state a claim entitling them to injunctive relief, while asserting, at 10, the "relief Plaintiffs seek with respect to the Commission appears to

[66] This may (or may not) be parody: "Why sign an easement on a farm with no turbines, but getting "Effects" from others? What a complete waste of money! The Zoning Ordinance doesn't require it, the Board of Adjustment has issued the CUP. Privity is not required to just dump our Effects. Dig the hole."

be an order enjoining the Commission from issuing a facility siting permit in Docket No. EL19-003." Count II of the Complaint, at ¶ 110, asserts:

> 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. (*Emphasis supplied.*)

To be perfectly clear, there is *no* injunctive relief being sought against the PUC. Such relief is being sought against the defendants who will be operating the Crowned Ridge Wind Farm; further, such pertains *only* if the Court finds the several approvals, licenses or permits issued by the governmental agencies (that would be both the PUC and Codington County and its agencies) are not in the nature of a *de facto* easement upon the Lindgren Farm.

If these licenses and permits are *not* in the nature of an easement, as determined by the Court, then this writer expects this Court has the latitude to determine also that the "Effects" are not actually or really in the nature of a "burden" or "servitude," in which case Plaintiffs would at least have an issue to appeal. Governmental actions imposing servitudes upon lands are themselves in the nature of easements, this being the topic of Part E, following. Such servitude exists and has been declared by local governmental edict, whether the duration is less – or more – than 30 hours of Shadow Flicker annually; the same is true if the PUC determines (as it has) that a particular (and higher) measurement of sound level is fine for this wind farm, EL19-003, but in another case, a lower volume of sound is appropriate. *If* no such "easement" has been conferred by virtue of the governmental licenses and permits, each having some discernible

reference to the Lindgren Farm itself, as a property now forever and permanently consigned by others to being within the boundaries of this Project[67], or *if*, in the determination of this Court, there is simply no servitude, within the meaning of South Dakota law, that is laid upon the lands as a consequence of these identified authorizations, Plaintiffs then may find it simply more appropriate to pursue their rights as citizens of the United States.

The second to the last argument of the PUC is that the Lindgren Farm has not been damaged in the constitutional sense. Plaintiffs will further address this argument in connection with Part E, following. For now, however, a response will be made to Defendant's argument that under the expression of *Krier v. Dell Rapids Township*, 2006 SD 10, 709 N.W.2d 841 (2006), namely, that in the making of claims for "damage" of property under that clause of Article 6, section 13 of S.D. Constitution, the plaintiff must establish that the consequential injury to property is peculiar to theirs, and "not of a kind suffered by the public as a whole." *Id.*, ¶ 26.

We pause only so long to briefly note that *Krier* should be read in light of *Long v. State*, 2017 SD 79, 904 N.W.2d 502. In *Long*,[68] the Court observed:

> . . . [T]he circuit court herein found that Landowners produced sufficient evidence to establish a distinct injury of a kind not suffered by the general public. The court found that the State's design pushed water into the closed sub-basin to delay the arrival of water downstream and to avoid overtopping Highway 11. This sub-basin was drained by a single 24-inch culvert which was "exceedingly slow to drain." Accordingly, the circuit court found that the "State created a condition that peculiarly caused flooding in the sub-basin drained by the 24[-inch] culvert." No other evidence was presented by the State that other area residents or the public as a whole suffered similar flooding. From our review of the evidence produced at trial, we cannot say that the circuit court erred in applying the consequential damages rule set forth in *Krier*. *Id.*, ¶ 37.

To Plaintiffs' best knowledge, there are *few if any* other farms in the area of Crowned Ridge Wind that would be comparable to the facts of the Lindgren Farm, as to the peculiar

[67] See Exhibit 2, Lindgren Affidavit.

[68] The case involved the claims of five neighboring couples living along SD Highway 11, an unincorporated area known as "Shindler," southeast of Sioux Falls.

"damage" review discussed in *Krier*. What is the meaning of the "general public"? The wind farm in question does not affect the general public, and many who are affected are subject to an express easement, having sold their land rights for a veritable mess of potage.[69] How many Non-Participating Owners (those pesky "receptor" kind of people) are there, having land that, at one time, was under an option for easement, but which option was then allowed to lapse? Adding in also as to those kinds of prospective claimants (there were 10 total plaintiffs in *Long*), having expired options but whose farm and home nevertheless continued to be physically embraced by the Project's boundaries, being thus made subject also to the "Effects" at the explicit request of Crowned Ridge Wind (designer of the Project), and upon the express approvals of both the Board of Adjustment and the PUC? Is there anyone?

The answer to that question is not presently known, but if the State intends to defend on that basis, we hasten to add that the clear presence of official imprimaturs and approvals is certainly consistent with Plaintiffs' claim also that these actions of approval are tantamount also to a Takings, pure and simple, at least in the context of the U.S Constitution, whose protections are also claimed by Plaintiffs (just not in this case). Each board or agency has discretion to deny the required permits, and each chose to approve a use of the Lindgren Farm for the "Effects." Should this Court, under the provisions of the S.D. Constitution and in applying *Krier*, find *no* violation of Article 6, section 13, either as a Taking or as Damage, then perhaps another venue would find differently under the somewhat more conservative language of the U.S. Constitution.

Finally, the PUC asserts that Plaintiffs have "waived their right to raise the claims they now assert against the Commission." In response, Plaintiffs will again say – they could not have raised any claim regarding the Crowned Ridge Wind project, that envelops the Lindgren Farm –

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[69] Also known as lentil stew, *see* Genesis 25:19-34, the ancient account of Jacob and Esau.

until such time and date as the option for "Easement Agreement" of June 2014[70] had run its course. This expiration or lapse transpired on June 10, 2019. At that point, the PUC had made no final order or determination as to the wind farm, and Plaintiffs did what they could to intervene, albeit unsuccessfully.

This is not a case of "sitting on rights" as the PUC suggests. According to the PUC, Plaintiffs are afforded a relatively narrow window – under a statute that imposes a six-month timeline from start-to-finish upon the PUC itself. We commiserate with the agency, frankly, about such a task and such a short time to get there. But, if the Plaintiffs have vested land rights and, in fact, had given no actual "easement" as such to the wind farm developer, even as the agency rushes along to impose specific Shadow Flicker and noise tolerances upon the various "receptors," and if – *as it now turns out* – there is not an actual easement, but the developer's intended use is going to continue anyway, there is simply no other course for Plaintiffs but to accept – and endure - these circumstances? Plaintiffs' constitutional and statutory rights, seeking to protect the Lindgren Farm and raising the concerns recounted in the Complaint, cannot now be invoked in this Court? Those questions being asked (and perhaps not yet fully answered), Plaintiffs turn to Part E, following.

E. CONSTITUTIONAL CONSTRAINTS ON THE ZONING POWER

The use of "state zoning power" was ruled constitutional in the often-cited case of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). Decades would then pass without further significant cases as to that power (or similar powers and laws, such as historic landmark preservation, beachfront conservation, and the like) coming to the Supreme Court.

[70] See Exhibit 1, Lindgren Affidavit.

In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), the Court surveyed general principles as to the Takings clause of the Fifth Amendment, as applied to the States by the Fourteenth Amendment. The owner of Grand Central Terminal challenged the application of the State's Landmarks Preservation Law, asserting a taking in violation of the owner's constitutional rights; after initial win in trial court and reversals on appeal in the state's appellate courts, the owner's claim was taken up by the Supreme Court. Although ultimately ruling against the owner, the decision would become known as a specific kind of "taking" that may be addressed under the constitution – the "regulatory taking."

In 2009, Honorable Bruce V. Anderson, Circuit Judge, entered a memorandum decision in the hotly contested, long running zoning case, *E.L. Thompson Farms, Ltd. v. Aurora County*, 2009 WL 10704880 (Civ. 02-09, First Judicial Cir. Aurora County), summarizing four kinds of takings cases arising under the United States Constitution, citing also to *Krier v. Dell Rapids Township*, 2006 SD 10, ¶ 22, 709 NW2d 841:

> (1) a *per se* physical taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US 419 (1982);
>
> (2) a *per se* regulatory taking which deprives a landowner of all economically viable use of his property pursuant to *Lucas v. South Carolina Coastal Council*, 505 US 1003 (1992);
>
> (3) a regulatory taking under *Penn Central Transportation v. City of New York*, 438 US 104 (1978);
>
> (4) a land-use exaction violating the standards set forth in *Nollan v. California Coastal Commission*, 483 US 825 (1987).

In *Nollan*, the owners of a beachfront lot sought a development permit from the California Coastal Commission, proposing to demolish an old structure in favor of a new three-bedroom house. The permit was granted, subject to granting a public easement to pass across a

portion of the property, much like the Commission had done with 43 prior development permits. In due course, after much litigation in the California state court system regarding the Takings Clause of the Fifth Amendment, the owners appealed from the Court of Appeals (which reversed and ruled for Commission) to the Supreme Court, raising only the constitutional question. Justice Scalia wrote the majority opinion, beginning thusly:

> Had California simply required the Nollans [who were the applicants, having submitted an application] to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking. To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather (as Justice BRENNAN contends) "a mere restriction on its use" . . . is to use words in a manner that deprives them of all their ordinary meaning. Indeed one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such interests, so long as it pays for them [citations omitted]. Perhaps because the point is so obvious, we have never been confronted with a controversy that required us to rule upon it, but our cases' analysis of the effect of other governmental action leads to the same conclusion. We have repeatedly held that, as to property reserved by its owner for private use, "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' " 483 U.S. at 831.

In concluding the easement requirement was not a valid exercise of a land-use power, Justice Scalia, reversing the California Court of Appeals, also cut to shreds the Commission's justification for gaining "access" as being unrelated to land-use regulation, concluding:

> That [justification] is simply an expression of the Commission's belief that the public interest will be served by a continuous strip of publicly accessible beach along the coast. The Commission may well be right that it is a good idea, but that doesn't establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its "comprehensive program," if it wishes, by using its power of eminent domain for this "public purpose," see U.S. Const., Amdt. 5; but if it wants an easement across the Nollans' property, it must pay for it. *Id.*, at 841-2.

A few years following *Nollan*, Chief Justice Rehnquist wrote for the majority in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), an appeal from the Oregon Supreme Court, with appellant

claiming a taking of property in violation of her Fifth Amendment rights. At issue was whether the Oregon city could require a storeowner to dedicate a portion of her land to the public for flood control and traffic improvements. The opinion notes the distinction between "essentially legislative determinations," as in *Village of Euclid* (and others) adjudicative decisions, as presented here, further noting:

> [T]he conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city. In *Nollan* . . . we held that governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments. Under the well-settled doctrine of "unconstitutional conditions," the government may not require that a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property. 512 U.S. at 385.

The Court, with respect to *Nollan*, observed that the coastal commission there was "simply trying to obtain an easement through gimmickry, which converted a valid regulation of land use into " 'an out-and-out plan of extortion.' " 483 U.S. at 837, quoting *J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981). Then, the majority proceeded to fashion a test of when a required exactment, in exchange for a discretionary benefit of the government, may be lawfully imposed under and in light of the Takings Clause:

> We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment [Takings Clause]. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development. 512 U.S. at 391.

The "unconstitutional conditions" doctrine was again addressed by Justice Alito, writing for the majority in *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595 (2013), an appeal from the Florida Supreme Court over a development permit, where the applicant for a permit was denied a permit as he refused to yield to the district's demand for conservation easement. In the process of ruling for the Appellant (applicant), this conclusion was drawn:

> Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. *Id.*, 607.

Returning to the case at hand – Plaintiffs were not the applicant in any application for relief from the Board of Adjustment, and no "exactment" has been made against them by any zoning authority. The conditions imposed – whether by the PUC or the Board of Adjustment – have all been imposed upon Crowned Ridge Wind.

Yet, it is clear the applicant (Defendant Crowned Ridge) intends to make use of the "receptor" Lindgren Farm in intensive ways, *approximating a degree or intensity* that would otherwise have required an easement provided by the Plaintiffs. The language of the "Effects Easement" set forth in Section 5.2[71] is certain proof of that claim. Written at a time when the Lindgren Farm was expected to host two wind turbines[72] the text covers *both* the effects given off by those located on the property, and those flowing over from other properties.

Instead, Crowned Ridge holds a claimed legal right to make use of the Lindgren Farm – as to potential or actual harm flowing from the "Effects" – based *entirely* on the two permits or licenses issued by other Defendants. These permits (CUP and Facility Siting Permit), in turn, either directly or indirectly have been built on the strength of the very same "authority," which is: (A) The NARUC Best Practices report from 2012, which, in turn, (B) cites to and relies on the writings of one Richard Lampeter (this being a PowerPoint presentation, as reflected in Exhibits PB-1 and PB-2, attached), and which (C) PowerPoint from Lampeter is stands on the German judge, professedly, finding 30 hours of Shadow Flicker is "acceptable."

Given the Supreme Court's incredulity in *Nollan* over the gimmicks employed by the coastal commission, we are left to ponder – briefly – just what that Court might say about the

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[71] See Exhibit 1, Lindgren Affidavit, and as referenced ¶¶ 34, 36, Complaint.

scheme employed here, involving a Zoning Ordinance (as amended in 2018) constructed upon such flimsy parent material. It just might be possible to erect many more wind turbines, and also larger wind farms, *if* the governmental authority chooses not to impose regulations that fix noise levels at the property line of the host parcel, and further makes the decision that extending the applicant's right to make use of the neighboring lands – even to the display of Shadow Flicker (up to 30 hours per year) on an occupied residence, or the assaulting of that same home with noise far above ambient levels. Perhaps so, but many of the essential sticks within the bundle of rights comprising the Lindgren Farm have been either taken or damaged by the official actions complained of in the Complaint.

The supposition that Crowned Ridge Wind may – *when and as it wishes* - make an adverse use of Plaintiffs' land by means of dumping noise and Shadow Flicker thereon – and to do so without any legal support *other* than the Zoning Ordinance and the CUP itself, with added essential support from the Facility Siting Permit – *is plainly wrong.* To paraphrase *Nollan*, if Crowned Ridge wants an easement across the Lindgren Farm, it needs to purchase it[73] – or, in the alternative, those governmental authorities already establishing approval for such a use by means of their respective orders, must confirm that such property has been Taken (or damaged) by their respective actions, and then these agencies must make arrangements to pay for it.

In 2012, Scott Township, in Lackawanna County, near Scranton, Pennsylvania, adopted an ordinance, requiring that *all cemeteries within the Township are to be kept open and accessible to the general public during daylight hours*.[74] Mrs. Knick owned a 90-acre rural property within the Township, which included a relict cemetery where the ancestors of Knick's

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[72] See Exhibit 2, Lindgren Affidavit; CR 56 and CR 57 eliminated prior to the PUC's final order of July 2019, EL19-003.
[73] For the Court's information, no such easement is available from Plaintiffs at this time.
[74] Ordinance No. 12-12-20-001

neighbors are allegedly buried. Not wishing to keep access open to the general public (or her neighbors, apparently), Mrs. Knick- after beginning her efforts in state court – filed an action in U.S. District Court, alleging the ordinance violated the Takings Clause of the Fifth Amendment. The federal trial court, however, dismissed the claim under the doctrine of *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) – essentially, that doctrine held that an owner of property, taken by the local government, has not suffered a violation of Fifth Amendment rights, and thus cannot bring a federal takings claim in federal court, *until* the state court has denied the claim for just compensation under state law. (Mrs. Knick had not invoked the state court jurisdiction for compensation under state law.)

Knick then appealed to the Third Circuit Court of Appeals, which, though finding the Scott Township ordinance was "extraordinary and constitutionally suspect," the Court of Appeals deemed itself unable to reach the merits, and proceeded to affirm on the *Williamson County* doctrine. *Knick v. Twp. of Scott*, 826 F.3d 310 (3d Cir. 2017). The Supreme Court granted certiorari; on June 21, 2019, Chief Justice Roberts delivered the Court's opinion in *Knick v. Township of Scott*, 588 U.S. ______ (2019), writing for a 5-4 majority.

After a long discussion of the "unintended consequences" of *Williamson County*, the majority opinion, the Court held that "[f]idelity to the Takings Clause and our cases construing it requires overruling *Williamson County* and restoring takings claims to the full-fledged constitutional status the Framers envisioned when they included the Clause among the other protections in the Bill of Rights." (slip op., at 10.) The majority opinion, based on the understanding that the Township ordinance (allowing access to reach old cemeteries) is, in fact, a Taking of the Knick property interest, then reversed and remanded the case.

In a concurring opinion, Justice Thomas further observed:

> The Fifth Amendment's Takings Clause prohibits the government from "tak[ing] private property "without just compensation." The Court correctly interprets this text by holding that a violation of this Clause occurs as soon as the government takes property without paying for it.
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> The United States, by contrast, urges us not to enforce the Takings Clause as written. It worries that requiring payment to accompany a taking would allow courts to enjoin or invalidate broad regulatory programs "merely" because the program takes property without paying for it. . . . According to the United States, "there is a 'nearly infinite variety of ways in which government actions or regulations can affect property interests,'" and it ought to be good enough that the government "implicitly promises to pay compensation for any taking" if a property owner successfully sues the government in court. Supplemental Letter Brief for United States as *Amicus Curiae* 5 (Supp. Brief) (citing the Tucker Act, 28 U.S.C § 1491). Government officials, the United States contends, should be able to implement regulatory programs "without fear" of injunction or invalidation under the Takings Clause, "even when" the program is so far reaching that the officials "cannot determine whether a taking will occur." . . . .
>
> This "sue me" approach to the Takings Clause is untenable. The Fifth Amendment does not merely provide a damages remedy to a property owner willing to "shoulder the burden of securing compensation" after the government takes property without paying for it. *Arrigoni Enterprises, LLC v. Durham*, 578 U.S. __, _____ (2016), (THOMAS, J., dissenting from denial of certiorari) (slip op., at 2). Instead, it makes just compensation a "prerequisite" to the government's authority to "tak[e] property for public use." *Ibid.* A "purported exercise of the eminent-domain power" is therefore "invalid" unless the government pays just compensation before or at the time of its taking." Id., at ___ (slip op., at 3). If this requirement makes some regulatory program "unworkable in practice," Supp. Brief 5, so be it – our role is to enforce the Takings Clause as written. (slip op., at 28-9.)

In the context of *Knick*, it is recognized that Codington County's Zoning Ordinance (and subsequent adjudication) does not give direct physical access to the Lindgren Farm by the personnel, equipment and hardware belonging to Crowned Ridge Wind. Likewise, the staff of the PUC, or of the County, is not likely to be entering the property under the CUP or the Facility Siting Permit. The County's regulatory scheme is founded on NARUC Best Practices. NARUC Best Practices, meanwhile, considered neither state nor federal law regarding "takings" concerns, or state law much as exists here with Ch. 43-13, SDCL, "Easements and Servitudes." Rather, the report cites to the PowerPoint presentation of Richard Lampeter, which,

in turn, cites the unknown German judge, dealing with unknown facts and law, at an unknown date, ostensibly finding "acceptable" that a neighbor would receive not more than 30 hours of flicker per year.[75]

It seems quite likely the German neighbor did *not* have the benefit (as do Plaintiffs) of SDCL 43-13-2(8). The right to be free from such burdens is surely one (or more) of the sticks in the bundle of rights, comprising fee simple title to the Lindgren Farm.

Further, though not mentioned as such within the collection of Easements and Servitudes, Ch. 43-13, SDCL, Plaintiffs maintain that their rights as property owners includes that of also not being perpetually or permanently assaulted, whenever the wind farm is in operation, by noise volumes or types in excess of what currently exists under ambient conditions. The giving or emitting of sound or noise in excess of ambient conditions – as was so evidently contemplated by Section 5.2 of the Easement Agreement – is itself an adverse and consequential use of the Lindgren Farm.

The Zoning Ordinance, by use of the delegated legislative power, attempts to render the home and residence of Plaintiffs readily subject to such greater sound levels (while making no provision for ILFN) and also Shadow Flicker, though not presently displayed anywhere on the Lindgren Farm. Responding to the permit request of Crowned Ridge Wind, the Board of Adjustment (and also the PUC, having jumped into both sound and Shadow Flicker regulation based on its own "health and welfare" statutes – but is not the state's regulation of such "Effects" also an inherent land use right associated with the Lindgren Farm?) has expressly authorized some such level of sound (but while ignoring ILFN) and Shadow Flicker. All of these "Effects" have been authorized and approved in the respective official edits at specific,

[75] Wait! Rather than "acceptable," the judge may have wrote "tolerable" – Exhibit PB-4, attached, is p. 3 from a study for a North Dakota project, "Shadow Flicker Impact Analysis for the Wilton IV Wind Energy Center," September 2014. The citation to Windpower2003 leads nowhere, no current link exists.

long-term or permanent levels (or limits) for that unique receptor, the Lindgren Farm; this is a place that usually includes *also* those mobile *human receptors*, Tim and Linda Lindgren (being a total of four eyes and four ears).

So long as Crowned Ridge Wind, over the course of wind farm operation, stays within those levels incorporated into or expressly blessed by adjudicatory edict, the future ability of Plaintiffs to make a "real life, real circumstance" challenge to those Effects through the nuisance laws of South Dakota, would seem to be blunted, if not entirely neutered. Thus, Plaintiffs have no other judicial remedy, other than this Court, starting with this Complaint for declaratory relief, starting with the premise that the Zoning Ordinance and the adjudication made thereunder is a Taking – or at least a damage – under the provisions of the S.D. Constitution.

The respective and collective decisions (proprietary, legislative and adjudicatory) within the full phalanx of Defendants - to permit, approve, build and operate a wind farm at specific sites, including several very near the Lindgren Farm and residence (but without bothering to obtain and keep, or to require, an actual "easement" for the scattering or disposal of the Effects upon such property) - are each, in their own unique way, an injury to, if not an outright loss of "ownership rights" to some part of the Lindgren Farm. Thus far, the governmental entities involved have not required that Crowned Ridge Wind appropriately site the wind farm so that the predicted receptors, such as the Lindgren Farm and also the humans that own and operate it, are neither subjected to nor injured by the "Effects."

If the wind farm developer holds no such easement but yet brings experts clearly opining that the Effects *are* going to be seen, felt, and heard (as in "received") at those Non-Participating sites, then the correct answer for the contemplated authorizing agencies

(Defendants herein) to give is not so "sue me"[76] – as referenced by Justice Thomas in *Knick* – but rather, in an aside to Crowned Ridge Wind, duly overheard - "fix this and make it right." If an appropriate easement can't be secured, then the wind farm boundaries and operating sites must be adjusted. Any other approach, Plaintiffs submit, comprises a Taking of property – or at least a Damage of property - under the South Dakota Constitution.

F. FACIAL AND FACTUAL CHALLENGES

The Rule 12(b) motions presented, first, assert that this Court "[l]ack[s] jurisdiction over the subject matter," and, secondly, the Plaintiffs, despite many words and paragraphs, have yet "[f]ail[ed] to state a claim upon which relief can be granted.[77]

The motions of both Crowned Ridge Wind and Codington County are supported by affidavits of counsel, which, in each instance, introduce matters that may be relevant to the background of wind farm litigation and zoning regulation but are not themselves within "the pleadings," as such.[78] Further, the motion of Crowned Ridge, at footnotes 2 and 4, citing to SDCL § 19-19-201, requests the Court take judicial notice of the "application filed with the Board" and the "decision," along with "the PUC filings" in Docket EL19-003.

The motions of the two defendants should be recognized as each comprising a factual attack rather than a facial attack on the Complaint. Typically, a challenge to subject matter jurisdiction is facial only, with a complete focus on the pleadings, and the non-moving party receives the benefit of the doubt as to all facts properly pled in the Complaint. However, in these motions, Crowned Ridge and Codington County appear to make a factual attack; that's fine, but Plaintiffs should have an opportunity to respond with explanatory materials.

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[76] Or, based on the pending motions, the more apt statement at the moment is "just try to sue me."
[77] SDCL § 15-6-12(b)(1) and (5).
[78] This writer, for one, is agreeable to what Defendants have adduced, in particular, the memorandum opinion of Circuit Judge Spears in the *Johnson* case – being *Exhibit B* to Schumacher Affidavit.

That said, Plaintiffs are submitting this brief with several attached exhibits (marked as PB-1 to PB-4, inclusive) to aid in reading, and an understanding of just how thin and questionable are the legal foundations of the extensive NARUC Best Practices document. Codington County (and now the PUC, too) bases regulations arising from undue proximity to an operating wind farm (all to be imposed upon persons - Plaintiffs - and the property of those persons - Lindgren Farm – persons who are neither applicants for zoning relief, having submitted no such application, and having given no effective privity with the wind farm developers) *squarely* on the NARUC guidance. The purported logic of that "guidance" was to just regulate or limit the "Effects" upon the receptors (another way of saying, you may hit them this bad, at their home, and not more – they should have known better when building here 70 years ago). In turn, this guidance is based on a *PowerPoint presentation*, citing to a famous (but unknown) German judge. This morass has been construed, at least by the agencies now bringing these motions, as a good, fully sufficient legal support, to establish the 30-hour dichotomy in Shadow Flicker (more than 30 requires an easement, and less than 30, no easement required).

Further, one of the documents or instruments central to the Complaint is the June 2014 "Wind Easement." Complaint, ¶ 35, notes the conflict between Defendant Boulevard and Plaintiffs' counsel as to whether all or any part of that instrument was "confidential and proprietary" as claimed by Crowned Ridge, even though the option had lapsed without exercise. The Complaint's immediately following paragraph (¶ 36) proceeds to paraphrase certain language in Section 5.2 (also known as the "Effects Easement," as so referenced in ¶ 37 of Complaint, and elsewhere) of the easement, but without substantial direct quotations. As recently agreed by counsel, however (as noted, and also quoted, at 6, above), Crowned Ridge has agreed that the instrument *may* be disclosed publicly, as long as the disclosure does not include Exhibit D thereto. Hence, it is now also part of the Lindgren Affidavit, as noted following.

Since the instrument (other than the Exhibit D item) is important to Plaintiffs' claims, and is not presently annexed to the Complaint – Plaintiffs desire to have it submitted to the Court at this time. Accordingly, submitted with this brief is an "Affidavit of Linda Lindgren (November 1, 2019)," with six identified exhibits being annexed:

Exhibit 1 – *Wind Farm Lease and Easement Agreement* (23 pages – excludes Exh. D)

Exhibit 2 – *Figure 3a. Project Map (also marked Exhibit A53)* (1 page)

Exhibit 3 – *Application for Party Status, Docket EL19-003* (3 pages)

Exhibit 4 – *PUC Order Denying Late-Filed Application for Party Status* (2 pages)

Exhibit 5 – *Codington County CLUP (excerpt re "Wind Energy Systems")* (2 pages)

Exhibit 6 – *Codington County Zoning Ordinance (excerpt from Ord. # 68)* (1 page)

Within the Complaint, ¶¶ 74-75, reference is also made to a document as NARUC Best Practices, published in January 2012, which, *inter alia*, recommends that zoning officials regulate wind farms in certain ways and means. As to Shadow Flicker, the NARUC document (which runs to 182 pages) recommends limiting such to 30 hours per year or 30 minutes per day. The on-line location of the NARUC document is identified at 8, above, and rather than submitting the entire report to Odyssey, Plaintiffs would propose that all counsel further stipulate the Court may take judicial notice of that item.

Clearly, the NARUC Best Practices report – along with the Richard Lampeter PowerPoint documents (annexed to this brief as Exhibits PB-1 and PB-2), along with the not-yet-seen official determination of the nameless German judge (who may have "approved" 30 hours of Shadow Flicker, or perhaps merely found such to be "tolerable" as noted in Exhibit PB-4, annexed) – was the impetus behind Defendant Codington County's Ordinance # 68, as adopted June 7, 2018. Meanwhile, the rationale for Exhibit PB-3 – being an exchange between the PUC

and one of the experts for Crowned Ridge in Docket EL19-003, concerning justification for emitting Shadow Flicker – is outlined at 15-16, above.

In June 2018, Codington County joined in the rush with many other state and local jurisdictions, swallowing the premise the NARUC Best Practices document (based on Lampeter's PowerPoint slides, and the German judge's supposed finding on some earlier date) is worthy of embrace in the Zoning Ordinance (or similar legislation), providing for the dumping across property lines of the "Effects" from wind farm operations. Defendant Codington County's # 68 Ordinance was *just in time*, blessing the very CUP, issued by Defendant Board in favor Defendant Crowned Ridge, that supports some "legal right" to cast the "Effects" onto Plaintiffs. The PUC, for its part, finds that none of these Effects will "substantially impair" the health of Plaintiffs, while yet stopping to note that Plaintiffs should also (or, perhaps, can, given their sturdy ancestral stock) endure a *greater measure of noise* than in other wind farm settings. The PUC's permit, also unhinged from the law, thus supports the form and substance of the County's own imperious CUP.

These permits are built on a regulatory premise that has never – *not even once* - considered (a) the integrity or inherent worth of the fee owner's bundle of sticks, (b) whether this scheme is consistent with the actual, delegated Zoning Power (with the County imposing "just how far you can go" limits at the homes of mere receptors, all for the obvious benefit of the wind farm), or (c) whether, when taking or damaging such bundle of rights, during the course of wind farm proximity concerns, is it also a Taking under constitutional doctrines? No State or County official has been heard to express even the slightest concern whatsoever about the legal sufficiency and efficacy of the NARUC Best Practices premise (which seems to be - the Zoning Ordinance allows it – so just do it!). When the facts are examined, that the Zoning Power

includes placing the Effects burden (servitude) of a proposed wind farm onto the shoulders of the "receptors" is the very thinnest of legal varnishes.

The injury and damage to the property interests of Plaintiffs - arising from the Codington County Zoning Ordinance and the resulting CUP (July 2018), as further pressed down and upon the head of Plaintiffs by the PUC's Final Order of July 2019, all eagerly seized upon by Defendant Crowned Ridge as warranting a "full speed ahead, build the wind farm" mode - is of *much greater and more enduring impact* as to the Lindgren Farm and the enjoyment thereof by Plaintiffs, than that peculiar Scott Township ordinance that permitted public daytime access across the horse pasture so as to reach the old enclosed cemetery, all as described in *Knick*.

All such matters considered, Plaintiffs respectfully request the motions of Defendants be denied.

Dated at Canton, South Dakota, this 8th day of November, 2019.

Respectfully submitted,

/s/ A.J. Swanson
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