

STATE OF SOUTH DAKOTA
COUNTY OF CODINGTON

IN CIRCUIT COURT
THIRD JUDICIAL DISTRICT

TIMOTHY LINDGREN and LINDA
LINDGREN,

Plaintiffs,

VS.

CODINGTON COUNTY, *a political
subdivision of the State of South Dakota,*
CODINGTON COUNTY BOARD OF
ADJUSTMENT, *an agency of Codington
County, having issued a certain
Conditional Use Permit, # CU018-007,*
CROWNED RIDGE WIND, LLC,
CROWNED RIDGE WIND II, LLC,
BOULEVARD ASSOCIATES, LLC,
*all other Persons having present or future
interests in #CU018-007, and*
SOUTH DAKOTA PUBLIC UTILITIES
COMMISSION, *having issued a certain
Facility Siting Permit, Docket EL19-003,*
*and all other Persons having
present or future interest in a certain
Energy Facility Permit issued by the
South Dakota Public Utilities Commission
in Docket EL19-003,*

Defendants.

14 CIV. 19-303

**DEFENDANTS CROWNED
RIDGE WIND, LLC, CROWNED
RIDGE WIND II, LLC, AND
BOULEVARD ASSOCIATES,
LLC'S BRIEF
IN REPLY PLAINTIFFS' BRIEF
IN OPPOSITION TO
DEFENDANTS' MOTION TO
DISMISS**

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

attorneys of record, respectfully submit this Brief in Reply to Plaintiffs' Brief in Opposition to Defendants' Separate Motions to Dismiss. Crowned Ridge further joins the reply briefs filed by the other named defendants in this matter, and adopts and incorporates their arguments and authorities.

Plaintiffs' Brief is replete with semantic parlor tricks and rhetorical sleights of hand, all of which appear calculated to engender its own peculiar form of populism, which in turn drives away the better angels of sound legal analysis. In sum, the arguments advanced in opposition to Defendants' Separate Motions to Dismiss constitute nothing more than an intellectual game of Three-card Monte, and we respectfully ask this Court to step away from the cardboard box around which Plaintiffs have forced us all to gather.

Crowned Ridge is before this Court on a Motion to Dismiss which seeks to dispose of Plaintiffs' Complaint based upon SDCL §§ 15-6-12(b)(1) and (5). As stated in its Brief in Support, a motion to dismiss under any of the subsections of SDCL § 15-6-12(b) "tests the legal sufficiency of the pleading, not the facts which support it. *Stathis v. Mary Indian School*, 2019 S.D.33, ¶ 13, 930 N.W.2d 653, 658. As such, Crowned Ridge echoes the PUC's objection to the inclusion of the various attachments included within Plaintiffs latest submission to the Court and endeavors to limit its Motion to Dismiss to the four corners of Plaintiffs' Complaint.

ADMINISTRATIVE AND PROCEDURAL HISTORY REDUX

From Crowned Ridge's perspective, an abbreviated procedural history of this case merits repetition at this juncture. In 2018, Codington County amended its zoning ordinance ("CZO"), and in doing so, adopted standards and specifications for permitting wind energy systems within the unincorporated area under its jurisdiction. Codington County's legislative actions were based upon and in accordance with the powers conferred upon it by the South Dakota Legislature, such being codified in SDCL Ch. 11-2. As a legislative body, Codington County determined that these zoning changes were consistent with and in furtherance of the policies set forth in the Comprehensive Land Use Plan ("CLUP") it had adopted for itself pursuant to and in accordance with the powers conferred upon it by the South Dakota Legislature. In the absence of public referendum and upon the effectiveness of those zoning changes, Crowned Ridge tendered its application for a conditional use permit ("CUP") for a wind energy system based upon and in accordance with the CZO. Based upon and in accordance with the procedural and substantive requirements of the CZO, the Codington County Board of Adjustment ("BOA") exercised its quasi-judicial authority and issued a CUP. It did so after having conducted the requisite public hearings, applying the requisite criteria and standards, balancing competing interests, and exercising its sound, reasoned discretion in administering the ZO, all of which was based upon and in accordance with the statutory powers conferred upon it by Codington County and the South Dakota State Legislature.

Having obtained the necessary approval from Codington County, Crowned Ridge next applied to the South Dakota Public Utilities Commission (“PUC”) based upon and in accordance with the administrative rules and statutory framework adopted by the PUC and the South Dakota Legislature. In accordance with those rules and statutes, the PUC issued a permit to Crowned Ridge. It did so after having conducted the requisite public hearings, applying the requisite standards and criteria, balancing competing interests, and exercising its sound, reasoned discretion in administering the quasi-judicial powers that had been conferred upon it by the South Dakota Legislature. One should note here that contrary to Plaintiffs’ self-serving characterizations, it is clear by the Affidavit of Eric Paulson that Plaintiffs’ participation in the PUC’s proceedings was nothing short of full-throated and apparently unconstrained by fear of being “punished” by Applicant.

During the course of Crowned Ridge’s rather lengthy administrative journey, the BOA’s decision to issue the CUP to Crowned Ridge was appealed in accordance with SDCL Ch. 11-2. That judicial inquiry sought to determine whether Codington County had regularly pursued its authority as provided in SDCL § 21-31-8. Upon full hearing and sound analysis, the circuit court determined that it had. In other words, the circuit court determined that Codington County and its BOA engaged in no act forbidden by law, nor did it neglect to do some act required by law. See *Adolf v. Grant County Board of Adjustment*, et al., 2017 SD 5, ¶ 7, 891 N.W.2d 377, 381.

It is from this procedural context that Plaintiffs’ now appear and in curious fashion ask this Court to declare the actions of Defendants illegal – but not really, perhaps simply

collaterally, or something to that effect – and if not, then perhaps let us call it a “Takings.” Plaintiffs’ requested relief appears premised upon exhaustingly repetitious rhetorical questioning and a rather peculiar dedication to misconstruing and misapplying orthodox “Takings” jurisprudence.

1. WHAT GIVES CODINGTON COUNTY THE POWER AND AUTHORITY TO GRANT CROWNED RIDGE A CUP FOR A WIND FARM?

“Counties are creatures of statute and have no inherent authority. They have ‘only such powers as are expressly conferred by statute and such as may be reasonably implied from those expressly granted.’” *Schafer, et al., v. Deuel County Board of Commissioners, et al.*, 2006 SD 106, ¶ 15, 725 N.W.2d 241, 248 (internal citations omitted). The South Dakota Legislature has conferred upon counties the power and authority to determine the manner in which land is utilized within the incorporated areas under their respective jurisdictions. That statutory landscape is set forth in SDCL Ch. 11-2. Broadly viewed, that landscape may be described as such.

Counties are empowered to prepare and adopt a comprehensive land use plan. SDCL §§ 11-2-11 and 11-2-20. Codington County has done so here. A comprehensive plan is, among other things, a document that describes the goals, policies, and objectives of the county board of commissioners. SDCL § 11-2-1(3). Its purpose is to protect and guide the physical, social, economic, and environmental development of the county. SDCL § 11-2-12. Codington County has accordingly made those policy determinations for itself. To promote health, safety, and general welfare, and in furtherance of its stated

goals and policies, counties are authorized by the Legislature to adopt a zoning ordinance. SDCL § 11-2-13. Codington County has accordingly done so. The zoning ordinance may divide the county into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of SDCL Ch. 11-2. SDCL §11-2-14. Codington County's ZO has done so accordingly. As part of its zoning power, counties may authorize conditional use of real property. SDCL § 11-2-17.3. Such a regulation shall specify the approving authority, each category of conditional use, the zoning districts in which such conditional uses are available, and the criteria upon which applications shall be considered and granted. *Id.* Codington County has done so accordingly. A conditional use is any use that "owing to certain special characteristics attendant to its operation may be permitted in a zoning district" subject to evaluation and approval. SDCL § 11-2-17.4.

Crowned Ridge, in accordance with the requirements of Codington County, has been granted a CUP for the purpose of constructing a wind farm. By what authority and upon what law is such an action sanctioned? The South Dakota Legislature as set forth in South Dakota Codified Law. The CUP possessed by Crowned Ridge is lawfully sanctioned by South Dakota Codified Law coupled with the legislative and quasi-judicial acts of Codington County that flow therefrom. These local acts constitute the very nature and function of zoning. If one were to accept Plaintiffs' view, it would be impossible to populate the various zoning districts within a county's jurisdiction, as it is impossible to absolutely and completely confine the "effects" of one land use situated within one parcel

from being perceived from a parcel of another. That has never been the rule in South Dakota. Rather, an essential exercise inherent within the duties and responsibilities set forth in SDCL Ch. 11-2 is the fashioning of standards and criteria that strike a reasonable balance of contrasted uses and competing interests. Codington County has done so here. Crowned Ridge urges the Court to decline Plaintiffs' invitation to turn the business of land use regulation on its head.

“Zoning ordinances must find their justification in the police power exercised in the interest of the public.” *Tillo v. City of Sioux Falls*, 82 S.D. 411, 415, 147 N.W.2d 128, 130 (S.D. 1966). “While stability and regularity are undoubtedly essential to the operation of zoning plans, zoning is by no means static.” *Id.* “Property is always subject to the police power and its exercise with respect to the use of land is likely to affect adversely the property interests of some owners. *Id.* “We have thus recognized that incidental damages to property resulting from the exercise of such power is not a taking of the property entitling a property owner to compensation. *Id.* (internal citation omitted).

2. UPON WHAT AUTHORITY DOES THE PUC ISSUE ITS PERMIT?

The PUC has siting authority for wind farms with a capacity of 100 megawatts or more. The source of its authority may be found in SDCL Ch. 49-41B. In that regard, SDCL § 49-41B-1 provides:

[t]he Legislature finds that energy development in South Dakota and the Northern Great Plains significantly affects the welfare of the population, the environmental quality, the location and growth of industry, and the use of the natural resources of

the state. The Legislature also finds that by assuming permit authority, that the state must also ensure that these facilities are constructed in an orderly and timely manner so that the energy requirements of the people of the state are fulfilled. Therefore, it is necessary to ensure that the location, construction, and operation of energy conversion facilities and transmission facilities will produce minimal adverse effects on the environment and upon the citizens of this state by providing that an energy conversion or transmission facility may not be constructed or operated in this state without first obtaining a permit from the Public Utilities Commission.

Prior to the issuance of a permit, the PUC is required to find that the applicant has fully met its burden of proof. With regard to an applicant's burden of proof, SDCL § 49-41B-22 provides:

[t]he applicant has the burden of proof to establish by a preponderance of the evidence that:

- (1) The proposed facility will comply with all applicable laws and rules;
- (2) The facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area. An applicant for an electric transmission line, a solar energy facility, or a wind energy facility that holds a conditional use permit from the applicable local units of government is determined not to threaten the social and economic condition of inhabitants or expected inhabitants in the siting area;
- (3) The facility will not substantially impair the health, safety or welfare of the inhabitants; and
- (4) The facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government. An applicant for an electric transmission line, a solar energy facility, or a wind energy facility that holds a conditional use permit from the applicable local units of government is in compliance with this subdivision.

Crowned Ridge, in accordance with the requirements of the PUC and the State of South Dakota, after full contested hearing, has been granted a permit for the purpose of

constructing a wind farm. By what authority and upon what law is such an action sanctioned? The South Dakota Legislature as set forth in South Dakota Codified Law.

3. THE DOCTRINE OF EXACTIONS

To fully appreciate the manner in which Plaintiffs have misconstrued and misapplied Takings jurisprudence, it is unnecessary to engage in an exhaustive review of its various lines of inquiry. While Plaintiffs preface their takings claim with a nod to the four orthodox approaches, their attention appears settled upon the “exaction” line of cases of *Nollan v. California Coastal Commission*, 483 US 825 (1987) and *Dolan v. City of Tigard*, 512 US 374 (1994). As described by Patricia E. Salkin,

[t]he doctrine of exactions...applies in cases in which land use permits are conditioned upon compliance with some condition or restriction placed on land, such as the dedication of a portion of the property or payment of impact fees. At a minimum, the doctrine of exactions requires that, if government uses the land use regulatory process to condition the development of land on a taking of a portion of the same property, the government has the burden to prove: (1) that there is an essential nexus” between the condition and the government purpose that would be served by an outright denial of permission to develop; and (2) that the burden the exaction imposes on the property owner is “roughly proportional” to the adverse impact of the owner’s proposed development on the general community.

2 Am. Law. Zoning § 16:8 (5th ed.).

After setting forth select passages from *Nollan* and *Dolan*, Plaintiffs go on to note that they “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.” And with that statement, Crowned Ridge may say it is in accord. Plaintiffs appear to rely upon a loose association of words and concepts, a sort of rough proportionality of their

own devise. As such, Plaintiffs fall far short of establishing the doctrine of exactions should be applied to the case at bar. Moreover, Plaintiffs fail to sufficiently plead facts that bear any connection to the three remaining lines of Takings inquiry.

CONCLUSION

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

Dated this 2nd day of December, 2019.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

/s/ Miles F. Schumacher

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 2, 2019, I caused the foregoing document to be sent to:

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Dated this 2nd day of December, 2019.

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