

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF CODINGTON)

IN CIRCUIT COURT

THIRD JUDICIAL CIRCUIT

TIMOTHY LINDGREN and
LINDA LINDGREN,

 Plaintiffs,

vs.

14CIV19-000303

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.

REPLY TO
DEFENDANTS’
SEPARATE MOTIONS
TO DISMISS COMPLAINT
UNDER RULE 12(b)
AND CERTIFICATE OF
SERVICE

(Hearing: December 9, 2019, 1:30PM,
Watertown, SD – Circuit Judge Means)

Plaintiffs, by and through their attorney of record, now submit this *Reply to the Separate Motions of the Defendants to Dismiss the Complaint under Rule 12(b)(1) and (5)* (“Reply”).

A. Perceived Basis of Motions

Collectively, Defendants, as named in the caption above, maintain this Court does not have subject matter jurisdiction of a complaint seeking declaratory judgment against them, and have cited a number of points as to why this is so. This is chiefly because, as understood by Plaintiffs’ counsel, the time for judicial review of the Board of Adjustment’s order granting the

CUP in July 2018 has long since come and gone. Per the statute, SDCL § 11-2-61, the exclusive remedy is for review by a discretionary¹ writ of certiorari, to be sought within 30 days of the filing of the Board’s decision. We agree that date has come and gone.

Further, Defendants contend that as Plaintiffs did not participate in the case of *Johnson v. Codington County Board of Adjustment*,² or also, as an alternative, failed to initiate their own petition for writ on a timely basis, that time, too, has closed without a proper “exclusive” challenge. In addition, Defendants further assert, Plaintiffs failed to intervene as a party in the PUC’s proceeding, Docket EL19-003, which was opened in January 2019, and subject of a final order in favor of Crowned Ridge, entered in late July 2019. What’s worse, Defendants further state, Plaintiffs also failed to take an appeal from the PUC’s final order, the time for which has also expired.

Thus, Defendants appear to be linked, arm-in-arm, asserting to this Court that Plaintiffs – have gotten out of bed, so to speak, much too late in the day for purposes of protecting their interests in the Lindgren Farm – are simply too late and are now out of cards. This Court, they now assert, has no subject matter jurisdiction to proceed on the Complaint. That shared contention of Defendants is not conceded by Plaintiffs.

B. The Lindgren Affidavit and Attachments

Each of the Defendants, other than the PUC, has also submitted materials beyond the face of the Complaint, and in the case of Crowned Ridge, has requested the Court take judicial notice of the official (electronic) files that exist for both the Board of Adjustment and the PUC, citing to SDCL § 19-19-201. Defendants may find this surprising, but Plaintiffs do not oppose any of

¹ In the language of SDCL § 11-2-62, the Court “may allow a writ” to be issued to the Board.

² 14CIV18-000340, assigned to Honorable Robert Spears, Circuit Judge; Judge Spears entered Memorandum Opinion, denying relief to the Petitioners therein, on March 22, 2019. See *Exhibit B* to Affidavit of Miles Schumacher (“Schumacher Affidavit”).

those suggestions, and frankly, a factual attack upon the Complaint, as appears to be underway by virtue of the motions at hand, is welcomed! The *more* the Court learns about the facts and claims lurking within and around these dockets, the more likely it is, in our opinion, the merits of Plaintiffs' Complaint will become apparent.

That said, however, this should afford Plaintiffs the opportunity to submit – as part of the resistance to these motions – an affidavit and additional documents. Hence, submitted with this Reply is the *Affidavit of Linda Lindgren (November 1, 2019)* (“Lindgren Affidavit”), including as attachments thereto the following listed or described exhibits:

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)

The Lindgren Affidavit and attachments are submitted for the purpose of demonstrating that each of the remedies held out by Defendants as having been readily available to Plaintiffs is – or was – illusory in nature at the respective, relevant time. The reality is this – because of the “option” for Easement Agreement, being now fully presented (other than Exhibit D thereto) to the Court, Defendant Crowned Ridge (or its affiliate, Boulevard) had legally checkmated Plaintiffs as to their claims. Rather than repeat that position, already covered in the Lindgren Affidavit, as well as the Brief of Plaintiffs (referenced in Part C of this Reply), such is merely mentioned here. The fact remains, any formal legal action that might have been taken by Plaintiffs, challenging any right of Crowned Ridge to cast wind farm “Effects” upon and over the Lindgren Farm (including Plaintiffs' residence), would have been quickly neutered by producing

the instrument comprising the Wind Farm Lease and Easement Agreement, dated in June 2014. Actually, this instrument, with Section 5.2, was merely an *option* to obtain such an “Effects Easement,” and, in fact, the option expired on or about June 10, 2019. Once free from the snare, Plaintiffs then did what they could to become engaged, although ultimately to no avail.³

If the motions of Defendants are based in law, then Plaintiffs remain under the legal checkmate as referenced (or perhaps *stranglehold* is a more apt term at this point). Our arrival at this point is the result of a use of the Zoning Power, as delegated to, and then in the form as claimed to exist, and as exercised by Codington County. South Dakota case law informs us there are constitutional limits to that power, and the U.S. Supreme Court has spoken in several zoning (or zoning-type power matters) on the subject of “exactments.”

Exactments are those demands the governmental authority seeks to place on the Zoning Applicant, or the proposed project, as a consequence of the Zoning Application. The cases are instructive as to constitutional limits on the exercise of state zoning power, but each is also unlike the facts here – since *here*, the “exactments” made are *actually* those imposed as burdens (Shadow Flicker or noise) upon the lands, activities and residences of those who are Non-Participating Owners, in their unwilling supporting roles as “receptors.”⁴

This claimed use of the Zoning Power by Codington County – pursuant to which it may leap both tall buildings *and* across property lines (well beyond a wind farm site’s property line, but yet close enough to be “affected” by the project’s Effects flowing across the line), including the property line where the County’s CLUP calls for the “Effects” (of noise) to be measured by the Zoning Ordinance⁵ – is an abuse of the Zoning Power, presenting also a conflict with

³ See Exhibit 3 and Exhibit 4, Lindgren Affidavit.

⁴ See excerpt of Codington County Zoning Ordinance (Ord. # 68), being Exhibit 6, Lindgren Affidavit.

⁵ Spoiler alert: the Zoning Ordinance does not place noise measurement as called for by the CLUP, having moved such measurement point over to the property line of Non-Participants.

statutory provisions as to “Easements and Servitudes,” and the property rights of Plaintiffs as (we think is or should be the case) protected by the South Dakota Constitution.

C. Plaintiffs’ Brief In Opposition to Motions

Submitted with this Reply is Plaintiffs’ Brief, extending to 67 pages. Counsel extends apologies for the length of this submission. Writing concisely is an art; for this writer, it consumes massive amounts of time, now in short supply. As this is being tendered a number of days prior to the understanding of the due date (November 19), it is assumed that each of the readers may wish the additional time to read and grasp the intended points of the brief. As other matters continue to press for attention, this brief will be submitted today, including such apologies - and also with a short series of attached, numbered exhibits bearing the mark of “PB,” to help illustrate the dubious (we think) origins of the notion that “Shadow Flicker,” or other Effects, lawfully may be disposed of upon the lands of Non-Participants simply by invoking the Zoning Power, while also ducking any adverse legal consequences for the now degraded or missing “bundle of sticks” held by such persons as fee owners – these Plaintiffs, included.

All such matters considered, Plaintiffs respectfully urge 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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Certificate of Service

Undersigned, as counsel for Plaintiffs, hereby certifies that on the date below entered, a true and correct copy of *Plaintiffs' Reply to Defendant's Separate Motions to Dismiss Complaint under Rule 12(b)*, together with this certificate, and including also the *Affidavit of Linda Lindgren (November 1, 2019)*, along with Exhibits 1 through 6, inclusive, as annexed thereto, and *Plaintiffs' Brief in Opposition to Defendants' Separate Motions to Dismiss Complaint*, including also Exhibits PB-1 to PB-4, inclusive, annexed thereto, was served electronically through the Odyssey File & Serve ECF system (and also by email) upon each of the following counsel appearing in this matter:

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