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November 16, 2020

"Supplemental Brief of Appellants" Odyssey

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Honorable Dawn Elshere, Circuit Judge
THIRD JUDICIAL CIRCUIT

Re: My file 6184-005, Garry Ehlebracht, *et al.* •
19CIV20-000021, *In re PUC Docket EL19-027, etc.*
Argument: Monday, November 23, 2020

Judge Elshere:

Appellants intend to rely also on the additional matters outlined in this writing.

On Friday, November 13, 2020, the U.S. Supreme Court granted certiorari (No. 20-107) in *Cedar Point Nursery, et al. v. Hassid, et al.* This case involves California property right claims, arising from the 9th Circuit. The last report in *Cedar Point Nursery, et al. v. Shiroma, et al.*, 956 F.3d 1162 (9th Circ. 2020), is the court's denial of rehearing en banc, with the dissent of Judge Ikuta (joined by seven additional judges) being of particular interest at this time. Judge Ikuta writes that California recognizes easements are a type of real property, and an affirmative easement is one giving the owner a "right to do something on the land of another, such as a right to pass over the other person's land." *Id.* at 1169. Further, "the right to enter onto the land of another to take some action is the epitome of an easement in gross." *Id.*, 1171.

California's statutes governing property rights were the origin source for much of South Dakota's current statutes on the topic; this is true for easements appurtenant in SDCL 43-13-2, as well as easements in gross, SDCL 43-13-1. *Cedar Point Nursery* entails, in the view of Judge Ikuta, the *appropriation* of an easement in gross. Further, Judge Ikuta noted:

> To the extent there was any doubt as to whether the appropriation of an easement constitutes a taking, it was dispelled in *Nollan* [483 U.S. 825, 832 (1987)]. There, the Court stated that if California were to require landowners to "make an easement across their beachfront available to the public," there is "no doubt there would . . . be[ ] a taking." *Nollan*, 483 U.S. at 831, 107 S.Ct. 3141. According to the Court, "[t]o say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather . . . 'a mere restriction on its use,' is to use words in a manner that deprives them of all their ordinary meaning." *Id.* (citation omitted).

Judge Ikuta (at 1168) observes that while property rights are defined by state law, there are "limits on a state's ability to alter traditional understandings of property through legislation," citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 627-28, and also *Phillips v. Wash. Legal Found.*, 524 U.S. 156. "[A]s to confiscatory regulations (as opposed to those regulating the use of property), a State may not sidestep the Takings Clause by disavowing property interests long recognized under state law." *Phillips*, at 167. That is, a state may not, "by ipse dixit, transform private property into public property without compensation." *Palazzolo*, 533 U.S. at 628 (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164).

This is precisely what Deuel County's Board has already done (in the case now pending in Appeal 29352), and now, what the Public Utilities Commission proposes with regard to the homes and properties of each of the Appellants in this case: the appropriation of an affirmative easement for the permanent discharge of light upon and over the property of these Non-Participants.[1] The right to engage in such a discharge of light (in the form of "Shadow Flicker") is precisely what SDCL 43-13-2(8) otherwise envisions something that *requires an easement.*

Cedar Point Nursery concerns a so-called "access regulation" adopted by the California Agricultural Labor Relations Board, ostensibly allowing union organizers to enter private land on a daily basis for 120 days during the calendar year. Landowners claimed this regulation, authorizing entry without consent or compensation, is an unconstitutional taking of property rights. While the permits issued in South Dakota do not authorize physical intrusions by *persons*, they do purport to bless the invasion by Shadow Flicker, that adulterated form of light for which, Appellants would argue, the statute (SDCL 43-13-2(8)) envisions the need for an easement – an *affirmative easement* very much like that proposed to Mrs. Kranz. The facility siting power is not so comprehensive that the Agency itself may pick up and wield the sword of *ipse dixit*.

Each counsel of record has been simultaneously served by email, in addition to our intended service of this writing upon all counsel via Odyssey.

Sincerely yours,
ARVID J. SWANSON, P.C.

A.J. Swanson

c: Garry Ehlebracht, *et al.*
Counsel of record

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[1] Just as Appellee Crowned Ridge volitionally obtained affirmative easements for discharging this very same kind of light upon and over the property of Participants; the Kranz Easement being the example. Concerning Non-Participants, the focus is to *appropriate* such rights, via the orders of the County and State agencies. Merriam-Webster's definition of *appropriation* is "the act of taking or using something especially in a way that is illegal, unfair, etc."