STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF DEUEL	)	THIRD JUDICIAL CIRCUIT

In the Matter of PUC Docket EL19-027, Application of Crowned Ridge Wind II, LLC For a Permit of a Wind Energy Facility in Deuel, Grant and Codington Counties	
GARRY EHLEBRACHT, STEVEN GREBER, MARY GREBER, RICHARD RALL, AMY RALL, and LARETTA KRANZ, *Appellants,* vs. SOUTH DAKOTA PUBLIC UTILITIES COMMISSION and CROWNED RIDGE WIND II, LLC. *Appellees.*	19CIV20-000021 APPELLANTS' STATEMENT OF ISSUES ON APPEAL (SDCL 1-26-31.4)

COME NOW GARRY EHLEBRACHT, STEVEN GREBER, MARY GREBER, RICHARD RALL, AMY RALL, and LARETTA KRANZ (collectively, "Appellants"), by and through their undersigned attorney of record, A.J. Swanson, of Canton, South Dakota, and provide this statement of issues on appeal:

1. Whether the Legislative findings (SDCL 49-41B-1), ostensibly ensuring by means of a permit to be issued by the Agency that an "energy conversion [facility] . . . will produce *minimal adverse effects* . . . upon the citizens of this state," as applied to a wind energy project designed by the Applicant seeking such permit and the adverse effects (hereafter, the "Effects,"[1] that will be permanently visited upon those otherwise known as Non-Participants, having conferred no easement accepting any such burden of "minimal adverse effects"), comprise an unlawful taking of

[1] As used in this statement and Appellants' submissions generally, the term "Effects" has intended reference to "Noise" (or sometimes, "Sound") and "Shadow Flicker," both of which have been amply documented and predicted for Appellants' homes and lands by the experts appearing for Appellees in the Agency's docket; additionally, not further quantified or predicted within the record are other "Effects" named in the "Effects Easement" (§ 5.2 of Exhibit I-2), and also those not named therein, such as Infrasound or Low Freqency Noise.

property rights or interests without just compensation under the Fifth Amendment of the U.S. Constitution. (*Emphasis supplied.*)

2. Whether the Agency, having been authorized to promulgate rules concerning wind energy conversion facilities (SDCL 49-41B-35), but adopting no relevant rules as to the meaning of "minimal adverse effects,"[2] may proceed on a case-by-case or *ad hoc* basis to permit the burden of "Effects" placed upon both citizens and their properties according to variable regulatory limits developed by others, including those with interests for the promotion of wind development.

3. Whether the Applicant's (Appellee Crowned Ridge Wind II, LLC) use of an "Effects Easement," in the form now appearing of record (Exhibit I-2), serves as an *admission against interests* as to the burdensome scope or nature of "Effects" emitted by the Project upon those who have *not* accepted such burdens, these Appellants included.

4. Whether the Agency's permit, in furtherance of the Legislative findings (SDCL 49-41B-1), serves in place of an "Effects Easement," whereby the Non-Participants are effectively required to submit and conform the enjoyment of their property for the determined benefit of others (i.e., Applicant and/or the community at large).

5. Whether the Agency, in the process of developing and then applying limits of "Effects" for wind energy conversion facilities in South Dakota, may apply one specific standard in a specific case (*see* Docket EL18-026, *Prevailing Wind Park*), while reverting to a less favorable standard in this case (insofar as Appellants are concerned, being adversely affected, or more substantially burdened, by the Agency's action below).

6. Whether the Agency, when considering a multi-part standard developed by others (namely, the "German standard") for the purpose of governmental regulation or limits of Effects to be visited upon the Non-Participating neighbors of a wind energy conversion facility in South Dakota, and then imposing such standards on a case-by-case basis, may apply merely one part of such standard (the annual limit of 30 hours for

[2] ARSD 20:10:21:12, citing to the Legislative findings, speaks in terms of "efforts of the utility to . . . minimize or avoid adverse environmental, social, economic, health, public safety, and historic or aesthetic preservation effects." To avoid adverse effects on Appellants' private homes and lands, Applicant need only use a conservative means of design (as opposed to "aggressive," as opined by Witness David Hessler, appearing for Staff), *and* obtain an easement for the resulting, adverse effects – *neither of which was done in this case.* Thus, the Agency's permit itself becomes the alternative instrument to holding an easement for such purposes, as the Agency's Decision focuses on *ad hoc* "regulatory limits" rather than the statute's "minimal adverse effects."

Shadow Flicker), while ignoring the remaining standard adopted by foreign authorities, as identified in the source documents.

7. Whether the Agency, absent an easement accepting the burden, has lawful authority by edict or permit to place a burden of "Effects" (even if the Agency deems such to comprise a "minimal adverse effect") upon the home of a Non-Participant, when such Effects are of higher intensity or of longer duration, or are entirely new burdens, than those historically experienced in the existing, ambient environment in the Goodwin area (the small community where Appellants reside).

8. Whether the Agency, in pursuit of the Legislative findings in SDCL 49-41B-1, is authorized to regulate, set, establish, approve, adjust, or compromise the nature, level, intensity, or duration of the "Effects," to be permanently and adversely visited upon the lands and homes of Appellants (as Non-Participants), without their respective consent as property owners.

9. Whether the nature, level, intensity or duration of the Effects (as provided for in the Decision of the Agency) shall be deemed as a permanent, established, duly-licensed, permitted, or a lawful quotient or measure thereof, so that within the parameters as now permitted and so proscribed, Appellants, being required to accept (or endure) such Effects by the terms of the Decision, are also without further legal or equitable remedies to challenge Applicant's continued, future emission of such Effects upon them, as a public or private nuisance under the provisions of Chapter 21-10, SDCL.

10. Whether the Agency's Decision, by expressly permitting Applicant's design for the siting of Project infrastructure proximate to the land and homes of Non-Participants, comprises a reverse restriction, whether actual or implied, upon the property interests of Appellants, in that the rights of use and enjoyment of Appellants' lands and homes for purposes otherwise lawful under law and local ordinance, are otherwise narrowed, reduced or forfeited by Applicant's Project.

11. Whether SDCL 43-13-2(8) has application to the land and property interests of Appellants, bearing on the Applicant's claimed right to hereafter discharge adulterated light (in the form of Shadow Flicker) onto and into the dwellings and lands of Appellants, given that the Agency's Decision provides approval of such discharge.

12. Whether the Agency has lawful authority to impose, within the regulatory process applied to Applicant's sought permit, specific burdens, measures or levels of "Effects" upon the pre-existing land and homes of Appellants, as unwitting and unwilling neighbors, because of the relative proximity thereof to "Project infrastructure" features, such proximity being due to the spatial siting and design decisions unilaterally pursued by Applicant.

13. Whether the Agency's Decision and the resulting permit to Applicant, expressly approving and authorizing the Project to *permanently* cast or emit Effects (of some certain degree, level, intensity or duration) onto the homes and properties of Appellants, comprises an effective *per se* (or other) taking of or injury to those property interests, in the nature of a *de facto* or implied easement for the casting or emitting of the "Effects" (such being without the consent of the fee owner, the Agency not requiring Applicant to obtain an actual easement for such "Effects" in the case of Non-Participants), and for which taking or injury Appellants may seek compensatory redress from the State and the Agency in accord with the U.S. Supreme Court's decision in *Knick v. Township of Scott* (and other cases).

Appellants may propose to further amend, revise, combine clarify or refine this statement of issues within Appellants' briefs to the Court.

Dated at Canton, South Dakota, this 7th day of May 2020.

Respectfully submitted,

/s/ A.J. Swanson
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State Bar of South Dakota, # 1680

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CERTIFICATE OF SERVICE

The foregoing pleading has been electronically filed with the Clerk of Courts, Deuel County, through Odyssey File and Serve, Case 19CIV20-000021, for further service upon those appearing as counsel for Appellees at this date and time:

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In addition, the following has been served this date by electronic mail and U.S. Mail, the latter having been mailed via U.S. Mail, deposited into a facility of the U.S. Postal Service at Canton, Harrisburg, or Sioux Falls, South Dakota, the date below printed:

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/s/ A.J. Swanson