

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

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.*

No. \_\_\_\_\_

APPELLANTS'  
DOCKETING  
STATEMENT

SECTION A.

TRIAL COURT

1. The circuit court from which the appeal is taken: **THIRD CIRCUIT**
2. The county in which the action is venued at time of appeal: **CODINGTON**
3. The name of the trial judge who entered the decision appealed:  
**HONORABLE CARMEN MEANS, CIRCUIT JUDGE**

PARTIES AND ATTORNEYS

4. Identify each party presently of record and the name, address and phone number of the attorney for each party.

*Plaintiffs/Appellants:*           **TIMOTHY LINDGREN and LINDA LINDGREN  
("Lindgrens")**

Attorney for Appellants:     A.J. Swanson, ARVID J. SWANSON, P.C.  
27452 482<sup>nd</sup> Ave.  
Canton, SD 57013  
(605) 743-2070

*Defendants/Appellees:*           **CODINGTON COUNTY, a political subdivision of the  
State of South Dakota, CODINGTON COUNTY BOARD  
OF ADJUSTMENT, an agency of Codington County,  
having issued Conditional Use Permit # CUP018-007  
("Codington" or "Board")**

Attorneys for Appellees:     Zachary W. Peterson and Jack Hieb  
RICHARDSON, WYLY, WISE, SAUK & HIEB, LLP  
P.O. Box 1030  
Aberdeen, SD 57402-1030  
(605) 225-6310

*Defendants/Appellees:*           **CROWNED RIDGE WIND, LLC, CROWNED RIDGE  
WIND II, LLC., BOULEVARD ASSOCIATES, LLC ("CRW")**

Attorneys for Appellees:     Miles F. Schumacher, Dana Van Beek Palmer, and  
Michael F. Nadolski  
LYNN, JACKSON, SHULTZ & LEBRUN, P.C.  
110 N. Minnesota Ave., Suite 400  
Sioux Falls, SD 57104  
(605) 332-5999

*Defendant/Appellee:*           **SOUTH DAKOTA PUBLIC UTILITIES COMMISSION,  
having issued Facility Siting Permit, Docket EL19-003 ("PUC")**

Attorneys for Appellee:     Kristen N. Edwards and Amanda Reiss, Special  
Assistant Attorneys General  
500 East Capitol Avenue  
Pierre, SD 57501  
(605) 773-3201

SECTION B.                           TIMELINESS OF APPEAL

1. The date the judgment or order appealed from was signed and filed by the trial court:

**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND GRANTING  
MOTION FOR COSTS, signed and filed by the trial court on December 20, 2019.**

2. The date notice of entry of the judgment or order was served on each party:  
**December 26, 2019**
3. State whether either of the following motions was made:
  - a. Motion for judgment n.o.v., SDCL 15-6-50(b) **NO**
  - b. Motion for new trial, SDCL 15-6-59 **NO**

NATURE AND DISPOSITION OF CLAIMS

4. State the nature of each party’s separate claims, counterclaims or cross-claims and the trial court’s disposition of each claim (e.g., court trial, jury verdict, summary judgment, default judgment, agency decision, affirmed/reversed, etc.)

The Lindgrens are owners of a 240-acre farm (“Lindgren Farm”) several miles south of South Shore, Codington County. On June 11, 2014, Appellants (as “Owner”) entered into what would become a 5-year option (“Option”) over the farm, entitled “Wind Farm Lease and Easement Agreement,” in favor of Appellee CRW. If exercised timely, the term would extend for fifty years; however, the option expired June 10, 2019 without exercise by CRW (as “Operator”). The instrument, *inter alia*, provided for an “Effects Easement” (Section 5.2) over Appellants’ farm, as referenced and described in ¶¶ 33-40 of complaint. The Option is part of the record, being Exhibit 1 to the “Lindgren Affidavit,” filed November 8, 2019; however, the trial court did not rule on whether such – or several other – submissions were to be considered beyond the complaint.

Accordingly, this description of the Option is limited to what might be gleaned from the verified complaint itself: ¶ 34, grants a very broad right and easement to use the Lindgren Farm for the “effects arising from the wind farm or for any activity located on Plaintiffs’ property, or arising upon adjacent properties and being visited upon the Lindgren Farm;” ¶ 35, the Option is to be kept confidential as containing proprietary trade secrets; ¶ 36, pending resolution of CRW’s claim of confidentiality, the Option is described as a “servitude . . . for a variety of adverse effects flowing from either hosting or being too proximate to wind farm operations, including . . . ‘noise’ and ‘light, flicker . . . [and] shadow’ (otherwise herein referenced as Shadow Flicker).”

The Option remains unrecorded, other than a memorandum thereof, as recorded with the local register of deeds. A subsequent provision of the Option (Section 11.4) also waives the benefit of any setback requirements or “other zoning restrictions” applicable to the Wind Farm, whether on the Owner’s property or on property adjacent thereto.

During the 5-year life of the Option, CRW designed a proposed wind farm that encircled Appellants’ farm, including proposed location of two wind turbines on the farm. During the option’s viable period, Appellants’ farm and residence would be considered a “participating” property, as opposed to “non-participating.” Codington exercises the Zoning Power, having adopted a Comprehensive Land Use Plan (CLUP), providing, as to Wind Energy Systems (WES), policies that “appropriate setbacks will be determined [to] protect adjacent properties, roadways and residences from potential noise, destruction, or other potential adverse impacts of towers,” and establishing “[m]aximum noise levels to be heard at the property line of the site with a wind

tower.” As of June 2018, Codington amended the Zoning Ordinance (Ordinance 68), providing that noise level generated by a wind energy system shall not exceed 50 dBA, average A-weighted Sound pressure level effects “at the property line of existing non participating residences,” with no limit imposed for so-called “participating residences.” (Measuring or limiting sound at this property line is not the policy required by the CLUP.) Further, the amended ordinance now requires a flicker analysis, as to all occupied dwellings (each being termed a “receptor”) within a one mile radius of each proposed wind turbine, while establishing a maximum exposure to flicker of 30 hours per year for each receptor. By agreement, however, a participating or non-participating owner could accept a greater duration of flicker, and if approved by the Board, the agreement “is to be recorded and filed with the Codington County Zoning Officer.” A third feature of the ordinance amendment is that a WES is to be setback from a non-participating occupied residence by at least 1,500 feet.

Within days of Codington’s ordinance amendment, CRW filed for a Conditional Use Permit (CUP), involving about 130 WES sites over thousands of acres, including two to be sited on Appellants’ farm. During the CUP hearing – with Appellants’ home having the unique receptor code of CR1-C37P (CR1 being the wind farm, while “C” reflects Codington, “37” the home of Appellants, and “P” denotes a status of participating by reason of the option) – CRW’s experts predicted Appellants’ home would experience shadow flicker for nearly 28 hours per year, at a distance of 1,696 feet from the nearest WES. No evidence was provided for sound intrusion for Appellants’ home, as participating residences are not subject to limits under the ordinance. In July 2018, the CUP was unanimously approved by the Board.

The Lindgrens did not pursue an appeal (by writ of certiorari) of the Board’s CUP to CRW, although others did so, in 14CIV18-000340, *Johnson, et al. vs. Codington County Board of Adjustment*. Honorable Robert L. Spears issued a memorandum decision (March 22, 2019), denying review under SDCL 11-2-61.

As the proposed Wind Farm is of a size requiring a Facility Siting Permit (SDCL 49-41B-2(13)), CRW then invoked the PUC’s jurisdiction in January 2019, assigned Docket EL19-003, covering a proposed development in both Codington and Grant Counties. The application was submitted to the PUC in January 2019, and given the fast track required by the statute then applicable (6 months to final decision, SDCL 49-41B-25, amended in 2019 to 9 months), the PUC gave notice to interested parties, including Appellants, of the opportunity to become a party to the proceeding. Appellants did not seek intervention under SDCL 49-41B-17(3), and ARSD 20:10:22:40 (intervention to be filed within 60 days of the application filing).

On June 11, 2019, the Option expired without being exercise by CRW, with notice to the PUC the two WES planned for the Appellants’ farm were being removed from the Facility Siting Permit. Updated information provided by CRW reflects the Appellants’ home remains about 1,696 feet from the closest WES site, and now as a “Non-Participant” home, CRW yet plans to emit both shadow flicker and noise upon the home, although no longer having any claim of privity with Appellants for such easements, as provided for in the Option.

On June 13, 2019, the Lindgrens submitted a petition for intervention in the PUC’s Docket EL19-003, asserting that without an “Effects Easement” being in place, CRW had no legal right to make an adverse use of their property. PUC’s own counsel urged the petition be allowed, while

CRW took no position in the matter. On June 26, 2019, the PUC, on a vote of two to one, denied the Lindgren intervention petition. The PUC's final order, approving the Facility Siting Permit, followed on July 25, 2019. Not being considered a party to the matter, although their farm and home is within the boundaries of the project, the Lindgrens had no standing to appeal the permit.

The PUC's final order, *inter alia*, approves shadow flicker being displayed at or on residences (including that of the Lindgrens), so long not exceeding 30 hours per year in duration, nor generate a sound pressure level (10-minute equivalent continuous sound level, Leq) of more than 45 dBA as measured within 25 feet of any non-participating residence.

On August 29, 2019, the Lindgrens filed their verified complaint for declaratory judgment (and other relief) against Defendants, challenging, *inter alia*, the County's use of a purported Zoning Power, and also the PUC's use of a purported Facility Siting Permit, to expressly authorize a long-term use of Appellants' farm and home for the Defendant CRW's disposing of both shadow flicker and noise, no longer in privity with the Lindgrens, and having no effective easement or claim of right over the property, apart from whatever *de facto* easement might arise under the Zoning Ordinance and CUP. By use of the Effects Easement within the Option, the Lindgrens assert, CRW's own instruments suggest these effects *require* or warrant an easement in favor of CRW; if that is the case, the complaint seeks to establish the governmental actions being challenged are themselves the taking of such an easement. As variously stated within the seventeen subparts of ¶ 109 of the complaint, it is recognized the trial court may deem the Zoning Power sufficiently broad so as to permit creation of a servitude upon the described properties, in which case the Lindgrens assert their intent to pursue damages for the taking of property. As to the PUC, the complaint notes that in another recent Wind Farm project, the PUC limited noise exposure for residences to merely 40 dBA, while in this case, the permitted level is 45 dBA (an intensity level that is on the order of three times greater); the complaint challenges the lack of delegated standards for an enhanced noise level on the Lindgren property. The complaint notes the origins of the Codington County Zoning Ordinance, being traceable to "NARUC Best Practices" report (¶ 74) and what an unidentified German judge (¶ 73) has "tolerated."

Defendants (Codington County, et al., and Crowned Ridge Wind, et al., responded with motions to dismiss under Rule 12(b)(1) and (5), and affidavits of counsel, while the PUC moved under Rule 12(b)(5) (failure to state a claim), and also asserting the complaint is barred by the doctrine of waiver (the Lindgrens knew the project would be in their area, and failed to intervene during the sixty-day intervention period), failure to exhaust administrative remedies, and denying the Plaintiffs' property is damaged in "the constitutional sense." The PUC's motion also includes a request for an award of costs, citing SDCL 21-24-11.

Plaintiffs replied to each motion, including an affidavit of Linda Lindgren, submitting several exhibits, including the Option that had lapsed on or about June 11, 2019. At the close of arguments heard December 9, 2019, the trial court ruled from the bench in favor of Defendants, and directed counsel to prepare an order. The Court's order was entered on December 20, 2019, granting each of the motions to dismiss, granting also the PUC's motion for award of costs pursuant to SDCL 21-24-11, and dismissing the case with prejudice, Notice of Entry being served December 26, 2019.

5. Appeals of right may be taken only from final, appealable orders. See SDCL 15-26A-3 and 4.
- a. Did the trial court enter a final judgment or order that resolves all of each party's individual claims, counterclaims or cross claims? **YES**
  - b. If the trial court did not enter a final judgment or order as to each party's individual claims, counterclaims or cross-claims, did the trial court make a determination and direct entry of judgment pursuant to SDCL 15-6-54(b)?  
**NOT APPLICABLE**
6. State each issue intended to be presented for review.

Issue A: Whether the trial court, in granting each of the motions of defendants, erred in concluding that the complaint for declaratory judgment failed to reflect the Circuit Court has jurisdiction over the subject matter?

Issue B: Whether the trial court, in granting each of the motions of defendants, erred in concluding the complaint fails to state a claim upon which relief can be granted?

Issue C: Whether Appellants have stated one or more claims for injury to, a taking of or an infringement upon their rights as fee owners of property within the general jurisdiction of the Circuit Court given the statutory and constitutional grounds for relief asserted in the complaint?

Issue D: Whether the trial court, ruling for defendants under Rule 12(b) but without findings or conclusions that the action was frivolous or brought for malicious purposes, erred in granting defendant PUC's motion for costs based on SDCL 21-24-11?

Date: January 10, 2020

*Attorney for Appellants*  
TIMOTHY & LINDA LINDGREN

/s/ A.J. Swanson  
A.J. Swanson  
ARVID J. SWANSON, P.C.  
27452 482<sup>nd</sup> Ave.  
Canton, SD 57013  
605-743-2070  
aj@ajswanson.com

Attach a copy of findings of fact and conclusions of law supporting the judgment or order appealed from. See SDCL 15-26A-4(2). **The order appealed from is an adverse ruling under Rule 12(b), being a dismissal with prejudice; no findings of fact and conclusions of law were entered. The trial court's order of December 20, 2019, and counsel's notice of entry of December 26, 2019, are each attached.**