IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

TIMOTHY LINDGREN and LINDA LINDGREN,

Appellants,

-vs-

CODINGTON COUNTY, *a political subdivision of the State of South Dakota,* CODINGTON COUNTY BOARD OF ADJUSTMENT, CROWNED RIDGE WIND, LLC, CROWNED RIDGE WIND II, LLC, BOULEVARD ASSOCIATES, LLC, *and* SOUTH DAKOTA PUBLIC UTILITIES COMMISSION,

Appellees.

Appeal No. 29229

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
CODINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE CARMEN MEANS
CIRCUIT COURT JUDGE

BRIEF OF APPELLEES CODINGTON COUNTY AND CODINGTON COUNTY BOARD OF ADJUSTMENT

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PRELIMINARY STATEMENT

In this brief, the plaintiffs and appellants, Timothy Lindgren and Linda Lindgren, will be referred to as "the Lindgrens." Codington County will be referred to as "County," and the Codington County Board of Adjustment will be referred to as "Board." Crowned Ridge Wind, LLC, Crowned Ridge Wind II, LLC, and Boulevard Associates, LLC, will be collectively referred to as "Crowned Ridge." The South Dakota Public Utilities Commission will be referred to as "PUC." The Codington County Clerk of Courts' record will be referred to by the initials "CR" and the corresponding page numbers. The transcript of the December 9, 2019 hearing will be referred to as "T" and the corresponding page numbers.

JURISDICTIONAL STATEMENT

This is an appeal from the Circuit Court's Order Granting Defendant's Motion to Dismiss and Granting Motion for Costs, dated December 20, 2019. (CR 339-341.) Notice of Entry was served on December 26, 2019. (CR 342-343.) The Lindgrens served a Notice of Appeal on January 10, 2020. (CR 365-366.) This Court may exercise jurisdiction pursuant to SDCL 15-26A-3(1), because the Circuit Court entered a final judgment dismissing the Lindgrens' case.

QUESTIONS PRESENTED

I. DID THE CIRCUIT COURT CORRECTLY CONCLUDE THAT IT LACKED SUBJECT MATTER JURISDICTION TO ADJUDICATE AN UNTIMELY CHALLENGE TO A DECISION MADE BY THE CODINGTON COUNTY BOARD OF ADJUSTMENT?

> The Circuit Court granted the motion to dismiss pursuant to SDCL 15-6-12(b)(1) and concluded that, as neighbors to a property where a conditional use permit has been granted who did not timely appeal the Board's decision under SDCL 11-2-61, et seq., the Lindgrens do not have a right to commence an action for declaratory judgment to challenge the land use at any time they please. (T16:9-21.)

Huber v. Hanson Cnty. Planning Comm'n, 2019 S.D. 64, 936 N.W.2d 565.

Elliott v. Board of County Com'rs of Lake County, 2007 S.D. 6, 727 N.W.2d 288.

In re Appeal from Decision of Yankton Cnty. Comm'n, 2003 S.D. 109, 670 N.W.2d 34.

Appeal of Heeren Trucking Co., 75 S.D. 329, 64 N.W.2d 292 (1954).

SDCL 11-2-61.

SDCL 11-2-61.1.

II. DID THE CIRCUIT COURT CORRECTLY CONCLUDE THAT THE LINDGRENS' COMPLAINT FAILED TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED?

> The Circuit Court granted the motion to dismiss pursuant to SDCL 15-6-12(b)(5), finding that the Complaint failed to state a claim upon which relief could be granted.

Schafer v. Deuel Cnty. Bd. of comm'rs, 2006 S.D. 106, 725 N.W.2d 241.

Cary v. City of Rapid City, 1997 S.D. 18, 559 N.W.2d 891.

Muscarello v. Ogle County Bd. of Comm'rs, 610 F.3d 416 (7th Cir. 2010).

Muscarello v. Winnebago County Bd., 702 F.3d 909 (7th Cir. 2012).

SDCL 11-2-13.

SDCL 11-2-17.3.

SDCL 11-2-17.4.

STATEMENT OF THE CASE

The Lindgrens filed a document entitled "Complaint (Verified) for Declaratory Judgment and Other Relief" ("Verified Complaint") on August 28, 2019. (CR 1-46.) All defendants, including the County and the Board, filed motions to dismiss in lieu of answering the Verified Complaint. (CR 59-75, 81-82, 130-131.) The motions to dismiss came on for hearing before the Circuit Court, the Honorable Carmen Means, presiding, on December 9, 2019. Judge Means granted the defendants' motions and dismissed the case. (CR 339-341.) This appeal followed.

STATEMENT OF FACTS

The County has adopted a comprehensive land use plan and a zoning ordinance, which it has amended from time to time. (CR 2, VC ¶2.)[1] In 2018, the County amended its

[1] Because factual allegations are accepted as true for purposes of the Court's review, much of the factual background is derived from the allegations of the Verified Complaint (CR 1-46), which will be cited as "VC" followed by the corresponding paragraph number.

zoning ordinance to include certain additional requirements regarding Wind Energy Systems ("WES"). (CR 17, VC ¶60.)

On July 2, 2018, Crowned Ridge filed an application for a conditional use permit ("CUP"), seeking approval for construction and operation of the Crowned Ridge Wind Farm in Codington County. (CR 22-23, VC ¶76.) On July 16, 2018, the Board held a hearing, at which the Lindgrens appeared and spoke in opposition to the CUP. (CR 100, 104-105.) The Board approved the CUP by a unanimous 6-0 vote. (CR 110.) Its findings of fact and conclusions of law were signed and filed on July 18, 2018. (Id.)

The Lindgrens acknowledge they did not timely challenge the Board's decision to grant the CUP to Crowned Ridge. (CR 24, VC ¶81; Appellants' Brief, pg. 10.) Another group of individuals pursued a circuit court appeal under SDCL 11-2-61 to challenge the Board's decision, but they were unsuccessful. (CR 111-126.)

The Lindgrens' Verified Complaint, as it relates to the County and the Board, is a collateral attack aimed at the CUP. The Lindgrens' "Introduction" makes clear they are challenging the Board's jurisdiction and authority to issue the CUP:

> 19. By this action, Plaintiffs seek a declaratory judgment, **concerning the identified CUP**, against Defendants Codington County and the Board of Adjustment, and also Defendants

> Crowned Ridge I, Crowned Ridge II and Boulevard, and all others claiming any interest therein, to the effect that:
>
> (a) **the Board of Adjustment has no lawful, delegated zoning authority or jurisdiction, by terms of the Zoning Ordinance, to consider, determine and issue a CUP** to Defendants Crowned Ridge I and Crowned Ridge II, under which affirmative rights are awarded to make a continuing and long term use of Plaintiffs' real property, which use in the nature of a servitude and easement adverse to Plaintiffs' rights as fee owners of property under the law; . . .

(CR 7-8.) (Emphasis added.)

The balance of the Complaint also points to an attack on the zoning ordinance and the Board's decision. It lodges allegations about: "the right, jurisdiction and authority, first, of Codington County to adopt a Zoning Ordinance making provision for such action" (CR 16, VC ¶56); the authority of "the Board of Adjustment to take adjudicatory action upon a Conditional Use Permit . . ." (Id.); the County's failure "to legislate a sufficient, reasonable separation distance between a proposed wind farm use and those who are Non-Participating Owners, such as Plaintiffs. . ." (CR 16-17, VC ¶58); the Board's failure "in the exercise of adjudicatory powers, to impose adequate separation distance for the proposed use" (Id.); the Board allowing "a proposed, intensive use, namely, the Crowned Ridge Wind Farm, which, according to every required prediction,

will adversely impose 'Effects (of a particular duration or intensity) upon neighboring Non-Participating Owners, including Plaintiffs," which becomes a "*de facto* easement as to the Lindgren Farm." (CR 17, VC ¶59.)

Ultimately, on the basis of their allegations, the Lindgrens requested the Circuit Court to declare that the Board's grant of the CUP was invalid and sought to enjoin construction or operation of the WES. (CR 32-37, VC ¶¶ 109 (8)-(10), 110.)[2] Their "Prayer for Relief" sought a declaration regarding "the **legal power or jurisdiction** of the Board of Adjustment, acting under the provisions of the Zoning Ordinance, to approve and issue a CUP in like manner and for such purposes . . ." (CR 39.) (Emphasis added.)

ARGUMENT

A. The Lindgrens cannot collaterally attack the Board's CUP decision through a declaratory judgment action.

This Court reviews a dismissal for lack of jurisdiction as a question of law under the de novo standard of review. Upell v. Dewey Cty. Comm'n, 2016 S.D. 42, ¶ 9, 880 N.W.2d 69, 72. "Judicial review of decisions by boards and commissions is statutory and established by the

[2] On page 14 of Appellants' Brief, the Lindgrens attempt to retreat from this position by arguing that their inquiry relates only to their farm and its immediate environs. The Lindgrens never amended their Verified Complaint below, and the relief requested in the Verified Complaint remains the same as when the action was filed.

Legislature." Huber v. Hanson Cnty. Planning Comm'n, 2019 S.D. 64, ¶ 11, 936 N.W.2d 565, 569 (citing Appeal of Lawrence Cty., 499 N.W.2d 626, 628 (S.D. 1993)). "When a request for judicial review or appeal of such decisions is not authorized by statute, the court lacks subject matter jurisdiction and must dismiss the action." Id.

The Lindgrens' argument concerning subject matter jurisdiction is that the Circuit Court erred by dismissing their case because they are not pursuing an untimely appeal, but are, instead, raising issues within the Circuit Court's general jurisdiction. "'The test for determining jurisdiction is ordinarily the nature of the case, as made by the complaint, and the relief sought.'" Decker by Decker v. Tschetter Hutterian Brethren, Inc., 1999 S.D. 62, ¶ 14, 594 N.W.2d 357, 362 (quoting State v. Phipps, 406 N.W.2d 146, 148 (S.D. 1987) (citations omitted). The County and the Board submit that it is obvious from the Lindgrens' Verified Complaint that they challenge the Board's decision on the CUP following the July 16, 2018 hearing. Not to be lost in the Verified Complaint's verbosity is the simple fact that the Lindgrens ask the Court to declare that the Board's grant of the CUP was invalid and seek to enjoin construction or operation of the WES. (CR 34, VC ¶109(9); CR 38-39, VC ¶¶ 110-111.)

If parties could challenge CUP decisions at any time they wish through a declaratory judgment action or by seeking injunctive relief, as the Lindgrens have done here, favorable zoning decisions would never be truly final. That is why the legislature has enacted specific methods for bringing such challenges. "The legislature prescribes the procedure for reviewing the actions of the county. Review may be had only by complying with the conditions the legislature imposes." Elliott v. Board of County Com'rs of Lake County, 2007 S.D. 6, ¶ 17, 727 N.W.2d 288, 290. This Court has said that "[w]hen procedure is prescribed by the legislature for reviewing the action of an administrative body, review may be had only on compliance with such proper conditions as the legislature may have imposed." Appeal of Heeren Trucking Co., 75 S.D. 329, 330-31, 64 N.W.2d 292, 293 (1954); In re Appeal from Decision of Yankton Cnty. Comm'n, 2003 S.D. 109, ¶ 18, 670 N.W.2d 34, 40 (because the taxpayers did not take an appeal from the Board of Adjustment to circuit court as directed by SDCL 11-2-61, the circuit court lacked jurisdiction).

SDCL 11-2-61.1 was enacted in 2018, and it clearly prescribes the way that the Board's CUP decision must be challenged:

> Any appeal of a decision relating to the grant or denial of a conditional use permit **shall be brought under a petition, duly verified, for a writ of certiorari** directed to the approving authority and, notwithstanding any provision of law to the contrary, shall be determined under a writ of certiorari standard regardless of the form of the approving authority.

(Emphasis added.)

This language is mandatory and could not be more clear: if the Lindgrens wished to challenge the legality of the Board's decision on the Crowned Ridge CUP, they had to do so through a petition for writ of certiorari. See SDCL 2-14-2.1 ("As used in the South Dakota Codified Laws to direct any action, the term, shall, manifests a mandatory directive and does not confer any discretion in carrying out the action so directed.") Over a year after the CUP was granted, and several months after the Board's decision was affirmed by the circuit court and the judgment became final, the Lindgrens attempted to get around the clear statutory requirements by challenging the Board's action on the CUP through a declaration that the CUP is invalid and injunction to prevent the WES from operating.

The Lindgrens blame their lack of a timely appeal on the fact that Crowned Ridge held an option over the Lindgren Farm. (Appellants' Brief, pg. 18.) This argument misses the mark, for a couple reasons. First, the Lindgrens present no legal authority that excuses them from pursuing a

timely appeal under SDCL 11-2-61 because of the terms of a separate contract. "The failure to cite to supporting authority is a violation of SDCL 15-26A-60(6) and the issue is thereby deemed waived." State v. Pellegrino, 1998 S.D. 39, ¶ 22, 577 N.W.2d 590, 599. Second, this argument is belied by the Lindgrens' own actions. Apparently, the option did not prevent the Lindgrens from appearing before the Board on July 16, 2018 and voicing their opposition to the CUP. (CR 104-105.) Whether they breached their contract with Crowned Ridge or not is entirely irrelevant to whether they possessed a statutory right to appeal the Board's decision. They had such a right, and they never exercised it.

The Lindgrens also characterize their declaratory judgment action as a challenge to the County and Board's zoning power, rather than a challenge to the Board's adjudication of the CUP application. (Appellants' Brief, pg. 20.) The Lindgrens argue that this Court authorized an action seeking declaratory relief in Abata v. Pennington County Bd. of Comm'rs., 2019 S.D. 39, 931 N.W.2d 714. (Appellants' Brief, pg. 19.) The critical difference is that the plaintiffs in Abata did not seek relief in the form of invalidating or enjoining a previously granted CUP that withstood an appeal. That is precisely the relief that the Lindgrens

seek here. (CR 34, VC ¶109(9); CR 38-39, VC ¶¶ 110-111.) There is a major difference between seeking *prospective* declaratory relief, such that an allegedly invalid ordinance cannot be applied in the future, versus seeking declaratory relief that would affect a CUP that has already been granted and affirmed on appeal. The Lindgrens cite no authority from this Court suggesting that a declaratory judgment action can be used as an alternate means of challenging an existing CUP.

The Lindgrens also cite to Lake Hendricks Improvement Association v. Brookings Co. Planning and Zoning Commission, 2016 S.D. 48, 882 N.W.2d 307, and Wedel v. Beadle Co. Comm'n, 2016 S.D. 59, 884 N.W.2d 755, for the proposition that they could not challenge the constitutional validity of the zoning ordinance in a writ of certiorari proceeding because the Circuit Court's appellate jurisdiction is too narrow. (Appellants' Brief, pgs. 21-22.) These cases, and others, actually cut against the Lindgrens' argument that the relief they seek here was unattainable in a timely appeal under SDCL 11-2-61, et seq. This Court's decisions demonstrate that many zoning litigants have raised challenges relating to the alleged violation of their constitutional rights, and this Court has never expressed a reservation about ruling on such issues in the context of a

writ of certiorari appeal. See e.g. Lake Hendricks Improvement Ass'n, 2016 S.D. at ¶ 28, 882 N.W.2d at 315 (due process); Wedel, 2016 S.D. at ¶ 14, 884 N.W.2d at 759 (due process); Grant Cnty. Concerned Citizens v. Grant Cnty. Bd. of Adjustment, 2015 S.D. 54, ¶ 29, 866 N.W.2d 149, 159 (due process); Tibbs v. Moody Cnty. Bd. of comm'rs, 2014 S.D. 44, ¶ 9, 851 N.W.2d 208, 212 (equal protection); Armstrong v. Turner Cnty. Bd. of Adjustment, 2009 S.D. 81, ¶ 19, 772 N.W.2d 643, 651 (due process).

In fact, under a certiorari review, the Court is charged with evaluating the legality of the Board's decision. If the Board's decision violates a litigant's constitutional rights, it would be illegal and beyond the jurisdiction of the Board. In Lake Hendricks, this Court considered its ability to review a due process challenge by revisiting the scope of its appellate review in Tibbs:

> This result is consistent with Tibbs. Tibbs involved a writ under SDCL chapter 11-2 to review a board of adjustment's decision to grant a CUP. 2014 S.D. 44, ¶ 1, 851 N.W.2d at 210. On appeal, the petitioners asserted "that the statutory scheme applicable to the appeal procedure from a board of adjustment decision is unconstitutional in violation of the Equal Protection Clause[.]" Id. ¶ 8. They further claimed that the county failed to comply with chapter 11-2 when it enacted its ordinances, and, therefore, the board did not have authority to grant the CUP. Id. ¶¶ 8, 20. **Ultimately, this Court examined both the validity of the county's ordinances and the petitioners' claim that the statutes governing zoning appeals violated petitioners' equal protection rights. Id.**

¶¶ 19, 26. The Court properly addressed the issue because whether the ordinances were valid related directly to the Court's ability to review the board's jurisdiction to grant the CUP.

Lake Hendricks, 2016 S.D. at ¶ 28 n.3, 882 N.W.2d at 315 (emphasis added).

Likewise, the Lindgrens were not foreclosed from raising a constitutional challenge to the Codington County Zoning Ordinance in a timely appeal brought under SDCL 11-2-61, et seq. The constitutionality of the zoning ordinance is an issue that goes to the Board's jurisdiction and the legality of the Board's decision on the CUP. However, the Lindgrens are foreclosed from challenging the CUP on constitutional grounds now, because their challenge is untimely. Put simply, they failed to timely avail themselves of the sole statutory remedy for challenging a Board of Adjustment decision on a CUP.

The Lindgrens argue that the Circuit Court's dismissal forecloses any opportunity to challenge the zoning ordinance. (Appellants' Brief, pg. 30.) But the Lindgrens do not merely seek to challenge the zoning ordinance; the CUP granted under the zoning ordinance is their ultimate target. There is a reason the Legislature created specific, mandatory ways for those who claim to be aggrieved by a Board of Adjustment's CUP decisions to challenge such decisions. If the Lindgrens are allowed to proceed with their

current lawsuit and collaterally attack the CUP through a declaratory judgment or injunction action, no judgment affirming a Board's CUP decision would ever truly be final. Successful CUP applicants could never be confident that their permit will be safe years later, after they have expended significant resources.

The Lindgrens' challenge to the Crowned Ridge CUP is untimely under SDCL 11-2-61. The Circuit Court saw through the general jurisdiction disguise and correctly dismissed the Lindgren's case against the County and the Board under SDCL 15-6-12(b)(1).

B. The Lindgrens fail to state a plausible claim regarding the illegality of the County's exercise of its zoning power.

In addition to its dismissal for lack of subject matter jurisdiction, the Circuit Court also dismissed under SDCL 15-6-12(b)(5). This Court "review[s] the circuit court's decision to grant a motion to dismiss under SDCL 15-6-12(b)(5) de novo." Hernandez v. Avera Queen of Peace Hosp. (AQOP), 2016 S.D. 68, ¶ 15, 886 N.W.2d 338, 344. "'Where the allegations show on the face of the complaint there is some insuperable bar to relief, dismissal under Rule 12(b)([5]) is appropriate.'" Sisney v. State, 2008 S.D. 71, ¶ 8, 754 N.W.2d 639, 643 (quoting Benton v. Merrill Lynch & Co. Inc., 524 F.3d 866, 870 (8th Cir. 2008).

The County acknowledges that it has only those powers that are expressly conferred upon it by statute and such as may be reasonably implied from the powers expressly granted. See State v. Quinn, 2001 S.D. 25, ¶ 10, 623 N.W.2d 36, 38. However, what makes the Lindgrens' claim for relief implausible is the fact that everything about which the Lindgrens complain falls squarely within the zoning power conferred upon the County and the Board under South Dakota law. As such, the Circuit Court was correct to conclude that the Lindgrens' claims against the County and the Board fail to state a claim upon which relief may be granted, as a matter of law.

1. The County has exercised its statutory authority to enact zoning regulations.

The South Dakota Legislature has conferred upon counties the authority to determine the manner in which land is utilized withing the areas under a county's jurisdiction. Counties are empowered to prepare and adopt a comprehensive land use plan under SDCL 11-2-11 and 11-2-20. Codington County has adopted such a plan. (CR 14.) It has also adopted a zoning ordinance. (CR 14-15.) The statutory grant of power to adopt zoning ordinances is contained in SDCL 11-2-13:

> For the purpose of promoting health, safety, or the general welfare of the county the board may adopt a zoning ordinance to regulate and restrict

> the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of the yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, flood plain, or other purposes.

As part of its zoning power, a county may also authorize conditional uses 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. 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. The County has recognized a WES as a land use that is appropriate in the Ag District under certain conditions, and has enacted criteria to be used when considering WESs. The Board has been selected to evaluate CUPs. (CR 15.)

2. Enacting restrictions on Wind Energy Systems is not arbitrary, capricious or unconstitutional.

"Zoning ordinances find their justification in the legislative police power exerted for the interest and convenience of the public." Cary v. City of Rapid City, 1997 S.D. 18, ¶ 20, 559 N.W.2d 891, 895. "'[A] zoning law is a

legislative act representing a legislative determination and judgment, and like all legislative enactments a zoning law is presumed to be reasonable, valid and constitutional.'" City of Brookings v. Winker, 1996 S.D. 129, ¶ 4, 554 N.W.2d 827, 828-29 (quoting State Theatre Co. v. Smith, 276 N.W.2d 259, 263 (S.D. 1979) (further citations omitted). "The burden of overcoming this presumption is on the party challenging its legitimacy and he or she must show the ordinance is unreasonable and arbitrary." City of Colton v. Corbly, 323 N.W.2d 138, 139 (citing State Theatre at 263, and Tillo v. City of Sioux Falls, 82 S.D. 411, 147 N.W.2d 128 (1966)). Something more than abstract considerations is needed to demonstrate arbitrariness. Id. The party assailing the ordinance must show facts supporting the claim the ordinance is arbitrary, capricious, and unconstitutional. Fortier v. City of Spearfish, 433 N.W.2d 228, 231 (S.D. 1988).

The Lindgrens' theory is that the County has enacted a zoning ordinance that allows for certain effects from a WES, and by the Board approving the CUP, the Board has burdened or taken their property. The zoning ordinance actually *restricts* the effects of a WES. The adjudication of a land use application consistent with a zoning ordinance that imposes *restrictions* on a WES is not the equivalent of the Board granting a *de facto* easement over non-participants' properties or otherwise effecting a taking of

their property rights. The Lindgrens present no apposite authority that supports their *de facto* easement theory.

Similar constitutional theories were advanced and rejected in the Northern District of Illinois and the Seventh Circuit Court of Appeals in Muscarello v. Ogle County Bd. of Comm'rs, 610 F.3d 416 (7th Cir. 2010), and Muscarello v. Winnebago County Bd., 702 F.3d 909 (7th Cir. 2012). Much like the Lindgrens, Ms. Muscarello was a "pertinacious foe of wind farms." Muscarello v. Winnebago County Bd. at 912. In each case, Muscarello raised a number of concerns about the effects from a wind farm some day occupying the land adjacent to her property, including shadow flicker and noise. She alleged takings and other constitutional theories in each case, and, in each case, her claims were rejected.

Muscarello v. Ogle County Bd. of Comm'rs bears the strongest similarity to this case. Under the County's amended zoning ordinance, a wind farm obtained a special use permit to build 40 wind turbines, some of which were slated for land adjacent to Ms. Muscarello's land. She sued 42 defendants, including the county, various county officials and the wind developer. She claimed, *inter alia*, that the county's decision to grant a permit to the wind developer constituted a taking of her property without just

compensation. The district court dismissed her claim. The Seventh Circuit affirmed:

> Muscarello would have us turn land-use law on its head by accepting the proposition that a regulatory taking occurs whenever a governmental entity *lifts* a restriction on someone's use of land. We see no warrant for such a step.

Id. at 421-22 (emphasis in original).

In Muscarello v. Winnebago County Bd., the plaintiff brought a lawsuit against the County Board, the County Zoning Board of Appeals, and a number of county officials, attacking a 2009 amendment to a County's zoning ordinance that made wind farms a permitted use. Before the amendments of the Winnebago County ordinance, a property owner had to obtain a special-use permit for a wind farm. The amendments made wind farms a "permitted use," which meant that only a zoning clearance (showing compliance with the zoning code) and a building permit were needed to construct a wind farm. Justice Posner rejected Ms. Muscarello's various constitutional theories, and reasoned that Ms. Muscarello was simply trying to turn a nuisance claim against the neighbor into a constitutional claim:

> Stepping down from the dizzying heights of constitutional law, we can restate the plaintiff's contention as simply that a wind farm adjacent to her property would be a nuisance. . . . That is a more sensible conceptualization of her claim than supposing as she does that she has a property right in her neighbors' use of their lands.

Muscarello v. Winnebago Cnty. Bd., 702 F.3d at 914.

Ultimately, Justice Posner concluded:

> There is, in sum, no merit to the plaintiff's claim that the ordinance as amended in 2009 violates her constitutional rights. It is a modest legislative encouragement of wind farming and is within the constitutional authority, state as well as federal, of a local government.

Id. at 915.

Conceptually, the Lindgrens' contentions in this case are weaker than those made by Ms. Muscarello in her case against Winnebago County and its officials that failed to state a claim. Ms. Muscarello claimed that the county took legislative actions that made it *easier* for neighboring properties to obtain a permit, and thereby effected a taking, damaged her property, or otherwise assaulted her constitutional rights as a landowner. The appellate courts disagreed, and concluded that the legislative or adjudicative actions of county government did not impact Ms. Muscarello's constitutional rights.

Here, the County has legislatively determined that a WES is a land use that qualifies as a conditional use and, therefore, it must meet a litany of criteria before approval can be granted. As described above, the County has the statutory authority to enact zoning ordinances and prescribe standards and guidelines to evaluate proposed land uses, and it may designate the Board to adjudicate whether such land

uses are appropriate. SDCL 11-2-13; SDCL 11-2-17.3; 11-2-17.4. In doing so, the County is *restricting* a landowner's ability to use his or her land as he or she pleases. With specific regard to a WES, the County enacted provisions that set additional restrictions as to shadow flicker and noise. It made it *harder* to develop a WES. This makes the Lindgrens' claims more dubious than those of Ms. Muscarello in her dismissed lawsuits.

As suggested in the Muscarello decisions, the Lindgrens' theory is counter-intuitive. The Lindgrens challenge the County's zoning ordinance under a number of grounds that relate to the standards the County adopted for WESs. In paragraphs 58-75 of their Verified Complaint, they raise allegations about how the restrictions that the County has established for WESs on things like setbacks, noise, and shadow flicker are insufficient to protect their property rights. (CR 16-22.) They seek a declaration that the Ordinance, as it relates to the permitting of a WES, "exceeds the constitutional limits of the Legislature's zoning authority, as delegated to Codington County." (CR 33, VC ¶109(5).) Stated another way, the Lindgrens believe the County did not zone enough.

Completely lost in the Lindgrens' pleading is the fact that zoning ordinances - like those that the Lindgrens

challenge - impose *restrictions* on landowners that would not otherwise exist. Their position begs the question: if the standards created by the County are deemed invalid, what standards remain in place to govern a WES?

The answer is very few. Such criteria are primarily up to the County to legislate. "A significant function of local government is to provide for orderly development by enacting and enforcing zoning ordinances." Schafer v. Deuel Cnty. Bd. of comm'rs, 2006 S.D. 106, ¶ 12, 725 N.W.2d 241, 245. What makes the Lindgrens' theory implausible is that it represents the exact opposite of the constitutional concern associated with zoning ordinances. The concerns about a County's constitutional authority to adopt zoning regulations does not turn on the adequacy of an ordinance's protection of neighbors. Neighbors can avail themselves of nuisance and trespass laws against adjacent landowners who utilize their property in a tortious, unlawful or harmful manner. Instead, this Court has recognized that allowing "the use of a person's property to be held hostage by the will and whims of neighboring landowners without adherence or application of any standards or guidelines" is repugnant to the due process clause of the Fourteenth Amendment. Cary, 1997 S.D. at ¶¶19-22, 559 N.W.2d at 895.

In that way, the Lindgrens - like Ms. Muscarello in Illinois - ask the Court to turn its authority on its head, elevating the will and whims of neighbors over a landowner's property rights. Landowners who wish to contract with an entity and allow wind turbine towers to be erected on their property have constitutional rights that are impacted when a county attempts to restrict the use of their land through zoning. Any zoning ordinance restricting landowners' use of their own property under a conditional use restriction (i.e., barring the use unless approved with conditions and a permit) must specify the approving authority and define the criteria that authority will assess in determining whether to approve the proposed land use. By enacting zoning ordinances which govern WESs, the County is providing standards and guidelines to permissibly evaluate, and, depending on the applicant's ability to comply, conditionally allow or preclude the proposed land use. This is what the County is required to do by law. See SDCL 11-2-17.3 and 11-2-17.4.

It is not arbitrary, capricious or unconstitutional for the County to adopt standards to govern WESs. It is the County's legislative prerogative to adopt such standards, even if the Lindgrens are not fond of them and believe they should be more stringent. The Circuit Court

correctly dismissed the Lindgrens' complaint under SDCL 15-6-12(b)(5).

CONCLUSION

For these reasons, the County and the Board respectfully urge the Court to affirm the Circuit Court's dismissal of the Lindgrens' case with prejudice.

Respectfully submitted this 3rd day of April, 2020.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief complies with SDCL 15-26A-66(4). This Brief is 24 pages long, exclusive of the Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service, is typeset in Courier New (12 pt.) and contains 5,052 words. The word processing software used to prepare this Brief is Word Perfect 12.

Dated this 3rd day of April, 2020.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Appellees Codington County and Codington County Board of Adjustment, hereby certifies that on the 3rd day of April, 2020, a true and correct copy of **BRIEF OF APPELLEES CODINGTON COUNTY AND CODINGTON COUNTY BOARD OF ADJUSTMENT** was electronically transmitted to:

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and the original and two copies of **BRIEF OF APPELLEES CODINGTON COUNTY AND CODINGTON COUNTY BOARD OF ADJUSTMENT** were mailed by first-class mail, postage prepaid, to Ms. Shirley Jameson-Fergel, Clerk of the Supreme Court, Supreme Court of South Dakota, State Capitol Building, 500 East Capitol Avenue, Pierre, SD 57501-5070. An electronic

version of the Brief was also electronically transmitted in Word Perfect format to the Clerk of the Supreme Court.

Dated at Aberdeen, South Dakota, this 3rd day of April, 2020.

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