IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

TIMOTHY LINDGREN and LINDA LINDGREN,
Appellants,

v.

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.

 # 29229
14CIV19-000303

Appeal from the Circuit Court, Third Judicial Circuit
Codington County, South Dakota
The Honorable Carmen Means, Presiding

APPELLANTS' REPLY BRIEF

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POINTS IN REPLY

This writing is organized around three points, in reply to the arguments of Codington County (and Board), South Dakota Public Utilities Commission (PUC), and Crowned Ridge Wind I, LLC (Crowned Ridge):

I. The complaint is not an impermissible collateral attack on the permits issued by the Board and the PUC.

II. This case offers stark contrast to the two *Muscarello* cases decided by the U.S. Court of Appeals, Seventh Circuit, as extensively discussed in the briefs of each appellee.

III. Absent a negotiated easement, the Zoning Power does not empower the Board (or the PUC) to permit or license the casting of "Effects" upon Appellants' home and farm.

ARGUMENT

I. The complaint is not an impermissible collateral attack on the permits issued by Board and the PUC.

Appellees each assert that the trial court lacked subject matter jurisdiction, as the Lindgren complaint is nothing more than a collateral attack on a zoning matter decided by the County's Board of Adjustment in mid-2018. These assertions are buttressed by misrepresenting what the complaint actually seeks to accomplish.[1]

With the Board's brief as an example, at 7, Appellants purportedly asked the Court to "declare that the Board's grant of the CUP was invalid and . . . to enjoin construction or operation of the WES," referencing verified complaint ¶ 109(9) and ¶¶ 110-111. Given the immense scope of the project – covering 53,186 acres of land in two

[1] The complaint, at VC ¶¶ 19-21, challenges the Zoning Power (and other powers) delegated to the agency defendants. If creating a burden on the Lindgren Farm is within those powers, then a declaration of taking, confirming the first prong of the *Williamson County* test (discussed at 9-11, *infra*) is met, seems appropriate. If those powers fall short, on the other hand, the permits issued with specific uses (burdens) placed on the Lindgren Farm would seem void to that extent, with injunctive relief thus being sought.

counties, and 130 wind turbines, each having some interface or close proximity with what must be dozens upon dozens of Non-Participant properties [2] – our reading of the complaint is *entirely* to the contrary. The passages cited in Board's brief focus entirely on the Lindgren Farm, and seek relief *only* as to the Lindgren Farm (including the home), being just one of many Non-Participants embraced by proximity to this project.

The Board may have acted fully in line with what the *Zoning Ordinance* provides, but whether this squares with the *Zoning Power* (as delegated by the state) is a separate question. As observed in *Shad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981):

> The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities. But the zoning power is not infinite and unchallengeable; it "must be exercised within constitutional limits." [citations omitted]

Shad, frankly, is an adult bookstore zoning case, a proposed use beyond the facts here; but the expressed limits of the zoning power remain applicable, and are not materially different from those expressed in *Village of Euclid*.[3]

Bingham Farms Trust v. City of Belle Fourche, 2019 S.D. 50, 932 N.W.2d 916 pertains to the collateral attack claims, being an appeal from the trial court's dismissal for lack of subject matter jurisdiction. Appellant (Bingham) sought to challenge a special assessment lien imposed by the City for vegetation removal on a lot within Belle Fourche. The lien was approved by resolution and published in City's legal newspaper.

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[2] The Lindgren Home was designated receptor CR1-C37-P, while covered by the "option," later becoming CR1-C37-NP following lapse without exercise.

[3] *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926): "[B]efore the ordinance can be declared unconstitutional, [it must be said] such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Appellees say the Zoning Ordinance restricts Crowned Ridge. The *place* of restrictions is key, being upon and over Appellants' home and property, imposing burdens upon that place, *permanently*. The wind farm's buffer area floods onto Appellants' property, without Appellants' consent or privity.

Although an appeal could have been taken within 20 days of publication, the property owner at the time of imposition failed to appeal the assessment. Appellant purchased the lot without notice of the lien, and was unable to resolve the matter with the City. Bingham brought action for slander of title and a declaration the lien is invalid.

On City's motion for dismissal, the trial court ruled for defendant, the 20-day appeal time having long since expired. As such, the lien could not be collaterally attacked. *Id.*, ¶ 13. On appeal, this Court determined the complaint invoked the power to quiet title,[4] and declaratory relief is within a class "of cases that may be heard and determined under express statutory authority." *Id.*, ¶¶ 16, 17. The Court concluded:

> By accepting the City's argument and viewing Bingham's causes of action exclusively as a prohibited collateral attack on the lien, the circuit court perceived the limits of its jurisdiction too narrowly. We must, therefore, reverse the court's determination that it lacked subject matter jurisdiction because Bingham's claims involve considerations which are broader than simply challenging the creation of the lien, and the court has the authority to consider the merits of Bingham's argument that the lien is not enforceable against it.

Bingham is applicable to this case. The language of the Lindgren complaint is long and verbose, even overwrought (at times). But an intended claim is that a post-hearing development (lapse of the option) may have freed the Lindgren Farm from the *Effects Easement*, but it remains fully burdened by the *Effects*, as firmly imposed by the Zoning Power (and subsequently adjusted under the Facility Siting Power).[5]

Appellants had intended to invoke the court's general jurisdiction, pleading the Board had no jurisdiction to exercise the Zoning Power in the precise way done here.[6]

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[4] Appellants attempted likewise in this case; see VC ¶¶ 32, 109(3).
[5] Appellants, *inter alia*, seek to apply SDCL 43-13-2(8) to Crowned Ridge's planned use with the Effects now about to begin.
[6] The complaint speaks only for the Lindgren Farm and Appellants, not others who may be similarly situated.

Crowned Ridge designed the wind farm, and pursued that design before the Board, proposing, *inter alia*, that the "Effects" (Shadow Flicker and noise, two prominent concerns) be a permanent burden upon the Lindgren Farm. This would be understandable *if* Crowned Ridge held an easement for that purpose, but it does not – having nothing more than an option at the time of evidentiary hearings.[7] The irony is that Crowned Ridge, having *once* held an option for the "Effects Easement," didn't miss a single beat as the option lapsed. What was once *possible* by the terms of the option, if timely exercised – is now an *assured reality.* The Board has provided Crowned Ridge with a CUP. Appellee is now assured of enjoying the use of the Lindgren Farm (other than not placing wind turbines there), despite the lack of an easement.

Appellees essentially ignore that the Lindgren Farm, at one time and at *all* times material to the underlying proceedings, was bound by the Effects Easement option.[8] Each argues the lack of subject matter jurisdiction (as an improper collateral attack), and the asserted failure of the complaint to state *any* claim on which relief can be granted. Appellees agree the Lindgren complaint is not yet ripe, but also comes much too late.[9]

The arguments advanced by Appellees run along these lines - if a neighbor takes issue with the impact a given (nearby) zoning project will have on his or her land, invariably that issue must be presented first to the Board, and be further pursued via all available appeal channels provided by the legislature. Ordinarily, that may be so. But

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[7] The option expired in June 2019, along with the inchoate "Effects Easement," Section 5.2, as quoted in VC ¶¶ 36-37.

[8] Crowned Ridge, at 7, makes light of Lindgrens' claim of feeling "contractually constrained" from opposing the project. Exhibit 1 to Lindgren Affidavit, § 11.4, requires "Owner shall cooperate with [Crowned Ridge] as necessary to obtain any governmental . . . approvals or permits . . ." while § 11.6 provides for "no interference." Might avid opposition at the Board level be deemed a breach, implicating indemnity under § 16.2?

[9] If *ripeness* is the problem, future remedies seem foreclosed by dismissal with prejudice.

when the "impact" is that of *taking* the neighbor's own property rights, the Board is not the obligatory opening forum where both the zoning power is to be resisted *and* the constitutional rights of non-applicant property owners must be first resolved.

Appellants did not actively participate before the Board, and did not seek a writ for review, and also did not seek to timely intervene before the PUC. The option, while viable, provided too many risks, while affording Crowned Ridge vast power over the Lindgren Farm. Then, by June 2019, the option became disposable. This post-permit development (long after the window for review by writ of certiorari was nailed shut, and after the PUC's intervention right and evidentiary record was also closed) is certainly one of the grounds for the complaint.

The opposing arguments ignore the statutory prerogatives of a property owner, including SDCL 43-2-1 – "the right of one or more persons to possess and use [property] to the exclusion of others," and the protection of property rights by provisions of both state and federal constitutions.[10] The Wind Lease & Agreement (or option), as referenced in the complaint,[11] had honored the rights of fee owners, given the design with two wind turbines on the Lindgren Farm.[12] In time, without explanation to Appellants, Crowned Ridge changed strategies, allowing the option to lapse in June 2019. Meanwhile, Crowned Ridge garnered the approvals of *both* the Board and the PUC, for maintaining a specific use of the Lindgren Farm (and home) as a buffer, each agency permitting the dumping of the Effects there on a permanent basis.

The project's design approved by the Board is not the same as ultimately reviewed and approved by the PUC. Removal of the two turbines planned for the

[10] See VC, ¶¶ 26-29.
[11] See VC, ¶¶ 31-40.
[12] Receptor CR1-C37-P was projected for 27:49 of Shadow Flicker, VC ¶ 78.

Lindgren Farm *may* have reduced the duration or intensity of the resulting Effects, but did not eliminate them.[13] Changes to the project (with the Lindgren Farm being ranked as "Non-Participating") may have stemmed from Expert Hessler's testimony to the PUC concerning noise compliance: noise predictions for the Lindgren Home were at 46.5 dBA, as noted in the complaint (see ¶ 98-100, including n. 14 and 15). The PUC *itself* selected the measurement point for noise (the home) and the maximum noise level (45 dBA), even as the Zoning Ordinance in Codington County selected a *different* measuring place (the property line of the home)[14] and permissible noise level (50 dBA).[15] The PUC now claims to play no role in perfecting Crowned Ridge's use of the Lindgren Farm for these Effects, but with three different (and inconsistent) measuring points being mandated, the complaint effectively asserts otherwise.

The Board and the PUC seem like a tag team, each promoting the location of a gigantic wind farm, even one with inadequate buffer areas. Each agency approves specific, future burdens (as limits) for the Effects flowing from this wind farm. As a result, Appellants would argue, fewer easements are needed, as the burden of Effects is shifted to Non-Participants by edict, including Appellants, in particular.

If this reflects a lawful use of the Zoning Power, backstopped by PUC's Facility Siting Permit, then the required governmental permits function as a means of taking. Ultimately, the complaint hopes to firmly nail down the first prong of *Williamson County* (discussed *infra*), thus allowing the Lindgrens to pursue damages accordingly. Alternatively, if the unlimbered Zoning Power is unable to require that mere neighbors to a project *must accept some government-determined share* of "Effects," then, to the extent

[13] See VC, ¶ 103, n. 17, Crowned Ridge's project as submitted to the PUC.
[14] Even as the CLUP mandated the measuring point to be the WES parcel's line.
[15] Zoning Ordinance 68, as recounted in VC ¶ 65.

that an unlawful burden falls upon the Lindgren Farm, the complaint seeks to void the essential permits to that same extent.

II. This case offers stark contrast to the two *Muscarello* cases decided by the U.S. Court of Appeals, Seventh Circuit, as extensively discussed in the briefs of each of the appellees.

Two reported federal cases involve one Patricia Muscarello,[16] filed against the zoning authorities in two Illinois counties where plaintiff's farms are located, now warmly embraced within the briefs of each Appellee. The cases were dismissed by U.S. District Judge Kapula, Northern District of Illinois, but have little in common with the plight of Appellants, whose claims have been dismissed "with prejudice."[17]

Muscarello lives in Arizona, with farms in two adjoining northern Illinois counties – Ogle and Winnebago. The current use is not clear other than plaintiff didn't live on either at the time of her actions.[18] Further, no developer had yet proposed to erect any wind turbines, much less a wind farm, near plaintiff's farms.[19] While future construction near Muscarello's farms remains a possibility, the absence of plans meant no specific, predicted burden or effect on either farm could be asserted.

In the case of the Lindgrens, however, the wind farm is built! Due to Crowned Ridge's design and proximity, the home (otherwise known as receptor CR1-C37-P, later recast as CR1-C37-NP) shall soon experience "Effects" from the wind farm's operations. Challenges in the future seem entirely foreclosed, given the dismissal "with prejudice." If

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[16] *Muscarello v. Ogle County Board of Commissioners*, 610 F.3d 416 (7th Cir. 2010), and *Muscarello v. Winnebago County Board*, 702 F.3d 909 (7th Cir. 2012); further reference to these cases will use the name of each defendant county.

[17] Appendix to opening brief, "Order Granting Defendant's Motion to Dismiss and Granting Motion for Costs."

[18] Appellants must now live just over 1,600 feet from the nearest wind turbine.

[19] Each Appellee asserts the claims of the Lindgrens are not ripe, even as Crowned Ridge, at 2, notes the wind farm "was completed in early 2020."

a similar day ever dawns for Ms. Muscarello, on the other hand, she might yet have *her* day in court, as the U.S. Court of Appeals, in each instance, focused on the ripeness of her claims. The Muscarello complaints were not dismissed "with prejudice."

Ms. Muscarello (unlike the Lindgrens, at least during the period of 2014 to 2019) was also never in privity of contract with a wind developer. Additionally, she fought with each of the Illinois counties, at each step of the way, as the governments developed changes to the wind farm provisions in their respective zoning ordinances. Under the facts cited by each author (Circuit Judge Posner in *Winnebago County*, Circuit Judge Wood in *Ogle County*) the threat to Ms. Muscarello's farms in the two counties seems rather remote or distant, if not speculative.

Contrast this with the Lindgrens' situation – *the neighboring wind farm has now been built*. Even with the lapsed option and the removal of two planned turbines, the wind farm will permanently spew Effects onto and into their home and across their lands, at a distance of just over 1,600 feet. Crowned Ridge's claimed legal right in doing so is thus pinned *entirely* on the CUP for this land use, along with the PUC's Facility Siting Permit, not on the expired option for easement.[20]

In *Ogle County*, Muscarello's litigation blast asserted violations of her rights under the U.S. and Illinois Constitutions, "a taking without just compensation," a denial of due process and of equal protection. Additional claims arising under Illinois statutory and common law were included. The federal trial court, however, dismissed each as "unripe" – the wind farm not having been built, noting that "Muscarello would have us turn land-use law on its head by accepting the proposition that a regulatory taking occurs

[20] Crowned Ridge rejects that an easement is *required* in order to convert a neighbor's home into a buffer zone, as the inchoate Effects Easement had contemplated. SDCL 43-13-2(8), is steadfastly ignored also in each Appellee's brief.

whenever a governmental entity lifts a restriction on someone's use of land." *Ogle County*, 610 F.3d at 421-22. Circuit Judge Wood then cites *Gagliardi v. Village of Pawling*, 18 F.3d 188 (2d Cir 1994), to the effect that "residential landowners had no property interest in the enforcement of zoning laws on adjacent property."

By contrast, Appellants' claims are not based on the permitting of wind turbines on neighboring lands. Rather, this case is based on the permitting of wind turbines on nearby lands, but with inadequate buffer zone concepts,[21] so much so that some substantial part of the "Effects" must be placed (and expressly permitted as such) upon and over the heads of Appellants themselves, including both home and land. This is not a mere "lifting a restriction on someone's use of land," as *Ogle County* observes. Despite a design with close proximity, Crowned Ridge has plunged bravely ahead, without the benefit of an Effects Easement as to the Lindgren Farm.

Muscarello brought her cases in the Northern District of Illinois. The most compelling aspect of Judge Wood's writing in *Ogle County* is this excerpt:

> Even if we thought that Ogle County might have "taken" Muscarello's property when it issued the permit to [a wind developer], Muscarello could not seek recovery in the way she has proceeded here. As we have observed in the past, in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985): 'the Supreme Court articulated a special ripeness doctrine for constitutional property rights claims which precludes federal cases from adjudicating land use disputes until (1) the regulatory agency has had an opportunity to make a considered definitive decision, and (2) the property owner exhausts available state remedies for compensation.'

[21] The setbacks and buffer areas are *fully* compliant with the Zoning Ordinance, but not the CLUP. Regardless, is the Zoning Ordinance – by permitting Effects on Non-Participants - within the meaning of a lawful Zoning Power?

Appellants have thus far maintained this complaint in state court, but the "special ripeness doctrine" of *Williamson County* is of some interest – and indirect application – to this case.

Williamson County involved damage claims of a land developer's assignee over the application of new zoning standards, restricting residential development to lower density standards. A federal court case followed, invoking 42 U.S.C. § 1983, alleging the planning commission had taken property without just compensation. On reaching the Supreme Court in 1985, a two-prong "special ripeness doctrine" was fashioned for such takings cases under the Fifth Amendment of the U.S. Constitution: First, the government entity charged with implementing the regulations must have reached a final decision regarding applying the regulations to the property at issue. (This prong had not been met in *Williamson County*, as a variance could be pursued.) Second, the property owner may not claim a violation of the "just compensation clause" until the state's procedure for providing such compensation has been employed and found lacking. (This also had not been met by *Williamson County's* plaintiff.) Years later, the Court in *San Remo Hotel v. City of San Francisco*, 545 U.S. 323 (2005), would add to this doctrine that legal and factual issues resolved in state court proceedings could not be re-litigated in federal court.

The *Williamson County* doctrine survived intact until the June 2019 decision in *Knick v. Township of Scott*, 588 U.S. ___, 139 S.Ct. 2162, 204 L.Ed.2d 558 (2019). The township adopted an ordinance requiring that property owners afford access during daylight hours to those wishing to visit old cemeteries. Mrs. Knick's small farm happened to include such a potential site, but the owner stubbornly refused to allow access. Initially challenging the ordinance in state court, Mrs. Knick filed a takings claim

in federal court. Based on *Williamson County*, Mrs. Knick was dismissed at the trial court level, and again in the Third Circuit. In the interests of brevity, the impact of *Knick* cannot be fully explored here, beyond observing that the majority opinion of Chief Justice Roberts, reversing the Third Circuit, and overruling *Williamson County*, is a reassertion of the Court's interest in federal takings jurisprudence, with implications for state-sponsored land use regulations, exercised in the name of the police power. This seems particularly apt where the regulations allow specific burdens upon the property interests of those not invoking the jurisdiction of the regulatory power.

III. Absent a negotiated easement, the Zoning Power does not empower the Board (or PUC) to permit or license the casting of "Effects" upon Appellants' home and farm.

Neither *Williamson County* nor *Knick* has much to say about the immediate issues presented to this Court. The dismissed complaint seeks neither monetary compensation nor claims inverse condemnation. It does not implicate the second prong of *Williamson County*. *Knick* dissolved the second prong (state litigation requirement) of *Williamson County*, but the first remains viable: *a final decision applying zoning regulations to the property at issue*.

The zoning applicant neither owns nor has other permanent interests in the Lindgren Farm. The complaint objects to zoning regulations, and their application to the Lindgren Farm, based on nothing more than an "option" that subsequently expired. Due to design, proximity *and* governmental licensure, Appellants must now permanently accept the Effects.

The complaint seeks to challenge the Board's actions. The Board may have conformed to the Zoning Ordinance, but is at odds with the County's CLUP.[22] The main focus of the complaint is the overwhelming scope of the Zoning Power, in the hands of the Board. As now employed to approve large-scale wind farm projects, with the casting of Effects on nearby properties not in true, permanent privity with the creator of such Effects, is *this* Zoning Power, exemplified by *this* Zoning Ordinance, what *Village of Euclid* envisioned as lawful?[23] If so, the impact of *Knick* becomes apparent: "A property owner may bring a takings claim under [42 U.S.C.] § 1983 upon the taking of his property without just compensation by a local government." (slip op., 23.)

The ordinance examined in *Knick*, requiring the landowner grant access to others during daylight hours, reads (in our view) like a "*de facto* easement," a term used in the complaint in reference to the CUP as well as the PUC's Facility Siting Permit.[24] Here, governmental edicts – ranging from zoning ordinances, permits, and licenses, whether issued from Watertown or Pierre – require that the fee owner accept the burden of the Effects of wind farms, consent being entirely optional.[25] By such edicts, Crowned Ridge is assured the enjoyment of use over Appellants' property, both home and lands.[26]

When the State's zoning power is used conditionally, demanding an easement from the zoning applicant, the government may be engaged in a taking of property *if the*

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[22] The CLUP directs measurement of sound at the property line of the parcel with the wind turbine. Is the County free, by ordinance, to divert to measuring sound at the property line of the Non-Participant's residence? The PUC's action in EL19-003 establishes the proper measuring point for Effects – *including noise* - as the Non-Participant's home.

[23] *Village of Euclid v. Ambler Realty Co*., 272 U.S. 365 (1926).

[24] See Verified Complaint, ¶¶ 14, 21, 59, and 63, among others.

[25] Consent being reserved for "Participants," compensated also as hosts for WES.

[26] The wind farm's life is estimated at more than 20 years; if not a *de facto* easement, enjoyment of use for the statutory period likely ripens to a prescriptive easement. *Rotenberger v. Burghduff*, 2007 S.D. 19, 729 N.W.2d 175.

exaction is overly onerous, as was determined to be the case in both *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). However, reported cases approving the use of the State's zoning power, imposing specific, measurable burdens on the adjacent land of neighbors, remain elusive.[27] Crowned Ridge initially represented it held an *easement* for the Lindgren Farm, an assertion maintained during the adjudicatory steps before the Board and the PUC. In the end, no such easement was actually secured, an outcome entirely in the hands of Crowned Ridge and the design for this wind farm. Thus, the factual claims made to governmental agencies are now, *at least to that extent*, untrue. There is no easement for the Lindgren Farm, but there *will* be Effects received by the Appellants.

Assuming that the option (executed 2014, expiring 2019) vested Crowned Ridge with a right to pursue a CUP as to the Lindgren Farm, then does not the lapse of that option undercut that very same premise, even long after the time for review by writ has expired? The Board made little if any inquiry about easements or options in any event. Without due inquiry as to land use rights,[28] the Board's own decision becomes *the* instrument of burden over the estates of Non-Participants.

Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection, 560 U.S. 702, 713 (2010), offers a summary of recent takings jurisprudence:

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[27] Demanding an exactment from neighbors who seek nothing from the zoning authority seems a pointless exercise. Imposing an easement on unwilling neighbors seems even more egregious. Hence, a dearth of such extreme zoning power cases seems obvious. Yet, with German wind farm standards now being applied to South Dakota land rights, this is where Appellants now find themselves.

[28] Affidavit of Zachary W. Peterson (September 30, 2019), includes Ex. A, minutes of Board of Adjustment, July 16, 2018, with excerpt, R 107: "Individual agreements between the applicant and landowner are not part of the Planning Commission's [sic] review as it is a civil issue." The Board didn't want to know, obviously. Appellants intend to make such "agreements" (or the lack thereof) a civil issue – in this very case.

> The Takings Clause – "nor shall private property be taken for public use, without just compensation," U.S. Const., Amdt. 5 – applies as fully to the taking of a landowner's riparian rights as it does to the taking of an estate in land . . . . Moreover, though the classic taking is a transfer of property to the State or to another private party by eminent domain, the Takings Clause applies to other state actions that achieve the same thing. Thus, when the government uses its own property in such a way that it destroys private property, it has taken that property . . . . Similarly, our doctrine of regulatory takings "aims to identify regulatory actions that are functionally equivalent to the classic taking." *Lingle v. Chevron USA Inc.*, 544 U.S. 528, 539, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005) Thus, it is a taking when a state regulation forces a property owner to submit to a permanent physical occupation, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425-426, 102 S.Ct. 3164, or deprives him of all economically beneficial use of his property, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

Stop the Beach further noted the Takings Clause is not addressed to the action of a specific branch or branches of government: "In sum, the Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking." *Id.*, at 715.

Perhaps it *is* a proper mission of governments to advance or encourage wind energy development by all means necessary. The complaint sought to determine whether such a mandate includes the approval of designs requiring a non-consensual use of homes and land as buffer area, given the nature of the Effects exuded by a wind farm. If reflective of the Zoning Power in lawful measure,[29] then, no matter how grand the purpose, how laudable the intent, this abrasive use comprises a *taking* of land interests. Zoning applicant's own instrument, extending the "Effects Easement" to neighbors in the role of Participants, speaks loudly as to the invasive nature of the "Effects," about to be cast on those not in privity, by pure force of permitting edicts.

[29] Or, in the case of the PUC, the permitting function under SDCL 49-41B-4, *et seq*.

"State, by *ipse dixit*, may not transform private property into public property without compensation."[30] This directive pertains to both the Board and the PUC, if issuing permits that lay burdens on land the fee owner does not wish to accept. If state and local governments must promote wind farms, via permits that transform nearby homes and lands into mere buffer areas, where the "Effects" from gigantic wind turbines may permanently dwell alongside of unwilling Non-Participants, the duty to compensate for such servitude is warranted. If not a proper mandate of government, or a lawful use of Zoning Power, however, having invoked the court's general jurisdiction, this kind of permitting largesse, at long last, may be curtailed.

CONCLUSION

Appellants renew their request for reversal of the Order of December 20, 2019.

Respectfully submitted:
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Date: April 17, 2020

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I certify Appellant's Reply Brief complies with the requirements set forth in South Dakota Codified Laws. This brief was prepared using Microsoft Word 2010, Times New Roman (12 point), and contains 4,892 words, excluding table of contents, table of authorities, and certificates of counsel, having relied on the word and character count of the word processing program to prepare this certificate.

Date: April 17, 2020

/s/ A.J. Swanson

[30] *Stop the Beach Renourishment*, 560 U.S. at 715.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date below, Appellant's Reply Brief in Appeal # 29229, was served via electronic mail upon each of the following as counsel for Defendants and Appellees herein, at the addresses stated below:

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Further, the original and two copies of Appellant's Reply Brief was transmitted via U.S. Mail to the Clerk of SOUTH DAKOTA SUPREME COURT, 500 E. Capitol, Pierre, SD 57501, after filing via electronic service in word format to the Clerk of the South Dakota at: SCClerkBriefs@ujs.state.sd.us.

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