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' BRIEF

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NOTICE OF APPEAL FILED JANUARY 10, 2020

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INTRODUCTORY STATEMENT

Plaintiffs and Appellants, Timothy Lindgren and Linda Lindgren, are referenced herein as "Lindgren," or "the Lindgrens," while their Codington County farm of 240 acres, a few miles south of South Shore, is identified as the "Lindgren Farm." Codington County, having adopted, by its county board, the amended legislation comprising the Zoning Ordinance, is the "County," while the Codington County Board of Adjustment, having issued the conditional use permit (CUP) referenced in the caption, is the "Board." The wind farm developers, Crowned Ridge Wind, LLC and several affiliates, with interests in the identified CUP (issued in July 2018), are collectively referenced herein as "Crowned Ridge," this being also the wind farm's name now under construction in Codington and Deuel Counties. Because of the project's size, the jurisdiction of the South Dakota Public Utilities Commission ("PUC") was invoked also, resulting in the issuance of a Facility Siting Permit, Docket EL19-003, in July 2019.

In August 2019, the Lindgrens commenced their verified complaint for declaratory judgment against defendants, serving also the Attorney General's office. Each of the defendants responded with motions to dismiss, citing either Rule 12(b)(1) or (5) (or both) as grounds. The motions were heard on December 9, 2019, resulting in the trial court's bench ruling granting the motions and allowing also the PUC's motion for costs under SDCL 21-24-11. This trial court's record, comprised of a lengthy verified complaint (40 pages, 110 paragraphs, plus several exhibits), motions, various affidavits, and attached exhibits, and a transcript of the December 9 argument, will be cited as "R" and page. In the Statement of Facts, citation will be given also to the relevant paragraph of the verified complaint ("VC ¶").

In administering the Zoning Ordinance, Defendants generally identify a landowner participating in a wind farm project – by means of providing a wind easement as referenced in SDCL 43-13-16, *et seq*. – as a "Participant" or "Participating Landowner." Those close to or within the boundaries of a wind farm, not in privity of contract with the developer, are "Non-Participants." This brief (and the Complaint) use these terms likewise, relating Appellants' journey from that of Participants to the ranks of Non-Participants, even as the Lindgren Farm and Appellants' home remain within the Project's grasp, as designed by Crowned Ridge.

JURISDICTIONAL STATEMENT

The circuit court issued one order, December 20, 2019 (Appendix), dismissed the complaint with prejudice, and granted the PUC's motion for costs, Notice of Entry following on December 26, 2019. Notice of Appeal was filed January 10, 2020 (R 348). This Court has jurisdiction pursuant to SDCL 15-26A-3.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

A. Whether the trial court erred in concluding it lacked jurisdiction to consider the declaratory relief sought by Plaintiffs?

The trial court's order of December 20, 2019 granted each of the defendants' motions, with prejudice, based in part on the assertion the Circuit Court has no subject matter jurisdiction to consider Plaintiffs' complaint.

Abata v. Pennington County Bd. of Com'rs, 2019 S.D. 39, 931 N.W.2d 714
Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)
Wedel v. Beadle County Comm'n, 2016 S.D. 59, 884 N.W.2d 755
SDCL 21-24-3
S.D. Const. article V, § 1
SDCL 15-6-12(b)(1)

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?

The trial court's order of December 20, 2019 also granted the motions under SDCL 15-6-12(b)(5), failure to state a claim for relief.

Bingham Farms Trust v. City of Belle Fourche, 2019 S.D. 50, 932 N.W.2d 916, 920.
Schafer v. Deuel County Bd. of Com'rs, 2006 SD 106, 725 N.W.2d 241
S.D. Const. article V, § 1
SDCL 15-6-12(b)(5)

C. Whether the trial court erred in dismissing the Complaint on the grounds Plaintiffs' exclusive relief was a petition for writ of certiorari under SDCL 11-2-61, rather than statutory and constitutional grounds within the general jurisdiction of the Circuit Court?

The trial court's order of December 20, 2019, as a dismissal with prejudice, implies no remedy can exist for Plaintiffs' claims based on statutory and constitutional grounds as expressed in the complaint, invoking the circuit court's general jurisdiction, unless joined and timely made in the form of a petition for writ of certiorari under SDCL 11-2-61, *et seq*.

State, Dept. of GF&P v. Troy Township, 2017 S.D. 50, 900 N.W.2d 840
SDCL 43-13-2(8)
S.D. Const. article V, § 1

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

The trial court granted defendant PUC's motion for costs with no further findings or conclusions as to why such relief is warranted. An affidavit of PUC, seeking staff time and travel costs, was submitted subsequent to the notice of appeal, with objections being filed.

Ridley v. Lawrence County Com'n, 2000 S.D. 143, 619 N.W.2d 254
SDCL 15-17-51

STATEMENT OF THE CASE

Appellants filed their verified complaint for declaratory judgment on August 28, 2019. The complaint focuses on the history and circumstances of the Lindgren Farm and the owners of such property, both fully ensnared within the boundaries of a large wind farm project, Crowned Ridge Wind I, now under construction. Intending to invoke the

circuit court's general jurisdiction,[1] the action below focused on the legislature's powers delegated to the agency defendants, and whether such powers, as exercised under and within the purported licensing or permitting jurisdictions of both County and PUC, resulted in creating a *de facto* easement upon and over the Lindgren Farm, in close proximity to the wind farm project.[2]

The complaint was served on the Attorney General (R 95) and each of the defendants or their appointed agents. Each defendant responded with a motion to dismiss. The PUC's motion, in addition to seeking an award of costs (citing SDCL 21-24-11), seeks dismissal under Rule 12(b)(5), as the "Complaint is completely devoid of well-pleaded factual allegations." R 68. The motion asserts the complaint is premature and not ripe, as the Crowned Ridge Wind I project is not yet built and thus it is impossible to know whether noise and shadow flicker will cause damage to Plaintiffs. R 64. The PUC's motion contends Appellants' failed to exhaust their administrative remedies. R 65.

The motion of County and Board of Adjustment cites Rule 12(b)(1) and (5), and is supported also by counsel's affidavit, sponsoring, as Exhibit A, the minutes of the Board for July 16, 2018, and as Exhibit B, the findings, conclusions and order of Honorable Robert L. Spears, dated May 6, 2019, in the case of *Johnson, et al. vs. Codington County Board of Adjustment, et al.* (14CIV18-000340). R 98. Movant, *inter*

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[1] S.D. Const. article V, § 1.

[2] VC, ¶ 18 founds the Complaint "entirely on state law property rights," as "protected by South Dakota statutes and the Constitution of this State." If remanded, should the Zoning Power include rendering the Lindgren Farm and home into a wind farm buffer area, afflicted by whatever Effects may arise, Appellants intend to add claims under the Fifth and Fourteenth Amendments to the U.S. Constitution, specifically as to the issue of "Takings" of Appellants' property, and a challenge based also on Substantive Due Process grounds. Zoning applicants, no matter the cause, are not entitled to some specific, measured adverse use of neighboring lands and homes.

alia, asserts the complaint is merely an untimely end-run to the statutory procedure for challenging a CUP, and should be dismissed. R 91.

Likewise, Crowned Ridge's motion cites Rule 12(b)(1) and (5), and is accompanied by an affidavit of counsel, seeking to adduce two items – Exhibit A being Codington County's Ordinance Review Information Page (approximately 7 pages), and Exhibit B, being Circuit Judge Spears' Memorandum Opinion, dated March 22, 2019, in the *Johnson* case, the challenge of others, under SDCL 11-2-61, *et seq*., to the Board of Adjustment's CUP issued to Crowned Ridge.

The Lindgrens opposed the motions, including an affidavit of Linda Lindgren, with six numbered exhibits.[3] Plaintiffs' submission traced the origins of one element of the County's Zoning Ordinance (shadow flicker, with limits of 30 hours per year, the Board being allowed to approve more with a recorded easement) to a certain "best practices report" of the National Association of Regulatory Utility Commissioners (NARUC), referenced in the complaint at ¶ 74. Noted also is the quandary of regulating Shadow Flicker (sometimes called "shadow casting"), the focus of a certain PowerPoint presentation cited in the NARUC document, and suggesting the current Zoning Ordinance language originates in the opinion of an unnamed judge in Germany who, on an unknown date, found that a neighbor is required to accept 30 hours of Shadow Flicker per year from wind turbines, such being deemed either "tolerable" or "acceptable."[4]

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[3] Exhibit 1 to the Lindgren Affidavit is a 23-page document entitled "Wind Farm Lease and Easement Agreement" (with the exception of Exhibit D thereto), dated June 11, 2014, structured as a five-year Option, now lapsed. Not annexed to the Verified Complaint, relevant portions are highlighted, VC, ¶¶ 31-40, R 11-13. The Option is the subject of discussion, at 6-7, *infra*.

[4] Two different sources attribute these summary conclusions to the judge; the German judge's actual, extended decision remains elusive. VC, ¶ 73, R 22.

Each of the defendants responded to Plaintiffs' resistance to motions. At this point, the PUC submitted Eric Paulson's affidavit (R 310), with observations about the activities of the Lindgrens at a certain public input meeting hosted by the PUC. R 311.

The trial court set argument on the motions for December 9, 2019, at which time all parties participated and presented their respective arguments. At the conclusion of argument, Circuit Judge Means granted each motion, including the motion of PUC for costs, and directed counsel for the Defendants to submit an appropriate order. The order, proposed by PUC's counsel, was entered on December 20, 2019, with notice of entry given by Crowned Ridge on December 26, 2019.

STATEMENT OF THE FACTS

The Lindgren Farm, occupied by the Appellants, consists of a quarter section and adjacent half-quarter in Section 2, Waverly Township.[5] Appellants, as fee owners, claim to have the right to possess and use the described farm to the exclusion of others, and claim also the right to acquire and protect property, which is not to be taken from them without due process of law.[6] The Lindgren complaint is founded on S.D. Const. article VI, § 13, and includes their right to "use, occupy and enjoy their property . . . in a manner consistent with law, and the rights of fee owners, including the various regulations pertaining to the use and development of the land under and in accord with the Zoning Ordinance, as Plaintiffs may hereafter wish to invoke."[7]

On June 11, 2014, the Lindgrens entered into an agreement with Crowned Ridge's affiliate, Boulevard Associates, a five-year option ("Option") for a lease and easement for

[5] VC, ¶¶ 22-23, R 9-10.
[6] VC, ¶¶ 25-27, R 10.
[7] VC, ¶¶ 26, 30, *Id*.

use of the Lindgren Farm. The Option includes an "Effects Easement," Section 5.2. The following details appear in the Complaint (R 11-12):

> 34. The "Effects Easement," being Section 5.2 of the Wind Lease & Easement, is a central provision of this Complaint, in that – *upon exercise of the Option* – Plaintiffs, as Owners of the Lindgren Farm, would have conferred upon Operator, a very broad right and easement to use the property as to 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.
>
> . . . .
>
> 36. For purposes of this Complaint, Plaintiffs will defer from otherwise quoting – or annexing – the entirety or specific provisions of the Wind Lease & Easement until such time as the Court shall have ruled on the issue of whether such provisions are a "trade secret," entitled to confidentiality. Meanwhile, Plaintiffs allege that the "Effects Easement" (Section 5.2), having been prepared by Defendant Boulevard, with the intention of being assigned to Defendant Crowned Ridge I, for purposes of developing a wind farm as contemplated by both the CUP and Facility Siting Permit, is itself clear and certain evidence that Defendants intended to employ the Wind Lease & Easement for purposes of an *easement*, upon and across the entirety of the Lindgren Farm, establishing a servitude thereon for a variety of adverse effects flowing from either hosting or being too proximate to wind farm operations, including, as relevant here, both "noise" and "light, flicker . . . [and] shadow" (otherwise herein referenced as Shadow Flicker).
>
> 37. The Effects Easement, as embraced within the Wind Lease & Easement, included specified and "any other effects attributable to the Wind Farm or activity located on the [Lindgren Farm] or on adjacent properties over and across the [Lindgren Farm] ("**Effects Easement**")." (Section 5.2, Wind Lease & Easement)

Thus, from June 11, 2014 until June 10, 2019, the Lindgren Farm was subject to the Option, and regarded as part of Crowned Ridge Wind I, with Project maps projecting the siting of two turbines – CR-56 and CR-57 – on the Lindgren Farm.

Until recently, Crowned Ridge has also maintained that the text and language of the Option held with Appellants (and other Participants) is a confidential document,

containing trade secrets.[8] Perhaps for this reason, the Option is unrecorded,[9] and was filed neither with the Board of Adjustment nor the PUC. A "Memorandum of Leases and Easements," dated June 3, 2014, is recorded, and, as of the date of the Complaint, remains of record, though the Option it purports to represent has lapsed.[10]

Upon exercise of the Option, the Effects anticipated for the Lindgren Farm include, in particular: (a) the level of audible noise at the receptor known as the Lindgren residence[11] (a subject specifically regulated by Zoning Ordinance, and also, Appellants say, by the final orders of the PUC); (b) inaudible noise below the usual range of human hearing (not regulated by either the Zoning Ordinance or the PUC, on the apparent theory of "whatever you can't hear won't hurt you"); and (c) "Shadow Flicker."

Shadow Flicker is that flickering or alternating shadow-light effect, given off by the rapidly rotating blades of a wind turbine, particularly observable in the interior of a home as the sun is either rising or setting, shining through the device as the blades rotate.[12] The Zoning Ordinance, now in effect, establishes that Shadow Flicker, with the Board's issuance of a CUP, can be inflicted on a residence, so long as the duration doesn't exceed 30 hours per year. If duration is exceeded, a recorded easement is in order.[13] In line with Crowned Ridge's experts, as submitted to the Board of Adjustment,

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[8] VC, ¶ 35, R 12.
[9] VC, ¶ 32, R 11.
[10] *Id.*
[11] Each residence near the project is assigned a unique code. CR1-C37-P (or Participant) was applied to the Lindgren residence; sometime after June 10, 2019, the code morphed into CR1-C37-NP (for Non-Participant). *See* VC, ¶ 78, R 23.
[12] Shadow Flicker, as an Effect, is frequently referenced within the Complaint; see, e.g., VC ¶ 36, and also "shadow casting," at VC ¶ 73. Shadow Flicker is most acute within 1000 meters (about 3,280 feet) of a turbine, a potential problem for property within 1700 meters (5,500 feet). *See* VC, ¶ 82, and notes 10, 11, R 24.
[13] *See* VC, ¶¶ 70-75, R 21-22.

the Lindgren home is predicted to receive 27 hours, 49 minutes of Shadow Flicker per year (27:49), at a distance of 1,696 feet to the nearest turbine site.[14]

During the five-year life of the Option, the following significant events transpired. First, County revised the Zoning Ordinance in June 2018 by means of Ordinance 68,[15] establishing a relevant setback of 1,500' from a wind turbine (referenced under the ordinance as a Wind Energy System, or WES) to a Non-Participating residence. The Zoning Ordinance, via Ordinance 68, also established a noise level of 50 dBA, as measured at the property line of existing Non-Participating residences.[16]

Appellants observe also that by establishing the measurement of audible noise at the property line for a Non-Participating residence, the Zoning Ordinance is out of harmony with Codington's Comprehensive Land Use Plan. The CLUP provides the policy that, *inter alia*, maximum noise levels shall be established for wind energy systems, and the measurement point is to be "at the property line of the site with a wind tower."[17] The Zoning Ordinance, as now amended in 2018, measures noise at a property line *not* called out in the CLUP, while also *failing* to provide for the measurements actually called for in the CLUP's clear policy. The 2018 amendments also added the privilege to cast Shadow Flicker on homes, as discussed above.

Within a few days of the 2018 amendments to the Zoning Ordinance, Crowned Ridge submitted its application for a wind farm CUP, involving some 130 WES, over some 53,186 acres of land in both Codington and Grant Counties.[18] A few weeks later, the Board of Adjustment held a public hearing on July 16, 2018, approving the CUP (as

[14] *See* VC, ¶ 78, R 23.
[15] *See* VC, ¶ 60, and also Exhibit A to Complaint, R 41.
[16] Text of the Zoning Ordinance quoted in VC, ¶¶ 65-68, R 19-20.
[17] CLUP, as quoted in VC, ¶ 46, R 14.
[18] VC, ¶ 12, R 5.

filed) by an affirmative vote of 6-0, followed by findings of fact and conclusions of law filed two days later.[19] During the course of that hearing, the Lindgrens informed the Board that Shadow Flicker (predicted duration of nearly 28 hours annually), apparently flowing onto their home from the wind turbines to be located on *adjacent properties* (as is otherwise provided for by the Effects Easement within the Option, yet viable at the time), was *not* acceptable to them.[20]

The Lindgrens did not seek review of the Board's CUP as permitted under SDCL 11-2-61, although others did, without success, as noted on p. 5, above; as seen, Defendants maintain, *inter alia*, and the trial court has agreed, that the failure to seek judicial review is now fatal to the averments of, and the relief sought under, the Complaint.

Because Crowned Ridge I is designed to produce more than one hundred megawatts of electricity, a Facility Siting Permit from the PUC is also essential, in accord with SDCL 49-41B-2(13). The application for that permit was filed in January 2019, docketed as EL19-003.[21] The PUC is assigned the task of processing and approving (or denying) a Facility Siting Permit within six months of filing.[22] Appellants do not dispute that notice of the application was given to them by certified mail – as required by law – and recognize their right to have obtained party status before the PUC, in accord with SDCL 49-41B-17. Appellants also agree that by PUC regulation, those having a right of

[19] VC, ¶ 80, R 23.
[20] VC, ¶ 79, R 23.
[21] *See* VC, ¶¶ 89-90, R 25-26.
[22] SDCL 49-41B-25, now enlarged to nine months, SL 2019, ch. 200, § 9.

intervention and failing to do so within sixty days, are then relegated to seeking intervention as a matter of agency discretion.[23]

On June 13, 2019 – exactly three days after the Option expired without exercise by Crowned Ridge - the Lindgrens submitted their Application for Party Status to the PUC, referencing Docket EL19-003.[24] By order dated June 25, 2019, the PUC, on a vote of 2 opposed, 1 in favor, voted to deny the sought intervention, and on July 26, 2019, the PUC issued a final decision in the matter, approving the Facility Siting Permit. As the Lindgrens were not timely intervenors, they also have no right to pursue an appeal of the PUC's Final Decision – and thus have not sought to appeal.

The Complaint (at R 7-8) identifies the nature of the declaratory relief sought, stated in the alternative, as follows:

> 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; (b) *in the alternative, if such authority and jurisdiction, as outlined in (a) is determined to lawfully exist*, then the certain CUP, otherwise known as CU018-007, represents a taking of, injury to, or infringement upon Plaintiffs' property interests, on the part of Defendants Codington County and the Board of Adjustment, for purposes of further confirming or conferring the adverse use of such interests, upon or for the benefit of Defendants Crowned Ridge I, Crowned Ridge II and Boulevard, and all other persons claiming any interests therein, enabling said Defendants to construct and operate an industrial scale wind farm. (*Emphasis supplied*.)

[23] ARSD 20:10:22:40.
[24] See VC, ¶ 20, R 8.

> 20. Plaintiffs, not having timely intervened in accord with SDCL 49-41B-17(3) and ARSD 20:10:22:40 (intervention having been sought by application dated June 13, 2019, and denied by the PUC by order entered June 25, 2019, a motion to deny status having been adopted on a vote of 2-1), are now unable to pursue an appeal to Circuit Court of the PUC's Facility Siting Permit, as was recently issued by Final Decision of July 26, 2019, in the proceeding docketed as EL19-003. Having no other apparent remedy for the harm done to their property interests, Plaintiffs seek also a declaratory judgment against Defendant PUC, and all other Defendants, concerning the import or legal effect of the Facility Siting Permit, and all others claiming any interest therein, to the effect that: (a) the PUC has no lawful authority delegated by the Legislature, whether under Chapter 49-41B, SDCL or otherwise, to determine and issue a Facility Siting Permit to Defendant Crowned Ridge I, having the import or effect of a license for a long term, continuing use of Plaintiffs' real property, for the special use and benefit of all or any of the Defendants, and being in the nature of a servitude and easement adverse to Plaintiffs' rights as fee owners of property under the law, or (b) *in the alternative, if this Court determines the PUC is deemed to have such authority and jurisdiction*, then the Facility Siting Permit, issued under Docket EL19-003, also represents a taking or an appropriation of, or an injury to, such property interests by and on the part of Defendant PUC, and as to such property interests, heretofore claimed exclusively by Plaintiffs, confirming or conferring those interests upon or for the use and benefit of Defendants Crowned Ridge I, affiliate Boulevard, and all other persons claiming any interests in the Facility Siting Permit, for the purpose of constructing and operating an industrial-scale wind farm in the immediate proximity of Plaintiffs' property and residence. (*Emphasis supplied*.)

The Complaint, now dismissed with prejudice, maintained a focus on the "Effects" that the Option provided for via the Effects Easement. Plaintiffs' desire to either staunch or avoid the "Effects" was checkmated by the Effects Easement from June 2014, and would continue likewise until the Option expired in June 2019. How might the Lindgrens have formally resisted or deflected the coming of these Effects (whether directed to the Board, the PUC or the trial court), when the Lindgrens *themselves*, in a moment of weakness or perhaps a desire for privity, had surrendered legal control of the

Lindgren Farm for the full duration of a five-year Option? Efforts to deflect or defeat the Effects seemed pointless, so long as the Option was viable.

The Option then expired June 10, 2019. Thus, Crowned Ridge's right to use the Lindgren Farm no longer arises as a matter of contractual privity or an effective Lease and Easement. Rather, the claimed right to make use of Appellants' farm for the "Effects" arises *solely* under the Zoning Ordinance and the permits or licenses issued by the Board and the PUC.

In writing and amending the Zoning Ordinance, and then issuing an adjudication in the nature of a CUP for a large wind farm, both County and Board failed to require a *reasonable buffer area* between lands of the Participants, encumbered by the chains of an Effects Easement (lands serving as hosts to WES installations), and the homes and lands of those who, as Non-Participants (such as the Lindgrens) seek to avoid the Effects freely flowing from nearby WES sites.[25] County's legislative efforts and the Board's adjudicative functions failed to impose a reasonable buffer area or distance in design, while readily imposing some substantial part or portion of the ordained buffer area as a burden upon the homes of Non-Participants.

These efforts have been aided and abetted by also adopting the recommendations of NARUC's Best Practices report,[26] thus bringing the views of that resource into the Zoning Ordinance. The County has done that which bears *no* counterpart in zoning law practice – some substantial part of the meager land area specified to form a setback or

[25] The Lindgren residence is merely 1,696 feet from the nearest turbine; while this complies with the Zoning Ordinance's spatial mandate, such proximity assures the home will be afflicted by the "Effects" of wind turbines, notwithstanding the Option's lapse. Later, the distance was reduced to 1,631 feet. VC ¶ 103, n. 17, R 30-31.

[26] Which, as noted in VC, ¶ 74, R 22, offers recommendations but noting no constraints on the Zoning Power; these recommendations, followed by County in 2018, seem rooted in a one-word ruling of a nameless German judge.

buffer area from wind turbines is, in effect, merely borrowed (or stolen) from Non-Participants! This is done, in the case of Codington County, by imposing some express limit or maximum ceiling on the duration of Shadow Flicker (30 hours at the home) and noise levels (50 dBA at the Non-Participant's property line).

The result is that the Non-Participants (such as the Lindgrens) remain close enough, spatially speaking, to be assured of adverse impacts from future wind farm operations; further, such Effects are a likely source of bother, discomfort and annoyance. Unless they abandon their homes at some future date, the natural refuse or discards from these nearby wind farm operations simply must be endured and outlasted.[27] While these limits, placed at the homes or property lines of Non-Participants, were touted to the trial court as positive features - as protections for all Non-Participants - they are in fact "burdens," or servitudes, being imposed upon the expanse and future enjoyment of their lands and homes, in the guise of an exercise of the Zoning Power. These burdens, furthermore, arise because the County – along with the PUC as the essential protégé – failed to impose, honor or require a sufficient buffer area for the protection of Non-Participants.

To be clear, the Lindgrens have not brought this Complaint for the benefit of any Non-Participant, other than themselves, or to benefit any property, other than the Lindgren Farm. The CUP touches and concerns dozens of WES installations and tens of thousands of acres of land. There may be other Non-Participants in Crowned Ridge who are just as unhappy as these Appellants – but the inquiry raised as to this use of Zoning Power, is limited to the Lindgren Farm and its immediate environs.

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[27] The Option, if exercised, envisioned a 50-year term; clearly, Crowned Ridge intends to stay – and make an adverse use of the Lindgren Farm – on a permanent basis.

Sound emitted from a wind turbine begins at about 107.5 dBA.[28] Adequate separation distance to points and places of human habitation is the only cure.[29] The County's Zoning Ordinance places a noise limit at property line (of the residence, not that of the parcel with the WES, as required by the CLUP) of 50 dBA. Meanwhile, the evidence to the Board predicted the Lindgren residence itself (a measuring point *not* specified in the Zoning Ordinance) would be exposed to noise at 46.5 dBA.[30] The PUC's hired expert (Hessler), however, apparently thought it best the noise level at the Lindgren home be reduced to 44.8.[31]

Noise measured in decibel (dB) scale is a logarithmic measurement; the intensity of sound pressure doubles with every increase of 3 dBA.[32] The Complaint notes the difference between 40 dBA and 50 dBA is "substantial, not a mere trifle."[33] The Lindgren pleading notes that, during the PUC's Docket EL19-003, the PUC's expert witness (Hessler) presented evidence in another case, Docket EL18-026, *In the Matter of Prevailing Wind Park, LLC*, a project developed in Hutchinson, Bon Homme and Charles Mix Counties. The PUC's Final Decision and Order (November 28, 2018), includes the following finding:

> The record demonstrates that 40 dBA at non-participating residences is an appropriate and reasonable sound limit to protect the welfare of non-participants. Sound limitations vary from jurisdiction to jurisdiction. There are no federal or state noise regulations that apply to this project and Applicant's sound limit goal for the project was based on the Bon Homme ordinance. . . . . At the evidentiary hearing, Mr. Hessler testified that he would like to see the project utilize a 40 dBA sound limit. Mr. Hessler stated that there is no limit that could be set to avoid sound complaints.

[28] VC ¶ 82, citing n. 9; R 24.
[29] Apart from turning the switch to "off."
[30] VC, ¶ 99, and n. 14, R 29.
[31] *Id.*
[32] VC ¶ 67.
[33] *Id.*

> Mr. Hessler acknowledged that that there is no need for a 35 dBA sound limit. Mr. Hessler testified that a sound level of 40 dBA would better protect the residences than a sound level of 45 dBA.[34]

The Hessler opinion, underlying the PUC's "sound" decision in EL18-026, is also highly relevant to this case. Appellants suggest the ears of those living in Bon Homme County are neither remarkably different, nor designed with fewer parts, than the auditory systems of Appellants, or other persons living in Codington County, in or near the project boundary for Crowned Ridge I.

Yet, in EL19-003, following the lead of a stipulation between PUC Staff and Crowned Ridge, the PUC selected a higher threshold or limit for noise, as alleged in paragraphs 99 and 100 of the Verified Complaint:

> 99. In due course, PUC Staff and Crowned Ridge I entered into a stipulation entitled "Permit Conditions," establishing the following noise limit (Permit Conditions, ¶ 25):
>
> > The Project, exclusive of all unrelated background noise, shall not 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 unless the owner of the residence has signed a waiver . . . .
>
> 100. The stipulated compilation of Permit Conditions (forty-five numbered paragraphs over 11 pages) was then annexed to the PUC's Final Decision of July 26, 2019 for Docket EL19-003, with the Commissioners adding (Final Decision, ¶ 45):
>
> > The record demonstrates that [Crowned Ridge I] has appropriately minimized the sound level produced from the Project to the following: (1) no more than 45 dBA at any non-participants' residence . . . .[35]

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[34] See VC, ¶ 97, R 28.

[35] Appellants note the intensity difference of permitted noise on Non-Participants, in one case limited to 40 dBA, and in another of direct interest to Appellants, 45 dBA, is no mere trifle. Sound intensity doubles for each increase of 3 dBA.

In the case docketed as EL18-026, the PUC implemented a more protective noise ceiling to protect Non-Participants, one that can be sharply contrasted with what is now the standard for Crowned Ridge I and its noise emissions over the Lindgren Farm, as permitted in EL19-003.

The relief sought by the Complaint is specified in two causes of action – starting with declaratory relief, with ¶ 109 outlining seventeen (17) specific declarations for the trial court's consideration. By detailing a certain level or duration of the "Effects" upon the Lindgren Farm, the Complaint seeks to establish that the respective orders or permits issued by certain Defendants – and now held by other Defendants – are *themselves* burdens or servitudes upon the land and the people that live there, comprising a *de facto* easement not created by the fee owners of the land. (Importantly, these inquiries are focused entirely upon the "Effects" as to the Lindgren Farm and the fee ownership of the Lindgrens.)

Thus, *if* the wind farm CUP is consistent with the Zoning Power, and represents a lawful exercise by the County and the Board – or *if* the PUC is delegated authority and standards so as to regulate the volume or duration of the Effects at one particular South Dakota wind farm to a more favored level than that which will soon beset the Lindgren Farm – then a declaration to that end is proposed. Alternatively, if the court concludes one or both of the agencies are acting beyond the scope of their lawful, delegated jurisdiction, the Complaint seeks injunctive relief accordingly.

STANDARD OF REVIEW

A motion to dismiss a complaint under Rule 12(b) "tests the legal sufficiency of the pleading, not the facts which support it. For purposes of the pleading, the court must treat as true all facts properly pled in the complaint and resolve all doubts in favor of the

pleader." *North American Truck & Trailer Inc. v. M.C.I. Communications*, 2008 S.D. 45, ¶ 6, 751 N.W.2d 710, 712.

Issues of jurisdiction are questions of law. *Huber v. Hanson County Planning Commission*, 2019 S.D. 64, ¶ 10, _____ N.W.2d _____. Granting of a Rule 12(b) motion is reviewed de novo, giving no deference to the circuit court's determination. *Hallberg v. South Dakota Board of Regents*, 2019 S.D. 67, ¶ 10, ____ N.W.2d ___.

ARGUMENT

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

As observed in *Hutterville Hutterian Brethren, Inc. v. Waldner*, 2010 S.D. 86, ¶ 20, 791 N.W.2d 169, 174-5, in deciding a motion under Rule 12(b)(1), the court is to distinguish between a "facial attack" and a "factual attack." Citing *Osborn v. United States*, 918 F.2d 724 (8th Cir. 1990), the former involves restricting the review to the face of the pleadings, while in the context of a factual attack, the court considers matters outside the pleadings, and the non-moving party does not enjoy the benefit of the doubt provided by South Dakota's Rule 12(b)(5).

The trial court here seems to have considered the motions to dismiss as a facial attack. It appears further the circuit court determined the Lindgren Complaint failed to invoke the subject matter jurisdiction of the court as Plaintiffs had not sought review of the Board of Adjustment's decision (and CUP) by writ of certiorari under SDCL 11-2-61, *et seq.* The time for judicial review of the CUP would have expired in or about July 2018. Further, a review by writ of the Board's CUP would have transpired while Crowned

Ridge and affiliates held the Option over the Lindgren Farm, including the Section 5.2 Effects Easement. The Lindgrens could not effectively challenge the Board as to the "Effects" sure to come upon their home as an affliction by authority of the Zoning Ordinance and CUP, when the Option *already* provided for that very same outcome (and perhaps even worse) by means of contractual privity.

The Complaint does seek one or more declarations to the effect that the Zoning Ordinance – and the resulting CUP – exceeds the scope of the legislature's delegated Zoning Power. Merely establishing a permissible range or limit to the Effects that may now (after amendment of the ordinance) be lawfully inflicted (according to the ordinance) upon the nearby lands and homes of Non-Participants (those unlucky enough to be in or near the wind farm designed by Crowned Ridge, and also seeking no affirmative relief or license from the County) should not be the end of this inquiry.

Appellants press no issue regarding the County's *procedure* in adopting the Zoning Ordinance; it appears the ordinance was adopted – and amended, most recently in June 2018 – in line with the notice requirements of SDCL, chapt. 11-2. As a general rule, the use of a declaratory relief action to challenge the procedure followed in adopting or amending a zoning ordinance has been approved by this Court. *Abata v. Pennington County Board of Commissioners*, 2019 S.D. 39, 931 N.W.2d 714. The *Abata* Court, at ¶ 11, observed:

> The Declaratory Judgment Act [SDCL chapter 21-24] is remedial in nature and should be construed liberally, "particularly . . . when the construction of statutes dealing with zoning, taxing, voting or family relations presents matters involving the public interest in which timely relief is desirable." *Kneip v. Herseth*, 87 S.D. 642, 648, 214 N.W.2d 93, 96-97. (1974).

While the procedure for enacting the Zoning Ordinance is not challenged in this Complaint, the *substance* of that Ordinance 68 is of grave concern to Appellants. The ordinance purports to bless zoning action, initiated by Crown Ridge, adverse to the fee ownership and enjoyment interests of the Lindgrens. The Board, by edict, permits (or licenses) the wind farm applicant to cast both noise (within limits) and Shadow Flicker (not to exceed 30 hours per year) over and amongst those living nearby, close enough to be affected by these "Effects." Accepting that the curse of Effects is simply a function of the Zoning Power, pursuant to which *this* measure of noise and *that* duration of Shadow Flicker may be lawfully imparted upon Appellants' home, seems abusive.

During the course of the bench ruling,[36] although not expressly provided for in the order of December 20, 2019,[37] the circuit court seemingly suggested that a review of the Board of Adjustment's decision and CUP is required, and that such a remedy may be had *only* via a writ of certiorari as provided for in SDCL 11-2-61, *et seq*. A review of the Board's decision by writ of certiorari leads nowhere, however, since the Board seems to have done *exactly* what the newly amended Zoning Ordinance provides on behalf of wind farm applicants.[38] A challenge to the constitutionality of that Zoning Power, as exercised in Deuel County, with express burdens placed upon Non-Participants, is best resolved under the Court's general jurisdiction.

Appellants sought to question the Zoning Power in this case, by invoking original jurisdiction of the Court and challenging a purported use of the Zoning Power, such that a commercial or industrial scale wind farm may place many dozens of turbines, and is

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[36] R 385, Transcript, at 16.
[37] R 339.
[38] In accord with the NARUC Best Practices report, and the nameless German judge's opinion of Shadow Flicker, as one of the Effects; see n. 12, above.

permitted *also* to make free use (without privity) in the dumping of the "Effects" on the home and property of those who pursued *no* application for relief under the Zoning Ordinance. In effect, these dozens of turbines, approaching five hundred feet in height, are in process of occupying and also overwhelming the rural neighborhood, without regard to whatever permissive uses (measured by the same Zoning Ordinance) the Lindgrens (along with other neighbors in that category of owners) had hoped or intended to make for their farm and home, including lawful actions now thwarted.

The challenge intended by Plaintiffs is *not* that a wind farm was authorized by the Zoning Ordinance as a potential conditional use within the Agriculture zoning district of Codington County. The challenge is also *not* based on the Board's adjudication that the proposed wind farm is fully compliant with the newly amended Zoning Ordinance. Rather, this case is based on the claim that neither County nor the Board has the right and power to award Crowned Ridge a privilege to permanently conduct a noisy, overwhelming industry or business so close to the Lindgren Farm and home that it was thought necessary to also place maximum limits on just how much noise may reach – and just how long the Shadow Flicker might dance – upon and into the home of Appellants.[39] By this measure, annoyance is an attribute of the Zoning Power.

Zoning regulations, as a general rule, meet the substantive due process test of "reasonable relationship" to a "legitimate" state purpose, according to a case often cited by zoning decisions in South Dakota (and everywhere), *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Rather than require the applicant to keep a reasonable buffer area, so that the Effects flowing from the wind farm remain on the wind farm and

[39] Actually, the PUC itself, as County's tag-team partner, devised the noise limits for Appellants' home; the Zoning Ordinance places the noise measurement line at the *home's property line*, while the CLUP requires such at the property line having the WES.

its voluntary Participants, the County's Zoning Ordinance saws the baby in two: some Effects fall on the Participants, as other Effects are showered at will upon those who are Non-Participants. *This* is the claimed "Zoning Power" use that the Lindgrens seek to challenge - as applied to the Lindgren Farm.

The writ of certiorari is the exclusive means of obtaining an appellate review of the zoning decisions of this Board. *Elliott v. Bd. of County Commissioners of Lake County*, 2005 S.D. 92, ¶ 15, 703 N.W.2d 361, 368; *Huber v. Hanson County Planning Commission*, 2019 S.D. 64, ¶ 13, _____ N.W.2d ____. Further, the grounds for review by the Court are quite narrow: did the Board have jurisdiction to act, and did the Board regularly pursue its authority? The review goes not to whether the Board's decision is right or wrong; rather, was some act done that is forbidden by law, or did it neglect some act required by law? *Grant County Concerned Citizens v. Grant County Bd. of Adjustment*, 2015 S.D. 54, ¶ 10, 866 N.W.2d 149, 154.

The decisions of this Court in *Wedel v. Beadle County Comm'n*, 2016 S.D. 59, 884 N.W.2d 755 and *Lake Hendricks Improvement Association v. Brookings County Planning and Zoning Commission*, 2016 S.D. 48, 882 N.W.2d 307 help to understand the permissible scope of review, via a writ of certiorari.

Lake Hendricks, decided in June 2016, involved a dairy cow CAFO CUP, challenged by a writ of certiorari sought by a neighbor in Brookings County, and also a nearby Minnesota community. Petitioners asserted the decision was illegal (in accord with SDCL 11-2-61), and that the zoning ordinance itself was jurisdictionally defective. Following the 2004 legislative change to SDCL 11-2-53.4 (repealed), the County failed to adopt amendments (in 2007) identifying the Board as the CUP "approving authority"

as is now required by SDCL 11-2-17.3. As such, Petitioners asserted the Board lacked jurisdiction to approve the CUP in this case. The trial court, however, refused to consider whether the ordinance was invalid, concluding that such review "was beyond the scope of Petitioners' writ." *Id.*, ¶ 5.

This Court reversed and remanded to the circuit court to examine whether the Board, as claimed by Petitioners, did not have jurisdiction. If ruling in favor of petitioners on that issue on remand, all that is then required and permitted is for the circuit court to rule in favor of petitioners' request for certiorari relief, rather than granting any request to declare the ordinance void, as such exceeds the scope of SDCL 11-2-65. *Id.*,¶ 29.

Wedel, 2016 S.D. 59, decided in August 2016, involved a CUP for a large hog CAFO in Beadle County. The petitioners alleged the Board's decision was illegal, pursuant to SDCL 11-2-61, and also alleged that in the process of adopting the ordinance in 2011, the County's planning commission failed to provide timely notice of a hearing and, in fact, did not hold a public hearing. In ruling for petitioners, the circuit court found the ordinance was invalid, in that the County's agency failed to observe due process requirements of SDCL 11-2. *Id.*, ¶ 8. On appeal, this Court took note that *Lake Hendricks* had been decided a few months before, and again concluded the decision being reviewed by certiorari is that of the Board of Adjustment, not whether the County made errors in adopting the ordinance some years before. That said, the Court further concluded:

> If the county does not adopt the ordinance in accordance with [SDCL chapter 11-2], the body charged with granting the CUP lacks the jurisdiction to grant a CUP. *Id.*, ¶ 14.

Thus, in reversing the circuit court as to the declared invalidity of the county's ordinance, the *Wedel* Court concluded that in undertaking review under the certiorari standard, the

trial court still lacked the requisite power to "invalidate the ordinances themselves *in this action*." *Wedel*, 2016 S.D. 59, ¶ 16.[40]

Appellants, by their Complaint for Declaratory Judgment and other Relief, do not allege any *procedural* defect, under the measure of SDCL chapter 11-2, in Codington County's adoption of the Zoning Ordinance, apart from the claim the ordinance amendments do not themselves conform to the CLUP.[41] For purposes of concluding the issue at hand, namely, the alleged lack of subject matter jurisdiction on the part of the circuit court, resulting in a dismissal with prejudice of all claims – *is this not the very kind of action,* suggested by *Wedel*, where, as one of several possible outcomes, the Zoning Ordinance itself might be declared invalid? The invalidity of the ordinance is *not* pinned on some technical, procedural gateway imperfectly traversed by the County Board or the Planning Commission during the writing and adoption of the legislation.

The substantive law infirmities of this Zoning Ordinance run deep, on the other hand. The error is the attempted scope and substance of land use regulation, the very reasonableness of the Zoning Ordinance. Rather than create a reasonable buffer area designed and funded by the wind farm developer, Codington's Ordinance[42] attempts to lay some substantial measure of the burdens of the land use project (wind farm) upon the property interests of Non-Participants.[43]

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[40] The opinion does not further state *what* legal action might best serve the purpose of invalidating the ordinance in such circumstances. SDCL 21-24-3 affords as least one example. If *another* action is required to confirm the invalidity, as clearly suggested by *Wedel*, is this not the same conundrum ensnaring these Appellants?

[41] *See* VC, ¶ 109(6), R 33. The CLUP, per SDCL 11-2-12, is to protect and guide development of the County, among other goals. Codington's CLUP requires one thing, while the Zoning Ordinance does quite another.

[42] Duly following the lead of the NARUC Best Practices report, see VC ¶ 74.

[43] This approach represents "Trespass Zoning," as discussed in VC, ¶¶ 61-64, and VC Exhibits B and C.

Does the Zoning Power *actually* permit the County and its Board to act much like a procurement service for Wind Farm buffer areas, allowing a Wind Farm CUP for benefit of Participating Landowner "A" and Wind Project Developer "B" (each being a dominant tenement as to Non-Participants lying appurtenant)? Having in hand both a CUP and Facility Siting Permit, is "B" not fully privileged under the Zoning Ordinance to regard the nearby homes and farms of Non-Participants (landowners, including Appellants, now labeled as "C" for this example) as a viable dumping grounds for the Effects?[44] Why seek privity with "C," and the messiness of monetary consideration, when the Zoning Ordinance and CUP so readily supply the mechanism? If the scenario painted by these questions *is* within the Zoning Power, via a Zoning Ordinance blessed by the substantive due process test laid down in *Village of Euclid* (subject to the slightly modified ratification at the PUC) then the County seems deeply involved in taking Appellants' property interests, via that same Zoning Ordinance.[45]

What benefit might Crowned Ridge derive from such a Zoning Ordinance? Because the required buffer or separation area is cut to the bone and placed *partially* on the lands and homes of Non-Participants (with the balance on the Participants), the developer is freed from the need to assemble – *at some considerable expense, no doubt* – a buffer area free of wind turbines, suitably and reasonably segregating the lands and homes of Non-Participants from those imprisoned within the Wind Farm. With Codington County's legislative and adjudicative help, the buffer area now rests to some certain measure upon the land and homes of these Non-Participants, and is exactly what it

[44] Is the Wind Farm now insulated from future nuisance claims, in line with SDCL 21-10-2, being maintained under "express authority of a statute"?

[45] Whether this is a public purpose taking – or perhaps one merely for a private purpose, benefitting only Crowned Ridge – remains to be seen. No discovery has transpired.

appears to be - *a gift, albeit one stolen from those having no continuing privity with Crowned Ridge, and those seeking no zoning relief*.

Appellants maintain this Complaint properly arises under the general jurisdiction of the circuit court,[46] not the court's appellate jurisdiction as the legislature may further sculpt and determine.[47] This challenge to the scope of Zoning Power deployed in Codington County (particularly at the fringes of the so-called wind farm where the lands of Participants meet up with those of Non-Participants, along with the relief sought by the Complaint, as expressed in ¶¶ 109 and 110) is much more than an ordinary review or appeal by writ of certiorari.

This is legal action that *could* invalidate the scope in which the Zoning Power has been carried out – reaching even the property interests of Appellants, who have filed no application for zoning permits. Codington County has permitted the wind farm developer to fashion a buffer or setback area that lies *heavily* on the Lindgren Farm. That seems unreasonable and arbitrary. But, if the Zoning Power as exercised is deemed fully valid, the Complaint then presses forward on this question - is this not a "takings" case, along with other potential constitutional and statutory infirmities? The Complaint, Appellants submit, raises issues within the circuit court's general jurisdiction.

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

Motions to dismiss under Rule 12(b)(5) assert a "[f]ailure to state a claim upon which relief can be granted."[48] The trial court granted each of the motions presented.

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[46] S.D. Const. article V, § 1.
[47] S.D. Const. article V, § 5.
[48] SDCL 15-6-12(b)(5).

Appellants are left to assume that the legal basis for the trial court's rulings are along these lines - that the Lindgrens might have challenged the Board by writ of certiorari – but didn't do so; and, the Lindgrens could have challenged the PUC by timely intervening in the docket, and then taking an appeal to circuit court – but again, didn't do so.[49] Thus, no other form of action can be implemented at this time, the dismissal with prejudice being a formidable obstacle for future concerns, as well. Wind farm or not, when a state or county agency meddles with the historic land-rights and prerogatives of a Non-Participant, that landowner should be entitled to challenge that action under the general jurisdiction of the courts of this State.

Assuming this is the rationale of the trial court, a view through the lens of the Lindgrens seems in order. At all times relevant, from June 11, 2014 to June 10, 2019, the Lindgren Farm was beset with the Option in favor of Crowned Ridge, including Section 5.2, the "Effects Easement." It seems unlikely a cogent argument could be made in resisting the "Effects" that the CUP – or even the Facility Siting Permit – proposed to henceforth cast upon the Lindgren Farm (and home), since the Lindgrens themselves had given up such an expansive instrument in favor of Crowned Ridge. By the time the Option finally lapsed without exercise, the CUP was aged well beyond the time for challenge by writ of certiorari, and the PUC proceeding was just a few weeks from being finalized.

Appellants reiterate this point – the Complaint, filed August 28, 2019, does not purport or attempt to invoke the circuit court's appellate jurisdiction over any inferior agency or tribunal. Rather, the Complaint is an effort to invoke the circuit court's original

[49] Appellants did not seek to intervene in the PUC case so long as the Option remained viable. Thereafter, intervention was sought but denied. Non-parties may not appeal a PUC case, see ARSD 20:10:22:40, SDCL 49-41B-17(3), SDCL 1-26-30.

or general jurisdiction, as provided for in S.D. Const. article V, § 1. The outcome in *Wedel*, 2016 S.D. 59, involving the court's appellate jurisdiction under SDCL 11-2-61, *et seq.*, seems entirely foreordained by S.D. Const. article V, § 5. The legislature, by statute, provides the means and mechanisms of all such appeals. While the method of appeal for all matters originating at the Board of Adjustment (and the PUC) are within the exclusive purview of the legislature, the Complaint endeavored to invoke the trial court's general jurisdiction. See, *In the Matter of PUC Docket HP14-0001*, 2018 S.D. 44, ¶ 21, 914 N.W.2d 550, 557-8; *Bingham Farms Trust v. City of Belle Fourche*, 2019 S.D. 50, ¶ 14, 932 N.W.2d 916, 920.

In ruling on these motions, the court must be convinced – beyond doubt – that the "plaintiff cannot recover under any facts provable in support of the claim." *Elkjer v. City of Rapid City*, 2005 S.D. 45, ¶ 6, 695 N.W.2d 235, 238. The Zoning Power is implemented under the Legislature's police power delegated to the County. *Schafer v. Deuel County Bd. of Com'rs*, 2006 S.D. 106, ¶ 11, 725 N.W.2d 241, 245. Citing CJS *Zoning and Land Planning* § 3 (2005), the *Schafer* Court observed that "zoning is designed to benefit a community generally by sensible planning of land uses, taking into consideration the most appropriate use of land throughout the community."

Schafer, at ¶ 14, further concluded that that "[z]oning regulations when enacted or amended, under the proper exercise of the police power, cannot exceed the constitutional limitations on governmental restrictions of private property." Contrasting the differences between ordinances initiated under SDCL 7-18A-13 and zoning ordinances commenced through the planning process under SDCL 11-2-28, *et seq*., such distinctions were noted as having substance and not merely procedural, as they address due process and property

rights.[50] Zoning Power is used often to impose conditions on land uses. The CUP approved here, as ratified by the PUC, more closely resembles a burden imposed by agency fiat on the property of neighbors, requiring that they must forever bear the Effects.

Earlier, *Schafer*, at ¶ 12, cited *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), quoting:

> In basing its claim on federal due process requirements, respondent also invokes *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926), but it does not rely on the direct teaching of that case. Under Euclid, a property owner can challenge a zoning restriction if the measure is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."

The due process requirements of importance in *Schafer* – and also in *Eastlake* - are those of the procedural variety. In *Village of Euclid*, on the other hand, the direct teaching is that for the zoning ordinance to fail the test of substantive due process under section 1 of the Fourteenth Amendment, the regulations must be seen as "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Village of Euclid*, 272 U.S. at 395. The zoning applicant, now having no easement, yet holds an adjudicated permit to spill the "Effects" over the property line and onto the neighbors (Non-Participants), up to a specified measure. With Participants, on the other hand, Defendant employs an easement as well. This Zoning Ordinance fails the test in *Village of Euclid*, Appellants will argue to the trial court.

Defendants asserted the Codington County Zoning Ordinance[51] merely seeks to protect the public health and safety, imposing limits or ceilings on the Effects to be

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[50] *Id.*

[51] Having followed the lead of both the German judge and the NARUC Best Practices report thus far, without apparent consideration of constitutional concerns.

endured. However, the Zoning Ordinance draws the noise measurement line contrary to the CLUP, while allowing Wind Farm Effects to be both seen and heard[52] at the Non-Participant's home and property. This effectively transforms the Lindgren Farm (and home) into captive, gratuitous service as a permanent buffer area for Crowned Ridge. These actions, as a whole, seem more akin to a Taking, not lawful Zoning or Permitting.

If the petitioner in *Wedel* can question the County's procedure in adoption of the Zoning Ordinance – *albeit not to the extremes of having the ordinance declared invalid in the context of review by a writ of certiorari review* – are not the Plaintiffs here also entitled to question, in the context of the relief sought in this case, the scope and substance of the *Euclidean* zoning ordinance as Codington County has unleashed on Non-Participants? Plaintiffs have the burden to establish the Zoning Ordinance violates their substantive due process rights. The order appealed would hold that Plaintiffs will *never* have that opportunity, as they failed to press any such issue, first to the Board and then, by writ, to a reviewing court. Under *Wedel*, would review by writ have reached the very concerns of Appellants in this case? In any case, claiming that a full challenge to the Board, and the PUC, *must* be carried out, even during the time the Option conferred those inchoate rights on Crowned Ridge, would leave the Lindgrens without a viable remedy of any kind, or at any time.

C. Whether the trial court erred in dismissing the Complaint on the grounds Plaintiffs' exclusive relief was a petition for writ of certiorari under SDCL 11-2-61, rather than statutory and constitutional grounds within the general jurisdiction of the Circuit Court?

The proposed declarations of ¶ 109 of the Complaint were written for the circuit court to either adopt or reject. The declarations begin rather modestly: the Option is

[52] As adjusted, downward, by the PUC – see VC, ¶¶ 97-100.

expired, the recorded memorandum remains a cloud on title, and the owners of Lindgren Farm have themselves created no actual servitude in favor of Defendants as to the "Effects."[53] In preparing the declarations, it seemed important that Defendants, in executing the Option in 2014, viewed the "Effects" as warranting an "easement," regardless of whether originating on the grantor's property, or an adjacent property. Crowned Ridge then allowed the Option to expire, thus obviating any such Effects Easement. Defendant, however, will yet use the Lindgren Farm (and home) for the dumping of noise and Shadow Flicker. Are not the recently amended Zoning Ordinance and the newly issued CUP the substitute sources of this servitude? Appellants sought to challenge the Zoning Power for use in this way, and for such ends.[54]

Such questions as are raised within the Complaint are *not* those that have been committed to the primary jurisdiction of the Board of Adjustment, nor as to which that agency is likely to have expertise. For example, the Complaint cites SDCL 43-13-2(8), the servitude for the "right of receiving . . . light . . . from or over . . . or discharging the same upon or over land." This seems akin to what the Effects Easement proposed under the expired Option.[55] As Crowned Ridge yet proposes to cast Shadow Flicker on the Lindgren Farm, Appellants have sought to invoke the trial court's original jurisdiction.

Invariably requiring that challenges to the Zoning Power be laid before the circuit court *only* at the same time and place as a writ of certiorari seeking review of the Board's ruling,[56] damages (if not destroys) the constitutional and statutory rights of Appellants, particularly given a dismissal with prejudice. Jurisdiction or power arising under Article

[53] VC, ¶ 109(2), (3), and (4), R 32-33.
[54] VC, ¶ 109(5), (6), (7), (8), (9), R 33-34.
[55] VC, ¶¶ 33-38, R 11-13; the statutory provisions suggest the Doctrine of Ancient Lights.
[56] Appeal time having expired for Plaintiffs while yet subject to the Option.

V, § 1, S.D. Const., should not be surrendered to other branches of government. *State, Department of Game Fish and Parks v. Troy Township, et al.*, 2017 S.D. 50, ¶ 20, 900 N.W.2d 840.

The legislature, having delegated the Zoning Power, controls also the appeal methods and timing from a Board of Adjustment, Article V, § 5, S.D. Const. But it is not for the legislature to also say that with an essential interest is at stake – the right to own and protect property, in this case – the circuit court must *not* take jurisdiction, or that the court may *not* consider the scope of the Zoning Power as applied. The case of these Appellants is *that* case of unreasonable regulation, falling on the property of those who sought no zoning permit, and falling also outside the broad blessings of *Village of Euclid*.

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

The pleadings and thus the record are indeed sparse on this issue. The PUC included a sentence or two, at most, in a motion to dismiss the Complaint, citing to SDCL 21-24-11. In ruling from the bench, the trial court declared that motion was being granted. In the order of dismissal (December 20, 2019) the motion is again mentioned.

While it is certainly true the civil action at hand has been dismissed, an award or imposition of costs requires more than what has been done here. Given the language of SDCL 15-17-51, the trial court could find the case was frivolous, or implemented for malicious purposes. No such findings were made.

As noted in *Ridley v. Lawrence County Commission*, 2000 S.D. 143, ¶ 14, 619 N.W.2d 254, 259, to "fall to the level of frivolousness there must be such a deficiency in

fact or law that no reasonable person could expect a favorable judicial ruling."[57] Doubts about whether a position is frivolous or taken in bad faith are to be resolved in favor of the party whose legal position is questioned. *Id.*, ¶ 15. This part of the trial court's order should be reversed also.

CONCLUSION

Appellants request the trial court's Order of December 20, 2019, providing for a dismissal of the Complaint with prejudice, be reversed and remanded.

Respectfully submitted:
TIMOTHY LINDGREN and
LINDA LINDGREN, Plaintiffs-Appellants

Date: February 12, 2020

/s/ A.J. Swanson
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CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I certify Appellant's 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 9,649 words and 48,821 characters, excluding table of contents, table of authorities, jurisdictional statement, statement of legal issues and authorities, and certificates of counsel. I have relied on the word and character count of the word processing program to prepare this certificate.

Date: February 12, 2020

/s/ A.J. Swanson

[57] Petitioners incorrectly pursued review of zoning changes by a writ of certiorari, rather than a direct appeal, several years before the advent of SDCL 11-2-61, *et seq*.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date below, Appellant's 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 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 (appendix in pdf) to the Clerk of the South Dakota at: SCClerkBriefs@ujs.state.sd.us.

All such service being accomplished the date entered below:

Date: February 12, 2020

/s/ A.J. Swanson
A.J. Swanson, Attorney for Appellant

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APPENDIX

Case No. 14CIV19-000303

"Order Granting Defendant's Motion to Dismiss and Granting Motion for Costs"

(Entered December 20, 2019,
Notice of Entry December 26, 2019)

(Annexed, 3 pages)

STATE OF SOUTH DAKOTA :ss COUNTY OF CODINGTON	)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT

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.*	)	Case No. 14CIV1-000303 ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND GRANTING MOTION FOR COSTS

Each Defendant having filed motions to dismiss the Plaintiffs' Complaint, to which Plaintiffs objected, with a hearing being held on December 9, 2019, before the Court, with A.J. Swanson (appearing on behalf of Timothy Lindgren and Linda Lindgren), Kristen N. Edwards and Amanda M. Reiss (appearing on behalf of South

Dakota Public Utilities Commission), Miles Schumacher (appearing on behalf of Crowned Ridge Wind, LLC; Crowned Ridge Wind II, LLC; and Boulevard Associates, LLC), and Jack Hieb (appearing on behalf of Codington County Commission and Codington County Board of Adjustment), participating.

After hearing arguments of counsel, opposition by Plaintiffs, and having considered the written submissions of the parties, for reasons stated in the Court's oral decision and for good cause appearing, it is hereby

ORDERED, ADJUDGED, & DECREED, that Defendant South Dakota Public Utilities Commission's Motion to Dismiss is hereby GRANTED with prejudice. It is further

ORDERED, ADJUDGED, & DECREED, that Defendant South Dakota Public Utilities Commission's Motion for Award of Cost Pursuant to SDCL 21-24-11 is hereby GRANTED. It is further

ORDERED, ADJUDGED, & DECREED, that Defendants Crowned Ridge Wind, LLC, Crowned Ridge Wind II, LLC, and Boulevard Associates, LLC's Motion to Dismiss is hereby GRANTED with prejudice. It is further

ORDERED, ADJUDGED, & DECREED, that Defendants Codington County Commission and Codington County Board of Adjustment's Motion to Dismiss is hereby GRANTED with prejudice. It is further

ORDERED, ADJUDGED, & DECREED, that the above-entitled matter is hereby DISMISSED with PREJUDICE.

BY THE COURT:

Signed: 12/20/2019 12:30:48 PM

Carmen Means

Honorable Carmen Means
Circuit Court Judge

Attest:
Zeller, Barbara
Clerk/Deputy