IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 29229

TIMOTHY LINDGREN and LINDA LINDGREN,

Plaintiffs and 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,

Defendants and Appellees.

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

BRIEF OF APPELLEES CROWNED RIDGE WIND, LLC, CROWNED RIDGE WIND II, LLC, AND BOULEVARD ASSOCIATES, LLC

A.J. Swanson
Arvid J. Swanson, P.C.
27452 482nd Ave.
Canton, SD 57013
Attorneys for Plaintiffs / Appellants Timothy Lindgren and Linda Lindgren

Jack H. Hieb
Zachary W. Peterson
Richardson, Wyly, Wise, Sauck & Hieb
One Court St.
Aberdeen, SD 57402
Attorneys for Defendants / Appellees Codington County and Codington County Board of Adjustment

Amanda Reiss
Kristen N. Edwards
SD Public Utilities Commission
500 East Capitol Ave.
Pierre, SD 57501
Attorneys for Defendants / Appellees South Dakota Public Utilities Commission

Miles F. Schumacher
Michael F. Nadolski
Dana Van Beek Palmer
Lynn, Jackson, Shultz & Lebrun, P.C.
110 N. Minnesota Avenue, Suite 400
Sioux Falls, SD 57104-6475
Attorneys for Defendants / Appellees Crowned Ridge Wind, LLC, Crowned Ridge Wind II, LLC, Boulevard Associates, LLC

NOTICE OF APPEAL FILED JANUARY 10, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Dakota Case Law

Case Law From Other Jurisdictions

Statutory Authorities

JURISDICTIONAL STATEMENT

Defendants/Appellees, Crowned Ridge Wind, LLC, Crowned Ridge Wind II, LLC, and Boulevard Associates, LLC (collectively "Crowned Ridge"), agrees with the jurisdictional statement proffered by Plaintiffs/Appellants, Timothy and Linda Lindgren (collectively the "Lindgrens").

LEGAL ISSUES

1. Whether Lindgrens' declaratory judgment action stated an issue ripe for judicial determination?

The circuit court concluded that the declaratory judgment was not a proper remedy for their complaints.

Most apposite authorities:

SDCL § 21-24-1

SDCL § 21-24-10

Boever v. South Dakota Bd. of Accountancy, 526 N.W.2d 747, 749-50 (S.D. 1995)

Muscarello v. Ogle County Bd. of Commissioners ("Ogle County"), 610 F.3d 416, 425 (7th Cir. 2010)

2. Whether the circuit court had jurisdiction over Lindgrens' declaratory judgment action?

The circuit court held it lacked jurisdiction because a declaratory judgment action was not a proper remedy.

Most apposite authorities

Dan Nelson Auto., Inc. v. Viken, 2005 S.D. 109, ¶ 17 n.9, 706 N.W.2d 239, 245

Elliott v. Board of County Com'rs of Lake County, 2007 S.D. 6, ¶ 17, 727 N.W.2d 288, 290

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

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

3. Whether Lindgrens' claims are precluded by the doctrine of *res judicata?*

The circuit court did not expressly rule on this issue, concluding a declaratory judgment action was not a proper remedy.

Most apposite authorities

JAS Enter., Inc. v. BBS Enterprises, Inc., 2013 S.D. 54, ¶ 19, 835 N.W.2d 117, 125

Moe v. Moe, 496 N.W.2d 593, 595 (S.D. 1993)

REQUEST FOR ORAL ARGUMENT

Crowned Ridge respectfully requests oral argument.

STATEMENT OF THE CASE

This appeal stems from the circuit court's dismissal of Lindgrens' declaratory judgment action, in which they sought a declaration that parts of Codington County's zoning ordinance is unconstitutional, that the South Dakota Public Utilities Commission ("PUC") was without jurisdiction in granting a permit for the wind energy system ("WES"), that the decision of Codington County Board of Adjustment ("Board") should be invalidated, and that the presence of the Crowned Ridge wind farm constitutes a trespass. For each of these requested declarations, however, there exists other, more appropriate if not exclusive avenues of relief which Lindgrens failed to seek.

Accordingly, Crowned Ridge, the County and Board, and the PUC all filed Motions to Dismiss, seeking dismissal of the Complaint for Declaratory Judgment and Other Relief under SDCL §§ 15-6-12(b)(1) and (5). The PUC also sought to recover costs pursuant to SDCL § 21-24-11. The circuit court granted the Motions to Dismiss and granted the PUC's Motion for Award of Costs. The Order Granting Defendants' Motion to Dismiss and Granting Motion for Costs was filed on December 20, 2019. The Notice of Entry of that Order was filed on December 26, 2019.

Lindgrens timely filed their Notice of Appeal on January 10, 2020. In their appeal brief, Lindgrens claim the circuit court erred in concluding it lacked subject matter jurisdiction, erred in concluding their Complaint failed to state a claim,

erred in concluding the writ of certiorari was their exclusive remedy, and erred in granting the PUC's Motion for Costs. However, very little of Lindgrens' brief actually addresses these arguments.

STATEMENT OF THE FACTS

Codington County has in effect a zoning ordinance, which was amended in 2018, to include certain requirements regarding WESs – "Ordinance 68." CR 2, 17. Prior to implementing Ordinance 68, the Codington County Planning and Zoning Commission and the County Board of Commissioners held several public meetings, in which public input was received and discussion was held. CR 149-156.

Following passage of Ordinance 68, Crowned Ridge filed an application for a conditional use permit ("CUP"), in order to construct and operate the Crowned Ridge Wind Farm in Codington County.[1] CR 22-23. The wind farm is located on approximately 53,186 acres in the townships of Waverly, Rauville, Leola, Germantown, Troy, Stockholm, Twin Brooks, and Mazeppa, in Grant and Codington County in South Dakota. CR 5, 112, 134. The project, containing up to 130 wind turbine generators, was completed in early 2020. CR 134. On July 16, 2018, the Board held a hearing on Crowned Ridge's application for a CUP,

[1] There are separate proceedings in Grant County regarding a CUP there.

and Lindgrens personally appeared at that hearing.[2] CR 23. The Board unanimously approved the CUP by a 6-0 vote, and its findings of fact and conclusions of law relative to the CUP were filed on July 18, 2018. CR 23. Lindgrens did not challenge the Board's decision, but other parties filed a petition for writ of certiorari to challenge the Board's decision, which was upheld by the circuit court. CR 24; *Johnson, et al vs. Codington County Board of Adjustment*, Civ. No. 14CIV18-000340. The circuit court, the Honorable Judge Spears presiding, denied the petition for writ of certiorari in that case, finding, "the Board pursued in a regular manner the authority conferred upon it by considering the issue of project density or overcrowding of structures and determining that Crowned Ridge's application complied with Ordinance requirements." CR 157-183.

Because of the proposed size of the Crowned Ridge Wind Farm, Crowned Ridge was also required to obtain a permit from the PUC to construct a wind energy facility.[3] CR 3. On January 30, 2019, Crowned Ridge filed an application for a permit to construct a wind energy conversion facility with the PUC. CR 3; *See also* Application to the Public Utilities Commission of the State of South

[2] The application filed with the Board and the Board's hearing and decision are matters of public record, and this Court can take judicial notice of such public hearing and filings. *See* SDCL § 19-19-201.

[3] Pursuant to SDCL § 49-41B-4, such a permit is required if the proposed wind generation facility is greater than one hundred megawatts; and such a permit is separate and distinct from any permit that may be required by the county.

Dakota for a Facility Permit to Construct a 300 Megawatt Wind Facility, dated January 30, 2019.[4]

Lindgrens did not timely seek to intervene in the proceedings before the PUC, but others did, and they were represented by counsel.[5] CR 8. An evidentiary hearing was held on June 6, 2019, and June 11-12, 2019. *See* PUC Decision, PUC Docket EL 19-003. Only after the conclusion of the hearing, on June 13, 2019, did Lindgrens file a petition for intervention. *See id.* On June 26, 2019, the Commission issued an order denying Lindgrens' petition for intervention as untimely, and finding the late intervention would unduly prejudice the rights of the other parties to the proceeding or be detrimental to the public interest. *See id.* Lindgrens did not appeal from this denial of their petition to intervene. *See generally,* PUC docket.

The PUC then determined that Crowned Ridge met its burden of proof pursuant to SDCL § 49-41B-22, including that the wind farm did not pose a significant health risk to the inhabitants of the project area, and issued the permit.[6] CR 3; PUC Decision. Lindgrens did not appeal the issuance of that permit, but it

[4] The PUC filings are a matter of public record, Docket EL 19-003, and this Court can take judicial notice of such public filings. *See* SDCL § 19-19-201.

[5] Pursuant to ARSD 20:10:22:40, interested parties had sixty days from the date that application was filed to intervene in the proceeding; thus, the deadline to intervene was April 1, 2019.

[6] After issuance of the permit, Crowned Ridge filed a letter on September 12, 2019, notifying the PUC that due to interconnection issues, construction of 100 MW of the 300 MW Crowned Ridge Wind Farm would be deferred.

was appealed by others. *See In the Matter of the Application by the Crowned Ridge Wind, LLC for a Permit of Wind Energy Facility in Grant and Codington Counties*, Civ. No. 14CIV19-920.[7]

As noted, Lindgrens never appealed from the Board's decision granting the CUP, which was, in any event, upheld by the circuit court in an appeal by other parties, nor did Lindgrens timely intervene in the matter before the PUC, or appeal from the PUC's decision. Nevertheless, Lindgrens sought injunctive relief and declarations, *inter alia*, that Ordinance 68 is unconstitutional, that the PUC was without jurisdiction, that the Board's decision granting the CUP should be invalidated, and that the presence of the Crowned Ridge wind farm constitutes a trespass.

Crowned Ridge, the County and Board, and the PUC all filed Motions to Dismiss the Complaint. Crowned Ridge based its Motion to Dismiss on lack of ripeness, pursuant to SDCL § 21-24-10; lack of subject matter jurisdiction, because there existed other avenues of relief; and on res judicata, because other parties challenged the Board's and PUC's decisions, which were upheld. CR 132-146. The County and Board generally based its Motion to Dismiss on lack of subject matter jurisdiction, failure to state a claim regarding the County's adoption of Ordinance 68, and failure to state a valid takings claim. CR 83-97. The PUC moved to dismiss based on substantially the same reasons – declaratory judgment

[7] This appeal has not been decided.

is improper under SDCL § 21-24-10 and the matter is not ripe for such action; that Lindgrens failed to exhaust their administrative and other remedies; and that they failed to state a claim upon which relief can be granted, arguing the Complaint is not well-plead and the relief sought is unclear. CR 59-73.

At the hearing on the Motions to Dismiss, similar arguments were advanced, with counsel for the County and Board arguing, in part, "you cannot attack the permit via a corollary or a collateral proceeding that the exclusive remedy as legislatively mandated is set forth in the code, it's the writ of cert, it's the appeal that's heard under a writ of cert standard." CR 388-389. Part of the reason for this, counsel explained, if for finality: "If you give somebody a permit and they spend millions of dollars in reliance on that, under Mr. Swanson's theory, you could come in not just a year later, you could come in 5 years later theoretically and you could say I'm going to start a lawsuit that effectively says you should take away the permit or the authority or deem that the County didn't have the authority to issue the permit, the net effect being that you could no longer legally operate that facility." *Id.* In addition, counsel explained that the legislature intended the review of local decisions to be deferential and allow the local boards to have the final say. *See id.*

In regard to dismissal under SDCL § 15-6-12(b)(5), and the failure to state a claim for an unconstitutional taking, counsel argued that the court would essentially have to declare that a county is "effecting a taking of property by not

zoning, because what they're saying is we are effecting a taking of the neighboring property by not, I'll use flicker, by not restricting flicker to a greater degree, shadow flicker." CR 390. Counsel explained the infirmity with Lindgrens' claim:

> That would allow the Court to judicially declare that the legislative prerogative of Codington County of setting flicker, shadow flicker restriction here has to be here because it's your call not theirs. As the Court is well aware, Codington County could set it here. They could say we're not even going to get into this which ironically enough is where the County was before they passed a recent amendment that restricted Crowned Ridge in a way that forced them to actually put shadow flicker into play. Somehow that has been turned on its head and has been used to argue that that amendment which added a shadow flicker requirement somehow opened the door to claiming that a regulatory taking has now occurred on neighboring property.

CR 390-392.

In its argument to the circuit court, the PUC joined in the County's argument, and additionally focused on lack of jurisdiction:

> Appeal is an exclusive remedy, the PUC process was exhaustive. . . . And our processes at the PUC are very open, we're -- for intervenors, I've been in cases where there are 50, 60 intervenors before the PUC so it's not something that is difficult to take part in, they simply chose not to, and that's unfortunate. The matter was appealed and that appeal is now pending and that's the exclusive remedy with respect to that permit. Beyond the appeal that's currently pending there's just no jurisdiction to bring another cause of action, especially against the PUC.

CR 392- 393.

Finally, Crowned Ridge joined in the arguments made by the County and the PUC, and addressed Lindgrens' claim they felt contractually constrained from acting in opposition to the project by pointing out that the Lindgrens actively

spoke against the project at the public hearing held for this project, they spoke out at the public hearing before the PUC, and belatedly sought to intervene. As such, counsel for Crowned Ridge argued Lindgrens "simply failed to exhaust the legal remedies available to them and now are seeking to accomplish an end run on what the statute have said are the sole and exclusive remedies with regard to both the County permit and the PUC permit and for that reason, your Honor, we believe they should be dismissed." CR 394-395.

The circuit court agreed with these arguments, ruling:

> I find under 12(b)-1 and 12(b)-5 that the plaintiffs' motions to dismiss should be granted. . . . The idea that the Lindgrens or any other neighbor of a property where a conditional use permit has been granted has the right at any time to make an action for declaratory judgment would be against the idea of any finality of judgment in these sorts of matters, . . ., and so folks stand in opposition to this, they have the opportunity to do so at the level of the PUC and then can appeal that and they have the opportunity to intervene in the Board of Adjustment matter and they can appeal that. And I understand that those appeals are very limited, but that's the appropriate remedy, not a declaratory judgment action as has been made here. So I am granting the plaintiffs' motions to dismiss, I will grant costs as requested by the PUC, and these matters are dismissed. I do think that this is, despite your claims Mr. Swanson, an attempt to end run around the processes that are already in place and I don't think that's appropriate and so I'm granting the motion to dismiss.

CR 400-401.

For the above reasons, and further explained below, Lindgrens' Complaint (Verified) for Declaratory Judgment and Other Relief was properly dismissed by

the circuit court, and Crowned Ridge respectfully submits that this Court should reach the same conclusion and affirm that dismissal.

ARGUMENT AND AUTHORITIES

Standards of Review

Crowned Ridge moved to dismiss the Complaint under SDCL § 15-6-12(b)(1), for lack of subject matter jurisdiction, and under § 15-6-12(b)(5), for failure to statute a claim upon which relief can be granted. A motion to dismiss under any of the subsections of SDCL § 15-6-12(b) "tests the legal sufficiency of the pleading, not the facts which support it." *Stathis v. Marty Indian School*, 2019 S.D. 33, ¶ 13, 930 N.W.2d 653, 658. "'For purposes of the pleading, the court must treat as true all facts properly pleaded in the complaint and resolve all doubts in favor of the pleader." *Id*. (other citations omitted). However, "the court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences, and sweeping legal conclusions cast in the form of factual allegations." *Id.*

Recently, in *Stathis*, the Court considered a motion to dismiss under rule 12(b)(1), and reiterated the requirement of subject matter jurisdiction:

> "Subject matter jurisdiction is a 'court's competence to hear and determine cases of the general class to which proceedings in question belong; the power to deal with the general subject involved in the action;' and 'deals with the court's competence to hear a particular category of cases.'" . . . "Subject matter jurisdiction is conferred solely by constitutional or statutory provisions." . . . "[S]ubject matter jurisdiction can neither be conferred on a court, nor denied to a court by the acts of the parties or the procedures they employ." . . . "The test for determining jurisdiction is ordinarily the nature of the case, as made by the complaint, and the relief sought."

Stathis, 2019 S.D. 33, ¶ 14, 930 N.W.2d at 658 (internal and other citations omitted).

"It is well settled that '[a] motion to dismiss under Rule 12(b)(5) tests the law of a plaintiff's claim, not the facts which support it.'" *Osloond v. Farrier*, 2003 S.D. 28, ¶ 4, 659 N.W.2d 20, 22 (quoting *Thompson v. Summers*, 1997 S.D. 103, ¶ 5, 567 N.W.2d 387, 390 (other citations omitted). "'In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' . . . . The question is whether in the light most favorable to the plaintiff, and with doubt resolved in his or her behalf, the complaint states any valid claim of relief. The court must go beyond the allegations for relief and 'examine the complaint to determine if the allegations provide for relief on any possible theory.'" *Osloond*, 2003 S.D. 28, ¶ 4, 659 N.W.2d at 22 (other citations omitted). "While a complaint attacked by a Rule 12(b)([5]) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . ." *Sisney v. Best Inc*., 2008 S.D. 70, ¶ 7, 754 N.W.2d 804, 808 (other citations omitted).

"In addition to the pleadings and exhibits attached to the pleadings, a court may take judicial notice of matters of public record." *Jenner v. Dooley*, 1999 S.D. 20, ¶ 15, 590 N.W.2d 463, 470 (other citations omitted). "Despite the language of Rule 12(b), when a court takes judicial notice of facts, it will not convert a dismissal motion into a motion for summary judgment. Only when a court goes beyond judicially noticed facts and pleadings will it be required to convert the motion and give both sides notice and an opportunity to supplement the factual record." *Id.*

On appeal from dismissal pursuant to SDCL § 15-6-12(b)(1) and (5), this Court reviews "a dismissal for lack of jurisdiction as a 'question [ ] of law under the de novo standard of review.'" *Upell v. Dewey County. Comm'n*, 2016 S.D. 42, ¶ 9, 880 N.W.2d 69, 72 (other citations omitted). This is in keeping with the principle that "[w]e review issues of jurisdiction de novo because they are questions of law." *Id. See also Barnaud v. Belle Fourche Irrigation Dist*., 2000 S.D. 57, ¶ 18, 609 N.W.2d 779, 784 ("An appeal of a motion to dismiss presents a question of law and our standard of 'review is de novo, with no deference given to the trial court's legal conclusions.'") (other citations omitted).

A. There Is No Issue Ripe for Judicial Determination

Lindgrens sought declaratory relief, citing SDCL § 21-24-1, et seq. SDCL § 21-24-1 provides:

> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or

> not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree.

The statutes further state, "[t]he court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." SDCL § 21-24-10.

The Court in *Boever v. South Dakota Bd. of Accountancy*, 526 N.W.2d 747, 749-50 (S.D. 1995), reiterated the four jurisdictional requirements for declaratory relief:

> "There must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy, that is to say, a legally protectible interest; and (4) the issue involved in the controversy must be ripe for judicial determination."

(other citations omitted). As to the fourth requirement – ripeness – the Court explained: "Ripeness involves the timing of judicial review and the principle that '[j]udicial machinery should be conserved for problems which are real and present or imminent, not squandered on problems which are abstract or hypothetical or remote.'" *Id.* (quoting *Gottschalk v. Hegg,* 228 N.W.2d 640, 643-44 (S.D. 1975) (other citations omitted)). Accordingly, the Court held, "[c]ourts should not render advisory opinions or decide moot theoretical questions when the future

shows no indication of the invasion of a right." *Boever*, 526 N.W.2d at 749-50. Thus, "courts ordinarily will not render decisions involving future rights contingent upon events that may or may not occur. . . . Even if a court has jurisdiction to decide the constitutionality of the law, it should decline to do so if the issue is so premature that the court would have to speculate as to the presence of a real injury." *Id.* (citing *Meadows of West Memphis v. City of West Memphis*, 800 F.2d 212, 214 (8th Cir. 1986)).

The allegations in the Complaint show that this matter was not ripe and, accordingly, no declaratory ruling could be issued by the circuit court. Lindgrens allege "[t]his Complaint to the Circuit Court is sitting in Codington County, concerns *what will soon become* (upon commencement of wind farm operations) an intensive, hostile, and adverse use of the Plaintiffs' land. . . ." Complaint, ¶ 7 (emphasis added). Lindgrens' unsupported predictions of some future consequences are simply insufficient to create a ripe controversy. *See also Muscarello v. Ogle County Bd. of Commissioners ("Ogle County")*, 610 F.3d 416, 425 (7th Cir. 2010) (holding action for trespass and nuisance was not ripe where there had been no construction of the wind turbines). *See* Section B.2. below.

This ripeness argument was part of the basis for Crowned Ridge's Motion to Dismiss (as well as the PUC's), which Lindgrens never addressed before the circuit court. Further, Lindgrens must know that such an argument would be made to this Court as well, yet their Brief does not contain any argument at all related to

this issue. On this basis alone, the requested declaratory ruling could not be issued, and the circuit court correctly dismissed the Complaint. *See Boever*, 526 N.W.2d at 749-50.[8]

B. This Court Lacks Jurisdiction over the Declaratory Judgment Action

Even if there exists a ripe controversy, which is expressly denied, Lindgrens' declaratory judgment action challenging the legality of Ordinance 68, seeking to invalidate the Board's issuance of the CUP, and seeking a declaration that the PUC was without jurisdiction, is not the proscribed method for challenging those bodies' decisions. Codington County properly held public meetings in which it accepted public input, including from Lindgrens, and thereafter Lindgrens had the ability to challenge both the Board's and the PUC's decisions through proscribed methods, of which they failed to avail themselves. As a result, Lindgrens failed to exhaust their administrative remedies, and this Court lacks jurisdiction.

As noted above, "[s]ubject matter jurisdiction is conferred solely by constitutional or statutory provisions." *Stathis,* 2019 S.D. 33, ¶ 14, 930 N.W.2d at 658. There was ample opportunity for Lindgrens to oppose the Ordinance, and there are specific statutory directives on how to seek review of the Board's and the PUC's decisions. First, as noted, the Lindgrens had several opportunities not only

[8] While this was not the express basis for the circuit court's dismissal, the Court can affirm on any basis supported in the record. *See Wyman v. Bruckner*, 2018 S.D. 17, ¶ 9, 908 N.W.2d 170, 174.

to attend the public meetings held by both Planning and Zoning and the County Commission, prior to the adoption of the Ordinance, but also to provide input. They cannot be heard to complain about the legality of an ordinance they were given the opportunity to and did speak in opposition. Further, there exists a statutory remedy, by way of referendum, to challenge a newly-enacted ordinance, pursuant to SDCL § 7-18A-15, which they failed to do.

Second, the Board's decision in granting the conditional use permit is challengeable under SDCL § 11-2-61.1, which states: "Any appeal of a decision relating to the grant or denial of a conditional use permit shall be brought under a petition, duly verified, for a writ of certiorari directed to the approving authority and, notwithstanding any provision of law to the contrary, *shall* be determined under a writ of certiorari standard regardless of the form of the approving authority." (emphasis added). Lindgrens also failed to avail themselves of this appeal process.

Finally, in addition to the ability to intervene in the proceedings before the PUC, which Lindgrens attempted too late, there exists a statutory procedure to challenge a decision of the PUC. *See* SDCL § 1-26-30 ("A person who has exhausted all administrative remedies available within any agency or a party who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter."). "*When a remedy by appeal is available following administrative action, an action for declaratory judgment is not available*." *Dan*

Nelson Auto., Inc. v. Viken, 2005 S.D. 109, ¶ 17 n.9, 706 N.W.2d 239, 245 (emphasis added).

Unquestionably, in order to challenge the Board's decision, Lindgrens were required to file a petition for writ of certiorari, the exclusive remedy to challenge a CUP, and in order to challenge the PUC's decision, the exclusive remedy is to appeal to circuit court, pursuant SDCL § 1-26-30. Lindgrens did neither. As a matter of law, Lindgrens failed to avail themselves of the statutory procedures for challenging the Board's and the PUC's decisions, and cannot make an end run around those statutory directives and seek to challenge those decisions by other means, such as the declaratory judgment action at the root of this appeal. *See Elliott v. Board of County Com'rs of Lake County*, 2007 S.D. 6, ¶ 17, 727 N.W.2d 288, 290 ("The legislature prescribes the procedure for reviewing the actions of the county. Review may be had only by complying with the conditions the legislature imposes."); *Appeal of Heeren Trucking Co*., 75 S.D. 329, 330-31, 64 N.W.2d 292, 293 (1954) ("When procedure is prescribed by the legislature for reviewing the action of an administrative body, review may be had only on compliance with such proper conditions as the legislature may have imposed."); *In re Appeal from Decision of Yankton County Comm'n*, 2003 S.D. 109, ¶ 18, 670 N.W.2d 34, 40 (circuit court lacks jurisdiction where no appeal was taken from the board of adjustment, pursuant to SDCL § 11-2-61). *See also Ogle County*, 610

F.3d at 422 (holding plaintiff failed to exhaust her administrative remedies because Illinois law provides a remedy).

Lindgrens argue that the circuit court's general jurisdiction, as opposed to jurisdiction via certiorari or any of the other permissible methods of appealing the Ordinance, allow the court to consider the constitutionality of the County's zoning power. *See* Lindgrens' Brief, p. 20.[9] Lindgrens' point, apparently, is that allowing the "effects" of the Ordinance, including the flicker and noise, to be imposed upon them and their property is abusive. *See id.* Contrary to the Court's rules, Lindgrens cite no authority for these claims, and they should be considered waived. *See Kostel v. Schwartz*, 2008 S.D. 85, ¶ 34, 756 N.W.2d 363, 377 ("Failure to cite relevant supporting authority is a violation of SDCL 15-26A-60(6) and is deemed a waiver.") (citing *State v. Boston*, 2003 S.D. 71, ¶ 27, 665 N.W.2d 100, 109 (failure to cite relevant authority on point)).

Even if the Court were to consider this agreement, it is without merit. Similar arguments were considered and rejected by the Seventh Circuit Court of Appeals in two cases brought by the same individual – *Muscarello v. Ogle County Bd. of Comm'rs ("Ogle County")*, 610 F.3d 416 (7th Cir. 2010) and *Muscarello v. Winnebago County Bd. ("Winnebago County")*, 702 F.3d 909 (7th Cir. 2012), which both affirmed the district courts' dismissal of Muscarello's claims.

[9] Lindgrens' assert: "A challenge to the constitutionality of the Zoning Power, as exercised in *Deuel County*. . . ." Lindgrens' Brief, p. 20 (emphasis added). The relevant county in *this appeal* is Codington, not Deuel County.

1. Unconstitutional Taking

In the first of those cases, *Ogle County,* plaintiff, like Lindgrens in this case, claimed an unconstitutional taking when the county granted a special use permit for the construction of a wind energy system; claimed trespass and nuisance due to the "effects" that would generated by the wind turbines, including noise and shadow flicker; and she sought a declaratory judgment and injunctive relief. *See Ogle County*, 610 F.3d at 419-421.

In the second of the cases brought by Muscarello, she took issue with the amendment to the zoning ordinance that made it easier to obtain permission to build a wind farm. *See Winnebago County*, 702 F.3d at 910-911. Her alleged damage from that amended ordinance were similar to the damages alleged in *Ogle County* – a wind farm adjacent to her property could cause shadow flicker and reduction of light, severe noise, and ice throw. *See id.*

As to her claim of an unconstitutional taking, the court in *Ogle County* explained that to amount to a taking, it must be a "physical invasion" of property, or a "regulatory taking," which requires that the measure must place such onerous restriction on land as to render it useless." *Ogle County,*610 F.3d at 421-22. The court held that even if the plaintiff had alleged facts to support a taking, she failed to exhaust her administrative remedies, concluding that "[s]ince Illinois law provides a remedy for Muscarello, her claims are not excused form the exhaustion requirement." *Id.* at 422.

The court in *Winnebago County*, explained "it is germane to the merits if not to jurisdiction that no property of the plaintiff's has yet been taken, or will be until and unless a wind farm is built near her property – and probably not even then." The court concluded there could be no constitutional taking of Muscarello's property, because "no wind farm has yet been built, [and] there has been no direct, or for that matter, indirect, physical disturbance of the plaintiff's property." *Winnebago County*, 702 F.3d at 913.

In this case, like Muscarello, Lindgrens do not allege and there is no evidence that their property has been physically invaded or that their property would be rendered useless. Further, Lindgrens' Complaint does not allege the sort of disturbance necessary to qualify as an unconstitutional taking, and as of the date this action was commenced, there had not been any disturbance at all, direct or indirect, of Lindgrens' property. Accordingly, there could have been no constitutional taking, as a matter of law.

2. Trespass Zoning, Trespass and/or Nuisance

In their Complaint, Lindgrens make reference to a concept they term "trespass zoning," which they claim is a "term often used to describe the proclivity of wind farm developers, as often facilitated by the writers and administrators of zoning ordinances, to squeeze as many turbines into an allocated leased space, while making use also of non-leased adjacent lands (held by Non- Participating Owners) for some portion of the setbacks required by law or regulation." CR 17-

19. However, Lindgrens' Brief provides no citation to any authorities recognizing or even discussing "trespass zoning." Any claim that Ordinance 68 constitutes trespass zoning is waived and should accordingly be disregarded. *See Kostel*, 2008 S.D. 85, ¶ 34, 756 N.W.2d at 377 ("Failure to cite relevant supporting authority is a violation of SDCL 15-26A-60(6) and is deemed a waiver."); *Boston*, 2003 S.D. 71, ¶ 27, 665 N.W.2d at 109.

Lindgrens also claim that the "effects" of the wind farm, shadow flicker and noise, constitute a trespass on their property. The court in *Ogle County* considered a similar claim, and affirmed the dismissal of the trespass (and nuisance) claim on the basis of ripeness. *See id.* at 423. The court of appeals explained, "the windmills have not been built yet, and so it is difficult to see how they might either by causing a trespass on Muscarello's land or creating a nuisance. . . . We cannot see how the permit, unexercised, causes trespass or nuisance. . . ." *Id.* at 425. The court in *Winnebago County* also considered Muscarello's nuisance claim, rejecting it as premature, at best, explaining:

> Sufficient unto the day is the evil thereof. For all one knows, no wind farm will ever be built close enough to any of the plaintiff's properties to do any harm, let alone harm sufficient to constitute a nuisance under the standard for determining nuisance, which involves a balancing of the costs and benefits of the land used claimed to have caused a nuisance. . . .

Winnebago County, 702 F.3d at 915 (other citations omitted).

As explained above, "[c]ourts should not render advisory opinions or decide moot theoretical questions when the future shows no indication of the

invasion of a right" and accordingly, the court should decline to order declaratory relief "if the issue is so premature that the court would have to speculate as to the presence of a real injury." *Boever*, 526 N.W.2d at 749-50. As the court in *Ogle County* concluded, without actual construction of the wind turbines, there is no way to know whether the turbines might constitute a trespass on Lindgrens' property or whether they might create a nuisance. On this basis, as well, the circuit court correctly dismissed Lindgrens' Complaint. Even if any of the other avenues of relief were somehow revived, the portion of the Complaint seeking a declaration that Crowned Ridge's wind farm constitutes a trespass was properly dismissed and that portion of the circuit court's Order should be affirmed.

3. Due Process

Lindgrens also argue the Ordinance is unreasonable and they appear to claim that, consequently, the Ordinance violates their due process rights. *See* Lindgrens' Brief, pp. 21-26. Beyond a general citation to the seminal case of *Village of Euclid v. Ambler*, 272 U.S. 365 (1926), and to authorities indicating the scope of certiorari review, Lindgrens cite to no pertinent authority that supports a claim that the Ordinance is unreasonable or in violation of their due process rights. *See* Lindgrens' Brief, pp. 21-26. And, Lindgrens do not even explain how or in what ways the Ordinance is unreasonable. In fact, zoning like that found in the Ordinance here is reasonable and constitutional, and furthermore, is generally not reviewable by the courts.

The Court in *Parris v. City of Rapid City*, 2013 S.D. 51, ¶ 12, 834 N.W.2d 850, 854 (affirming summary judgment), held: "Municipalities are "empowered to enact ordinances to 'promote the health, safety, morals, and general welfare of the community. . . ." *Id.* (other citations omitted). "It is well within a municipality's 'power to enact zoning ordinances.'" *Id.* (quoting *Law v. City of Sioux Falls*, 2011 S.D. 63, ¶ 9, 804 N.W.2d 428, 432 (citing SDCL § 9-19-3, SDCL Ch. 11-4)). The Court explained, the "purpose of zoning is not to . . . permit the maximum possible enrichment of a particular landowner. Rather, zoning is designed to benefit a community generally by sensible planning of land uses [.]" *Parris*, 2013 S.D 51, ¶ 12, 834 N.W.2d at 854 (other citations omitted).

In *Fortier v. City of Spearfish*, 433 N.W.2d 228, 230-31 (S.D. 1988) (affirming summary judgment), the Court explained, "it is well settled in this state that any legislative enactment, including a zoning law, is presumed reasonable, valid and constitutional. . . A presumption of validity also applies to zoning ordinances enacted by municipalities." *Id.* (other citations omitted). Accordingly, the Court "will uphold a law unless it is unmistakably unconstitutional." *Id.* (other citations omitted). The Court in *Fortier* explained that a plaintiff such as Lindgrens who attack "the validity of a zoning ordinance carries the burden of overcoming the ordinance's presumption of validity and must show the ordinance is unreasonable and arbitrary." *Id.* (other citations omitted).

This specific due process argument aimed at wind farm ordinances was also considered by the court in *Winnebago County*, which applying the same general principles explained by this Court, concluded the ordinance in that case was not unconstitutional:

> [Muscarello's] attack on the legality of the amended ordinance fails for a more fundamental reason. The wind farm ordinance is legislation. It applies throughout the county and thus to many different properties owned by different people having different interests. Some property owners want to be permitted to build wind farms—otherwise the ordinance would not have been amended to make it easier for them to obtain permission—and at least one does not. "Cities [and other state and local governments, including counties] may elect to make zoning decisions through the political process" rather than having to "use adjudicative procedures to make" such decisions. . . . "Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption."

Winnebago County, 702 F.3d at 914-915 (internal and other citations omitted). The court also explained why judicial actions such as the present are particularly inappropriate:

> "Adjudicative procedures would not be workable in a case like this. Evaluating the plaintiff's objections to the ordinance would require comprehensive knowledge not only of wind farms and their effects pro or con on the environment and on energy independence, but also of the most valuable potential uses of all rural land in the county. A judge could review the ordinance for rationality, . . . but that is an undemanding test, and the national interest in wind power as a clean source of electrical energy and as a contribution to energy independence is enough to establish the ordinance's rationality. (There is federal money to support wind farms; why shouldn't Winnebago County try to get a bit of it by making it easier to build wind farms in the county?) For a court to allow a hypothetical harm to one person's property from a yet to be built (or even permitted to

> be built) wind farm to upend a county-wide ordinance would be an absurd judicial intrusion into the public regulation of land uses.

Id. (internal and other citations omitted).

In short, the purpose of Ordinance 68 is not to "allow" wind turbines, but to place limitations on siting of them. The County, like many other counties throughout the nation, enacted a zoning ordinance that provides specified limitations on the construction of WESs. The limiting of the very effects that Lindgrens complain of, while at the same time allowing wind turbines, strikes a permissible balance between the public's interest in clean, sustainable, affordable energy from the wind, and individuals' own property and other interests. The process of enacting the Ordinance is onerous and careful, and Lindgrens had every opportunity to challenge it prior to its enactment.

Lindgrens have not met their burden of overcoming the presumed validity of the Ordinance and have not, and could not, demonstrate that the Ordinance here is unreasonable. For the Court "to allow a hypothetical harm" to Lindgrens' property from a yet to be built wind farm "to upend a county-wide ordinance would be an absurd judicial intrusion into the public regulation of land uses." *See id.* Under no circumstances or set of facts could Lindgrens prevail on their due process claims. While the circuit court's dismissal was not expressly based on these reasons, this Court can affirm the dismissal on this basis as well.

In sum, Lindgrens' declaratory judgment action was properly dismissed for several reasons. Lindgrens should have exercised the statutory remedies to

challenge the Ordinance, and they should have appealed the PUC's and the Board's decisions via appeal to the circuit court and via petition for writ of certiorari. Because Lindgrens had remedies available to them and failed to avail themselves of these remedies, their declaratory judgment action is impermissible. Further, there is no merit to Lindgrens' constitutional claims of a taking and due process violation, and no merit to a claim of trespass or trespass zoning, even if such claims were properly brought via declaratory judgment action. The circuit court's dismissal was correct and should be affirmed.

C. Lindgrens' Claims are Precluded by the Doctrine of Res Judicata

As noted, Lindgrens had the opportunity to oppose the Ordinance, to challenge the Board's decision through a writ of certiorari, the ability to intervene in the PUC proceedings, and the ability to appeal the PUC's decision, all of which are expressly and statutorily provided. As Lindgrens acknowledge, other parties challenged the Board's decision and other parties appealed from the PUC's decision. The doctrine of res judicata applies here and prevents Lindgrens from relitigating the issues brought in those appeals from the PUC's and Board's decisions.

"'Res judicata bars an attempt to relitigate a prior determined cause of action by the parties, or one of the parties in privity, to a party in the earlier suit.'" *JAS Enter., Inc. v. BBS Enterprises, Inc*., 2013 S.D. 54, ¶ 19, 835 N.W.2d 117, 125 (other citations omitted). The Court does not require strict privity; rather,

"[i]n deciding who are parties for the purpose of determining the conclusiveness of prior judgments, 'the courts look beyond the nominal parties, and treat all those whose interests are involved in the litigation and who conduct and control the action or defense as real parties, and hold them concluded by any judgment that may be rendered.'" *Id.* (other citations omitted).

As noted, Lindgrens could have sought a referendum to challenge Ordinance 68. They personally appeared at the July 16 hearing before the Board and spoke in opposition to issuing a CUP for the WES. Lindgrens' express remedy to challenge the Board's decision was through a petition for writ of certiorari, such as that filed by other opponents. Lindgrens' express remedy to challenge the PUC's decision was via appeal to the circuit court, again, as filed by others. The express statutory scheme provided for challenging the PUC's and Board's decisions are in place, in part, to provide finality to those decisions, so as to allow decisions to be made and actions to go forward. *See Moe v. Moe*, 496 N.W.2d 593, 595 (S.D. 1993) ("public policy is best served when litigation has a finality."). The outcomes of those challenges are final judgments, which cannot be collaterally attacked through this declaratory judgment action, or any other means.[10]

[10] The last issue in Lindgrens' appeal – whether the circuit court erred in granting the PUC's Motion for Costs – does not involve or affect Crowned Ridge. Accordingly, Crowned Ridge offers no argument on this issue.

CONCLUSION

For all these reasons, as well as those set forth by the County, Board and PUC, Crowned Ridge respectfully requests that the Court affirm the dismissal of Lindgrens' Complaint.

Dated this 6th day of April, 2020.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

/s/ Miles F. Schumacher

Miles F. Schumacher
Dana Van Beek Palmer
Michael F. Nadolski
110 N. Minnesota Avenue, Suite 400
Sioux Falls, SD 57104
Telephone: (605)332-5999
mschumacher@lynnjackson.com
mnadolski@lynnjackson.com
dpalmer@lynnjackson.com
Attorneys for Defendants / Appellees Crowned Ridge Wind, LLC, Crowned Ridge Wind II, LLC, Boulevard Associates, LLC

CERTIFICATE OF COMPLIANCE

This Brief is compliant with the length requirements of SDCL § 15-26A-66(b). Proportionally spaced font Times New Roman 13 point has been used. Excluding the cover page, Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance, Brief of Appellees contains 7,015 words as counted by Microsoft Word.

/s/ Miles F. Schumacher

Miles F. Schumacher

CERTIFICATE OF SERVICE

Miles F. Schumacher, of Lynn, Jackson, Shultz & Lebrun, P.C. hereby certifies that on the 6th day of April, 2020, he electronically filed the foregoing document with the Clerk of the Supreme Court via e-mail at SCClerkBriefs@ujs.state.sd.us, and further certifies that the foregoing document was also e-mailed to:

A.J. Swanson
Arvid J. Swanson, P.C.
27452 482nd Ave.
Canton, SD 57013
Attorneys for Plaintiffs / Appellants Timothy Lindgren and Linda Lindgren

Jack H. Hieb
Zachary W. Peterson
Richardson, Wyly, Wise, Sauck & Hieb
One Court St.
Aberdeen, SD 57402
Attorneys for Defendants / Appellees Codington County and Codington County Board of Adjustment

Amanda Reiss
Kristen N. Edwards
SD Public Utilities Commission
500 East Capitol Ave.
Pierre, SD 57501
Attorneys for Defendants / Appellees South Dakota Public Utilities Commission

The undersigned further certifies that the original and two (2) copies of the Brief of Appellees Crowned Ridge Wind, LLC, Crowned Ridge Wind II, LLC, and Boulevard Associates, LLC in the above-entitled action were mailed by United States mail, postage prepaid to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501 on the above-written date.

/s/ Miles F. Schumacher