IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

In the Matter of the Administrative Appeal of
GARRY EHLEBRACHT, STEVEN GREBER, MARY GREBER,
RICHARD RALL, AMY RALL and LARETTA KRANZ,
Appellants,

v.

SOUTH DAKOTA PUUBLIC UTILITIES COMMISSION and
CROWNED RIDGE WIND II, LLC,
Appellees.

 # 29610
19CIV20-000021

Appeal from Circuit Court, Third Judicial Circuit, Deuel County, South Dakota
The Honorable Dawn Elshere, Presiding

APPELLANTS' BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Secondary Sources

INTRODUCTORY STATEMENT

Appellants, Garry Ehlebracht, Steve Greber, Mary Greber, Richard Rall, Amy Rall and Laretta Kranz, will be referenced by their full names or generally as Appellants. South Dakota Public Utilities Commission, Appellee, will be referenced as PUC or Agency. Agency issued a Facility Siting Permit ("Permit") for a large-scale wind farm project ("Project") to Appellee Crowned Ridge Wind II, LLC, generally referenced as Applicant or Crowned Ridge II.

The Agency's accumulated record is massive (about 15,000 pages). References to that record employ the prefix "R" followed by page(s). When referring to a specific document, numbered-lettered as an exhibit, the reference is underscored, as in "Ex. A12-1," followed by citation to the Agency's record. The transcript of argument to the PUC on claims of "confidentiality" (September 17, 2019) is referenced as "TR-A" followed by page and line. Testimony during the Agency's evidentiary hearing (February 4-6, 2020) is cited "TR-H" followed by page and line. The circuit court heard argument on November 23, 2020; that transcript is referenced as "TR-C," with page and line. Citations to the Clerk's Record appear as "CR"- followed by page in the Clerk's index.

Reference herein to "Effects" potentially includes many undesirable consequences when humans are asked (or required, without their consent) to live in the immediate vicinity of a Project. The term is especially used for two chief among them, "Noise" and "Shadow Flicker." As commonly used in the record, "Participant" is a landowner who has given a wind turbine lease to Applicant, an instrument that also includes a litany of easements, including an "Effects Easement." The Participant may also happen to live in the vicinity of wind turbines, but not necessarily. "Non-Participant," on the other hand, references a landowner not granting leases or easements to Applicant. This term is used

in a more narrow sense, with Applicant's experts focusing not upon the open lands but only the "occupied dwellings" (the homes) of the Non-Participants.[1] The Non-Participant *always* lives in close proximity to the Project, while having *never* executed an instrument accepting the Effects upon the Non-Participant's residence.

JURISDICTIONAL STATEMENT

The circuit court's order of March 12, 2021 (see Appendix B, CR-1566), incorporates the court's previously issued memorandum opinion ("Mem. Op.," CR-1528, see Appendix A), affirming the Agency's decision and order of April 6, 2020. R014230. Notice of entry of the order was served March 15, 2021. CR-1586. Notice of Appeal was filed April 6, 2021. CR-1609. This Court has jurisdiction under SDCL 15-26A-3. This appeal is pursued by the same Appellants as in # 29352, submitted on briefs in November 2020, challenging Deuel County's use of the Zoning Power to accommodate this Project.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

Appellants' docketing statement, filed April 6, 2021, identifies the issues presented to the circuit court, and for further consideration, as follows:

> ***Issue 1:***
> **Whether the Agency, authorized to promulgate rules concerning wind energy conversion facilities (SDCL 49-41B-35) but adopting no relevant rules as to the meaning of "minimal adverse effects,"[2] may proceed on a case-by-case or *ad hoc* basis to permit a burden of "Effects" upon both citizens and their properties under variable**

[1] Quantifying the Effects is reserved for "occupied dwellings," and *never* at the property line of Non-Participants. Under the applicable zoning ordinances, Participants – *if they happen to live there* – are eligible to receive somewhat greater doses of Noise, as an Effect. The casting of "Effects" upon agricultural lands matters not to the PUC - only occupied dwellings are considered.

[2] ARSD 20:10:21:12, citing to the Legislative findings in SDCL 49-41B-1, speaks in terms of "efforts of the utility to . . . minimize or avoid adverse environmental, social, economic, health, public safety, and historic or aesthetic preservation effects."

regulatory limits developed by others, including those interested in the promotion of wind development[?]

Agency's Decision on Issue 1: As per the Agency's customary practice in several prior cases, Permit Condition 26, as to Noise and measurement [R014252] a sound level of 45 dBA for Non-Participants, and Permit Condition 35, as to Shadow Flicker [R014255] an annual limit of 30 hours, have been imposed based on testimony of Applicant's experts, and experts hired and called by Staff.[3]

Trial Court's Decision on Issue 1: The trial court concluded the Agency is permitted – *but not required* - to adopt rules concerning the statutory standard of "minimal adverse effects." (Mem. Op., 14-16, CR-1542).

Issue 1 is restated as follows:

Issue 1-A: Whether the Agency, charged with ensuring "minimal adverse effects" are received by neighbors, has discretion to impose, on an ad hoc basis, variable limits for intensity and duration of the Effects (noise and shadow flicker)?

Issue 1-B: Whether the Agency's practice of a case-by-case approach to regulation, while failing to adopt a statewide standard for adverse effects emitted by a Project onto the public, violates Appellants' rights otherwise assured by state and federal constitutions?

Issue 2:

Whether SDCL 43-13-2, "Easements and Servitudes," applies to the land and property interests of Appellants, bearing on the Applicant's claimed right to hereafter discharge adulterated light (in the form of Shadow Flicker, along with other Effects) onto and into the dwellings and lands of Appellants, given that the Agency's Decision offers or affords approval of such discharge but without the required consent of the fee owner[?]

Agency's Decision on Issue 2: While the PUC's Decision notes the names of Appellants [R014233], the Agency failed to make *any* pertinent findings or conclusions as to their particular land-based interests as nearby Non-Participants, including their claimed right as landowners to avoid burdens and servitudes of the Effects to be thrown off by the Project, other than to find, Finding of Fact 34, "Applicant has all land rights needed to construct and operate the Project." Appellants challenge that accuracy of finding, as the Project, without benefit of easement, will cast the Effects on their homes and lands.

[3] Each condition being *more* favorable to Applicant, and *less* so to Appellants, than the Agency's *ad hoc* determinations in *Prevailing Wind Park*, if such had been imposed here.

Trial Court's Decision on Issue 2: Taking note, at 16, of Staff's argument the PUC "is not a court of general jurisdiction and has no authority to assess property rights, nor waive any underlying law, ordinance or regulation that otherwise applies to the construction of wind turbines," the trial court concluded the statute that Appellants rely on (SDCL 43-13-2(8), suggesting that the "right to discharge light upon and over land is an affirmative easement") is a matter beyond the jurisdiction of the Agency. With the PUC making no relevant determinations concerning easements,[4] the trial court concluded it need "not weigh into the question of easements" (Mem. Op., at 17, CR-1545).[5]

Issue 2 is restated to this Court as follows (Issue 2-C, as stated in Appellants' Docketing Statement, is merged into Issue 2-A):

Issue 2-A: Whether the Applicant, holding Effects Easements from Participants, is entitled or privileged by law, or the Agency's Permit, to cast or emit the "effects" (both noise and shadow flicker) on nearby Non-Participants, without benefit of similar easements?

Issue 2-B: Whether Applicant's casting of shadow flicker on Non-Participants, having granted no easements to Applicant, conflicts with the rights and privileges of such landowners under SDCL 43-13-2(8)?

Issue 3:

Whether the exercise of the Agency's permitting authority under Chapter 49-41B, SDCL, giving approval for the casting of Effects over the homes and lands of Non-Participants, but without an easement being conferred in favor of Applicant and also without the provisions of SDCL 21-35-31 having been invoked, is a taking of Appellants' private property interests?

Agency's Decision on Issue 3: The PUC decision, beyond noting the names of Appellants [R014233], made no findings or conclusions

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[4] And indeed, the Agency did not, since it never inquired whether the casting of "Effects" upon Non-Participants also entails the need for an "Effects Easement," as Applicant obtained from *each* Participant. The issue was not addressed by the Agency, but the trial court could have done so given the scope of inquiry permitted by SDCL 1-26-36. The Agency's decision is a *de facto* easement, though lacking Appellants' signatures and unrecorded in the land records office of Deuel County. The PUC decision embodies Applicant's entitlement claims, just as if it *were* the dominant estate owner in relation to the homes and lands of Appellants.

[5] SDCL 1-26-36 permits inquiry, *inter alia*, as to whether the substantial rights of appellant are prejudiced because the agency "inferences" or decisions are "in violation of constitutional or statutory provisions." Appellants, as landowners, homeowners and citizens of the United States, have consistently made that assertion below, to no avail.

regarding the property rights of Appellants, as Non-Participants, other than expressly approving the flow of Effects thereon in accordance with Permit Conditions 26 and 35 [R014251, 014255].

Trial Court's Decision on Issue 3: Citing *Benson v. State*, 710 N.W.2d 131, 149 (S.D. 2006), the trial court concluded (Mem. Op., 17) Appellants failed under each of the four theories of "taking" available under South Dakota case law.[6] The trial court further concluded the question of whether the Project is a nuisance *per se* is not ripe.[7]

Issue 3 is now restated thusly:

Issue 3-A: Whether the Agency decision, expressly approving the intensity and duration for the casting or emission of "Effects" (noise and shadow flicker) upon Non-Participants (including Appellants) represents a *per se* taking of interests (an easement) in the lands and property interests of Non-Participants?

Issue 3-B: Whether the Agency decision, expressly approving certain levels or durations of the Project's adverse effects upon the homes and lands of Non-Participants (including Appellants) vitiates the nuisance laws as a potential remedy available to Non-Participants, thus representing a taking of property rights otherwise secured by law?

STATEMENT OF FACTS

Appellants are neighbors, all living within several miles of Goodwin, a small village in Deuel County. Ehlebracht and Kranz are to the south, very near Bemis, while

[6] Namely, a regulatory physical taking; a permanent physical invasion of property; depriving owner of all economically beneficial uses of property; and a land-use exaction violating standards. This Court's decision in *Benson* is cited by the briefs of both Petitioner and Respondent as argued to the U.S. Supreme Court on March 22, 2021, No. 20-107, *Cedar Point Nursery v. Shiroma*, on writ of certiorari to the U.S. Court of Appeals for the Ninth Circuit (prior decision reported at 956 F.3d 1162). *Cedar Point* involves a state access regulation that has the effect of an easement, a taking of private property without just compensation. The PUC order here is comparable to an "Effects Easement," even though *not* conferred under a volitional instrument uttered by the fee owner (Appellant Kranz). The decision operates *just as if* an easement had been taken.

[7] Reference to a potential nuisance claim challenged the PUC decision, the Project being expressly approved to cast "Effects" (the maximum dosage being specified by the Agency). *That* particular ceiling of intensity or duration of Effects becomes the legal standard for this permanent land use. When otherwise observing that specified allotment, the Project is seemingly beyond challenge under the nuisance law, given the language of SDCL 21-10-1 and -2, in particular.

the Grebers and Ralls are to the northeast. The four homes and associated lands are nonconsensually embraced by Applicant behind the Project's rendered boundary line, represented by four "red dots." Ex. A14-2, R011280.

Appellants' individual sites are smaller parcels, with the exception of Mrs. Kranz' farm at Bemis. Applicant's affiliate sought - in or about 2013, without success - to obtain a wind turbine site lease with myriad easements from Appellant Kranz, a document commonly referenced as the "Kranz Easement." Ex I-2, R013272. Applicant sought to exclude the Kranz Easement (R001499-001525) from the record based on a claim of confidentiality, with the "application for party status (corrected)" [R001197] being partially expunged from the record for a time at Applicant's behest. R001215.

Applicant's attempt to retain secrecy for the Kranz Easement – first, as to Section 5.2 (the "Effects Easement") but in particular, Section 11.10 ("Remediation of Glare and Shadow Flicker") – remains relevant to this case.[8] Applicant argued these two sections deserved confidential treatment, as potential "competitors [might] use [that information] to develop more attractive offers to landowners, which . . . directly impacts the competitiveness of Crowned Ridge Wind II's affiliates . . . ." TR-A 5:4, R001988.

Given this assertion, Commissioner Nelson observed:

> [Counsel's] reasoning for keeping this confidential - - and I'm going to quote this. He said today "to prevent more attractive offers to landowners." Well, when we get all of these developers coming to South Dakota, one of the things that they are contending is, by golly, you should approve our Application because we are benefitting landowners. And now he's saying, well, by golly, we wouldn't want to do anything to further improve the offer to landowners. I just find that offensive as it relates to South Dakota landowners. TR-A 15:16-16:4, R001998.

[8] Sections 5.2 and 11.10 of the Kranz Easement are replicated in Appendix C.

The Commissioner is concerned for the interests of South Dakota landowners in privity with Applicant. And what of Non-Participants? As to their homes and lands, the Agency has done nothing to blunt the competitive aims of Applicant or those promoting like projects.[9] As such, Applicant is allowed to make use of the lands and homes of Non-Participants, *and permanently*, a gift of sorts now fully confirmed by the Agency's order.[10]

The Agency ruled the challenged provisions were not entitled to confidential treatment (R003224). The comments of counsel - and Commissioner Nelson's response - demonstrate also the shift in wind farm development strategies from the era of the Kranz Easement (2013) to the recent submission of this Project to the Agency.[11]

Both Applicant and Staff called expert witnesses to provide opinions and literature about the likely impact and risks of the "Effects" on the lives of Non-Participants, as neither statute nor regulations establish intensity or duration parameters. From this array of witnesses, and the recommendations of Staff, the Agency imposed limits for both Noise and Shadow Flicker, measured at or near the occupied dwellings of Non-Participants. (See Permit Conditions 26 and 35, R014252, 014255.)

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[9] The PUC's own expert, Hessler, opined the Project was "aggressively devised" (Ex. S2, R012746; TR-H 497-8); this remarkable statement is *never* referenced in the Agency's deliberations or decision. When a Project is readily permitted notwithstanding such a design, is the PUC effectively protecting both the property interests *and* persons of Non-Participants?

[10] Not one Commissioner expressed concern over this fact.

[11] Applicant still obtains "Effects Easement" (much like Section 5.2, *see* Appendix C), while assuming no contractual obligation to Participants, as with Section 11.10, to subsequently address glare and Shadow Flicker concerns. As to Non-Participants, no such obligation was ever assumed by Applicant, and the Agency's decision fails to impose one.

Witness Chris Ollson, an environmental consultant, adduced copious volumes of wind farm literature, "Effects" ranging from annoyance, distress, sleep disorders, Noise, and Shadow Flicker.[12] Ollson's Ex. A12-16 (R006006) in both German and English, is the origin of the premise[13] that humans will withstand certain doses of Shadow Flicker without ill effect. A cursory review of the German study ("Information on How to Identify and Assess Optical Immissions Wind Turbines," dated 2002) establishes that Shadow Flicker is not "significantly harassing" if not exceeding 30 hours per calendar year and "beyond no more than 30 minutes per calendar day." R006011. The German study also provides for a limit of "8 hours per calendar year." R006012. Ollson's Ex. A12-15 (at R005988, with a slightly different summary at R005952) explains the German study recommendations:

> "German guidance (2002) adopts two maximum limits:
> - An astronomic worst case scenario limits of 30 hours per year or 30 minutes on the worst affect day; and
> - A realistic scenario taking account of meteorological parameters limited to 8 hours per year."

Hence, the Agency applies merely *one-half of one* of the *two* maximum limits devised by German officials. As recounted by Staff witness Kearney (Ex. S1, R011799), the PUC has *always* used the 30 hour per year limit for Shadow Flicker – except in the case of *Prevailing Wind Park* (EL-18-026), with limits set at 15 hours per year, along with a daily limit of 30 minutes (unless the residence owner had signed a waiver).

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[12] Ollson's prepared testimony, (Ex. A12, R005696) is followed by fifteen articles, some being Ollson's own work, Ex. A12-2 to Ex. A12-16, as referenced and identified further in Appendix D, *infra*.

[13] In Germany, now said to be commonly accepted everywhere. R002023. In reality, only a *one-half of one element* of the *two-part* German standard is deployed by the PUC.

R011810.[14] Witness Kearney further explained that Staff recommended "30 hours per year" (TR-H 573:10-13) for the *Prevailing Wind Park* matter. The applicant agreed, but the Commission, on its own motion, "changed it to 15 hours per year." (*Id.*) Kearney understands the usual annual limit of 30 hours has come into being because of a "determined court case, and it's kind of slowly filtered through the U.S. in a lot of zoning ordinances and state ordinances." TR-H 570:11-15.[15]

Witness Kearney testified that Staff relies on expert witness Hessler for sound guidance, being aware of the distinction between the expert's "ideal design goal of 40 [dBA] and the regulatory permit limit of 45 dBA." TR-H 575:14-17.[16] In *Prevailing Wind Park*, the noise limit for Non-Participants was set at 40 dBA (R011808), which happens to be Hessler's "ideal design goal." Kearney recommended – and the PUC adopted - 45 dBA as the Agency's so-called regulatory limit. R014251, Permit Condition 26. This limit is supported neither by statute nor regulation. Witness Hessler's "ideal design goal" (40 dBA), along with his observation *this* Project is "aggressively devised" (thus necessitating Kearney's recommendation of 45 dBA for Non-Participants, including Appellants), are never mentioned by the Agency. The fallacy of a case-by-case approach, to fix duration and intensity of Effects for the homes of Non-Participants for *this*

[14] A wind farm in Bon Homme, Charles Mix, and Hutchinson Counties, permitted in late 2018. *Prevailing Wind Park* is unique in having both annual *and* daily limits imposed.

[15] Appellants continue to search for that "determined court case." An Agency regulation limiting "Effects" on Non-Participants would provide clear guidance. Presently, Kearney explained, the Agency looks "to the record that's presented in each docket" – "[i]t's a case-by-case basis." TR-H 569:19-20, 24-25. The German standard is neither consistently nor fully applied. Using just part of this foreign test on an *ad hoc* basis here seems rather thin, with a permanent right conferred for Effects upon the homes of Non-Participants.

[16] See note 9, *supra*, for Hessler's view this Project is "aggressively devised."

particular case, seems obvious.[17] The Agency's determinations may be flexible to accommodate aggressive Project designs, but run counter to the "ideal design goals" for those forced to live permanently[18] within the shadows and din. The PUC's statutory role would greatly benefit from regulations limiting Effects that Non-Participants must experience, as well as declaring *the* proper place for measuring those Effects.

STANDARD OF REVIEW

This appeal is governed by SDCL 1-26-36. The Agency's factual findings are reviewed under the clearly erroneous standard, and questions of law and statutory interpretation are reviewed de novo. *Midwest Railcar Repair, Inc. v. South Dakota Department of Revenue*, 2015 S.D. 92, 872 N.W.2d 79. The court may reverse if appellant's substantial rights have been prejudiced because the agency's findings, inferences, conclusions or decision are, *inter alia*, in violation of constitutional or statutory provisions, in excess of the statutory authority of the agency, made upon unlawful procedure or affected by other error of law, clearly erroneous, or characterized by an abuse of discretion. Appellants submit this *is* a case in which their substantial rights have been prejudiced – their rights as property owners being fully ignored by the PUC - and the Agency's resulting decision is thus legally defective.

ARGUMENT

Issue 1-A: Whether the Agency charged with ensuring "minimal adverse effects" are received by neighbors has discretion to impose, on an

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[17] Appellants suspect the design of their auditory and other senses, as residents of Deuel County, is not materially different than those living in close proximity to *Prevailing Winds Park* in Bon Homme County. Applicant's wind farm design trumps all at Agency.

[18] The Kranz Easement, if executed and the option exercised, would endure for 50 years (R013273). Applicant expects the Project's life to extend for 25 years (R014234), but if repowered, the Project might extend "for many more years." R004511. The Permit itself has no explicit term. As such, the "Effects" from this Project are *permanent* in nature.

ad hoc basis, variable limits for intensity and duration of the Effects (noise and shadow flicker)?

Permits are required as the legislature ensures the "location, construction, and operation of facilities will produce minimal adverse effects . . . upon the citizens of this state." SDCL 49-41B-1. The Agency is directed to adopt rules to implement the chapter. SDCL 49-41B-35. No Agency rules plumb the meaning of "minimal adverse effects."[19] The trial court, Mem. Op. 15, adopts the arguments of Staff and Applicant to the effect the Agency has the discretion, but not the legal obligation, to adopt rules, concluding also that the PUC must defer to whatever "Effects" standard is in place under the zoning ordinance in each county. As such, the Agency's action in one case (the establishment of more stringent Permit Conditions for a wind farm in Bon Homme County, for example) causes no offense or harm to the Appellants residing in Deuel County.

Allowing this Agency to establish variable standards – one set of "Effects" for a wind farm in Bon Homme County and another for this Project in Deuel County – leads to the Hessler opinion: this Project is "aggressively devised." *See* Ex. S2, R012746, TR-H 497:24-498:25.[20] Under the straightjacket imposed upon the Agency, as to elements of

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[19] If PUC wishes suggestions for rules, consider these: (1) prohibit the non-consensual embrace of property within the Project's boundary (as implicated here); (2) prohibit the casting of "Effects" onto homes and lands not consensually accepted by easement (likewise at issue). Otherwise, with knowledge of Agency's prior decisions, to quote expert Hessler, those with "aggressively devised" Projects may probe the depths of the ephemeral "regulatory limits" as to Non-Participants. One can assume Applicant favors this approach, with Effects allowed to invade Non-Participants – up to and into their homes - without need of an Effects Easement, so long as the "annual limit" of 30 hours for Shadow Flicker (merely one part of the German standard) is not exceeded.

[20] This expert's apt description conflicts with legislative findings that citizens never receive more than "minimal adverse effects." This opinion of Staff's own expert is never repeated or quoted, other than by Appellants.

time to issue the Permit and the design presented,[21] some rule making activity as to what comprises "minimal adverse effects" would maintain the onus for devising a proper design on each applicant. Thus, the Agency's failure to adopt substantive rules enhances the risk of failing to comply with the letter and the spirit of the legislative findings. Applicant is likely to simply *take* as much as possible of whatever it does not own,[22] so long as the Agency's regulatory limits *de jour* (porous, existing neither in statute nor regulation) are not penetrated.

As noted in *Matter of Sales and Use Tax Refund Request of Media One, Inc.*, 1997 S.D. 17, 559 N.W.2d 875, at ¶ 11, and in SDCL 1-26-1(8), a "rule" is an agency statement of *general applicability* to implement, interpret, or prescribe law, policy, procedure or practice requirements of an agency. Whether an agency has correctly applied its own rules presents a question of law, and as such, no deference is accorded to the conclusions reached by the agency or the circuit court below. *Id*.

For now, there are *no* substantive rules addressing the legislative policy a facility is to cause merely "minimal adverse effects." As the Agency attempts to keep this standard in mind, while relying on the *ad hoc* opinions of Staff's own experts – along with the testimony of whatever experts Applicant has presented[23] - it may seem logical that the citizens residing near a Project in Bon Homme County can be assured of a lesser intensity and duration of "Effects" (with both an annual and daily limit being applied for

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[21] SDCL 49-41B-25 (9 months) and SDCL 49-41B-36 (no jurisdiction to mandate location).

[22] The land and homes of Non-Participants, for example. Ex. I-3, R013293, at 013294, summarizes the "Effects" anticipated from this Project.

[23] None of the experts directly address the concept of "minimal adverse effects."

shadow flicker), even while those residing near this Project, in Deuel County, must accept greater measures. Such distinctions are warranted, the Agency concludes, given the Project's conservative design (in Bon Homme County, not Deuel). Agency's proceedings for large-scale wind are like the tail wagging the dog. If an Applicant's design is "aggressive," Staff recommends a duration or an intensity of Effects beyond the "ideal" (as Hessler puts it). Just how did this fractional part of a German "safety" rule become the honored, *ad hoc* polestar for this Agency, such that South Dakota Non-Participants must likewise accept it also? Property rights and health issues are conflated.

Thus, no rules of general applicability are applied here (such as those suggested by Appellants - see note 19, *supra*). Rather than applying a permanent rule, the Agency's short history in permitting large wind farms is marked by an iteration of "Permit Conditions," largely recycled from one Project to another, case-by-case. The exception is made *if* the design submitted to the Agency just happens to be sufficiently prudent or conservative to allow stricter constraints on the Applicant's emissions of Effects.[24] But this can't be whenever a Project is "aggressively devised" (in the words of Hessler, the expert willing to ignore, *for this case*, his own pronounced ideal model).[25]

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[24] In *Application of Prevailing Wind Park LLC*, EL18-026, the Agency employed both an annual *and* a daily standard for shadow flicker; *that* annual standard is exactly 50% of that used here. R011810. Since neither Staff nor Applicant suggest a daily limit, one wonders how the Agency there came to know of this part of the German rule. This also suggests the key factor for these cases is not that of "minimal adverse effects," but whether the Project is conservatively designed to allow for such benefits upon being shoehorned into the neighborhood. The Project here (obviously) does *not* have such a conservative design, according to Hessler.

[25] Hessler further observed, TR-H 507:4-12 - "It's how many turbines are around a particular house or a point of interest. . . . [T]he density of turbines is such that there's lots of nonparticipating houses with predicted levels above 40 [dbA]. At my last count I think it was approaching 100 [homes]. It was a lot. . . . And I would like to see a lot lower

This isn't the first time this Agency, in pursuit of public safety, was selected to accomplish "uniformity of regulation" (even if the concepts employed by the several counties in their zoning ordinances have their differences).[26] See *Northwestern Bell Telephone v. Chicago & North Western Transp. Co.*, 245 N.W.2d 639, 642 (S.D. 1976). Employing one standard of "effects" for those in Bon Homme County, living in the shadows of a wind farm there, while applying quite another standard for those in Deuel County (Appellants), is unjust, an abuse of process flowing from the policy of SDCL 49-41B-1.

> ***Issue 1-B:*** Whether the Agency's practice of a case-by-case approach to regulation, while failing to adopt a statewide standard for adverse effects emitted by a Project onto the public, violates Appellants' rights otherwise assured by state and federal constitutions?

Because of the PUC's *ad hoc* approach in the permitting of large wind projects, persons who are Non-Participants are treated differently. The legislature's findings in SDCL 49-41B-1 pertain statewide, rather than merely a particular area or territory of South Dakota. *State v. Smith*, 88 S.D. 76, 80, 216 N.W.2d 149, 151 (1974). Yet, varying intensities and durations of "Effects" are approved and applied by the Agency, case-by-case, neighbors in Bon Homme County being afforded greater favor than those in Deuel County. Nothing suggests the physical characteristics or capacities of the residents of Deuel are better designed by their Maker to handle higher intensities or durations of

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number there." Hessler's stated concerns remain unaddressed by the Agency, ostensibly in pursuit of the legislature's findings.

[26] Trial court concluded, at Mem. Op. 15, the PUC must "[defer] to local county ordinances." This conclusion seems to rest on SDCL 49-41B-22, as amended in 2019. County's CUP authorizes "Effects" of specific duration or intensity, but does *not* obviate Agency's duty to govern "Effects." Further, use of the Zoning Power for *this* purpose by the several counties is likewise a taking of property interests, at issue in Appeal # 29352, submitted on briefs November 15, 2020.

Effects, or that their inherent property rights are less worthy of protection. The standards regularly deployed by the PUC since 2017 (with one exception) have not been adopted as safe or suitable limits in any formal sense, whether from the standpoint of human health and safety or as burdens to be imposed on the property interests of those humans, now appearing here as Appellants.

City of Aberdeen v. Meidinger, 29 S.D. 412, 233 N.W.2d 331 (1975) involved criminal prosecution of a defendant charged with operating a junkyard without a permit. After being sentenced on a conviction in municipal court, defendant appealed, claiming that the statutes under which he was charged violated Article VI, s 18 of the South Dakota Constitution and the Equal Protection clause of the Fourteenth Amendment, U.S. Constitution. After reviewing potential different outcomes for violating municipal ordinances in Sioux Falls, Rapid City, Aberdeen, Mitchell, Clark and Garretson, this Court concluded the statutes were based on an "arbitrary classification resulting in unequal punishment for like offenses where one city qualifies population wise for a municipal court . . . and another in the same locality does not." *Id.*, at 416, 333. This inequality, the Court concluded, was "completely arbitrary and capricious." *Id*.

The arbitrary and capricious nature of the "rules" enforced by the PUC is even more stark. It depends on just how conservative – or perhaps how "aggressively devised" (in the opinion of Hessler) – the Project happens to be. The PUC – proving to be ever flexible in carrying out the legislature's policy – is willing to quantify and sculpt the Effects, for sanctioning as a Permit Condition, to fit the particular circumstances of the Project's design. In such circumstances, *Applicant* is in charge, having fostered the design, while the PUC is merely on stage, playing an assigned role and overseeing small

details of the Effects. In such manner, PUC readily tightens the permissible emission of Effects (as was done in *Application of Prevailing Wind Park*), yet without ever infringing upon the design of that Project. But, if design requires a more liberal approach (as Hessler famously observed), then *more* Effects are permitted, becoming an *added burden* upon the property rights and interests of Non-Participants.

As applied by the Agency, the *ad hoc* classifications purportedly devised to protect the property (and health) interests of Non-Participants are entirely arbitrary, lacking a rational basis, as observed in the concurring opinion of Justice Sabers in *Lyons v. Lederle Laboratories*, 440 N.W.2d 769, 773 (S.D. 1989). If a more conservative design were presented (or, one not so "aggressively devised" in Hessler's view), this Project could be made subject to the very same two-fold criteria applied in the *Prevailing Wind Park* matter. The regulations suggested (*see* note 21, above) would end the pseudo role-playing by both Applicant and Agency, thus benefiting the "citizens of this state."[27]

> ***Issue 2-A:*** Whether the Applicant, holding Effects Easements from Participants, is entitled or privileged by law, or the Agency's Permit, to cast or emit the "effects" (both noise and shadow flicker) on nearby Non-Participants, without benefit of similar easements?

Applicant has obtained wind leases from Participants for purposes of siting the Project's turbines. The leases include "Effects Easements," accepting both Noise and Shadow Flicker from turbines on the Participant's own land, or "attributable to the Wind Farm . . . on adjacent properties over and across the Owner's Property." R011898.[28] Neither Applicant nor Agency's Staff expressed views on the record as to whether similar Effects Easements are appropriate (or perhaps even required) for the lands and homes of

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[27] As referenced in SDCL 49-41B-1.

[28] Matching the language of the Kranz Easement, Section 5.2, in Appendix C.

Non-Participants. With the exception of one "Participation Agreement" disclosed after the Agency's hearing[29], Applicant has in place no Effects Easements with Appellants or other Non-Participants.

While Participants have granted Applicant a substantial amount of control over their property, thus inviting the Agency's ruling on the level of the Effects that may be cast upon them by the Project, Non-Participants uttered no such instruments in favor of Applicant, conceded no such role to the PUC. If an "Effects Easement" is warranted for the lands of Participants, then when Applicant seeks the same legal footing and the right to afflict with Effects as a servitude upon the lands and homes of Non-Participants, it must likewise hold an Effects Easement.[30] Thus, without benefit of an interest created under the provisions of SDCL Chapter 43-13, any claim of *lawfully burdening* the homes and lands of Appellants (and of all other Non-Participants) hangs entirely upon the Permit issued by the PUC.

The doctrine of judicial estoppel has been outlined in many cases, including *Stabler v. First State Bank of Roscoe*, 2015 S.D. 44, ¶ 18, 865 N.W.2d 466 (2015). In essence, if an earlier position is judicially accepted, the party later claiming an inconsistent legal position may be estopped, in order to avoid inconsistent legal determinations. Applicant's use of an "Effects Easement" with Participants – *and those*

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[29] Marked as Ex. I-8 (R013802). Why this landowner, with a small parcel that does not also include a wind turbine, afforded Applicant a form of "Effects Easement" is not clear. Appellants assume that owner may receive "Effects" beyond the specific intensity or duration level otherwise approved by the Agency. When or by what means have those levels of Effects become *the* fulcrum point in South Dakota, such that when exceeded, an easement is required - otherwise the Effects may be freely cast without recourse?

[30] Neither the PUC nor the trial court accepted this logical conclusion.

landowners only – is inconsistent with the position that, *for all others*, the Agency's Permit fully suffices in casting Effects within the Permit Conditions.[31] This view, again, conflates the legislature's focus on *health* (as the Agency resorts to some part of a German standard) with rights conferred by instrument upon a servient estate.

Aside from the statutory assignment under SDCL 49-41B-1[32], and the elements for Applicant's burden of proof listed in SDCL 49-41B-22, the PUC has *no* authority to determine, grant, award or compel easements. That much is clear, but without retreating from the position the PUC Permit under SDCL Chapter 49-41B, does have the *effect* of ostensibly authorizing burdens or servitudes on adjoining lands and homes, albeit without the formal hallmarks of an easement.[33]

That burden is particularly evident as to these Appellants and their homes.[34] The homes are from 2,000-2,749 feet from the nearest turbine, must endure between 3:04 and 15:04 hours of Shadow Flicker annually, while Noise is predicted from 42.0 to 43.6 dBA. While Shadow Flicker for each home is less than 30 hours annually, no one knows (on this record) whether the German standard's daily limit of 30 minutes is also offended by Applicant's predictions, or if the additional 8-hour per year limit (as referenced in Ex.

[31] The PUC's own actions in *Prevailing Wind Park* – imposing a daily time limit for Shadow Flicker, being part of the German standard – is compelling also on the issue of judicial estoppel. No evidence was adduced here as to daily time limits.

[32] That task is to ensure "minimal adverse effects" are "upon the citizens of this state."

[33] In pleadings before the PUC, Appellants have referenced the Agency's action as the taking of a *de facto* easement. Appellants also persistently criticized the PUC's actions that erase Non-Participant's property lines and, without benefit of Agency rule making, encourage deployment of some fractional part of the so-called German "safety" standard, which reads or tallies the Effects at the occupied dwellings of Non-Participants.

[34] Ex. I-3, R013293, at 013294, includes a summary of Applicant's predicted Effects.

A12-15, at R005988) is also transcended. Notably, two of the four homes exceed 8 hours annually.

If merely one portion of the German safety standard is to be enforced in South Dakota, that should entail an appropriate rule-making proceeding. Appellants also can't help but notice that both Staff and Applicant are avid promoters of that *part* of the German rule selected by the PUC (30 hours per year for Shadow Flicker). No evidence was adduced on unapplied aspects of the German "safety" rule, even as the PUC's own expert (Hessler) was pushed beyond *his* ideal design goal (40 dBA) to some illusory "regulatory limit" of 45 dBA.

These Effects, cumulatively, burden the lands of those living nearby.[35] When given by the owner of lands, an "Effects Easement" is certainly in order. The PUC's Permit is a rather poor (and wholly inadequate) substitute where such an easement was neither sought by Applicant nor given by Non-Participants.

> ***Issue 2-B:*** Whether Applicant's casting of Shadow Flicker on Non-Participants, having granted no Effects Easement to Applicant, conflicts with the rights and privileges of landowners under SDCL 43-13-2(8)?

From the outset of Appellants' intervention in August 2019 (R001197), the Agency's unilateral imposition of servitudes on the lands and homes of Non-Participants has been challenged, citing SDCL 43-13-4 and 43-13-2, including the latter's subsection (8): "[t]he right of receiving air, light or heat from or over, or discharging the same upon

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[35] Shadow Flicker does not extend to infinity. According to Applicant's expert Haley, the Effect is "indistinguishable" beyond 1,700 meters (about 5,577 feet). The homes of Appellants are in the range of 2000-2800 feet (about 850 meters, at most). Haley testified the "flickering effect is most noticeable within approximately 1,000 meters of the turbine." Ex. A14-2, at R011270. The rule suggested in note 19 would prevent this. In the absence of any such rule, this appeal seeks to establish whether Applicant's right to cast Effects and burden property can be conferred under the terms of the Agency's Permit.

or over land."[36] The pulsating or flickering effect, when the turbines are turning, is a "discharging [of light]" – *in objectionable form* – over Non-Participants.

Neither Appellee responded to this assertion until the time of argument before the circuit court, when Applicant's counsel countered with these comments:

> With regard to the Ehlebracht appellant's arguments, Mr. Swanson can't even make his argument without a dramatic mischaracterization of shadow flicker as a discharge. As he explains in great detail in his initial brief, the source of the light is the sun. The shadow flicker just means the blade passes between the sun and the receptor. There's no capturing reflection, discharge, light source, or anything of that nature from these wind turbines and his argument relies on there being some kind of discharge of light originating from the turbines. That doesn't happen. TR-C 25:7-16.

Counsel concluded with the claim that "[e]asements and property rights are not within the purview of the PUC in this process and are not an appropriate subject matter for this appeal." TR-C 26:17-19.

While it is agreed the PUC has no actual authority to issue easements, *or to adversely affect property rights*, the question fairly remains: does the Permit nevertheless constitute a *de facto* easement upon and over the homes and lands of Non-Participants? Further, while the original source of the light being discharged *is* the sun, the actual source of the resulting, adulterated light is *actually* the wind turbine. Applicant's own Section 5.2 (*see* Appendix C), depicting the Effects Easement, lays down this string of words: "light, flicker, noise, shadow."

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[36] This statute, copied by the territorial legislature in 1877 from California's Civil Code of 1872 (presently § 801), was discussed in Appellants' opening brief to the circuit court, at 18-27. CR 1399. This Court does not seem to have addressed the issue, but the list of easements in California's statute is not an exclusive list. *Blackmore v. Powell*, 150 Cal.App 4th 1593, 59 Cal.Rptr. 3d 527, 534 (2007); *Wright v. Best*, 19 Cal.2d 368, 381, 121 P.2d 702 (1942).

Stated differently, a light source, shining through spinning turbines, will yield Shadow Flicker. The wind turbine is the discharge point. The record holds hundreds if not thousands of pages of professional literature claiming this essential point: *Shadow Flicker and Noise each may be an annoyance, as is the case elsewhere, but they will not kill you*. That point relates entirely to the *health* of humans. Whether these Effects are a burden on *property* was never resolved by either the Agency or the trial court.

The old statute (SDCL 43-13-2(8)) does not seem to have been cited in *any* decision of this Court, much less one focused on wind turbine permitting or whether Shadow Flicker comprises a servitude, a burden to be created only by the vested owner of the estate rather than at the direction of some state agency. Applicant's own experts clearly state that Shadow Flicker becomes "indistinguishable"[37] if the turbine is about one mile or so from the Non-Participating property. Rather than either observe that separation distance or negotiate an easement from Non-Participants, Applicant has acted to burden the lands and homes of Non-Participants, trusting the PUC's Permit will suffice to close the legal gap.

Do the Effects comprise a burden or servitude? In extracting wind leases from Participants, Applicant *itself* selected a mechanism for protection should the burden of Effects eventually outweigh the benefit of mere monetary consideration paid to present or future owners of leased turbine sites. That Non-Participants would regard these Effects as a burden on *their* nearby lands and homes should not be surprising. What is surprising is that the PUC, willing to accommodate even an "aggressively devised" Project (as opined by Staff's expert Hessler), shifts the burden of Effects onto the homes of Non-

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[37] See testimony of Haley, as referenced in note 35, *supra*.

Participants, while yet professing *ad hoc* allegiance to some favored part of the purported German safety standard for Shadow Flicker and the imaginary case-by-case line (otherwise known as a "regulatory limit") for the burden of Noise. Ironically, what the Agency concedes it has no jurisdiction to grant (Effects Easement), it has, in fact, given.

> ***Issue 3-A:*** Whether the Agency decision, expressly approving the intensity and duration for the casting or emission of "Effects" (noise and shadow flicker) upon Non-Participants (including Appellants) represents a *per se* taking of interests (an easement) in the lands and property interests of Non-Participants?

Convinced that no one will be maimed or killed by the Effects, the Agency's Permit effectively licenses Applicant for permanently casting those Effects - in some predicted level of intensity or duration – onto the homes and lands of Non-Participants. Applicant didn't supply an applicable easement for such neighbors, and the Agency also never considered whether the sought Permit is effectively a taking of property interests.

The trial court cites *Benson v. State*, 2006 S.D. 8, 710 N.W.2d 131, 149 to support the conclusion that the Permit is not a taking of property rights, citing also *Boever v. South Dakota Board of Accountancy*, 526 N.W.2d 747 (S.D. 1995), for the proposition that, as argued by Staff, any claim of *per se* nuisance is unripe.[38] Applicant's own evidence is extensive in predicting the Effects now coming upon Appellants' homes.

In *Benson*, at ¶ 60, this Court cites *Harms v. City of Sibley*, 702 N.W.2d 91 (Iowa 2005). *Harms* is a city zoning case, where the adjoining property owners claimed the city's rezoning approval for a cement plant (with resulting noise, dust, traffic problems, and lights) caused the harm to the nearby home, seeking damages for inverse

[38] Appellants did not argue that this or any wind farm comprised a nuisance *per se*. With the Permit in hand, the point of Issue 3-B, *infra*, is that relief is even more unlikely because of SDCL 21-10-2 and cases determined by this Court. The PUC's taking of Non-Participant's property interests, as to such Effects, seems to be complete.

condemnation as if the City had appropriated an interest in property. While deciding the city did not "[work] a taking of private property within the meaning of the Fifth Amendment," *Harms* remains instructive as to the "consequential damages rule," or the "natural, probable consequence test," as referenced in *Benson*, ¶ 60. The Iowa Supreme Court reviewed a range of federal cases,[39] distinguishing between burdens placed on private landowners because of the government taking an easement over the land, versus government action on the government's own property, resulting in a burden. The consequential damages rule generally precludes the finding of a taking in the former case, but not the latter. *Harms*, 702 N.W.2d at 101. The court then further noted:

> The Harms do not challenge the district court's finding that the rezoning ordinance was valid. Joe's Ready Mix and Sandbulte, as the county in *Griggs*, were the promoter and owner of the ready mix plant and decided, subject to the ordinance, where the plant was to be built and how it would be operated. The City in enacting the rezoning ordinance has taken no action in determining these matters.
>
> Unlike *Causby* and *Portsmouth Harbor*, it was not the operation and maintenance of government property that produced the nuisance which caused the Harms' injury and damages. Under these circumstances, the City's action in rezoning the property did not result in a taking of an easement created by the nuisance as the Harms contend. Rather it was the action of Joe's Ready Mix and Sanbulte that produced the nuisance and they – rather than the City – should pay for the easement. *Id.*

The conclusion in *Harms* must be contrasted with what is clearly presented here: the PUC has expressly licensed the casting of Effects (as minutely and exhaustively

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[39] Including *Lingle v. Chevron U.S.A. Inc.*, 544 US 528 (2005), *Griggs v. County of Allegheny*, 369 U.S. 84 (1962), and *United States v. Causby*, 328 U.S. 256 (1946). *Lingle*, reverses the holding of *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), to the effect that a zoning ordinance "effects a taking if [such regulation] does not substantially advance legitimate state interests . . . ." The state *has* legitimate interests as expressed in SDCL 49-41B-1, including the health of citizens; Appellants, however, submit that ensuring Non-Participants (such as Mrs. Kranz) will be nonetheless subjected to wind farm "Effects" by means of a PUC Permit is *not* among those expressed interests. *Lingle*, at 548, clarifies the grounds for challenging government regulations as a taking.

predicted by computer modeling) upon all homes and properties within the Project area, both Participants and Non-Participants, according to some *ad hoc* regulatory limit. In the case of Participants – whether entailing bare land or occupied dwellings (or both) – they are compensated to accept this burden, having conferred an Effects Easement. In the latter case, the issued Permit, *standing alone*, is Applicant's sole source of right and privilege with regard to the occupied dwellings of Non-Participants – no concern whatsoever being shown for licensing the dumping of either Noise or Shadow Flicker also upon the bare land of Non-Participants, and in all cases, permanently, and without compensation.[40]

While finding the rezoning action of city did not comprise a taking, *Harms* took note of its prior decision in *Bormann v. Board of Supervisors*, 584 N.W.2d 309 (Iowa 1998). In *Bormann*, the Iowa court had held the nuisance immunity created an easement in property affected by a nuisance in favor of land belonging to those seeking the agricultural designation; easements are property interests subject to the just compensation requirements of the Federal Takings Clause. *Id.*, at 316. The "right-to-farm" (RTF) statute was held unconstitutional in *Bormann* because of authorizing the use of property in ways that infringed on the rights of others, by "allowing the creation of a nuisance-easement without the payment of just compensation." *Harms*, at 101-2.[41]

Appellants recognize this is not yet an inverse condemnation case. Presently, this is an administrative appeal, moving to this Court from the circuit court; Appellants intend to present a challenge to the jurisdictional power of the PUC to actually license what the

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[40] That Applicant's permanent use of open land for such purposes reduces or eliminates the owner's right to develop other homes or uses now permitted by the zoning ordinance is mentioned only in passing – this, too, is an infringement of property rights.

[41] The doctrine of *Bormann* pertains to Issue 3-B, *infra*.

Permit purports to confer upon Applicant, *as a matter of right*, over the lands and homes of Non-Participants.[42] As argued in Issue 3-B, *infra*, that very license, furthermore, becomes also a means of insulating Applicant's operations from further challenge as a nuisance.

> ***Issue 3-B:*** Whether the Agency decision, expressly approving certain levels or durations of the Project's adverse effects upon the homes and lands of Non-Participants (including Appellants) vitiates the nuisance laws as a potential remedy available to Non-Participants, thus representing a taking of property rights otherwise secured by law?

The history of other large-scale wind energy facility permits issued by the Agency confirms that these endeavors are fairly recent, beginning in 2017. R011799, 011808, Ex. S1, Staff Witness Kearney.[43] For their part, Appellants are less than enthused about being *permanently* consigned to now live and own property in or near the boundary of an industrial-scale electrical energy generation facility. Appellants are concerned the Agency's Permit serves as a *de facto* easement for the permanent casting of the Effects upon their homes and lands. So long as Applicant remains within whatever dose of Effects has been prescribed for Appellants by terms of the Permit Conditions, Appellants are further concerned this uncompensated taking is further harmful to their property interests by serving also as an effective roadblock to a nuisance action.

Legal literature suggests that wind energy development has always felt vulnerable to attack on the basis of nuisance law. In West Virginia, a wind farm project with the

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[42] That said, if the Permit endures as a veritable, permanent Effects Easement, the taking of Appellants' property rights may be further considered in a suitable forum under the ruling of *Knick v. Township of Scott*, 588 U.S. _____ (2019).

[43] PUC docket number reflects the year – thus, *Crocker Wind Farm* application, EL17-055; *Prevailing Wind Park*, EL18-026, transpired in 2018.

name of NedPower Mount Storm, obtained a certificate from the State's Public Service Commission, and proceeded with construction of 200 turbines. Several neighbors – living between a half-mile and two miles from the proposed site – brought legal action to enjoin the work based on nuisance, citing noise, and "flicker" or "strobe" effect, among other concerns. Following the trial court's dismissal on the pleadings, the case reached the West Virginia Supreme Court, which reversed and remainded the case for trial. *Burch v. NedPower Mount Storm*, LLC, 647 S.E.2d 879 (W.Va. 2007).

That remand gave rise to a number of law review articles arguing the developing wind industry needed protection from nuisance and other suits. In "Headwinds to a Clean Energy Future: Nuisance Suits Against Wind Energy Projects in the United States,"[44] the author provided several suggestions, including adopting the view that a state siting permit for a wind farm should be preclusive and final. The article asserts also that wind development would be economically beneficial, outweighing any harm it caused.[45]

Although the PUC did not start hearing large wind farm cases until 2017 (as outlined in Ex. S1, R011806), the legislature made the assignment to this Agency many years before. The PUC's expert witness, David Hessler, is a well known "noise expert." In the words of Staff's witness Kearney (Ex.S1, at 9, R011808), Hessler "consistently maintain[s] that wind projects should work to achieve an ideal design goal of 40 dBA if possible." Kearny continues: "At the same time, Mr. Hessler acknowledges that in most

[44] Stephen Harland Butler, 97 Calif. L. Rev. 1337 (October 2009). *See also*, Joseph Haupt, "A Right to Wind? Promoting Wind Energy by Limiting the Possibility of Nuisance Litigation," Journal of Energy & Environ. Law, 256, Summer 2012. Haupt, at 256, suggests using the Right-to-Farm acts as a model to pave the way for wind farm development, thus placing *Bormann* in context; see 30, *infra*.

[45] By the time of this article (2009), *Lingle* had overturned *Agins*, as cited in note 43 – otherwise, the author surely would have cited the 1980 case, with the "legitimate state interests" test as an exception to "takings."

circumstances it is difficult for wind projects to meet the ideal design goal and for regulatory purposes a permit limit of 45 dBA for non-participants is reasonable." Ex. S2, R012746; TR-H-497:24-498:25.[46]

The Agency's decision reflects the adoption of "permit standards" that, as to noise, do not meet Hessler's ideal design goal, while yet being below the "regulatory limit," in Kearney's words.[47] Meanwhile, notwithstanding opinions as to what might be "reasonable" for Non-Participants, the record before the Agency is replete with Applicant-provided articles and journals. These writings are to the effect that, while Non-Participants are relegated to living on the edge of a wind farm (an environment not necessarily pleasant for everyone because of the potential for sleep disruption and various health complaints), the writers seem unanimous in the view that no serious health risk exists, nor is anyone likely to be killed.[48] The striking conclusion of nearly all of the studies adduced by Applicant is this: *more studies are required* to plumb the depths of the relationship between wind farm proximity, the "Effects," and the reported sleep disturbances and other health concerns.

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[46] Non-Participants, such as Appellants, often enclosed by the Project's boundary line, volitionally accepted *none* of the Project's Effects burdens, now imposed without consent by force and effect of the Permit.

[47] This so-called "regulatory limit" is found neither in statutes nor regulations, but arise – *this time, at least* – from the *ad hoc* expert opinions (Hessler and others), along with the recommendations of Kearney to the Commissioners.

[48] Appendix C, *infra*, lists fifteen (15) studies or articles in the Agency's record, regarding noise (sound) or shadow flicker and claims of annoyance or health effects. The list reflects the "effects" of the Effects is not settled science. Under SDCL 49-41B-22(3), Applicant has the burden of proof that "[t]he facility will not substantially impair the health, safety or welfare of the inhabitants." This suggests *some* impairment in the health of inhabitants *is* an acceptable price to pay, under the State's scheme. This appeal concerns Agency's award to Applicant of a free use of Appellants' property rights, in accord with PUC's *ad hoc* "regulatory limits."

For now, the expert opinions are given, mixed together with Staff recommendations and computer-generated modeling performed by other experts at the behest of Applicant to create the Permit Conditions. As of this writing, Applicant's Project is *fully built* – and *fully permitted* by the Agency (as envisioned by SDCL 49-41B-2), with Permit Conditions *written and imposed* as a result of the computer modeling, opinions and projections. What Hessler opined as being "reasonable" (noise is still an intrusion on neighbors, even if below the *ad hoc* "regulatory limits" proclaimed from the witness stand by Kearney) could yet prove to be, in actual experience, a living nightmare for Appellants and other Non-Participants. What then? What remedy remains for Appellants as neighbors locked within the Project boundary?

Appellants fear that the computer modeling, studies, and prognostications have become the Agency's Permit Conditions and are now immutable. Further, these are imposed on Applicant's wind farm "under the express authority of a statute" (as referenced in SDCL 21-10-2) marking the permissible limits of invasive uses. As such, "Effects" emitted from this Project in full conformity with the applicable Permit Conditions (if conforming also to the Agency's *ad hoc* regulatory limits – that is to say, the limits for this particular Project and these Non-Participants) are then protected from further question or challenge as a public or private nuisance, without regard to the *actual* consequences on the lives and well-being of Appellants.[49]

The point made by statute ("express authority of a statute," SDCL 21-10-2) is discussed in several decisions of this Court. In *Kuper v. Lincoln-Union Elec. Co*., 1996 S.D. 145, 557 N.W.2d 748, the majority opinion, at ¶ 46, concludes that based on the

[49] As noted in Appendix D, *infra*, many of the papers presented by witness Ollson suggest further studies are warranted.

statute, no action based on nuisance could lie against a public utility. *Kuper,* at ¶ 47, cites *Armory Park v. Episcopal Community Services*, 148 Ariz. 1, 712 P.2d 914, 921 (1985): "We would hesitate to find a public nuisance, if, for example, the legislature enacted comprehensive and specific laws concerning the manner in which a particular activity was to be carried out." The South Dakota permitting process is an example of comprehensive, specific direction.

In *Krsnak v. Brandt Lake Sanitary District*, 2018 S.D. 85, 921 N.W.2d 698, the doctrine of *Kuper* was followed, as "[s]anitary districts are specifically authorized by statute." Plaintiffs "must present evidence that the District engaged in some act or omission that violated its statutory authority." *Id.*, ¶ 32.

Likewise, the PUC's *ad hoc* regulatory limits for the Effects [50] – applicable to this specific wind farm – have become *the* statutory authority of the intensity and duration of those Effects, *permanently*, while the literature adduced by Applicant often observes that *more study* of the potential adverse consequences to humans is warranted. The resulting regulatory limits become the officially licensed, permitted, and approved quotas of Effects upon all Non-Participants.[51]

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[50] Given the opinions of Hessler – this wind farm being "aggressively devised" – the *ad hoc* regulatory limits fashioned here are beyond what the expert considers "ideal." Is this what the legislature intended with a standard of "minimal adverse effects"? A distinction must be made for the Effects and consequences for human health (including that of "Participants"), versus burdens or servitudes placed on property interests owned by such persons. The PUC may have jurisdiction to conduct the former inquiry but the latter is yet challenged by Appellants.

[51] In *Joffer v. Cargill Inc*., 2010 WL 1409444, given the statute, *Kuper*, and *Hedel-Ostrowski v. City of Spearfish*, 679 N.W.2d 491 (S.D. 2004), Magistrate Simko concluded likewise as to grain warehouses, in the face of claims the site emitted dust and mold to the detriment of the neighbor's health.

The linkage between the legislature's findings under SDCL 49-41B-1 and the ancient language of SDCL 21-10-2 is clear.[52] Together, a one-two punch is delivered to the vested property rights of Non-Participants. First, an invasion by noise and shadow flicker is officially licensed in terms of intensity and duration, and then - because of that very license - the neighboring landowner, including each Appellant, is now stripped of legal remedies to challenge the very source of that invasion.

In *Bormann v. Board of Sup'rs In and For Kossuth County*, 584 N.W.2d 309 (1998), the Iowa Supreme Court reviewed that jurisdiction's "right-to-farm" act, affording immunity for nuisance claims against intensive agricultural practices. In the process of determining that section to be unconstitutional,[53] the court concluded this was not a close case:

> When all the varnish is removed, the challenged statutory scheme amounts to a commandeering of valuable property rights without compensating the owners, and sacrificing those rights for the economic advantage of a few. In short, it appropriates valuable private property interests and awards them to strangers. *Id.*, at 322.

As a small group of Non-Participants huddled near and behind the Project boundary line (drawn by Applicant and approved by Agency), the result in *Bormann* is compelling – and disturbing.[54] Here, the State, through the PUC and at the behest of the

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[52] Ironically, SDCL 21-10-2 was borrowed from California in the very same year – 1877 – as SDCL 43-13-2(8). The language of each remains unchanged today, and, Appellants now urge, directly bear on the merits of this case.

[53] Under the Fifth Amendment, U.S. Constitution, and also under article I, section 18, Iowa Constitution, the court noting, at 319-20 "Thus, the state cannot regulate property so as to insulate users from potential private nuisance claims without providing just compensation to persons injured by the nuisance."

[54] In *Stop the Beach Renourishment, Inc. v. Florida Dep't. Environmental Prot., et al*, 560 U.S. 702, 715 (2010), Justice Scalia observed "[T]he Takings Clause bars the State

legislature, on the one hand, has officially licensed the duration and intensity of the Effects each Non-Participant must henceforth endure upon their homes and lands[55] – *permanently*. Then, on the other, the State holds that the prescribed dose of Effects enumerated within the License cannot be challenged by means of the nuisance law.[56] No other judicial remedy seems apparent as to this Project. Taken together, these legislative measures accomplish a taking of Appellants' property rights – and, whether or not presently recognized, the rights of all other Non-Participants.

Mrs. Kranz declined to enter into a wind lease with Applicant's affiliate, with the Effects Easement language of Section 5.2 (*see* Appendix B). Notwithstanding, Applicant now holds a Permit for permanent use of her farm and home in the dumping of the Effects. Applicant's Permit extends to the homes and lands of each Appellant.

Many cases can be cited to illustrate the Takings Clause doctrines of the U.S. Supreme Court – *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978), being three in particular. The first two are commonly referenced as "exaction" cases, requirements imposed by governmental entities upon an owner for the privilege of applying for land development rights. For the latter, a landmark law has been applied to thwart further development of the owner's property under the zoning law. Attempts to make these cases fit the circumstances of Appellants is painful, to be sure: Appellants are *not* seeking to develop anything on their

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from taking private property without paying for it, no matter which branch is the instrument of the taking."

[55] Much like a servitude, including those listed in SDCL 43-13-2.

[56] "State, by *ipse dixit* may not transform private property into public property without compensation," *Stop the Beach*, 560 U.S. at 715.

properties, they only seek to continue to make use of their current homes and lands without being forced to endure or suffer the onslaught of Effects.

To be sure, nothing will be quite the same as the wind farm moves into production. There will be wind turbines on the horizon – but this case is not some lament about formerly uncluttered views. Rather, this case is about being required, by force of the Permit, to permanently tolerate the Effects of this wind farm operation, the nearest facet of which is sited some 2,000 to 2,700 feet distant from the homes of Appellants. Meanwhile, Applicant's own experts assured the Agency that Shadow Flicker, for example, fades to insignificance with a separation distance of about one (1) mile.[57]

Applicant counted on the PUC to follow the recent history of "regulatory limits" (as Staff witness Kearney has testified) for the objectionable Effects. In that respect, based on some part of the German "safety" standard (Ex. A12-16, R006006)[58] as Applicant itself has touted (and the Agency has embraced on an *ad hoc* basis), the infliction of Shadow Flicker for 30 hours or less per year on the home of a Non-Participant is perfectly safe and acceptable – at least, in the view of the PUC. (But even this claim of human safety has nothing to do with burdens on property rights.)

Likewise, so long as Noise does not exceed 45 dBA at the homes of Non-Participants, the PUC is content.[59] Mere annoyance or sleep disruption does not compel the Agency to find a risk of adverse health consequences. As such, Applicant has carefully observed and learned the lesson taught - there is no "need" to produce an Effects Easement from Non-Participants when invoking the PUC's jurisdiction, as the

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[57] See note 35, *supra*.

[58] As referenced in Appendix D.

[59] The Agency ignored expert Hessler's view the Project is "aggressively devised."

Permit alone will suffice (so long as that German standard, as parsed and applied in South Dakota, isn't transcended). These suppositions are all mistaken, as argued herein.

CONCLUSION

The trial court correctly determined the PUC lacks jurisdiction to grant or issue easements. On the other hand, the *actual effect* of the Permit is the very thing the Agency itself eschews – *an Effects Easement*. If the State has a legitimate interest in promoting wind development, evidence of a volitional easement from property owners adversely affected by the Effects is essential. Approving the casting of Effects on the property interests of Appellants on the bare authority of a PUC Permit, asserting *this* outcome is exactly what the legislature intended to accomplish, is a pretense - another *ipse dixit* proclamation.

Respectfully submitted:

Date: May 25, 2021

/s/ A.J. Swanson

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GARRY EHLEBRACHT, STEVEN GREBER, MARY GREBER, RICHARD RALL, AMY RALL, and LARETTA KRANZ,
Appellants

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, being 33 pages in length. This brief was prepared using Microsoft Word 2010, Times New Roman (12 point), and contains 9,023 words and 48,175 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: May 25, 2021

/s/ A.J. Swanson

CERTIFICATE OF SERVICE

The undersigned hereby certifies that Appellant's Brief in the above referenced case was served upon each of the following persons, as counsel for Appellees herein, having been accomplished by electronic mail, at the addresses stated below:

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Further, the signed original of Appellant's Brief was transmitted via U.S. Mail to the Clerk of SOUTH DAKOTA SUPREME COURT, 500 E. Capitol, Pierre, SD 57501, as well as filing by electronic service in portable document format to the Clerk of the South Dakota Supreme Court at: SCClerkBriefs@ujs.state.sd.us.

All such service being accomplished the date entered below:

Date: May 25, 2021

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

APPENDICES TABLE OF CONTENTS:

Appendix A

Appendix B

Appendix C

Appendix D

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNT OF DEUEL	)	THIRD JUDICIAL CIRCUIT

IN THE MATTER OF
ADMINISTRATIVE APPEAL GARRY
EHLEBRACHT, STEVEN GREBER,
MARY GREBER, RICHARD RALL,
AMY RALL, AND LARETTA KRANZ

And

AMBER KAYE CHRISTENSON AND
ALLEN ROBISH,

Appellants,

Vs.

CROWN RIDGE WIND, LLC AND
SOUTH DAKOTA PUBLIC UTILITIES
COMMISSION,

Appellees

19CIV20-21 and 20-27

MEMORANDUM OPINION

INTRODUCTION

This matter comes before the circuit court on appeal by Appellants Amber Christenson and Allen Robish (collectively "Christenson Appellants")[1], Appellants Garry Ehlebracht, Steven Greber, Mary Greber, Richard Rall, Amy Rall, and Laretta Kranz (collectively "Ehlebracht Appellants")[2], appealing the South Dakota Public Utilities Commission Staff's (the "Commission's" or "Staff's") Final Decision and Order Granting Permit to Construct Facility in EL 19-027 dated April 6, 2020. (AR 14230-14258), Final Decision and Order Granting Permit to Construct Facility, Permit Conditions, Notice of Entry (Permit)).[3]

[1] Christenson Appellants – 19CIV20-27
[2] Ehlebracht Appellants – 19CIV20-21.
[3] All citations to the administrative record are referenced as "AR".

STATEMENT OF JURISDICTION

The Christenson Appellants appeal from Commission's April 6, 2020, Final Decision and Order Granting Permit to Construct Facility; Permit Conditions; and Notice of Entry as related to its issuance of a wind energy facility permit to CRWII, pursuant to SDCL § 1-26-30, as provided for by SDCL § 49-41B-30. Appellants each timely and properly filed their respective Notice of Appeals on May 1, 2020, and May 5, 2020, in both Codington and Grant Counties, South Dakota. Thereafter, following Commission's unopposed motion to change venue (May 11, 2020), the circuit court entered its Order changing venue herein (May 19, 2020), pursuant to SDCL § 1-26-31.1. This Court ordered that the Intervenors files would be thereafter combined into this appellate file, 19CIV20-27.

The Ehlebracht Appellants appeal from the same April 6, 2020, Final Decision and Order, as related to its issuance of a wind energy facility permit to CRWII, pursuant to SDCL § 1-26-30, as provided for by SDCL § 49-41B-30. Appellants timely and filed their Notice of Appeal on April 29, 2020, in Deuel County, South Dakota.

STATEMENT OF FACTS

On July 9, 2019, Crowned Ridge Wind II, LLC[4] ("Applicant", "Crowned Ridge", or "CRWII") submitted its application for a facility permit for a 300.6-megawatt (MW) wind energy facility to consist of up to 132 wind turbines in Deuel, Grant, and Codington counties (the "Project").[5] (AR 14230-14258). Within its application, CRWII submitted written testimony from six witnesses.[6] (AR 1-1118, 3233-3254). The commercial operation date of the Project was estimated to be in the fourth quarter of 2020. (AR 11).

On July 11, 2019, the Staff issued the Notice of Application; Order for and Notice of Public Input Hearing; and a Notice for Opportunity to Apply for Party Status and established an intervention deadline of September 9, 2019. (AR 1122-1123).

On July 31, 2019, the Commission issued an order granting party status as Intervenors to the Christenson Appellants. (AR 1193-1194). On August 26, 2019, the Commission issued an order granting party status as Intervenors to the Ehlebracht Appellants. (AR 1478). On that same

[4] CRWII is a wholly-owned, indirect subsidiary of NextEra Energy Resources, LLC.
[5] Besides the turbines, the Project also includes access roads to the turbines and associated facilities, underground 34.5 kV electrical collector lines, underground fiber-optic cable, a 34.5-kV to 230 kV collection substations, two permanent meteorological towers, and an operations and maintenance facility.
[6] Jay Haley, Sarah Sappington, Mark Thompson, Tyler Wilhelm, Daryl Hart, and Richard Lampeter.

day, pursuant to SDCL §§ 49-41B-15 and 49-41B-16, the Commission held the public input meeting in Watertown, South Dakota. (AR 1122-1123, 1274-1477).

On September 20, 2019, CRWII submitted pre-filed Supplemental Testimonies and Exhibits.[7] (AR 2007-3223). On October 21, 2019, CRWII filed Corrected Direct Testimony of Witness Sarah Sappington. (AR 3233-3254). On December 9, 2019, Staff filed Pre-Filed Direct Testimony and Exhibits of five witnesses.[8] (AR 3356-4259). On December 12, 2019, several Ehlebracht Appellants[9] each filed Pre-Filed Direct Testimony in the form of Affidavits. (AR 4251-4264). On January 8, 2020, CRWII submitted Pre-Filed Rebuttal Testimony and Exhibits of seven witnesses[10] (with corrections filed on January 22, 2020, and January 24, 2020). (AR 4267-4338). On January 23, 2020, Staff submitted Pre-Filed Supplemental Testimony of David Lawrence. (AR 7054-7079).

On February 4-6, 2020, the Commission held an evidentiary hearing in Pierre, South Dakota. (AR 8844-13781). CRWII, Staff, and Appellants participated in the evidentiary hearing, presenting testimony, and cross-examining witnesses.[11] (AR 8844-13781). Appellants presented witness testimony,[12] but did not pre-file expert testimony. The Hearing Examiner presided over the hearing and each of the commissioners were present for the entirety of the hearing. On February 27 and March 2, 2020, the Parties filed Post-Hearing Briefs. (AR 13820-13919).

On March 17, 2020, the Commission met to consider whether to issue a facility permit for the Project. (AR 13984-14079). At the meeting, the Commission voted unanimously to issue a permit for the Project, subject to 49 conditions. (AR 13994-14079). On April 6, 2020, the Commission issued the Permit. (AR 14230-14258). The Permit includes conditions establishing maximum permissible sound levels and maximum levels of shadow flicker at residences near the Project.[13] (AR 14246-14258).

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[7] These include Mark Thompson, Jay Haley, Tyler Wilhelm, Dr. Cristopher Ollson, Daryl Hart, Sarah Sappington, Michael MaRous, and Dr. Robert McCunney.

[8] These include David Hessler, Darren Kearney, Hilary Meyer Morey, David Lawrence, and Paige Olson.

[9] Amy Rall, Laretta Kranz, Garry Ehlebracht, and Steven Greber.

[10] These include Mark Thompson, Jay Haley, Tyler Wilhelm, Richard Lampeter, Sarah Sappington, Michael MaRous, and Dr. Christopher Ollson.

[11] Seventeen witnesses testified at this hearing.

[12] On December 12, 2019, Garry Ehlebracht, Steven Greber, Amy Rall, and Laretta Kranz submitted pre-filed direct testimony.

[13] Specifically, Permit Condition 26 limits sound levels emitted from the Project to 45 dBA for non-participating residences and 50 dBA for participating residences, as measured within 25 feet of a residence, with an allowance for a landowner to waive the condition. (AR 14251). Permit Condition 35 restricts Shadow Flicker at residences to 30 hours per year, with an allowance for an owner to waive the condition. (AR 14255).

On April 29, 2020, the Ehlebracht Appellants filed a Notice of Appeal of the Order in the Third Circuit Court located in Deuel County followed by a Statement of Issues on May 7, 2020. On May 1, 2020, the Christenson Appellants filed a Notice of Appeal followed by a Statement of Issues on May 11, 2020. With the consent of the parties, the appeals were consolidated in the Third Circuit Court in Deuel County.

On July 13, 2020, Ehlebracht Appellants filed their initial brief. On August 10, 2020, Christenson Appellants filed their initial brief. On September 11, 2020, Staff filed its Response Brief to Christenson Appellants. ("Staff's Brief to Christenson"). On September 23, 2020, CRWII submitted its Response Brief to both Christenson and Ehlebracht Appellants ("CRWII's Brief"). On September 24, 2020, Staff filed its Response Brief to Ehlebracht Appellants. ("Staff's Brief to Ehlebracht"). On October 8, 2020, Christenson Appellants submitted their Reply Brief to both Staff and CRWII. On October 13, 2020, Ehlebracht Appellants submitted their Reply Brief. On November 23, 2020, a hearing was held on the matter in Deuel County, South Dakota

STANDARD OF REVIEW

The regulatory agency here, the Public Utilities Commission, is governed by the Administrative Rules of South Dakota ("ARSD"), specifically ARSD Chapter 20:10:22 ("Energy Facility Siting Rules"). Decisions by the Commission may be appealed to the circuit court:

> Any party to a permit issuance proceeding aggrieved by the final decision of the Public Utilities Commission on an application for a permit, may obtain judicial review of that decision by filing a notice of appeal in circuit court. The review procedures shall be the same as that for contested cases under chapter 1-26.[14]

SDCL § 49-41B-30. Subsequently, SD Ch. 1-26 states the following review procedures:

> The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;

[14] "The sections of Title 15 relating to practice and procedure in the circuit courts shall apply to procedure for taking and conducting appeals under this chapter so far as the same may be consistent and applicable, and unless a different provision is specifically made by this chapter or by the statute allowing such appeal." SDCL § 1-26-32.1; *see also* SDCL § 15-6-81(c) ("SDCL Ch. 15-6 does not supersede the provisions of statutes relating to appeal to the circuit courts.").

(2) In excess of the statutory authority of the agency;
(3) Made upon unlawful procedure;
(4) Affected by other error of law;
(5) Clearly erroneous in light of the entire evidence in the record; or
(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. . ..

SDCL § 1-26-36; *see also In re Otter Tail Power Co. ex rel. Big Stone II*, 2008 S.D. 5, ¶ 26, 744 N.W.2d 594, 602.

The agency's factual findings are reviewed under the clearly erroneous standard. *Id.* (citing SDCL § 1-26-36(5)). A decision is clearly erroneous if, after reviewing the entire record, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Steinmetz v. State, DOC Star Academy*, 2008 S.D. 87, ¶ 6, 756 N.W.2d 392, 395 (internal citations omitted). It is well-settled that a court will not weigh the evidence or substitute its judgment for that of the Commission, rather, it is the court's function to determine whether there was any substantial evidence in support of the Commission's conclusion or finding. *See, e.g., Application of Svoboda*, 54 N.W.2d 325, 327 (S.D. 1952) (citing *Application of Dakota Transportation of Sioux Falls*, 291 N.W. 589 (S.D. 1940)).

Regarding questions of fact, the court affords great weight to the findings made and inferences drawn by an agency. *See* SDCL § 1-26-36. The agency's decision may be affirmed or remanded but cannot be reversed or modified absent a showing of prejudice. *Anderson*, 2019 S.D. 11, ¶ 10, 924 N.W.2d at 149 (citing SDCL § 1-26-36) (emphasis added). Even if the court finds the Commission abused its discretion, the Commission's decision may not be overturned unless the court also concludes that the abuse of discretion had prejudicial effect.[15] *Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856 (emphasis added).

Questions of law are reviewed de novo on appeal from an administrative agency's decision. *Anderson v. South Dakota Retirement System*, 2019 S.D. 11, ¶ 10, 924 N.W.2d 146, 149 (citing *Dakota Trailer Mfg., Inc. v. United Fire & Cas. Co.*, 2015 S.D. 55, ¶ 11, 866 N.W.2d 545, 548) (emphasis added). Matters of reviewable discretion are reviewed for abuse. *Id.* (citing SDCL § 1-

[15] A reviewing court will reverse an administrative agency decision when the substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are affected by error of law, are clearly erroneous in light of the entire evidence in the record, or are arbitrary and capricious, or are characterized by abuse of discretion, or are clearly an unwarranted exercise of discretion. SDCL § 1-26-36; *In re One-time Special Underground Assessment by Northern States Power Company in Sioux Falls*, 2001 S.D. 63, ¶ 8, 628 N.W.2d 332, 334. *See also Wise v. Brooks Const. Services*, 2006 S.D. 80, ¶ 16, 721 N.W.2d 461, 466; *Apland v. Butte County*, 2006 S.D. 53, ¶ 14, 716 N.W.2d 787, 791.

26-36(6)) (emphasis added). "An agency's action is arbitrary, capricious or an abuse of discretion only when it is unsupported by substantial evidence and is unreasonable and arbitrary." *In re Midwest Motor Express*, 431 N.W.2d 160, 162 (S.D. 1988) (citing *Application of Dakota Transportation of Sioux Falls*, 291 N.W. 589 (S.D. 1940)) (emphasis added); *see also Sorensen v. Harbor Bar, LLC*, 2015 S.D. 88, ¶ 20, 871 N.W.2d 851, 856 ("An abuse of discretion 'is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.'") (internal quotation omitted)). "Substantial evidence" is defined as "such relevant and competent evidence as a reasonable mind might accept as being sufficiently adequate to support a conclusion." SDCL § 1-26-1(9).

Here, Appellants challenge the agency's conclusion that the CRWII wind facility will not harm the social and economic condition of inhabitants in the wind energy facility siting area and that the facility will not substantially impair the health, safety, or welfare of the inhabitants within the siting area as clearly erroneous based upon the record in its entirety.[16] This presents a mixed question of fact and law, reviewable de novo. *Johnson v. Light*, 2006 S.D. 88, ¶ 10, 723 N.W.2d 125, 127 ("Mixed questions of law and fact that require the reviewing Court to apply a legal standard are reviewable de novo.") (quoting *State ex rel. Bennett v. Peterson*, 2003 S.D. 16, ¶ 13, 657 N.W.2d 698, 701)).

PART I: CHRISTENSON APPELLANTS

Burden of Proof

South Dakota law requires the following:

> The applicant has the burden of proof to establish by a preponderance of the evidence that:
> (1) The proposed facility will comply with all applicable laws and rules; [and]
> . . .
> (3) The facility will not substantially impair the health, safety or welfare of the inhabitants. . ..

SDCL § 49-41B-22. Furthermore, the ARSD also places the burden upon the applicant:

> In any contested case proceeding, the complainant, counterclaimant, applicant, or petitioner has the burden of going forward with presentation of evidence unless otherwise ordered by the commission. The complainant, counterclaimant,

[16] An applicant for a permit is required to establish that the facility "will not substantially impair the health, safety or welfare of the inhabitants" in accordance with SDCL § 49-41B-22(3).

> applicant, or petitioner has the burden of proof as to factual allegations which form the basis of the complaint, counterclaim, application, or petition. In a complaint proceeding, the respondent has the burden of proof with respect to affirmative defenses.

ARSD 20:10:01:15.01 ("Burden in contested case proceeding").

Christenson Appellants assert that the PUC's findings of fact were clearly erroneous, and its corresponding conclusions of law amounted to reversible error under SDCL § 1-26-36, in part, since Applicant failed to meet its burden of proof and/or its burden of going forward as required by SDCL § 49-41B-22 and/or ARSD 20:10:01:15.01. Under this burden of proof issue, the Christenson appellants assert several issues where the burden of proof failed. The court will address them below.

Solid Waste

Christenson Appellants initially raised the issue of "solid or radioactive waste" in their first brief. Christenson Brief, at 9-11. However, as Appellees PUC and CRWII argued in their responsive briefs, Christenson argued the wrong ARSD, as that did not apply to wind energy facilities, such as this Project.[17] The applicable ARSD in this case is the following:

> The applicant shall include an identification and analysis of the effects the construction, operation, and maintenance of the proposed facility will have on the anticipated affected area including the following:
>
> (1) A forecast of the impact on commercial and industrial sectors, . . . solid waste management facilities, . . . and other community and government facilities or services. . ..

ARSD 20:10:22:23 ("Community impact"). Christenson acknowledges the previous error, and then argues this "community impact" regulation in their reply brief. Christenson Reply Brief, at 2-4. Although the incorrect statute was cited, the issue of "solid waste" was argued initially.

[17] Christenson initially argued that CRWII did not comply with ARSD 20:10:22:31, which states "The applicant shall provide information concerning the generation, treatment, storage, transport, and disposal of solid or radioactive waste generated by the proposed facility and evidence that all disposal of the waste will comply with the standards and regulations of any federal or state agency having jurisdiction. . .." However, as PUC argued, ARSD 20:10:22:05 states that ARSD 20:10:22:26 to 20:10:22:33, inclusive, apply for a permit for an *energy conversion* facility. *See* SDCL § 49-41B-2(6) for the definition of an energy conversion facility. Rather, this regulation states that ARSD 20:10:22:33.01 and 20:10:22:33.02 apply for a permit for a *wind energy* facility.

Christenson's argument concentrates upon the issue of identifying, analyzing, and forecasting the end of life disposal of the Project's used blades, concrete, and other refuse. The Staff states that the Commission heard evidence on the future disposal of wind turbine blades and received assurance from CRWII that it would comply with the applicable laws for disposal, which could occur decades into the future. CRWII stated at the November 2020 hearing that the statute is limited to the construction, operation, and maintenance of the facility, and that there is nothing in it regarding the decommissioning or tearing down.

Appellees' arguments are more persuasive here. First, the testimonies provided repeated assurances that the Project would follow the applicable laws. Furthermore, in the Application, this ARSD was specifically addressed, and stated in part, "Construction and operation of the Project . . . is not anticipated to have significant short- or long-term effects on . . . solid waste management facilities." Ex. A1, page 93.

Second, the argument of "disposal" here appears moot. While the incorrect, previously cited ARSD 20:10:22:31 requires proper disposal, the correct, applicable ARSD 20:10:22:23 does not mention the words "disposal" or "decommissioning" at all. It specifically refers to a facility's "construction, operation, and maintenance." Christenson's argument here concerns the *end of life* of the Project, and not the *construction, operation, and maintenance* of the Project. This ARSD does not require specific plans for the *disposal* of blades and refuse; therefore, the Commission did not violate SDCL § 49-41B-22, ARSD 20:10:01:15.01, or ARSD 20:10:22:31.

Thus, regarding the issue of "solid waste," the Commission met its burden of proof and did not err when granting a permit to CRWII. Furthermore, because the Commission did not err in its decision, the question of prejudice need not be discussed for "solid waste."

Compliance with Grant County Ordinance

Christenson Appellants argue the following:

> Appellee PUC wrongly and prejudicially entered Finding of Fact No. 18 (FN. 24) in erroneously finding, in essence, that Appellee CRWII will be in compliance with applicable laws, including the Grant County Ordinance since, directly contrary to testimony by Jay Haley, that Appellee CRWII "complies with both versions of the Grant County Ordinance – the one in effect at the time of the approval of the Project by Grant County, and the one made effective shortly after the December 2018 CUP vote."

Christenson Brief, at 3. In the record, FOF 18 states the following:

> FOF 18. The evidence submitted by [CRWII] demonstrates that the Project will comply with applicable laws and rules.[18] Applicant committed that it will obtain all governmental permits which reasonably may be required by any township, county, state agency, federal agency, or any other governmental unit for the construction and operation activity of the Project prior to engaging in the particular activity covered by that permit.[19]

PUC Staff states that the Commission properly determined that the Project will comply with all applicable laws, specifically as it relates to compliance with the Grant County ordinance. Additionally, CRWII states that the record shows CRWII's commitment and ability to comply with the old and new Grant Country Sound Ordinance.

CRWII applied for its CUP for Grant County on September 17, 2018. On December 17, 2018, Grant County approved this CUP. The original ordinance was as follows:

> 13. Noise. Noise level shall not exceed 50 dBA, average A-weighted Sound pressure including constructive interference effects at the perimeter of the principal and accessory structures of existing off-site residences, businesses, and buildings owned and/or maintained by a governmental entity.

On December 28, 2018, the new ordinance was adopted, and on January 28, 2019, it became effective. The new ordinance was as follows:

> 14. Noise. Noise level shall not exceed 45 dBA, average A-weighted Sound pressure including constructive interference effects measured twenty-five (25) feet from the perimeter of the existing non-participating residences, businesses, and buildings owned and/or maintained by a governmental entity.

In addition to FOF 18, Christenson Appellants argue that FOF 46 is also clearly erroneous:

> 46. The record demonstrates that Applicant has appropriately minimized the sound level produced from the Project to the following: (1) no more than 45 dBA at any

[18] FOF 18 (Footnote 23): Ex. A1 at 72-76, 111-112 (Application) and Ex. A5 at 8-11 (Wilhelm Direct Testimony).
[19] FOF 18 (Footnote 24): At the evidentiary hearing, pro se Intervenor Christenson questioned whether Applicant was in compliance with the Grant County Ordinance in effect at the time Grant County voted to approve the Project or the Ordinance that was made effective after the County's vote to approve the Project. Applicant testified that Grant County has indicated it intends to apply the Ordinance made effective shortly after approval of the CUP for the Project. Evid. Hrg. Tr. at 47-49 (Wilhelm) (February 4, 2020). The record in this proceeding shows that Crowned Ridge Wind II complies with both versions of the Grant County Ordinance - the one in effect at the time of the approval of the Project by Grant County, and the one made effective shortly after the vote. Evid. Hrg. Tr. at 217-218, 233-234, 237-239 (Haley) (February 4, 2020); Exs. A2; A14; A21 (Haley Direct, Supplemental and Rebuttal Testimony); Ex. A14-1 through Ex. A14-4 (Supplemental Testimony Sound and Shadow Flicker Studies); Ex. A21-1 through Ex. A21-3; and Ex. A28 and Ex. 29 (Rebuttal Testimony Sound and Shadow Flicker Results); and Ex. AC-19. Therefore, the record shows that Crowned Ridge Wind II will be in compliance with applicable laws, including the Grant County Ordinance.

non-participants' residence and (2) no more than 50 dBA at any participants' residence. . ..[20]

Christenson Brief, at 16. Christenson Appellants argue that Conclusion of Law 9, 13, and 15 are in error:

> COL 9. In the event the Project's contracted life is not extended, the record demonstrates that Applicant has appropriate and reasonable plans for decommissioning. The Project will be decommissioned in accordance with applicable state and county regulations. Applicant has agreed to Permit Condition No. 33 for purposes of decommissioning the Project.
>
> COL 13. Applicant must comply with the applicable requirements in the Deuel County, Grant County, and Codington County ordinances.
>
> COL 15. Based on the preponderance of the evidence presented to the Commission, the Commission concludes that all the requirements of SDCL § 49-41B-22 have been satisfied.

This court will not weigh the evidence or substitute its judgment for that of the PUC. Rather, it is this court's function to determine whether there was any substantial evidence in support of the PUC's conclusion or finding. The PUC found that CRWII followed the Grant County ordinance, and the findings, cited above, are supported by substantial evidence of reports, testimonies, and studies. CRWII held a valid CUP from Grant County. (AR 14235-14236). Furthermore, the Commission concluded the following:

> The evidence submitted by [CRWII] demonstrates that the Project will comply with applicable laws and rules. Applicant committed that it will obtain all governmental permits which reasonably may be required by any township, county, state agency, federal agency, or any other governmental unit for the construction and operation activity of the Project prior to engaging in the particular activity covered by that permit. The record demonstrates that construction and operation of the Project, subject to the Permit Conditions, meets all applicable requirements of SDCL Chapter 49-41B and ARSD Chapter 20:10:22.

Id. (AR 14235 footnotes citing record evidence omitted).

Christenson cites *In re Conditional Use Permit Granted to Van Zanten*, 1999 S.D. 79, 598 N.W.2d 861, and PUC counters that that case is inapplicable, as its facts and laws relate to a county

[20] FOF 46 (Footnote 98): Exs. A2; A14; A21 (Haley Direct, Supplemental and Rebuttal Testimony); Ex. A1-I (Sound Modeling Report); Ex. A14-1 through Ex. A14-3 (Supplemental Testimony Sound Studies); Ex. A21-1; Ex. A21-3; Ex. A28, and Ex. 29 (Updated Rebuttal Sound Results).

zoning ordinance. This is an appeal from an *agency* decision, and not an appeal from a *county* decision. Because this issue is a *county* issue, and currently ongoing in case file 25CIV20-10, the Court will not address the validity of the CUP itself in this case.

Lastly, both Staff and CRWII argue in the alternative that no Appellants are prejudiced by these sound regulations of the Grant County ordinance. The Court refuses to weigh into this argument as it is unnecessary. Because the Commission did not err in its decision, the question of prejudice need not be discussed for this issue.

Aircraft Detection Lighting System (ADLS)

The Aircraft Detection Lighting System (ADLS) statute, effective on July 1, 2019, states the following:

> For any wind energy facility that receives a permit under this chapter after July 1, 2019, the facility shall be equipped with an [ADLS] that meets the requirements set forth by the Federal Aviation Administration [FAA]. . ..

SDCL § 49-41B-25.2 (in pertinent part). On April 6, 2020, the Commission issued its permit to CRWII (AR 14230-14258); therefore, this ADLS requirement applies to this permit.

Christenson Appellants argue the following:

> Appellee Commission committed error in violation of statutory provisions insofar as Applicant [CRWII] failed to meet the statutory requirements of SDCL § 49-41B-25.2 by and through its failure, at the time of the Commission's hearing on the merits of Appellee CRWII's wind energy facility permit, of being equipped with – or even having applied for – the necessary and statutorily required aircraft detection lighting system (ADLS).

Christenson Brief, at 16. Christenson argues that CRWII failed to even apply for ADLS by the time of the administrative hearing seeking approval (February 4-6, 2020), and that the Commission clearly erred in its Findings of Fact 18,[21] 30,[22] and 66.[23]

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[21] *See* Issue 1A: Compliance with Grant County Ordinance, *supra.*

[22] FOF 30. Applicant will install and use lighting required by the [FAA]. Applicant will equip the Project with a FAA-approved [ADLS] to minimize visual impact of the Project starting with the commercial operation date and for the life of the Project, subject to normal maintenance and forced outages.

[23] FOF 66. The Commission finds that the Project, if constructed in accordance with the Permit Conditions of this decision, will comply with all applicable laws and rules, including all requirements of SDCL Chapter 49-41B and ARSD Chapter 20:10:22.

The Court finds Christenson's argument to be misguided. The plain reading of the statute requires that CRWII, the applicant wind energy facility, which receives a permit, shall be equipped with an ADLS in compliance with the FAA. Christenson appears to argue that CRWII was not equipped with ADLS at the time of the permit, which is a clear misunderstanding of the statute.

Or, alternatively, Christenson argues that CRWII had no plan to install ADLS in its Application for its facility permit (submitted July 9, 2019) at the time of the Commission's Hearing (February 4-6, 2020). This would also be a misunderstanding of the statute, which says a facility that "receives a permit . . . shall be equipped" with an ADLS. Nothing in the statute requires the "merits" of the Applicant's permit being equipped or applied for an ADLS.

Furthermore, this point is moot. Findings of Fact 30 and 51, and Permit Condition 34, all state that CRWII will install and use ADLS in compliance with the FAA. CRWII points to Permit Condition 1 (Applicant will obtain all governmental permits which reasonably may be required by any governmental unit for construction and operation activity of the Project prior to operation) and Permit Condition 34 (Applicant shall apply to the FAA for approval to utilize an ADLS and allow enough time for a FAA determination and system construction prior to operation). FOF 51 requires the Applicant to illuminate the wind turbines as required by the FAA.

Therefore, regarding the ADLS, the Commission did not err when granting a permit to CRWII. Furthermore, because the Commission did not err in its decision, the question of prejudice need not be discussed for ADLS.

Sound and Air Quality Studies

A. Sound Study

Christenson Appellants argue the following:

> Appellee Commission failed to receive and consider Appellee [CRWII's] complete application for a wind energy facility permit through the time of the evidentiary hearing herein contrary to the requirements of South Dakota law, pursuant to SDCL § 49-41B-22(3), including the submission for review of a pre-construction sound or health study in each (or any) of the adversely affected counties.

Christenson Brief, at 18. Staff responds that Applicant met is burden of proof with respect to SDCL § 49-41B-22(3). CRWII responds that it carried its burden that the Project will not substantially impair the health or welfare of inhabitants.

South Dakota law states that the "applicant has the burden of proof to establish by a preponderance of the evidence that . . . the facility will not substantially impair the health, safety or welfare of the inhabitants. . .." SDCL § 49-41B-22(3).

Christenson Appellant states that "[a]lthough four (4) proposed experts appeared and gave testimony and evidence at the evidentiary hearing for Appellee CRWII, no infrasound or low frequency sound study was requested to be conducted, nor any study submitted to Appellee PUC for evidentiary analysis and review." Christenson Brief, at 19.

Staff responds that (1) there is no legislative directive as to how an applicant must establish that a project will not substantially impair the health and welfare of the community; and (2) there is no rule that mandates how the applicant must satisfy the burden. Staff's Brief, at 11. Staff then states that the Commission found sufficient evidence in the record to demonstrate that "the sound from the Project would not substantially impair the health and welfare of the community." *Id.*, (Findings of Fact 68, AR 14244). This finding was supported by substantial evidence in the record, including "expert testimony from both health experts and acousticians, with no corresponding intervenor testimony to contradict these experts." *Id.*

Again, the statute, SDCL § 49-41B-22, does not require an act that Appellants claim exists. Rather, it simply states that CRWII must prove its facility will not substantially impair the health, safety or welfare of the inhabitants. As Staff argued, there are no specific mandates on completing this task.

Therefore, regarding the sound study, the Commission did not err when granting a permit to CRWII. Furthermore, because the Commission did not err in its decision, the question of prejudice need not be discussed for the sound study.

B. Air Quality Study

Christenson Appellants argue that "contrary to the regulatory requirements of ARSD 20:10:22:21, no air quality study was requested nor submitted to Appellee PUC for review." Christenson's Brief, at 20. This ARSD states the following:

> The applicant shall provide evidence that the proposed facility will comply with all air quality standards and regulations of any federal or state agency having jurisdiction and any variances permitted.

ARSD 20:10:22:21.

CRWII argues that in its Application, it explained in detail that the Project's operations did not implicate air quality standards. CRWII's Brief, at 30. (AR 99-100). The Commission concluded "The evidence further demonstrates that there are no anticipated material impacts to existing air and water quality, and the Project will comply with applicable air and water quality standards and regulations." *Id.*; (AR 14237).

This ARSD does not require that an air quality study be submitted, only that it would comply with standards and regulations. Therefore, regarding the air quality study, the Commission did not err when granting a permit to CRWII. Furthermore, because the Commission did not err in its decision, the question of prejudice need not be discussed for the air quality study.

As to each of these issues raised the Commissions finding that the applicant has met its burden of proof as to the applicable rules and laws and that the Project will not negatively impact the health and welfare of the inhabitants was not clearly erroneous and is affirmed by this court.

PART II: EHLEBRACHT APPELLANTS

This court's role, in this procedural appeal, is to determine whether the regulatory agency was clearly erroneous or not in its findings. This court will not address the arguments of easements or takings, the histories of regulatory limitations of shadow flicker borrowed from German standards, or whether this is a discharge of light in accordance with SDCL § 43-13-2(8). This is not the proper place nor time for these arguments. This court does not have the jurisdiction to hear these argument, rendering them moot in this appeal. The court does however, address the following issues raised by Ehlebracht Appellants.

Minimal Adverse Effect

Ehlebracht Appellants argue the following issue:

> Whether the Agency, authorized to promulgate rules concerning wind energy conversion facilities (SDCL § 49-41B-35) but adopting no relevant rules as to the meaning of "minimal adverse effect," may proceed on a case-by-case or *ad hoc* basis to permit a burden of "effects" upon both citizens and their properties under

> variable regulatory limits developed by others, including those interested in the promotion of wind development.

Ehlebracht Brief, at 2, 12. This South Dakota statute states the following:

> To implement the provisions of this chapter regarding facilities, the commission shall promulgate rules pursuant to chapter 1-26. Rules may be adopted by the commission:
>
> (1) To establish the information requirements and procedures that every utility must follow when filing plans with the commission regarding its proposed and existing facilities;
> (2) To establish procedures for utilities to follow when filing an application for a permit to construct a facility, and the information required to be included in the application; and
> (3) To require bonds, guarantees, insurance, or other requirements to provide funding for the decommissioning and removal of a solar or wind energy facility.

SDCL § 49-41B-35 ("Promulgation of rules").

Ehlebracht's argument of the *ad hoc* basis is that the Commission has permitted more stringent standards for other wind energy facilities, specifically Prevailing Wind Park,[24] than others, such as the CRWII Project here. These standards include "effects" such as noise and shadow flicker.

Staff argues that the Commission is not required to promulgate rules defining "minimal adverse effects," but rather is permitted this rulemaking authority. Staff's Brief to Ehlebracht, at 7. Furthermore, Staff argues that the state statute instructs the Commission to review permit applications on case-by-case or ad hoc bases.[25] CRWII likewise makes the same argument, the Commission has discretion, not the legal obligation to adopt rules. CRWII's Brief, at 8-9.

The state statutes and ARSD clearly permit the Commission to adopt rules and procedures. Ehlebracht's argument here focuses on requiring the Commission to adopt a standard that applies to all windfarms. Currently, the laws require that the Commission defers to local county ordinances. As evidenced within this case itself, there are three counties (Codington, Deuel, and Gran), each with their own separate standards.

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[24] This wind energy facility is in Bon Homme, Yankton, and Charles Mix counties.
[25] *See* SDCL §§ 49-41B-11 through 49-41B-25, inclusive.

Therefore, regarding this issue, the Commission did not err when granting a permit to CRWII. Furthermore, because the Commission did not err in its decision, the question of prejudice need not be discussed for this issue.[26]

Issue 2: Easements and Servitudes

Ehlebracht Appellants argue the following issue:

> Whether SDCL § 43-13-2, "Easements and Servitudes," applies to the land and property interests of Appellants, bearing on the Applicant's claimed right to hereafter discharge adulterated light (in the form of Shadow Flicker, along with other Effects) onto and into the dwellings and lands of appellants, given that the Agency's Decision offers or affords approval of such discharge but without the required consent of the fee owner.

Ehlebracht Brief, at 18. This South Dakota statute states the following:

> The following land burdens or servitudes upon land may be attached to other land as incidents or appurtenances, and are called easements:
> . . .
> (8) The right of receiving air, light, or heat from or over, or discharging the same upon or over land . . .

SDCL § 43-13-2(8).

Ehlebracht Appellants argue that the right to discharge light upon or over land is an affirmative easement. Ehlebracht Brief, at 21. Staff argues that the "Commission is not a court of general jurisdiction and has no authority to assess property rights, nor waive any underlying law, ordinance or regulation that otherwise applies to the construction of wind turbines." Staff's Ehlebracht Brief, at 12. CRWII argues that this statute "is wholly outside the statute the Legislature enacted for the Commission to administer." CRWII's Brief, at 20; *Northwestern Bell Tel. Co. v. Chicago & N.W. Transp.*, 245 N.W.2d 639, 641 (S.D. 1976) ("The Public Utilities Commission is an administrative body authorized to find and determine facts, upon which the statutes then operate. It is not a court and exercises no judicial functions").

[26] Ehlebracht Appellants also casually state that the equal protection laws are violated (Art. 6, 18, S.D. Const.; 14th Amendment, U.S. Const.). The Court finds this argument without merit, as it does not provide evidence aside for claims that one county ordinance has a more stringent ordinance than that of another county on the other side of the state.

Here, the Court agrees with the appellees that this issue is outside its jurisdiction. This court's role, in this procedural appeal, is to determine whether the regulatory agency was clearly erroneous or not in its findings. Therefore, regarding this issue, the Court will not weigh into the question of easements.

Taking and *Per Se* Nuisance

Ehlebracht Appellants argue the following issue:

> Whether the exercise of the Agency's permitting authority under Chapter 49-41B, SDCL, giving approval for the casting of Effects over the homes and lands of Non-Participants, but without an easement being conferred in favor of Applicant and without the provisions of SDCL § 21-35-31 having been invoked, is a taking of Appellants' private property interests?

Ehlebracht Brief, at 27. Ehlebracht Appellants state that they will be subject to the Effects given off by the Project (such as noise and shadow flicker). Without the appellants granting permission, this would in effect "accomplish[] a *taking* of the property interests of these Appellants." *Id.*, at 29.

Staff argues that the Commission's order granting CRWII a permit to construct a wind energy facility is not a taking or a *per se* nuisance. Regarding a "taking," Ehlebracht fails each of the four theories under South Dakota case law. *Benson v. State*, 710 N.W.2d 131, 149 (S.D. 2006) (a regulatory physical taking; a permanent physical invasion of property; depriving owner of all economically beneficial uses of property; and a land-use exaction violating standards). Regarding *per se* nuisance, Staff argues that Ehlebracht's claim is not ripe, nor do the appellants submit sufficient evidence for the court to determine a taking has occurred. *See Boever, v. South Dakota Bd. of Accountancy*, 526 N.W.2d 747 (S.D. 1995). CRWII argues that the per se nuisance is insufficient to create a ripe controversy. *See Boever*, 526 N.W.2d at 750.

The Court here agrees with Appellees' arguments. Ehlebracht has not established that noise and shadow flicker is a taking under South Dakota law, and the per se nuisance is not ripe for controversy. Therefore, the court will not address either of these issues.

CONCLUSION

Considering the Commission's findings, inferences, and conclusions, the Commission was not clearly erroneous and did not abuse its discretion in granting the permit to Crowned Ridge II. The Commission's decision was supported by extensive findings and conclusions that were supported by an exhaustive and complete administrative record. Therefore, the court affirms the Commission's decision and denies all of issues raised by each group of Appellants (Christensen and Ehlebracht). Counsel for the Appellee is directed to prepare an Order affirming the Decision of the Public Utilities Commission.

BY THE COURT:

Dawn Elshere
Circuit Court Judge
Third Judicial Circuit

STATE OF SOUTH DAKOTA) : SS COUNTY OF DEUEL)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
IN THE MATTER OF ADMINISTRATIVE APPEAL GARRY EHLEBRACHT, STEVEN GREBER, MARY GREBER, RICHARD RALL, AMY RALL AND LARETTA KRANZ and AMBER KAYE CHRISTENSON AND ALLEN ROBISH, Appellants, v. CROWNED RIDGE WIND, LLC AND SOUTH DAKOTA PUBLIC UTILITIES COMMISSION, Appellees.	19CIV20-000021, and 19CIV20-000027 **ORDER**

Appellants Garry Ehlebracht, Steven Greber, Mary Greber, Richard Rall, Amy Rall, and Laretta Kranz having appealed from the South Dakota Public Utilities Commission's Final Decision and Order Granting Permit to Construct Facility in EL 19-027, and Appellants Amber Christenson and Allen Robish having separately appealed as a part of their separate issues in both Codington County and Grant County, and with the appeals being thereafter combined for purposes of judicial economy, and with all parties having appeared by and through their respective counsel of record, and the Court having considered the Briefs submitted by all parties as well as all arguments of counsel, and the Court having

issued its Memorandum Opinion on February 26, 2021, which is attached as Exhibit A and incorporated herein by this reference, it is hereby,

ORDERED, ADJUDGED and DECREED that the Decision and Order of the South Dakota Public Utilities Commission, entered April 6, 2020, is affirmed.

Signed: 3/12/2021 10:56:19 AM

Dated this _____ day of March, 2021.

BY THE COURT:

_____
Honorable Dawn Elshere
Circuit Court Judge
Third Judicial Circuit

Attest:
Reichling, Sandy
Clerk/Deputy

APPENDIX C

APPELLANTS' BRIEF
No. 29610

Appellants' Selected Excerpts of
the "Kranz Easement"
(Ex. I-2, R013269)

Section 5.2 (R013272-3):

Effects Easement. Owner grants to Operator [Crowned Ridge Wind Energy Center, LLC] a non-exclusive easement for audio, visual, view, light, flicker, noise, shadow, vibration, air turbulence, wake, electromagnetic, electrical and radio frequency interference, and any other effects attributable to the Wind Farm or activity located on the Owner's Property or on adjacent properties over and across the Owner's Property ("**Effects Easement**").

Section 11.10 (R013279):

Remediation of Glare and Shadow Flicker. Operator [Crowned Ridge Wind Energy Center, LLC] agrees that should Owner experience problems with glare or shadow flicker in Owner's house associated with the presence of the Turbines on Owner's Property or adjacent properties, Operator [Crowned Ridge Wind Energy Center, LLC] will promptly investigate the nature and extent of the problem and the best methods of correcting any problems found to exist. Operator [Crowned Ridge Wind Energy Center, LLC] at its expense, with agreement of Owner, will then promptly undertake measures such as tree planting or installation of awnings necessary to mitigate the offending glare or shadow.

APPENDIX D

APPELLANTS' BRIEF
No. 29610

List of Studies & Articles Regarding Wind Farm "Effects" –
Sponsored by Applicant's Expert Witness Chris Ollson
(All quoted material selected by Appellants; footnotes added by Appellants)

Exhibit	R	Title
A12-2	005720	*Exposure to Wind Turbine Noise: Perceptual Responses & Reported Health Effects*, Health Canada (2016) R005729: "Study findings indicate that annoyance toward all features related to wind turbines, including noise, vibrations, shadow flicker, aircraft warning lights and the visual impact, increased as WTN levels increased. The observed increase in annoyance tended to occur when WTN levels exceed 35 dB and were undiminished between 40 and 46 dB."
A12-3	005732	*Effects of Wind Turbine Noise on Self-Reported and Objective Measures of Sleep*, Leila Jalali, et al. (2016) R005742: "The WHO's health-based limit for protecting against sleep disturbance is an annual average outdoor level of 40 dBA."
A12-4	005745	*Before-After Field Study of Effects of Wind Turbine Noise on Polysomnographic Sleep Parameters*, Leila Jalali, et al. (2016). R005745. "[A]lleged health-related effects of exposure to wind turbine (WT) noise have attracted much public attention and various symptoms, such as sleep disturbance, have been reported by residents living close to wind developments . . . Further studies with a larger sample size and including comprehensive single-event analyses are warranted."
A12-5	005758	*Impact of wind turbine sound on annoyance, self-reported sleep disturbance and psychological distress*, R. Baker, et al. (2012). R005758: "People living in the vicinity of wind turbines are at risk of being annoyed by the noise, an adverse effect in itself. Noise annoyance in turn could lead to sleep disturbance and psychological distress. No direct effects of wind turbine noise on sleep disturbance or psychological distress has been demonstrated, which means that residents, who do not hear the sound, or do not feel disturbed, are not adversely affected." R005764: "Another question that is worth considering is . . . whether people who live in noisier areas are perhaps better habituated to noise."
A12-6	005768	*The association between self-reported and objective measures of health and aggregate annoyance scores toward wind turbine installations*, David Michaud, et al. (2017). R005775: "[I]n response to concerns

raised during the external peer review of this paper, the association between the non-noise annoyance variables and self-reported and measured health outcomes was evaluated. With the exception of vibration annoyance, which could not be evaluated due to the small sample size, blinking lights, shadow flicker and visual annoyance were found to be statistically associated with several measures of health, including, but not limited to, migraines, dizziness, tinnitus, chronic pain, sleep disturbance, perceived stress, quality of life measures, lodging a WTN-related complaint, and measured diastolic blood pressure. . . . As this area of research matures, new findings may identify an aggregate annoyance value that corresponds to a threshold for community acceptability."

A12-7 005777 *Health-Based Audible Noise Guidelines Account for Infrasound and Low-Frequency Noise Produced by Wind Turbines,* Robert G. Berger, et al. (2015).

A12-8 005791 *Low-Frequency Noise Incl. Infrasound from Wind Turbines and Other Sources,* LUBW-Ministry for the Environment, Climate and Energy of the Federal State of Baden-Wuerttemberg. (2016).

A12-9 005897 An *assessment of quality of life using the WHOQOL-BREF among participant living in the vicinity of wind turbines,* Katya Feder, et al. (2015). R005897: "Living within the vicinity of wind turbines may have adverse impacts on health measures associated with quality of life (QOL). There are few studies in this area and inconsistent findings preclude definitive conclusions regarding the impact that expsoure to wind turbine noise (WTN) may have on QOL."

A12-10 005909 *Monitoring annoyance and stress effects of wind turbines on nearby residents: A comparison of U.S. and European samples,* Gundula Huber, et al. (2019). R005909: "As wind turbines and the number of wind projects scale throughout the world, a growing number of individuals might be affected by these structures. For some people, wind turbine sounds and their effects on the landscape can be annoying and could even prompt stress reactions." R005916: Our results have practical implications for wind farm development and monitoring. For example, the strong links between residents' experiences with wind farm planning processes and their levels of experienced stress impacts suggest that improving planning processes – such as by engaging residents actively from the beginning . . . might reduce annoyance and related symptoms. . . . Although participation cannot guarantee positive perceptions of the planning process, additional problems are more likely in the absence of substantive resident engagement."

A12-11 005918 *Health effects and wind turbines: A review of the literature,* Loren D. Knopper and Christopher A. Ollson. (2011) R005918: "While it is acknowledged that noise from wind turbines can be annoying to some and associated with some reported health effects (e.g., sleep disturbance), especially when found at sound pressure levels greater than 40db(A),[D1] given that annoyance appears to be more strongly related to visual cues and attitude than to noise itself, self reported health effects of people living near wind turbines are more likely attributed to physical manifestations from an annoyed state than from the wind turbines themselves." R005926: "Ultimately it is up to governments to decide[D2] the level of acceptable annoyance in a population that justifies the use of wind power as an alternative energy source. Assessing the effects of wind turbines on human health is an emerging field, as demonstrated by the limited number of peer-reviewed articles published since 2003. Conducting further research into the effects of wind turbines (and environmental change) on human health, emotional and physical, as well as the effect of public consultation with community groups in reducing pre-construction anxiety, is warranted."

A12-12 005928 *Wind Turbines And Photosensitive Epilepsy,* Epilepsy Society. (2019) "The person with photosensitive epilepsy would need to be within a certain distance from the turbine. Regulations for commercial wind farms include placing wind turbines at enough distance from private dwellings for it not to affect people in their houses[D3] . . . . If you have a seizure directly triggered by shadow flicker from wind turbines, and you'd like to tell us about it, we would like to hear from you."

A12-13 005929 *Wind turbines, flicker, and photosensitive epilepsy: Characterizing the flashing that may precipitate seizures and optimizing guidelines to prevent them,* Graham Harding, et al. (2008) R005929: "The provision of energy from renewable sources has produced a proliferation of wind turbines. Environmental impacts include safety, visual acceptability, electromagnetic interference, noise nuisance and visual interference or flicker. Wind turbines are large structures and can cast long shadows. Rotating blades interrupt the sunlight producing unavoidable flicker

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[D1] This Project, of course, includes the Permit Condition of greater than 40 dBA.

[D2] Appellants would argue this point, if governments deem themselves empowered to decide the matter without the consent of landowners subjected to the annoyance.

[D3] This brief article neither relates nor defines the "enough distance" assertedly required by regulations; here, Appellants homes are between 2,000 and 2,800 feet from nearest turbines. Applicant's own experts report that shadow flicker is not noticeable beyond some 5,500 feet (1,700 meters). See Ex. A14-2, R011270.

bright enough to pass through closed eyelids, and moving shadows cast by the blades on windows can affect illumination inside buildings."

A12-14 005933 *Potential of wind turbines to elicit seizures under various meteorological conditions,* Andrew R. D. Smedley, et al. (2009) R005938: "[C]onsidering the tendency of patients to look away from the sun as a natural reaction, but for those who find themselves in the shadow zone, we find that for an observer viewing the ground the contrast is almost always insufficient to be epileptogenic. . . . It is noted that eye closure is a natural immediate protective action when exposed to flicker, and so has the unfortunate consequence of exacerbating its adverse effect in this context. A more effective strategy would be to cover one eye with the palm of a hand as monocular stimulation is known to be generally far less epileptogenic . . . or for the observer to simply avert their gaze to the ground."[D4]

A12-15 005939 *Update of UK Shadow Flicker Evidence Base,* Parsons Brinckerhoff for the Department of Energy and Climate Change. (2009) R005943: "The term 'shadow flicker' refers to the flickering effect caused when rotating wind turbine blades periodically cast shadows over neighbouring properties as they turn, through constrained openings such as windows. The magnitude of the shadow flicker varies both spatially and temporally and depends on a number of environmental conditions coinciding at any particular point in time, including, the position and height of the sun, wind speed, direction, cloudiness, and position of the turbine to a sensitive receptor." R005994: "The extent of the impact that shadow flicker causes is given in a psychology study (Pohl, 1999). This study concludes that the shadow flicker effect did not constitute a significant harassment. However, under specific conditions the increased demands on mental and physical energy, indicated that cumulative long term effects might meet the criteria of a significant nuisance.[D5] This demonstrates the need to reduce the impact where possible. . . . Mitigation measures adopted by developers have been successful. Careful site design to eliminate shadow impacts is important, with mitigation measures such as turbine shut down being used regularly. These systems are acceptable for all parties, and by

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[D4] Appellants are thus given to understand that, when outside in the midst of shadow flicker, it might be best to cover one eye with a hand, or to simply look down at the ground. Got it!

[D5] This phrase – "might meet the criteria of a significant nuisance" – cannot be overstressed. With the permit in hand, the nuisance criteria for neighbors seem obviated.

virtue of their success, the issue of shadow flicker appears to be minor. Mitigation measures are often put into planning conditions."[D6] This article also helps explain, in Appellants' view, the ensuing article received as Ex. A12-16. That explanation appears at R005988, without specifically identifying the source by name.

A12-16 006006 *Information on How to Identify and Assess Optical Immissions Wind Turbines,* Country Committee and Import Protection. (2002). This article, in German and English, opens with the statement:

"Scientific research shows that optical immissio [sic]-can lead to significant nuisance (stressor), especially in the form of periodic shadow discarding. Taking investigations and hearings by experts into account, these indications are intended to unable a uniform and practical and practical identification and assessment of the optical immissions of wind energy plants." (R006007)

The article proceeds with discussion of "[a]stronomically maximum possible shading time (worst case)" – this being the time when "the sun theoretically shines continuously in cloudless skies throughout the time between sunrise and sunset, the rotor surface stands perpendicular to solar radiation and the wind turbine is in operation." On the other hand, "[m]eteorologically probable shading time is the time for which the shadow cast is calculated taking into account the usual weather cnoditions. The long-term measurement series of the German Weather Service (DWD) serve as the basis." (R006009)

The study further asserts: "An influence by expected periodic shadow cast is considered not to be significantly harassing if the astronomically maximum possible duration of the coverage [references omitted] takes into account all WEA contributions at the respective emission site in a reference height of 2 m above ground is no more than 30 hours per calendar year and beyond no more than 30 minutes per calendar day. In assessing the level of harassment, an average sensitive person was used as benchmark." (R006011) Continuing, the study then asserts: "An important technical measure, as the subject of conditions and orders, constitutes the installation of a deduction switching automatically, which uses radiation or lighting strength sensors to detect the specific

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[D6] Other than the PUC's *ad hoc* "regulatory limits" of 30 hours annually (unless one is a Non-Participant in Bon Homme County, in which case it is 15 hours annually and 30 minutes daily) no known flicker mitigation measures were imposed by the Agency. Each Appellant's home is slated to receive shadow flicker *below* the professed regulatory limit. Appellants challenge Agency's right to establish that limit as a burden on land, particularly on an *ad hoc* basis, without also descending into takings jurisprudence.

meteorological shading situation and thus limits the local document duration. Since the value of 30 hours per calendar year was developed on the basis of astronomically possible shading, a corresponding value for defeat automobiles is determined for the actual, real shadow duration, the meteorological shading duration. Based on [reference omitted], this figure is 8 hours per calendar year." (R006012)

Concerning this study, witness Chris Ollson testified in Ex. A12, at R005710, line 5:

Q. ARE THE 30 HOURS OF SHADOW FLICKER STANDARD ADOPTED BY THE COUNTIES THAT WILL HOST THE CRW II PROJECT CONSISTENT WITH THE [SIC] HOW OTHER JURISDICTIONS APPLY THE THRESHOLD FOR SHADOW FLICKER?

A. Yes. For context, the origins of the 30-hour shadow flicker threshold standard can be traced to Germany in 2002. (Exhibit CO-S-16 in German and English). [Introduced in the Agency proceeding as Ex. A12-16] The German standard was based on limiting the nuisance of local residents and was subsequently codified.

Also the United States jurisdictions have successfully adopted shadow flicker restrictions based on the "Realistic/Expected" scenario of no more than 30 hours a year. The following are examples of state-wide legislation. [Witness Ollson goes on to cite regulations adopted by North Dakota Public Service Commission, and Connecticut State Agencies.] [D7]

[D7] Remarkably, this reflects that state-wide regulations have been adopted in at least two jurisdictions, per witness Ollson - *not* in South Dakota, however, where one standard is applied, *ad hoc*, to a wind farm in Bon Homme County, and yet another in Deuel County.