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 PUBLIC 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' REPLY BRIEF

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PRELIMINARY STATEMENT

This appeal is related to Appeal # 29352 - the same Appellants residing in Deuel County, the same wind farm project – the difference being the challenge there is the role of the Zoning Power to support Applicant's casting of wind turbine "Effects"[1] onto the homes and lands of Non-Participants. As with the PUC, the county's Board of Adjustment approved Applicant's emission of Effects from wind farm operations without regard to property lines or easements. Participants receive the same Effects (if living near the wind farm, which *is* the case for each of the Appellants), an "Effects Easement" having been given by *each* Participant.[2] Appellants have consistently argued the governmental agencies have adversely taken a *de facto* easement, awarded to and solely for Applicant's benefit.

Appellees maintain that voluntary easements are vital *only* if Applicant itself *wishes* to obtain one from a given landowner, *or* whenever the projected "Effects" are in excess of the Agency's so-called Regulatory Limits.[3] With permits in hand, Appellees' shared theory is that Effects Easements are not required as to Non-Participants.

Two recent U.S. Supreme Court decisions must be noted. *Knick* v. *Township of Scott*, 139 S.Ct. 2162 (2019), cited in Appellant's brief to the trial court below (CR 1399) and also in Appellant's opening brief in # 29352, held that a county ordinance requiring

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[1] Primarily consisting of "shadow flicker" and noise. These Effects originate from wind turbine operations conducted upon the fields, lots and parcels of Participants, the Zoning Power being invoked by Applicant in pursuit of the essential CUP. As deployed in Deuel County, this power then purportedly extends *beyond* property lines to afflict, by some explicit measure, the property interests of those not invoking the Zoning Power.

[2] One small landowner, *not* a participant, has given a "Participation Agreement" with a similar effects easement, also not revealed until *after* the Agency's hearing – see Appellants' brief, 17, and n. 29, being placed in the record post-hearing as Ex. I-8, R013802.

[3] As referenced in the testimony of Staff's expert witness Hessler and Staff member Kearney, cited in Appellant's brief, 26-7.

daytime access to old cemeteries comprised a taking of property. The Court then overruled part of *Williamson County Regional Planning Commission* v. *Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). *Williamson County* had established a two-prong test of "special ripeness" for federal jurisdiction of land use takings claims – *first*, had the planning body reached a final, reviewable decision, and *second*, has the property owner unsuccessfully availed itself of a compensatory process afforded by state law?[4] The second prong was overruled in *Knick*.[5] The doors to the federal courthouse are now open to state agency taking claims under 42 U.S.C. § 1983, under a final, reviewable decision.[6]

The second notable decision was issued June 23, 2021, *Cedar Point Nursery* v. *Hassid*, 594 U.S. ____ (2021).[7] *Cedar Point* concerned a California state agency regulation granting union organizers the right to access private property at certain times of the day, for 120 days per year. This access right was seen by the Court as an easement, even though not exactly in the usual form of an easement (slip opinion, at 13):

> As a general matter, it is true that the property rights protected by the Takings Clause are creatures of state law. See *Phillips* v. *Washington Legal Foundation*, 524 U.S. 156, 164 (1998); *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992). But no one disputes that, without the access regulation, the growers would have had the right under California law to exclude union organizers from their property. See *Allred* v. *Harris*, 14 Cal.App. 4th 1386, 1390, 18 Cal.Rptr. 2d 530, 533 (1993). And no one disputes that the access regulation took that right from them. The Board cannot absolve itself of takings liability by appropriating the growers' right to exclude in a form that is a slight mismatch from state easement law. Under the Constitution, property rights "cannot be so easily

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[4] *Williamson County*, at 195, 199.

[5] *Knick*, 139 S.Ct. at 2179.

[6] Appellants suggest that a fully reviewed agency decision also satisfies the first prong of *Williamson County*.

[7] The Clerk and parties were informed of this ruling by letter of June 24, 2021. Chief Justice Roberts wrote the majority opinions in both *Knick* and *Cedar Point*.

> manipulated." *Horne*, 576 U.S., at 365 (internal quotation marks omitted); see also *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164 (1980) ("a State, by *ipse dixit*, may not transform private property into public property without compensation").

The Facility Siting Permit (likewise, the CUP issued in Deuel County) is tantamount to a *de facto* easement. Though not bearing the formal requisites, and being neither recorded in the local office nor indexed as a specific burden upon Appellants' properties, these government-issued approvals serve as an easement, providing legal cover for discarding the "Effects" on the lands of neighbors.[8]

Cedar Point concluded the California regulation was a "*per se* physical taking" of property rights: "[t]he regulation appropriates for the enjoyment of third parties the owners' right to exclude" (slip op., at 7). The decision substantially clarifies takings jurisprudence. Cases involving "use restrictions" (or regulatory takings), citing the zoning ordinance in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), and noting the Court of Appeals for the Ninth Circuit had reviewed the state's access regulation under the multifactor balancing test of *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), are to be distinguished from those that are *per se* or physical takings.[9]

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[8] Just *as if* Appellants had each executed an instrument with the "Effects Easement" language; see Section 5.2 of Ex. I-2, R013269, reproduced in Appendix C, Appellant's brief.

[9] *Cedar Point*, slip op. at 3-7, observing also, at 3, the growers "had made no attempt to satisfy" the *Penn Central* tests. Appellee Agency continues to cite *Penn Central* as the hurdle that Appellants must leap. Applicant relies on *Muscarello v. Ogle County Bd. of Com'rs*, 610 F.3d 416 (7th Cir. 2010); however, the legal foundation of *Muscarello* – involving a *proposed* wind farm, apparently never built - includes *Williamson County*, now swept away by *Knick*. Much of the ground has shifted since *Muscarello* was decided.

This is not a case of "use restrictions." Rather, this is (or soon will be recognized as, Appellants suggest) a *per se* takings case.[10] Human agents of Applicant are not licensed to walk or enter the properties of Non-Participants, there is no directive to open their gates to construction equipment and materials. Yet, this case is about the "Effects" of undue proximity to a wind farm designed by Applicant, approved by the PUC, where citizens are nonconsensually enclosed within the boundaries and compelled (by virtue of the Agency's decision) to permanently endure[11] the adverse consequences flowing from Applicant's volitional design.[12] This is an uncompensated compulsion. Meanwhile, the Project is fully constructed. From many lofty perches, rising well above any deflecting veil of trees or other structures, the Effects face little resistance in ferreting out the Appellants within their respective homes and lands. The Effects are a burden on the Appellants' homes, even assuming for sake of argument that burden, even over a long period of time, will neither kill nor maim them.[13]

ARGUMENT

Appellants now review the issues pressed by Appellees, each having urged that the trial court be affirmed. Those asserted by Appellees are slightly rephrased, with the first two considered jointly.

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[10] This is merely an appeal of the trial court's affirming order on review of the Agency's decision, the inquiry being directed by the full scope of SDCL 1-26-36.

[11] The wind farm leases (with Effects Easement) have a life of 25 years, and perhaps "many more years." See Appellants' brief, 10, n. 18. The Permit itself has no expiration date. Effects will be emitted so long as the turbines remain and the winds blow.

[12] Staff's Expert Hessler opined the Project is "aggressively devised" (Ex. S2, R012746, TR-H 497:24-498:25). Neither Agency nor Applicant mentioned or cited Hessler's opinion below, and now, Appellees continue to ignore it.

[13] Albeit their lives are now lived in permanent annoyance.

Agency's Issue A (at 8), Applicant's Issue I (at 8)

A. IS THE AGENCY ENTITLED TO REGULATE "EFFECTS" ON AN AD HOC BASIS?

Agency's Issue B (at 12), Applicant's Issue II (at 20)

B. IF THE AGENCY HAS NO AUTHORITY CONCERNING EASEMENTS, WHY DOES IT ISSUE ORDERS HAVING THE EFFECT OF EASEMENTS?

The opposing arguments of Appellees assert that as the language of SDCL 49-41B-35 is not mandatory but permissive, the PUC can wade into the regulation of siting these complicated Projects[14] without further substantive rules in place. This position is both curious and dangerous, rather like allowing small children to have matches, near haystacks - on a windy day – during a drought. What could go wrong?

Appellants readily agree the Agency has *no* jurisdiction to determine or to adjudicate land easements. That was never the point - Appellants never claimed Agency *could* grant easements over land. In the void left by having no *suitable regulations*, however, the PUC's decisions and orders have the effect of an easement; the subject matter of the orders affects the use and enjoyment of property, in ways adverse to the fee owner's prerogatives. Agency could certainly read the collected statutes on easements,[15] and come to realize, in consultation with Staff, that wind farms are big, complicated, intertwined proposals, *permanently* touching the property and incomes of Participants. Likewise, these Projects pose health and safety concerns for Non-Participants residing

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[14] Spread over 3 counties and more than 130 turbine sites, rising to about 500' in height, casting "Effects" of noise and shadow flicker onto literally hundreds of different property owners, both Participants and Non–Participants. Some of the Participants – and all of the Non-Participants – are also residents of the area.

[15] SDCL 43-13-1 to -13, inclusive, copied from California Civil Code in 1877; the chapter then continues, ending with wind and solar easements, generally added in 1996 and extensively and frequently amended since.

nearby, even as the property interests and incomes of those same Non-Participants are also *burdened*.[16]

Despite the absence of Agency's jurisdiction to *issue* or *determine* easements, prudence and common sense suggests that regulations might serve as prophylactic, much as already suggested in Appellants' brief, 11, n. 19, repeated following:

> 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.[17]

If proposing to encircle or embrace property within the Project's boundaries, or needing to cast "Effects" into or onto property by reason of proximity,[18] the Project promoter should hold an easement authorizing that burden. However, Applicant chose *not* to even pursue Effects Easements (other than with Mrs. Kranz).

The proceeding below was a tightly scripted, time-limited dance between the Agency and Staff, with Applicant appearing for a great host of compensated Participants

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[16] What was *once* possible for Non-Participants under current zoning law may no longer be possible; for example, no adult child returning home to the parents' farm would build a new home within several hundred feet of an existing 500' wind turbine, even if not strictly prohibited under the County's wind ordinance. By narrowing such choices, the property rights of Non-Participants are burdened or diminished, saddled also with the burden of "Effects."

[17] As Appellants now know, once the hearing had ended, it *is* possible for Applicant to enter into an Effects Easement with a Non-Participant; *see* n. 2, above.

[18] Shadow Flicker does not extend to infinity; *see* Appellants' brief, 19, n. 35.

(each holding an "Effects Easement"). Non-Participants were mere observers to this shindig, left standing along the wall.[19] The PUC did note the names of Appellants in the decision, no further details deemed essential to conclude the permitting carnival.

The PUC was pressed to decide (and quickly, in line with the legislature's timetable) the specific doses of "Effects" that can be given to those with easements (Participants as well as that one Non-Participant signing the oddly named "Participation Agreement," referenced in n. 2, above), and likewise, the dosage for all those giving no such easements. Thus, regarding Non-Participants (including Appellants), there is *only* the Agency's decision to establish Applicant's legal right to administer the Effects (over the course of the next 25 or more years) to those living and owning property in proximity to the Project.[20]

Appellants own and live on their respective properties and homes within the immediate vicinity of the Project.[21] Both they and their properties are permanently exposed to Effects greater (or more intense) than prescribed for neighbors of the wind

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[19] This is not to allege Appellants were denied procedural rights; but what other explanation is there for an Agency decision that mentions the *names – but none of the interests* – of Appellants. Consider the comments of Commissioner Nelson in taking Applicant's counsel to task, as recounted in Appellants' brief, at 6-7, on the issue of confidentiality. The exchange was on the value to Participants of negotiating wind farm leases and easements. The property interests of Non-Participants, however, merited no expression of concern; these interests have been trampled in the process.

[20] Crucially, the Agency's Decision establishes a "lawful dose" of Effects, and even in the absence of an easement, is the purported legal mechanism for Applicant's administration of full measure to Non-Participants and property interests, when and as the wind blows. Appellants thus argue the Agency's own acts – *or the adamant refusal to promulgate regulations* - creates this Catch-22: without an underlying voluntary easement for Applicant's benefit, the PUC's decision steps in to serve as one.

[21] These homes being embraced within the Project's boundaries, as shown in Appendices A-1, A-2 and A-3, *Appellants' Reply Brief to Circuit Judge Elshere*, CR 1497, and also Ex. 14-2, R011280.

farm in Charles Mix County.[22] This enhanced level of Effects will not kill or maim them, we trust. But is decreeing disparate levels of Effects for different counties really part of the Agency's prerogative? The professional literature amassed by Applicant (and Staff) clearly suggests the long-term health consequences of exposure to the Effects is not well understood, and that additional study is required.[23]

In a presumed effort to shore up Appellees' positions, Crowned Ridge, at 16, with reference to the noise levels to be experienced by Appellants, asserts:

> For additional context, the record shows that the sound produced from the Project for the Intervenors is *approximately that of a soft whisper at a distance of 3 feet.* (AR-1 229). (Emphasis supplied.)

Appellants are skeptical that noises emitted from a wind turbine resemble a "soft whisper," at any distance.[24] This writer is hard-pressed to think of a more annoying scenario than required to endure someone speaking to you (whenever the wind is blowing) in a soft whisper at three feet (forever)!

Because the Agency doesn't inquire whether Applicant holds Effects Easements from Non-Participants, the record in this case reflects the dangerous ice onto which the State and its agencies have crawled for purposes of avidly promoting wind energy development. A short list of warnings include: A) South Dakota has approved disparate levels of Effects for wind farms in different counties; B) Experts hired by Staff are

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[22] Noise and shadow flicker estimates at Appellants' homes are asserted in Appellee Crowned Ridge's brief, at 16. However, the asserted levels for noise are *not* in accord with other predictions, as noted in Ex. I-3, R-013292, at 013294, and referenced in Appellants' brief, at n. 34. Appellants did *not* invent those predictions!

[23] The literature collected by just one expert for Applicant – Chris Ollson – is outlined in Appendix D to Appellants' brief.

[24] A quick review of articles collected by Applicant's witness Ollson – listed in Appendix D of Appellants' brief – fails to uncover claims the noise is merely a "soft whisper."

effectively forced, in their professional roles, to support and urge approval of Projects emitting Effects beyond the ideals professed by those experts (40 DBA being Hessler's ideal goal); C) Those experts (again, Hessler) are required to support the design of a Project, even though "aggressively devised,"[25] with Hessler further elaborating on his views:

> It's how many turbines are around a particular house or point of interest. . . . [T]he density of turbines is such that there's lots of nonparticipating houses with predicted levels about 40 [dbA]. At my last count I think it was approaching 100 [homes]. It was a lot . . . And I would like to see it a lot lower number there."[26]

The expert's views or worries reflect a disconnect from the legislature's purpose that Projects yield "minimal adverse effects" on the citizens of this state, SDCL 49-41B-1. Hessler's concerns for the design are never cited nor addressed in the Agency's decision of April 6, 2020 (R014230), or the trial court's order (CR-1566) and memorandum (CR-1528).[27]

To compensate for the void in regulations, the PUC relies on the *ad hoc* opinions of experts hired by Staff (like Hessler), and borrows some convenient part of the regulations of other bodies, in the name of "Regulatory Limits." This includes the

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[25] Ex. S2, R012746, TR-H 497:24-498:25.

[26] TR-H 507:4-12. Needless to say, Hessler did not see a "lot lower number" from either the PUC or Applicant. (Simply nothing can be done for these unfortunates, it seems.)

[27] Rather than focus on "minimal adverse effects," Applicant's Project, as observed by Hessler, was an aggressive design without exceeding the PUC's "regulatory limits *de jour*" in too many places. One might suppose that needing too many "Effects Easements," in the form of a "Participation Agreement," as referenced in n. 2 – could get expensive. Otherwise, the burden of Effects, up to that regulatory limit, will be laid on lands and homes by the PUC's edict, without cost to Applicant.

German safety rules exemplified by Ex. A12-16 (R006006).[28] The *ad hoc* opinions on Shadow Flicker generally point to those German rules and some mythical "determined court case" as foundations.[29] (The county's own Zoning Power has settled on essentially those same rules for Shadow Flicker duration and noise intensity; in review of the briefs in pending Appeal 29352, the German regulation, said to be ratified by some unidentified German court opinion, are likewise the sources for the zoning standards in Deuel County, at least for cumulative Shadow Flicker duration).

The intended point is that when the PUC borrows part of the German rule for Shadow Flicker, which has both a daily and annual limit of duration,[30] and also adheres to Hessler's ideal model for noise (40 dBA), it is reasonable to assume the same *ad hoc* limits for Charles Mix would be imposed also in Deuel, no matter how aggressive the design. The differences between Hessler's ideal (40 dBA at the receptor, the "ideal" regulatory limit as applied in *Prevailing Wind Park*) and the purported new "regulatory limit" of the PUC (45 dBA, as applied here) are not mere trifles.[31]

Even assuming *arguendo* the borrowed rules (as to the effects of noise and Shadow Flicker) are properly found in the PUC's wheelhouse and are duly applied as to

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[28] Sponsored by Applicant's Chris Ollson, and summarized in Appendix D to Appellants's brief.

[29] See Appellants' brief, 9, n. 15 – no citation to that purported case, as referenced by Staff witness Kearney, is found in the briefs of Appellees. Appellants believe no such case exists, or at least, not one that would hold precedental value for this Court and South Dakota property law (including SDCL 43-13-2(8)).

[30] Both limits were applied in the 2018 permit case for *Prevailing Wind Park*, *see* Appellants' brief, n. 14, but not here.

[31] In logarithmic scale, every 3dB change represents either a doubling or halving of sound energy, according to professional literature. *See* "Understanding the 3dB rule," https://pulsarinstruments.com/en/post/understanding-3db-rule.

"human health" concerns, this still does not answer the question of the Agency's jurisdiction to impose those same levels or duration of Effects as a permanent burden on the land and homes of Appellants. Appellants never accepted those burdens, and by imposing such a servitude – *permanently* - the PUC's order becomes a *de facto* easement.[32] Spreading the burden of Effects to those unwilling to receive is merely a forced gratuity for Applicant's benefit. This result is not in harmony with Appellants' property rights.

Agency's Issue C (at 13), Applicant's Issue IV (at 26)

C. APPELLANTS DID NOT ARGUE THIS WIND FARM COMPRISES A NUISANCE *PER SE*.

Black's Law Dictionary (Rev. Fourth Ed.) defines nuisance *per se* as "[a]n act, occupation, or structure which is a nuisance at all times and under all circumstances, regardless of location or surroundings." Appellants never claimed as such below, even in asserting their property rights, objecting to enclosure behind the Project's boundaries and the burden of "Effects."

The definition was not fully embraced by this Court in *Town of Colton v. South Dakota Cent. Land Co.*, 25 S.D. 309, 126 N.W. 507, 508 (1910), given that "[n]o one can create a nuisance in the absence of some one affected by the former's act or omission." That said, a "lawful business or erection" (which likely includes 500' wind turbines) "may become a nuisance by reason of extraneous circumstances, such as being located in an inappropriate place." *Id.*, at 509. Siting the turbines to readily cast both noise and shadow flicker into Appellants' homes is one example of an "inappropriate place," even

[32] Or, as Chief Justice Roberts wrote in *Cedar Point*, slip op., 13, "The Board cannot absolve itself of takings liability by appropriating the growers' right to exclude in a form that is a slight mismatch from state easement law."

if the Zoning Power has blessed the arrangement, given the full absence of Effects Easements as to Appellants.[33]

The nuisance arguments of Appellants related entirely to the proscribing language of SDCL 21-10-1 and -2. The Project now has a CUP (under challenge in Appeal # 29352) and the Facility Siting Permit at issue here. The Project is fully permitted, entirely built. The casting of Effects upon Appellants is already underway. Appellants have no apparent remedy to challenge the discarding of Effects upon them within the scope of nuisance law; this, too, has elements of an easement, as argued in Appellants' brief.

Agency's Issue D (at 13), Applicant's Issue III (at 23)

D. APPELLANTS DO ASSERT THE AGENCY'S ORDER IS A TAKING OF PROPERTY FOR WHICH NO VOLITIONAL EASEMENT EXISTS

Applicant itself devised the "Effects Easement," making it part of the wind lease instrument and extracting it from compensated Participants, without regard to whether the owner actually lives on the property. Applicant also prepared the "Participation Agreement" with the solitary small parcel owner, which includes the Effects Easement language – although this post-hearing production leaves one to wonder whether this instrument exists because: (a) the nearest turbine was too close, (b) the Project produced too much noise, or (c) Shadow Flicker issued for too many hours – counted annually.[34]

In terms of property burdens, what law declares the PUC to be the final arbiter over specific levels (regulatory limits) upon neighbors (and their homes)? If the sound level intensity of 45 dBA (or Hessler's ideal, 40 dBA) is exceeded, or if Shadow Flicker

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[33] Mrs. Kranz's farm is capable of hosting turbines; she declined to enter into the proferred Kranz Easement (Ex. I-2, R013269). Ironically, as noted in Appellants' brief, 5, n. 6, 10, n. 18, and 23, n. 39, Ms. Kranz, by virtue of the PUC order, nevertheless must now tolerate the Effects *just as if* the Kranz Easement had been signed and delivered.

[34] *Not daily* – that's *only* for Non-Participants living near the *Prevailing Wind Park* Project. The single example of "Participation Agreement" is Ex. I-8, R013802. *See* Appellants' brief, 17, n. 29, and n. 2, above.

endures for more than 30 hours annually, then (and apparently only then), are those Effects viewed as excessive burdens upon property; this is what Applicant's extraction of a Participation Agreement (see n. 2, above) suggests to Appellants. The PUC does not have that authority. Regulatory Limits, as administered to Appellants and upon their homes, have been borrowed, *ad hoc*, from a German regulatory agency[35] or are constructed for each case on the opinions of experts (forced by Project design here to exceed his own ideals), while being unevenly applied.[36]

The PUC's brief discusses *Harms v. City of Sibley*, 702 N.W.2d 91 (Iowa 2005), asserting the Agency is *not* responsible for loss or damage to Appellants' interests. The crux of that case has been missed. The court, at 101, noted:

> We think the consequential damages rule applies here. 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 v. County of Allegheny,* 369 U.S. 84], *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.* (emphasis supplied)

It is true that Applicant made the plan, laying it before the PUC. The Staff's hired expert concluded the plan was "aggressively devised," but the Agency approved it regardless – *in every little detail*, with certain limited adjustments negotiated between Applicant and Staff. No design decision of Applicant could be implemented absent the express, highly conditioned approval and ratification of the PUC.

By contrast, the City in *Harms*, after approving the zoning district change, clearly took a hands-off approach, leaving the details of such a facility to the discretion and common sense of the plant developer. The PUC's order issued to Applicant is neither

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[35] Ex. A12-16, R006006, bearing the daunting title of "Information on How to Identify and Assess Optical Immissions Wind Turbines."

[36] SDCL 43-13-4, declaring that a "servitude can be created only by one who has a vested estate in the servient tenement," comes to mind. The "right" alluded to in the question presented is that of the "right to exclude," a right as noted in *Cedar Point*, slip op., 16, is "[not] an empty formality, subject to modification at the government's pleasure."

forgiven nor blessed by the "consequential damages rule." Proper regulations issued by this Agency, as suggested, would signal very poor prospects for licensing if a wind farm with gigantic turbines is sited to give Non-Participants a burden of "Effects" without benefit of an easement. Here, the response, in effect, is: "No easement, no problem."

In *Cedar Point*, slip. op., 20, Chief Justice Roberts concluded: "The access regulation amounts to simple appropriation of private property." That conclusion is likewise warranted here, such that the trial court's affirmance of the Agency's order should be reversed. This is not yet an inverse condemnation case, but one where the Agency's actions, in violating or prejudicing the substantial rights of Appellants, are open to question under SDCL 1-26-36. As is likely said before in other settings, the homes and lands of Appellants are not for sale, even as the PUC lacks the legal authority to place this servitude of "Effects" upon them.

CONCLUSION

The trial court correctly determined the Agency lacks jurisdiction to grant or issue easements. For the lands of Appellants, however, that is precisely what has been issued by means of the order appealed. The order gives the right to burden property, without benefit of an underlying easement, and thus serves just as if an easement.

Respectfully submitted:

Date: July 15, 2021

/s/ A.J. Swanson

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I certify Appellant's Brief complies with the requirements set forth in South Dakota Codified Laws, being 14 pages in length. This brief was prepared using Microsoft Word 2010, Times New Roman (12 point), and

contains 4,624 words and 24,449 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: July 15, 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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The signed original (and two exact copies) of Appellant's Reply Brief was transmitted via U.S. Mail to Clerk of SOUTH DAKOTA SUPREME COURT, 500 E. Capitol Ave., 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: July 15, 2021 /s/ A.J. Swanson
A.J. Swanson, Attorney for Appellants