BEFORE THE PUBLIC UTILITIES COMMISSION
STATE OF SOUTH DAKOTA

In the Matter of the Application by CROWNED RIDGE WIND II, LLC *for a Permit of a Wind Energy Facility in Deuel, Grant and Codington Counties*	))))	Docket EL19-027

POST HEARING BRIEF OF INTERVENORS
GARRY EHLEBRACHT, ET AL.

I. Introduction

Hearing having been held before the Commission on February 4-6, 2020, this post-hearing brief is submitted on behalf of Intervenors Garry Ehlebracht, and several others, all residing in the immediate area of Goodwin (Goodwin Township), Deuel County, South Dakota. These Intervenors include Steven and Mary Greber, Richard and Amy Rall, Laretta Kranz, and Garry Ehlebracht. Collectively, the interests of these Intervenors are reflected in Exhibits I-1 to I-6, inclusive; these parties will be generally referenced herein by their last names. Each is also a "Non-Participant" in this project.

Crowned Ridge Wind II, LLC (Applicant or sometimes, CRW) proposes a 300.6 MW wind farm, at a development cost of some $425 million and consisting of about 132 wind turbine placements across nearly 61,000 acres of land in three counties, currently arrayed as shown in Exhibit A-28. The project will deploy GE 2.3 MW turbines, with rotors with a 381 foot diameter, mounted at 295 feet (the highest point thus being a few feet shy of 500 feet, or approximately 485 feet by some calculations, a measurement having relevance, *inter alia*, for application of the Deuel County Zoning Ordinance). The wind farm is said to be, at the time of readiness for operation, subject to a contract of sale to Northern States Power, a subsidiary of Xcel Energy (NYSE: XEL).

In September 2019, Applicant advised that the project would consist of a 200 MW array, and a subsequent potential array of 100 MW. Greber and Rall, located northeast of Goodwin,

are affected primarily by the scope of the 200 MW segment, while Kranz and Ehlebracht, south of Goodwin, are primarily (but not exclusively) affected by the 100 MW phase.

The homes and properties of Intervenors have been established for many years, and are all regarded as "permitted uses" under the Deuel County Zoning Ordinance's Article XI. Provided there is a minimum lot size of three (3) acres,[1] "permitted uses" include single-family residences and farm dwellings. These Intervenors were *not* asked concerning their relative proximity to Applicant's planned wind farm, Applicant having been in full control of those details. These Intervenors played *no* role in the design of Applicant's wind farm, such being within the exclusive domain and province of Applicant, subject, of course, to whatever tweaks and adjustments this Commission may ultimately direct for the Permit now sought.

Staff's own expert, Mr. Hessler, describes the design of this wind farm as "aggressive." This label is understood to mean that while the design may comply with "regulatory limits," it otherwise reflects an attempt to place too many turbines in a relatively confined area, and as close as possible to Non-Participants. Applicant proposes to build a considerable number of 485 foot wind turbines in this area, so that, when and as the wind blows, a considerable volume and quantity of "Effects" (so named, in part, based on Section 5.2 of the Wind Lease & Easement Agreement, Exhibit I-2) will be permanently cast down, upon, around, and into the homes and properties of each of the Intervenors. Such is the fruit of an "aggressive design."

Intervenors have appeared in this proceeding (as shown also in Exhibit I-3, Application for Party Status, filed August 6, 2019) to especially assert that, as fee owners, these Intervenors did not agree to the placement of servitudes or burdens upon their lands for the benefit of the wind farm. Additionally, Deuel County, in the purported exercise of the State's delegated zoning power, even if acting to the same ends as this Commission, has *no* legal authority to

[1] Section 1101.04, Deuel County Zoning Ordinance; this ordinance is not of record before the PUC, but,

permit or license this Applicant so as to impose a burden upon Intervenors, or to issue a permit then becoming a *de facto* easement for the casting of such "Effects." This "easement" – now represented by licensure - could not heretofore be obtained, in the case of Intervenor Kranz, through the exchange of mere money for privity of contract.

The notational use of "regulatory limits," within the testimony of Witness Hessler, is also a key underpinning to this brief. Rather than design a wind farm that has wind turbines, constructed in and among "Participants" (those having contracted and paid for the services of their lands, and their persons, assuming they live on the lands), further surrounded by a reasonable buffer area (also comprised of Participants, but those who have no wind turbines) that gives way to the homes and lands of Non-Participants, these areas seem fully blended. Often, as can be affirmed by the sound and shadow flicker studies of Witness Haley, the homes and properties of Non-Participants (those having given up no Effects Easement as to, or over, his or her lands and home) are slated to be even closer to one or more wind turbines, receiving a higher level of noise and a longer duration of shadow flicker, than are the homes of Participants, already in privity for those very purposes!

Thus, an aggressive wind farm design might serve (or meet) the so-called regulatory limits, but these questions must be answered: *First*, is the setting of "regulatory limits" on the home and lands of a Non-Participant within the Zoning Power as delegated to the County? *Second*, as an essential backstop to the County's purported exercise of that delegated power,[2] is this Commission likewise empowered to establish "regulatory limits" upon and as realized at the lands and homes of Non-Participants? (These limits seemingly sound in terms of an inquiry formed under SDCL 49-41B-22, "substantially impair the health, safety or welfare of the inhabitants" - but in reality, much as the County has done previously, the result is a stipulated

[2] Since this Commission's jurisdiction must be invoked also, given the project's size.

importation of the Commission's own undeclared, unwritten "regulatory limits," with Effects to such limits then forming a burden upon and over the properties of Non-Participants.[3]) These Intervenors wish to offer their own emphatic answers to the questions posed preceding: "No!"

This writing turns to an extended outline of the basis for these abrupt answers.

II. Effects, Easements & Confidential Conundrums

The Legislature has determined, *inter alia*, that energy development in the state "significantly affects the welfare of the population." By claiming permit authority, the state is to ensure the facilities are orderly and timely constructed; and also that the "location, construction and operation of facilities will produce minimal adverse effects . . . upon the citizens of this state." (SDCL 49-41B-1) The Legislature has delegated *that* authority to this Commission.

The statute has a presumptive air about it; there is no specific public interest test that must be met by an application for a facility siting permit, as existed in the days of intrastate trucking regulation.[4] Rather, in reading this law, the reader can generally understand "this thing is going to happen, unless . . ." What is the specific "unless" in this case? It is the burden placed on the applicant under SDCL 49-41B-22 – the statute outlines a series of tests, all but one of which is stated (as summarized following) in the negative:

(1) The facility must comply with applicable laws and rules;

(2) The facility will *not* pose a risk of serious injury to the environment;

(3) The facility will *not* substantially impair health, safety or welfare of neighbors;

(4) The facility will *not* unduly interfere with orderly development.[5]

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[3] Related questions include – do sufficient standards accompany the legislature's delegation of power, and has the Commission correctly deployed the power, pursuing case-by-case determinations of allowable Effects?

[4] Such as "public convenience and necessity," the applicant's standard for a common carrier certificate.

[5] This subdivision is satisfied if applicant holds a CUP, fashioned by local units with Zoning Power.

Since becoming involved in these "facility siting permit" controversies, the common expression conveyed to this writer is on the order of "you're barking up the wrong tree." The speaker usually refines that exclamation, adding this – "this Commission has *no jurisdiction* over land use or property rights matters." On the face of things, that seems to be true, sort of.

In fact, it also appears to this writer the Commission's staff – at least until recent events – has taken no interest in the contents of Applicant's wind lease or the terms of easements. This "wind lease has no bearing on our jurisdiction" position is remarkably like that of Deuel County's Board of Adjustment during the brief course of quickly approving the special exception permit (conditional use permit) for this Applicant in June 2018.[6]

The Commissioners may recall when Intervenors first attempted to interject – *in this docket* - the actual text of a Wind Farm Lease & Easement. This started with the Application for Party Status ("AFPS"), filed August 5, 2019 (corrected August 6, 2019), a filing that is also now part of the evidentiary record, Exhibit I-3.

This filing referenced the background of a certain Wind Farm Lease and Easement Agreement, as an agent[7] had provided to Intervenor Kranz, who, in turn, provided it to Garry Ehlebracht. While the "Lease & Easement" itself purports to be a confidential document (Sect. 17, at p. 16, Exh. 1-2), the AFPS proceeded to quote from Section 5.2 and 11.10 therein, thusly:

> **5.2 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**").
>
> **11.10 Remediation of Glare and Shadow Flicker**. Operator [Crowned Ridge Wind Energy Center, LLC] agrees that should Owner experience problems with

[6] The zoning ordinance requires easements be filed with the Board; in fact, Applicant filed dozens if not hundreds of "memorandums," none of which contained the actual text of any easement or lease.
[7] In the name of Crowned Ridge Wind Energy Center, LLC; counsel Schumacher's letter of August 6, 2019 claims the benefit of this document on behalf of Applicant.

> 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.

This filing brought a letter protest from Applicant's counsel, demanding the AFPS be redacted at pages 3 to 6, thus deleting the background discussion of this Lease & Easement, as well as the sections quoted, as immediately preceding. Presently, the Commission requested briefs on the issue.

In the process, Applicant retreated from the claim that Section 5.2 (Effects Easement) is entitled to confidential treatment, but yet maintained that Section 11.10 should be protected. These Intervenors maintained the two quoted sections are actually related, and that neither should be kept confidential. By order entered September 20, 2019, the Commission overruled Applicant's redaction request as to the AFPS.

Why does this history bear repeating here? Because it is reflective of a commercial business practice, where Applicant sews up compensated contractual relations with those who (as Participants) will also host wind turbines, while holding evident disdain for the property and "enjoyment of life" rights of those unlucky to be Non-Participants (unwilling neighbors to the willing Participants). Even in that relationship of privity, moreover, Applicant hedges the bet. Having one's farm host a wind turbine (or several), obviously, results in "effects" to the Participant, in the same sense as referenced in Section 5.2. Whether it is the wind turbines on Owner's property – or those on neighboring properties – that prove to be the source of these "effects," the Lease & Agreement has it covered, both ways. The instrument is an easement,

commonly defined as a nonpossessory right to enter and use land of another, and obligating Owner not to interfere with the uses authorized by the easement.[8]

In making the identical use of a Non-Participant's (neighbor's) property, however, Applicant takes a dramatically different tack: while Witness Wilhelm offered some discussion of a "participation agreement" with Non-Participants, including a Section 5.2 "Effects Easement," apparently there are no such agreements now in play, or in force, or contemplated.[9] *If* either "Shadow Flicker," or "noise"[10] is *such an experience* that, as part of Applicant's standard fare, an easement is thought advisable, how is it this *same experience* requires *no such easement*, when the recipient[11] is a Non-Participant? This sharp contrast in dealings seems, well, duplicitous. If one nonpossessory use by Applicant requires an easement (without regard to whether the use is compliant with the so-called German rule, discussed *infra*), then does not the other likewise require one?

What might possibly warrant this difference, other than to observe that Applicant regards the nonpossessory use of a Participant's land (and home, if he or she actually lives there) as covered (authorized) by the Effects Easement? As to the Non-Participant's land (and home – as *each* of these Intervenors *actually live* there), on the other hand, it seems clear the operative authority (or right) rests on two related permits: (1) the Special Exception Permit (CUP) issued by the Deuel County Board of Adjustment, followed by (2) the upcoming Facility Siting Permit to be issued by this Commission. Staff and others may object to this claim, *but please – continue reading and hear us out!*

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[8] Restatement (Third) of Property: Servitudes § 1.2(1) (1998).
[9] One such item is used in Deuel, as recently disclosed; see Exhibit I-8, "Participation Agreement."
[10] Section 5.2 uses "noise," not "sound."
[11] Commonly a "receptor" with a coded nomenclature, establishing witness Haley's predicted duration. Notably, the intensity of noise or duration of flicker is *longer* for many Non-Participants than for Participants offering up an "Effects Easement" for such express purposes!

The Deuel County Zoning Ordinance ("DCZO") – adopted in a purported exercise of the delegated Zoning Power – allows the visitation of certain identified "wind farm effects" upon receptors.[12] The Special Exception Permit ("SEP"), issued October 22, 2018, is actually a nine-page document, while the representation submitted by Applicant here, as Exhibit A1-K, is but one page, noted as Special Exception Permit Number 18-102. (Deuel County's full permit is part of the administrative record filed with the Circuit Court, Third Judicial Circuit, by the issuing Board of Adjustment (noted therein as "Exhibit G"), in the pending writ of certiorari matter docketed as 19CIV18-000061, *Ehlebracht, et al. v. Deuel County Planning Commission, et al*.).

The SEP imposes *no* specific, or discernible limits on Applicant as to Shadow Flicker or noise (or other Effects) in relationship to Intervenors in their involuntary role as "receptors." By its own terms, the SEP has no effect until this Commission also issues a permit. The document does make several oblique references to the DCZO and Section 1215. Further, the Board's order provides for no post-construction study or testing to confirm that the wind farm, in practice, is the equal of the DCZO's permitted levels of Effects.

Staff witness Kearney sponsored Exhibit S1, with annexed Exhibits DK-1 through DK-5, as well as Exhibit S7, "Proposed Permit Conditions." Considering the last (for now), this is the document that Staff has fashioned in consultation with Applicant to establish, *inter alia*, what will be, as a consequence of this Permit, the specific, permitted intrusions upon the lands, and into the homes, of Non-Participants. First, in ¶ 26 of Exhibit S7 (in pertinent part):

> The Crowned Ridge Wind II Project (CRW II), exclusive of all unrelated background noise except for that associated with the pre-existing Crowned Ridge Wind I Project (CRW I), shall not generate a sound pressure level (10-minute equivalent continuous sound level Leq) of more than 45 dBA as measured within

[12] Or neighbors, to the tune of 45 dBA at Non-Participant residences, and up to 30 hours annually of "Shadow Flicker" at existing residences. Such limits respect no property lines, serve also as infringements on property rights, as no limit pertains until the home, and even then, the Effects invade.

> 25 feet of any non-participating residence unless the owner of the residence has signed a waiver . . . The Project Owner shall, upon Commission formal request, conduct field surveys and provide monitoring data verifying compliance with specified noise level limits. If the measured wind turbine noise level exceeds a limit set forth above, then the Project Owner shall act in accordance with prudent operating practice to rectify the situation. . . .

Second, ¶ 35 then permits:

> Shadow flicker at residences shall not exceed 30 hours per year unless the owner of the residence has signed a waiver. Prior to construction, Applicant shall obtain and file with the Commission a waiver for any occupied structure which will experience more than thirty hours of shadow flicker per year. If no waiver is obtained, Applicant shall file a mitigation plan with the Commission prior to construction and obtain Commission approval of the mitigation plan.

In other provisions, the Proposed Permit Conditions require that Applicant, prior to construction, submit further analysis related to the specified conditions or limits, including sound levels and shadow flicker,[13] and further specifies the meaning of "residence" and the like, so as to include only those in existence on the date of this Commission's permit order (*Id.*, ¶ 39).

Consequently, because these Effects are allowed to spread upon and to invade well past the property lines of these Intervenors, these Proposed Permit Conditions effectively "freeze" or inhibit further development or improvement by the owners of property, including those ranked as "Permitted Uses" under DCZO. This invasion is noteworthy as a taking or destruction of property rights previously held by these Intervenors, accomplished with the State's encouragement of an "aggressive," large-scale $425 million wind project now literally (and legally) towering over these Intervenors, with an enjoyment of Intervenors' environs, normally associated only with the *ownership of property* or a *nonpossessory right of use (an easement)*.

By establishing specific intensity and duration limits for the Effects, measured at the point of the close (the home, as occupied by these Intervenors), this Commission is *directly* assisting Deuel County in a forced transfer (or taking) of property rights. These rights are taken

[13] Exh. S7, ¶ 43(b) and (c).

from Intervenors and conferred upon Applicant. With this approach, there simply is *no* need for an "Effects Easement" from any Non-Participants, one might conclude! Not so, we would argue, and what's more, counsel for Intervenors adds, without an Effects Easement, an invasive use of the homes and lands of Intervenors, as contemplated, cannot be approved in all due wisdom.

III. Delegation Without Apparent Standards

For several years, this Commission has applied noise and shadow flicker limits for Facility Siting Permits on an *ad hoc* (case-by-case) basis. Most of the final orders in those prior dockets are an extrapolation of the Proposed Permit Conditions in Exhibit S7 here, except for the final decision and order in Docket EL18-026, *Application of Prevailing Wind Park, LLC for a Permit . . . in Bon Homme County, Charles Mix County and Hutchinson County, South Dakota, for the Prevailing Wind Park Project*.

Under the proposed permit conditions in that specific docket, at ¶ 27:

> The Project, exclusive of all unrelated background noise, shall not generate a long-term sound pressure level (L_{10}), as measured over a period of at least two weeks, defined by Commission staff, that includes all integer wind speeds from cut in to full power, of more than 40 dBA within 25 feet of any non-participating residence unless the owner of the residence has signed a waiver, and 45 dBA of any participating residence unless the owner of the residence has signed a waiver.

As to shadow flicker, ¶ 28 provides that applicant shall:

> [E]nsure that shadow flicker does not exceed 15 hours per year with no more than 30 minutes per day at non-participating [residences] and participating [residences] that have not signed a waiver. Applicant shall also take steps to mitigate shadow flicker concerns at any residence that could experience shadow flicker levels above 15 hours with no more than 30 minutes per day.

There is quite a difference between what is *now* proposed for Applicant (because of being "aggressive," perhaps) in this docket, and that as was adopted for Docket EL18-026.

From questions posed in this case by one of the Commissioners to witness Dr. Ollson, the term "shadow flicker" is one of art. As typically used by Applicant and its array of experts, the term is *limited* to the flickering, rotating shadow that is appearing within an occupied dwelling,

having entered via windows or other openings. While the shadows emitted by the rotating blades will fall upon other open property or structures, in that context it is merely "shadow," not "shadow flicker."[14] When a regulatory limit is imposed, such only addresses the interior of a residence. "Shadow" emitted by wind turbines onto other surfaces is not limited.

The delegation of authority to an administrative agency must be accompanied by sufficient standards for the agency's guidance.[15] Authority is given to adopt certain rules (SDCL 49-41B-35). The Commission is to consider whether to issue a Facility Siting Permit – *if* the Applicant has carried the burden on establishing the several *negative* tests outlined in SDCL 49-41B-22. Certainly the level or intensity or duration of the "Effects" (as described in Applicant's Effects Easement) play a role here, but rather than adopt regulations for guidance, this Commission has deemed as controlling (on matters of "health, safety or welfare" – unofficially, at least[16]) the *very same regulations or regulatory limits* very recently adopted by several counties for standards within their respective Zoning Ordinances.[17]

This writer does not envy the task of this Commission: neither the Commissioners themselves, nor the Staff at hand, have apparent medical training or degrees, and the marshalling of evidence and expert opinions for the statute's negative tests is a formidable (and expensive) task. The state agency with *some* expertise in "health" is the South Dakota Department of Health; according to Exhibit DK-3, part of Exhibit S1, this agency, through its Secretary, takes no "formal position on the issue of wind turbines and human health." Pointing to studies of other state public health agencies, the exhibit's writer concludes "that there is insufficient evidence to

[14] Haley's narrative in Exhibit JH-S-2, at 3, states "flickering effect can also be experienced outdoors." Which is it?
[15] *Affiliated Distillers Brands Corp. v. Gillis*, 81 S.D. 44, 130 N.W.2d 597 (1964).
[16] On a case-by-case basis.
[17] Each county with legislative authority under the Zoning Power, writes a slightly different constraint; Deuel County limits Shadow Ficker to 30 hours, Codington County allows "exceedences" (a term used both by Applicant *and* a certain German source) *if* an easement permits it. Exhibit I-8 is duly noted.

establish a significant risk to human health," while further observing the most common complaints associated with wind turbines are of "[a]nnoyance and quality of life."[18] Further, the Secretary observes that these complaints "may be minimized by incorporating best practices into the planning guidelines."[19] What exactly comprises "best practices" is an open question, as the concept is not referenced in the Commission's regulations. However, it is assumed to signal the adoption, at the level of county zoning, of *some* Shadow Flicker limit, along with less generous (dangerous) noise limits, and an enlargement in the required setback distances between a wind turbine and an occupied dwelling.[20]

In prior contested cases over wind farm permitting, the Commission appears to have done pretty much the same as has been done here: Staff hires a panel of experts to study the Applicant's case (the cost being recouped by filing fee assessments to Applicant). The respective hired experts then struggle for a bit (and sometimes longer) over details of location and number of turbines, and by the time the case is being heard by the Commission, Staff and Applicant have ironed out most, if not all, of their differences in the form of a Proposed Permit Conditions document, much like Exhibit S7 here.

Witness Hessler, an acoustician with considerable experience in wind farm noise concerns (this witness having also concluded the design of this Applicant's wind farm is "aggressive") has written regarding his findings that wind farm noise levels at residences should be kept at 40 dBA and below; yet, in this case, Hessler is willing (but with some undertones of

[18] Annoyance, quality of life, and violations of property rights are chief concerns for these Intervenors.
[19] The Commission disallowed taking notice of the thick study by Tom Stanton, entitled "Put It There! – Wind Energy & Wind-Park Siting and Zoning Best Practices and Guidance for States," January 2012, NARUC Grants & Research, referenced as NARUC Best Practices report. This report has no influence on the Commission? Stanton's work cites to Hessler, at p. 27; 40 dBA being an "ideal design goal."
[20] We recall the "10/2008 SDPUC" model WES siting ordinance, formerly on the PUC's website, with 1,000 feet minimum distance to occupied homes, noise limits of 55 dBA (wow!), no mention of Shadow Flicker. Big changes for a dozen years; more yet to come? Who developed this model ordinance? Is the

reluctance) to approves a noise limit of 45 dBA. Still, the logic (and lawfulness, as an issue of guiding standards) of permitting one wind farm (not that long ago) – Prevailing Winds – to 40 dBA of noise, and 15 hours of Shadow Flicker, but having the discretion to notch the throttle back upwards here to 45 dBA and 30 hours of Shadow Flicker, escapes this writer. These differences are substantial, not mere trifles, and serve to reward the Applicant in bringing forward that "aggressive" design.

If risk of annoyance to Non-Participants (in their homes!) is some coin of the realm, then might this Commission also conclude the auditory systems and visual perceptions of those living in and around Crowned Ridge Wind II are *not* necessarily more resilient or better equipped to handle noise or shadow flicker than those who are neighbors to the Prevailing Winds project? Applying limits on a case-by-case basis, according to the expressed opinions of experts laying their views before the Commission, seemingly assures arbitrary outcomes. Assuming the terms of Exhibit S7 are adopted by the Commission, then this is an arbitrary outcome in that sense.

IV. The German Standards Are Now Here to Govern Us All?

In entering the final decision and order in Docket EL18-026, the Commission, at 22, ¶ 67, observed as follows for shadow flicker:

> The record demonstrates that 30 hour/year limit is merely an *industry standard*. Intervenors advocated that no shadow flicker should be allowed at non-participating residences. There is no federal standard for shadow flicker exposure from wind turbines, and state and local standards are uncommon. This standard is commonly applied in regulatory proceedings in other jurisdictions. *No jurisdictions prohibit shadow flicker at non-participating residences. For this Project, a 15 hour/year limit is an appropriate standard to protect the welfare of non-participants.* (*Emphasis supplied*.)

Much of what the Commission said in *Prevailing Winds* is actually true as to "shadow flicker." But that still doesn't make the conclusions right, as these Intervenors see the problem. Yes, state

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resource trusted? Stanton's seminal "Put It There!" cites to PUC's model ordinance pp. A-88, 89; *to be helpful*, Stanton's "South Dakota" pages are annexed as Appendix A.

standards *are* uncommon. For jurisdictions (like South Dakota) functioning without one, but yet willing to allow Shadow Flicker inside the homes of Non-Participants for any duration, several related questions should be answered: in allowing this use, are property rights violated? Further, if *some* use is allowed, subject to limits (say, 30 hours), what legal principle affords the right to establish the line of demarcation?[21] If the German standard is fine to be used here, then why use only one of the three tests independently applied (in Germany)? And, why re-fashion this standard, each time, on an *ad hoc* basis?

Starting with the "Effects Easement," keep in mind that Applicant – having full knowledge of shadow flicker, and likely knowing also the aversion to litigation over such matters the eventual buyer-operator of this wind farm will have - has deployed this instrument for purposes of dealing with the Participants. During the course of operation, if the Participant grows weary of Shadow Flicker, well, that's going to be just too bad, because Applicant and all those taking title from Applicant will hold an *easement* (one that has been bargained for) to continue to cast Shadow Flicker, to be limited only, we presume, by the applicable Zoning Ordinance and now the Facility Siting Permit.

What if a Non-Participant grows weary likewise? What is his or her remedy?[22] More to the point, what is the *source* of Applicant's claimed legal right (or property right, and ultimately, the purported right of Northern States Power likewise) to cast Shadow Flicker into and throughout the residence of these Intervenors?

According to the final decision and order in EL18-026, at note 177, a witness by the name of Aaron Anderson testified in *that* case that there is *no jurisdiction that prohibits shadow*

[21] Following "industry standards" or adopting whatever works in Germany doesn't suffice, in our view.
[22] It only seems right that there should be a remedy. But, what is it?

flicker at non-participating residences.[23] If Anderson is correct, then perhaps there is *no* remedy, and also *no* effective right by which to resist this *thing* that Applicant seeks to accomplish and to unleash on the Non-Participants and their homes. Before conceding the apparent point made by Anderson in *that* case, however, this writer feels the need to dig a bit deeper.[24]

How did we get to this point? In the writing of the 2008 model WES siting ordinance (the one that formerly appeared on this Commission's website[25]), shadow flicker is mentioned *nowhere*. Of course, in the few years since, wind turbines have since gotten bigger (taller) and noisier, too. According to witness Haley, the effects from shadow flicker are indistinguishable beyond 1,700 meters (about 5,577 feet).[26] Intervenors are about 2,000 to 2,200 feet from the nearest turbine, the most recent distance to the Greber residence now under 2,000 feet.[27]

Following on Anderson's testimony in EL18-026, a good point of beginning for *this* Commission is to ban, *by regulation*, all infliction of Shadow Flicker at and inside the homes of Non-Participants. No one contends this Commission *could not do so* in the interests of health, safety and welfare of the inhabitants.[28] Instead of doing so, what this Commission is effectively doing at this time is to backhandedly apply a standard that, yes, is clearly an "industry standard," one that the "industry" (and those who seek to support and protect it) have simply imported (part of it, anyway) from Germany.[29]

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[23] Sounds rather grim for Intervenors, each desiring to avoid Shadow Flicker at and in their homes. In citing this footnote, Intervenors are reporting, rather than affirming or accepting of that conclusion.
[24] If witness Anderson is right, Applicant's willful design of a wind farm with a promise of Shadow Flicker for *your home* should suffice as reason enough. The law affords no protection?
[25] The model ordinance, at n. 19, hasn't aged well after merely 12 years; here, the Commission is asked for a Permit to be set in concrete, literally, for an aggressive wind farm that might endure for 30 or 40 or more years. How might *this* decision age over *that* life span?
[26] Exhibit A1-J, p. 3-4.
[27] Exhibit A28, Receptor CR2-D221-1-NP, 1,995 feet; depends on the "evergreen receptor" location.
[28] A clear, proscriptive regulation better serves the public interest than an *ad hoc*, case-by-case order.
[29] South Dakota law has few if any ancedents from Germany; now seems a poor time to start, particularly if the actual provisions of South Dakota law are ignored in the importation process.

This "industry standard," over the course of relatively few years, has taken hold virtually everywhere in this country, except there is still *no such law or regulation* in South Dakota above the level of county zoning ordinances. Why did the industry borrow and promote this? Because it was convenient to do so, and one they can readily or easily live with, we suspect is the real answer. (Before moving beyond this argument, please recall that when it comes to *Participants*, Applicant employs an Effects Easement; when facing *Non-Participants*, however, Crowned Ridge merely provides the unhappy predicted details of the Effects upon unwitting neighbors, while asking for a Facility Siting Permit. When Shadow Flicker is a *burden* on real estate ownership, and it is clearly so, then an easement *is* appropriate to place that servitude upon the fee. When the burden or servitude is then authorized under the terms of a Permit issued by a governmental agency,[30] to be held by someone other than the fee owner, then a whole different legal concern arises. *Is not this Permit functioning also as an easement, giving license for use of the Non-Participant's property – a use that is also in derogation of, or a burden upon, fee ownership?* Again, we think this is entirely so. The reasons behind Applicant's efforts to keep the Effects Easement, and related provisions, from the public eye and public discussion are now obvious.)

Witness Dr. Ollson from Ontario province, appeared to sponsor Exhibit A12-16, entitled "Information on How to Identify and Assess Optical Immissions Wind turbines,"[31] a 30-page document (in both German and English) with an adoption date of March 13, 2002. This would certainly be one of the relevant documents for the origins of this *German rule* – now fast becoming the U.S. rule, as well as the *South Dakota rule*. While this Commission professes no

[30] "Yes - you may cast up to 30 hours of Shadow Flicker." (Unless you are near *Prevailing Winds* – those humans shall receive only 15 hours.) Fluidity in such standards means no standard at all. Each "standard" is yet an invasion of property rights – in South Dakota.

[31] My old, split-at-the-seams dictionary doesn't include "immissions." Others suggest an obsolete word from "British English," a meaning of "the act of inserting something." How true! Thus, we also object!

such rule (in writing), this agency is bent on making it so, *ad hoc*. Others appearing in this case as witnesses for Applicant have played some role in supporting or advancing the grip of this German rule, the willing importation of the rule into this country. I have in mind witness Lampeter, for example, whose work is cited in Stanton's NARUC Best Practices document, referenced in note 18, above; Lampeter's PowerPoint from 2011 cites an unknown German judge, whose ruling is variously quoted as "tolerable" or "acceptable" (in context of 30 hour/annual exposure to Shadow Flicker). Stanton's work for NARUC, we further note, carries the main title "Put it There," which raises for this writer images of someone throwing a dart at a distant map. It suggests that no matter where the dart lands in a penetrating fashion, there is or will be someway to make it work – *right there*.[32]

Exhibit A12-16 reflects the rules for Germany in siting *Windenergieanlagen* (also known as WEA). First, the exhibit outlines[33] the "worst case," which is the "Astronomically maximum possible shading time," where 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." *Id.*, at 4.

Then, there is "actual shading time" – this is the "actual interaction time on periodic shadow design that is determined and enumerated on the spot." The "spot," we assume is a home, or perhaps one or more windows in a home. Then, "[i]f the irradiation intensity of direct sunlight on the level normal for incidence is more than 120 W/m^2, sunshine with shadow casting is to be assumed," with the "conversion to the illuminance [being] listed in the appendix." The

[32] Author Tom Stanton holds degrees, B.A. Communications, M.A. in Journalism and an M.S. in Public Administration; his work has no discernible analysis of constitutional limits for the Zoning Power. In "Finding the Right Words When Times Get Rough: How Commissions Can Address Difficult Communications" (July 2012), Stanton offers helpful suggestions on dealing with NIMBY, LULU, BANANA, CRAVE, and even NIMEY. *Suggestion:* if a catchy acronym for Non-Participants Unwelcoming of Shadow Flicker In Their Homes is required, let's use NPUSFITH.

[33] This writer reads English, not German; the English translation provided seems hard to follow.

object is to "safely avoid significant nuisance that can result from periodic light effects (optical immissions) by WEA." The "seriousness of harassment depends not only on its intensity, but also wo-temporally (sic) on the use of the area on which it affects, on the nature of the effects and the length of time of the effects."[34]

This German-English exhibit (sponsored by Witness Ollson) further states, in crystal clarity, this much (at 6):

> The actual immissions that occur at an immission location and which can only occur in certain weather conditions can be relevant. An influence by expected periodic shadow cast is considered not to be significantly harassing if the astronomically maximum possible duration of the coverage [8] [9] takes into account all WEA contributions at the respective emission site[35] 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 a benchmark.

Finally, Exhibit A12-16 (this is Applicant's own exhibit!) then asserts:

> If the values are exceeded for the astronomically maximum possible shade duration, technical measures to limit the operation of the WEA for time can be considered, among other things. 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 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[36] is determined for the actual, real shadow duration, the meteorological shading duration. Based on [2], this figure is 8 hours per calendar year.

Getting a grasp of (and then retaining) all angles of South Dakota property law is a challenge, let alone what might pertain in Germany. (Counsel for Intervenors is unable to read a word of German, beyond "Achtung."[37]) As a general rule, Intervenors would propose this – the Commission should not simply assume the Zoning Power (or the Facility Siting Permit Power),

[34] Hence, the "Effects Easement," one can presume! Not certain this extended test has been imported.
[35] This site is, we presume, the "receptor."
[36] Yes, that's what it says; the interesting caveat being 8 hours per year. For Intervenors slated to receive more than 8 hours of Shadow Flicker annually, a full understanding of this proviso would be helpful.

as such exists in South Dakota, is fully amenable and sufficiently flexible to permit a deployment on South Dakota citizens of *whatever is claimed to work for the wind industry in Germany*.

The German rule, as stated in Applicant's exhibit, seemingly embraces three distinct measurements of time – (a) 30 hours per year for "astronomically maximum possible shade duration;" (b) 30 minutes per calendar day of "astronomically maximum possible shade duration;" and (c) 8 hours per calendar year for "actual, real shadow duration, the meteorological shading duration." When Stanton's work for NARUC[38] recommended the use of 30 hours year / 30 minutes per day as the Shadow Flicker control mechanism (with no reference to 8 hours), this was seemingly based on a study prepared for Massachusetts Department of Public Health in January 2012, authored by Ellenbogen, *et al*.[39]

The Ellenbogen work (and Dr. Ellenbogen himself), as cited by Stanton, then shows up before this Commission as Exhibit A11 in Docket EL18-053, *Deuel Harvest Wind Energy, LLC for Energy Facility Permit in Deuel County, South Dakota*. In a quick review of that exhibit, the testimony of Dr. Ellenbogen opines that "[a]nnoyance is not a health effect." Rather, "[a]nnoyance is a feeling – an emotional response – related to a stimulus."[40] So, this Commission can ignore annoyance, is the apparent teaching of Ellenbogen.

Dr. Ellenbogen did not include the full text of his January 2012 study during his appearance in Docket EL18-053. But, a Dr. Mark Roberts sponsored that study as an exhibit in several wind farm dockets before this Commission, including EL18-003, *Dakota Range I, LLC and Dakota Range II, LLC, Grant County and Codington County*. As to the duration of shadow flicker, Dr. Roberts sponsored Dr. Ellenbogen's study, as cited in the work of Stanton (and relied

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[37] Due to years of nightime study during the 1950's of "LIFE'S Picture History of World War II."
[38] The same NARUC report referenced in note 19, above.
[39] The very same study referenced by South Dakota's Secretary of Health, Exhibit DK-3.
[40] Somewhat like love, we suspect; this passage is from line 335-36 of Exhibit A11.

on also by the South Dakota Secretary of Health), which (as Exhibit 7 in Docket EL18-003) includes this statement (at p. 55 of 164):

> General consensus in Germany resulted in the guidance of 30 hours per year and 30 minutes per day (based on astronomical, clear sky calculations) as acceptable limits for shadow flicker from wind turbines (NRC, 2007). This is similar to the Denmark guidance of 10 hours per year based on actual conditions.[41]

Ellenbogen's study, as sponsored by Dr. Roberts in EL18-003, then also says this about shadow flicker (at p. 37):[42]

> It appears clear that shadow flicker can be a *significant annoyance or nuisance* to some individuals, particularly if they are wind project non-participants (people who do not benefit economically or receive electricity from the turbine) whose land abuts the property where the turbine is located. (*Emphasis supplied*.)

Dr. Ellenbogen's January 2011 study, as sponsored by Dr. Roberts, then further opines (at p. 58):

> Collectively, although shadow flicker can be a *considerable nuisance particularly as to wind turbine project non-participants*, the evidence suggests there is no risk of seizure from shadow flicker caused by wind turbines. In addition, there is limited evidence primarily from a German government-sponsored study (Pohl et al., 1999) that prolonged shadow flicker (more than 30 minutes) can result in transient stress-related effects on cognition (concentration, attention) and autonomic nervous system functioning (heart rate, blood pressure). There was insufficient documentation to evaluate other than anecdotal reports of additional health effects including migraines or nausea, dizziness or disorientation. There are documented mitigation methods for addressing shadow flicker from wind turbines and these methods are presented in Appendix B. (*Emphasis supplied*.)

A review of Dr. Ellenbogen's Appendix B provides details for predicting shadow flicker at a proposed turbine site, and includes the thought that turbines located within forestry will reduce nuisance from flicker (wind farms in forests?), but when in "other open land area such as farmland that [location] would be more susceptible to the annoyance of shadow flicker." The appendix further notes that:

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[41] Certainly a more understandable statement than the German-English translation in Exhibit A12-16. Denmark's 10 hour limit is quite close to the German limit of 8 hours. Why has the 8 hour limit not been adopted here?

> [S]everal states in the US have adopted the German model of 30 hours per year of allowed shadow flicker that was primarily based on the government-sponsored study summarized above. However, other states or localities including Hutchinson, Minnesota have enacted stricter guidelines including no shadow flicker to be allowed at an existing residential structure, and up to 30 hours per year of shadow flicker allowed on roadways or residentially zoned properties and a computer analysis is required for project approval (NEWEEP, 2011).[43]

Whether this result – *that is, the importation of German standards for wind farms in the United States* - is due to the work of Ellenbogen, or that of Stanton, or of Dr. Pohl, this much can be said in summary form: *First*, only *certain* German standards, *but not all of them*, have been imported, both the 30 minutes per day exposure to Shadow Flicker, and also the 8 hours per year limit, based on "actual, real shadow duration," being omitted from the Deuel County Zoning Ordinance.[44] *Second*, and just as importantly, not one of the authors writing about, nor one of the agencies deploying this German standard (which this Commission, in *Prevailing Winds*, correctly labels as an "industry standard"), address the question of whether a German-influenced cram-down of Shadow Flicker into the homes and onto the lands and lives of the Non-Participants is consistent with the *inherent, inchoate, and conferred property rights* of these unwilling wind farm neighbors – *here in South Dakota*.

That a foreign government would neglect *these issues* (again - how will this work in conjunction with South Dakota property law – and more importantly, why is only part of the German rule imported here?) is hardly surprising, as the focus was on their internal concerns. This Commission, on the other hand, should face these issues, and in this case, rather than merely continuing to assume, en route to concluding that Applicant meets the negative burdens

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[42] Intervenors request the Commission take judicial notice of testimony and exhibits in the referenced dockets, as is the prerogative of this agency.

[43] Code of Ordinances, § 154.027, City of Hutchinson, Minnesota, adopted 2007; this ordinance prohibits shadow flicker at existing residences, contrary to the Commission's finding in EL18-026, ¶ 26, apparently based on the testimony of one Aaron Anderson. Failing to ban *all shadow flicker intrusion* reflects a lack of political will, rather than lack of legal grounds. Non-Participants object to such intrusions, and use of German standards (or "industry standards") applied to their property rights.

of SDCL 49-41B-22 (health, safety or welfare of the inhabitants), that this Commission remains safe to follow the lead of Deuel County's Zoning Power claims, and thus is free to impose specific "Effects" burdens on the homes and lands of these Intervenors.

There is an important *third point* to be discussed, drawn from Ellenbogen and others. These writers note that Non-Participants are those most often afflicted by "annoyance," as if this is surprising or grounds on which the agency is right to be dismissive of such voices. The enjoyment of land and home is directly linked to the common law concept of the "close," whether a field or a home that is enclosed, even if that enclosure is invisible and nothing more than a property line. Any South Dakotan, having purchased and having either paid for – or in the process of paying for – the close is naturally resentful of an invasive use of the close by someone – anyone – not bargaining for the privilege of entrance and use. That "someone" is regarded in law much like a thief.

The close of these Intervenors is being dishonored by Applicant, and also by local and state governmental agencies issuing the necessary permits to Applicant. Germany's use of "an average sensitive person" is *not* a valid test as to property rights. An act is either trespassory or it is not – a trespass is neither excused by brevity nor is it actionable only when crossing a time threshold (such as 30 hours per year). The trespasser is afforded no defense by exclaiming and citing to Ellenbogen or other experts: "You're looking mighty annoyed because of my trespass; your look is unwarranted." (One may assume also the writer of Exhibit A12-16 had language skills, having also linked "harassment" with the "average sensitive person.") The right to defend and to exclude others from the unpermitted use of one's own property (and close) is the South Dakota standard.[45]

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[44] Apart from this Commission's *ad hoc* resort to the German 30-minutes daily limit in *Prevailing Winds*.
[45] SDCL 43-2-1, "ownership," 43-2-9, "right to hold," 43-13-4, "creation of servitudes," among others.

As of 2008, this Commission was in the *business* of recommending a specific "model WES siting ordinance" to South Dakota counties, as a function of the Zoning Power delegated to local governments. The Commission, no doubt, was trying to be helpful on a difficult issue.[46] By close reading, it seems that a large and growing number of counties then adopted something much like the recommendation, which is now being adjusted (wider separation distances to homes, and lowered permissible dBA sound pressures) and amended (adopting the German standard for Shadow Flicker). Staff's witness Kearney seemed (to this writer) rather disinterested in Stanton's seminal work from January 2012. Given the proximity in time of the PUC's model ordinance to Stanton's NARUC report, one has to assume the impact of the latter, upon the former, is well understood and appreciated, even if Kearney was then employed in the industry rather than on Commission Staff. Within a few years of Stanton's work, many counties in South Dakota – including Deuel – began to adjust their Zoning Ordinances, as well.[47]

There is now a entirely different approach to "Effects," both by this Commission and those exercising the Zoning Power at the local level. That said, this Commission is serving as a backstop to local level units, exercising (in the name of "health, safety [and] welfare") the similar (but not identical) limits on noise and Shadow Flicker, just as Stanton, Lampeter and others (most of whom are in the business of consulting for the design of wind farms) have urged, these limits (or the parts worthy of becoming the "industry standard") being lifted wholesale from German law. As noted earlier in this brief, the permit issued (or to become effective) at the level of Deuel County is based on the Zoning Ordinance (deploying a German standard); but the Special Exception Permit itself does not actually specify *what* those limits might be, either generally or at any specific point in or near the wind farm.

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[46] The issue is unresolved by ignoring Shadow Flicker, *and* in ignoring property rights, assuming the Non-Participant is powerless to exclude a trespass. The German rule perpetuates this assumption.

[47] And Crowned Ridge modified the Lease & Easement form by deleting Section 11.10.

Assuming Exhibit S7 is engrafted into this Commission's final decision and order, however, there will be a declaration of *limits* regarding both noise and Shadow Flicker – such declaration being then intended to govern this wind farm until it is no more.[48] By governing the wind farm, however, this Commission also governs the Non-Participants and their property rights, since these limits are established *at their homes*, not their property lines. Applicant is licensed to emit the Effects, even as Non-Participants are relegated to endure them. This might be how it works in Germany, but – *and this is a key point* - not in South Dakota.

Is the setting of such limits actually part of the Zoning Power in the first instance? Ultimately, this case – and others like it - may serve to challenge that point. The Commission's "Information Guide to Siting Energy Conversion Facilities" is noted, with the pledge that "this Commission strives to issue a reasoned decision and conditions where appropriate that uphold the law and discourage a potentially expensive and lengthy appeal process." Intervenors feel likewise. Permitting an aggressive design, sanctioning of "as designed" burdens upon the lands and homes of Non-Participants, is beyond the scope of this Commission's actual authority.

In the past several decades, the U.S. Supreme Court has decided a number of cases involving an overuse or misuse of the State's Zoning Power – or in the setting of land-use rights or development powers – in a manner violating the constitutional rights of the owners. Exploring those cases for the benefit of this Commission is actually beyond the scope of this brief[49] – however, these general rules are apparent: when the State's Zoning Power (or similar power) expects too much of an *applicant* for relief, it runs a risk of being declared unconstitutional, whether as a Taking, or as a violation of the Substantive Due Process rights of that owner, under the Fifth Amendment of the U.S. Constitution, as applied to the States via the

[48] Intervenors are concerned how well these limits will age; *better than the model ordinance*, *we trust.*
[49] A reviewing court may have an interest in that discussion, to be further briefed at that point in time.

Fourteenth Amendment.[50] Again, *all* of these zoning (or other) cases have involved demands, requirements or burdens the State (or local unit) has placed on the *zoning applicant*. None of these cases at that level, to the best knowledge of this writer, has *ever* crossed the property line so as to stray with State-imposed burdens onto either the land, or deep into the homes, of Non-Participants. When the State is constitutionally limited as to the burdens placed on an *applicant*, we can further imagine the State will be further constrained in placing burdens on the *applicant's neighbor* – a "Non-Participant." The use of an "industry standard" or a favorite part of the "German rule," whereby the Effects are time-limited at the humble cottage door (or within the abode itself), is unlikely to trump the vested property rights of these Non-Participants.

Whenever Deuel County, or even this Commission, purports to have the authority to ignore property lines, in the promotion and permitting of wind energy development, expressly declaring the burden that Non-Participants *must* henceforth (and forever) carry by reason of unfortunate circumstances,[51] the government agencies are taking rights associated with the ownership and possession of land (and homes) – and simply conferring them upon Applicant.

We turn to Justice Scalia's opinion in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, et al.*, 560 U.S. 702 (2010); state actors sought to promote the restoration of eroded beaches, and issued a permit pursuant to the Beach and Shore Preservation Act. Owners of beachfront property affected by the restoration act challenged the project, claiming denied of littoral rights without just compensation. The Florida Supreme Court ruled against the owners, the Supreme Court granted certiorari, and the focus then turned to the actions of the lower court and the effect of the ruling that no such rights had been taken.

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[50] Justice Scalia, author of much of the relevant case law, has passed but His Honor's work lives on.

[51] Those circumstances being, wherever Applicant has aggressively designed a wind farm, or, in the parlance of NARUC's Mr. Stanton, wherever the dart lands – "Put It There!" (then apply the imported portion of German siting standards in the process).

A prior decision of the Florida Supreme Court - *Beckwith v. Webb's Fabulous Pharmacies*, 374 So.2d 951 (1979) – had involved the purchaser of an insolvent corporation, and, having interpleaded the corporation's creditors, the purchaser placed the purchase money in an interest-bearing account under the jurisdiction of the Seminole County court, to be distributed in satisfaction of claims approved by the receiver. The Florida Supreme Court then construed the statute to mean that the interest earned on the account belonged to the county, because the account was considered "public money." The *Beckwith* case reached the U.S. Supreme Court and was decided in 1980 – 449 U.S. 155, with the Court deciding the lower court's order was a taking, by applying the general rule: "[t]he usual and general rule is that any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal." 449 U.S. at 162. "Neither the Florida legislature, by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply be recharacterizing the principal as 'public money.'" 449 U.S. at 164.

In considering *Beckwith*, Justice Scalia then wrote for the majority in *Stop the Beach* (560 U.S. at 715):

> In sum, the Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking. To be sure, the manner of state action may matter: Condemnation by eminent domain, for example, is always a taking, while a legislative, executive, or judicial restriction of property use may or may not be, depending on its nature and extent. But the particular state *actor* is irrelevant. If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation. "[A] State, by *ipse dixit*, may not transform private property into public property without compensation." [Id., 449 U.S. at 164.]

How is the State complicit in a taking of the real property interests of these Intervenors? By setting standards for a permitted (officially approved) invasion of Non-Participants property,

up to and including their very homes; and also by accepting expert testimony to the effect that "while these people look mighty peevish,[52] these Effects shouldn't kill them."

In dealing with Participants in other settings, Applicant dutifully extracted an "Effects Easement," while also attempting to maintain that text as a "trade secret," confidential. In casting those very same Effects on Non-Participants, however, Applicant has no apparent interest in pursuing an easement.[53] No rule of this Commission requires that such an easement be obtained, and the Commission willingly applies "known industry standards, borrowed from Germany" (my label) on a case-by-case basis. What would motivate Applicant to act or think otherwise? The governmental units and agencies simply license the invasion of Non-Participants' homes, while claiming, in effect, that "no one bans Shadow Flicker." Obtaining formal effects easements would cost both time and money *(if they can be obtained at all)* – much like a wind lease for the siting of turbines. A mere Permit, or even two of them, cannot cure what is lacking here – a legal right, granted by the owners of land.

This Commission cannot also simply pass the buck, claiming that all land use rights rest below, in the hands of the County with the Zoning Power – or, that in adopting the Proposed Permit Conditions (with these *ad hoc* limits or burdens as to Effects, to the extent imported from Germany), the Commission is simply attempting to license and allow this wind farm to proceed, all in the name and interests of "health, safety [and] welfare." By these actions, neither the County nor this Commission honor the property lines or property rights of Non-Participants.

The *Beckwith* case (see p. 26, above) – in which the Florida lower court attempted to declare all interest earned as being public money – harkens the recent case of *Knick v. Township*

[52] Annoyed, or harassed.

[53] Note is taken of Exhibit I-8, "Participation Agreement" dated July 23, 2019. Assigned CR2-D38-P, no record for noise was submitted to Deuel County Board, while Shadow Flicker is reported at 15:26, 1,693 feet from closest turbine. Exhibit B, p. 1683 of 1707, of record in Circuit Court, Third Judicial Circuit, Deuel County, 19CIV18-000061, *Ehlebracht, et al. v. Deuel County Planning Comm'n, et al.*

of Scott, 588 U.S. ___, decided June 21, 2019, a majority opinion written by Chief Justice Roberts, and joined by Justices Thomas, Alito, Gorsuch and Kavanaugh. Knick owned a small farm, enclosing an old abandoned cemetery. The township adopted an ordinance requiring that landowners permit access to all such cemeteries during daylight hours. The township ordinance did not use the word "easement" across Mrs. Knick's farm, but yet compelled her to keep it open. The *legal effect* of the ordinance was that of an *easement*; in adopting the ordinance and then attempting to compel Mrs. Knick to allow access to her farm, the township had taken an ownership interest from her. By the same token, in permitting a wind farm to cast Effects in an invasive manner,[54] even up to some specific limits or thresholds honored in Germany, is not this Commission giving to this Applicant an "Effects Easement"? The question suggests the answer.

This Commission has the power to blunt unwelcomed use of a Non-Participant's home (unlucky in close proximity to the dart's point, thrown at the encouragement of Tom Stanton), but, we further assume, it chooses not to do so. If avoiding the making of rules because, as noted in *Prevailing Winds*, it is uncommon for a State to do so, *then a choice is yet being made*. That choice results in a qualified or defined right to inflict "annoyance" upon Non-Participants, and to engage in the harassment of these neighbors, whether when within or without their close. *It is not uncommon, however, for Germany to impose rules!* Why, in the name of honoring "industry standards," should South Dakota governmental units reach over national boundaries and the ocean to borrow a part of the German rules, dishonoring property rights in that process?[55]

Rather than simply importing German rules (well, a part, anyway – what about the 30 minutes daily limit, or the 8 hours annual limit, both referenced in Exhibit A12-16?) from that foreign land, and then applying them on an *ad hoc* basis to the rights of property ownership and

[54] That Shadow Flicker, inside a Non-Participant's home, is an invasive use, and a source of *annoyance*, hardly seems debatable.
[55] Hutchinson, Minnesota hasn't engaged in double-speak; see note 43, above.

enjoyment here in South Dakota, perhaps this Commission will look afresh at the need to protect the property rights – *inherently part of the welfare* – of the inhabitants of South Dakota. These Non-Participants played no role in the decision of Applicant to aggressively design a wind farm, or in Applicant's throw of Stanton's veritable dart in their direction, but they will surely bear the burden of these efforts and actions, and will harvest the resulting "Effects."

The orders and permits contemplated will allow invasive uses, right up to and including the homes of these Intervenors. This permitted use then *permanently damages* (or takes) the rights each Non-Participant otherwise has historically held to enjoy his or her property, including the ability to make use thereof in ways and for purposes that are consistent with the Zoning Ordinance.

V. The Common Law Prevails in South Dakota.

SDCL 1-1-24, "Common law and law merchant applied – Evidence of common law" - provides:

> The evidence of the common law, including the law merchant, is found in the decisions of the tribunals.
>
> In this state the rules of the common law, including the rules of the law merchant, are in force, except where they conflict with the will of the sovereign power, expressed in the manner stated in § 1-1-23.

Meanwhile, the latter statute, SDCL 1-1-23, provides, with the heading "Expressions of sovereign will":

> The will of the sovereign power is expressed:
>
> (1) By the Constitution of the United States;
> (2) By treaties made under the authority of the United States;
> (3) By statutes enacted by the Congress of the United States;
> (4) By the Constitution of this state;
> (5) By statutes enacted by the Legislature;
> (6) By statutes enacted by vote of the voters;
> (7) By the ordinances of authorized subordinate bodies;

(8) Rules of practice and procedure prescribed by the courts or adopted by departments, commissions, boards, officers of the state, or its subdivisions pursuant to authority to do so.

Another statute of interest is SDCL § 1-1-22, "Law defined" –

Law is a rule of property and of conduct prescribed by the sovereign power.

While "ordinances of authorized subordinate bodies" includes Deuel County in the exercise of the Zoning Power, the statute needs to be viewed in descending order of importance; the County's Zoning Ordinance cannot exceed or violate the statutory and constitutional provisions that precede its position in this line up.

As fee owners, these Intervenors also have the right and privilege to possess and use their property to "the exclusion of others." SDCL § 43-2-1. These exclusionary rights are subject to certain doctrines or exceptions, such as the air navigation rights, for example. *Griggs v. County of Allegheny, Pa.*, 369 U.S. 84 (1962). Flights may pass far overhead without obtaining legal passage, but as the Court noted in *Griggs*, 369 U.S. at 89, the "use of land presupposes the use of some of the airspace above it," citing *United States v. Causby*, 328 U.S. 256, 265 (1946), as "an invasion of the 'superadjacent airspace' will often 'affect the use of the surface of the land itself.'"

While the wind turbines are being constructed on the lands of Intervenors, each of their homes is scheduled (or predicted) to receive an allocation of Shadow Flicker, which in this context is also an invasion by alternating light-shadow sequences multiple times per minute – one fleeting shadow for each pass of the blade before each window or opening. While these intrusions have now been routinely approved by the County since amendment of the Zoning Ordinance in 2018, and also by this Commission since that same year (or perhaps 2017), this question remains: what legal principal supports an assertion of power, exercised by the State and

favoring the wind farm applicant, so that this use is duly permitted, even as the legal owner – a Non-Participant – is *required* to accept this intrusion?

We know that Applicant itself has girded its own loins as to Participants by obtaining an Effects Easement for Shadow Flicker and other castings of a wind farm. But, as to Non-Participants, these burning questions remain – is Applicant expecting the Special Exception Permit, along with the Facility Siting Permit soon to issue, will comprise an "easement" for this use? Or is this display of Shadow Flicker[56] to be in the nature of an open, continued and unmolested use of the Non-Participant's land and home, so that after twenty years, a prescriptive easement will have arisen by operation of law? If the Commission has clear answers for these questions, Intervenors trust such will be included in the final decision and order.

South Dakota is one of the few state jurisdictions[57] with a statute like SDCL 43-13-2(8):

> 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.

This provision was adopted by Dakota Territory in 1878, and thus far, no reported case has cited the law.

This statute strongly resembles the common law doctrine of ancient lights. In this reference, "lights" means "windows." If a window has been unblocked from sun for the prescriptive period (20 years), then the owner of that window has established a legal right – an easement over and as to adjacent lands or lots – to continue to receive sunlight.

In a typical rural setting, there are few structures that a neighbor might build (or hope to build) that would long obfuscate the sun. But, wind turbines – sited a few thousand feet distant –

[56] Witness Haley, it is recalled, testified to the "shadow sausage," which seems to be pictured or represented on p. 29 of Exhibit DK-2, as part of Exhibit S1.
[57] North Dakota Century Code Annotated § 47-05-01; Montana Code Annotated § 70-17-101, plus also Oklahoma, California and Guam.

and rotating in the wind seem to be within the gambit of the statute. The rotor doesn't completely block the sun, of course – but it certainly adulterates it. The credible witnesses concede this shadow flicker is certainly an *annoyance* to the occupants of the afflicted home, even if this Commission prefers to rule on this concern as more of a "health, safety [and] welfare" issue, and doing so on a case-by-case basis (such as, *mere annoyance is not a health concern*, at least in the judgment of some).

The doctrine codified in SDCL 43-13-2(8) has been around for centuries in England, while being entirely untested by the courts of South Dakota. However, in a Florida case from 1959, *Fountainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So.2d 357, the appellate court reviewed and reversed a lower court's restraining order to prevent a hotel from construction a substantial enlargement that would block a neighboring hotel's pool from the afternoon sun. The Florida court took an abrupt sledgehammer to the order, holding that "the English doctrine of 'ancient lights' has been unanimously repudiated in this country." The court, at 359, went on to say also that "[e]ven at common law, the landowner had no legal right, in the absence of an easement or uninterrupted use and enjoyment for 20 years, to unobstructed light and air from the adjoining land," citing *Blumberg v. Weiss*, 1941, 129 N.J.Eq.34, 17 A.2d 823. Calling this a "universal rule," the court further concluded: "There being, then, no legal right to the free flow of light and air from the adjoining land, it is universally held that where a structure serves a useful and beneficial purpose, it does not give rise to a cause of action, either for damages or for an injunction under the maxim *sic utere tuo ut alienum non laedas*, even though it causes injury to another by cutting off the light and air and interfering with the view that would otherwise be available over adjoining land in its natural state, regardless of the fact that the structure may have been erected partly for spite."

The old doctrine may be completely dead down there, but here it merely slumbers; we are in South Dakota, of course, not Florida. This writer remains unconvinced the old doctrine has been "unanimously repudiated" – at the very least, despite the passage of nearly 150 years, we can conclude this much: as of today, the courts of this state have not had the opportunity to weigh in on the meaning of SDCL § 43-13-2(8), particularly in today's context of wind turbines approaching the height of 500 feet, and the ever functioning rotor, spinning sunlight into "Shadow Flicker."

As a first year student at USD School of Law (winter of 1970), this writer vividly recalls study and discussion of the *Fountainebleu Hotel* case in the Property I law class taught by Associate Professor Oliver E. Laymon (Boston College, School of Law, 1947[58]), making use of the old Foundation Press casebook, with blue covers. The apparent conflict between this 1959 Florida case and the South Dakota statute (dating all the way back to 1878) was duly noted. "What happens here?" (meaning this state, South Dakota) one of the students asked. Now fifty years later, I can still recall the scene - the good professor shrugged his shoulders, rubbed his close-shaved head with one hand, while waving the other in the air, exclaiming to his class: "Someday, it will come up. Someday."[59]

These Intervenors *do* claim the benefit of SDCL § 43-13-2(8); the adulterated light – *in the form of Shadow Flicker, such features being never before encountered in this area of Goodwin* – and which this Commission is now proposing to expressly permit in favor of Crowned Ridge, is *not* acceptable to these Non-Participants. Applicant and this Commission are on notice accordingly. Just as the government cannot declare as "public" the money that Intervenors might carry in their wallets or earn on their bank accounts, nor can these Intervenors

[58] This information is based on memory of sitting before the professor's desk in his tiny office, looking at the prominent "sheepskin" hanging behind him, next to his U.S. Marine Corps discharge certificate.
[59] This is a true story. Not many of the 1972 class are yet in practice, or alive, to say otherwise.

(along with their homes and lands) be forcibly converted into permanent service as mere measured "receptors" for Effects from a wind farm, the one that this Commission seems ready to permit. A required permit, using German edicts, represents a *de facto* easement.[60] *Ipse dixit*.

These Intervenors, based on SDCL § 43-13-2(8), have two distinct claims here: *first*, they claim the right of servitude across the lands of their neighbors – Participants, having given the use of their lands over to Applicant – for the flow of air and light across those lands, and onto the lands of Non-Participants (this being the "receiving" aspect of the statute). As a consequence, these Intervenors also claim the right to be and remain free from the Applicant's continuous, permanent acts of dumping, from sites leased from Participants, of an adulterated light (Shadow Flicker) upon and into their homes and lands. While the Legislature remains busy adopting, adjusting and modifying the terms of wind and solar easements in Chapter 43-13, SDCL, *nothing* wrought by the Legislature has diminished or undercut potential claims arising under the work of the 1878 Territorial Legislature, now embraced in SDCL § 43-13-2(8).

Deuel County wields a much different view of the scope of Zoning Power than does the City of Hutchinson in Minnesota. Deuel County assumes the power is *expansive*, so that when the Stanton dart is thrown for an aggressive wind farm design, there's not much left to do at the local county courthouse gathering but to permit it, just as designed by Applicant, Shadow Flicker included, and without further quarrel. The Zoning Power cannot *lawfully* chart an easement or place a servitude upon or over a neighbor's land (or even worse, into the interior of his or her home), to accomodate an aggressive wind farm design as sought by Applicant. Such intrusions are not transformed into lawful uses simply because the agency attempts to limit the dose to "just add a little dash of Shadow Flicker."

[60] Deuel County's permit is not effective unless or until the EL19-027 permit issues.

VI. Participation Agreements

As we now know, there *is* one "Participation Agreement" in force for Deuel County, as represented by receptor CR2-D38-P (Schlotterbeck), up in the northwest corner of Section 6 of Rome Township. This appears to be a home and site of approximately four acres. The site will not hold turbines, but under the agreement (structured as a 3-year option) dated July 23, 2019 (several weeks after the application was filed in Pierre), an easement has been given up for the "effects" flowing from wind farm proximity, much like that within Section 5.2 of the Lease & Easement, sometimes referenced as the Kranz Easement (Exhibit I-2, bearing also the name and telephone number of Adam McDonald).

It is noted that compared to Intervenors Steven and Mary Greber (receptor CR2-D221-NP), those living within that receptor labeled CR2-D38-P are a *bit* closer to the nearest wind turbine (1,693 feet, compared to 1,995 feet for Greber, once the greenhouse receptor was moved to the east side of the Greber home). Shadow Flicker for Greber has been variously predicted (so many times, we've lost count), in the general range of 14 hours, with sound at 42 dBA, while for the residents of CR2-D38-P, it was in the range of 15:26 (as declared to the Board of Adjustment, per the administrative record filed in 19CIV18-000061), but has now fallen to 5:02 (Exhibit A21-2, Table C-2), with sound being pegged at 45 dBA (Exhibit A21-2, Table C-1). One of the major differences, of course, is the Schlotterbeck home and property is subject to the Participation Agreement,[61] while the Greber property and home is not.

This situation is the *essence of property rights*.[62] Schlotterbeck had the right to embrace – *or to reject* – the status of "participating." For whatever reason, they selected to be in privity

[61] The property was always shown as "Participating" before the Board of Adjustment; Greber's property was likewise mistakenly identified as such before the Board.

[62] As persons of skill, experience and licensure in the business world, each of the Comissioners understand property rights; likewise, we trust, the Commissioners fully appreciate also the impending violation of these rights by this Applicant.

of contract with Applicant. The Grebers, on the other hand, were never offered the status of "participating" (or a Participation Agreement), hastening to add, they likely would have rejected that status, *if* offered. (But, if this Commission rules in line with Exhibit S7, the Grebers are *not* free to reject the Effects. That is tantamount to a taking, a topic left to another time and place.)

To continue this discussion, we now arrive at the converse – the *essence of how property rights are violated.* This result naturally arises because of what the Grebers cannot now avoid (as far as Deuel County is concerned) – the "as felt, as seen, as heard and fully observed impact" of the "Effects" themselves upon their home and quality of life. The Effects will be coming, with or without any Participation Agreement, Applicant, as can be seen from Exhibit S7, being well on the way to full licensure for this aggressively designed wind farm. In the case of Shadow Flicker, this particular effect will be visited on the Grebers at a duration much greater than is predicted for the Schlotterbeck family.

This isn't a case of Crowned Ridge Wind II being legally precluded from offering a Participation Agreement to those unable or unwilling to host wind turbines. Rather, this is a case of Applicant itself not being willing to do so,[63] and there is no rule, regulation or statute requiring such an agreement, at the risk of being required to move or shift the turbine to avoid the Effects. The German rule – to the extent imported and now deployed as to landowners within the U.S. – establishes a limit of 30 hours annually. In most cases, Applicant is *not* over that limit. This limit, whether established by ordinance or an *ad hoc* application of what is deemed appropriate for the project, thus becomes the countervailing property claim – *a licensing privilege or expectation* - of Applicant itself. This Commission failed by not promulgating a clear, definitive "no immissions into the home" rule that wind farms *must* honor.[64]

[63] There being no "exceedences" as Applicant has termed those effects in excess of the one German standard they've imported for application here.
[64] Someone has done so, and such a rule seems fully square with the property rights of Non-Participants.

Consider also the vague representation that *if* the Effects are such that "there is a specific need to mitigate an identified impact with a non-participant, [then] the Applicant may enter into an agreement related to the implementation of the mitigation."[65] So, this vaguely promised relief, *such as it is*, would come at the conclusion of the case, after the wind farm is permitted and in operation. And, as this representation then further states (albeit shaped by our paraphrase at this point), "If the wind farm is really hurting you in your home and property, and you raise enough fuss about it, we might stop in and offer you a written agreement, perhaps, along with some money. Take it or leave it."

Applicant's selective use of some kind of an agreement, some amount of money, based on Applicant's assessment of what's the "right thing to do" at that point in time, is not assuring to these Intervenors – not even a little. The property rights of these Intervenors are not for sale, not to Applicant, nor to anyone. Government agencies might deign, for Applicant's benefit, to simply infringe upon those rights, but fortunately – *this being the United States with the protections afforded by law and the governing constitutions to property rights* – any such agency orders and the resulting wind farm permits will not be the final words on this subject.

VII. Conclusion

Even if this Commission believes Crowned Ridge will act justly as to the Effects, these Intervenors have no confidence that such would be so. This Applicant is part of a large group that – *as of today* – yet denies that Non-Participants have any property rights or interests at stake as to the casting of "Effects"[66] onto and *into* their homes. (Apart from the isolated example of the *one* Participation Agreement, discussed above. That *one* such example exists, with an easement for Effects, belies claims the fee owner has no property right in the avoidance.)

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[65] See Exhibit DK-2, p. 21 of 157, Item 1-8, response of Tyler Wilhelm, part of Exhibit S-1.
[66] This coming from an Applicant who, as to each lease, includes an "Effects Easement."

Applicant further maintains, in line with the specific part of the German rule they've imported to govern themselves here, that "these are those 'immissions' every one of you Non-Participants are just going to have to learn to live with." Crowned Ridge adds: "This is how it is done in Germany!"[67] That this *isn't* Germany warrants frequent mention, the truth of which, we also trust, has not been lost, even briefly, on the members of this Commission.

Deuel County, eager to claim any benefits of another wind farm, paid scant attention. Before following after the County's exercise in favor of Applicant, embracing German-developed standards in the siting of *Windenergieanlagen*, and a flow of Effects to permanently afflict the homes and lands of Non-Participants, this Commission is urged to carefully study, measuring twice, the thin ice upon which the key, linked assumptions - *lawfulness of the Zoning Power, Non-Participants cannot avoid these Effects* - now rest. The assumptions are thin indeed.

Not one of the experts, not one of the prolific writers rushing (repeatedly) to the aid of Applicant, has considered, *even briefly*, the issue of the property rights held by these Intervenors. Declaring *ipse dixit* in Applicant's favor - *let it be so* – while licensing a permanent burden of Effects upon the homes and properties of these Intervenors, for whatever strength or duration is granted under the text and final form of Exhibit S7, seems unlikely to emerge as the final edict.

Dated at Canton, South Dakota, this 26th day of February, 2020.

Respectfully submitted,

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[67] These quotes are by literary license, Applicant's actions and testimony all clearly suggesting such.